IN THE SUPREME COURT OF FLORIDA

NEIL K. SALAZAR,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC06-1381
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court
Of Nineteenth the Judicial Circuit
In and For Okeechobee County, Florida

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STATEMENT OF THE CASE AND FACTS

An indictment charged Neil K. Salazar, appellant, and Julius Hatcher with first degree murder of Evelyn Nutter, attempted first degree murder of Ronze Cummings, armed burglary of a dwelling, and auto theft. R1 14-15. The charges against Hatcher were severed, and he was not tried until after appellant. A jury convicted appellant of all four offenses, R4 609-11, and unanimously recommended a death sentence for the murder. R4 612. The court entered judgment and imposed a death sentence for the murder and sentences of life imprisonment for attempted murder and burglary, and a sentence of five years of imprisonment for auto theft. R4 664-70. Defense counsel Russell Akins filed a notice of appeal to the Fourth District Court of Appeal, R4 675,[1] and that court transferred the case to this Court. R4 685.

A. The state's case was that Shirleen Baker drove appellant and Julius Hatcher to the home of Evelyn Nutter and Ronze Cummings. Baker (who did not testify, although her deposition is in the appellate record) was the girlfriend of Fred Cummings. Ronze Cummings and Hatcher were both cousins of, and were close to, Fred Cummings, but they testified that they did not recognize each other and had not seen each other since childhood.

[1] Appellant filed a pro se notice of appeal correctly stating that the appeal was to this Court. R4 681.

Appellant had Hatcher bind Nutter and Ronze Cummings (hereafter "Cummings") with duct tape and put plastic bags over their heads. He then had Hatcher shoot them. Cummings survived but Nutter did not.

Around 12:30 a.m., June 27, 2000, Deputies Chapman and Gonzalez received a report of a driveby shooting at a farm near Fort Drum. R13 1318, 1345. It took them 18-23 minutes to get there. R13 1320. They encountered Cummings in a pickup truck at a gate and he led them along a dirt road, eventually stopping at his house. R13 1337. When he got out, he had blood on his shirt, a plastic bag wrapped around his neck, and tape around his wrists. R13 1338. He reached in the truck, grabbed a small child and a six-pack of beer. Id. He was shaken up, tense, nervous, scared, and said, "They shot my wife, they killed my wife, she's in the back." R13 1321. He said they shot him up under the chin, and blood was pouring everywhere from the chin to mouth. R13 1324. He went in to show Gonzalez Nutter's body, then he spoke with Chapman at a picnic table. R13 1330-31. He said it was three or four Jamaicans and a man named Neil, whom he had worked with at Smurfeit Recycling. R13 1344-45, 1332. Chapman continued to ask for Neil's last name, but Cummings did not give it. R13 1335. EMS arrived, and the officers questioned Cummings in the ambulance. R13 1333. A paramedic treating Cummings in the ambulance heard him tell the deputies that

he knew the guy who shot him, and that he was from Fort Lauderdale and had stolen his wife's car. R13 1356.

A crime scene officer testified that Nutter was on her back, her hands bound behind her back with duct tape, a Wal-Mart bag around her head held by duct tape around her neck, with condensation on the inside of the bag, and one of her ankles had duct tape wrapped around it. R14 1388. Above her on the wall was what appeared to be a bloody handprint. R14 1389. The officer did not think the duct tape was dusted for prints. R14 1392. By Nutter's head was a pillow with a bullet hole in it and there was a knife in the room. R14 1409.

Cummings testified he and appellant had worked together at Smurfeit Recycling in Fort Lauderdale. R14 1457. At the time of the murder, Cummings was foreman at an orange grove. R14 1459. Appellant, a woman and a child came to live with him for several weeks in 2000, then Cummings had them move out. R14 1461-62.

On the night in question, Cummings left his older son in the field riding on a tractor, and was sitting watching television in the living room with Nutter and their two-year-old son. R14 1463-64. The dogs began barking outside around 10 p.m. and Cummings, who was still sitting, saw a hand go up over the light bulb at the back door and twist the bulb out. R14 1464, 1498. The door popped open and he saw appellant with a machine gun.

R14 1465-66. With him was another man, who Cummings later learned was Julius Hatcher. R14 1466-67. He did not recognize Hatcher as a distant cousin he had not seen since childhood. R14 1467. Appellant was just standing pointing the gun and said he wanted answers, something about his operation was falling apart; he was talking to Nutter. R14 1468. He said, "Jenny know what I'm talking about, she know why I'm down here." R14 1469. She said she didn't know what he was talking about, and they were talking back and forth and he said, "before I leave tonight, somebody die tonight." She said she didn't know what he was talking about. R14 1472. He told Cummings, "you a good man, you work too much, you don't pay attention to what going on in your home." R14 1473.

They talked about 15 or 20 minutes, then he made them get on the floor. Id. The two-year-old was beside them. R14 1473-74. Appellant told the other guy to get some bags from under the kitchen cabinet and get a knife out of the drawer. R14 1474. They kept bags under the counter when appellant was living with them. Id. Hatcher bound their legs and wrists with duct tape and put plastic bags around their heads with tape around the neck while appellant stood with the gun. R14 1475-76. Hatcher pinched a hole in the bag so Cummings could breathe, and said, "Ron, don't worry about it, I'm going to do your girlfriend the same way, I'm going to punch a hole in her bag where she can

breathe." R14 1476. He dragged Nutter and Cummings to separate rooms. R14 1477-78.

Hatcher came in the room with the knife and told him to play dead, and Cummings said "For what? You're going to kill us anyway." R14 1478. Appellant told Hatcher to cut his throat, but Hatcher said, "No, you must be crazy," and "If you want his throat cut, you cut it," and threw the knife in the bathroom. R14 1479. At some point Hatcher went in the room with Nutter and Cummings heard a gunshot and a body hit the wall. R14 1480-81. Cummings was standing up trying to rip the duct tape off his wrist, and he turned and saw Hatcher in the doorway with appellant behind him. R14 1480. Cummings looked down at his son, and somebody came up from behind and kicked him in the back and knocked him on the floor. Id. The person grabbed a pillow off the bed and put it to his head and pushed the gun down in the pillow where he could feel the end touching his scalp. R14 1480.

Hatcher shot him and Cummings stood up and started shaking, and Hatcher knocked him back down on the floor, grabbed the pillow again, put it to his head, then shot another round, and Cummings stood right back up and started shaking and looked down at his son on the floor, and a voice came to him and said to fall on the floor and play dead. R14 1481-82.

Hatcher and appellant went outside. R14 1482-83. Cummings picked his son up and went and checked on Nutter, who was dead, then sat in a living room chair and looked out the curtain and saw appellant, Hatcher, and Shirleen Baker talking in the yard. R14 1483-84. Hatcher hot-wired Nutter's white Buick,[2] and appellant and Baker left in the car they had arrived in. R14 1482-84. When they left, he saw the phone line was cut[3] and picked his son up and ran down to the office to call 911. Id.[4] He returned to the office in his truck to notify Nutter's parents and then he met the officers at the gate. R14 1485.

Cummings said he knew appellant's full name at the time, but he gave the police only the name Neil. R14 1487. He also gave Det. Brock only the first name at the hospital and again when interviewed at the station after spending five days in the hospital. R14 1487-88, 1509-10. He explained: "I wasn't hiding

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[2] Apparently he referred to a white Pontiac later recovered in Hollywood. R16 1627; R17 1820-21.

[3] He insisted at trial that the phone line was cut, R15 1567, but a crime scene officer found that the phone jack was unplugged rather than cut. R14 1383.

