IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-587

ROY MCDUFFIE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
Florida Bar No. 0754773
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, Florida 33140
Telephone: (305) 861-9252
Fax: (305) 861-9253

Counsel for Appellant

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REQUEST FOR ORAL ARGUMENT

Mr. McDuffie, who has been sentenced to death, requests oral argument in this case.

STATEMENT OF THE CASE

A grand jury in Volusia County, Florida, returned a four-count indictment against Mr. McDuffie: Count 1 alleged premeditated and/or felony murder of Dawniell Beauregard, Count 2 alleged premeditated and/or felony murder of Janice Schneider, Count 3 alleged robbery with a firearm, and Count 4 alleged false imprisonment (armed) of Dawniell Beauregard (RV1/15-17).[1] The State filed its notice of intent to seek the death penalty (RV1/23), and after the Public Defender's Office moved to withdraw due to conflict (RV1/24-26), attorney Gerald Keating was appointed to represent Mr. McDuffie (RV1/27). A second-chair attorney, Rob Sanders, was also appointed (RV1/76, 81).

Numerous pretrial motions and orders thereon were filed with respect to trial issues, discovery matters, access to physical evidence, and for defense experts and

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[1]The following symbols will be used to designate references to the record on appeal: references to the items contained in the record volumes will be "RV" followed by the volume number and page number. References to the trial

investigators (RV1/47-48, 85, 92, 109, 117, 121, 127, 133, 171, 176-82, 188-90; RV2/201-03, 208, 210, 212-15, 241; RV3/539, 562-64, 567-68, 587; RV4/646-47, 733-36, 760-64). Other pretrial motions of note included a motion to suppress admissions allegedly made by Mr. McDuffie to a jailhouse snitch (RV1/185-87), a motion to dismiss based on the jailhouse confession of Michael Fitzgerald (RV2/217 *et.seq*.), a motion to exclude the testimony of Olivia Souso regarding her purported observations of a black male in the Dollar General Store (RV4/739-40), and a motion to suppress the out-of-court identification Alex Matias as unduly suggestive (RV4/741-49).

Pretrial motions were filed as to the admissibility of *Williams*-rule and reverse-*Williams* rule evidence, including a defense motion to exclude evidence of Mr. McDuffie's financial history (RV4/737), a defense motion to exclude evidence of collateral bad acts through the introduction of Mr. McDuffie's job applications (RV4/757-58), a State motion of intent to introduce *Williams*-rule evidence (RV5/930-35), and a State motion to prevent the defense from presenting what it considered reverse-*Williams*-rule evidence (RV6/969-71).

Mr. McDuffie also challenged the constitutionality of Florida's death penalty based on *Ring v. Arizona*, 536 U.S. 584 (2002), the standard penalty phase

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proceedings will be to "TV" followed by the volume number and the page number.

jury instructions, and several of the aggravating circumstances (RV2/279-90, 326, 383; RV3/397, 409-32, 433-48, 450-64, 466-74,476-534; RV4/856, 858; R5/858). The trial court denied all requested relief (RV11/1873-99; RV5/948).

Jury selection commenced on January 10, 2005, and lasted until January 21 (TV1/1; TV27/2023-24). The presentation of evidence began on January 24, 2005 (TV28/2157). The defense moved for judgment of acquittal at the close of the State's case (TV41/3547-56), and again at the close of the defense case (TV48/4152) On February 15, 2005, the jury returned guilty verdicts on all counts as charged in the indictment (RV7/1164-67; RV49/4473-74). Penalty phase began on February 22, 2005 (TV50/4489), and on February 24, he jury returned unanimous death recommendations (TV52/4720-21; RV7/1306-07). On March 2, a *Spencer* hearing took place,[2] and sentencing memoranda were submitted (RV7/1221-36; RV7/1237-44).

At the sentencing hearing on March 15, 2005 (RV11/2031 *et. seq*.), the lower court entered its written findings in support of a death sentence on both counts (RV7/1308-18); (RV7/1319-29). With regard to Beauregard's murder, the following aggravators were found: (1) conviction of another capital felony or of a

[2]*Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

felony involving the use or threat of violence;[3] (2) during the course of a robbery (in accordance with the conviction on Count 2 for robbery);[4] and (3) especially heinous, atrocious, or cruel.[5] The trial court explicitly rejected the "cold calculated, and premeditated" aggravator argued to the jury and on which the jury was instructed, concluding that it had not been established beyond a reasonable doubt (RV7/1309-10). Finding that no statutory mitigating factors had been argued or submitted for consideration, the court concluded that none had been established (RV7/1310). As for nonstatutory mitigation, the trial court found that Mr. McDuffie was a good family man, made a substantial contribution to the community by serving as a Little League coach, is a good friend, earned his GED while in jail, is a religious man who assisted other inmates, expressed sympathy for

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[3]The evidence supporting this aggravator was the contemporaneous first degree murder of Janice Schneider (RV7/1308). The court assigned this aggravator "great weight" (RV7/1317).

[4]The court assigned this factor "significant or middle weight" (RV7/1317).

the victim's husband, and behaved well in court (RV7/1316-17). The court explained the weight attributed to the mitigation:

> **6. <u>Assigned Weights.</u>**
>
> The non-statutory mitigators listed above were reasonably established. This Court respects, considers, and acknowledges them. The Court does, however, struggle with reconciling these mitigators with the Defendant's criminal background and the brutal murders. As often is the case, the good aspects of the Defendant's character exist alongside his negative characteristics.
>
> The Court assigns the following weight to the mitigators: Defendant's coaching of youth football is a significant contribution to the community, beyond what is expected of an ordinary citizen. The Court assigns it medium weight. The fact that Defendant is a good family man and a good friend is an admirable characteristics [sic], however, these are traits we expect of the average person. The Court assigns little weight to both these mitigators.
>
> The Court notes that Defendant expressed sympathy and empathy for Tex Texeira, but it fell short of an apology. His statements in this regard are afforded light or little weight. Defendant's strong religious beliefs and prison ministry activities are commendable, but they are not extraordinary. The Court assigns them little weight. The Court assigns little weight to the fact that the Defendant earned his GED while in jail and to the fact that he did not misbehave at trial.

(RV7/1316-17). Finding that the three aggravators were established and that "[t]he mitigating circumstances do not sufficiently outweigh the aggravators," the court sentenced Mr. McDuffie to death for Beauregard's murder (RV7/1317-18).

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[5]The court assigned this factor "great weight" (RV7/1317).

With regard to Schneider's murder, the court found the identical three aggravators, rejected the CCP aggravator (RV7/1319-21),[6] assigned identical weights to the aggravators and mitigators as it did for Count 1 (RV7/1327-28), and sentenced Mr. McDuffie to death (R7/1329). Mr. McDuffie was sentenced to life on Count 3, and 15 years on Count 4 (R7/1340-45). A timely Notice of Appeal was filed (RV7/1347).

STATEMENT OF THE FACTS

GUILT PHASE

The Crime Scene. Shortly before midnight on Friday, October 25, 2002, the bodies of Dollar General Store employees Dawniell Beauregard and Janice Schneider were found dead in a rear office of the store, having been discovered by Schneider's husband, Tex Teixiera, and the Dollar manager, Daniel Vodhanel, after Schneider failed to pick up her son at a football game (TV28/2162-63; 2165-72; 2175-76; TV29/2193-2208). The police were immediately called (TV29/2201).

Beauregard was discovered on the floor of the office with her mouth, feet, and

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[6]The prior violent felony used to find the aggravating circumstance as to Janice Schneider's murder was the contemporaneous conviction for the murder of Dawniell Beauregard (RV7/1319).

wrists bound with duct tape and a "laceration" on her throat (TV34/2798; TV35/2805-07). According to the medical examiner, Dr. Thomas Beaver, Beauregard's hands were bound "reasonably tightly" with the tape, which he himself cut from her wrists (TV36/3004-14).[7] The autopsy revealed a series of non-fatal "sharp force injuries" and "superficial" wounds to the left side of Beauregard's face, neck, chest, and upper left arm (TV36/3015-17; 3019-20). Dr. Beaver could not determine if Beauregard was conscious when she received the sharp-force injuries, although she "had a blood pressure" at the time (TV36/3023). Case of death was a single gunshot wound inflicted at close range which entered from the back of her head with no exit wound, an injury that was "almost immediately fatal" with an "immediate" loss of consciousness and ability to feel pain (TV36/3021; 3027-30; 3037; 3640-41).[8]

Schneider was located lying on top of Beauregard, with gunshot wounds to the abdomen and head, and wounds to her face (TV35/2813-16). She also had non-fatal sharp-force injuries in a "relatively small area" of the left side of her neck and

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[7]The tape around her ankles had already been cut by the time the body arrived at the medical examiner's office (TV36/3036).

[8]Forensic testing later determined that the bullets from Beauregard and Schneider were .22 caliber and were all fired from the same weapon (TV40/3417-21). No

face (TV35/3059-64; 3077), and two close-contact gunshot wounds, one to her abdomen and the other to the head (TV35/3060). The head wound would have caused "immediate unconsciousness" with death "following soon," and the abdominal wound, which Dr. Beaver speculated was inflicted before the head wound, would have sent Schneider into shock within 15-20 seconds, with death from the abdominal wound occurring between 10-15 seconds and 30 minutes (TV35/3085-86). Based on the blood smearing on Schneider's arm, Dr. Beaver speculated that Schneider had "some movement" after the blood dropped on her arm, but he could not say with any certainty if it was "purposeful movement"; rather, the smearing could have resulted from her falling to the floor (TV35/3091).

There was no forcible entry into the store, no broken glass, and no tampering to the alarm panel (TV34/2737-40). Duct tape was sold at the store and, from the way the tape was stored on the shelf, it appeared that two or more rolls of tape were missing (TV34/2755; TV35/2864). Blood from an unknown female was located on the inside door handle of the public bathroom, and blood on the floor of the bathroom belonged to the same unknown female (TV34/2766-67; TV35/2866-

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firearm, however, was ever found to test (TV40/3422).

68; TV40/3444).[9] In the room where the bodies were located, a duct tape cardboard roll was found in the trash can (TV34/2775); no fingerprints were located on the trash can or the wrapper (TV35/2872). A box cutter and a purse with bloody paper towels were also discovered in the office; a "clump of hair" and a blade from the box cutter were inside the paper towels (TV34/2775-83). The purse was later determined to belong to Beauregard, and the blood on the paper towels matched Schneider (TV35/2873; TV40/3432). Biological evidence on the box cutter blade revealed a mixture of DNA from both victims (TV40/3430-31). No forensic testing was conducted on the clump of hair, and no fingerprints were detected on the box cutter blade (TV35/2873-74). Hairs not belonging to Mr. McDuffie were found on both victims' shirts (TV35/2896-99).

The door to the office safe was closed but unlocked (TV34/2784; TV35/2833). A screwdriver and pair of scissors with blood were on top of the desk (TV34/2789), and another pair of scissors was found on the floor, in blood, between the bodies (TV35/2818). As with the other items, no fingerprints or DNA matching Mr. McDuffie were located on these pieces of evidence (TV35/2863; 2885). Forensic testing did reveal, however, that there was a mixture of samples

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[9]The blood did not match either of the female victims nor did it match Mr.

from both victims on the scissors found on the desk, and DNA matching Schneider found on the screwdriver and its handle, the scissors on the floor, and on a swabbed area from a cardboard box in the office (TV40/3432-33).

According to David Dewees, lead crime scene technician for the Volusia County Sheriff's Office (VCSO), there was no evidence of an obvious struggle apparent on the desk in the room where the bodies were located (TV34/2793).[10] Given all of the weapons employed in the murder (duct tape, scissors, blade from box cutter, and firearm), Dewees opined that it would be impossible for one perpetrator to use all the potential weapons at the same time (TV35/2847). For example, it would take two hands to rip or cut the duct tape, and it would be "very difficult" for a single perpetrator to hold a gun on the victim while tying her up at the same time with tape (TV35/2851). He also would expect the perpetrator to have the victims' blood on him given the close range shots and the bloody crime scene (TV35/2874-76), and the perpetrator's shoes to have blood on them given the bloody crime scene (TV35/2905).[11] No bloody shoe prints were found in the room where the

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McDuffie's wife, Troy McDuffie (TV40/3452).

[10]Fingernail scrapings taken from both victims revealed that each victim had only her own DNA in the scrapings (TV35/3914-15; TV40/3434-36).

[11]The medical examiner agreed that the perpetrator's shoes would have been

bodies were located, however, and clothing later impounded from Mr. McDuffie's house,[12] including a dark shirt, khaki pants, numerous pairs of shoes, and several wristwatches, all were negative for the presence of blood, DNA, or hairs of any value to tie him to the crime (TV35/2880-83; 2903-03; 2952; TV38/3293-96).[13] Two rolls of paper towels were also located in the stockroom, which further suggested to Dewees the possibility that there were two perpetrators who cleaned up after the crime (TV35/2911). An open bottle of detergent found nearby also did not contain any forensic evidence linking Mr. McDuffie (TV35/2909). The subsequent search of Mr. McDuffie's house and car did not reveal any checks made out to the Dollar Store, nor were any bank bags found (TV35/2915-20). Likewise, no guns, bullets, holsters, shell casings, or any trace evidence were found (TV35/2921-22; TV38/3301).

In the defense case-in-chief, evidence calling into doubt the State's forensic

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bloody (TV36/3038; 3045).

[12]The search warrant was executed on November 2, 2002 (TV35/2926).

[13]Among the shirts confiscated during the search of the McDuffie house was a dark blue polo shirt which lead investigator Dewees acknowledged "closely resembled" the shirt that Mr. McDuffie was seen later that night wearing in the videotape of him and Troy McDuffie at a McDonalds (TV38/3294). Closer inspection of the video revealed to Dewees, however, that it was not same shirt as seen in the video (TV38/3296-97). No one ever asked Mr. McDuffie if he had the

evidence was presented through crime scene reconstruction and fingerprint expert James Hamilton (TV42/3562).[14] According to Hamilton, it would have been "very difficult" for one person to have committed the murders, a conclusion based on a number of factors including the handling of two victims in a relatively small area, securing both individuals, and the number of weapons that were involved in both securing, injuring, and then killing them (TV42/3583-90). Hamilton attached a "great deal of significance" to the presence of blood from an unknown female in the bathroom and unknown hairs found on Beauregard's shirt,[15] as well as the lack of bloody shoe prints (TV42/3583-87). He also had difficulty reconciling how a single person could have applied the duct tape and still used one or more of the weapons to subdue the victims (TV42/3590). Hamilton opined that two rolls of duct tape must have been used because (as the FDLE analysis acknowledged) there

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shirt that he was wearing that night for work (TV38/3299).

[14]Hamilton's experience comprised over forty (40) years of crime investigation at several law enforcement agencies, including the St. Lucie County Sheriff's Office, the Palm Beach County Sheriff's Office, and the City of Hialeah Police Department (TV42/3564-67).

[15]In the defense case, testimony from FDLE technician Kimbra Zayone established that because FDLE did not conduct hair analysis, the FBI was asked to test the unknown negroid hair found at the scene (TV42/3673-77). She also asked the VCSO to provide standards from both victims and Mr. McDuffie in order to compare with the unknown hair, but the VCSO never sent the standards and thus

were missing pieces of tape, and posited that Mr. McDuffie's partial palm print could have been put on the tape in the normal course of working at the store (TV42/3591-98). There was no explanation for how no other prints of Mr. McDuffie were located on the tape (TV42/3602-03).

When he personally inspected the duct tape in evidence, Hamilton was very surprised to observe a print on item Q3E, a print that had not been discovered by law enforcement (TV42/3603-06). Hamilton showed the print to investigator Willis and to the other attorneys present during the inspection. Willis told Hamilton that the tape had to go back to FDLE for examination, but by the time arrangements were made to have the print at least photographed, the print had evaporated thus was never photographed or forensically examined to determine whose print it was (TV42/3607). Hamilton also explained that the forensic analysis conducted by FDLE technician Strawser was not an exact science (TV42/3612-13).

The "Partial Palm Print" Evidence. By all accounts, including that of lead investigator Willis, the only physical evidence tying Mr. McDuffie to the murders was his partial palm print found on a piece of the duct tape used to bind Beauregard's wrists (TV39/3357). Although Beauregard was bound by her feet,

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the FBI testing was not fully conducted (*Id*.).

mouth, and wrists, the tape on her mouth and feet contained no latent prints of any value (TV39/3379-82; 3397-98).

