IN THE SUPREME COURT OF FLORIDA

EDDIE JUNIOR BIGHAM,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC05-245
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Nineteenth Judicial Circuit

CAREY HAUGHWOUT
Public Defender

JEFFREY L. ANDERSON
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 374407
Attorney for Eddie Junior Bigham
421 Third Street
West Palm Beach, Florida 33401
appeals@pd15.state.fl.us

(561)355-7600; 624-6560

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County. The parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal (Vol. 1-3),

The symbol "T" will denote the Trial Transcripts (Vol. 4-22),

The symbol "ST" will denote the Supplemental Transcript,

The symbol "SR" will denote the Supplemental Record,

The symbol "A" will denote the Appendix to this brief.

STATEMENT OF THE CASE

On July 28, 2004, Appellant was charged by indictment with murder in the first degree, kidnapping, and sexual battery R3-4. Jury selection began on November 1, 2004 T86,100. At the close of the state's case Appellant moved for judgments of acquittal T1258-1266. Appellant's motions as to Count II (kidnapping) and Count III (sexual battery) were granted T1265;R373. Appellant's motion for judgment of acquittal as to murder in the first degree was denied T1273. Appellant was found guilty of murder in the first degree R437,376.

The jury's recommendation was 12-0 for the death penalty R377. On January 11, 2005, the trial court sentenced Appellant

to death R437,447. A timely notice of appeal was filed R450. This appeal follows.

STATEMENT OF THE FACTS

Dennis Lewis testified that he went into the woods on his way to work T791. Lewis noticed a girl laying dead in the woods T792. Lewis called the police at 7:30 a.m. T792. Lewis knew that there was some belief that he had something to do with the dead girl T805.

Sergeant Antonio Hurtado of the Fort Pierce Police Department testified that on May 24, 2003, he was dispatched at 6:30 a.m. to the intersection of 26th Street and Avenue D in Fort Pierce T775-777. The crime scene was a wooded area T785. The body of a woman was found 40 feet off the road T788.

Tommy Garrason of the Fort Pierce Police Department arrived at 26th Street and Avenue D at approximately 7:45 am. T860. The body was 20 to 25 yards in the woods T847. One could not see the body from the roadway T874. The area was covered by Australian pine needles T812. There was a disturbed area in the pine needles T813. A flip-flop was found in the road T813. A female was found lying on her back T814. She was nude except for a bra which was rolled up over her breasts T814,826. A pair of jeans shorts was neatly placed on top of her upper torso and a T-shirt was laid across her lower torso T814. There appeared

to be dirt on the shorts T846. When she was rolled over there were pine needles on her back but there was no dirt T827. Black panties were found on the body T846. Five hairs were collected from the body T851,860. The hairs were under the clothing that was laid on the body T865. A black condom was found still inside the rectum T828. An condom wrapper was found 1 foot from the street T871. A piece of paper with the name Donna and a phone number was found at the scene T860-61. A fairly new fingerprint was found on the paper T861. Garrason never checked the phone number T870.

The state and defense stipulated that the victim was Lourdes Cavazos-Blandin T1198. She was also known as Lulu T897.[1]

Earl Ritzline testified he is a criminalist at the Indian River Crime Laboratory T1060. Ritzline examined various items for DNA in this case. Seminal fluid of the husband of the victim, Jose Guillermo, a/k/a Oscar,[2] was found on the outside of the condom T1114, on the panties of the victim T1143, and on the white T-shirt T1143. The two seminal fluid stains on the T-shirt came from Oscar and nobody else T1119,1120. Oscar's DNA was also found underneath the victim's fingernail T1141.

Appellant's DNA for seminal fluid was found on the outside

[1] Since the victim was most often referred to as Lulu during trial, Appellant will refer to her as Lulu.

[2] Since the husband was most often referred to as Oscar during trial, Appellant will refer to him as Oscar.

and inside of the condom, on the white T-shirt, and on the short pocket lining T1142-43,1149,1111. Appellant's DNA was found underneath the victim's fingernail T1141. One hair matching Appellant was found on the victim T1143,1132. Two bloodstains of Appellant were found on the white T-shirt T1143. One blood stain was found on the shorts T1143.

Ritzline testified he could not tell the chronology of the stains or cells T1150,1165. Ritzline could not tell if the DNA from Appellant or the husband came first T1150. Ritzline could not say if Oscar had sex with Lulu before or after Appellant T1168-69.

There is nothing to contradict anal sex between Oscar and Lulu T1169.

Ritzline testified that the victim's blood stains were found on her white T-shirt and on her shorts T1143,1137. The blood from the victim could be from a variety of sources T1152. Ritzline could not tell if it came from a scrape on the forehead, menstruation, bleeding of the gums, or something else T1152.

The victim's T-shirt also contained fecal stains in addition to the semen and blood T1079. The stain on the T-shirt was consistent with some type of wiping T1118. It was consistent with the wiping off of an erect penis T1118. Part of the wipe seems only consistent with Oscar the husband T1119. Other parts

of the wipe were consistent with either the husband or Appellant T1110.

The black panties had evidence of urination T1099. It was not full urination but it was more than just a dribble T1099. Ritzline could not tell if the urine stain was pre- or post-mortem T1156. It is typical after death to have urination T1157.

Sperm DNA will last for one or two hours inside the anal cavity T1104. Sperm will last several hours in the vagina T1105.

A vaginal swab had a mixture of 2 DNAs from 2 individuals T1127. The vaginal swab contained nothing from Oscar T1154.

The profile of a hair matched Appellant T1132. Five hairs found on Lulu had features not present in the her hair T1132. Ritzline could not eliminate anyone other than Lulu as the source for the 4 hairs T1157-58. The hairs could have come from the shorts or shirt when they were pulled up T1158. Other hairs on the clothing were never tested T1159.

No blood was found on the condom T1153. The outside of the condom had the DNA of Oscar and Appellant T1149. The vaginal swab contained nothing from Oscar T1154.

Oscar having had anal sex with Lulu could explain his semen on the exterior of the condom T1168. There is nothing to

contradict anal sex between Oscar and Lulu T1169. Ritzline testified that the evidence is consistent with Appellant wearing a condom and having anal sex with Lulu when he withdraws the condom stays inside Lulu and later Oscar had anal sex with Lulu and partially ejaculates in her anal cavity T1171. This would explain Oscar's semen on the exterior of the condom T1171. The physical evidence did not contradict that scenario T1171. Ritzline could not eliminate Oscar as the source of the 4 hairs left on the body T1176.

Ritzline testified that he could not tell whose member had been wiped on the T-shirt T1174. There was no evidence of anything other than consensual sex T1178-79. The clothing items contained no evidence of unusual cuts, tears, or stretching T1179. Ritzline testified that because "such a small quantity" of blood was on the clothing he could not indicate if there was a struggle T1186. There was no indication Lulu scratched while fighting someone off T1163. If Lulu was alive with the condom in her rectum there would be no reason for there to be any fecal matter in her panties T1187.

Ritzline had no opinion on the scenario of the condom left in the anus T1181. The condom could have been partially expelled from the anal cavity when natural bodily functions shut down T1186.

Deputy Medical Examiner Dr. Charles Diggs testified he

performed the autopsy on Lourdes Cavazos a/k/a Lulu on May 24, 2003 T1221. Dr. Diggs concluded that the cause of death was manual strangulation T1174,1143. There were fine pinpoint hemorrhages inside the whites of her eyes which occurs when one is strangled T1222. There was also soft tissue damage in the form of bruising to the muscles of the neck T1223-24. The thyroid cartilage and hyoid bone are often broken during strangulation T1223. This did not occur here T1223-24. There was no handprint on the skin T1225. One could not tell if she was strangled from the front or the back T1225. The closed end of the condom was found inside the anal cavity T1231. Dr. Diggs could not tell where the condom was just prior to death T1250. Gases could have released the condom from the body T1251. The act of death itself could have pushed the condom outside the anal cavity T1253. It is mere speculation as to how the condom got to the opening T1254. Any number of things could have happened T1254. It is also speculation whether Lulu urinated at the time of her death T1252.

Dr. Diggs testified that there was nothing to indicate a struggle T1250. There was no trauma to the body that would indicate a struggle T1250. There was no road rash on the feet T1250. Dr. Diggs looked for evidence of forced sexual activity but there was none T1249. There was no tearing to the fingernails T1249. There was no indication of trauma to the

rectal or vaginal areas T1249. There was a small superficial abrasion on her face with a small amount of blood but it was not significant T1227. The abrasion could have been caused by walking through a wooded area T1248. Lulu appeared to be in good shape and was 5'1" and 150 pounds T1226,1221. A ballpark figure for the time of death might be 1 or 2 in the morning T1234.

Jose Guillermo a/k/a Oscar testified he was married to Lulu T879. Oscar testified that when he came home from work Lulu was at home T880. Oscar and Lulu went to bed at 10:30 p.m. T881. They had vaginal sex T883. Oscar never had anal sex with his wife T883,890. Oscar next woke up at 6:30 a.m. T883. He was not worried she was not there because she would sometimes leave and say she would be right back but would not come back T884. Oscar and his wife talked about her leaving like that T885. Oscar said if she continued to do that they would separate T885. Oscar testified his wife went out many times at night T892. He did not know she was going out with other men T893.

Olivia Cavazos testified that she was Lourdes Cavazos' mother T894. Cavazos was not sure if her daughter had a drug problem T896. Cavazos slept on a couch near the door T898. Everyone went to bed T902. Cavazos woke up later and saw Lourdes (a/k/a Lulu) calling a taxi T903. Lulu asked for money T903. Cavazos gave her $7.00 T903. That was the last time

Cavazos saw her daughter T904. Cavazos fell asleep after giving her daughter money T918. Cavazos never saw a taxi arrive T904. Cavazos woke up early when Oscar had gone into the bathroom T904. Oscar said Lulu would be back T906. Oscar left at 7:30 a.m. T906. Cavazos thought Oscar was going to get barbecue because he always gets barbecue in the morning T906. Instead, Oscar went to Ponchos T906.

William Hall of the Fort Pierce Police Department testified that he received information that Lulu had been with at least 3 other men that night T993. Hall also received information that she may have been in a white Jeep with other individuals T993. The information about her entering a car was refuted T995.

Jeff Hamrick, an investigator for the State Attorney's Office, testified that individuals who Jermaine Thomas had identified as being with Lulu that night indicated that they were not with her T1000-1001.

A taped statement given by Appellant was played to the jury T1003-1047. Appellant stated that he had sex with her twice – once at Lightning's house and later in the bushes T1029. Appellant did not know what was going on and may have penetrated her in the rectum T1031,1017. Appellant stated that he was with a guy named Lightning and another female T1005. She walked up T1006. The four of them went into a house and drank beer T1005-6. One the way to the house she talked about getting high

T1019. She told Lightning that she wanted to get high T1006. Appellant had $15 T1006. She said she was willing to do some stuff T1006. Appellant had she went in the bathroom and had sex T1006. Appellant gave her $10 T1006. She left T1007.

Approximately 45 minutes later Appellant left the house T1007. Appellant saw her up the street T1040. She approached him T1041. They had sex in the bushes T1025,1027,1029. Appellant used a condom T1029. Appellant was not in the woods with her T1020. Appellant was unsure about what type of sex they had – he may have penetrated her in the rectum T1011,1031. Appellant might have ejaculated on her T1010. He noticed the condom was not on when he was pulling out T1010. At one point Appellant stepped over her and then she got up T1046. Appellant saw her dressing as he left T1026. Appellant did not kill her T1039.

Yajahra Garcia testified that Lourdes was her sister T1189. Garcia testified that her mother was at Lulu' house to see doctors T1196. Garcia did not know what medications her mother was on at that time T1196.

Harry Browning, a forensic investigator for the State Attorney's Office, testified he arrived at the scene at 9:00 a.m. T1199. The body was in a shaded area in the woods T1200. Clothing was laying on the abdomen and chest T1200. The bra was pulled up T1200. The body temperature was 88° at 9:30

a.m.T1201. There was a moderate amount of rigor T1201.

Officer Dean Orshak took custody of Appellant in July, 2003 T1056. As Appellant was being read his rights, Appellant said, “They will never be able to pin this on me” T1057,1059.

PENALTY PHASE

Captain Richard Scheff of the Broward County Sheriff’s Office, testified he investigated Appellant’s involvement in what was believed to have been shaken baby syndrome T1496. Appellant stated that the baby had fallen off the bed T1497. The baby had difficulty breathing T1497. Appellant placed the baby in both hot and cold water T1497. When the baby’s mother came home she was taken to the hospital T1499. The baby died T1499. An autopsy showed that she suffered a fractured skull and died of blunt head trauma T1500. The baby had bruising to the face T1500, and had burn marks to the face and buttocks T1496. Appellant later admitted that after the baby fell off the bed he was stressed out and shook the baby T1506-07. The child went limp T1506. Appellant then dipped the baby in hot water in order to get a response T1507-08. Appellant also performed CPR T1514. Appellant was afraid to take the baby to the hospital because he thought people would think that the injuries were intentional T1510. Scheff testified that Appellant was crying saying he wished he could have done

something T1511. Appellant entered a plea to second degree murder T1511.

Dr. Michael Riordan is a forensic psychologist and neuropsychologist T1529-30. Dr. Riordan performed an evaluation of Appellant T1531. Appellant took the MMPI II and there was no evidence of faking or malingering T1533,1537. Appellant has a repressed memory of his childhood which is common to abuse victims T1534. At the age of 5, Appellant was taken from his father due to a divorce T1528. Appellant grew up without a father figure T1528. Appellant did not have the coping skills one would normally develop in the childhood growing up process T1569. Appellant was injured in a car accident at the age of 3 T1541. When Appellant's cousin was raped, Appellant tried to help, but was shot T1555. The bullet is still inside Appellant T1555. At another time Appellant was repeatedly struck in the head with a baseball bat T1555. Persistent headaches and dizziness resulted T1556. Repeated head injuries give high risk of cognitive deficits T1557. Dr. Riordan found evidence that Appellant had been diagnosed with mental problems T1557. Appellant had a stress level to the point that he had been prescribed medication for his stress T1571.

Dr. Riordan testified Appellant loves his family and they love him T1549. Appellant quit school in the 9th grade because his mother told him to get a job T1550. He got a job as a

migrant worker T1550. Appellant had scores reflecting a vocabulary at a 5th grade level and a comprehension below a 3rd grade level T1552. Appellant was able to earn a GED while imprisoned T1552. Appellant scored 80 on the I.Q. test T1565. Dr. Riordan concluded that Appellant was unable to fully appreciate the nature of his conduct at the time of the offense T1572.