[4] He testified at trial that he told the dispatcher, "There are three or four Jamaican males that just came in, shot me, and killed my wife." R14 1504. But then he testified that he told the dispatcher that there were two males and a female and the first one through the door was Neil, but he could not explain why this statement was not in the transcript of the 911 tape. R14 1504-05. He then said he told 911 there were three or four Jamaican males at his house and did not give the name Neil. R14 1505-06.

his last name, they ain't ask me for his last name, I just said Neil." R14 1511. He knew that his cousin Fred Cummings and appellant were running together, but did not mention that to the police. R14 1512. He did not tell them that when appellant came to live with him, Fred had come with him. R14 1513. He did not mention Fred because he thought Fred might be involved in the shooting. R14 1514. At the station, he remembered he had a videotape of when he and Neil and others had gone to the beach, and gave officers the tape. R14 1489.

Cummings had four felony convictions. R14 14907. He said when the police arrived they did not ask for Neil's last name. R15 1546-47. Although he testified he did not know that night that the people came from Miami, he told Nutter that night, "Girl, let me tell you something, these people ain't come way from Miami this time of night to play cops and robbers." R15 1542-43. He testified that he told 911 that the persons came from Miami, but admitted that that statement was not in the 911 transcript. R15 1544-45.

He denied telling 911 that a few, three or four persons came in the house, but admitted the 911 transcript showed he said there were quite a few of them, three or four of them, about four of them. R15 1511. He testified on direct that appellant directed Hatcher to where the bags and knives were in the kitchen, R14 1474, but at deposition he said it appeared by the

way Hatcher went in there looking at knives that he knew right where he was going, and he said on cross that Hatcher acted like he lived there. R15 1558.

He testified that he could see what was going on through the bag on his head, and the bag did not obscure his vision and his eyes were not taped, R14 1478-79, R15 1559, but in the transcript of his statement to Det. Brock he said there was tape across his eyes. R15 1560. He said the transcript was correct except for the part about his eyes. R15 1563. At deposition he said that once the bag went over his head he couldn't see anything, but then testified on cross that that was after Hatcher "put the second bag over our head." R15 1564.

He told Det. Brock that a third person came in the house and then backed out. R15 1552.

He said he and his cousin Fred visited each other quite often. R15 1565. He would go down to visit Fred every month, but he never saw Hatcher. R15 1565-66.[5]

The medical examiner testified that duct tape had been put over Nutter's mouth and eyes before the bag was put over her head. R15 1593. The tape covering her mouth was very close to the nose, but the nostrils were exposed. Id. The tape on top of the bag covered her nose and was wrapped very tight. R15

[5] Hatcher was "tight" with Fred and the two hung out together. R16 1678-79 (testimony of Hatcher). They were "pretty close" and saw each other almost every weekend. R16 1727.

1593-94. The tape on her body was very tight. R15 1595. Her hands were significantly darker than the rest of her skin, indicating a tourniquet effect. R15 1597. Her face had a very dusky color and a mottled blue discoloration termed cyanosis, indicating poor respiration, and there was edema fluid from the lungs under her nose. R15 1600-01. She had been shot in the jaw and the bullet had hit the base of the skull probably causing immediate unconsciousness. R15 1604-05. Even if she had not died from the gunshot, she would have died from asphyxiation. R15 1607-08.

A firearms examiner said two bullets taken from Cummings were fired from the same gun, but he could not tell if the bullet taken from Nutter was from the same gun, although he could say it was fired from a similar type of gun. R16 1640-41, 1643-44.

Julius Hatcher testified that around 1:30 or 2 p.m. on June 26 he went to his cousin Fred Cummings' house in Miami and appellant let him in and told him he had something to show him under a bed upstairs. R16 1675-76.[6] He looked under the bed upstairs and saw nothing, and when he got up appellant had a gun on him. R16 1676. Appellant taped his arms and legs, threaten-

[6] Hatcher's account of the events before he arrived in Okeechobee were brought out by the defense on cross-examination with the apparent purpose of showing that his testimony was unbelievable.

ing him and accusing him of being a snitch who was planning to turn him in to the FBI. R16 1676-77. Appellant told Hatcher he was too clean and had to do something for him. R16 1677. Appellant was paranoid about everybody and would spend a lot of time bragging about what he did with drugs and how much money he had. R16 1677-78. Appellant shoved Hatcher's head under the bed where he remained for several hours. R16 1678.

Fred and Shirleen Green came home, but Fred did nothing to help Hatcher except that at some point Fred came up and said, "I don't know what you did to mess with my home boy, but I'm trying to help you out of this." R16 1678-79. Appellant put a coat on Hatcher, who was still bound with duct tape, and marched him to the car. R16 1682-83. Appellant had his machine gun on him, and when they got to Pompano, appellant cut him loose. R16 1683-84. Shirleen Baker was the driver. R16 1651.

Around 11 or 11:30, Shirleen stopped on a dirt road and Hatcher and appellant got out and went to the back of a house. R16 1653. Appellant "kind of like picked a lock or something" and they went in through the back door. R16 1655. He told a white woman and black man inside to lie down and had Hatcher tape their ankles and hands. Id. Hatcher put Wal-Mart bags around their heads, and appellant was asking them, "Where is Rico?" R16 1657. He was talking about them telling the Feds about his operation and Nutter talking to a Federal agent named

Rico. R16 1658. The discussion lasted about three minutes, and "he said if he don't get his answers, 'somebody is going to die tonight.'" Id. He had Hatcher put them in separate rooms. Id. It was appellant's idea to put tape around their necks to hold the bags. R16 1659. They were not able to breathe, but they were alive. R16 1660. Hatcher made a hole where their noses were so they could breathe. Id. Appellant told him to put a pillow on their heads and shoot them. Id. He shot the woman first; she was kind of leaning against the wall so she just kind of leaned, fell back. R16 1661. He then went in the other room and shot the man. Id. The man stood up at once and Hatcher told him lie down and just play dead. Id. Before they were shot, appellant told him to cut their throats and checked to see if they were dead and said they were not dead. R1661-62. Hatcher said no to cutting their throats and appellant told him to do it or die with them and to go shoot them, which Hatcher did. R16 1663-64. Earlier, Hatcher was saying he couldn't tape them up and appellant said if he didn't hurry up and do it, he was going to leave him dead where he stood. Id.

Hatcher shot the man and he was screaming and appellant told him to shoot him again. R16 1664. When he shot him again, Cummings was already lying on the floor, on his stomach. R16 1665.

Outside, appellant gave Hatcher the keys to Nutter's white car, and Shirleen and appellant left in a green Buick that Shir-

leen had rented. R16 1666-67. After appellant gave him the keys to the white car, Hatcher followed them because he did not know where they were going. R16 1669.

Hatcher denied hot-wiring the car and said he did not know how to. R16 1691. They got on I-95 and headed for Miami. R16 1670. On the way, Hatcher stopped for gas; by that point he was no longer in touch with them: they kept going. R16 1671, 1694. When he got back to Miami, he returned to Fred's house and dropped off the car. R16 1671. Fred already knew what had happened. R16 1694.

Hatcher told his father he was involved but said he did not do the shooting. R16 1671. He made a statement to Det. Brock admitting he was the shooter. R16 1673. After a mistrial in his case, he made a deal with the state under which he would get a jury of six and would not face the death penalty. R16 1698-99. He said he was pretty good at spinning yarns to keep people out of his face, and would say whatever he had to do to keep people out of his face for his protection as "everybody is always in my business around here." R16 1701.

Hatcher testified that when he started to make his police statement he did not deny that he was the shooter, but then said that when asked if he was the shooter, he answered: "Naw, because I kept telling him I couldn't do it, so he took the shit from me, he went in the room and did it right quick ... ." R16

1702-03. After Brock told him Cummings had identified him as the shooter, he admitted it. R16 1704, 1719. When he talked to Brock, Hatcher had heard Cummings was conscious and had talked to the police, but did not know what he had said. R16 1710. Later in his testimony he said that when he went to the police and heard that Cummings lived, he knew Cummings would tell what happened in the house. R16 1727.