FDLE lab analyst David Perry testified that a "partial palm print" (less then 1/3 of the palm) from a "piece" of duct tape that had been originally submitted as a "wad" of tape ("It was just one roll that was continuously rolled") was developed (TV39/3382-83; 3397-99). Perry opined that the latent on the piece of duct tape, labeled sample Q3 by the lab, matched the right 1/3 of Mr. McDuffie's right palm (TV39/3391). The "wad" of tape was still unseparated when it was submitted to Perry, and he did not know where in the unseparated "wad" of tape the part that contained Mr. McDuffie's "palm print" appeared (TV40/3401). He had no idea how a partial palm print could be present yet no fingerprints as well, nor did he have any idea how only one palm print could be present yet no other palm prints as well (TV40/3402-03). He had no idea how long the palm print existed on the tape (TV40/3403). He acknowledged that it was possible to transfer a print from one place with adhesive to another and that, in this case, he had to separate the "wad" of duct tape by "pulling apart" the various pieces from the wad (TV40/3404; 3408). The piece of tape he received was 1' 4" long and he did not remember if it was cut at different angles or just wadded together, it was just one piece of tape (TV40/3407). In his deposition, however, he stated that the tape appeared "like it

had been cut at different angles and just wadded together" (TV40/3407), and he ultimately admitted that the tape from Beauregard's wrists actually comprised of 15 pieces of tape wadded together (TV40/3409). After Perry conducted his examination, he turned over the tape to Martha Strawser of the FDLE (TV40/3411).

Stawser examined the duct tape used to bind Beauregard (TV40/3458-62). After examining standard duct tape and comparing it with the duct tape used to bind Beauregard, Strawser opined that the tape used to bind Beauregard's mouth (sample Q2) was consistent with the same tape sold at Dollar (TV40/3466-70). Q2 was a single 10 ½ long piece of tape (TV40/3470); neither end of the Q2 sample was consistent with the manufactured "ends" of the standard tape roll (TV40/3470). She was not able to physically match either end of the Q2 sample with either end of either Q1 (the tape used to bind Beauregard's feet),[16] or Q3 (the tape used to bind Beauregard's wrists) (TV40/3470-71). Nor was she able to reconstruct 3 of the 5 pieces comprising the Q1 sample, that is, 2 of the 5 pieces submitted as Q1 were not amenable to being reconstructed into one continuous

[16]The Q1 tape sample was submitted to Strawser already in a cut condition, and actually consisted of 5 pieces of tape, "one on top of the other, overlaid on top of each other" (TV40/3473-74).

piece of tape (TV40/3476-77). None of the five pieces of tape comprising Q1 had characteristic edges detected on the sample roll (TV40/3477), nor was there any correspondence between the fractured ends of Q1, Q2, or Q3 (TV40/3478).

The critical Q3 sample was submitted to Strawser in 2 overlapped pieces of tape which had been previously separated by David Perry (TV40/3479-80). After separation, Q3 comprised 15 individual pieces of tape, labeled Q3A through Q3O, which, in total, measured 79 inches (TV40/3481; 3496). Acknowledging that reconstructing the pieces of tape was like a "jigsaw puzzle," Strawser was able to only reconstruct 12 of the 15 pieces that comprised Q3 (12 of the 15 pieces made one continuous piece of tape, and the remaining 3 pieces made another piece) (TV40/3482-94). Piece Q3B, which is where Mr. McDuffie's partial palm print was discovered, was located 30 inches into the piece from one end, and 14 3/4 inch from the other end of the piece (TV40/3497). None of the fractured ends of Q3 was consistent with the start of a roll of tape (TV40/3498). The total amount of the tape from all three Q samples was 139 3/4 inches (TV40/3501).

On cross-examination, Strawser conceded the difficulty in reconstructing where the various pieces of tape were located in the entire amount of tape submitted for analysis because of the "missing pieces" of tape (TV41/3510-11). She had "no idea" where the missing pieces of tape were (TV41/3519). Some of the pieces of

tape submitted to her were cut, some were torn, and some had folded ends (TV41/3511-16). It was also possible that more than one roll of tape was used, she could not say how many were used (TV41/3518).

The Evening of October 25, 2002. The evening shift on October 25, 2002, was worked by Schneider, Beauregard, cashier Carol Hopkins, and Mr. McDuffie, a new manager trainee who had just been hired the previous Monday (TV29/2191-92). On October 25, the only employees who had keys to the store were manager Vodhanel, Schneider, and assistant manager Linda Torres (TV29/2196-97). As a new employee, Mr. McDuffie would not have had the store keys (TV29/2246). A different key was required to gain both entry into and exit from the store, and a manager or employee would even have to lock and unlock the bathroom door in the store and wait for a patron to finish using the facilities before re-locking the bathroom (TV2195-97; 2263).[17] Store policy also dictated that all employees were

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[17]Vodhanel acknowledged it was possible for someone to hide in the bathrooms, the stockroom, or in the store's closing racks (TV29/2266-67). While Vodhanel expressed that store policy was that the door leading to the stockroom was to be kept locked (TV29/2275), during the defense case, evidence was presented from Krista Vevero-Sepp, a frequent shopper at Dollar and a close friend of Schneider, that she entered the store near closing time on October 25 and the door between the retail and rear stockroom area was open and accessible to the public, which it was "most of the time" (TV43/3710-15). She also saw what she described as a black or dark-skinned hispanic male walking quickly down from the front door down the

to leave the store together, and if an employee like Hopkins had left before the official store closing, that would violate store policy (TV29/2265).

Vodhanel informed the police that, in addition to the victims, both Hopkins and Mr. McDuffie were working that night (TV29/2208-09). Vodhanel also testified that, during the day of October 25, Mr. McDuffie was, at Vodhanel's direction, to have attended a Dollar meeting in Apopka, Florida, after which Vodhanel instructed Mr. McDuffie to come to the store to go through the store closing procedures (TV29/2247). Vodhanel confirmed that the Dollar store sold duct tape, scissors, and screwdrivers, although he had no recollection of anyone using duct tape in the store (TV29/2271-73).[18]

According to cash register receipts, Schneider's register was closed out at 7:26 PM and Hopkins's register closed out at 8:08 PM (TV29/2214-20). It was not until 8:34 PM, however, that Hopkins actually clocked out of the computer system (TV29/2223). The remaining register was closed out by 8:37 PM and the "end of day" report, which is the final report run before the official "closing" of the store, was run at 8:37 PM (TV29/2224-25). There should have been a total of $6,413.93

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center aisle toward the rear of the store (TV43/3717-18; 3726).

[18]Other Dollar employees also testified that they never saw duct tape being used in the store in October, 2002 (TV31/2455; TV31/2461).

as part of what the store made that day, with $4,946.17 of that total in cash (TV29/2228). The store also kept $1,000 in petty cash in the safe plus some additional cash for the register drawers (TV29/2238). Only store managers had the combination to the safe, and the only employee on shift that night who would have known the combination was Schneider (TV29/45-46). All of the reports, after being run on the registers in the front of the store, would, in accordance with store policy, be taken into the back office to be tabulated in order to fill in the logs and the bank deposit slips (TV29/2232). According to the documentation located at the store, a deposit bag slip was prepared by Beauregard and verified by Mr. McDuffie, but another form was only partially filled out by Beauregard (TV29/2233-26). The documentation indicated that there had been a discrepancy in the cash from that day (TV29/2240-45). Approximately $6400 were taken from Dollar, including $1400 in checks (TV41/3538).

Carol Hopkins testified that she worked the 2:30 PM to 8:00 shift on October 25 (TV30/2301-02). She knew Mr. McDuffie as a recently-hired manager trainee (TV30/2302). According to Hopkins, Mr. McDuffie was wearing the Dollar "uniform" on October 25, that being tan or khaki pants, a black shirt with a white stripe (TV30/2303). Shortly after 6:00 PM, Mr. McDuffie and his wife arrived at the store (TV30/2308-10). At approximately 7:30 PM, Schneider began closing

out her register, taking the cash drawer into the back room to count the money (TV30/2310). Troy left at around 7:45 PM just before the store was about to close; as Schneider was closing the door, a white male and "a negro" came into the store, both of whom appeared to be "dangerous" in Hopkins's estimation (TV30/2313; 2375).[19] The white male was wearing a white tank top and tan pants, and the black male was wearing cargo pants, a bandana around his head, and a black t-shirt (TV30/2313-14). Schneider let the men in and, after they purchased sodas, let them out of the store, locking the door behind her (TV30/2315). Other customers also came in and left (TV30/2316). Hopkins claimed that she did a walk-through of the store to make sure no one was left inside (TV30/2317); however, she did not check the bathrooms (TV30/2373).

As the employees were closing out the registers and counting the cash in the office, Hopkins announced that she need to leave early, so Schneider let her out (TV30/2326-27). Upon exiting the store, Hopkins observed the two men outside who had purchased the sodas earlier (TV30/2328).[20] Because she believed the men

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[19]On cross-examination, Hopkins testified that there were also three (3) suspicious black males hanging around the store in the weeks before the murders (TV30/2373-74).

[20]The defense sought forensic testing of several items located outside of the store,

to be dangerous, she told Beauregard to call 9-1-1 in case there was any trouble (TV30/2374).[21] Hopkins then left the store and found out about the robbery and

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including a Pepsi bottle and a cigar butt (TV41/3542). DNA testing on these items revealed the presence of DNA but no match to any of the standards submitted (TV40/3449-50).

[21]During Hopkins's cross-examination, the defense attempted to show Hopkins a photograph of Steve Absalon and Michael Fitzgerald, both of whom had committed crimes in the area that the trial court had previously ruled inadmissible as reverse-*Williams*-rule evidence, and both of whom Hopkins had earlier identified as being similar in appearance to one of the men she saw upon exiting the store on the evening of October 25 (TV30/2343-47). The State argued that the defense was trying to "shift blame" to other "potential suspects" and that Hopkins' purported identification of other individuals was simply not relevant (TV2343-46). The defense countered that the prior *in limine* ruling could not be viewed as taking away "the complete defense that I can't show other suspects" and that the State's case was subject to attack on the basis of "credibility" and "conflicts in evidence" (TV30/2343-49). After a factual proffer from the defense (TV30/2530-61), the court ultimately refused to permit the defense to show Hopkins the photos of either Absalon or Fitzgerald because it was an improper attempt to suggest that they were possible suspects (TV30/2363). Following this proceeding, the State, outside the presence of the jury, brought into court two individuals, Harry Southwell and Sammy Angel Garcia, who the State represented were the last customers in the Dollar store that night (TV30/2378-79). During a proffer, Hopkins testified that she did not recognize either individual (*Id*.). The defense then presented the proffered examinations of Garcia and Southwell, both of whom testified that on October 25, 2002, they were at the Dollar store to buy soda at approximately 8:02 PM, after which they left the store and the plaza itself where the store was located (TV30/2380-82). Neither was on the bench outside of the store at about 8:35 PM, when Hopkins testified that she left the store (TV30/2381-82). After the jury was brought back, the State had Hopkins testify that she did not recognize either Southwell or Garcia (TV30/2384). On cross examination, Hopkins claimed not to be sure if they were the men she saw upon exiting the store or not, although she acknowledged that she "believed them to be" (TV30/2389-90).

murders early the following morning (TV30/2629).

Troy McDuffie was called as a State witness. Troy worked on October 25 until 3:00 PM and was waiting for Roy to pick her up because they only had one car at the time (the other car having been repossessed) (TV37/3138). She called the Dollar store looking for her husband and spoke with Carol Hopkins (TV37/3140). Roy eventually picked her up and they went to the store because he had to do the closing procedure (TV37/3141; TV38/3217-18). Roy was wearing a dark shirt and khaki pants (TV38/3218). They arrived at Dollar sometime around 5:00 PM, and Troy was introduced to and spoke with Schneider, Beauregard, and Hopkins (TV37/3143; TV38/3221-25). Schneider mentioned to Troy being worried about some suspicious shoplifters in the store (TV38/3225). As Roy was doing his work, Troy called Aaron's Rental from the store to find out its hours because money was due; she then went to the Winn-Dixie next door to purchase a money order (TV37/3145-46; TV38/3227). She returned to Dollar for a brief time, then, after Roy and the others began to go through their closing procedures, went out to wait for her husband in the car (TV37/3147-48; TV38/3228-29). The car was parked far away from the store, so after waiting for a while for Roy, Troy moved the car a little closer to the store to a spot near where a van was parked (TV37/3148-49; TV38/3230-31).

At some point Roy came out to see if she was all right, then he went back in the store (TV37/3154; TV38/3232-33). When he again returned to the car, he was dressed in the same clothes as earlier, had no blood or scratches, nor was he carrying anything (TV38/3234).[22] They left the parking lot and drove to Aarons (TV37/3157; TV38/3236). Troy did not recall what time it was when they arrived at Aarons (TV37/3157).[23] After dropping off the money order in the night deposit box, the McDuffies went to a nearby McDonalds, where they went inside, ordered food, and took it home (TV37/3157; TV38/3238-39). She and Roy learned of what happened at Dollar in the early morning hours when the police came to the house (TV37/3164).[24] The clothing Mr. McDuffie was wearing that night was never washed or thrown away either before the police came to the house or after

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[22]Mr. McDuffie neither owned nor carried a gun (TV38/3241).

[23]According to police testimony, Mr. McDuffie told police that he and Troy had left Dollar about around 8:50 PM, and arrived at Aarons between 9:30 and 9:45 (TV39/3352). A videotape showing the parking lot outside the Aarons's store shows a vehicle's lights entering the vicinity between 10:30 and 11:00 PM (TV39/3353; TV34/2716-20). The video never captured the actual vehicle, however, just headlights (*Id*.).

[24]Police went to the McDuffie house at about 3:30 AM on October 26 to determine if Mr. McDuffie was alive or missing (TV32/2541). VCSO investigator Thomas Frazier spoke with Mr. McDuffie in a recorded interview (TV32/2543; State Exhibit 19). Mr. McDuffie was cooperative, did not seem nervous, and was "concerned" and "surprised" when informed that there had been two murders at the

(TV38/3244-46). She and her husband spent the weekend in Bradenton with Roy's mother and family (TV38/3249-57).[25] On Monday, October 28, after she and Roy finished with work, they both went voluntarily to the police department and gave statements (TV38/3258).[26] No money or checks from the Dollar store were ever found in their house after the search warrant was executed later that week (TV38/3260).

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store (TV33/2577-79). He had no apparent injuries (TV2579).

[25]The State questioned Troy about why phone logs indicated that several phone calls were made from the McDuffie's house that weekend when they were, according to Troy, in Bradenton (TV38/3262; TV39/3344-46). She had no idea who made the calls because they were, in fact, in Bradenton that weekend (TV38/3262).

[26]According to VCSO lead agent Robert Willis, it was after Mr. McDuffie's statement on this day that police became "suspicious" of him (TV39/3318-19). During this statement, Mr. McDuffie told police that shortly before the store closed, some black males entered the store that Schneider had been afraid of (TV33/2590-91; State Exhibit 20). He also recounted that two hispanic men came into the store shortly before closing, purchased sodas, and left (TV33/2592). He then explained the closing procedures, and told police that he was anxious to leave because his wife was out in the car waiting for him (TV33/2592-95). Janice Schneider told him that he could leave if he wanted to and, after the money was put into the safe, he was let out of the store at approximately 8:45-8:50 (TV33/2597-98). On that night he was wearing tan pants and a blue shirt because he did not yet have the black uniform shirt (TV33/2598). On his way out to his car, he observed a white male in the parking lot (TV33/2599). After he left, he and Troy went to Aarons to drop off the money order, went to McDonalds, and then went home (TV33/2682-87). He thought he had gotten to Aarons at around 9:30 and to McDonalds around 9:45 or 9:50, there was heavy traffic on the expressway that

The State presented the testimony of Alex Matias, who, at approximately 9:25 PM on October 25, was on his way to the Winn-Dixie next to Dollar (TV32/2467-68). Matias noticed that the lights in the Dollar store were still on, which he thought unusual since he previously worked there (TV32/2470-71). From about 15-25 feet away, Matias observed a black man wearing a dark shirt and dark slacks exit the store, lock the door behind him, walk to a car, and then go back to the store, unlock the door, and re-enter (TV32/2472-73). The same man then came out a second time, again went to a car, and again entered the store (TV32/2474). The following morning, after learning about the murders, Matias called the tip hotline; later that night, Matias talked with Dawniell Beauregard's sister, Crystal, who he used to date and who urged him to go to the police (TV32/2476; 2484). As a result of several interviews with police, Matias formulated a composite, but was unable to complete it because none of the pictures shown to him looked like the man's face (TV32/2477-80). In the composite, Matias described the man as 6' to 6'3" and that the man was wearing a dark shirt over a white t-shirt and dark pants (TV32/2486-87).[27]

After Mr. McDuffie was arrested in December, 2002, Matias saw him on TV and

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night (TV33/2685-87).

recognized him as the man he saw, and Matias made an in-court identification of Mr. McDuffie as the man he saw that night (TV32/2480-81). He did not inform the police of his identification of Mr. McDuffie from the December TV news show until the following April (TV32/2491). He acknowledged that his in-court identification was "somewhat easier" because he saw Mr. McDuffie on TV being arrested (TV32/2489), and that he had received a $10,000 reward from police for making the identification (TV32/2481). Despite admitting that if he did not make an in-court identification he stood to lose the reward (TV32/2497),[28] he denied that he was identifying Mr. McDuffie just to get the reward (TV32/2502-03).[29]

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[27]The Dollar store uniform pants, however, were tan (TV32/2494).