Dr. Riordan testified Appellant has excellent potential for adjustment to prison T1572. Records indicated Appellant has done well within the prison environment T1558. Appellant had ratings from satisfactory to outstanding for his behaviour and accomplishments while in prison T1559. Appellant was involved in various social programs and he also developed skills T1559. Appellant had been in the Port St. Lucie jail the previous 1½ years without a problem T1562. Appellant cared for elderly relatives T1543. Appellant's mother died in 1984 T1547.. Appellant was then hospitalized due to stress T1548.

Dr. Riordan testified a man had attacked Appellant's mother with a machete and Appellant stepped in and put a stop to the attack T1547. In the St. Lucie County Jail Appellant notified the authorities of a suicide attempt of another inmate T1547. Appellant befriended and gave support to a Haitian inmate who lost his family in recent hurricanes and had difficulty with the English language T1547. The pro-social actions in helping

others has been a recurrent theme in Appellant's life T1547.

Appellant's uncle, Julius White, testified Appellant would help family and relatives T1635. He would do anything they asked T1635. White testified Appellant was never violent or angry T1636.

Clinical psychologist Gregory Landrum was hired by the state to evaluate Appellant T1641. Appellant was a good candidate for getting long in prison T1641. Appellant did not take responsibility for the murder.

SUMMARY OF THE ARGUMENT

GUILT PHASE

1. The prosecution introduced evidence that Appellant had sex with the victim. The evidence was consistent with consensual sex. Appellant testified he had consensual sex with the victim but did not kill her. The medical examiner testified there was no evidence of forced sex. The trial court even granted a judgment of acquittal as to sexual battery. The prosecution failed to link Appellant to the murder. Evidence that is inconclusive to identify the party as the perpetrator is insufficient for conviction. Appellant's conviction for murder in the first degree must be reversed.

2. Premeditation was not proven. None of the types of evidence which normally show premeditation was present. The evidence was insufficient for murder in the first degree.

3. A juror failed to disclose that he knew a state witness. Defense counsel explained that he may have used a peremptory challenge if the juror had made the disclosure. The trial court denied the motion to dismiss the juror because the juror was not disqualified. This was reversible error.

4. The prosecution witness' testimony concerning stain pattern interpretation was speculation. It was beyond his personal knowledge and expertise. It was error to admit this speculation over defense objection.

5. The prosecution witness' testimony, based on earlier speculation, regarding "plunger or piston effect" was speculation. It was beyond his personal knowledge and expertise. It was error to admit this speculation over defense objection.

6. The trial court removed sexual battery from the jury's consideration by granting the judgment of acquittal. It was error to allow the prosecution to subsequently argue that Appellant sexually assaulted the victim.

7. It was error to prohibit Appellant from arguing that the prosecution did not prove sexual battery.

8. The prosecutor informed the jury that it does not seek the death penalty in other murder cases. Such an argument was improper.

9. The prosecutor was permitted to argue facts not in

evidence. This was error.

10. The trial court erred in conducting pretrial conferences in Appellant's absence.

11. It was error to allow a witness to speculate as to what she would have heard or done if something did or did not occur. Such speculation is inadmissible.

12. The prosecution was permitted to introduce out-of-court statements identifying flipflops found near the crime scene. These statements were hearsay and should not have been admitted into evidence.

13. The prosecution was permitted to introduce out-of-court statements that information that the victim had been with other men was refuted. This was hearsay and should not have been admitted into evidence.

14. Potential juror Morrison testified that she could recommend the death penalty. She did not indicate that she could not follow the law. It was error to grant the state's cause challenge to Morrison.

15. Appellant was not informed of his right to have an attorney present during questioning. It was error to deny his motion to suppress.

16. The jurors had lengthy deliberations without reaching a verdict. The jurors then separated for 1½ days. The jurors returned and within a matter of minutes found Appellant guilty.

Appellant was denied due process and a fair trial by separation of the jurors during deliberations.

17. The instruction on first degree murder was inadequate and harmful, reversible error.

PENALTY PHASE

18. While civil cases involving money may permit the minimal burden of proof to be by the preponderance of the evidence, the certitude for deciding the severe and irrevocable penalty of death involves a far greater burden. Appellant was denied his right to a reliable capital sentencing and due process by the failure to instruct that the factfinder must determine beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

19. Instructing the jury to determine whether sufficient mitigating circumstances exist to outweigh aggravating circumstances places a higher burden of persuasion on Appellant and violates the Eighth Amendment, Fundamental Fairness and Due Process.

20. It was error to elicit evidence that Appellant has 12 prior convictions. This was evidence of a nonstatutory aggravating circumstance.

21. A witness may testify to certain facts. However, whether such facts are mitigating in the case at hand is a decision for the jury. The trial court erred in permitting a

state witness to testify whether certain facts were mitigating.

22. Speculation cannot substitute for proof of any aggravating circumstance. The trial court erred in its speculation that the killing was especially heinous, atrocious or cruel.

23. The jury instruction stating the jury is only to consider mitigation after it is reasonably convinced of its existence is improper.

24. The sentence of death must be vacated and the sentence reduced to life where the trial court failed to make the findings required for the death penalty.

25. The trial court's discretion is not unbridled in weighing mitigating circumstances. The trial court erred in using an incorrect standard in weighing the mitigation of good prison adjustment.

26. The trial court's discretion is not unbridled in weighing mitigating circumstances. The trial court abused its discretion in arbitrarily utilizing a fact common to every mitigator in a murder case to reduce the weight given to mitigation.

27. The trial court utilized victim characteristics in weighing the aggravating circumstances. These characteristics were not authorized by the Legislature to be considered. It was error to consider nonstatutory aggravating circumstances.

28. The trial court erred in failing to exercise discretion in evaluating mitigating circumstances.

29. The trial court failed to exercise its discretion in weighting mitigating circumstances against aggravating circumtances.

30. The death penalty is not proportionally warranted in his case.

31. Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) or Furman v. Georgia, 408 U.S. 238, 313 (1972).

ARGUMENT

GUILT PHASE ISSUES

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND FAILED TO PROVE IDENTITY.

Appellant moved for judgment of acquittal on the ground that the state had failed to prove that Appellant had killed T1265.

The standard of review for the denial of a judgment of acquittal is de novo. Jones v. State, 790 So. 2d 1194, 1196 (Fla. 1st DCA 2001).

The Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970). This Court has long

held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. Cox v. State, 555 So. 2d 352 (Fla. 1989). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. Williams v. State, 143 So. 2d 484 (Fla. 1962); Davis v. State, 90 So. 2d 629 (Fla. 1956); Mayo v. State, 71 So. 2d 899 (Fla. 1954). Circumstantial evidence is not sufficient when it requires the pyramiding of inferences. Gustine v. State, 86 Fla. 24, 97 So. 207 (1923); Chaudoin v. State, 362 So. 2d 398, 402 (Fla. 2d DCA 1978). When the State relies upon purely circumstantial evidence to convict an accused, the court have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonably hypothesis of innocence. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

In this case the state's hypothesis was that Appellant forcibly had sex with Lourdes Cavazos, a/k/a Lulu, and murdered her. The trial court found the evidence insufficient for

conviction of sexual battery. The evidence of consensual sex did not prove that Appellant killed Lulu.

In this case the state's evidence failed to link Appellant to the murder. The state produced DNA evidence to show that Appellant's semen was on and inside a condom which was inside Lulu's rectum. This evidence shows that Appellant had sex with Lulu, but it does show that Appellant murdered her. Appellant's statement to police was that he had consensual sex with Lulu for money T1006. Lulu was going to use the money for drugs T1006. This is consistent with testimony from Lulu's relations that she would go out at night after everyone had gone to bed T884-85,892. Lulu's husband testified he had not been aware that Lulu was seeing other men but had threatened to separate from Lulu due to her nighttime activities of leaving the house T885,893. A large amount of drugs were also found in Lulu's blood T1706,1714,1715,1716; SR371,203. The state's positive evidence that Appellant and Lulu had been together without showing that he committed the murder is not sufficient for conviction:

> Moreover, even where evidence does produce positive identification, such as fingerprints, the State must still introduce some other evidence to link the defendant to a crime. See e.g. Jaramillo v. State, 417 So. 2d 257 (Fla. 1982).

Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997). "Evidence that creates nothing more than a strong suspicion that a

defendant committed the crime is not sufficient to support a conviction." Id.

There was absolutely no evidence of forced nonconsensual sex. The state's criminalist testified that there was no evidence of anything other than consensual sex T1178-79. The clothing items contained no evidence of unusual cuts, tears or stretching T1179. Likewise, the medical examiner testified that he looked for evidence of forced sexual activity but there was none T1249. There was no indication of trauma to the rectal or vaginal areas T1249. Thus, the evidence is consistent with consensual sex.

The evidence of the condom with Appellant's DNA does not connect Appellant to Lulu's murder. Appellant's statement indicated the condom was probably left inside Lulu as he withdrew from her. Although the medical examiner found the closed end of the condom in the anal cavity, he could not tell where the condom was just prior to her death T1250. Gas could have released the condom from the body T1251. Criminalist Ritzline testified that the condom could have been partially expelled from the anal cavity when natural bodily functions shut down T1186. Dr. Diggs testified that the act of death itself could have pushed the condom outside the anal cavity T1253. Dr. Diggs testified that it is mere speculation as to how the condom got to the opening.T1254.

The fact that this DNA evidence showing sex does not show that it was the product of sexual battery. DNA evidence is like fingerprint evidence; it is merely a variety of circumstantial evidence. Mutcherson v. State, 696 So. 2d 420, 422 (Fla. 2d DCA 1997). A conviction may not be based on speculation or guesswork.

There was a minute amount of Appellant's DNA blood on Lulu's shirt. However, the state's expert testified because there was "such a small quantity" of blood it would not constitute evidence of a struggle or violence T1186. Dr. Diggs also testified the small amount of blood had no significance T1227. Appellant's statement indicated he had been accidentally scratched T1014-15. This evidence does not provide substantial, competent evidence that Appellant killed Lulu.

Finally, a hair matching Appellant was found with 4 other hairs. However, the hairs could have been present when Appellant had consensual sex. In fact, criminalist Ritzline testified the hairs could have come from Lulu's clothes T1158. In other words, they could have been there any amount of time T1158. The hair does not dispute consensual sex as opposed to murder.

The state's hypothesis was that Appellant grabbed Lulu, they struggled into the woods, then he raped and killed her. However, the evidence did not show a struggle and the evidence

was consistent with consensual sex. The trial court even granted Appellant's motion for judgment of acquittal as to sexual battery. The state failed to link Appellant to the strangulation.

The state failed to link any sexual activity to the strangulation. It has long been recognized by this Court that the value of circumstantial evidence depends on its conclusiveness and if the evidence is inconclusive to identify the party as the perpetrator the evidence is insufficient for conviction:

> The value of circumstantial evidence and its effect as proof depend upon the conclusive nature and tendency of the circumstances relied upon to establish the controverted fact. If any fact essential to a conviction is not legally established to a moral certainty, the evidence is inconclusive and cannot be said to be sufficient in law to satisfy the mind and conscience of a jury. Lee v. State, 96 Fla. 59, 117 So. 699, and cases there cited. Where the record discloses no circumstantial evidence which would constitute the basis for a verdict of guilty, a judgment based on such verdict will be reversed. Bloodgood v. State, 94 Fla. 639, 114 So. 528.
>
> When the evidence entirely fails to connect a convicted party with the crime of which he was convicted, the judgment of conviction should be reversed. Stewart v. State, 58 Fla. 97, 50 So. 642. Essential elements of the crime cannot be left to inference or conjecture. The accused is presumed to be innocent, and every essential element of the crime must be proven as alleged. Carnley v. State, 82 Fla. 282, 89 So. 808. There are no presumptions against the defendant. Every essential element of the crime charged must be established against the accused beyond a reasonable doubt before a conviction is warranted. Sykes v. State, 78 Fla. 167, 82 So. 778.

> Circumstantial evidence is always insufficient, where, assuming all to be proved which the evidence is to prove, some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of proof.

Frank v. State, 163 So. 223, 121 Fla. 53, 55-56 (Fla. 1935) (emphasis added). In this case, the evidence was far from sufficient to show that Appellant strangled Lulu.

There was no evidence of any prior or present difficulties between Appellant and Lulu. There was simply no evidence of involvement other than Appellant's statement that they had consensual sex and he gave her money. It is pure speculation that Appellant killed her. A conviction may not be based on guesswork, no matter how educated the guess or how strong the suspicion may be. Long; Frank.

Appellant's conviction and sentence must be reversed.

POINT II

THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENT OF PREMEDITATION.

Appellant was convicted of premeditated murder in violation of § 782.04(1)(a)1, Fla. Stat. (1997), which provides:

> The unlawful killing of a human being … [w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being … is a murder in the first degree and constitutes a capital

felony, punishable as provided in s.775.082.

In capital cases this Court reviews the sufficiency of the evidence for the first degree murder conviction. See Philmore v. State, 820 So. 2d 919, 926 (Fla. 2002) (court has obligation to review sufficiency of the evidence). In addition, at the motion for judgment of acquittal, Appellant noted that the evidence did not support premeditation T1266. The standard of review for sufficiency of the evidence is de novo review. Jones v. State, 790 So. 2d 1194, 1196 (Fla. 1st DCA 2001).

Premeditation is more than an intent to kill, it is a fully formed conscious purpose to kill done with reflection:

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997) (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986):

> "While premediatation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference." Norton v. State, 709 So. 2d 87, 92 (Fla. 1997). The State has the responsibility to prove each and every element beyond a reasonable doubt. Long v. State, 689 So. 2d 1055, 1057 (Fla. 1997). The proof cannot be left to guesswork or speculation. Id.

In the present case, the state simply sought to infer premeditation without real proof. The proof would essentially be guesswork.

In Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), this Court noted some evidence from which premeditation may be inferred:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

In this case there were no witnesses or events prior to the killing which showed premeditation. See Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996). Appellant never stated or indicated any plan to kill Lulu. There were no prior difficulties between Appellant and Lulu.

A weapon was not procured. The killing was by manual strangulation. Strangulation tends to be an impulsive act. The mere act of strangulation has not been sufficient to prove premeditation. See Hoefert v. State, 617 So. 2d 1046 (Fla. 1993) (premeditation not sufficient by evidence of strangled female found partially nude); Green v. State, 715 So. 2d 940 (Fla. 1998) (evidence that victim manually strangled and stabbed three times insufficient to prove premeditation).[3]

[3] See also State v. Bingham, 699 P.2d 262 (Wash. App. 1985) wherein the court held that strangulation alone cannot be sufficient proof of premeditation for otherwise premeditation would be proven even where there was no reflection or deliberation. Time to reflect is not enough, there must be actual reflection.