Hatcher and Fred were pretty close and saw each other almost every weekend. R16 1727. He spent a lot of nights at Fred's. R16 1728. He did not know what business appellant and Fred were in together, but knew they were close friends. R16 1729. Appellant passed himself off as a big drug dealer, but Hatcher decided he was a "bullshitter." R16 1729-30. Appellant had a gun all the time, kept the shades down, was paranoid all the time. R16 1730-31.

When Hatcher went to make the police statement, Fred told him, "Don't worry, I got your back, everything is going to be okay." R16 1735-36.

The tape of Hatcher's police interrogation was played for the jury. R17 1749-77. He said he stayed taped up under the bed for six hours or more. R16 1751, 1753. Then appellant made him walk out with his hands taped behind his back. R16 1753. They went in a green Buick. R16 1754. Appellant cut his hands loose around Yamato Road and started telling him "if I want to

live, I go in the house and do this, do I want to live." Id. Appellant did not say what he wanted Hatcher to do. R16 1755. At the house appellant pulled out a knife at the back porch and popped the lock or something. R16 1756. "June Bug" was coming to unlock the door or something and jumped back with his hands up when he saw appellant. R16 1758. He knew "June Bug" was "Fred's cousin. That's just I know what they call him." Id.[7] He denied having seen June Bug before, except when he was very small. Id. After appellant opened the door, he said to Hatcher, "If you want to die here, stay there. But if not, get your ass up in there." R16 1759. He gave him duct tape to tape them up. Id. Appellant had brought the tape with him. Id. Hatcher was trying to duct tape them and kept telling him he couldn't do it because the tape kept popping. R16 1760. Appellant said, "I'll put a shot in you." Id. He had Hatcher put plastic bags over their heads, telling him to tape their necks real tight so they could not breathe. Id. Hatcher made a hole in the front so they could breathe. At appellant's direction, he put them in separate rooms. Id. The two-year-old followed Cummings, who kept saying "Don't hurt my boy", and Hatcher said he wasn't hurting anybody, he was in the same boat, and when Cummings asked not to be killed, Hatcher told him to sit there and play dead. R16 1762. Appellant told him to get a knife and

[7] Cummings said his nickname was June Bug. R15 1557-58.

he said he was not killing anyone, and appellant started threatening him again, so he got a knife from the kitchen. Id. Appellant told him to see if the plastic bag worked, and Hatcher said it did, but appellant walked in the room and said it didn't, they weren't dead yet. R16 1763.

Hatcher refused to slash their throats and appellant said he did not have any more time and shot them and then ran out, got in the car, gave Hatcher some keys, and left. Id. Hatcher took the white car to Miami, stopping for gas on the way. R16 1764, 1766. He gave appellant the car keys. R16 1765.

Brock told Hatcher that June Bug said he had a .38, but Hatcher denied it at first. R16 1767. He then said the .38 was broken. R16 1768. He again denied that he shot June Bug, saying appellant went in the room and did it. R16 1769. Pressed further, he said he stood over June Bug but couldn't do it. R16 1770. After further questioning, he admitted he was the shooter. R16 1771. He said he shot June Bug one time. Id.

He then admitted he shot the woman. R1771-72. He said she was already lying down. R16 1772. He then went in and put a pillow on June Bug and told him to play dead, and shot him twice. Id. He did not know if June Bug tried to get up after the first shot. R16 1773. After shooting him the first time, Hatcher tried to walk out of the room, and appellant was standing at the door and told him to do it again, so he walked back

and shot him again. Id. Appellant was with him in the room when he shot Nutter. R16 1774-75. Hatcher said once they got on I-95 on the way back he tried to break off. R16 1776-77.

Det. Brock testified that he spoke with Cummings in the ambulance around 1 a.m.; Cummings looked like he was in shock and said Neil did it. R17 1804-05, 1875. At the hospital he repeated the name Neil. R17 1805-06. After his release from the hospital on June 30, he made another statement saying appellant just stood there and gave orders. R17 1806-09. He said Hatcher was moving too slow and appellant told him, "Do what I tell you. Drop your ass right there." R17 1809-10. Brock had this information before talking to Hatcher. R17 1811. Brock put out a BOLO for the car, but not for Neil Salazar because didn't have the last name. R17 1813. He didn't have a picture. Id. He had a photo lineup that he thought contained a photo of appellant, but Cummings did not identify him in any of the photos. T17 1815. Cummings provided the videotape showing appellant. T17 1815-16. The video was played for the jury. T17 1817. Brock interviewed Hatcher, Fred Cummings, and Shirleen Baker. T17 1825. Appellant was located in Puerto Rico on July 27, 2000. T17 1830.

Brock testified that someone seated in the living room recliner could not have seen the porch light being unscrewed. R17 1875. Cummings told him that both men were armed when they en-

tered the house. R17 1876. Cummings also said there were three or four males at the house, and then changed it to three males. Id. Cummings never changed it to two males and a female. Id. Brock got the name Neil from the statement at the hospital. R17 1877.

B. In the second phase of jury proceedings, the state presented no evidence as to aggravating circumstances, but presented letters from members of Nutter's family.

Cummings wrote that the shooting changed his life and he had problems he never had before and his sons asked about Nutter all the time. R19 2121. She loved her sons, and it is hard to raise children as a single parent, but he was going to take care of the boys. Id. He really missed Nutter, she made the sun brighter every day and was the sweetest person anybody ever met and was his heart and his sons'. Id.

Nutter's mother Patsy wrote their lives were changed forever and they were robbed of their daughter's love, companionship and long talks they had with her. Id. She was a loving daughter, mother and sister, and her life centered around her sons. R19 2121-22. Everywhere she went, she had her boys, she was too trusting and had no prejudices. R19 2122. All family members were impacted, there was a void in their lives that can never be replaced; holidays and birthdays are extremely difficult to get through. Id. She had a beautiful smile and personality, and

Patsy often awoke at night thinking she heard her call Patsy's name. Id. Cummings and the boys had suffered a big loss and the boys needed their mother and her love. Id. Justin would be traumatized for life. Id. They received counseling, but needed a lot more; anger and depression affected the family in many ways. Id. A toll impacted their bodies and minds. Id. Nutter was very important to them and was greatly missed; it was a senseless act of violence. Id.

Ronze Cummings, the older son of Cummings and Nutter, wrote he remembered the way Nutter looked, she was beautiful, had the biggest brown eyes, and every night he still saw her eyes looking down at him the way they did every night before as she tucked him in for a good night sleep. R19 2123. They did many fun things together, they went to the beach, she would splash in the water with the boys and build sand castles, and when they got hungry she always had a picnic ready with his favorite ham and cheese sandwich. Id. He especially enjoyed going fishing with his mom, and he remembered how big her smile was when he caught the big one. Id. She would sit and rock his brother and sing to them for hours, would take them to the orange groves where Cummings was working so they could eat lunch together, and would take them to different restaurants. Id. She liked to chase chickens around the yard while the boys followed closely behind yelling and laughing, and sometimes the dog even got in

on the chase. R19 2124. He missed her so much and would always love her with all his heart. Id.

Appellant presented the video testimony of his sister Michelle Lambert. She said they grew up in Trinidad. R19 2131. Appellant's original name was Gary Lambert. R19 2132. There was a strong stigma against divorce on the island, and the family was Catholic. R19 2136, 2138. Their parents divorced, and their older brother, Kurt, was head of security in the bank and was publicly humiliated. Id. The children were upset and embarrassed and if they could have kept their parents together, they would have tried to. R19 2137. Kurt took their mother's maiden name of Salazar, and appellant also changed his name. R19 2136-37. After the divorce, the mother and the girls (Michelle, Arlene and Chantal) moved to Texas in 1988, leaving the father and the two sons in Trinidad. R19 2133, 2142. While they lived on the island, appellant was the older brother who always took care of them and took them to the beach. R19 2133-34. Later, around 1994, Michelle and appellant lived together about a year in Miami Beach. R19 2134. She worked as a nurse's aide and he worked in construction. R19 2135. She decided to go to school full time and he worked full time to let her do so. R19 2135-36. He paid her gas and tuition and everything for her to go to school. R19 2136. He told her, "Just take it one day at a time, you know, you're going to graduate", and that voice

in her made her see it until the end. R19 2139. If it were not for him, she would not have graduated. Id. Later she supported him while he studied electronic engineering. R19 2139. Appellant was a compassionate person, loving, kind, her best friend and confidant. R19 2140. He has three children. R19 2140-41. Before his incarceration, he was supportive of his children and his family, always took care of his kids, provided for them, was a good, loving father, supportive of his kids. R19 2141.