[28]As it did during the examination of Carol Hopkins, the defense, during Matias's cross-examination, attempted to show a photograph of Steve Absalom, who had been the subject of the pretrial reverse-*Williams*-rule litigation (TV32/2499). In a proffer, Matias testified that Absalom's photograph "looked similar" to Mr. McDuffie and to the person he saw on TV (TV32/2499-2500). The State objected to showing Matias the photograph and the court, despite also acknowledging that Absalom looked a lot like Mr. McDuffie, refused to permit the defense to show the photo to Matias or to question him on the subject (TV32/2501). *See* Argument II, *infra*.

[29]The State also presented the testimony of Olivia Sousa, who was working in a restaurant in the plaza where the Dollar store was located (TV32/2505). After leaving work at approximately 9:20-9:30 PM that night, she went to the Winn-Dixie and notice that the lights were on at Dollar (TV32/2506-08). After making a purchase at the market, she was walking past the Dollar and saw a black male in the store walking toward the back of the store (TV32/2509-11). The man was

The "Motive" Testimony. Troy Mr. McDuffie was questioned extensively by the State about her and her husband's financial status leading up to October 25. Troy worked as a unit clerk/nursing assistant at an Orlando nursing home, and her pay differed depending on the hours she worked during a particular pay period (TV37/3125-29). In October, 2002, Troy confirmed, through a review of records, that her take home pay totaled approximately $1400.00 (TV37/2126-29). In early October, 2002, she and Mr. McDuffie moved into a house on Mardell Court rented from a Mr. Sturgis (TV37/3129). They previously lived at a rental house on Sussex Drive and moved after the lease had run out and Mr. McDuffie did not want to stay there (TV37/3125-36). She did not know if the landlord of the Sussex house, Peter Pederson, had evicted them for non-payment of rent (TV37/3136).

Troy explained that Roy had been out of work for about a month before he started at Dollar, and had several additional jobs in 2002 (TV37/3164).[30] Roy was responsible for paying the rent, but they each paid for their own car payments and

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about 5'8", over 200 lbs, and wearing tan pants with a black shirt (TV32/2511; 2516). She only saw the back of the man, however, not the face (TV32/2514-16).

[30]Troy also explained that, in October 2002, several family members loaned money to her husband (TV38/3263), which was confirmed by family members who testified in the defense case (TV43/3753-56; 3779-81; 3788-90). The prosecutor clarified, however, that Troy never saw this money, and that it was her husband who told her about the loans (TV38/3263-67).

shared some of the other household expenses (TV37/3168-70; 3173-75). In August, they purchased a new car for which they had been approved for a loan, and the monthly payment was approximately $400 (TV37/3171). Upon being shown documentation, Troy was required to testify that her husband wrote a check to the cable company on an account that was closed (TV37/3175-78). Roy had a credit card, and while Troy did not specifically recall receiving any calls from the bank during the week of October 21, after being confronted with phone logs, acknowledged that it would be fair to say that they were getting calls from creditors during the week of October 21 (TV37/3179-85). The State also elicited from Troy that her husband was not paying child support obligations (TV37/3185).[31]

VCSO agent Willis testified that he learned from the McDuffie's landlord, Mr. Sturgis, that a money order had been purchased by Mr. McDuffie on October 26, 2002 (TV39/3320-21). Investigation, including videotapes, later ascertained that he had purchased a money order on October 26 at 8:02 AM totaling $1450, and three additional money orders on November 6 (TV39/3322-31). According to

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[31]On cross-examination, Troy McDuffie denied that she and her husband were in dire financial straits at the time; indeed, tax return documents established that, in 2002, she and her husband had a combined income of nearly $55,000 (TV37/3189-

Willis, Mr. McDuffie was, prior to beginning work at Dollar, last employed on September 19 (TV39/3332). Numerous financial documents revealed monies owed for child support,[32] late car payments, late utility payments, late cable TV payments, and money owed on the Sussex rental house (TV39/3333-36).[33] No payments were being made to Mr. McDuffie's credit card, and phone logs revealed that creditors were calling the house in the week leading up to murders (TV39/3336-39). Phone logs also revealed a phone call made from Mr. McDuffie's house to David Pederson on October 22, 2002 (TV39/3341), and during the weekend of October 26-27, when the McDuffies were supposedly in Bradenton (TV39/3344-46).[34]

The State also presented the testimony of David Pederson, whose parents rented

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92). There was never any talk of declaring bankruptcy (TV37/3191-92).

[32]Willis testified on direct that Mr. McDuffie owed over $11,000 in child support arrears, but, on cross-examination, was forced to acknowledge that in actuality, the documents he subpoenaed reflected that Mr. McDuffie was required to pay only $25.00 a week (TV39/3365).

[33]Willis never bothered to subpoena the McDuffie's tax returns, and thus he was not aware that they had a combined income in 2002 of nearly $55,000 (TV39/3363).

[34]The reliability of the phone logs was seriously called into doubt because they also showed that phone calls were made from the McDuffie house at 7:03 PM and 7:25 PM on October 25, 2002 (TV39/3367-68). As lead investigator Willis conceded, all witnesses verified that the McDuffies were at the Dollar store until at

the Sussex home to the McDuffies prior to their move to the house where they lived at the time of the incident (TV31/2441). Pederson, an attorney, instituted eviction and civil action litigation against the McDuffies in mid-October, 2002 (TV31/2441-44), at some point after which Mr. McDuffie called and left an "extremely hardcore message" on his voice mail, saying that he hoped Pederson and his father would go to Baltimore and get their "asses shot off" by the sniper (TV31/2446). Mr. McDuffie also said "you can go suck your father's dick, fuck your mother, things along that nature" (*Id*.). According to Pederson, Mr. McDuffie owed his parents $1,800 in debt (TV31/2446-47). Pederson called the police, but nothing was done (TV31/2447). He acknowledged on cross-examination that he deleted the voice mail message after a few weeks (TV31/2448).

David Sturgis, who owned the house rented by Mr. McDuffie in October, 2002, testified as to how Mr. McDuffie provided false information on the rental application, including a fictitious landlord (TV36/2970-73; 2992). They agreed on a monthly rental of $1350, and on October 14, Mr. McDuffie paid $500 in cash, but as of October 22, he still owed $1350 as security deposit (TV36/2993-94). On October 23, Mr. McDuffie said that had no money but would have it soon and he could pick it up (TV36/2995). On October 27, Sturgis picked up $1450 in money

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least 8:00 PM on that night (TV39/3367).

orders at the house (TV36/2996-27). At some point, Sturgis learned that Mr. McDuffie worked at the Dollar store; Mr. McDuffie had also said he worked at Lockeed Martin but thought he might get laid off so he got the back-up job at Dollar (TV36/2998).

Mr. McDuffie's Testimony. Mr. McDuffie denied killing either victim, explaining that he would have had a bad limp had he engaged in the kind of struggle that would have occurred in the course of the killings; he had a leg injury and his leg would have swollen up terribly whenever he was active (TV45/3968-73). He has several prior non-violent felony convictions and one misdemeanor for worthless check (TV45/3973-77).

In 2002, neither he nor his wife were in desperate financial straits and their combined salary was almost $59,000 (TV45/3982-83). However, he had not been employed after September, 2002, so he borrowed from his family to satisfy pending financial obligations (TV45/3986-87). Mr. McDuffie acknowledged making the telephone call to Pederson, but he did not say what Pederson attributed to him (TV45/3988-89).

In September and October, 2002, Mr. McDuffie sent out many job applications, and Dollar made the first offer that he accepted (TV45/3991-92). Because the hours conflicted with his football coaching obligations, the job was not his first

choice but he took it anyway despite the fact he was placed in Deltona (TV45/3992-93; 3995). On his first day at Dollar, he received word that he had been offered a job at Coca-Cola, which he decided to accept because it paid more and had better hours than Dollar (TV45/3998-4000-01). He discussed the Coke job with Linda Torres, who told him to work out the week at Dollar to get paid for the full week (TV45/4000-01).

On Thursday, October 24, Mr. McDuffie was asked by his manager to attend a meeting the following day in Apopka and to return to the store in order to do another closing procedure (TV45/4007). On the morning of October 25, he took Troy to work, got a haircut, and then attended the Apopka meeting until it ended at around 5:15 (TV45/4008-13). On that day he was wearing a blue shirt, tan pants, and black shoes (TV45/4014). After picking up Troy from work, Mr. McDuffie went to the Dollar store, where he straightened up the store and prepared for closing (TV45/4015-17). At some point, Janice Schneider noticed a "suspicious" white man with a pony tail in the store and she was "concerned" (TV45/4017-18). As Mr. McDuffie was cleaning up, a lady came in and said that someone was supposed to be saving some boxes for her; Mr. McDuffie asked Dawniell, who said that she had stacked the boxes up in the back room for the lady (TV45/4018). Because he had just moved himself, Mr. McDuffie showed the lady how to put the

boxes together with a roll of duct tape that Dawniell gave him (TV45/4019-20). Mr. McDuffie tore of pieces of the tape and hung them on the neck of a bottle of bleach that Dawniell had been using to clean the back room (TV45/4019-21).

Mr. McDuffie and the cashiers began the procedures for closing out the cash registers (TV45/4025-29). While he and Dawniell were in the back room counting, Janice came back and said that a black male who had earlier called her a bitch was in the store, and because she was concerned, she asked them to come up front (TV45/4029). After Mr. McDuffie went up front, the man "got in line" and just paid for his item and left, getting into a blue 4-door Chevrolet (*Id*.).[35] Dawniell and him then went back to finish counting the registers (TV46/4039). They then came up front again because the store was about to close, and they all began to bring in the carts from the parking lot (TV46/4040). Just as the store was about to close, two men came in to buy sodas, and Janice said it was OK to let them in (TV46/4042). After making their purchases, the men left and the door was locked; to the best of Mr. McDuffie's knowledge, the store was empty at that point

[35]When he talked to police, Mr. McDuffie did a composite of the man, and he also identified the car as one depicted in a photograph of a nearby ATM machine (Def. Exhibit 72). The photo of the car was taken by the ATM camera at 9:12 PM, but Mr. McDuffie explained that he also saw that car before the store closing (TV46/4039).

(TV46/4043-44). Dawniell, Carol, and Mr. McDuffie continued to count the register receipts, but shortly thereafter Carol left between 8:25 and 8:35 (TV46/4045-46). As they accompanied Carol to the front door, Mr. McDuffie noticed that Troy, who had been waiting in the car, had moved the car closer to the store and he went out to briefly check on her (TV46/4046-48). He re-entered the store and they all continued to close out the registers (TV46/4049). When a small discrepancy with the receipts was discovered and they had to count again, Mr. McDuffie asked if he could leave; this would have been around 8:55 PM (TV46/4049-50). All three of them went to the front door and Janice let him out (TV46/5051).

After leaving the Dollar store, he and Troy first went to the Aarons store to make the night deposit, then to McDonalds, where they got food to go, and finally they went home (TV46/4052-53). At around 3 AM on the following morning, Mr. McDuffie and Troy were awakened by the arrival of the police at their home (TV46/4056). The clothing he was wearing that night was all at the house and he would have given it to the police had they asked (*Id*.).

On Saturday, October 26, Mr. McDuffie awoke early and took Troy to her haircut appointment (TV46/4060-61). Earlier in the week he had told Scott Sturgis to come by and get the rent, so Mr. McDuffie went to purchase three money orders

with cash he had been given by Troy's father (TV46/4061-62). Mr. McDuffie then went to coach a football game and, after Troy was done with her appointment, the two headed to his mother's house in Bradenton (TV46/4062-66). The two remained in Bradenton until Sunday evening (TV46/4066-68).

On cross-examination, Mr. McDuffie was confronted with a number of documents, such as his army and job applications, and acknowledged not having told the truth (TV46/4092-4102). He was also confronted with the fact that his job resume was not accurate in many respects, that he wrote a bad check to the cable company, and that he "embellished" some facts on his Coke job application (TV46/4106-15). He also acknowledged that when he spoke with the police voluntarily, his times were off with respect to when he got to Aarons, he had worked all day and was not paying close attention to the times (TV46/4034).

Jail Inmate Testimony. Michael Fitzgerald, a three-time convicted felon, testified during the defense case-in-chief that in October, 2002, he resided in Deltona, Florida (TV44/3819). Fitzgerald, who is 6' tall and weighs 204 lbs, has two children with Dawniell Beauregard's sister, Tammy Ryan (TV44/3819). During the time when the Dollar murders occurred, Fitzgerald was a crack addict with a $200-300 daily habit (TV44/3821-22). He would buy crack in the Spring Hill section of Deland from a number of dealers (TV44/3823). Fitzgerald spent the

better part of October 25 and 26 doing crack in Deland. He drove a white Dodge pickup truck (TV44/3826). By 8:00 PM on October 25, he had spent all his cash on crack, and he lent his truck to his dealer, "Charles," so he could get more drugs (TV44/3827). According to Fitgerald, "Charles" dropped him off in the woods, where he smoked some crack, and at some point "Charles" picked him up again not in his truck but in a car driven by a black male (TV44/3827-30). "Charles" and the black male told Fitgerald that the cops had his truck at a nightclub in Deland, so they drove him to where his truck was parked (TV44/3831). Because "Charles" did not have a licence, "Charles" told Fitzgerald to tell the cops that he (Fitzgerald) loaned his truck to a guy named Woodrow Moran (TV44/3831-32). Fitzgerald believed he told the police that night about Moran (TV44/3832). After speaking with the police Fitzgerald was not taken into custody (TV44/3834). A day or so later, the police again questioned Fitzgerald, who lied about his whereabouts on the night of October 25 because he did not want the police to know he was doing drugs (TV44/3833). Shortly thereafter, however, Fitzgerald called the police back to tell them that he had been smoking crack that night (TV44/3833).[36] Fitzgerald did not

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[36]VCSO investigator Greg Seymour confirmed that he spoke with Fitzgerald on October 27, and also that Fitzgerald had been contacted by police on October 25 (TV44/3898-3904). Seymour acknowledged that Fitzgerald told police that he had

think the composite drawing resembled him, but acknowledged that in his deposition he admitted there was a resemblance (TV44/3841-42). Fitzgerald had been to the Dollar store in Deltona when Dawniell was working there, but he did not confess to the murders to Keven Ingram (TV44/3843-44).

On cross-examination, Fitzgerald testified that Kevin Ingram was a known snitch in the jail (TV44/3848). Fitzgerald was aware that there was talk in the cell block about blaming him (Fitzgerald) for the murders (TV44/3852). He claimed to have overheard Mr. McDuffie confess the Dollar murders to another inmate (TV44/3854-55), although he never told anyone about this "confession" until he was deposed just 2 days before trial (TV44/3855-57). Fitzgerald denied having anything to do with the Dollar murders and denied that he was claiming that Mr. McDuffie confessed only because Mr. McDuffie's defense attorneys were claiming that Fitzgerald was responsible (TV44/3856-58).