In Kirkland v. State, 684 So. 2d 732 (Fla. 1996), the state asserted that evidence of numerous stab wounds, blunt trauma, use of both a cane and a knife, and the defendant being sexually tempted by the victim was sufficient for premeditation. Kirkland, at 734-735. This court found this was insufficient evidence of premeditation. First, the court noted that "there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide." Id. at 735. The same is true in the present case. Second, the court stated, "there were no witnesses to the events immediately preceding the homicide." Id. The same is true here. Third, "there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide." Id. The same is true in the present case. Fourth, "the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." Id. This is also true in the present case. This court reversed Kirkland's first degree murder conviction with instructions to enter judgment and sentence for second degree murder.

In Castillo v. State, 705 So. 2d 1037 (Fla. 3d DCA 1998), the victim was killed by a gunshot fired into the left side of her head from three feet away. Id. at 1038. Castillo and the victim had a "physically abusive sexual relationship" and they

were arguing before the killing. Castillo's varying accounts of the event, "although inconsistent with one another, were tales of sex, drugs, jealousy and rage." Id. However, "[m]issing from Castillo's accounts were statements of any conscious purpose to kill Munoz." Id. The Third District reversed Castillo's first degree murder conviction stating, "Here, although the State's evidence arguably is consistent with premeditation, it falls short of excluding every reasonable hypothesis of homicide by other than premeditated design." Id.

The evidence of premeditation in the instant case is even less compelling than that found insufficient in the cases discussed above. Accordingly, this court should reverse the judgment and sentence for first-degree murder and remand with instructions to enter judgment and sentence for second-degree murder.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS JUROR NEESE.

During jury selection, the potential jurors were asked if they knew any of the witnesses. Potential Juror Neese did not indicate that he knew any of the witnesses. However, after the testimony of the state's sixth witness – Detective William Hall, juror Neese indicated he knew a witness in the case (William Hall) T986,990. Neese testified when he worked security at a bar Detective Hall would come in T987. Neese saw Hall three or

four times a month T988. The two men would engage in casual conversations T988. Neese called Hall an acquaintance T989. After the bar closed, Neese would see Hall on the streets T990.

Appellant promptly moved to dismiss juror Neese T991. Appellant explained that he may have used a peremptory challenge if he had known Neese knew Hall T991. The trial court denied the motion because nothing Neese said would disqualify him as a juror T992. The trial court erred in denying Appellant's motion to dismiss juror Neese.

Under De La Rosa v. Zequeira, 659 So.2d 239 (Fla.1995), there is a three-part test governing this issue (id. 241):

> In determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 2d DCA 1972), cert. denied, 275 So.2d 253 (Fla.1973). First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. Id. at 380. We agree with this general framework for analysis and note that the trial court expressly applied this test in its order granting a new trial.

The point is not the moral culpability of the juror, but the effect of the nondisclosure on counsel's ability to make decisions about jury selection. Chester v. State, 737 So. 2d 557 (Fla. 3rd DCA 1999) summarizes the law in this regard, explaining that the question is not whether the juror has

intentionally concealed the information, but whether the nondisclosure would be relevant to jury selection (id. 558):

> A juror's false response during voir dire, albeit unintentional, which results in the nondisclosure of material information relevant to jury service in that case justifies a new trial as a matter of law. See De La Rosa v. Zequeira, 659 So.2d 239 (Fla.1995) (recognizing that an unintentional false response by a juror during voir dire would be no less prejudicial to the defendant); Redondo v. Jessup, 426 So.2d 1146 (Fla. 3d DCA 1983) (holding that either actively concealed or unintentionally false material information taints the entire proceeding such that the parties are deprived of a fair and impartial trial); Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 2d DCA 1972).

De La Rosa cited with favor Bernal v. Lipp, 580 So. 2d 315 (Fla. 3d DCA 1991), a case in which a juror had not intentionally withheld the relevant information. De La Rosa at 241. It further quoted with favor Judge Baskin's opinion in the lower court stating that, under Bernal, regardless whether the juror had any intent to mislead, the important question is whether the nondisclosure was material in that it "prevented counsel from making an informed judgment - which would in all likelihood have resulted in a peremptory challenge". De La Rosa at 241-42 (quoting Judge Baskin's quotation of Bernal) (e.s.).[4]

[4] De La Rosa also cited Mitchell v. State, 458 So. 2d 819 (Fla. 1st DCA 1984) with favor. Mitchell was charged with crimes occurring at a prison. Jurors responded negatively when asked if they had family members or relatives working at the prison, but it was later learned that one of the jurors was the aunt of a guard at the prison who assisted with security during the trial. Upon inquiry, she said that she thought the question referred to members of her immediate family. The appellate

Thus, De La Rosa's three-part test asks: (1) Was the information material and relevant in that it would have affected counsel's ability to make an informed judgement which would likely have resulted in a challenge to the juror? (2) Did the juror fail to disclose it, regardless of whether the nondisclosure was intentional? (3) Is the nondisclosure attributable to a lack of diligence by the complaining party?

The scope of review is essentially de novo in that a trial court has no discretion in whether to grant a new trial when the three-part test is met. Bernal states at page 316 (e.s.):

> The applicable test is:
>
> > A case will be reversed because of a juror's nondisclosure of information when the following three-part test is met: '(1) the facts must be material; (2) the facts must be concealed by the juror upon his voir dire examination; and (3) the failure to discover the concealed facts must not be due to the want of diligence of the complaining party.'
> >
> > Indus. Fire & Casualty Ins. Co. v. Wilson, 537 So. 2d 1100, 1103 (Fla. 3d DCA 1989) (citation omitted).

Accord James v. State, 717 So. 2d 1086 (Fla. 5th DCA 1998) ("If the test is met, the trial court must grant the appellant a new trial."). Cf. Loftin v. Wilson, 67 So. 2d 185, 192 (Fla. 1953) (juror's nondisclosure of material fact "'is prejudicial to the party, for it impairs his right to challenge'") (quoting Pearcy v. Michigan, Mut. Life Ins. Co., 12 N. E. 98, 99 (Ind. 1887) and

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court ordered a new trial.

other authorities).

Turning to the case at bar, appellant notes the following:

First, the information was relevant to jury service. There can be no question the juror's acquaintance with a state witness was relevant to counsel's decision-making during jury selection. Counsel indicated that had he known of Neese's relationship with the witness, he may have exercised a peremptory challenge on Neese. Counsel was prevented from making an informed judgment that would have resulted in a challenge to the juror.

Second, the juror did not disclose the information, although he explained he had not recognized Hall by name. The inquiry is not into the juror's moral culpability. The important question is whether the defendant lost his right to make an informed jury selection because of the juror's failure, for whatever reason, to provide accurate information.

Third, the failure to obtain the information cannot be attributed to any lack of diligence on appellant's part. Counsel sought to dismiss the juror as soon as the information was discovered, and the state never claimed that appellant should have known of the nondisclosure at an earlier time.

From the foregoing, appellant would have been entitled to a new trial if he had learned of the nondisclosure after the verdict. Hence, it hardly makes sense that he should not

receive a new trial here where he moved to dismiss the juror during the trial and the judge denied the request and kept the juror on the panel which decided appellant's guilt and rendered a sentencing verdict. Under these circumstances, this Court should order a new trial.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING STATE WITNESSES TO TESTIFY ABOUT STAIN PATTERN INTERPRETATION.

Over Appellant's objection T1119-20, prosecution witness Earl Ritzman was permitted to speculate that the numerous stains from Lulu's T-shirt were the result of a single wipe from an erect penis T1119-1120. This was reversible error.

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code constitute an abuse of discretion. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

Without evidence of some basis – such as personal knowledge or expertise – Ritzman's opinion that the multiple stains on the T-shirt came from a single wipe was pure speculation and should not have been admitted.

Ritzman did not see the cloth stained and thus did not have personal knowledge regarding the source of the multiple stains being from a single wipe.

Ritzman's expertise was laid out in the field of DNA testing

and analysis T1065-1086. There was no indication he had any special knowledge in stain pattern interpretation (or even blood splatter interpretation). As the prosecutor later proclaims, Ritzline's sole job was to match DNA and nothing else T1376. Thus, it was inadmissible speculation that the multiple stains came from a single wipe. See Fassi v. State, 591 So.2d 977, 978 (Fla. 5th DCA 1991) (handwriting expert's testimony comparing wall graffiti to handwriting sample was inadmissible because it "is too speculative"); Ruth v. State, 610 So. 2d 9 (Fla. 2d DCA 1992) (opinion of expert was "pure speculation and, as such, was inadmissible"). The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 3, 16, 22, Fla. Const.

The error was not harmless. The prosecutor utilized the improper evidence in closing argument to explain the DNA in a manner to help the prosecution's case T1360. This cause must be reversed and remanded for a new trial.

POINT V

THE TRIAL COURT ERRED IN ALLOWING A STATE WITNESS TO SPECULLATE, BASED ON HIS EARLIER SPECULATION THAT MULTIPLE STAINS ON THE T-SHIRT OF LULU WERE THE RESULT OF A SINGLE WIPE, THAT THE MULTIPLE STAINS WERE THE RESULT OF A HYPOTHESIS CALLED THE "PLUNGER OR PISTON EFFECT."

Over Appellant's objection, prosecution witness Earl Ritzman was permitted to speculate, based upon his earlier speculation that multiple stains on the T-shirt of Lulu were the result of a

single wipe, that the multiple stains were the result of a hypothesis he called the “plunger or piston effect”:

> Q Now, is this part of the same wipe that you were talking about?
>
> A Yes. This would – this, this and down in here.
>
> MR. HARRLEE: Objection. That’s speculation, Judge, they can’t say that’s the same wipe.
>
> Q Tell us why you think that.
>
> A It’s just – in my opinion it’s just the positioning and based on the fact that in the number one stain we find a combination of Eddie Bigham and the husband. And in these two stains, you find only a seminal fluid contribution from the husband.
>
> MR. HARLLEE: Objection.
>
> THE COURT: Overrule the objection. But this evidence, like all evidence, is for you to evaluate.
>
> * * *
>
> Q Your opinion that this is from one wipe, would the pattern of the fecal matter that you found on the shirt and its locations, would that suggest that to you as well?
>
> MR. HARLLEE: Objection. Lacking foundation and speculation, Judge.
>
> THE COURT: Overrule the objection. You may answer the question.
>
> A Again, when we look at these – the seminal fluid from the two individuals in stain one and the seminal fluid that was identified from the husband, this goes with the fact of what I associate as a plunger or piston effect.
>
> If an item is placed into the vaginal cavity, and if there’s seminal fluid or whatever sperm fluids in that cavity is plunged out to you would expect to see that on the lower portion of the member as opposed to the

> tip of the member. So this goes long with the fact this is a wipe and more than likely a one wipe with the tip of the penis here and this being towards the middle and the base of the shaft of the penis.

T1119-1121.

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code constitute an abuse of discretion. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

Without evidence of some basis – such as personal knowledge or expertise – Ritzman's opinion that the multiple stains on the T-shirt were the result of a combination of the hypothesis, named the piston or plunger effect, followed by the single wipe hypothesis, was pure speculation and should not have been admitted.

As shown from his testimony above, the plunger/piston hypothesis deals with the placing of an item in the vaginal cavity and the resulting effects T1121. Obviously, Ritzman was not present when Lulu had sex so he did not have personal knowledge that the plunger/piston activity occurred.

Again, as pointed out in Point IV, Ritzman's expertise was laid out in the field of DNA testing and analysis T1065-1086. This is far afield from any expertise in

dealing with the mechanics of what occurs during sex. There is no indication that Ritzman did experiments or studied to learn the plunger/piston effect. Rather, it is merely speculation without any real foundation. It was inadmissible speculation that the multiple stains were produced by the so-called plunger/piston effect. See Fassi v. State, 591 So. 2d 977, 978 (Fla. 5th DCA 1991) (handwriting expert's testimony comparing wall graffiti to handwriting sample was inadmissible because it "is too speculative"); Ruth v. State, 610 So.2d 9 (Fla. 2d DCA 1992) (opinion of expert was "pure speculation and, as such, was inadmissible"). The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 3, 16, 22, Fla. Const.

The error was not harmless. The prosecutor utilized the improper evidence in closing argument to explain the DNA finding in a way to help the prosecution's case T1359. This cause must be reversed and remanded for a new trial.

POINT VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO STRIKE THE PROSECUTOR'S ARGUMENT THAT APPELLANT SEXUALLY ASSAULTED LOURDES CAVAZOS A.K.A. LULU.

The standard for review of a prosecutor's argument is abuse of discretion, but the discretion does not extend to permit improper argument. See Gore v. State, 719 So. 2d 1197, 1200

(Fla. 1998).

In this case the trial court granted a motion for judgment of acquittal on the felony charges of sexual battery and kidnapping T1265. The trial court also ruled that the prosecution could not proceed under a theory of felony murder for its first degree murder case T1306.

Over defense objections T1339-40,1341, the state commented in closing argument that Appellant had sexually assaulted Lulu vaginally and anally T1339. Under the circumstances of this case it was reversible error to permit the prosecutor to argue that Appellant had sexually assaulted Lulu vaginally and anally.

It was improper for the prosecutor to argue that Appellant committed a sexual assault after the trial court had taken both the felony and felony murder off the table. Compare Cole v. State, 356 So. 2d 1307 (Fla. 2d DCA 1978) (reversible error for state to refer to offense for which JOA granted); Price v. State, 816 So. 2d 738 (Fla. 3d DCA 2002) (comments by prosecutor violated spirit of order in limine regarding prior robbery), such action also violates Double Jeopardy. See Smith v. Massachusetts, 125 S.Ct. 1129 (2005) (once JOA granted, Double Jeoparty barred reconsideration of further factfinding on allegation). There should not have been a debate about sexual assault after it was supposed to no longer be an issue for the jury to decide. There was simply too much danger that the jury

would misuse the sexual assault claim.

The error cannot be deemed harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The prosecutor had earlier informed the jury of felony murder with sexual battery as the felony, and asked the jury for assurances that they could find Appellant guilty under such a theory:

> MR. TAYLOR: Does everyone understand that concept, felony murder? In the course of the felony a person is killed then you're just as guilty of first degree murder as if you had a premeditated intent. Anyone else have a question about that? Pretty clear?
>
> Ms. Gauthier, you understand the two ways to find someone guilty of first degree murder, premeditation and then felony murder?
>
> MS. GAUTHIER: Yes.
>
> MR. TAYLOR: If you found that this person, this defendant, beyond a reasonable doubt committed a murder or someone was killed during the commission of a kidnapping or sexual battery, if you found that beyond a reasonable doubt, could you find someone guilty of first degree murder?
>
> MS. GAUTHIER: Yes.
>
> MR. TAYLOR: You could follow the felony murder rule?
>
> MS. GAUTHIER: Yes.
>
> MR. TAYLOR: Anyone else here could not do that? You may agree with premeditation, but this other way of finding someone guilty by felony murder. You may have philosophical differences with that, you don't agree with it, anyone have a problem with that? Not at all. Everybody is perfectly okay with that? Okay.