Arlene Lambert, another sister, said the family was middle class by Trinidadian standards, which would be poverty in Miami, without the luxuries taken for granted in the US. R19 2151-52. Appellant attended Uremia Comprehensive School, a vocation school, studying woodwork. R19 2153-54. He was athletic and played soccer. R19 2154. He was particularly gifted and played often for a team called Hill Toppers. R19 2155. A lot of spectators would come out and watch the games. R19 2156.

C. At the Spencer hearing, a jailer testified he found an eight-inch piece of metal that was sharpened on one end in appellant's jail cell and a piece of wire under his mat on December 17, 2002. R20 2242, 2246-48. Det. Brock testified appellant told him he was a drug dealer, that he was heavily involved in the sale of drugs in Trinidad and Jamaica, Miami, and going up into New York and other areas in the United States, and talked about being a part of a Muslim organization in Trinidad

under Abubaker, where he was involved in committing several crimes and he was eventually told to relocate out of Trinidad to go into other areas for protection, told about thefts or robberies that he committed in other countries. R20 2264-65. Appellant said he had studied under Abubaker, and he was like his lieutenant. R20 2266. Brock was unaware of any conviction or sentence for any of these crimes. R20 2267-68.

D. In sentencing appellant to death, the judge found four aggravating circumstances: appellant was convicted of a prior violent felony, the contemporaneous attempted murder of Cummings (some weight); appellant committed the murder while engaged in burglary, a violent felony (some weight); the murder was especially heinous, atrocious or cruel (great weight); the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (great weight). R4 658-59. The judge found in mitigation: appellant was not the actual shooter (little to some weight); appellant came from a broken home and was devastated by his parents' divorce (little weight); appellant was raised in an impoverished environment in a third world country (minimal weight); appellant was capable of, and had, a good relationship with family members (minimal weight); appellant was a good student, attended school regularly and obtained a vocational degree in wood working (lit-

tle weight); appellant was well behaved during the trial and the Court proceedings (minimal weight). R4 660-62.

SUMMARY OF THE ARGUMENT

1. Appellee argued to the jury that Hatcher's testimony was necessary to keep appellant from being acquitted and the state had a reasonable concern that there would be an attempt on Cummings' life if appellant was acquitted. The judge ruled at the bench that such argument failed "the stink test," but declined to give a curative instruction or grant a mistrial. Since the judge made no ruling disapproving of the argument in the jury's presence, the jury was left to believe that such a consideration was proper. The improper argument could reasonably have affected the jury's verdict. It also could reasonably have affected the jury's decision to recommend a sentence of death.

2. The judge erred in overruling appellant's objection to Det. Brock's testimony that he was trying to find the truth in his investigation. The testimony improperly bolstered Brock's credibility. The testimony occurred during Brock's testimony indicating that he had diligently investigated the case against appellant, interviewed many persons who did not testify at trial, and produced a book of evidence whose contents were never disclosed. The jury would take his testimony to mean that the statements of these non-witnesses and the contents of this book supported the state's case for guilt. There is a reasonable likelihood that the error affected the verdict.

3. The judge erred in applying the "cold, calculated, and premeditated" (CCP) aggravating circumstance at bar. This Court has struck CCP for murders committed in a colder, more calculated, and more premeditated manner. Further, CCP cannot apply under Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) unless the defendant had a careful plan or prearranged design to kill before the criminal episode began. Although this Court has upheld CCP in cases in which the defendant formed the intent to kill after successfully completing the original criminal purpose and after careful deliberation, at bar the original criminal purpose was thwarted. Regardless, Rogers serves important constitutional purposes and should be strictly followed. At bar, the judge did not find that appellant intended to kill before the burglary began, and the state argued to the jury that it could find CCP without proof of such a prior intent. This Court should order resentencing.

4. The judge erred in letting appellee urge the jury to consider in aggravation that appellant terrorized both Cummings and Hatcher in the burglary. Florida law strictly forbids the consideration of nonstatutory aggravating circumstances. The state said the argument supported a claim of kidnapping felony murder, but it never sought an instruction on such a theory and the judge gave none. Further, the judge ruled that such argument would go to the heinousness circumstance, but that circum-

stance could not apply to Cummings' state of mind since he was not the murder victim. Appellee's use of this nonstatutory aggravation requires reversal of the death sentence as it could reasonably have affected the jury's verdict.

5. The judge erred in giving the standard jury instruction which did not require the state to prove that appellant had an intent to kill before the criminal episode began. The error could reasonably have affected the jury's recommendation that appellant be sentence to death, and this Court should order resentencing.

6. Section 921.141, Florida Statutes, is unconstitutional on several grounds. Appellant concedes that this Court has rejected essentially similar arguments in the past.

ARGUMENT

1. WHETHER THE COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL DURING THE STATE'S FINAL ARGUMENT WHEN THE STATE TOLD JURORS THAT IT HAD MADE A DEAL WITH HATCHER SO THAT APPELLANT WOULD NOT "WALK" LEST THERE BE ANOTHER ATTEMPT ON RONZE CUMMINGS' LIFE.

In final argument, appellee told the jurors it made its deal with Hatcher to ensure appellant would not "walk" because it had a "reasonable concern that there could be another attempt on Ronze's life, attempt to finish him [off]". This argument presented the jury improper reasons for accepting the state's witnesses' testimony and convicting appellant. At the bench, the judge ruled the argument failed "the stink test," but he denied a curative instruction and a mistrial. Thus, he did not advise the jury that the state's argument presented improper considerations.

Where, as here, the judge took no corrective action, this Court will review to determine whether the improper argument could reasonably have affected the verdict. Under that standard, reversal is required at bar. The state relied entirely on the testimony of Cummings and Hatcher, and it argued that Hatcher's testimony and a resulting conviction would protect Cummings from being murdered. Such argument would divert the jury from considering the weakness of the witnesses' testimony and cause jurors to think an acquittal would lead to Cummings' death. This Court should order a new trial. Even if this Court

finds the argument harmless as to guilt, it should order resentencing as the argument could reasonably have affected the jury's sentencing recommendation.

A. *Proceedings below*.

Jurors heard the state raise the danger of someone coming back and finishing Cummings off unless appellant was convicted. They were left to mull this danger over while the attorneys and the judge conferred at the bench. They received no instruction that there was anything wrong with the alarming consideration that a guilty verdict would prevent a murder, and the state resumed its argument as if nothing were amiss.

1. The view from the jury box: the jurors were told that without Hatcher's testimony, appellant might walk and then there might be another attempt on Hatcher's life; nothing indicated to the jurors that this was not a valid consideration.

The state said to the jury in its final argument (R18 1969-70):[8]

> You may or may not like the deal, you may or may not like the concept that the State would give the shooter in this case some consideration, give him his life; not give him his freedom, give him his life. You may not like that. Nobody is happy about that. Nobody is happy about having to make any accommodation. But this is the real world, and if Hatcher is not available to the State as a witness, the person who did this act, who directed this act, who had it done and who not only took the life of one person, tried to

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

> take the life of another person, and for all practical purposes has taken the life of Hatcher by putting him in a position where he's committed an offense that will put him in prison, I'm sure, for the rest of his life, **would walk**. **He could have walked out of here**. So we made this case a little bit better by bringing the other person who made a statement real early saying that Neil was the one directing everything.
>
> We also did something else by doing that. We've had in this case a man come from Miami with another man, broke into a house, killed one person, certainly left there thinking they had killed two people, people they knew, people they had been friendly with, he (indicating) had been friendly with, and we have at the outset Ronze Cummings who has survived and who is alive today, six years later, and would the State in this circumstance have **a reasonable concern that there could be another attempt on Ronze's life, attempt to finish him** --
>
> MR. AKINS: Objection, Your Honor. May we approach?