Ingram, who had been an inmate in the Volusia jail with Mr. McDuffie and Michael Fitzgerald, testified that Fitzgerald told him that he (Fitzgerald) and Woodrow Moran committed the Dollar store murders, not Mr. McDuffie (TV44/3870-76). According to Ingram, Fitzgerald said that it was only supposed to

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been with someone named "Woodrow" on October 25 (TV44/3904). VCSO deputy Patrick Thompson testified to having contact with Woodrow Moran on

be a robbery in order to get money to purchase crack (TV44/3874).[37]

Woodrow Moran, also a convicted felon, testified that he could not really recall much of October 25 because he was a crack addict (TV45/3922-25). He recalled going to a nightclub that evening, but denied knowing anyone named Michael Fitzgerald and denied any involvement in the Dollar killings (TV45/3925-32). He did contact police after seeing on television that he was being implicated in the crimes and he gave his DNA to police (TV45/3933-34).

During the State's rebuttal case, Derek Willis, currently in prison for first-degree murder and a 10-time convicted felon, testified that he once shared a cell with Ingram, and had made an "agreement" with Ingram (TV47/4160-62; 4065). Willis would "confess" his crime to Ingram so that Ingram could have information to curry favor with the State in his own case in exchange for Ingram giving in excess of $15,000 to Willis and his children (TV47/4162). As a result of this "agreement," Willis confessed to Ingram, entered a plea, and got a life sentence (TV47/4164-65).

Inmate Curtis Williams also testified during the State rebuttal case. Williams,

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October 25 at approximately 11:30 PM (TV44/3909).

[37]The trial court instructed the jury that it could consider Ingram's testimony only for impeachment of Fitzgerald's testimony, not as substantive evidence

also an inmate at the Volusia jail, testified that he knew Mr. McDuffie, Kevin Ingram, Derek Willis, and Michael Fitzgerald (TV47/4165-67). According to Williams, Mr. McDuffie asked if Williams and other inmates would be willing to tell the police that Fitzgerald had confessed to the Dollar murders in exchange for money that Mr. McDuffie claimed to have had (TV47/4167-68). Mr. McDuffie's initial plan was to implicate Woodrow Moran and Fitzgerald's ex-girlfriend, but Williams found out that Mr. McDuffie planned to directly implicate Fitzgerald, which cause Williams to get upset (TV47/4169-70). According to Williams, Mr. McDuffie's opinion of white people was "very low" and that Mr. McDuffie and other inmates repeatedly threatened him (TV47/4170-73). Mr. McDuffie knew that Fitzgerald did not commit the Dollar murders (TV47/4170).[38]

PENALTY PHASE

The State presented several victim impact witnesses, each of whom read brief written statements to the jury (TV50/4496-4508; 4514-16). The State also re-

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(TV44/3897).

[38]During Williams' redirect, he testified that Mr. McDuffie had been written up in jail for "extortion" (TV47/4189). The defense moved for mistrial and the trial court indicated it would grant the motion, but offered the defense the opportunity to agree to a curative instruction (TV47/4189-93). After a discussion with Mr. McDuffie, defense counsel withdrew the motion for mistrial and agreed to a curative instruction and an admission by Williams that he made a mistake in his

called Dr. Beaver, whose brief testimony included the fact that the gunshot wounds to both victims would have produced unconsciousness (TV50/4510), the sharp-force injuries would not have produced immediate death and would "be painful" (TV50/4510-11), and that Dawniell Beauregard's mobility would have been limited because she was bound by duct tape (TV50/4511). On cross-examination, Dr. Beaver clarified that the gunshot wounds to both victims would have resulted in *immediate* loss of consciousness and the cessation of the ability to feel pain (TV50/4512). While Dr. Beaver believed there was "some interval" between the infliction of the sharp-force injuries and the gunshot wounds, it could have been merely "seconds" (*Id.*).

Mr. McDuffie presented a number of family members and friends in support of his mitigation case. His mother, Regina Prater, has been married to Johnny Prater for 14 years (TV51/4554). Earlier marriages produced a number of children, with Roy being the oldest (TV51/4554-57).[39] Roy's younger brothers, Anthony and Dwayne, are both special-needs children. Dwayne had brain surgery and is partially paralyzed and blind, and Anthony was born deaf (TV51/4557-58). Roy

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testimony (TV47/4192-96).

[39]Mrs. Prater never married Roy's father, but they lived together for many years (TV51/4569).

assisted her a great deal with handling Dwayne and Anthony, treated them both very well, learned sign language in order to be able to communicate with them, helped potty-train them, and was a loving and caring brother (TV51/4559–63).

Roy was "real young" when his father left the home, and in order to assist with the family finances, he began to work at the age of 9 and he continued to work until high school (TV51/4570-72). Roy was an "average" student and was heavily involved in sports, especially football, to the extent he could participate due to his asthma (TV51/4582). Roy did not finish his high school education, however (TV51/4583).[40]

Mrs. Prater showed the jury a number of pictures of Mr. McDuffie, including some when he was a child and others in his army uniform (TV51/4587-90). Roy's first marriage to Kim Williams resulted in the birth of a son, who Roy loves very much and who he continued to have a close relationship with after the divorce from Kim (TV51/4592-96). Roy has a loving relationship with his current wife, Troy, and has two grandchildren who he is "crazy" about (TV51/4600-01). Roy coaches midget and little league football and provides leadership and friendship to young troubled children (TV51/4608-14). He is also a very religious man,

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[40]Mr. McDuffie did obtain his GED while incarcerated (TV51/4677; Def. Exhibit

attending church on a regular basis (TV51/4616).

Joshua Smith, a 15-year old high school student, testified that he plays in the city football league and was coached by Mr. McDuffie (TV51/4630-32). Mr. McDuffie was "loving" and "caring" to them, a "nice guy" who made sure they took their schooling seriously (TV51/4630-34). Mr. McDuffie showed them leadership, how to be better in life (TV51/4636).

Mr. McDuffie's brothers, Don Perkins and Tyrving Perkins, both testified that Roy was a good brother, a positive influence on them and on their children (TV51/4637-39; 4641-44). Marquis White, Mr. McDuffie's 16-year old nephew, testified that his uncle coached him in football (TV51/4645-46). Mr. McDuffie's son, Tavaris Williams, testified that Roy was a good father and grandfather, and a positive influence on his life (TV51/4648-50). Mr. McDuffie's father, Roy McDuffie, Sr., testified that Roy Jr. is his first-born child, and was about 7 or 8 years old when he left the house (TV51/4652-55). Roy was "like any normal kid" who always got along well with others (TV51/4653-57). Vontina Papay, Mr. McDuffie's step-daughter, testified that Roy was like a father to her and was there for her when her real father was not (TV51/4662-63). Roy encouraged her, taught her about life lessons, and was a good provider to her and her brothers

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77).

(TV51/4666). Dawn Perkins, Mr. McDuffie's younger sister, testified that she and Roy were the closest of the siblings, he spoiled her and was always there for her especially when she gave birth to her own children (TV51/4671-72). Roy was a positive influence on her children, and always encouraged Dawn to go to school and continue with her employment with the corrections department (TV51/4673-74).

The Reverend Ronald Fortune has known Mr. McDuffie since he was a baby (TV51/4660). Roy attended church on a regular basis and is a religious person (TV51/4662). The Reverend tried to be a role model for Roy (TV51/4661). Anthony Wiggins, Mr. McDuffie's best friend, testified that he has known Roy for about 10 years and he helped him tremendously through some difficult personal times over the years (TV51/4665-66). Roy was a calming influence, and helped him mentally, financially, and emotionally, as well as provided him with help being a good parent (TV51/4667-69).

SUMMARY OF THE ARGUMENTS

1. The lower court failed to conduct an adequate *Richardson* inquiry regarding a defense discovery violation and thereby erred in excluding key defense evidence without inquiring as to any prejudice accruing to the State and without considering any alternatives short of exclusion of the defense evidence. Because the error is

not harmless beyond a reasonable doubt, a new trial is warranted.

2. The lower court erred in denying a motion to suppress the in- and out-of-court identification of Mr. McDuffie by Alex Matias. Under *Neil v. Biggers* and its progeny, the identification was unduly suggestive and because of the substantial likelihood of irreparable misidentification, the testimony should have been suppressed. The court further erred in restricting the defense from cross-examining Matias and Carol Hopkins with photographs of other potential suspects Absalon and Fitzgerald, in violation of Mr. McDuffie's Sixth Amendment rights.

3. The lower court erred in refusing the defense from presenting reverse-*Williams*-rule evidence. Mr. McDuffie submits that this Court's jurisprudence in this area should be revisited under *Holmes v. South Carolina*, under which analysis Mr. McDuffie should be afforded a new trial.

4. The State was permitted to introduce irrelevant and prejudicial evidence from David Pederson, in violation of Mr. McDuffie's right to a fundamentally fair trial. While the lower court ruled that the evidence was probative, it failed to perform the requite balancing of probative value against danger of unfair prejudice.

5. The lower court erred in permitting the State to introduce voluminous evidence of collateral bad acts regarding the McDuffie's financial situation, thus rendering the trial fundamentally unfair. The evidence became a feature at trial

and at closing argument, further exacerbating the error.

6. There is insufficient evidence, as a matter of law, to sustain Mr. McDuffie's convictions.

7. The trial court erred in finding the HAC aggravator as to both murders. Many of the findings supporting HAC are not substantiated by competent evidence, and because HAC was inappropriately found, a jury resentencing is required.

8. The lower court's instructions to the jury improperly shifted the burden to the defense to establish that mitigation outweighed the aggravation, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

9. The jury was improperly instructed on, and the State was allowed to argue, the CCP aggravator that the lower court ultimately concluded did not apply to either murder. Eighth Amendment error occurred and a jury resentencing is required.

10. Mr. McDuffie's death sentences violate the Sixth Amendment and *Ring v. Arizona.*

ARGUMENT I–FAILURE TO CONDUCT AN ADEQUATE *RICHARDSON* INQUIRY REGARDING A DEFENSE DISCOVERY VIOLATION AND ERRED IN EXCLUDING THE TESTIMONY OF DEFENSE WITNESS AND EXHIBIT.

A. Introduction.

During the defense case, Anthony Wiggins was called to testify (TV43/3796). The State objected and requested a *Richardson* hearing, *see Richardson v. State*, 246 So. 2d 771 (Fla. 1971), arguing that Wiggins was not listed as a guilt phase witness but only as a penalty phase witness. The State also complained about a Western Union transaction receipt showing a $40.00 wire transfer from Wiggins to Mr. McDuffie on October 18, 2002 (TV43/3796-97). The State acknowledged that the defense turned over the receipt earlier in the morning, but had "no opportunity to explore the validity of this particular document" which the defense was planning to introduce through Wiggins (TV43/3796). The following brief inquiry then transpired:

> THE COURT: Okay. Can you tell me if or if not you're prejudiced. Let me hear that prong of it.
>
> MR. ZAMBRANO [prosecutor] Well, we're prejudiced in the sense that we've had no opportunity to even find out.
>
> THE COURT: In other words, this is the first time you've seen it, right now.
>
> MR. ZAMBRANO: (Nods head.)
> THE COURT: Okay. And you've had no opportunity to verify it, et cetera.
>
> MR. ZAMBRANO: Right. And it was handed to me while Ms. Prater was testifying.[41]

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[41]Ms. Prater, who is Mr. McDuffie's mother, testified earlier that morning (TV43/3734-57), and two additional witnesses were called before the State

THE COURT: Okay. Richardson response from the defense.

(TV43/3797).

Defense counsel acknowledged there was an "inadvertent" oversight insofar as Wiggins, who had been listed as a penalty phase witness, not being also listed as a guilt phase witness (TV43/3798). Wiggins and defense counsel had "played phone tag" and were not able to speak before trial, but defense counsel had instructed Wiggins to be present to testify (*Id.*). When Wiggins showed up in court, he brought with him paperwork to verify that he sent Mr. McDuffie a money order on October 18, 2002; Wiggins also indicated that he sent Mr. McDuffie another money order a week earlier for which he was unable to obtain documentation (*Id.*). Defense counsel told the court that he had just received the document from Wiggins that morning, and he immediately copied and provided it to the State (*Id.*). Defense counsel proposed that if the State wished to verify the document, the defense would have no problem calling Wiggins after lunch or the following day "or give the State an opportunity to do it, to give the State an opportunity to question him right now" (*Id.*). Defense counsel noted that Wiggins's testimony

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brought the Wiggins matter to the court's attention (TV43/3778-87; 3788-91).

was going to be limited to discussing the document and the other loan made to Mr. McDuffie (*Id*.).

In reply to the defense argument, the prosecutor argued that although he was "totally unaware" of what Wiggins was going to say and it was a "surprise," he acknowledged that "I'm sure that I can probably deal with it at this point in time" (TV43/3799). Despite no request from the State to exclude the witness or to offer any alternatives to the State for handling the situation, and in the face of the prosecutor's concession that he could "deal with it at this point in time," the trial court immediately ruled that the witness and document were inadmissible, and refused to make a finding as to how the State was prejudiced:

> THE COURT: I believe there's a Richardson violation. I believe it is prejudice [sic]. As to whether the State can repair the prejudice, I'd have to speculate and I'm not willing to do it at this point in the trial.
>
> And you may not – You can mark it for identification, but it's not admissible, nor is the testimony.

(*Id*.). Following the ruling, the defense requested to proffer Wiggins's testimony and the excluded exhibit, which the court allowed "briefly" (*Id*.). Following the proffer (TV43/3800-03),[42] the court again ruled that neither the testimony nor the

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[42]During his proffered testimony, Wiggins testified that he was a barber who resided in Jacksonville, Florida, and has been a friend of Mr. McDuffie's for some

exhibit would be allowed due to a *Richardson* violation (TV43/3803). When defense counsel requested to make additional argument on the *Richardson* issue, the court indicated that it had ruled and admonished counsel to "move on" (TV43/3803-04).

B. The lower court conducted an inadequate *Richardson* inquiry and reversal for a new trial is warranted.

Once a court is faced with a request for a *Richardson* hearing–whether it be from the State or from the defense–an ***adequate*** inquiry must be performed which ***must*** encompass the following: (1) whether the discovery violation was willful or inadvertent, (2) was substantial or trivial, and (3) had a prejudicial effect on the aggrieved party's trial preparation. *See State v. Evans*, 770 So. 2d 1174, 1183 (Fla. 2000). While the failure to conduct a *Richardson* inquiry–or the failure to conduct an adequate inquiry–is not always *per se* harmful error, this Court has made it clear that the failure to conduct a proper inquiry regarding an alleged discovery violation is nonetheless subject to the "strict procedural prejudice standard" and only in a

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ten years (TV43/3800). He testified that he made two loans to Mr. McDuffie in October, 2002, the first for $300 and the second for $40, both via Western Union (TV43/3801). The loans were made around the same day, October 18, 2002 (*Id*.). He had one receipt reflecting the $40 loan which he had kept for tax purposes, but was unable to get the other receipt from Western Union in time to come to court (TV43/3801-02). Defense Exhibit GGGG is the receipt for the $40 loan (*Id*.). The

"rare instance" could such error be considered harmless beyond a reasonable doubt. *State v. Schopp*, 653 So. 2d 1016, 1021 (Fla. 1995); *Scipio v. State*, 2006 Fla. LEXIS 261 at *20 & n.5 (Fla. 2006). Adherence to this "strict prejudice standard" is even more critical in a case where a defense witness is excluded because it "implicates a defendant's sixth amendment right to present witnesses as well as the fundamental right to due process." *M.N. v. State*, 724 So. 2d 122, 124 (Fla. 4th DCA 1998). *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988). Thus, because a ruling excluding a defense witness implicates federal constitutional guarantees, the burden shifts to the State to prove the harmlessness of this constitutional error beyond a reasonable doubt. *M.N.*, *supra* at 125; *Comer v. State*, 730 So. 2d 769, 775 (Fla. 1st DCA 1999). *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Chapman v. California*, 386 U.S. 18 (1967).

This is not a case where the State can establish that the trial court's failure to conduct an adequate *Richardson* inquiry is harmless beyond a reasonable doubt. While the trial court did find that there was a defense discovery violation based on the defense acknowledgment that Wiggins's name was inadvertently not listed as a guilt-phase witness, the court nonetheless (1) failed to conduct any further inquiry on whether the violation was substantial or trivial, (2) failed to conduct an

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defense proffered the document into evidence as well (TV43/3803).

adequate inquiry into the prejudice accruing to the State, (3) failed to consider less-restrictive sanctions than the exclusion of the witness, and, (3) after the proffer by the defense witness, failed to permit the defense to make additional argument on the issue. Failure to conduct the requisite inquiry addressing all of the above factors is error. *Schopp*, 653 So. 2d at 1019 n.4 ("We find no merit to the State's contention that the trial court conducted an adequate inquiry in this case. *Even though there was inquiry as to the violation itself, there was no inquiry into the prejudice the violation may have caused the defense. Inquiry into the prejudicial effect of the violation is clearly required under Richardson*") (emphasis added). *Accord A.L.H. v. State*, 915 So. 2d 242, 244 (Fla. 4th DCA 2005) (while court "adequately" determined that violation was inadvertent and substantial, its inquiry into "the prejudice analysis, fell short and led to the erroneous imposition of the most severe sanction–striking the defense's only witness"); *Comer v. State*, 730 So. 2d 769, 74-75 (Fla. 1st DCA 1999) (inquiry inadequate because "the issue of procedural prejudice was never properly addressed" by trial court).