T126-27. The prosecutor then claimed in opening statement that

Appellant had taken Lulu into the woods to commit a sexual battery T770. Thus, despite the trial court telling the parties that felony murder was off the table it would still be in the jurors' minds. While the trial court informed the jury that Counts II and III were off the table, it never informed the jury that felony murder was off the table. The trial court informed that they were still to consider murder in the first degree – which the jury would understand to include felony murder.

It is prejudicial for the prosecution to argue counts and theories such as felony murder which have been JOA'd. There is an unacceptable risk that Appellant was convicted for conduct for which he had been acquitted. Compare Cole, supra. The error denied Appellant due process, his right to be free from double jeopardy, and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 3, 16, 22, Fla. Const.

Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM ARGUING TO THE JURY THAT THE STATE DID NOT PROVE THE CHARGES OF SEXUAL BATTERY AND KIDNAPPING.

The standard of review of counsel's argument is abuse of discretion, but the discretion does not extend to prohibiting proper argument. Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998).

Appellant attempted to argue in closing argument that the state had not proven the charges of sexual battery or kidnapping as they had promised in their opening statement:

> MR. UNRUH: … We have heard something from the State, they have given you a theory. We know that in opening statement the state attorney stood up and said that Eddie Bigham committed a kidnapping by dragging Lourdes Cavazos – dragged her into the wooded lot. That he raped her and committed first degree murder on her. And they said they would prove it beyond a reasonable doubt.
>
> MS. PARK: Your Honor, I'm going to object. May we approach?
>
> THE COURT: Okay.

T1316-17. The trial court sustained the State's objection and prohibited such an argument because the issue as to sexual battery was not before the jury T1318. This was reversible error.

There is no unfair prejudice to allow Appellant to argue the state had not proven the charges of sexual battery and kidnapping. However, prohibiting Appellant from arguing the state had not proven these charges was very prejudicial. As noted in Point VI, the prosecutor received assurances from jurors that they would convict of murder in the first degree if felony murder was proven. As noted in Point VI, the prosecutor was arguing to the jury that Appellant committed a sexual assault. Appellant was unfairly prejudiced by not being able to argue to the jury that the state had not proven that Appellant

committed a sexual battery. Without an argument by the defense the jury was looking at the state's claim about a sexual battery and their promise to the state to convict if there was a felony murder (sexual battery). It cannot be said beyond a reasonable doubt that the error was harmless. The error denied Appellant due process, the right to be free from double jeopardy, and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const.; Art. I, §§ 2, 3, 16, 22, Fla. Const.

POINT VIII

THE TRIAL COURT ERRED IN OVRRULING APPELLANT'S OBJECTIONS TO THE PROSECUTOR INFORMING THE JURY THAT THE STATE DOES NOT SEEK DEATH IN OTHER MURDER CASES.

The standard for review of a prosecutor's argument is abuse of discretion, but the discretion does not extend to permit improper argument. See Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998).

The prosecutor informed the jury that the state does not seek the death penalty in all murder cases, but in this one they were seeking death.

> MR. TAYLOR: And, MS. Dubberly, you understand the State does not seek the death penalty in all murder cases, do you understand that?
>
> MS. DUBBERLY: Yes.
>
> MR. TAYLOR: But in this case we are.
>
> MR. HARLLEE: I'm going to object.

T250. Defense counsel then explained that it was irrelevant

that the prosecutor does not seek the death penalty in all cases and the argument creates an assumption of a process which decided that the instant case was a death case T259-60. The trial court overruled the objection T260. This was error.

A prosecutor may not explicitly or implicitly give a personal opinion which indicates a personal belief in the guilt of the defendant. See Lavin v. State, 754 So. 2d 784 (Fla. 3d DCA 2000) (comment that prosecutor's role was to "make sure that the innocent are not prosecuted" was improper); Reed v. State, 333 So. 2d 524 (Fla. 1st DCA 1976) (comment about prosecuting people "because they are guilty of crimes" was improper); Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990) ("I don't prosecute people who have legitimate self defense claims" improper). Thus the prosecutor informing the jury that it selected this case as deserving the death penalty while not selecting other murder cases not only displayed a personal opinion as to strong guilt but also displayed a personal opinion that this case deserved the ultimate penalty in comparison to other cases that come before the prosecution. In Brooks v. State, 762 So. 2d 879 (Fla. 2000) this Court found that the prosecutor's statement, "I would submit now that the state does not seek the death penalty in all first degree murders because it's not always proper," was improper as it tends to cloak the state's case with legitimacy as a bona-fide death penalty prosecution. This cause must be

reversed and remanded for a new trial and/or a new penalty phase.

POINT IX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECITON AND ALLOWING THE STATE TO ARGUE FACTS NOT IN EVIDENCE.

The standard for review of a prosecutor's argument is abuse of discretion, but the discretion does not extend to permit improper argument. See Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998).

In closing argument the prosecutor informed the jury that Dr. Diggs testified one would not expect signs of trauma to Lulu because she was dead at the time Appellant had sex with her T1340. Appellant objected that such facts were not in evidence and no expert so testified T1340-41. The trial court overruled the objection T1341. This was error.

Contrary to the prosecutor's representations, Dr. Diggs did not testify Lulu was dead at the time Appellant had sex with her. Rather, Dr. Diggs merely testified that there was no evidence of forced sex. The prosecutor's comments were regarding facts not in evidence.

One cannot argue facts that are not in evidence. Hazelwood v. State, 658 So. 2d 1241 (Fla. 4th DCA 1995)(prosecutor must confine closing argument to evidence in record and must not make comments which could not be reasonably inferred from

evidence); Henry v. State, 651 So. 2d 1267 (Fla. 4th DCA 1995)(prosecutor cannot argue fact not supported by the evidence such as that a witness was tampered with without any evidence of any improper contact with the witness); Courson v. State, 414 So. 2d 207 (Fla. 3d DCA 1982) (recognizing that attempt of prosecutor to transform his own, often unshared courtroom observations into evidentiary fact is inappropriate).

The use of facts not in evidence was not harmless. The interjection of facts not in evidence could only mislead and distract the jury from considering the true evidence. Appellant testified that he had consensual sex with Lulu. Obviously, the improper comments that Dr. Diggs had testified differently was extremely detrimental to the defense. The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 3, 16, 22, Fla. Const. This cause must be remanded for a new trial.

POINT X

THE TRIAL COURT ERRED IN CONDUCTING PRETRIAL CONFERENCES IN APPELLANT'S ABSENCE.

The trial court erred in conducting several pretrial conferences in Appellant's absence. This denied Appellant's rights pursuant to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution; the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Florida Rule of Criminal Procedure 3.180.

Appellant was absent from four pretrial hearings. These hearings occurred on October 2, 2003 (ST2), December 11, 2003 (ST6), February 26, 2004 (ST9), and August 31, 2004 (ST17).

The right to be present has been held to be a fundamental component of due process pursuant to Florida law and the United States Constitution. Francis v. State, 413 So. 2d 1175 (Fla. 1982); Turner v. State, 530 So. 2d 45 (Fla 1987); Coney v. State, 653 So. 2d 1009 (Fla. 1995); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Florida Rules of Criminal Procedure 3.180(a)(3) requires the presence of the defendant at any pre-trial conference unless waived in writing. In addition, for any waiver to be effective there must be an inquiry demonstrating that the waiver of the defendant's presence is knowing, intelligent and voluntary. See Coney v. State, 653 So. 2d 1009, 1013 (Fla. 1995) ("court must certify through proper inquiry"); Turner v. State, 530 So. 2d 45, 49 (Fla. 1987) (defendant must be made aware of rights he was waiving to knowingly and intelligently waive); Butler v. State, 676 So. 2d 1034 (Fla. 1st DCA 1996). There was no valid waiver in the present case.

There was no written waiver of Appellant's presence at the hearings. Also, there was absolutely no inquiry of Appellant to verity that he had actually participated in any waiver. More importantly, even if Appellant had participated in a waiver,

there was absolutely no inquiry of Appellant to ensure that he was knowingly, intelligently and voluntarily waiving his right to be present in the proceedings. This type of inquiry is particularly important in Appellant's situation where he has a low IQ and functions at an elementary school level. How could the trial court certify that Appellant's waiver was knowing, intelligent and voluntary without knowing whether Appellant understood the nature of the hearings? Turner v. State, 530 So. 2d 45, 49 (Fla. 1987) (defendant must be made aware of rights he was waiving to knowingly and intelligently waive). Without a proper inquiry, it cannot be said that there was a valid waiver in this case. It was error to hold a pretrial hearing in Appellant's absence. Pomeranz v. State, 703 So. 2d 465 (Fla. 1997) (error to hold pretrial conferences in absence of the defendant).

The error cannot be deemed harmless. Appellant's presence at these hearings was important. His presence would not have constituted a mere shadow of his attorney. An issue involved whether the state would be allowed to invade Appellant's person and take his blood ST6. Nothing can be more personal and private. Also, another issue involved the waiver of one of Appellant's rights – the right to speedy trial ST2. Appellant's presence should have been allowed for these issues. The error was not harmless.

POINT XI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO OLIVIA CAVAZO'S TESTIMONY THAT SHE WOULD HAVE HEARD JOSE GUILLERMO A.K.A. OSCAR IF HE HAD LEFT THE HOUSE.

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code constitute an abuse of discretion. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

One of the possibilities before the jury was that Lulu's husband (Jose Guillermo a/k/a Oscar) killed her. Oscar had amotive. Lulu was going out at night. Oscar warned her that if she did this one more time he would leave her T884-885. After Oscar fell asleep Lulu again left the house. Appellant's statement indicated that Lulu exchanged sex for money in order to buy drugs. If Oscar left the house that night he may have killed Lulu after she had sex with Appellant. Olivia Cavazos testified that Lulu called a taxi and left that night T903. Cavazos went to sleep. Over defense objection on the ground of speculation, Cavazos was permitted to testify that she would have heard Oscar get up and go out if he had gone out during the night:

> Q Would you have heard Oscar if he left during the night?
>
> MR. AKINS: Objection. Speculation.

THE COURT: Overrule the speculation objection.

MS. PARK: You want me to repeat it?

THE INTERPRETER: Yes.

BY Ms. PARK:

Q Would you have heard Oscar get up and go out if he had gone out during the night?

A I would have to hear it, because he would have to pass where I was to go out.

T904-905. The trial court overruled the defense objection and permitted the testimony T905. This was error.

The law is very clear: a witness may not speculate as to what action he or she would have taken if something did or did not occur:

> Conjecture has no place in proceedings of this sort…. The law seems well established that testimony consisting of guesses, conjecture or speculation – suppositions without a premise of fact – are clearly inadmissible in the trial of causes in the courts of this country. A statement by a witness as to what a person would have pursued under certain circumstances which the witness says did not exist will ordinarily be rejected as inadmissible and as proving nothing.

Dracket Prods. Co. v. Blue, 152 So. 2d 463, 464 (Fla 1963); LeMaster v. Glock,Inc., 610 So. 2d 1336-39 (Fla. 1st DCA 1992). Thus, Olivia Cavazos' speculation she would have heard Oscar leave the house if he had left the house should not have been admitted.

The error in admitting the speculation was not harmless. The prosecutor emphasized the improper testimony in closing

argument that Olivia would have heard Oscar if he had left the house at night – "She says he didn't leave. She would have heard him." T1366. Whether Oscar left the residence was an issue. Oscar was a plausible suspect. Lulu had sex with other men for money. Oscar told Lulu that if she left the house again at night their relationship was over T885. Oscar somehow knew that Lulu's body was found nude despite the fact the police never gave him this information.[5] Also, the killer neatly placed and folded Lulu's clothing and covered her private areas. This is consistent with the actions of someone who loved or cared for Lulu – such as her husband Oscar. Oscar denied ever having anal sex with Lulu T883,978, yet Oscar's semen was found on the tip of a condom that was in her anal cavity T1114,1168-1169,1171. Despite Oscar's testimony of having vagina sex, there was absolutely none of Oscar's semen in Lulu's vaginal cavity T1154.[6]

The bottom line is that Oscar was a plausible suspect in this case which could cause a reasonable doubt on the state's theory that Appellant was the killer. However, the improper testimony would case a doubt on whether Oscar would have the opportunity to kill Lulu. Thus, the error cannot be deemed harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.

[5] Detective Hall testified that he had shown Oscar a photo of Lulu but the photo was not a nude photo T980.

[6] There was some semen from someone else in the vaginal cavity, but it could not be identified T1127.

2d 1129, 1139 (Fla. 1986). This cause must be remanded for a new trial.

POINT XII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND ADMITTING HEARSAY STATEMENTS THAT JOSE GUILLERMO AND OLIVIA CAVAZOS HAD IDENTIFIED FLIP FLOPS THAT WERE FOUND NEAR THE SCENE WHERE THE BODY WAS FOUND.

Over Appellant's hearsay objections T968,969, Detective Hall was permitted to testify that Jose Guillermo and Olivia Cavasos identified flip flops that were found near the scene where the body was found T968-9. This was error.

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code constitute an abuse of discretion. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

Hearsay is defined in Section 90.801(1)(c), Florida Statutes as a statement other than one made by the declarant while testifying at trial or hearing offered in evidence to prove the truth of the matter asserted. Section 90.801(1) defines the "declarant" as the person who makes the statement.

Clearly, the statements at bar were hearsay. See Keen v. State, 775 So. 2d 263, 272 (Fla. 2000) (where testimony provided an "inescapable inference" that declarant had made out-of-court

statement; the statement will be hearsay despite fact that witness did not specifically repeat what he was told).

It was error to admit the hearsay. The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 3, 16, 22, Fla. Const.

The error was not harmless. The prosecutor used the hearsay evidence (that the flip flops belonged to Lulu) to argue that she struggled as she was taken near the road T1337.

POINT XIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND PERMITTING INVESTIGATOR HAMRICK TO TESTIFY THAT, AFTER SPEAKING WITH INDIVIDUALS, THE INFORMATION THAT LULU WAS IN A WHITE JEEP WITH SEVERAL MEN WAS REFUTED.

Detective Hall testified that during his investigation he received information that Lulu may have been in a white Jeep with several men T993. Hall also had information that Lulu was with at least three other men that evening T993.

Over Appellant's hearsay objection, T1000, investigator Hamrick was permitted to testify that he talked to individuals who claimed that they were not the individuals in the white Jeep with Lulu T1000-1004.