The jurors were then left to ponder a possible attempt on Ronze's life while the attorneys engaged in a long bench conference. R18 1970-76. When the state resumed its argument, it did not retract its prior statements. Instead it said the jurors were free to "speculate" as to why it had made its deal with Hatcher, but that the deal was irrelevant unless it made his testimony unreliable (R18 1976-77):

> MR. SEYMOUR: Ladies and Gentlemen, the fact the State made a deal with the murderer is not an issue in this case and it is not something that you should be concerned with. All of us can speculate or you can wonder in your own mind why or think of reasons why it might have been the right thing to do, but the bottom line is the issue for all of you here is did what the State did make this testimony so unreliable that we cannot believe him. And to make that determination, you have to go back and look at the reasonableness of the testimony, you have to go back and look at is it

> consistent with other testimony in this case that we have heard, testimony from him, testimony from Ronze Cummings, the statement he gave, the statement that you've heard quoted from portions of the statement that Ronze Cummings made on June 30th about who did what and Neil's role in all this, and -- and the fact that he made an early statement long before there was any deal saying what happened when he was getting nothing for saying that.

2. The bench conference: the judge found the argument failed the "stink test," but took no corrective action.

Meanwhile the following had occurred at the bench: The defense had objected that the argument improperly commented on facts not in evidence and appealed to the jury's sympathy. R18 1970. The state replied it was not suggesting that there was an attempt on Cummings' life, but there was a concern "in the minds of all of us" that someone may come back and "finish the job," and "by doing so, we have basically bought an ... insurance policy for Ronze Cummings because if anybody is going to do that, they're going to have to get rid of Hatcher and Ronze, not just Ronze." R18 1971-72. Defense counsel said that had nothing to do with this crime and whether appellant committed a crime and what might happen in the future was not proper argument. R18 1972.

The judge ruled the state's argument failed "the stink

test," but denied a mistrial. R18 1972-73. He refused to give a curative instruction, saying it "would just highlight it that much more". R18 1973. Defense counsel agreed that it would highlight the error, but said he had to seek an instruction for appellate purposes, and the judge again refused the request. Id. The state resumed its argument as set out above.

B. *The state's argument was improper.*

The judge correctly found the argument improper. It diverted the jurors from proper consideration of the evidence before them as it commented on facts outside the evidence and appealed to sympathy. It left the possibility of a future murder hanging over the jury's deliberations.

The state may not:

$ Refer to matters not in evidence.[9] Here, the prosecutor did not testify to his reasons for making the deal with Hatcher, and no evidence showed an ongoing threat to Cummings' life.

$ Appeal for sympathy for the victim or a witness.[10] The

[9] Cf. Huff v. State, 437 So. 2d 1087, 1090 (Fla. 1983) ("the state attorney is prohibited from commenting on matters unsupported by the evidence produced at trial"); Adams v. State, 585 So. 2d 1092 (Fla. 3rd DCA 1991) (citing ten cases including Huff).

[10] Cf. Edwards v. State, 428 So. 2d 357, 359 (Fla. 3d DCA 1983) (state asked for justice on behalf of victim's family; "It is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion or prejudice"; trial court "should so affirmatively re-

argument that there might be another attempt on the life of Cummings, who, as jurors knew, was the father of two small children, called on jurors to sympathize with him in his plight.

$ Claim a threat to a witness absent clear and convincing evidence that the defendant instigated or made the threat.[11] There was no evidence that appellant planned to kill Cummings if he was acquitted.

$ Suggest that the jury will prevent future crimes by convicting the defendant.[12] Jurors would take the state's ar-

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buke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments"); Brown v. State, 593 So. 2d 1210, 1211-12 (Fla. 2d DCA 1992) (appeal for sympathy for witness).

[11] Cf. Rozier v. State, 636 So. 2d 1386, 1388-89 (Fla. 4th DCA 1994) (error to allow evidence of threat to witness absent clear and convincing evidence of defendant's involvement in threat); Madison v. State, 726 So. 2d 835, 836 (Fla. 4th DCA 1999) (same). "A third person's attempt to influence a witness is inadmissible on the issue of the defendant's guilt unless the defendant has authorized the third party's action." State v. Price, 491 So. 2d 536, 536-37 (Fla. 1986).

[12] Cf. Gomez v. State, 415 So. 2d 822 (Fla. 3d DCA 1982) (argument not to let victim walk away with permanent injury and let defendant walk away "and commit further crimes of this nature"); Rahmings v. State, 425 So. 2d 1217 (Fla. 2d DCA 1983) (argument that conviction necessary to prevent a subsequent murder was so prejudicial as to deprive defendant of a fair trial); Broomfield v. State, 436 So. 2d 435, 435-36 (Fla. 4th DCA 1983) (argument that defendant's release would foster similar criminal activity); McMillian v. State, 409 So. 2d 197, 198 (Fla. 3d DCA 1982) ("state's comment, 'Ladies and gentlemen, after hearing the facts, if you want to let Larry McMillian walk out of here, if you want to let this kind of horrible crime go on in Dade County, Florida-', cannot be deemed harmless error"); Singer v.

gument as saying that if they did not convict appellant he would walk out and kill Cummings.

This Court has long since set out the general principles forbidding such argument: while the parties have broad discretion in remarks directed to the evidence, they may not seek to influence jurors by matters outside the evidence or arising from sympathy:

> In argument to the jury counsel for all parties are restricted to the evidence and reasonable deductions therefrom, but within this rule they have a very wide discretion. As was said in Mitchum v. State, 11 Ga. 615, text 631:
>
> > 'His illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination. To his freedom of speech, however, there are some limitations.'
>
> Any attempt to pervert or misstate the evidence or to influence the jury by the statement of facts or conditions not supported by the evidence should be rebuked by the trial court, and, if by such misconduct a verdict was influenced, a new trial should be granted. Clinton v. State, 53 Fla. 98, 43 South. 312, 12 Ann. Cas. 150; Bradham v. State, 41 Fla. 541, 26 South. 730; 3 Wharton's Crim. Proc. p. 1496.

Akin v. State, 86 Fla. 564, 98 So. 609, 613 (1923). See also Newton v. State, 21 Fla. 53 (1884) (condemning remarks outside

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State, 109 So. 2d 7, 28 (Fla. 1959) (in prosecution for murder of wife of county prosecutor, statements by state prosecutor asking jury to withhold recommendation of mercy because of what defendant might do to state attorney's family if he were not put to death were prejudicial); Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983) (argument at second phase of capital case that jury should not let defendant kill again).

the evidence with no relation to the guilt of the accused and "certainly intended to influence the minds of the jury").

At bar, the jury was confronted with trying to decide whether the contradictory and confused testimony of Ronze Cummings and Julius Hatcher amounted to proof beyond a reasonable doubt. The state improperly injected into its consideration the contention that Hatcher's testimony served to ensure appellant's conviction so that Cummings would not be murdered.

Finally, the argument was not invited by the defense. The state's argument was preceded by the defense's brief initial argument, which only mentioned Hatcher's deal only in passing and claimed nothing about the state's motives or a threat to Cummings. (R18 1938). An even briefer reference in opening statement also raised no such claim: "You will hear [a] benefit that a witness was given; that Mr. Hatcher, who, like Mr. Salazar could face the death penalty, now doesn't have that to worry about." R13 1316. The defense cross-examination of Hatcher about his deal also did not suggest any impropriety or anything about a threat to Cummings. R16 1698-1701. Thus, the defense in no way invited the state's argument that it made a deal with Hatcher so that appellant would not walk out of a concern that Cummings might be murdered.