The error here is particularly acute due to the combined failure by the court to properly address the prejudice to the State and its exclusion of the defense witness and evidence. While a court has discretion to determine whether noncompliance with Rule 3.220 results in harm to an aggrieved party, "that discretion can be

properly exercised only after the court has made an adequate inquiry into all the surrounding circumstances." *Wilcox v. State*, 367 So. 2d 1020, 1022 (Fla. 1979). Here, aside from a naked assertion of prejudice from the State, there was no further demonstration by the State or inquiry by the court as to the precise procedural prejudice flowing from the violation; indeed, after the defense expressed its willingness to make Wiggins available to the State and offered to call him either after the lunch break or event the next day, the prosecutor conceded that "I'm sure that I can probably deal with it at this point in time" (TV43/3799). The lower court's purported finding of "prejudice" to the State was a palpable abuse of discretion and reversal is warranted. *See Baker v. State*, 522 So. 2d 491, 493 (Fla. 1st DCA 1988) (reversible error for court to exclude defense witness when the State, "although objecting on the ground of prejudice, stated to the court that the information to be supplied by the witness was not so damaging that it should be kept from the jury").

C. Exclusion of defense evidence, without any inquiry into lesser sanction, violates Sixth and Fourteenth Amendments and cannot be harmless error.

Even had procedural prejudice been shown by the State (despite the concession to the contrary by the prosecutor), the court, by refusing to consider how the State

could "repair" the "prejudice" it found to have existed, further erred by "fail[ing] to inquire whether other reasonable alternatives could be employed to overcome or mitigate such prejudice." *A.L.H.*, 915 So. 2d at 245. "The failure of a party to timely disclose a witness in discovery is not, in and of itself, a sufficient ground to exclude that witness." *Tomengo v. State*, 864 So. 2d 525, 529 (Fla. 5th DCA 2004). A witness should not be excluded "except under the most compelling of circumstances" and where "no other remedy suffices." *Id*. (*quoting Cooper v. State*, 336 So. 2d 1133, 1138 (Fla. 1976)). *Accord Austin v. State*, 461 So. 2d 1380, 1381 (Fla. 1st DCA 1984); *Wheeler v. State*, 754 So. 2d 827, 830 (Fla. 2d DCA 2000); *Peterson v. State*, 465 So. 2d 1349, 1351 (Fla. 5th DCA 1985); *Wessling v. State*, 877 So. 2d 877, 879 (Fla. 4th DCA 2004). Exclusion of a defense witness or evidence should only be a "last resort" because it "implicates a defendant's sixth amendment right to present witnesses as well as the fundamental right to due process." *M.N. v. State*, 724 So. 2d 122, 124 (Fla. 4th DCA 1998). *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988). Thus, as noted above, the burden shifts to the State to prove the harmlessness of this constitutional error beyond a reasonable doubt.

The error in the lower court's ruling is manifest and not amenable to harmless error analysis; even if strict reversal is not warranted, the State cannot meet its high

burden of proving harmlessness beyond a reasonable doubt. *See Schopp*, 653 So. 2d at 1020; *Scipio*, 2006 Fla. LEXIS 261 at *30-31. In the face of the prosecutor's *acknowledgment* that the State was not prejudiced ("I'm sure that I can probably deal with it at this point in time") (TV43/3799),[43] the trial court ordered the witness excluded and explicitly refused to consider any alternatives short of exclusion. The court did so in the face of the defense suggestion that it would hold off presenting Wiggins until after the lunch break or even the next day in order to allow the State to speak with him.[44] *See Wilcox*, 367 So. 2d at 1023 ("Prejudice may be averted through the simple expedient of a recess to permit the questioning

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[43]Although the prosecutor claimed "surprise" at the fact that Wiggins was going to be testifying at the guilt phase, it is important to note that Wiggins's existence as a defense witness was not a surprise to the State, as Wiggins had been listed as a potential penalty phase witness. Thus, this is not a situation where Wiggins's mere existence was a surprise to the State.

[44]It should be noted that the trial was by no means nearing an end when the *Richardson* inquiry was conducted, nor was Wiggins the last defense witness. The issue arose on February 8, 2005, and the State's rebuttal case did not begin until two days later (TV47/4160). Following the court's refusal to permit the defense to call Wiggins, the defense called twelve (12) additional witnesses over the ensuing days. Thus, there was plenty of time for the court to have fashioned a remedy, such as deposition or brief continuance, in order to give the State the opportunity to speak with Wiggins. Of course, the State, aside from its naked complaint about the late disclosure, never even asked the court to permit a brief recess, never asked for an order that defense to make Wiggins available for deposition, and never asked for a mistrial. To the contrary, the prosecutor conceded that it was something he

or deposition of witnesses"); *Roberts v. State*, 760 So. 2d 208, 210 (Fla. 2d DCA 2000) ("The trial court failed to make a finding or determination on the issue of prejudice nor did it make any effort to use other reasonable means, short of excluding the witness, to overcome such prejudice. We are therefore compelled to reverse and remand for a new trial"); *Fabregas v. State*, 829 So. 2d 238, 241 (Fla. 3d DCA 2002) ("it does not appear that the trial court considered any other alternatives to exclusion. The case could have been recessed for a few days . . . Another remedy could have been to declare a mistrial . . ."); *Casseus v. State*, 902 So. 2d 294, 296 (Fla. 4th DCA 2005) ("the court could have recessed the case for a few days or declared a mistrial to cure the state's prejudice, rather than excluding the evidence to the great prejudice of the defendant who has a constitutional right to present a defense"); *Baker v. State*, 522 So. 2d 491, 493 (Fla. 1st DCA 1988) ("the trial court did not address the question of whether further minimal investigation would avoid any prejudice due to the late disclosure"); *Peterson v. State*, 465 So. 2d 1349, (Fla. 5th DCA 1985) ("Neither was there any attempt made to determine if there was a remedy for the violation short of excluding the witnesses . . . [I]t is incumbent on the trial judge to conduct an adequate inquiry to determine whether other reasonable alternatives can be employed to overcome or

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could "deal with at this point in time".

mitigate any possible prejudice"). The court then further refused to permit the defense to make further argument as to the *Richardson* violation following the proffered testimony of Wiggins. The court's exclusion of otherwise relevant and important evidence–evidence which was "relevant to the defense theory"– was an abuse of discretion, and violated Mr. McDuffie's right to a fair trial and his right to present a defense under the Sixth and Fourteenth Amendments. *See Miller v. State*, 636 So. 2d 144, 149 (Fla. 1st DCA 1994).

The error in, and the harm resulting from, the court's exclusion of relevant, exculpatory defense evidence cannot be overstated. The key aspect of the State's circumstantial case was that Mr. McDuffie desperately needed money in order to pay off outstanding debts,[45] and that the proceeds of the robbery were used by Mr. McDuffie to purchase money orders subsequent to the murders (TV48/4291-93; 4301; 4314-16; 4415). To counter the State's theory, the defense presented the testimony of several of Mr. McDuffie's family members. His mother, Regina Prater, testified, *inter alia*, that she and other family members gave Mr. McDuffie cash in the weeks leading up to the murders (TV43/3754-56). On cross-

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[45]Indeed, the State spent an inordinate amount of time presenting witnesses and evidence on the issue of Mr. McDuffie's financial status in the weeks leading up to the murders. *See* Argument IV, *infra*.

examination, however, the prosecution cast doubt on Ms. Prater's testimony by pointing out that she only came forward with the evidence about giving money to Mr. McDuffie after he was arrested and it became "important that [he] have money in October of 2002" (TV43/3759-60), that she never informed the police that her son had been given money from his family prior to the robbery (TV43/3765), that the money was given in cash and so there was no documentation such as a check so "we can go back and take a look at it" (TV43/3770), and that there were no wire transfer receipts so that the State could verify the transactions she supposedly made to her son (*Id*.). The defense also presented Mr. McDuffie's brother, Don Perkins, who testified that he too gave Mr. McDuffie cash prior to the date of the murders (TV43/3779-81). The prosecutor cast doubt on Perkins's testimony by pointing out that because the money was given in cash, there was no objective documentation such as checks or wire transfer receipts (TV43/3782; 3785), and that prior to Mr. McDuffie's arrest, Perkins never told law enforcement about having lent money to his brother (TV43/3785). Next, the defense presented Tyrving Perkins, another of Mr. McDuffie's brothers, who also testified that he loaned cash to Mr. McDuffie in October, 2002, prior to the date of the murders (TV38/3789). As with the other defense witnesses, the prosecution pointed out that the loan was made in cash, and thus there would be no documentation to

corroborate the testimony (TV43/3793). Finally, Mr. McDuffie himself testified that he had been given money from family members in the weeks leading up to the murders (TV45/3986-87), including about $390 that he borrowed from Anthony Wiggins (TV45/3987), and that he used that money to purchase the money orders (TV45/4061-62). On cross-examination, however, the prosecution again cast doubt on the existence of these loans, querying Mr. McDuffie as to why he did not purchase the money orders before October 26, 2002, if he had received these loans from his family weeks earlier (TV46/4137-38).

Critically, during closing arguments, the prosecution portrayed the defense evidence as incredible because, in addition to the fact that the evidence came solely from Mr. McDuffie's family, there was a lack of any definitive objective evidence of the existence of the loans or the amounts of the loans:

> Some of the Defense witnesses, *just the family*, came forward *two years later*. *All of them have different amounts of money they have given the defendant.* ***Nobody bothers to ask why do you need the money? None of them could pin down any dates in which the money was given.*** *At some point in time Mr. McDuffie impeached his own mother as to how much money was given and when, saying she was confused.* ***There's no confusion in the State's case***.

(TV48/4419-20) (emphasis added).

The unjustified exclusion of defense witness Wiggins, and the Western Union wire transfer receipt, was a critical loss to the defense. Wiggins was the only non-

family member who could have provided the jury with evidence that loans were made to Mr. McDuffie in the week leading up to the murders, and, unlike the other defense witnesses, was the only witness who had objective documentary evidence establishing the existence of such loan. As noted above, the State was able to substantially impeach the defense witnesses (including Mr. McDuffie himself) due to their familial relationship and, critically, the lack of any documentation to support their testimony regarding loans. *See Roberts*, 760 So. 2d at 210 (error in excluding defense expert witness not harmless where State able to impeach other defense expert witness as to bias and suggesting that he was the "only" witness to determine that defendant was insane). Moreover, the State was able to take advantage of the exclusion of the defense evidence by arguing that the jury should disbelieve the evidence of family loans due to the fact that the only witnesses on this point were biased and had no documentation to support the loans. *See Shibble v. State*, 865 So. 2d 665 (Fla. 4th DCA 2004) (error to exclude defense witness due to *Richardson* violation not harmless where State able to take advantage of exclusion during closing arguments). When a court excludes defense evidence, without making the proper inquiry under *Richardson*, and such evidence "may have created a reasonable doubt in the minds of the jurors," *Baker*, 522 So. 2d at 493, is "exculpatory in nature," *Woody v. State*, 423 So. 2d 971, (Fla. 4th DCA

1982); or would have "direct[ly] challenge[d]" the State's case and/or "supporte[d] [] inferences" made by the defense as to the State's case, *Tomengo*, 864 So. 2d at 530, reversal for a new trial is warranted. This is particularly true in capital cases, where heightened scrutiny must be afforded in order to ensure that a defendant is given a fundamentally fair trial and to avoid the possibility of wrongful conviction. *See generally Gore v. State*, 719 So. 2d 1197, 1203 (Fla. 1998); *Ramirez v. State*, 810 So. 2d 836, 853 (Fla. 2001). A new trial is warranted.

ARGUMENT II–IMPROPER DENIAL OF MOTION TO SUPPRESS ALEX MATIAS' IDENTIFICATION OF MR. MCDUFFIE AS UNDULY SUGGESTIVE AND IN RESTRICTING CROSS-EXAMINATION OF MATIAS AND CAROL HOPKINS.

A. Improper Denial of Motion to Suppress.

Prior to trial, the defense moved to suppress Alex Matias' out-of-court identification of Mr. McDuffie as unduly suggestive and any in-court identification as tainted, in violation of due process (RV4/741-49). At an evidentiary hearing, Matias testified that he was in the parking lot outside the Dollar store at around 9:30 PM on October 25 and noticed that the lights at the Dollar were still on (RV10/1709). The parking lot was illuminated (RV10/1712). While he was standing by his car, Matias saw, on two occasions, a black male exit Dollar, lock

the door with a key, go to a car, look in the car, step away, look at him (Matias), and then re-enter the store using the key to unlock the door (RV10/1712). Matias looked "directly" at the black male's face (RV10/1714). The following morning, Matias found out about the murders "at some point," contacted police, and did a composite with investigator Willis (RV10/1714). The composite was missing a part on the face area because none of the pictures he was shown matched the person he saw and he "wasn't too sure" (RV10/1715). At a later date, Matias was watching the TV news when he saw the individual who he had seen at the Dollar store, and he identified Mr. McDuffie in court as the person he saw that night (RV10/1715).[46]

On cross-examination, Matias testified that he originally told police that the man he saw was in his mid-20s to late 30s, about 6' to 6'3" tall (RV10/1718-19).[47] He

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[46]The parties agreed that the date that Mr. McDuffie's photos would have appeared on TV was approximately December 17, 2002, when he was arrested (TV10/1737).

[47]At the hearing, Matias attempted to change his testimony on this point. At the hearing, he testified that he told police the man was about 5 ½ feet to 6'3" tall, but he acknowledged that he actually told the police that the man was 6' to 6'3" tall (RV10/1718-19). He later confirmed that he was "sticking with" his statement to police that the man was between 6' and 6'3" tall (TV10/1730). This was a significant point, given that Mr. McDuffie is only 5'7" tall, a fact of which the trial court took judicial notice (RV10/1694, 1703).

also told police that the man was wearing dark pants, despite the fact that Matias was aware that Dollar employees wore khaki pants (RV10/1721). Matias acknowledged that he knew Dawniell Beauregard and in fact used to date her sister, Crystal, with whom he spoke shortly after the crimes and who asked him to speak with the police (TV10/1722-23). Matias further acknowledged that shortly before his deposition in March, 2004, he again saw on TV or in the news that the police had arrested a suspect and that the suspect he saw on TV was the man that he saw on October 25 (TV10/1723-24; 1726). Despite "recognizing" Mr. McDuffie on TV in December, 2002, he did not inform police of his "identification" until April, 2003, conceding that there "was a delay" between the day he did the composite and the day he saw Mr. McDuffie on TV (TV10/1726). He admitted that after seeing Mr. McDuffie on TV following his arrest, he was only "pretty sure that's the man I saw" (TV10/1731).[48] After being shown a photograph of Steve Absalon, Matias testified that Absalon also "looks similar" to

[48]It later came out at trial that Matias had in fact applied for and received a $10,000 reward for "coming forward" with an identification of Mr. McDuffie (TV32/2481, 2495), and that he stood to lose the money if he did not stand by his identification (TV32/2497).

the picture of Mr. McDuffie that he saw on TV (TV10/1733-34).[49]

Following an evidentiary hearing (RV10/1690-1752), the court denied the motion, concluding first that "no State action was involved in Matias' identification of the Defendant on television" and secondly that, applying the factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), Matias' "out of court identification bears sufficient reliability to be admitted at trial" (TV5/955).[50] Mr. McDuffie submits that the lower court erred in denying the motion to suppress.[51]

First, the court's legal conclusion that there was "no State action" involved and thus Mr. McDuffie's due process rights were not violated, is erroneous. No State

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[49]During argument on the motion, even the trial court conceded that there was a "tremendous similarity" between the composite prepared by Matias and the picture of Absalon (TV10/1751).