The out-of-court statements as to what others told Hamrick were hearsay. See Section 90.801(1)(c). Thus, it was error to overrule Appellant's objection and to allow the introduction of

the hearsay evidence.[7] Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 3, 16, 22, Fla. Const.

POINT XIV

THE TRIAL COURT ERRED IN GRANTING THE STATE'S CAUSE CHALLENGE TO POTENTIAL JUROR MORRISON OVER APPELLANT'S OBJECTION.

The trial court granted the state's cause challenge to potential juror Morrison over Appellant's objection T479. This was reversible error.

During jury selection, Morrison did not indicate that she could not follow the law or that she had an unyielding bias against the death penalty.

Morrison was excused because she did not like to sit in judgment of others. This is not sufficient to disqualify someone for cause. Especially where Morrison never indicated a problem with following the law and testified that she could recommend the death penalty T450. Morrison indicated that she would fall in the middle of a scale from 0 to 10 of those against and for the death penalty T450.

The state and federal constitutions forbid excluding jurors from capital cases because of their views about the death

[7] Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code constitute an abuse of discretion. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) (discretion "narrowly limited by rules of evidence"); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001) (no discretion to make rulings contrary to evidence code).

penalty unless those views would prevent or substantially impair the performance of their duties in accordance the with judge's instructions and the jurors' oath. See Gray v. Mississippi, 481 U.S. 648, 658 (1987); Ault v. State, 866 So. 2d 674, 684 (Fla. 2003) (quoting and following Gray). Chandler v. State, 442 So. 2d 171, 173-74 (Fla. 1983), found error in excusing for cause jurors who did not express an "unyielding conviction and rigidity of opinion regarding the death penalty).

In Gray, prospective juror Bounds "was somewhat confused," but "ultimately stated that she could consider the death penalty in an appropriate case and the judge concluded that Bounds was capable of voting to impose it." 481 So. 2d at 654. Questioned by the state, she "stated that she could reach either a guilty or not guilty verdict and that she could vote to impose the death penalty if the verdict were guilty." Id. At 655. The judge erred excusing her for cause under those circumstances.

Whether one does not like to sit in judgment of others is of no moment as long as they can follow the law. Morrison was unequivocal in her responses ("Yes, I do") as to recommending the death penalty in the appropriate case T450. It was reversible error to grant the cause challenge over defense objection.

The improper granting of a cause challenge on this ground is per se prejudicial under Gray, Ault, and Chandler. Those cases

(and many others) held the error prejudicial only as to penalty rather than guilt, and ordered new penalty proceedings.

These cases were decided against a background understanding that it is the penalty phase that determines death eligibility. Bottoson v. State, 833 So. 2d 693 (2002), however, held that a conviction fo first degree murder without more makes one eligible for the death penalty. Justice Lewis explained: "An individual is eligible for the maximum penalty immediately upon being found guilty of a capital felony." Id. 728 (Lewis, J., concurring).

Bottoson was contrary to prior Florida law. Cf. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988) ("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist."); Elam v. State, 636 So. 2d 1312, 1314-15 (Fla. 1994) (quoting and following Banda); accord Buckner v. State, 714 So. 2d 384, 390 (Fla. 1998); Thompson v. State. 565 So. 2d 1311, 1318 (Fla. 1990) ("Because no valid aggravating circumstances exist, the death sentence cannot stand and we find no need to discuss other points raised on appeal."); Kampff v. State, 371 So. 2d 1007 (Fla. 1979) (vacating death sentence where state failed to establish any aggravating circumstance).

Further, and perhaps more importantly, section 921.141, Florida Statutes, requires the finding of "sufficient

aggravating circumstances" (e.s.) as a requisite for a death sentence.

After Bottoson, a vote to convict for first degree murder is itself a vote for death eligibility. No further fact-finding is required. (If further fact-findings were required, the statute would violate the requirements of Ring v. Arizona, 536 U.s. 584 (2002).) The murder conviction is both necessary and sufficient for death-eligibility under Bottoson. The fact that Ault was decided after Bottoson does not affect this argument. The initial brief in Ault was filed in January 2002, well before the decision in Bottoson, and Ault requested only a new penalty phase. See Ault v. State, No. SC00-863 (briefs and transcript of oral argument).[8] Hence, Ault did not decide the effect of Bottoson on the relief to be granted.

Grant of the cause challenge denied Appellant his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

Since the guilty-phase verdict itself is now enough to qualify one for a death sentence, the erroneous exclusion of the juror was prejudicial both as to guilt and as to penalty. This Court should order a new trial.

Alternatively, if this Court finds the error prejudicial

[6] The briefs and transcript may be read at:

http://www.wfsu.org/gavel2gavel/archives/03-01.html#JAN10

only as to the separate penalty phase, it should reverse the death sentence and remand for new jury sentencing proceedings.

POINT XV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Appellant moved to suppress a statement he made to police on the ground that he was never informed of his right to have an attorney present during questioning T73-81,941. The trial court denied the motion pretrial and during trial T82,942. This was error.

The present issue involving the adequacy of Miranda warnings is a question of law which is reviewed de novo on appeal. Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004); Dooley v. State, 743 So. 2d 65, 68 (Fla. 4th DCA 1999) (trial court is in no better position to evaluate audio or videotape from the appellate court).

In the present case the police taped a statement from Appellant. The tape shows that police failed to inform Appellant of his right to have an attorney present during questioning. Exhibit #2. Detective Hall acknowledged that all his conversations with Appellant were on the tape T51,53. Despite the fact that Hall claimed to have read all the rights the tape does not reflect that Hall informed Appellant of his right to have an attorney present during questioning. Hall explained that only a portion of the rights were on the tape

because the beginning of the tape had a leader which could not record. However, the tape shows there was no leader problem. See Exhibit #1. Moreover, the testimony was that the leader was only 10 seconds T68. Hall testified that during this 10 second interval he turned on the recorder from one room, walked out of the room, went inside the interview room and then told Appellant he wanted to read him his rights and proceeded to read the following Miranda warning which was not reflected on the tape:

> … you have the right to remain silent. Anything that you say can be used against you in court. You have the right to talk to an attorney for advice before we ask you any questions and to have him with you during questioning …

T41. However, this scenario is impossible. The tape has no leader. See Exhibit 1. Furthermore, all the actions that Hall took after turning on the tape, including reading the alleged warning not picked up by the tape, would be physically impossible to do in 10 seconds or even in 20 seconds. It was an abuse of discretion for the trial court to rely on evidence that was impossible or inherently unreliable in denying the motion to suppress. See Van Note v. State, 366 So. 2d 78, 80 (Fla. 4th DCA 1978) (appellate court "has the right, nay, the duty, to reject 'inherenly incredible and inprobable testimony or evidence'"). It was error to deny the motion to suppress where Appellant was not informed of his right to have counsel present during questioning. Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA

2004); Cook v. State, 896 So. 2d 885 (Fla. 4th DCA 2005); West v. State, 876 So. 2d 614 (Fla. 4th DCA 2004).

In Roberts, the court explained that Miranda requires that the person in custody be informed of the right to have counsel present during questioning:

> Florida courts have consistently interpreted Miranda as requiring notification that a person in custody has a right to have counsel present not only before interrogation but during interrogation as well. See Ramirez v. State, 739 So. 2d 568 (Fla. 1999); Sapp v. State, 690 So. 2d 581, 583-84 (Fla. 1997); Holland v. State, 813 So. 2d 1007, 1009 (Fla. 4th DCA 2002); T.S.D. v. State, 741 So. 2d 1142 (Fla. 3d DCA 1999); Statewright v. State, 278 So. 2d 652 (Fla. 4th DCA 1973); James v. State, 223 So. 2d 52 (Fla. 4th DCA 1969).
>
> Similarly, federal courts have recognized that advisement of the right to counsel during questioning is a vital part of the Miranda procedural safeguards. See United States v. Noti, 731 F.2d 610, 614 (9th Cir. 1984); United States v. Anthon, 648 F.2d 669 (10th Cir. 1981); Atwell v. United States, 398 F.2d 507 (5th Cir. 1968); Goshart v. United States, 392 F.2d 172, 175 (9th Cir. 1968); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968);

874 So. 2d at 1227-1228. Likewise, in Canete v. State, 30 Fla. L. Weekly D1387 (Fla. 4th DCA June 1, 2005), it was explained that the right to have an attorney before and during questioning must be given:

> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), makes it clear that suspects must be informed of their right to have an attorney present before and during questioning. See Franklin v. State, 876 So. 2d 607 (Fla. 4th DCA 2004), cert. denied, ___ U.S. ___, 125 S.Ct. 890, 160 L.Ed.2d 825 (2005); West

> v. State, 876 So. 2d 614 (Fla. 4th DCA 2004), review denied, 892 So. 2d 1014 (Fla. 2004); Roberts v. State, 874 So. 2d 1225 (Fla. 4th DCA 2004), review denied sub nom, State v. West, 892 So. 2d 1014 (Fla. 2005). The issue, here, is whether appellant could readily infer from what he was told that he had the right to have an attorney present during questioning since he was not expressly give that advice. We conclude that he could not. Although no magic words are required for Miranda, see Gore v. State, 599 So. 2d 978 (Fla. 1992), here, the warnings simply failed to convey the significant right to counsel's presence during the questioning process. It is true, as the dissent points out, that appellant was told by the officers that he had the right to the presence of an attorney before they could ask any questions and that if he decided to answer questions without an attorney present, he had the right not to answer any question until he could speak with an attorney. Yet, this information never effectively and expressly conveyed to appellant that he had the right to have an attorney present and by his side while the actual questioning was taking place, i.e., "during" questioning. A criminal defendant need not have to guess at the substance of his constitutional rights under Miranda. As this Court stated in Roberts, Miranda requires a clear, understandable warning from law enforcement officers that conveys all of a defendant's rights. "Only through such a warning is there ascertainable assurance that the accused was aware of his right."

30 Fla. L. Weekly at 1388. The error violated Appellant's rights under the Fifth, Sixth and Fourteenth Amend., U.S.. Const. and Art. I, § 9, Fla. Const.

POINT XVI

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY SEPARATION OF THE JURORS DURING DELIBERATIONS.

Jury deliberations began on the morning of November 9, 2004. After struggling with deliberations all day, the jury indicated that they were not close to a verdict T1422. The trial court allowed the jury to discontinue deliberations and separate until 9:30 a.m. November 10, 2004 T1422. The jury deliberated all day on November 10, 2004. Again, after struggling with deliberations all day, without being close to a verdict T1446, the trial court discontinued deliberations and separate for 2 days until November 12, 2004 T1447-48. The jury returned that morning and reached a verdict within minutes T1460. Under the unique circumstances of this case, Appellant was denied due process and a fair trial by the jury separating during deliberations.

In Raines v. State, 65 So. 2d 558 (Fla. 1953), this Court reversed where there was no objection to the separation of jurors during deliberations noting the danger of contamination of the jury:

> The record does not show that appellant raised any objection whatever to the order of the Court permitting the jury to separate and go to their homes for the night.
>
> There was no objection when the jury was dispersed, nor were counsel consulted. There is no showing in the way of evidence that defendant's rights were prejudiced but trials should not be conducted in a way that defendant had good reason for the belief that he was deprived of fundamental rights. The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that the appellant's trial was conducted with that

> degree of fairness and security that the bill of rights contemplates. A fifteen hours absence under no restraint whatever leaves to much room to question the bona fides of everything that took place during that time, particularly when one defendant was acquitted and the other was convicted on the same charges and evidence. It imposes too great a burden on defendant to produce evidence of prejudice to his rights under such circumstances. We think this error calls for reversal.

65 So. 2d at 559-60 (emphasis added).

Rule of Criminal Procedure 3.370(c) specifically requires the jury in a capital case not separate during deliberations unless both defense and prosecution affirmatively waive non-separation of the jury:

> (c). During Deliberations. Absent exceptional circum-stances of emergency, accident, or other special necessity or unless sequestration is waived by the state and the defendant, in all capital cases in which the death penalty is sought by the state, once the jurors have retired for consideration of their verdict,t hey must be sequestered until such time as they have reached a verdict or have otherwise been discharged by the court. In all other cases, the court, in its discretion, either on the motion of counsel or on the state's initiative, may order that the jurors be permitted to separate. If jurors are allowed to separate, the trial judge shall give appropriate instructions.

(emphasis added).

In this case although the parties agreed that the jurors could stop deliberations for the night, neither party specifically elected to have the jury separate during deliberations. The topic regarding jury separation was never specifically addressed. Appellant was never asked about the

jurors being about to separate. However, the danger that this Court worried about in Raines appears to have come true. To exacerbate the situation the trial court instructed the jurors they were "allowed to discuss the case amongst" themselves during the separation T1422. The jury in this case struggled day after day, but once they separated and rejoined they reached a verdict in a matter of minutes. This cause must be reversed and remanded for a new trial.

POINT XVII

THE TRIAL COURT'S INSTRUCTION ON PREMEDITATION WAS HARMFUL REVERSIBLE ERROR.

Defense counsel objected to the inadequate instruction on first degree murder. T19-20,769,1319-20;R204-05. The motion was denied. T21,1319-20. The trial court gave the erroneous instruction. T1405-06. This was harmful, reversible error.

Whether a jury instruction misstates the elements of a statutory crime is reviewed *de novo*. See United States v. Petrosian, 126 F. 3d 1232, 1233 n.1 (9th Cir. 1997), cert. denied, 522 U.S. 138, 118 S.Ct. 1101, 140 L.Ed.2d 156 (1998).

The following instruction regarding premeditation was given to the jury in this case:

> Killing with premeditation, killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the pre-meditated intent to kill and the killing.

> The period of time must be long enough to allow reflection by the defendant. The pre-meditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

T1405-06.

In McCutchen v. State, 96 So. 2d 152 (Fla. 1957) this Court explained that a premeditated design includes reflection **and deliberation** before and at the time of the killing:

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection **and deliberation** on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

96 So. 2d at 153 (emphasis added).

Deliberation is defined as the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means. BLACK'S LAW DICTIONARY, Rev. 4th

Ed, at page 514; see also People v. Hillman, 295 P. 2d 939 (Cal. App. 1956) (deliberate includes weighing of various considerations). The instruction that was given in this case is misleading and does not accurately define premeditated design referred to in Florida Statute Section 782.04(1)(a)1 and McCutchen under Florida law. The instruction objected to by Appellant fails to inform the jury that premeditated design includes deliberation: the weighing of the reasons for and against the act. The instruction does not reflect the correct law and permits a verdict of guilty where there is no deliberation by the defendant.