C. *The improper argument requires reversal.*

The jurors did not know the judge had sustained the objec-

tion. They were left to consider the possibility that Cummings' life was in their hands. In view of the record as a whole, the improper argument was not harmless beyond a reasonable doubt. The state relied entirely on the testimony of Cummings and Hatcher, witnesses whose testimony and accounts were severely impeached. The state combined forms of argument especially likely to prejudice the defense, as it evoked sympathy for Cummings, vouched for Hatcher, brought up matters outside the record, and said Hatcher's testimony served to assure a conviction in order to save Cummings' life.

1. The standard of review is whether the state's argument was harmless beyond a reasonable doubt, a standard which focuses on the error's effect on the jury.

Since the judge did not sustain the objection in the jury's presence or give a curative instruction, this Court will review to determine whether appellee can show beyond a reasonable doubt that the error could not have affected the jury's verdict. Where, as here, the appellant has preserved the issue for appeal, the standard requiring reversal if the argument vitiated the trial also requires reversal unless appellee can show that there is no reasonable likelihood that the error affected the jury's verdict.

a. Because the judge did not sustain the objection in the jury's presence and took no corrective action, the state must show that the improper argument could not reasonably have affected the jury's verdict.

This Court wrote in Parker v. State, 873 So. 2d 270, 284, n. 10 (Fla. 2004):

> In Goodwin v. State, 751 So. 2d 537 (Fla. 1999), we held that "use of a harmless error analysis under [State v.] DiGuilio, [491 So. 2d 1129 (Fla. 1986),] is not necessary where ... the trial court recognized the error, sustained the objection and gave a curative instruction." 751 So.2d at 547. **Because the trial court in this case neither sustained Parker's objection in front of the jury nor gave a curative instruction, we conclude that a harmless error analysis is appropriate in this case**.[13]

See also State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (applying harmless-beyond-reasonable-doubt standard to denial of mistrial where judge took no corrective action).

In a harmless-error analysis, the reviewing court focuses on how the error affected the jury. Williams v. State, 863 So. 2d 1189, 1189-90 (Fla. 2003) ("The focus is on the effect of the error on the trier-of-fact.") (quoting State v. DiGuilio). The "burden to show the error was harmless must remain on the state." Id.

Here, the judge determined that no instruction could cure the error. "When any curative instruction would be insufficient, the trial court should grant a mistrial." Coverdale v.

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[13] In Parker, the prosecutor mistakenly assigned to a co-defendant an inculpatory statement of the defendant. This Court held the comment harmless because the state **retracted the statement explicitly and at length**. Further, the state's misstatement damaged the defense less than the factually accurate statement that Parker himself admitted guilt.

State, 940 So. 2d 558, 560 (Fla. 2d DCA 2006) (quoting and following prior cases).[14] See also Denmark v. State, 927 So. 2d 1079, 1081 (Fla. 2d DCA 2006) ("Although no curative instruction was requested or given, any such instruction would not have cured the error."); Lavin v. State, 754 So. 2d 784 (Fla. 3d DCA 2000) (remark during jury selection that state had mandate to ensure that innocent not be charged; defense refused curative instruction; judge erred in not striking panel). In general terms the question is "whether a cautionary instruction will cleanse the record of prejudice or whether a mistrial is required." Saavedra v. State, 421 So. 2d 725, 727 (Fla. 4th DCA 1982) (discussing procedure when judge strikes evidence that had been provisionally admitted).[15]

b. Since appellant preserved the issue for appeal,

[14] Of course, even if the judge gives a curative instruction, a mistrial may still be required. Cf. Fischman v. Suen, 672 So. 2d 644, 646 (Fla. 4th DCA 1996) (single unsupported statement that plaintiff committed medicare fraud required mistrial notwith-standing curative instruction since error involved "an accusation of criminal conduct difficult for a jury to ignore"); Brooks v. State, 868 So. 2d 643 (Fla. 2d DCA 2004) witness's statement, not responsive to state's question, that defendant had been sent to prison in the past, required mistrial notwithstanding curative instruction); Graham v. State, 479 So. 2d 824 (Fla. 2d DCA 1985) (officer's statement that two unknown persons identified Graham required mistrial even though the judge sustained objection, admonished prosecutor, and gave curative instruction) (opinion of then-Judge Grimes for court).

[15] Romani v. State, 528 So. 2d 15 (Fla. 3d DCA 1988), disagreed with Saavedra on a related evidentiary issue, but this Court overruled Romani on that issue in Romani v. State, 542 So. 2d 984 (Fla. 1989).

the standard that the court will reverse for an argument that has vitiated the trial is identical to the State v. DiGuilio standard.

This Court will reverse a conviction when it finds an argument Avitiate[d] the entire trial." King v. State, 623 So. 2d 486, 488 (Fla. 1993). Somewhat confusingly, the term "vitiates the entire trial" is also used to determine whether unobjected-to errors require reversal under the fundamental error doctrine,[16] a doctrine which is effectively the opposite of harmless error analysis. King shows, however, that the "vitiates the entire trial" standard equates with the harmless-error standard in cases of errors that have been preserved (King, 623 So.2d at 488 (footnote omitted)):

> King also argues that several comments by the prosecutor during opening and closing arguments were so improper as to constitute prosecutorial misconduct and that the trial court erred in overruling his objections to these comments. A conviction will not be overturned unless a prosecutor's comment is so prejudicial that it **vitiates the entire trial**. State v. Murray, 443 So.2d 955 (Fla.1984). Any error in prosecutorial comments is harmless, however, **if there is no reasonable possibility that those comments affected the verdict**. Watts v. State, 593 So. 2d 198 (Fla.), cert. denied, 505 U.S. 1210, 112 S.Ct. 3006, 120 L.Ed.2d 881 (1992); Murray. After reviewing this record, we conclude that the comments **did not affect the verdict** and that any error was, therefore, harmless.

State v. Murray explained in greater detail that the standard is one of harmless error (443 So. 2d at 956):

[16] See Doorbal v. State, 837 So. 2d 940, 944-45 (Fla. 2003), England v. State, 398 (Fla. 2006).

> ... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to **vitiate the entire trial**." Cobb, 376 So. 2d at 232. The appropriate test for whether the error is prejudicial is the **"harmless error" rule** set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the Court in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations. The opinion here contains no indication that the district court applied the harmless error rule. The analysis is focused entirely on the prosecutor's conduct; there is no recitation of the factual evidence on which the state relied, or any conclusion as to whether this evidence was or was not dispositive.

The "'harmless error' rule set forth in Chapman v. California" requires that the state show that the error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d at 1138 ("The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.").[17]

[17] State v. DiGuilio also used the vitiates-the-trial stan-

From the foregoing, the state must show that its improper argument was harmless beyond a reasonable doubt.

2. The comments at bar were of the kind reasonably likely to prejudice the defense.

Comments on matters outside the record are likely to be so prejudicial as to require reversal. See Blanco v. State, 150 Fla. 98, 7 So. 2d 333, 339 (1942) ("Remarks of a prosecuting officer before a jury that are entirely outside the record and could not be reasonably inferred from the evidence adduced and prejudicial to the rights of the defendant are grounds for a new trial."; citing numerous cases).

Likewise, a comment that the defendant's release would lead to another homicide may require reversal. See Williams v. State, 68 So. 2d 583 (Fla. 1953) (state argued that verdict of not guilty by reason of insanity could lead to defendant's release to commit another homicide), Rahmings, and McMillian.