[50]Among the "totality of the circumstances" cited by the trial court in support of its conclusion were that (1) Matias had sufficient opportunity to observe Mr. McDuffie at the crime scene "with a degree of close attention," (2) Matias' prior description and the composite he approved at the time of his police interview "bear sufficient similarity to the Defendant to indicate the subsequent identification was reliable," (3) the time elapsed between the crime and the confrontation was not so lengthy as to undermine the reliability of the identification, and (4) Matias demonstrated "sufficient certainty" when he identified Mr. McDuffie as the person he saw in the parking lot in the evening of October 25, 2002 (TV5/955-56).

[51]A trial court's determination of historical facts on a motion to suppress is clothed with a presumption of correctness, but appellate courts engage in an independent, or *de novo*, review of the mixed questions of law and fact. *Fitzpatrick v. State*, 900 So. 2d 495, 517 (Fla. 2005).

action is required in order to make out a successful due process claim. The "primary evil" to be avoided in such claims "is `a very substantial likelihood of irreparable misidentification.'" *Neil*, 409 U.S. at 198 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968). Therefore, the "evil" that this type of claim seeks to prevent is *not* police or State misconduct; rather, as the *Neil* Court noted, "[i]t is the likelihood of misidentification which violates a defendant's right to due process." *Neil*, 409 U.S. at 198. *See also Stovall v. Denno*, 388 U.S. 218, 302 (1967) (issue is whether the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law").

Mr. McDuffie further issue with the lower court's analysis of the *Neil* factors in concluding that Matias' identification passed constitutional muster. For example, the court's found that Matias' prior description and the composite he approved at the time of his police interview "bear sufficient similarity to the Defendant to indicate the subsequent identification was reliable." This finding completely misses the mark of an appropriate *Neil* analysis. The issue is not whether Matias's prior description and the *composite* were sufficiently similar, but rather whether

the prior description and *Mr. McDuffie* were sufficiently similar.[52] The most glaring discrepancy between Matias' observations on October 25 and the Mr. McDuffie involved the issue of height; even the trial court conceded that the "defense is right" that Matias was "wrong about the height. It was nowhere six-three" (RV10/1751-52). The court, however, simply declined to "fully explain" this glaring discrepancy (*Id*.). Matias' initial description was also at odds with, for example, the individual's clothing; Matias told police that the individual he observed was wearing dark pants, whereas, by all other accounts, if the man was Mr. McDuffie, he was wearing tan or khaki–not dark–pants.

Critically, the lower court's *Neil* analysis concluded that the time between the crime and the "confrontation" was not unduly lengthy as to undermine the reliability of the identification. However, the lower court completely overlooked that Matias was never able to even provide a description of the individual's face to police, and it was only *after* Matias saw Mr. McDuffie on TV being arrested for

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[52]Even if the court correctly compared Matias' description and the composite he later complied, the court's finding would still be erroneous, as even the trial court conceded that there was a "tremendous similarity" between the composite prepared by Matias and the picture of Steve Absalon, the perpetrator of other crimes that the defense sought to introduce as reverse-*Williams*-rule evidence (TV10/1751).

the murders did he "recognize" Mr. McDuffie.[53] He never made any independent identification of Mr. McDuffie, nor can the State show by clear and convincing evidence that Matias' identification "had an independent source." *Edwards v. State*, 538 So. 2d 440, 444 (Fla. 1989). Moreover, Matias never went to the police when he saw Mr. McDuffie on TV in December, 2002; it was not until the following April that he went to police. These facts, coupled with Matias' acknowledged equivocation on how certain he was that the man he saw was Mr. McDuffie (he was only "pretty sure" that Mr. McDuffie was the man), all counter against introduction of Matias' identification under *Neil*. Under the "totality of the circumstances," the lower court erred in denying the motion to suppress Matias' identification of Mr. McDuffie.

B. Improper Restriction of Cross-Examination.

During Matias' trial testimony, defense counsel, during cross-examination, submitted a proffer in which counsel attempted to show Matias a photograph of Steve Absalom, who had been the subject of the pretrial reverse-*Williams*-rule

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[53]Essentially, the manner in which Matias' "identified" Mr. McDuffie was the functional equivalent of an inherently suggestive "show up" procedure. *Perez v. State*, 648 So. 2d 715, 719 (Fla. 1995).

litigation (TV32/2499). In the proffer, Matias testified that Absalon's photograph "looked similar" to Mr. McDuffie and to the person he saw on TV (TV32/2499-2500). The State objected to showing Matias the photograph and the court, despite also acknowledging that Absalom looked a lot like Mr. McDuffie, refused to permit the defense to show the photo to Matias or to question him on the subject (TV32/2501). Because Matias's identification The defense indicated its desire was only to show Matias the photograph of Absalon, and not to get into the fact that Absalon was one of the perpetrators in a bank robbery that the court previously ruled inadmissible as reverse-*Williams*-rule evidence (TV32/2500). Despite acknowledging that the picture of Absalon "does look like McDuffie," the court ruled that the defense was "back-dooring" the previous order *in limine* prohibiting the reverse-*Williams*-rule evidence, the court denied the defense the ability to cross-examine Matias on his identification of Mr. McDuffie with the photograph of Absalon (TV32/2501).

Additionally, during the cross-examination of key prosecution witness Carol Hopkins, the defense attempted to show Hopkins a photograph of Absalon and Michael Fitzgerald, both of whom had committed crimes in the area that the trial court had previously ruled inadmissible as reverse-*Williams*-rule evidence, and both of whom Hopkins had identified as being similar in appearance to one of the

men she saw upon exiting the store on the evening of October 25 (TV30/2343-47). As it did with Matias, the State argued that the defense was trying to "shift blame" to other "potential suspects" and that Hopkins' purported identification of other individuals was simply not relevant (TV2343-46). The defense countered that the prior *in limine* ruling could not be viewed as taking away "the complete defense that I can't show other suspects" and that the State's case was subject to attack on the basis of "credibility" and "conflicts in evidence" (TV30/2343-49). After a factual proffer from the defense (TV30/2530-61), the court ultimately refused to permit the defense to show Hopkins the photos of either Absalon or Fitzgerald because it was an improper attempt to suggest that they were possible suspects (TV30/2363).

The lower court's refusal to permit the defense from cross-examining Matias and Hopkins with the photographs of Absolon and Fitzgerald was error of a constitutional magnitude. The right to full cross-examination is constitutionally protected, *see Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982), and "the curtailment of a defendant's right to cross-examination of a state witness is a power to be used sparingly." *Salter v. State*, 382 So. 2d 892, 893 (Fla. 4th DCA 1980). The lower court's view that its prior order *in limine* precluded the defense from showing the photographs of Absalon

and Fitzgerald to both Matias and Hopkins failed to contemplate the defense was seeking to cross-examine the accuracy and reliability of their testimony, *not* to "back door" the reverse-*Williams*-rule order.[54] It is axiomatic that "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is true." *United States v. Abel*, 469 U.S. 45, 56 (1984). The photographs of Absalon would unquestionably be admissible to impeach Matias's identification of Mr. McDuffie despite the fact that Absalon's criminal activities, ruled inadmissible as reverse-*Williams*-rule evidence, were ruled inadmissible. Because the lower court's ruling precluded the defense from fully cross-examining Matias and Hopking, the Sixth Amendment right to confrontation was denied. *See Delaware v. Van* Arsdall, 475 U.S. 673, 680 (1986) ("a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in an otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby `to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'" (citation omitted). A new trial is warranted.

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[54]The defense was not seeking to inform the jury of Absalon's and Fitzgerald's

ARGUMENT III–UNCONSTITUTIONAL RESTRICTION ON INTRODUCTION OF DEFENSE EVIDENCE.

Prior to trial, the State moved *in limine* to prevent the defense from presenting evidence which it considered reverse-*Williams*-rule evidence (RV6/969-1006), and the defense responded, acknowledging its intent to rely on and introduce specific instances of conduct by other individuals believed to be suspects in the case, to wit: (1) evidence that Michael Fitzgerald on more than one occasion robbed a business with a firearm to obtain money to support his crack cocaine habit; (2) evidence that Ashley Emanuel worked with Fitzgerald in committing armed robberies with the same *modus operandi* as Fitzgerald; (3) evidence that Carlos Ruiz committed an armed robbery of an individual at the Banco Popular, which is located in the same shopping plaza as the Dollar Store; and (4) evidence that Steve Absalon committed armed robbery at the same Banco Popular (RV6/1008-09).[55] Following a hearing at which both sides presented their proffers (TV28/2076-95), the court precluded

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prior crimes, but simply show their pictures to the witnesses.

[55]Additional matters were also litigated with respect to potential non-reverse-*Williams*-rule evidence, such as Michael Fitzgerald's confession to inmate Kevin Ingram (RV6/1022-25). Following an evidentiary hearing, the trial court granted the State's motion *in limine* on this issue (RV6/1154-56), but, during the defense case-in-chief, reversed itself and, over the State's objection, permitted the defense to present this evidence, ruling that "it's not just a straw man [defense] if you believe the defense motion" (TV42/3681-84; TV43/3702; TV44/3810).

the defense from presenting evidence of the crimes of Fitzgerald, Ruiz, and Absalon,[56] ruling that Mr. McDuffie failed to "meet his burden of proving sufficient similarity" between the Dollar crimes and the crimes of Fitzgerald, Ruiz, and Absalon" (RV6/1156-57).[57] Mr. McDuffie contends that the lower court erred and that its ruling deprived him of his constitutional right to present a defense.

While this Court has allowed the introduction of similar fact evidence by a defendant for exculpatory purposes, *see State v. Savino*, 576 So. 2d 892 (Fla. 1990); *Rivera v. State*, 561 So. 2d 536 (Fla. 1990), it has placed limits on a defendant's ability to introduce such evidence, requiring the defense to establish that there be a "close similarity of facts, a unique or `fingerprint' type of information, for the evidence to be relevant.'" *Savino*, 567 So. 2d at 894. It is

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[56]The court noted that the prior robberies involving Fitzgerald occurred on June 19, 2003, and June 21, 2003, at convenience stores open to the public. In both cases, Fitzgerald displayed a firearm but did not discharge it. Nor did he restrain any victims, but, after making a purchase, took cash from the register and exited the stores. As to Ruiz, the court wrote that he attempted to rob an ATM located in the same shopping plaza as the Dollar Store in the evening hours of August, 2001. He also displayed a firearm but never fired it. Finally, as to Absalon's crimes, the court wrote that Absalon and an accomplice, wearing masks, robbed the Banco Popular in the morning hours of May 28, 2003, while the bank was open for business. A firearm was displayed but never discharged, and Absalon, after the robbery, fled on foot and dropped the cash outside the bank (RV6/1156).

[57]The court also ruled that Mr. McDuffie need not re-proffer the evidence during

these principles that the lower court applied in determining that the proffered reverse-*Williams*-rule evidence was inadmissible.

The lower court's restrictive view of Mr. McDuffie's ability to present a defense violated the Sixth and Fourteenth Amendments. As the Supreme Court has recently reaffirmed, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 2006 U.S. LEXIS 3454 at *11 (U.S. May 1, 2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). This right is "abridged" by state evidentiary rules that "infringe upon a weighty interest of the accused" and are "`arbitrary' or `disproportionate to the purposes they are designed to serve.'" *Holmes* at *11 (quotations omitted). In *Holmes*, the Court found unconstitutional a South Carolina rule that prohibited a defendant from introducing evidence of third-party guilt if the prosecution introduced forensic evidence that, if believed, strongly supported a guilty verdict. The *Holmes* Court did note that rules of evidence do permit trial judges to exclude evidence under certain circumstances, such as when its probative value it outweighed by unfair prejudice, confusion of issues, or

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the defense case in order to preserve the issue (TV28/2089-90).

potential to mislead the jury. *Id*. at *14-*15. Any rule, however, that excludes defense evidence when such rule serves no legitimate purpose or is disproportionate to the end it asserts to promote, is prohibited by the Constitution. *Id*.

The ruling below, relying on this Court's exacting standards for the admissibility of reverse-*Williams*-rule by a criminal defendant, suffers from similar constitutional infirmities as the South Carolina rule condemned in *Holmes* and thus this Court's decisions in *Savino, Rivera*, and their progeny, should be revisited. There is a clear constitutional right for a defendant to present a defense, *see Washington v. Texas*, 388 U.S. 14 (1967), and there is "well-established policy requiring the introduction into evidence of all probative evidence tending to prove a defendant's innocence." *Palazzolo v. State*, 754 So. 2d 731, (Fla. 2d DCA 2000). Moreover, "[i]f there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility." *Vannier v. State*, 714 So. 2d 470, 472 (Fla. 4th DCA 1998). Given the importance of this constitutional right, the requirement that a defendant establish such a high level of similarity between the crime and the proffered reverse-*Williams*-rule evidence is the type of "arbitrary" rule that does not serve "any legitimate interests." *Homes* at *12. Moreover, because Florida courts have

acknowledged that it is "less likely" that prejudice will occur "when evidence of other crimes is sought to be introduced by a defendant," *Palazzolo*, 754 So. 2d at 740 n.5; *Edwards v. State*, 857 So. 2d 911, 913 (Fla. 3d DCA 2003), it is difficult to envision how, under *Holmes*, the Court's exacting standard for admission of reverse-*Williams*-rule evidence can pass constitutional muster and serve any legitimate interest. Because of the recognition that reverse-*Williams*-rule evidence has a "lower potential" for prejudice to the State, and the concomitant constitutional guarantee afforded to a defendant to present a defense, the lower court erred in prohibiting the defense from presenting the proffered evidence and the Court should revisit the area of reverse-*Williams*-rule evidence in light of *Holmes*.

ARGUMENT IV–ERRONEOUS ADMISSION OF IRRELEVANT AND UNDULY PREJUDICIAL STATEMENTS THROUGH THE TESTIMONY OF DAVID PEDERSON.

The State presented the testimony of David Pederson, whose mother and father rented a house to the McDuffies prior to their move to the house where they lived at the time of the incident (TV31/2441). Prior to Pederson's testimony, the State asserted that it intended on having Pederson testify to the contents of a "very threatening" voice mail message left by Mr. McDuffie earlier in the week of the homicides as evidence of his "state of mind . . . with respect to financial matters"

(TV31/2414; 2426-27). The defense objected to Pederson's testimony on relevancy, undue prejudice, best evidence grounds, and that it was inadmissible collateral bad character evidence (TV31/2414; 2431; 2436-37 *et seq.*). After a proffer, the court, despite acknowledging that Mr. McDuffie supposedly said some " pretty nasty stuff" to Pederson, permitted Pederson's testimony *in toto*, including testimony about the contents of the voice mail, ruling that it was probative as to the issue of state of mind (TV31/2437-38).

Before the jury, Pederson, an attorney, testified that he instituted eviction and civil action litigation against the McDuffies in October, 2002, with a complaint filed on October 16 (TV31/2441-44). At some point subsequent to the filing of the complaint, Pederson testified that Mr. McDuffie called and left an "extremely hardcore message" on his voice mail, saying that he hoped Pederson and his father would go to Baltimore and get their "asses shot off" by the sniper (TV31/2446). Mr. McDuffie also said "you can go suck your father's dick, fuck your mother, things along that nature" (*Id*.). He acknowledged on cross-examination that he deleted the voice mail message after a few weeks (TV31/2448).

Under §90.403, Fla. Stat., Pederson's testimony as to what Mr. McDuffie said on the voice mail was irrelevant and unduly prejudicial and Mr. McDuffie was denied a fundamentally fair trial as a result of the court's erroneous admission of this

testimony. §90.403 provides that relevant evidence is admissible if its probative value is substantially outweighed by the danger of unfair prejudice. A trial court is *required* to perform a balancing test in determining whether relevant evidence also is admissible against a defendant at trial, and although the admission of evidence rests within the sound discretion of a court, a court has no discretion to fail to perform the requisite balancing test. *See Steverson v. State*, 695 So. 2d 687, 688 (Fla. 1997); *State v. McClain*, 525 So. 2d 420, 422 (Fla. 1988). *See also Fernandez v. State*, 730 So. 2d 277, 282 (Fla. 1999) (emphasis added) ("A trial judge *must* balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice"). Here, the lower court simply concluded that the evidence was probative without any consideration of the unfair prejudice accruing to Mr. McDuffie by what even the court admitted was "pretty awful stuff" that was in no way relevant to the State's case. Pederson's inflammatory comments, brought up by the State in its closing argument (TV48/4293), constituted irrelevant bad character evidence that deprived Mr. McDuffie of a fundamentally fair trial. *See Old Chief v. United States*, 519 U.S. 172 (1997). A new trial is warranted.