The instruction given here is misleading, as it defines a first degree premeditated murder as a two step process, whereas the elements of first degree murder contain a three step process. The standard instruction informs the jury that "killing with premeditation" is killing after consciously deciding to do so. Thus, the instruction states that consciously deciding to kill and then killing is premeditated murder. The instruction completely omits the process of deliberation. Consciously deciding to do something is not the same a weighing and deliberating over the reasons and means of doing something. Being aware of one's actions, being "conscious" and cognizant of them, does not entail the level of contemplation, weighing and considering the means and reasons

for and against an act that is “deliberation.”

The standard instruction also states that no period of time is needed between the formation of the premeditated intent to kill and the killing, except that period which must be long enough to permit reflection. This is misleading. This does not inform the jury that the defendant must reflect or what the defendant must reflect upon, but only that he have time to do so. The law requires actual reflection and not merely time for reflection.

The standard instruction given in this case informs the jury that premeditation is proven **if the premeditation was at the time of the killing**:

> It will be sufficient proof of premeditation if the circumstances of the killing, and the conduct of the accused, convince you beyond a reasonable doubt of the premeditation at the time of the killing.

T 1895. This is an incorrect statement of law. The premeditation must be present before the time of the killing. McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957) (“entertained in the mind before and at the time of the homicide”). The instruction erroneously relieves the State of the burden of proving that the fully formed purpose was before the killing. Telling the jury that premeditation only has to be at the time of the killing along with telling the jury premeditation is killing after consciously deciding to kill allows for the erroneous conclusion that the decision to kill can be without

the required deliberation process of McCutchen. The jury should have been given a correct instruction.

Due process requires accurate instructions as to what must be proven for a conviction. See Screws v. United States, 325 U.S. 91, 4107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U. S. Const., Art. I, §§ 2, 9, 16, 22, Fla. Const. This cause must be reversed for a new trial.

PENALTY ISSUES

POINT XVIII

APPELLANT WAS DENIED HIS RIGHT TO A RELIABLE CAPITAL SENTENCING AND DUE PROCESS BY THE FAILURE TO INSTRUCT THAT THE FACTFINDER MUST DETERMINE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES.

Appellant challenged the preponderance standard for determining whether the sentence of death is appropriate (mitigators must outweigh aggravators) R70;T769,1319. The trial court overruled the objection T769,1319-20. This was reversible error.

The reliability of determining that death is the appropriate

sentence depends on certitude.

In civil cases involving monetary disputes the burden of proof is by the preponderance of the evidence. The risk of error is almost equally shared by the litigants.

In criminal cases because liberty is at stake, society demands much more reliability and certitude. The burden of proof is beyond a reasonable doubt.

The death penalty is unique in its severity and irrevocable nature.[9] A higher degree of certitude must be required for its imposition.[10] Thus, the factfinder must determine that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.

As recently as Deck v. Missouri, 544 U.S. ___ (2005), the United States Supreme Court has emphasized there is just as

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[9] "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however, long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).... "The death penalty differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basis purpose of criminal justice. And it is unique, finally in its absolute renunciation of all that is embodies in our concept of humanity." Furman v. Georgia, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

[10] The Eight Amendment requires "heightened reliability ... in the determination whether the death penalty is appropriate...." Sumner v. Shuman, 483 U.S. 66, 72, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

critical a need for reliability in decision making in the penalty phase as in the guilt phase:

> Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the "'severity'" and "'finality'" of the sanction, is no less important than the decision about guilt. Monge v. California, 524 U.S. 721, 732 (1998) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977))..... Neither is accuracy in making that decision any less critical. The Court has stressed the "accruate need" for reliable decisionmaking when the death penalty is at issue.

544 U.S. ___, Slip opinion at 9.

In State v. Wood, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 980 (1982), the Utah Supreme Court held that the certitude required for deciding whether the aggravating factors outweighed the mitigating factors was beyond a reasonable doubt:

> The sentencing body, in making the judgment that aggravating factors "outweigh," or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

648 P.2d at 83-84.

In State v. Rizo, 833 A.2d 363 (Conn. 2003), the Connecticut Supreme Court recognized that the reasonable doubt standard was required for the weighing process:

> Imposing the reasonable doubt standard on the weighing process, moreover, fulfills all of the functions of burdens of persuasion. By instructing the jury that its level of certitude must meet the demanding standard of beyond a reasonable doubt, we minimize the risk of error, and we communicate both to the jury and

> to society at large the importance that we place on the awesome decision of whether a convicted capital felony shall live or die.

833 A.2d at 407 (emphasis added). The court recognized that the greater certitude lessened the risk of error that is practically unreviewable on appeal:

> ... in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instructions, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some constitutional floor based on the need for reliability and certainty in the ultimate decision-making process.

833 A.2d at 403 (emphasis added). Finally, the court reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable doubt:

> Consequently, the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in the case. In this regard, the meaning of the "beyond a reasonable doubt" standard, as describing a level of certitude, is no different from that usually given in connection with the questions of guilt or innocence and proof of the aggravating factor.
>
> The trial court's instructions in the present case did not conform to this demanding standard. We are constrained, therefore, to reverse the judgment of death and to remand the case for a new penalty phase hearing.

833 A.2d at 410-411. Likewise, the factfinder in this case must

have been persuaded beyond a reasonable doubt that the aggravators outweighed the mitigators. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellant's sentence must be vacated.

POINT XIX

INSTRUCTING THE JURY TO DETERMINE WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST THAT OUTWEIGH AGGRAVATING CIRCUMSTANCES PLACES A HIGHER BURDEN OF PERSUASION ON APPELLANT AND VIOLATES THE EIGHTH AMENDMENT REQUIREMENT THAT DEATH BE THE APPROPRIATE PUNISHMENT, FUNDAMENTAL FAIRNESS AND DUE PROCESS.

Appellant objected to the penalty phase jury instruction that the jury determine whether sufficient mitigating circumstances exist that outweigh aggravating circumstances R70;T769,1319. The trial court overruled the objections T769,1319-20. The weighing equation was given to the jury as its duty to determine whether the mitigating circumstances outweigh the aggravating circumstances T1678,1674. This was reversible error and violates the reliability requirement for the death penalty, fundamental fairness, and Due Process under Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The statute and jury instructions direct the judge and jury to perform the following analysis to determine whether a sentence of life imprisonment or the death penalty should be

imposed:

> (a) that sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Section 921.141(3), Florida Statutes (emphasis added).

In People v. Young, 814 P.2d 834 (Colo. 1991), the Colorado Supreme Court held that the statutory weighing equation, which favored death if there were insufficient mitigating factors to outweigh the statutory aggravating factors, could result in an unreliable death sentence when mitigating and aggravating factors are equal and thus is unconstitutional:

> The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury cannot determine with reliability and certainty that the death sentence is appropriate under the standards established by the legislature. A statute that requires a death penalty to be imposed in such circumstances without the necessity for further deliberations, as does section 16-11-103(2)(b)(III), is fundamentally at odds with the requirement that the procedure produce a certain and reliable conclusion that the death sentence should be imposed. That such a result is mandated by statute rather than arrived at by a jury adds nothing to the reliability of the death sentence. The legislature has committed the function of weighing aggravators and mitigators to the jury. A jury determination that such factors are in equipoise means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded inconclusive results. A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. Accordingly, we conclude that the statute contravenes

> the prohibition of cruel and unusual punishments under article II, section 20, of the Colorado Constitution, and deprives the defendant of due process of law under article II, section 25, of that constitution.

814 P.2d. at 845 (emphasis added).

In State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (N.J. 1987), the court held that a death sentence was improper where instruction provided for death when the aggravating factors are not outweighed by the mitigating factors:

> The error concerns the jury's function in balancing aggravating factors against mitigating factors, a function that leads directly to its ultimate life or death decision. Its effect was to allow a death sentence without a finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. We hold that such a finding was required by the Act at the time of defendant's trial as a matter of fundamental fairness and that its absence mandates reversal and retrial of the penalty decision. Legislative policy also mandates this result, as indicated by the 1985 amendments to the Act; those amendments, furthermore, provide an independent basis for this result.

524 A. 2d at 130 (emphasis added).

In Hulsey v. Sargent, 868 F.Supp. 1090 (E.D. Ark. 1993) again a statute which required mitigation to outweigh aggravation created a presumption of death that would result in death when the aggravating and mitigating circumstances were in equipoise:

> If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be obligated to impose the death sentence since the mitigating circumstances would not be found to

> outweigh the aggravating. The requirement that the aggravating circumstances justify the sentence of death, which could easily be (and was probably intended to be) construed as an independent inquiry (satisfied by a single finding of an aggravating circumstance) would not cure the presumption created by the equation.

868 F.Supp. at 1101 (emphasis added).

Finally, in State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (Kan. 2001), the Kansas Supreme Court reversed a death sentence due to the instruction regarding mitigating circumstances outweighing aggravating circumstances:

> Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its' reasoned moral response" to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue. We see no way the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional.

40 P.3d at 232 (emphasis added). However, the Kansas court held that its construction of invalidating the weighing equation saved the statute itself from being unconstitutional. However, three years later in State v. Marsh, 278 Kan. 520, 102 P.3d 445 (Kan. 2004), the court recognized that the language of the statute was unambiguous and that the court could not usurp the legislature by rewriting the statute and despite stare decisis

the Kansas death penalty statute was declared unconstitutional:

> In Kleypas, we first held that the weighing equation of K.S.A. 21-4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments. We avoided striking the statute down as unconstitutional on its face only by construing it to mean the opposite of what it said, i.e., to require aggravating circumstances to outweigh mitigating circumstances. 272 Kan. 894, Syl. ¶¶ 45-48. This reasoning compelled us to vacate Kleypas' death sentence and remand the case for reconsideration of the death penalty under proper instructions on the weighing equation. 272 Kan. 894, Syl. ¶ 49.
>
> * * *
>
> Here, Marsh correctly notes, and the State concedes, that Kleypas requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our Kleypas decision that saved the statute through judicial construction must be overruled. We agree.
>
> * * *
>
> In short, the United States Supreme Court is willing to exercise its power to construe statutes in a constitutional manner to save legislative enactment rather than strike it down. However, both the United States Supreme Court and this court have acknowledged that the power to construe away constitutional infirmity is limited. "'Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature.'" Salinas v. United States, 522 U.S. 52, 59-60, 139 L.Ed.2d 352, 118 S.Ct. 469 (1997). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." United States v. Locke, 471 U.S. 84, 96, 96 L.Ed.2d 64, 105 S.Ct. 1785 (1985). The maxim cannot apply where the statute itself is unambiguous. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494, 149 L.Ed.2d 722, 121 S.Ct. 1711 (2001).

* * *

> These cases make plain that the avoidance doctrine is applied appropriately only when a statute is ambiguous, vague, or overbroad. The doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute. The court's function is to interpret legislation, no rewrite it. State v. Beard, 197 Kan. 275, 278, 416 P.2d 783 (1966); Patrick v. Haskell County, 105 Kan. 153, 181 Pac. 611 (1919).
>
> * * *
>
> We conclude that the second holding of Kleypas – that the equipoise provision could be rescued by application of the avoidance doctrine – is not salvageable under the doctrine of stare decisis. That holding of Kleypas is overruled. Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. Kleypas' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not clearly erroneous; as a constitutional adjudication; it encroached upon the power of the legislature.
>
> Our decision today to confine the application of the avoidance doctrine to appropriate circumstances recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the legislature's job, no ours. This decision does more in the long run to preserve separation of powers, enhance respect for judicial review, and further predictability in the law than all the indiscriminate adherence to stare decisis can ever hope to do.

102 P.3d 457-465 (emphasis added).

Likewise, Appellant's death sentence should be reversed

because the jury was instructed that unless mitigating circumstances outweigh aggravating circumstances the sentence should be death.

POINT XX

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INQUIRE INTO APPELLANT'S PRIOR CRIMINAL RECORD OVER APPELLANT'S OBJECTION.

Over Appellant's objection T1610, the trial court permitted the state to elicit evidence that Appellant had 12 prior criminal convictions T1612-13. This was reversible error.

Only the part of a defendant's criminal history involving prior violent felonies constitutes a statutory aggravating factor. Otherwise, a defendant's prior criminal record constitutes a nonstatutory aggravating circumstance which may not be presented to the jury. See Geralds v. State, 601 So. 2d 1157 (Fla. 1992) (substantiated nonviolent criminal history); Mikenas v. State, 367 So. 2d 606 (Fla. 1978); Miller v. State, 373 So. 2d 882 (Fla. 1979) (propensity to commit crime). Thus, it was error for the state to elicit the nonstatutory aggravating circumstances of the prior criminal record.

POINT XXI

THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS TO TESTIFY WHETHER CERTAIN FACTS WERE MITIGATING.

Over defense objections the state was permitted to ask its expert witness whether certain facts were mitigating (for example, whether rehabilitation was mitigating) T1650. This was error.

Witnesses may testify to facts but it is not their province to render the ultimate conclusion regarding those facts. Cf. Martinez v. State, 761 So. 2d 1074, 1079 (Fla. 2000) (witness' opinion as to guilt or innocence is not admissible – such opinion could unduly influence the jury).

In a capital case a witness may testify to the occurrence or non-occurrence of a certain fact. For example, whether someone has been rehabilitated. However, the Legislature has placed the responsibility of determining whether rehabilitation constitutes a mitigating circumstance on the jury and judge.

It was also improper for the witness to testify that a low ability to cope with stress would not constitute a mitigating circumstance T1650 Lines 19-24.[11] Again, this question was an issue for the jury to decide. It was error for the witness to opine that inability to cope with stress should not be

[11] Appellant did not specifically object to this question. However, this question was in the same form as the other objectionable questions (whether some fact is mitigating) which were overruled and had already been unsuccessfully twice objected on the ground that such questions invaded the province of the jury. Further objection would have been futile.

considered mitigation.

POINT XXII

WHETHER THE COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

It was error for the court to find the murder especially heinous, atrocious, or cruel (EHAC). It was also error to allow EHAC to be argued to the jury over Appellant's objection T1482,1484.