Particularly prejudicial, of course, is the suggestion that the jury can prevent crime by convicting the defendant. See Go-

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dard **as equivalent to the harmless-beyond-reasonable-doubt standard**. Id. at 1136-37. See also, e.g., Grier v. State, 934 So. 2d 653, 655 (Fla. 4th DCA 2006) ("Comments on silence are high risk errors because there is a substantial likelihood that such comments will vitiate the right to a fair trial. DiGuilio, 491 So. 2d at 1136. Unless the state can show harmless error, a comment on the defendant's exercise of the right to remain silent warrants reversal. Id. at 1136-37.").

mez, Rahmings, McMillian, and Singer.

3. The argument at bar was not the kind of isolated comment that is so insignificant as to be found harmless beyond a reasonable doubt.

This Court has sometimes not reversed for an isolated remark, if the comment was unobjected-to, Lugo v. State, 845 So. 2d 74, 107 (Fla. 2003), invited, Bell v. State, 841 So. 2d 329 (Fla. 2002), or trivial and corrected, Rimmer v. State, 825 So. 2d 304, 324 (Fla. 2002), Walker v. State, 707 So. 2d 300, 312-13 (Fla. 1997).[18]

There is no one-free-error rule, however, and many cases have reversed because of brief, isolated, unrepeated comments. Cf. Graham (error to deny mistrial for brief reference to identification of defendant by two unknown persons, even though judge sustained objection, admonished prosecutor and instructed jury to disregard); Lee v. State, 873 So. 2d 582, 585 (Fla. 3d DCA 2004) (officer's single remark that victim was very positive in identifying defendant and was a credible witness was not harmless even though state "did not solicit or highlight" remark);[19] McMillian (error to deny mistrial after state said jury

[18] See also Evans v. State, 800 So. 2d 182, 188-90 (Fla. 2001) (mistrial not required for brief reference to police records containing defendant's fingerprints: any possible error was cured by Evans' own testimony admitting criminal history).

[19] In Lee, the court wrote that if "the trial court had sustained the objection and immediately given a curative instruction, perhaps the damage could have been mitigated, but by overruling the objection, the jury was left with the impression that

should not let defendant "walk out of here, if you want this kind of horrible crime to go on"); State v. Wheeler, 468 So. 2d 978, 981-82 (Fla. 1985) (golden rule argument constituted independent ground for reversal);[20] State v. DiGuilio (isolated comment on silence required mistrial; judge took no corrective action); Rahmings (comment that conviction necessary to prevent a murder required mistrial); Watts v. State, 921 So. 2d 722 (Fla. 4th DCA 2006) (error to deny mistrial for single comment on defendant's failure to testify); Meade v. State, 431 So. 2d 1031 (Fla. 4th DCA 1983) (comment that Meade "forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill"; judge erred in denying mistrial);[21] Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959) (comment that prosecution had no right to appeal followed "close on" by comment that prosecutor had determined that case was appropriate for death penalty constituted fundamental error); Lavin (remark during jury selection that prosecutor had duty to

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it could properly take into account the detective's opinion." Id. at 583-84. At bar, although the judge sustained the objection **at the bench**, he did not make the jury aware of this ruling and he gave no curative instruction, so that the jury was left in the same situation as the jury in Lee.

[20] State v. Wheeler was superceded by statute as to a separate issue. See Herrera v. State, 594 So. 2d 275 (Fla. 1992).

[21] In Farina v. State, 937 So. 2d 612, 630-31 (Fla. 2006) this Court apparently approved of Meade but held that it did not support a claim of fundamental error in Farina's case.

ensure that innocent are not charged); Barnes v. State, 743 So. 2d 1105 (Fla. 4th DCA 1999) (single remark in final argument that former defense counsel's testimony amounted to the mercenary actions of a hired gun amounted to fundamental error requiring reversal despite instruction to disregard); Hurst v. State, 842 So. 2d 1041 (Fla. 4th DCA 2003) (statement that informant said defendant was selling drugs and pointed him out).

At bar, appellant did object to the state's argument, but the judge did not correct the error and the prosecutor did not withdraw its argument. Further, appellant did not invite the error. The argument at bar was not the sort of isolated, uncorrected argument that may be found harmless beyond a reasonable doubt.

4. In view of the record as a whole, the state's argument was prejudicial.

The state hardly had an overwhelming case. It had no physical evidence linking appellant to the crime, and no statement by him. It rested its case entirely on the inconsistent, contradictory, impeached testimony of Cummings and Hatcher. Its improper argument directed the jurors' attention away from consideration of the merits of the state's case and provided an improper basis for conviction: that jurors should convict to prevent a murderous attack on Cummings. Jurors could take the argu-

ment as referring to additional, undisclosed evidence turned up in the detectives' investigation. The state's argument was not harmless because it went directly to the testimony of Cummings and Hatcher, the two witnesses who were crucial to the state's case, it could have resulted in a verdict based on irrelevant considerations, and it reasonably could have contributed to the verdict.

a. Cummings' testimony was self-contradictory and contradicted his former statements and the officers' testimony.

i. Cummings repeatedly contradicted himself. First, he contradicted himself about the people who came to his house. He testified that two men and a woman were involved, but admitted he told 911 that three or four men committed the crime. R14 1504. After admitting this, he reversed himself and testified that he told 911 that there were two males and a female, and the first one through the door was Neil, even though the transcript of the 911 tape refuted his testimony. R14 1504-05. He continued changing his account, saying he told 911 there were three or four Jamaican males at his house and did not give the name Neil. R14 1505-06. He denied telling 911 that a few, three or four persons came in the house, but admitted the 911 transcript showed he said there were quite a few of them, three or four of them, about four of them. R15 1511.

Further, Cummings contradicted himself as to what he knew about the people when they were at his house. He testified he did not know that night that the people came from Miami, R15 1542, but admitted he told Nutter that night they had come up from Miami. R15 1543. He contradicted himself again, testifying that he told 911 that the persons came from Miami, but admitted that that statement was not in the 911 transcript. R15 1544-45.

Cummings also made contradictory statements about what he could see after his head was covered. He testified that he could see what was going on through the bag and the bag did not obscure his vision and he could even see the men just before he was shot. R14 1478-80, R15 1559. At deposition he said that once the bag went over his head he could not see anything, but then explained on cross that he could see until Hatcher "put the second bag over our head." R15 1564. But he did not testify to any second bag going over his head even up through the time that he saw the men just before the final shot and the men's departure. R14 1480. He testified his eyes were not taped, and denied telling Det. Brock that his eyes were taped. R15 1559. Confronted with a verbatim transcript of his statement to Brock in which he said his eyes were taped, he said the transcript was wrong. R15 1560, 1563.

ii. Cummings contradicted the testimony of Dep. Chapman and

Det. Brock, and he made unbelievable statements about the officers' questioning. Chapman testified that he repeatedly asked Cummings for Neil's last name, R13 1335, but Cummings testified that the officers never asked him for Neil's last name. R15 1546-47. Cummings testified that although he knew Neil's last name, he did not give it to the officers at the scene, at the hospital, or at the detective bureau because they did not ask for it. R14 1511.

Cummings' testimony also conflicted with Det. Brock's. Cummings testified he saw the porch light being unscrewed while seated in the recliner, R14 1497, but Brock testified that someone seated in the recliner could not have seen the porch light being unscrewed. R17 1875. Brock testified that Cummings also said there were three or four males at the house, and then changed it to three males, but never changed it to two males and a female. R17 1876. Brock testified to Cummings' statement that both individuals were armed when they entered the house, R17 1876, which contradicted Cummings' testimony that one man had a machine gun and that the second man did not have the second gun when they came in. R15 1552, 1554 ("The second man didn't have the revolver at the time.").

iii. In addition to the foregoing, Cummings thought Cousin Fred might have been involved, but decided to conceal this from the officers. R14 1513.

b. Hatcher's testimony was similarly impeached, he contradicted his earlier statements and Cummings' account, and he had powerful reasons to put blame on another.

i. Hatcher said he was pretty good at spinning yarns to keep people out of his face, and would say whatever he had to to keep people out of his face as "everybody is always in my business around here." R16 1701.