ARGUMENT V–ERRONEOUS ADMISSION OF VOLUMINOUS EVIDENCE OF BAD ACT COLLATERAL CONDUCT WHICH BECAME A FEATURE OF THE CASE.

Based on its theory that the murders were motivated by Mr. McDuffie's purportedly dire financial situation, the State noticed its intention to introduce *Williams*-rule evidence addressing collateral bad acts relating to the financial history of Mr. McDuffie and his wife (RV5/930-35),[58] and the defense sought an order *in limine* to exclude evidence of Mr. McDuffie's financial history (RV4/737), and an order *in limine* to exclude evidence of collateral bad acts through the introduction of Mr. McDuffie's job applications (RV4/757-58). Following a hearing on these matters (RV10/1852 *et. seq*.), the court ruled that the State would be prohibited from presenting evidence that Mr. McDuffie lied or made false statements on job applications, but that it could present evidence of "dire financial condition" such as vehicle repossession, failure to pay rent and other bills, and personal debts and credit problems, because this evidence was relevant to the issue

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[58]The State sought to introduce twelve areas of collateral bad acts regarding Mr. McDuffie: (1) false statement on job application to the Dollar General Store, (2) false items on job resume, (3) false statement on job application to Coca-Cola, (4) false statements on job application to Thyssen Krupp Materials NA, (5) fraudulent entry into U.S. Army based on false statement on documentation, (6) faluse statement on apartment rental application, (7) repossession of motor vehicle for non-payment of premiums, (8) false statement on credit application, (9) failure to pay rent resulting in eviction, (10) leaving "harassing and threatening" voice mail of David Pederson, attorney and son of former landlord Peter Pederson, (11) indebtedness of Mr. McDuffie and his wife, Troy McDuffie, and (12) insolvency

of motive (TV10/1867-68; TV5/950-51). The court warned the State, however, that the financial issues relating to the McDuffies should was "not to be feature of the trial" (TV11/1927).

Despite the court's warning, the issue of Mr. McDuffie's financial condition, and that of his wife, did become a feature of the trial and the closing argument. Numerous witnesses were questioned, many extensively to the issue of the McDuffie's financial condition, including Troy McDuffie (TV37/3125-36; 3164-75; 3173-85); VCSO Investigator Willis (TV39/3332-39); David Pederson (TV31/2441-48); David Sturgis (TV36/2970-98). And because the State was allowed to present this evidence, the defense, in its case, was forced to present its own evidence to challenge the State's financial motive theory through the testimony of numerous witnesses including Regina Prater, Tyrving Perkins, Kim Williams, and, of course, Mr. McDuffie himself (TV43/3753-56; 3779-81; 3788-90; TV44/3813-14; TV45/3982-83; 3986-87; 3991-92; TV46/4092-4115). In the instant case, the collateral bad act evidence became so excessive as to impermissibly transcend any possible relevance.

The Florida Evidence Code sanctions the introduction of evidence of uncharged crimes or bad acts to prove "motive, opportunity, intent, preparation, plan,

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of Mr. McDuffie's wife, Troy McDuffie (RV5/930-35).

knowledge, identity, or absence of mistake or accident." §90.404(2)(a), Fla. Stat. However, to be admissible, these facts must be material to the State's prosecution and are nonetheless subject to exclusion if the danger of unfair prejudice substantially outweighs its probativeness. *See Steverson v. State*, 695 So.2d 687, 688 (Fla. 1997); *Henry v. State*, 574 So.2d 73, 75 (Fla. 1991); §90.403, Fla. Stat.

This exclusionary rule is implicated when the state's collateral offense evidence is so extensive that it becomes a feature of the trial. *E.g., Steverson*; *Henry*. Evidence of collateral crimes or bad acts becomes a feature where it has "so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or propensity to commit crimes." *Bush v. State*, 690 So.2d 670,673 (Fla. 1st DCA 1997); *Snowden v. State*, 537 So.2d 1383, 1385 (Fla. 3rd DCA), *rev. denied*, 540 So.2d 1210 (Fla. 1989). The mere volume of the evidence does not necessarily make it a feature. *Snowden* at 1386. Rather, the question is whether the collateral crimes evidence has transcended the bounds of relevance *See Williams v. State*, 117 So.2d 473, 475-6 (Fla. 1960); *Bush* at 673; *Snowden* at 1385 n.3. Here, the amount of time spent by the State presenting evidence of Mr. McDuffie's job, credit, lease, and rental applications, credit problems, amounts owed to utility companies, etc., more than transcended the bounds of any relevance that it might have had.

The concern with such evidence is that "the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law." *Snowden* at 1384 (quoting *Huddleston v. United States*, 485 U.S. 681, 686 (1988)). Stated differently, evidence of uncharged crimes or bad acts "will frequently prompt a more ready belief by the jury that the defendant might have committed the charged offense, thereby predisposing the mind of the juror to believe the defendant guilty." *Bush* at 673 (citations omitted). It implicates a defendant's right to a fair trial. *See* U.S. Const. amend. XIV.

The prosecutor exacerbated the unfair prejudice of the collateral bad act evidence during closing argument, using it to argue that Mr. McDuffie lied on his job applications in order to "get into the corporate world" (TV48/4291-93; 4294). It is improper for a prosecutor to focus on a defendant's collateral crimes during closing argument, *see State v. Lee*, 531 So.2d 133, 137-8 (Fla. 1988), or argue that a defendant is guilty of the charged offense because of his involvement in prior, uncharged acts or the defendant's bad character. *See, e.g., Consalvo v. State*, 697 So.2d 805, 813 (Fla. 1997). Nonetheless, during closing argument, the prosecutor expertly deployed the *Williams* rule evidence to urge conviction based on bad character, propensity, and moral indignation. Because the State made the collateral

bad act evidence a feature of the trial, Mr. McDuffie was denied a fundamentally fair trial, and relief is warranted.

ARGUMENT VI– INSUFFICIENCY OF THE EVIDENCE.

"In capital cases, this Court has . . . a fundamental obligation to ascertain whether the State has presented sufficient evidence to support a conviction." *Ballard v. State*, 2006 Fla. LEXIS 273 at *18 (Fla. Feb. 23, 2006). "[T]he Due Process Clause protects the accused against conviction 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, 375 (1970). *Accord Jackson v. Virginia*, 443 U.S. 307 (1979). When reviewing the sufficiency of evidence in a circumstantial evidence case such as this one, a special standard of review applies: "[w]here the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *McArthur v. State*, 351 So. 2d 972, 976 n.12 (Fla. 1977). "Suspicions alone cannot satisfy the State's burden of proving guilt beyond a reasonable doubt, and [] expansive inferences required to justify a verdict . . . are indeed improper." *Ballard*, 2006 Fla. LEXIS 273 at *20.

The State's evidence, while "perhaps sufficient to create some suspicion,"

Ballard, 2006 Fla. LEXIS 273 at *22, is not strong enough to support the convictions obtained. The case against Mr. McDuffie was largely, if not entirely, circumstantial, the sole physical evidence being the "partial palm print" purportedly matching Mr. McDuffie found on the duct tape used to bind Dawniell Beauregard. However, in light of the record as a whole, this "partial palm print" was insufficient to sustain the State's burden. *Ballard, supra*; *Jaramillo v. State,* 417 So. 2d 257 (Fla. 1982). Where fingerprints are used to establish identity, "the circumstances must be such that the print could have been made only at the time the crime was committed." *Tirko v. State*, 138 So. 2d 388 (Fla. 3d DCA 1962). Where the State fails to show that the fingerprints could only have been made at the time that the crime was committed, the defendant is entitled to a judgment of acquittal. *Sorey v. State,* 419 So. 2d 810, 812 (Fla. 3d DCA 1982); *State v. Hayes*, 333 So. 2d 51, 54 (Fla. 4th DCA 1976).

By all accounts, including that of lead investigator Willis, the only physical evidence tying Mr. McDuffie to the murders was his partial palm print found on a piece of the duct tape used to bind Beauregard's wrists (TV39/3357). Although Beauregard was bound by her feet, mouth, and wrists, the tape on her mouth and feet contained no latent prints of any value (TV39/3379-82; 3397-98). FDLE lab analyst Perry testified that a "partial palm print" (less then 1/3 of the palm) from a

"piece" of duct tape that had been originally submitted as a "wad" of tape ("It was just one roll that was continuously rolled") was developed (TV39/3382-83; 3397-99). Perry opined that the latent on the piece of duct tape, labeled sample Q3 by the lab, matched the right 1/3 of Mr. McDuffie's right palm (TV39/3391).

The "wad" of tape was still unseparated when it was submitted to Perry, and he did not know where in the unseparated "wad" of tape the part that contained Mr. McDuffie's "palm print" appeared (TV40/3401). He had no idea how a partial palm print could be present yet no fingerprints as well, nor did he have any idea how only one palm print could be present yet no other palm prints as well (TV40/3402-03). He had no idea how long the palm print existed on the tape (TV40/3403). He acknowledged that it was possible to transfer a print from one place with adhesive to another and that, in this case, he had to separate the "wad" of duct tape by "pulling apart" the various pieces from the wad (TV40/3404; 3408). The piece of tape he received was 1' 4" long and he did not remember if it was cut at different angles or just wadded together, it was just one piece of tape (TV40/3407). In his deposition, however, he stated that the tape appeared "like it had been cut at different angles and just wadded together" (TV40/3407), and he ultimately admitted that the tape from Beauregard's wrists actually comprised of 15 pieces of tape wadded together (TV40/3409). After Perry conducted his

examination, he turned over the tape to Martha Strawser of the FDLE (TV40/3411).

Stawser opined that the tape used to bind Beauregard's mouth (sample Q2) was consistent with the same tape sold at Dollar (TV40/3466-70).[59] Q2 was a single 10 ½ long piece of tape (TV40/3470); neither end of the Q2 sample was consistent with the manufactured "ends" of the standard tape roll (TV40/3470). She was not able to physically match either end of the Q2 sample with either end of either Q1 (the tape used to bind Beauregard's feet),[60] or Q3 (the tape used to bind Beauregard's wrists) (TV40/3470-71). Nor was she able to reconstruct 3 of the 5

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[59]During his testimony, Mr. McDuffie explained that while he was cleaning up the store before closing, a lady came in and said that someone was supposed to be saving some boxes for her; Mr. McDuffie asked Dawniell, who said that she had stacked the boxes up in the back room for the lady (TV45/4018). Because he had just moved himself, Mr. McDuffie showed the lady how to put the boxes together with a roll of duct tape that Dawniell gave him (TV45/4019-20). Mr. McDuffie tore of pieces of the tape and hung them on the neck of a bottle of bleach that Dawniell had been using to clean the back room (TV45/4019-21). This testimony provides a "reasonable explanation" for how Mr. McDuffie's "partial palm print" could have been located on the tape. *See Davis v. State*, 90 So. 2d 629, 631-32 (Fla. 1956) ("Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence").

[60]The Q1 tape sample was submitted to Strawser already in a cut condition, and actually consisted of 5 pieces of tape, "one on top of the other, overlaid on top of each other" (TV40/3473-74).

pieces comprising the Q1 sample, that is, 2 of the 5 pieces submitted as Q1 were not amenable to being reconstructed into one continuous piece of tape (TV40/3476-77). None of the five pieces of tape comprising Q1 had characteristic edges detected on the sample roll (TV40/3477), nor was there any correspondence between the fractured ends of Q1, Q2, or Q3 (TV40/3478).

The critical Q3 sample was submitted to Strawser in 2 overlapped pieces of duct tape which had been previously separated by David Perry (TV40/3479-80). After separation, Q3 comprised 15 individual pieces of tape, labeled Q3A through Q3O, which, in total, measured 79 inches (TV40/3481; 3496). Acknowledging that reconstructing the pieces of tape was like a "jigsaw puzzle," Strawser was able to only reconstruct 12 of the 15 pieces that comprised Q3 (12 of the 15 pieces made one continuous piece of tape, and the remaining 3 pieces made another piece) (TV40/3482-94). Piece Q3B, which is where Mr. McDuffie's partial palm print was discovered, was located 30 inches into the piece from one end, and 14 3/4 inch from the other end of the piece (TV40/3497). None of the fractured ends of Q3 was consistent with the start of a roll of tape (TV40/3498). The total amount of the tape from all three Q samples was 139 3/4 inches (TV40/3501).

On cross-examination, Strawser again acknowledged the difficulty in reconstructing where the various pieces of tape were located in the entire amount

of tape submitted for analysis because of the "missing pieces" of tape (TV41/3510-11). She had "no idea" where the missing pieces of tape were (TV41/3519). Some of the pieces of tape submitted to her were cut, some were torn, and some had folded ends (TV41/3511-16). It was also possible that more than one roll of tape was used, she could not say how many were used (TV41/3518).

Mr. McDuffie submits that his convictions, particularly capital murder convictions, should not be based on a single piece of evidence that even law enforcement acknowledged was like a "jigsaw puzzle." There were "no eyewitnesses to the crime, its preparation, its execution, or its aftermath." *Ballard*, 2006 Fla. LEXIS 273 at *27. Because the State failed to prove the identify of the murderer and the perpetrator responsible for the robbery and false imprisonment, Mr. McDuffie submits that all of his convictions be vacated at this time.

ARGUMENT VII--ERROR IN FINDING THE "HAC" AGGRAVATING CIRCUMSTANCE TO BOTH MURDERS.

A. Introduction.

Because the facts as found by the lower court do not substantiate the finding of the "especially heinous, atrocious, or cruel" [HAC] aggravating circumstance as to both the murder of Dawniell Beauregard and that of Janice Schneider, this Court must strike the finding of HAC as to each murder. "When evaluating claims

alleging error in the application of aggravating factors, this Court does not reweigh the evidence to determine whether the State proved each factor beyond a reasonable doubt." *Diaz v. State*, 860 So. 2d 960, 965 (Fla. 2003). Rather, the Court "must determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *Id* (quotations and citations omitted). *Accord Jackson v. Virginia*, 443 U.S. 307 (1979).

In concluding that the HAC aggravator was established by the State as to the murder of Dawniell Beauregard, the lower court cited no legal authority but made the following findings:

> During the course of the armed robbery, Dawniell J. Beauregard was bound, her throat was cut, and then she was shot in the head at point blank or at close range. Her mouth was taped in such a manner that she was unable to make more than a muffled sound (see State 99 and 162). She was alive when her throat was cut. The top neck wound was superficial, but the bottom wound cut through muscle (see State 99 and 100). The wounds were not immediately fatal and were extremely painful. Suffering from the taping and cutting, she would have known that her death was imminent. She would have experienced extreme pain, terror, and mental anguish prior to the fatal gunshot wound.
>
> The details of this crime, including the duct taping, throat slicing, and execution of both victims at close range, constituted more than a shooting during a robbery. Dawniell J. Beauregard was slaughtered (see State 96 and 97). The crime was heinous, atrocious, and cruel. Further, it was conscienceless, pitiless, and unnecessarily torturous.

(RV7/1309). With respect to the murder of Janice Schneider, the lower court, again citing no legal authority, made the following findings:

> During the course of the armed robbery, Janice Schneider had her throat and face sliced multiple times (see State 166). She was shot in the right flank (see State 116). She was shot in the head at point blank or close range. She was alive during the time her face was throat were sliced and would have felt extreme pain. The gunshot to her side was not immediately fatal but, having passed through her aorta and liver, would have killed her in a period of fifteen to twenty minutes. The medical examiner found the slicing occurred first, followed by the shot to the flank, and finally the gunshot to the head. The latter probably brought immediate unconsciousness and death within minutes. Janice must have seen Dawniell Beauregard bound up with duct tape. She must have experienced extreme pain and terrible mental anguish knowing she and Dawniell were going to die.
>
> The details of this crime constituted more than just a shooting during a robbery. The evidence showed a terrible slicing to the face and neck with a sharp object, the gunshot wound to the body, and the final close range shot to the head. Janice Schneider and Dawniell Beauregard were slaughtered (see State 96 and 97). The crime was heinous, atrocious, and cruel. Further, it was conscienceless, pitiless, and unnecessarily torturous.

(RV7/1320).

B. Many of the Lower Court's "Findings" Not Supported by Competent and Substantial Evidence and are Based on Speculation.