The trial court based EHAC on a number of speculations. The trial court assumed that Lulu was conscious when she was strangled. However, there was no evidence whether Lulu was conscious or unconscious when strangled. The medical examiner testified that there was no indication of any struggle T1250. Lulu was 5'1" and 150 pounds and appeared to be in good shape T1226,1221. One would expect to see signs of a struggle.[12] Then again, the toxicology report showed that Lulu was full of drugs T1706,A1. Thus, Lulu may have been unconscious due to alcohol and cocaine. The bottom line is that it is simply speculation

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[12] The trial court also wrote that photographs showed signs of a struggle. However, the photos showed no such signs. There was a disturbance of pine needles but this does not indicate a struggle. One witness thought the disturbance showed dragging of somebody T932. This does not indicate a struggle. It indicates the dragging of something – maybe an already dead body. It should be noted that Lulu's feet showed no signs of being dragged T1250. Also, the area was well-traveled with paths T801, and was used for prostitution and drugs T787. It was basically a "dope hole" T787. The disturbance could have been caused by anything.

to say she was conscious during the strangulation. The evidence was insufficient for EHAC due to uncertainty about what happened. See Bundy v. State, 471 So. 2d 9 (Fla. 1985) (HAC rejected because there was no clear evidence the victim struggled with her abductor or experienced extreme fear); DeAngelo v. State, 616 So. 2d 440 , 442-43 (Fla. 1993) (trial court did not err in rejecting HAC in strangulation case where facts were unclear); King v. State, 514 So. 2d 354 (Fla. 1987) (aggravator might not be based on what might have occurred).

The trial court also speculated that Lulu knew she was going to die and was so terrified that she urinated. However, the medical examiner testified it was speculation whether Lulu urinated at the time of her death T1252.

Speculation cannot substitute for proof of this aggravating circumstance. See Knight v. State, 746 So.2d 423, 435-36 (Fla.1998). "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

Not every strangulation is HAC. This Court wrote in Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989):

> The trial court found the murder was especially heinous, atrocious, or cruel because the evidence suggested the victim was manually strangled. We note, however, that in the many conflicting stories told by

> Rhodes, he repeatedly referred to the victim as "knocked out" or drunk. Other evidence supports Rhodes' statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In Herzog v. State, 439 So.2d 1372 (Fla.1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d at 9. Due to the conflicting stories told by Rhodes we cannot find that the aggravating circumstance of heinous, atrocious, and cruel has been proven beyond a reasonable doubt.

Cf. Deangelo v. State, 616 So. 2d 440, 442-43 (Fla. 1993) (trial court did not err in rejecting HAC in strangulation case where facts were unclear).

In Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1999), this Court struck the heinousness circumstance where the victim "may have been" rendered unconscious. The evidence was that "Zakrzewski approached Sylvia, who was sitting alone in the living room. He hit her at least twice over the head with a crowbar. The testimony established that Sylvia may have been rendered unconscious as a result of these blows, although not dead. Zakrzewski then dragged Sylvia into the bedroom, where he hit her again and strangled her with rope." 717 So. 2d at 490 (e.s.). This Court wrote at pages 492-93 (e.s.):

> As for Sylvia's death, we find that the trial court's finding of HAC was erroneous. The State has the burden of proving beyond a reasonable doubt that an aggravator has been established. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989). Medical testimony

> was offered during the trial which established that Sylvia may have been rendered unconscious upon receiving the first blow from the crowbar, and as a result, she was unaware of her impending death. We have generally held awareness to be a component of the HAC aggravator. See, e.g., Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994) (holding that HAC is repeatedly upheld where the victims are "acutely aware of their impending deaths"); Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) (holding that events occurring after the death of a victim cannot be considered in determining HAC); Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984) (holding that circumstances that contribute to a victim's death after the victim becomes unconscious cannot be considered in determining HAC). Based on the medical expert's testimony, we conclude that the State has failed to meet this burden. Therefore, we find that it was error for the trial court to apply the HAC aggravator to Sylvia's murder.

EHAC is "inapplicable under Florida law where the victim is unconscious or unaware of impending death at the time of the attack." Cherry v. State, 781 So.2d 1040, 1055 (Fla.2000).

In Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), this Court wrote: "The United States Supreme Court recently has stated that this factor would be appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992). Thus, the crime must be both conscienceless or pitiless and unnecessarily torturous." At bar, the state did not show these elements. The court erred in finding the circumstance.

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review

as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001).

The evidence at bar does not rise to the level of proof required for this circumstance. Its use renders the death sentence unconstitutional under the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Its erroneous use was not harmless beyond a reasonable doubt. Without it, the state had only one aggravator set against extensive unrebutted mitigation. This Court should strike the circumstance, vacate the sentence.

POINT XXIII

THE JURY INSTRUCTION STATING THAT THE JURY IS TO ONLY CONSIDER MITIGATION AFTER IT IS REASONABLY CONVINCED OF ITS EXISTENCE IS IMPROPER.

Section 921.141 provides no standard for the proof of mitigating evidence. The jury instruction committee has promulgated an instruction that the jury is to consider only mitigation after being "reasonably convinced" of its existence. This instruction is improper for three reasons: (a) it invades the province of the Legislature; (b) it is an incorrect statement of Florida law; and (c) it unconstitutionally limits the consideration of mitigating evidence. It was error to overrule Appellant's objections to this instruction T15-16,769,1319-20.

(a) Article 2, section 3 of the Florida Constitution forbids the judiciary from exercising the powers of the Legislature.

The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. Section 921.001(1), Florida Statutes; Smith v. State, 537 So. 2d 982 (Fla. 1989) (sentencing guidelines).

Despite the fact that the Florida Legislature put no restrictions on the consideration of mitigating evidence, the Standard Jury Instruction Committee placed such a restriction by the promulgation of the "reasonably convinced" standard. Hence the "reasonably convinced" standard is unconstitutional for violating the Florida Constitution's separation of powers.13 Florida law places no restriction on consideration of mitigation. By placing a "reasonably convinced" restriction, the instruction is contrary to Florida law.[14] Also, by placing a

[13] The promulgation of the "reasonably convinced" standard by the jury instruction committee also violates the Cruel and Unusual Punishment Clauses of the state and federal constitutions. A death penalty statute is constitutional only to the extent that it reflects the reasoned judgment by the people through their duly elected representatives in the Legislature. Gregg. Here, we have a major provision of Florida's death penalty scheme substantially rewritten by a little known committee of lawyers.

[14] Adoption of standard instructions by the supreme court does not necessarily mean that the instructions correctly state

high degree of restriction where none exists by statute, the jury instruction is contrary to the constitutional requirement that all mitigating evidence be considered and it imposes an unconstitutionally high standard of proof.

The state and federal constitutions require that all mitigating evidence be considered. Hitchcock v. Dugger, 481 U.S. 393 (1987). Any jury instruction that prevents consideration of all mitigating evidence is unconstitutional. Mills v. Maryland, 486 U.S. 367 (1988). Full consideration of mitigating evidence is essential in a capital case; the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. Penry v. Lynaugh, 109 S.Ct. 2934 (1989).

POINT XXIV

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

The legislature has made it clear under § 921.141(3) of the Florida Statues that if the trial court is to sentence a defendant to death it "shall set forth in writing its findings"

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the law. Yohn v. State, 476 So. 2d 123, 127 (Fla. 1985) (promulgation of standard instructions does not mean they are necessarily correct; standard jury instruction on insanity proper). See also Pope v. State, 441 So. 2d 1073 (Fla. 1984) (standard instruction on "heinous, atrocious or cruel").

that (1) sufficient aggravating circumstances exist to justify the death penalty and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances.[15] The legislature directed in § 941.141(3) that if the trial court "does not make the findings requiring the death sentence" within 30 days -- a life sentence must be imposed.[16] In this case, the

[15] This Court has also recognized that both of these circumstances must exist to uphold the death penalty. See Rembert v. State, 445 So. 2d 337, 340 (Fla. 1989) (sentence reduced to life even though trial court had found no mitigating circumstances and this Court upheld one aggravating circumstance); Terry v. State, 668 So. 2d 954 (Fla. 1996) (reduced to life where two aggravators were not sufficient for death even where no mitigation).

[16] § 921.141(3) reads as follows:

> (3) Findings in support of sentence of death. -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall be set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> > (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> >
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the

trial court did file the sentencing order within 30 days, however, the order does not contain "the findings requiring death." Thus, Appellant's death sentence must be vacated.

As noted above, there are two specific findings "requiring the death sentence." One is a finding that "sufficient aggravating circumstances exist" to justify the death sentence. The trial court never made this required finding -- instead it skipped this step and merely weighed the aggravating circumstances against the mitigating circumstances R447. The failure to make the required finding that sufficient aggravating circumstances exist requires vacating the death sentence and imposition of a life sentence.

POINT XXV

THE TRIAL COURT ABUSED ITS DISCRETION IN ARBITRARILY AND CAPRICIOUSLY FINDING BECAUSE APPELLANT HAS NOT ADJUSTED WELL TO FREEDOM THE MITIGATING CIRCUMSTANCE OF GOOD PRISON ADJUSTMENT DESERVES LESS WEIGHT.

The trial court has discretion in weighing mitigating circumstances. Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000). However, that discretion is not unbridled. For example, if the trial court gave less weight to a mitigator because it was Tuesday this Court would not defer to the trial court's discretion as to weight to give the mitigator. When the trial

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rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

court uses an illogical reason in its weighing decision it has abused its discretion. If the discretion was unbridled and could be based on whim or raw power, the sentencing decision would be arbitrary and capricious and the resulting death sentence would violate the Eighth and Fourteenth Amendments to the United States Constitution. Thus, the very constitutionality of the death penalty rests on the trial court's exercise of discretion in weighing mitigation being reviewable. A trial court's discretion is not unbridled and may be abused.

In the present case the trial court gave less weight to good prison adjustment because Appellant does not adjust well when he is free R444. However, the issue is not Appellant's ability to adjust to unstructured freedom. Instead, the issue involves the adjustment to structured imprisonment. The trial court should have been deciding between life without parole versus death and not discharge into society versus death. Thus, the trial court utilized a wrong and illegal basis in his evaluation and abused its discretion.

The error is not harmless where good prison adjustment has been recognized as extremely strong mitigation. See Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986) (conduct while in prison basis for life recommendation); Cooper v. Dugger, 526 So.

2d 900 (Fla. 1988).

This cause must be reversed and remanded for a new sentencing.

POINT XXVI

THE TRIAL COURT ABUSED ITS DISCRETION IN ARBITRARILY UTILIZING AN IMPROPER CONSIDERATION IN EVALUATING THE MITIGATING CIRCUMSTANCE OF APPELLANT'S CHILDHOOD PROBLEMS.

A trial court's assessment of weight to give a mitigating circumstance is reviewable for abuse of discretion. Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000). However, that discretion is not unbridled.

It is an abuse of discretion to arbitrarily utilize a fact common to every mitigator in a murder case to reduce the weight given to the mitigator. For example, it would be an abuse of discretion to give reduced weight to a mitigating circumstance because the defendant had committed first degree murder. This fact is common to all first degree murder cases. It would be arbitrary and unreasonable to utilize such a fact. See Boyd v. State, 910 So. 2d 167 (Fla. 2005).

In the present case the trial court grouped 9 mitigating circumstances into one category because "all show childhood problems due to family difficulties" R445. However, the trial court gave this mitigation "only a little weight" because "many people are able to lead crime free lives after such unfortunate family circumstances" R445. The trial court also emphasized

that in total Appellant's mitigating circumstances are of little weight because "many who suffer from similar childhoods nevertheless grow up to be responsible citizens" R447. Such a fact is common to every mitigating circumstance and murder.

A very small number of people commit murder. A vast majority of people have not committed murder. Every statutory and non-statutory mitigator in every case could be given less weight based on the trial court's reasoning. For example, many people without a significant criminal history do not commit first degree murder. Many people of a young and immature age do not commit murder. However, this fact does not alter that lack of significant criminal history, age, and mental and emotional problems are mitigating. Likewise, mitigation should not be denigrated because of a fact common to all murder cases – many people who share that characteristic do not commit murder. To utilize a fact that is present in every murder case to give less weight to mitigation is arbitrary. To utilize the fact in some cases, while not in others, is arbitrary and fanciful. It is being done at the whim of the trial court. The arbitrary use of this fact is the poster child for an abuse of discretion. What calls into question the constitutionality of the death penalty more than allowing some trial judges to weigh in favor of the death penalty based on facts common to all murder cases while other judges ignore the same facts? It is discretion run amok.

Appellant was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amend., U.S. Const. and Art. I, §§ 2, 9, 16, 17, Fla. Const.

The error is not harmless. This mitigating circumstance was the only one the trial court chose to place in weighing aggravators against mitigators R447. In other words, the trial court believed the mitigation was only hope for a life sentence. Thus, it was prejudicial when such mitigation was reduced due to the error.

POINT XXVII

THE TRIAL COURT ERRED IN UTILIZING THE VICTIM'S CHARACTERISTICS AS A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

The trial court has the discretion to accept or reject statutory aggravating circumstances. However, the trial court abuses its discretion in utilizing non-statutory aggravating circumstances against a defendant in a capital case.

Certain victim characteristics are recognized as statutory mitigating circumstances.

> "The victim of the capital felony was a person less than 12 years of age"; "The victim of the capital felony was vulnerable due to advanced age or disability"; "The victim of the capital felony was a law enforcement officer ..."; "The victim of the capital felony was an elected or appointed public official ..."

Section 921.141(3)(k)(1)(m).

In the present case in weighing the aggravating circumstances the trial court utilized the victim's character as a "lowly woman addicted to drugs and prostituting herself to obtain them" who did nothing "to bring this awful death upon herself.

> The aggravating circumstances in this case clearly outweigh the mitigating circumstances. This is the defendant's second murder of a human being. In the one case it was a helpless infant. In this case it was a lowly woman addicted to drugs and prostituting herself to obtain them. She was a pitiful person. While the same can be said of the defendant, he is pitiful only because he has chosen a life of living in opposition to society and harmful to it. She may have made bad choices, but they did not directly cause harm to others. She did not deserve to be strangled and the experience of it must have been terrible. There is no indication that she did anything to bring this awful death upon herself.

R447 (emphasis added). As can be seen the trial court weighted the victim's character against that of Appellant.

The victim's character as a pitiful woman addicted to drugs who did nothing to deserve to die is not among the statutory circumstances created by the Legislature. While victim vulnerability due to prostitution could be made a statutory aggravating circumstance, the Legislature has only defined victim vulnerability due to advanced age as a statutory aggravating circumstance. The victim characteristic of a lowly addict and prostitute who did not deserve to die constitutes non-statutory aggravation circumstance. Thus, the trial court erred. See Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977)

(court "must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death"). Appellant was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amend., U.S. Const. and Art. I, §§ 2, 9, 16, 17, Fla. Const.

The error of the trial court's use of the non-statutory aggravating circumstance cannot be deemed harmless. Over half of the trial court's discussion of the weight of the aggravating circumstances in its final weighing process was focused on the non-statutory circumstance of the victim's character. See record at 447.

POINT XXVIII

THE TRIAL COURT ERRED IN FAILING TO EXERCISE DISCRETION IN EVALUATING MITIGATING CIRCUMSTANCES.

Unexplainably, the trial court decided that a mitigator of saving lives and protecting others deserved less weight than mitigators which the trial court could not comprehend. The trial court did not exercise discretion in weighing much of the aggravating circumstances.[17]

In capital cases, it is well-settled that heightened standards of due process apply that require reliability of sentencing decisions. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977) ("special scope of review ... in death cases").

[17] In other points in the brief it is explained how the trial court abused its discretion when it was exercised.

In the present case the trial court failed to observe the safeguards of due process by failing to exercise a reasonable discretion in weighing the mitigating circumstances. Appellant's was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Untied States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Determination of the weight to be given a mitigating circumstance is within the trial court's discretion if supported by competent substantial evidence. State v. Bolender, 503 So. 2d 1247, 1249 (Fla. 1987); Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988). Of course, the power to exercise "judicial discretion" does not imply that a court may act according to mere whim or caprice. Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930). As explained in Parce v. Byrd, 533 So. 2d 812 (Fla. 5th DCA) rev. denied, 542 So. 2d 988 (Fla. 1989) the valid exercise of discretion requires that there be a valid reason to support the choice between alternatives:

> [Judicial discretion] is not a naked right to choose between alternatives. There must be a sound and logical valid reason for the choice made. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, and there is no valid reason to support the choice made, then the choice made may just as well have been decided by a toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar.

533 So. 2d at 814 (emphasis added). See also Thomason v. State,

594 So. 2d 310, 317 (Fla. 4th DCA 1992) (Farmer dissenting) quashed 620 So. 2d 1234 (Fla. 1993) ("Judicial discretion is not the raw power to choose between alternatives", nor is it "unreviewable simply because the trial judge chose an alternative that was theoretically available to him").

In the present case, the trial court failed to exercise any discretion in weighing the mitigating circumstances. Instead, without giving any reasons, the trial court merely designated the mitigating circumstances to have some or little weight.

The trial court analyzed a number of mitigating circumstances in a manner which would logically result in a conclusion that the mitigator is of substantial or great weight. However, in weighing the mitigator there is no evidence of the exercise of any discretion. Instead, the trial court decided to give the mitigator little weight based on mere whim contrary to any analysis. For example, Appellant had mitigation of looking "after a younger, mentally impaired inmate, who was preyed upon by others at the jail" combined with "four (4) instances of saving others" R444. The other instances of saving others included Appellant putting his life at risk – a man attacked his mother with a machete, but he stopped the attack T1547, -- Appellant was shot when trying to prevent a rape T1555.

The trial court without explanation gave these mitigators "some weight but only a little" R444. Meanwhile, the trial

court indicated it was giving "some weight" to things it could not understand as being mitigating.[18] No reasonable person exercising discretion would give less weight to saving lives than to mitigation he does not understand. In fact, saving lives and protecting a mentally impaired person from being preyed upon by others would be considered by any reasonable person as important mitigation. Certainly, no reasonable person would give more weight to mitigation he cannot understand than to mitigation of protecting others and saving lives. The trial court just was not exercising its discretion, or if any discretion was being exercised it was mere whim and not any reasoned judgment.

This Court has stressed the importance of issuing specific written findings of fact in support of mitigation in capital cases. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10.

In Ferrell v. State, 653 So. 2d 367 (Fla. 1995) this Court

[18] The trial court's analysis of entering prison at a young age – "It is hard to see why this is mitigating but the Court gives it some weight" R446. The same is true for his cooperation with police and good conduct at trial – "It is hard to see why this is mitigating, but the court give it some

explained that the "weighing process must be detailed in the written sentencing order" in order for an opportunity for a meaningful review:

> Once established, the mitigator is weighed against any aggravating circumstance. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

653 So. 2d at 371 (emphasis added).

In dealing with mitigating circumstances, the trial court has found that a mitigating circumstance exists, but has arbitrarily given it little weight. This violates the principle of individual decision making that is required in death penalty cases.

In a line of cases commencing with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant.

While the Lockett doctrine is clearly violated by the explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this case. By refusing to give Appellant's uncontroverted,

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weight." R447.

mitigating evidence any real weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days prior to Hitchcock v. Dugger, 481 U.S. 393 (1987).

Prior to Hitchcock, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. Hitchcock v. Dugger, supra. Since Hitchcock, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where the explicit evidence that consideration of mitigating factors was restricted. E.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).

Arbitrarily attaching no real weight to uncontested mitigating evidence results in a *de facto* return to the "mere presentation" practice condemned in Hitchcock v. Dugger.

By giving "little weight" to valid, substantial mitigation, trial judges can effectively ignore Lockett, supra, and the constitutional requirement that capital sentencings must be individualized. The trial court's refusal to give any

significant weight to valid mitigating evidence calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

POINT XXIX

THE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION IN WEIGHING MITIGATING CIRCUMSTANCES AGAINST AGGRAVATING CIRCUMSTANCES.

As discussed earlier, the trial court has discretion in weighing mitigating circumstances against aggravating circumstances. The discretion must be exercised rather than arbitrarily weighing by whim. Also, discretion is not unbridled.

In analyzing the mitigating circumstances in the weighing equation the trial court totally ignored the most powerful mitigation in this case (good adjustment to prison, protecting and saving lives of others, IQ of 80 and other mental health problems) and states that the "mitigating circumstances in total only show an unfortunate childhood:

> This Court now discussed all the aggravating circumstances and all the mitigating circumstances. The aggravating circumstances in this case clearly outweigh the mitigating circumstances. This is the Defendant's second murder of a human being . In the one case it was a helpless infant. In this case it was a lowly woman addicted to drugs and prostituting herself to obtain them. She was a pitiful person. While the same can be said of the defendant, he is pitiful only because he has chosen a life of living in opposition to society and harmful to it. She may have made bad choices, but they did not directly cause harm

> to others. She did not deserve to be strangled and the experience of it must have been terrible. There is no indication that she did anything to bring this awful death upon herself.
>
> The mitigating circumstances in total only show an unfortunate childhood. However, everyone has choices to make in this life and many who suffer similar childhoods nevertheless grow up to be responsible citizens. Neither the court nor the jury is inclined to give this Defendant a third strike at committing murder. The unanimous decision of the jury was the only appropriate one under the circumstances and the Court gives great weight to it. The Court concurs in the recommendation of the jury that Death is the appropriate sentence in this case.

R447 (Emphasis added). It is well-settled that a trial court may not refuse to consider any relevant mitigating evidence that is placed before it. Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. North Carolina, 476 U.S. 1 (1986). Yet, this is exactly what the trial court did in ignoring the most prominent mitigation and stating the mitigation "only show an unfortunate childhood."

Appellant was denied due process and a fair reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amend., U.S. Const., Art. I, §§ 2, 9, 16, 17, Fla. Const.

POINT XXX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionally of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla.

1988). This Court summarized proportionality review as a consideration of the "totality of circumstances in a case," and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 956 (Fla. 1996).

In Dixon v. State, 283 So. 2d 1 (Fla. 1973) made it clear that similar results would be reach for similar circumstances and results would not vary based on discretion:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in ***Furman v. Georgia***, ***Supra***, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

283 So. 2d at 10 (Emphasis added). See also Proffitt v. Florida, 428 U. S. 242, 250 & 252-53 (1976). In other words, proportionality is not left to the individual tastes of the judges but this Court reviews each case to ensure that similar individuals are treated similarly.

Under this Court's proportionality analysis, the death penalty is reserved for the "most aggravated" and "least mitigated" of murders. Cooper v. State, 739 So. 2d 82, 85 (Fla.

1999); Almeida v. State, 748 So. 2d 922, 943 (Fla. 1999):

> [O]ur inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, **and** (2) the least mitigated of murders.

Almeida, at 943 (emphasis added)(footnote omitted); Cooper v. State, 739 So. 2d at 85; see also, e.g., Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995)("'Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders.'")(Quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

In Crook v. State, 30 Fla. L. Weekly S560 (Fla. July 5, 2005), found that the first prong (whether the crime was the most aggravated) had been met by 3 aggravating circumstances. However, this Court held that the substantial mitigation took the case out of the category of "least mitigated" crimes.

As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will be affirmed in cases supported by one aggravating circumstance only where there is either nothing or very little in mitigation:

> Having found that two aggravating circumstances are unsupported by the record, this death sentence is now supported by just one aggravating circumstance -- that the murder was committed during the course of a violent felony. As we have previously noted, "this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'"

> *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990) (quoting *Songer v. State*, 544 So. 2d 1010, 1011 (Fla. 1989)). Here, the trial court found as a statutory mitigating circumstance that McKinney had no significant history of prior criminal activity. In addition, McKinney presented substantial mitigating evidence relating to his mental deficiencies and alcohol and drug history. In light of the existence of only one valid aggravating circumstance present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. *See Lloyd*, 524 So. 2d at 403 (and cases cited therein).

In the present case, cannot be said that there was little or nothing in mitigation. The trial court found a total of 47 mitigating circumstances. The mitigators were grouped into common categories. Appellant submits that some of these mitigators were very significant.

As recognized by the trial court, there was mitigation demonstrating that Appellant would adjust well to life in prison:

1. Positive correction adjustment.
15. Only verbal DR's.
30. Good institutional adjustment.
31. Good previous prison record
38. Good behavior in jail.

R444. This is substantial mitigation when the issue is a choice between life in prison without parole and death.[19] It cannot be said that there is little or nothing in mitigation.

[19] As noted in Point XXV, the trial court incorrectly analyzed this mitigation in terms as a choice between Appellant being discharged and death.

There was also mitigation of Appellant looking after a mentally impaired inmate who was preyed upon by others and four (4) instances of saving others R444. The life saving instances included the following: Appellant came to the aid of his cousin who was being raped and was shot (the bullet is still inside Appellant) T1555, Appellant stepped in to put a stop to a machete attack of his mother T1547, Appellant notified authorities of a suicide attempt in the St. Lucie jai. T1547.

Appellant submits that looking after a mentally impaired person who is preyed upon by others and saving others' lives (sometimes at the risk of one's own life) is among the strongest mitigation that there is. It cannot be said that this is a case with little or nothing in mitigation. It cannot be said that this case is among the least mitigated.

Appellant also had mental mitigation including an IQ of 80 R444. The trial court also found that there was some impairment of Appellant's capacity to conform his conduct R445. Appellant also had a number of head injuries (including being struck with a baseball bat and car accidents) which gave a high risk of cognitive defecits T1557. Appellant would never develop coping skills one would normally develop in the childhood growing up process. This mitigation is the type that is important.

In addition, Appellant had mitigation showing childhood problems due to family difficulties which the trial court

grouped together:

> 5. Sudden death of mater (stet) at age 27 (m approx 46 yo)
> 6. Grieved for mother during incarceration.
> 7. Strong relationship with mother.
> 8. No relationship with father – absence and rejection.
> 10. Moved to new state at age 5, no local family support.
> 25. Parents divorced at age 5.
> 26. Moved to another new state at age 14.
> 28. Single parent household.
> 29. Minimal supervision as a child, due to mother working.

R445.[20] The problems Appellant had as a 5-year-old child can impact his development and how he copes later in life.

As noted before, there were 47 mitigating circumstances. It cannot be said that there was little or nothing in mitigation or (even if HAC was valid) that this was among the least mitigated of offenses. See Crook, supra.

POINT XXXI

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR FURMAN v. GEORGIA, 408 U.S. 238, 313(1972).

The death penalty sentence in this cause violates Ring v. Arizona, 536 U.S. 584 (2002).

Section 775.082(1), Florida Statutes, provides that one convicted of a capital felony shall be punished by death "if the proceeding held to determine sentence according to the procedure

[20] As pointed out in Point XXVI, the trial court abused its discretion in regard to analyzing this mitigation.

set forth in s. 921.141 results in findings by the court that such person shall be punished by death", and that otherwise there shall be a life sentence. Under section 921.141, the jury is to determine whether "sufficient aggravating circumstances exist" and whether there are "sufficient mitigating circumstances exist which outweigh the aggravating circumstances", and the court must find that "sufficient aggravating circumstances exist" to support a death sentence, and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hence, to obtain a death sentence, there must be "sufficient aggravating circumstances" and insufficient mitigating circumstances to outweigh them. Under the statutory and constitutional rule of strict construction of criminal statutes,[21] a defendant is not eligible for a death sentence unless there are "sufficient aggravating circumstances" and insufficient mitigation to overcome them.

Under Ring v. Arizona, 536 U.S. 584 (2002), the question of death eligibility must be determined beyond a reasonable doubt by a jury pursuant to the Jury and Due Process Clauses. The jury determination must also be unanimous. There must also be notice

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[21] See § 775.021(1), Fla. Stat.; Trotter v. State, 576 So.2d 691, 694 (Fla. 1990) (rule applies to capital sentencing statute); Borjas v. State, 790 So.2d 1114, 1115 (Fla. 4th DCA 2001) (rule derives from due process and applies to sentencing

of aggravating factors in the charging document. The jury proceeding under section 921.141 does not comport with the requirements of the Jury and Due Process Clauses of the state and federal constitutions because the jury renders an advisory non-unanimous verdict at which it is not required to make the eligibility determination by proof beyond a reasonable doubt and the normal rules of evidence do not apply. Nor is proper notice given. Hence, Florida's death penalty sentencing scheme is unconstitutional, and this Court should vacate appellant's death sentence.

Appellant recognizes that this Court has rejected similar arguments in, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla. 2002). He respectfully submits, however, that such decisions did not consider the rule that the statute must be strictly construed in favor of the defense so that one is death eligible only on a finding of sufficient aggravating circumstances and insufficient mitigation.

Further, so far as Bottoson stands for the proposition that a conviction for first degree murder without more makes the defendant death eligible, it renders Florida's death sentencing scheme unconstitutional under the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Under Furman v. Georgia, 408 U.S. 238, 313 (1972), there must

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statutes); Dunn v. United States, 442 U.S. 100, 112 (1979) (rule

be a narrowing of the category of death eligible persons. Cf. Jurek v. Texas, 428 U.S. 262, 276 (1976) (statute constitutional because by "narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered"); Gregg v. Georgia, 428 U.S. 153, 196-97 (1976); Lowenfield v. Phelps, 484 U.S. 231, 245 (1988) (constitutionally required "narrowing function" occurred when jury found defendant guilty of three murders under death-eligibility requirement that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person": "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers").

This issue presents a pure question of law subject to de novo review. This Court should reverse appellant's death sentence and remand for imposition of a life sentence.

CONCLUSION

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

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender

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is rooted in due process).

JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407
15th Judicial Circuit of Florida
Attorney for Eddie Junior Bigham
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600; 624-6560

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to Leslie Campbell, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier, this _____ day of December, 2005.

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Attorney for Eddie Junior Bigham

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

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Attorney for Eddie Junior Bigham