Many of the "findings" by the lower court are not supported by competent and substantial evidence, are based on speculation, and are therefore due no deference by this Court when evaluating whether the lower court's findings that the murders

were HAC should be upheld. First, the findings that both victims suffered from "extreme pain" due to the pre-gunshot wound injuries are not supported by the record. The closest and only record evidence on this point is derived from the testimony of Dr. Beaver, the medical examiner, at the penalty phase, where he testified only that the wounds to Schneider and Beauregard "would be painful" (TV50/4510-11) (emphasis added).[61] Dr. Beaver never opined that the pre-gunshot wounds to both victims would have caused, or did cause, "extreme pain." The addition of the qualifier "extreme" by the trial court, critical to the proper assessment of whether the murders were "especially" HAC, is without basis in the record and must be rejected by this Court. *Diaz*, *supra* at 967 (trial court's characterization of testimony not supported by competent and substantial evidence). Most, if not all, murders would be "painful" to some degree. However, in order for HAC to apply, there must be evidence, beyond a reasonable doubt, that the murder was "accompanied by additional acts as to set the crime apart from the norm of capital felonies," was "unnecessarily torturous to the victim," and was "deliberately and extremely painful." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973);

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[61]Dr. Beaver briefly touched on this issue during his guilt phase testimony, but he also simply agreed that the neck injuries to Dawniell "would cause pain" (TV36/3047.

Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). The trial court's attempt to buttress Beaver's testimony by finding that the wounds were "extremely painful" as opposed to merely "causing pain," is simply not supported by the record and is unsubstantiated speculation. As this Court has explained, the existence of an aggravating circumstances may not be based on speculation. *Hamilton v. State*, 547 So. 2d 630, 633-34 (Fla. 1989).

Next, the trial court "found" that Dawnielle's "throat was cut," that she was "alive" when this occurred, and that she was "slaughtered." All of these findings overstate and/or mischaracterize Beaver's testimony. As to Dawnielle's throat being "cut" and his characterization of her murder as a "slaughter," the trial court's order appears to suggest that she was practically decapitated. However, no testimony supports such an exaggerated description. In describing the neck injuries to both victims, Beaver testified at the penalty phase that "the wounds weren't deep enough to cut any vital structures" and "would not result in immediate death" (TV50/4510). He provided more detail during his guilt phase testimony, where he explained that Dawniell's injuries were "very superficial, more like a scratch than anything else" (TV36/3017). There was another area comprising a "series of incised wounds" which formed a larger wound on the neck which went through muscle tissue but not "through the jugular vein or cartoid

artery or any of the major neurovascular structures. So these wounds are not fatal wounds. They will bleed a lot, but they won't be fatal" (*Id*.). Because the vessels in the neck area are more "superficial" than in other parts of the body, "they're more easily damaged" and would bleed "quite profusely" (TV36/3018-20). Simply because the wounds would "bleed profusely," however, does not transform Dawniell's murder into a "slaughter."

The finding that Dawniell was "alive" when her throat was cut is also bereft of competent and substantial record support. While Beaver did opine that the neck injuries were inflicted before the immediately-fatal gunshot wound to the head, he was unable to express a definitive opinion as to whether she was alive and conscious at the time (TV36/3022-23); at best he was able to opine that Dawniell "had a blood pressure" when the neck wounds were inflicted; however, he was not able to opine that she was conscious at the time. In light of this testimony, the trial court's "finding" that Dawniell was "alive" far overstates the qualified nature of Beaver's testimony on this important point.

The finding that Dawniell suffered from mental anguish, terror, and knew that her death was imminent is also not supported by competent and substantial evidence. While, as noted above, Beaver opined that the neck wounds preceded the gunshot wound, he was *unable* to speculate how long an interval there was

between the infliction of the neck wounds and the fatal gunshot wound to her head. *See* TV36/3046 ("I don't offer an opinion as to the length of time between the injuries to the neck and the gunshot wound to the head"). Indeed, he acknowledged that one "could construct a hypothetical where they did occur simultaneously, that's possible" (*Id*.). At the penalty phase, while Beaver opined that there was "some interval" between the neck wounds and the gunshot wounds as to both victims, he ultimately conceded that the interval "could be seconds" (TV50/4511-12).[62] Moreover, and critically, the gunshot wound which proved fatal to Dawniell was a close-range shot through the back of her head (TV36/3025-26), thus debunking any theory that she was aware that she was about to be shot.

Several important "findings" regarding Janice's death also are not supported by competent and substantial evidence. First, the court found, as it did with Dawniell, that Janice was alive at the time of her neck injuries and must have experienced terror of impending death because of the sequence of injuries, that is, first the neck wounds, then the abdominal gunshot wound, and finally the gunshot wound to the head. The implication that Janice's death was an unnecessarily prolonged one, however, is bereft of competent record support. Beaver testified that Janice's neck

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[62]There was no evidence whatsoever presented as to the existence of defensive

injuries were "very superficial" in a "relatively small area" and "all came about the same time" (TV36/3077). He acknowledged that all the wounds–the neck wounds, the abdominal gunshot wound, and the head wound–occurred "in a short temporal time frame with each other" (TV36/3080). And while the trial court found that the abdominal wound "would have killed" Janice within fifteen to twenty minutes, this is a complete mischaracterization of Beaver's testimony: Beaver testified that he could not provide "an exact" time but rather a range from "*between 10 to 15 seconds* and 30 minutes" (TV36/3086) (emphasis added). She also would have gone into shock from the abdominal gunshot "almost immediately" (TV36/3085). This testimony hardly supports the trial court's definitive statement on the nature of Janice's abdominal wound and furthermore does not meet the exacting standards for HAC. *See Knight v. State*, 746 So. 2d 423, 435 (Fla. 1998) ("While the trial court's speculation as to what took place may well have occurred, there simply is no evidence in the record to fill in the void in the tragic episode or to rule out other possible scenarios"). Moreover, the gunshot wound to Janice's head did not have an entrance wound from the front, which would give rise to an inference that she knew she was about to be killed; rather, the gunshot to the head entered from the right side of her head (TV36/3065-66).

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wounds on either victim.

C. HAC Does Not Apply to Either Murder.

The lower court erred in finding HAC as to both of the murders. Both victims died from a single gunshot wound to the head which resulted in immediate loss of consciousness, ability to feel pain, and death (TV36/3040-41, 3050, 3081, 3086; TV50/4512). This Court has "consistently held that instantaneous or near instantaneous deaths by gunshot, unaccompanied by additional acts to mentally or physically torture the victim, are not especially heinous, atrocious, or cruel." *Diaz*, *supra* at 967. *Accord Rimmer v. State*, 825 So. 2d 304, 327-28 (Fla. 2002); *Donaldson v. State*, 722 So. 2d 177, 186-87 (Fla. 1998); *Ferrell v. State*, 686 So. 2d 1324, 1330 (Fla. 1996); *Robinson v. State*, 574 So. 2d 108, 112 (Fla. 1991). In other words, "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not [especially] heinous, atrocious, or cruel." *Lewis v. State*, 398 So. 2d 423, 438 (Fla. 1981).

As noted above, many of the trial court's "findings" about the pre-gunshot wound injuries are speculative and simply not supported by competent and substantial evidence. But even accepting the court's findings, HAC was still inappropriately found as to both murders because of a lack of evidence to establish, beyond a reasonable doubt, that the killings were accompanied by additional acts

to mentally or physically torture the victims or that the victims suffered "substantial mental anguish." *Hutchinson v. State*, 882 So. 2d 942, 958 (Fla. 2004). Where this Court has found HAC in gunshot wound cases where the victim's death was almost instantaneous, it has also found that the record supported additional facts evincing extreme depravity, torture, or prolonged suffering due to acts occurring before the fatal gunshot wound(s). *See Banks v. State*, 700 So. 2d 363, 366-67 (Fla. 1997) (HAC upheld in shooting case because prior to being shot, 10-year old victim was sexually battered for 20 minutes, her anus was dilated and torn as the result of penetration, and victim had appellant's blood under her fingernails); *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988) (HAC upheld where victim was abducted and sexually abused before being shot 9 times, "most of [the shots] directed at the torso and extremeties"); *Lightbourne v. State*, 438 So. 2d 380, 391 (Fla. 1983) (HAC upheld where, before being shot, victim was sexually battered both orally and anally as "she begged [the defendant] not to kill her"); *Routley v. State*, 440 So. 2d 1257, 1264 (Fla. 1983) (HAC upheld where, before being shot, victim was bound and gagged in his home, carried out of the house by the defendant, thrown in the trunk of a car, tried to escape by disconnecting the back lights of the car, and taken to an isolated area); *Griffin v. State*, 414 So. 2d 1025, 1029 (Fla. 1982) (HAC upheld were, before being shot,

victim was abducted from store and shot several times over his pleas for mercy); *Parker v. State*, 476 So. 2d 134, 139 (Fla. 1985) (HAC upheld where, before being shot, victim was told by defendants they were going to kill her so she could not identify them, forcibly removed from car with such force that "large chunks of her hair were torn out by the roots," stabbed in the stomach and then shot after she had fallen to ground in a kneeling position); *Hutchinson, supra* at 958-59 (HAC upheld where, before being fatally shot, 9-year-old victim saw the bodies of his mother, sister, and brother in blood-spattered bedroom, heard the gunshots that killed his family, had defensive wounds, and, after being initially shot, attempted to escape); *Chavez v. State*, 832 So. 2d 730, 765 (Fla. 2002) (HAC upheld were, before being fatally shot, child victim was abducted, sexually abused, held captive and driven to several locations over the course of 3 ½ hours, and defendant played "mind games" with victim during this prolonged period of abduction); *Henyard v. State*, 689 So. 2d 239, 254 (Fla. 1996) (HAC upheld where, before being fatally shot, two children saw their mother shot and raped, were screaming for their "mommy" and were taken out of car, brought to another location, and then executed while pleading and sobbing); *Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001) (HAC upheld where, before being fatally shot, victim was rounded up and confined in a walk-in freezer with co-workers while store being robbed, was upset and had to be calmed

by co-workers, had hands tied behind her back and conscious as two co-workers were shot in the chest and jaw); *Lynch v. State*, 841 So. 2d 362 (Fla. 2003) (HAC upheld where, before being shot, 13-year-old victim was held hostage at gunpoint for 30-40 minutes while awaiting arrival of her mother, and when mother arrived, defendant shot mother in front of victim numerous times); *Hertz v. State*, 803 So. 2d 629, 651 (Fla. 2001) (HAC upheld were, before being shot, victims were held at gunpoint for over 2 hours, bound and taped while face down on bed, and were aware that co-defendants were pouring gasoline, lighter fluid, and terpentine throughout dwelling).

A comparison of the afore-cited cases establishes that the circumstances of both of the murders here, while unquestionably tragic, do not rise to the level needed to establish that they were "especially" HAC. *See Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994); *Bonifay v. State*, 626 So. 2d 1310, 1311 (Fla. 1993); *Kearse v. State*, 662 So. 2d 677, 686 (Fla. 1995); *McKinney v. State*, 579 So. 2d 80 (Fla. 1991); *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla. 1983).

Because the lower court erred in finding that both murders were especially HAC, error occurred and Mr. McDuffie is entitled to a jury resentencing, particularly because of (1) the "significant weight that has historically been accorded to the HAC aggravator" by juries, *Perez v. State*, 919 So. 2d 347 (Fla. 2005), (2) where,

as here, the jury was permitted to weigh the "CCP" aggravator that the trial court ultimately concluded had not been established (RV7/1309-10, 1319-21), (3) the remaining aggravators are the contemporaneous murder conviction and the "during the course of a robbery," (4) the wealth of mitigation that was presented to the jury, and (5) the absence of any significant violent criminal history on Mr. McDuffie's part. Moreover, the State highlighted HAC during closing argument, even contending that it was the "most disturbing" of all of the aggravators in this case (TV52/4691). Because the State cannot establish that the trial court's finding of HAC was harmless beyond a reasonable doubt, jury resentencing is required under the Eighth Amendment. *See, e.g. Clemons v. Mississippi*, 494 U.S. 738 (1990). Relief is warranted.

ARGUMENT VIII--IMPROPER BURDEN SHIFTING

The defense moved to declare Florida's capital sentencing statute and the standard jury instructions unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the statute and the instructions unconstitutionally shift the burden of proof to the defendant to establish mitigating factors and to show that mitigation factors outweigh aggravating circumstances (RV2/383-96). Following a hearing, the trial court denied relief (RV5/948; RV11/1873-99). The lower court erred in denying Mr. McDuffie's constitutional challenges.

§921.141 (2), Fla. Stat. (2001), unquestionably provides that the advisory jury, after first determining whether sufficient aggravating circumstances exist, is to then determine "[w]hether sufficient mitigating circumstances exist *which outweigh the aggravating circumstances found to exist.*" The standard jury instructions provide similar language (RV2/384), and Mr. McDuffie's jury was instructed accordingly (RV52/4706-07, 4709). The statutory and instructional language, however, create an unconstitutional presumption that death is appropriate and that it is the defendant's obligation to rebut the presumption by demonstrating that "sufficient mitigation" outweighs the aggravation in violation of the Constitution. *See Francis v. Franklin*, 471 U.S. 307, 312 (1985); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975); *In re Winship*, 397 U.S. 358, 363-64 (1970). *Accord Schoenwetter v. State*, 2006 Fla. LEXIS 668 at *50-*51 (Fla. Apr. 27, 2006) (Anstead, J., dissenting). Mr. McDuffie's death sentences should therefore be vacated and remanded for a penalty phase before a properly-instructed jury.

ARGUMENT IX– JURY IMPROPERLY GIVEN AN AGGRAVATING CIRCUMSTANCE LATER FOUND INAPPLICABLE.

During the penalty phase charge conference, extensive argument occurred with respect to whether the jury should be instructed on, and whether the State could

argue the "cold, calculated, and premeditated" (CCP) and witness elimination aggravators (TV50/4524 *et. seq*.). Over defense objection, the court ruled that the jury would not be instructed on witness elimination, but could consider CCP (TV50/4546). The State then emphasized CCP to the jury and asked it to give it "great, great weight" (TV52/4690-91), and the court instructed the jury on CCP (TV52/4708-09). In sentencing Mr. McDuffie, however, the court explicitly rejected CCP as to both murders (RV7/1309-10; 1319-21).

Because the jury was permitted to consider an aggravator that the court later concluded was not applicable, its recommendation is tainted by Eighth Amendment error because an extra "thumb" was placed on the death side of the scale and this Court "may not assume it would have made no difference . . ." in the jury's recommendation. *Stringer v. Black*, 503 U.S. 222, 232 (1992).[63] *Accord Clemons v. Mississippi*, 494 U.S. 738 (1990). Because this extra "thumb" was placed on death's side of the scale, and in light of the mitigation that was presented, this error cannot be harmless beyond a reasonable doubt, Mr. McDuffie did not receive an individualized sentencing, and relief in the form of a new jury

[63]Unfortunately, this Court lacks the benefit of knowing the extent to which the jury relied on or even found the CCP factor due to repeated defense requests for a special verdict form at the penalty phase which were denied by the court

sentencing is warranted.

ARGUMENT X--FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE RIGHT TO JURY TRIAL UNDER THE SIXTH AMENDMENT.

Pursuant to *Ring v. Arizona,* 536 U.S. 584 (2002), Mr. McDuffie moved to declare Florida's capital sentencing scheme unconstitutional (RV2/326; R3/450; R5/858). The lower court denied all capital motions (R5/948). Although Mr. McDuffie acknowledges that this Court has upheld the constitutionality of Florida's capital statute following *Ring, see Lawrence v. State*, 846 So. 2d 440, 451 (Fla.), *cert. denied*, 540 U.S. 952 (2003); *Butler v. State*, 842 So. 2d 817, 834 (Fla. 2003), he respectfully raises this argument herein for preservation purposes. *See Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000). He further submits that because Florida's capital sentencing statute violates *Ring* and the Sixth Amendment, the death sentences herein should be vacated.

CONCLUSION

Based on the foregoing arguments, Mr. McDuffie requests that the Court grant a new trial, a new penalty phase, vacate the convictions and/or death sentences, and grant any other relief as deemed just and proper at this time.

(TV50/4520-21; RV2/279; RV5/948).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief was furnished by U.S. Mail to Barbara Davis, Assistant Attorney General, 444 Seabreeze Blvd, Suite 500, Daytona Beach, FL, 32118, on this 24th day of May, 2006.

CERTIFICATE OF TYPE SIZE AND FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font, a font that is not proportionately spaced.