He denied to his father that he was the shooter. R16 1671. He testified that when he started to make his police statement he **did not deny that he was the shooter**. R16 1702. But he then admitted that he **did deny that he was the shooter** at the start of the police statement: when asked if he was the shooter, he said he was not the shooter, that he refused to use the gun and appellant "went in the room and did it right quick". R16 1703. After Brock said Cummings had identified him as the shooter, he admitted it. R16 1704, 1719. When he went to talk to Brock, Hatcher had already heard Cummings was conscious and had talked to the police, although he did not initially know what Cummings had said. R16 1710. Thus, once Brock told him what Cummings had said, Hatcher conformed his version of the crime to Cummings' version.

ii. Hatcher's account conflicted with Cummings'. Cummings testified his dogs "went kind of wild just barking" when the men arrived, R14 1464, but Hatcher testified he did not hear any dogs. R16 1687-88. Cummings said he was seated when the men

arrived. R14 1464-65. Hatcher told Brock that when they opened the door Cummings "was coming to unlock the door or something and he seen Neil, he jumped back with his hands up." R16 1758. Hatcher testified that appellant did not give him a gun until they were in the hallway after he refused to use the knife. R16 1688-90. Cummings told Brock that both men were armed when they entered the house. R17 1876.

Hatcher said he duct taped Cummings and Nutter before appellant asked about Rico, R16 1655-57, but Cummings said Hatcher did not duct tape them and put bags on their heads until after the questioning about Rico. R14 1473-76. Cummings said appellant questioned them for about 15-20 minutes, R14 1473, but Hatcher said he questioned them for three minutes. R16 1658.

Cummings testified he saw Hatcher hot-wiring Nutter's car while talking with appellant and Baker, R14 1483-84, but Hatcher testified that he did not hot-wire the car and did not even know how to hot-wire a car. R16 1691. He testified that when they came out appellant gave him the keys and left immediately with Baker. R16 1666, 1669, 1691. Likewise, Hatcher initially told Brock that appellant shot the people inside, ran out of the house, "ran to the car and he left. He gave me some keys and then left me." R16 1763. After he admitted to Brock that he shot the people, he again said that appellant gave him the keys and took off. R16 1776.

iii. Finally, but hardly least important, Hatcher had a powerful motivation to testify against appellant in order to avoid a death sentence, and this motive provided a separate and powerful reason to doubt his testimony.

c. Jurors could have reasonably taken the state's argument as referring to additional unspecified evidence turned up by the ongoing investigation.

The state had previously shown jurors that it had developed additional evidence, and they could reasonably have thought that the state's argument referred to that additional evidence.

Brock testified about talking to many people including Cousin Fred, Shirleen Baker, and people in Miami and in the Melbourne area, he said the investigation was ongoing up to the time of trial, and he displayed to the jury a book stuffed[22] with reports and evidence. R17 1825-37. When defense counsel expressed concern over such testimony at a bench conference, the state said it was not going into any claim of collateral criminal activity, and the judge observed that it was relevant for the limited purpose of contradicting "a potential defense that they rushed to decide that Salazar did it." R17 1831-34.[23] But

[22] When he held the book up for the jury to see he had to be careful to keep things from falling out of it. R17 1837.

[23] The defense made no such claim. To the contrary, it emphasized that appellant was not a police suspect until after Cummings was released from the hospital several weeks after the crime. At most, it suggested that the crime scene investigation on the night of the murder was inadequate in that some items of evidence were not submitted to the crime lab, R14 1430-31, which

the jurors were unaware of this limitation, and they could have thought the argument about another attempt at finishing Cummings off referred to these interviews, the book, and the claim that the investigation was ongoing even up through the time of trial.

> d. Although the state did not go as far into its improper argument as it wanted to go, the argument was prejudicial in view of the record as a whole.

The judge denied a mistrial because the state "didn't go into it very far". R18 1973. The judge was right that the state did not get very far into its planned argument, and the prejudice could well have been worse if the state had gone on with the argument it sketched out at the bench conference. This Court must defer to the trial judge's factual finding that the state did not go very far into such argument, which finding in any event can hardly be disputed. But a court must consider how the state's argument could reasonably have affected the jury. While the length of an improper argument is part of the equation, the main consideration is how the improper argument fit into the case as a whole from the jury's viewpoint and whether one can determine beyond a reasonable doubt that the error could not reasonably have affected the verdict. The "burden to show the error was harmless must remain on the state." State v. DiGuilio, 491 So.2d 1129, 1139.

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contention underscored the lack of forensic evidence linking appellant to the crime, but it did not claim a rush to judgment.

The jury needed to decide whether the testimony of Cummings and Hatcher proved appellant's guilt beyond a reasonable doubt. It heard the state say that Hatcher's testimony prevented appellant's acquittal, lest Cummings be finished off in the future. The judge did not tell the jurors that there was anything wrong with such a consideration. Hence, **they** would think that the state had presented them with a valid point to consider in deciding the case.

Unlike in Parker, the state did not make a long, detailed and explicit retraction at bar. It made no retraction at all. After the bench conference, it told the jurors they were free to speculate why the deal with Hatcher "was the right thing to do" and that Hatcher's deal was not a consideration unless it made his testimony "so unreliable that we cannot believe him." R18 1976-77. The state did not remove the prejudicial effect of the remark about Cummings being murdered, and did not tell jurors to ignore that possibility. Instead, it turned its burden of proof on its head: it had the burden of proving beyond a reasonable doubt that things happened according to Hatcher's testimony, but it told the jury to ignore Hatcher's powerful motive to lie unless it made him completely unbelievable.

The jurors were still left to ponder someone coming back to finish Cummings off unless they convicted appellant. From **their** point of view, there was no indication that there was anything

wrong about the state's claim: they saw the defense object, but never heard the judge disapprove of the state's argument, and heard the state continue on as though nothing were amiss. They would be coldblooded jurors indeed who would ignore the threat to Cummings' safety and their potential role in protecting him. The improper argument was not harmless beyond a reasonable doubt under the facts of the present case.

In summary, our law forbids comments on facts not in evidence, appeals to the jury's sympathy, and suggestions that a conviction will prevent a murder. The judge sustained the defense objection at the bench, but did not instruct the jury that such considerations were improper. So far as the jury could tell, the improper argument presented important and proper considerations. The state's case rested on the accounts of Hatcher and Cummings, who contradicted themselves, each other, and the investigating officers. In view of the record as a whole, the improper argument was not harmless beyond a reasonable doubt. Appellant was deprived of his right to a fair jury trial on the evidence under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

5. The state's improper argument was separately prejudicial as to penalty.

An error harmless as to guilt may be harmful as to penalty. Gonzalez v. State, 700 So. 2d 1217 (Fla. 1997) (codefendant's

confession harmless as to guilt, but prejudicial as to penalty); Burns v. State, 609 So. 2d 600, 607 (Fla. 1992) (background information about deceased harmless as to guilt, but prejudicial as to penalty).

The state's argument at bar could reasonably have affected the jury's penalty verdict. The argument put before the jury that appellant was such a dangerous person that Ronze Cummings continued to be under a threat of death. It would lead jurors to resolve doubts about aggravating and mitigating circumstances against appellant. It would add to any consideration that the murder was especially calculated and premeditated, and put before the jury a concern about appellant's future dangerousness.

Perhaps most importantly, the argument would affect the significant mitigator of co-defendant disparity. The disparate treatment of a co-defendant is a major mitigating circumstance.[24] The state argued to the jury that the disparate treatment of appellant and Hatcher was "the real issue" in the case. R19 2189. The jury could have disbelieved Hatcher's testimony about being left bound under a bed and then abducted and forced to participate in the crime, and could have convicted appellant without

[24] The mitigator is so important that failure to consider it may constitute reversible error. See O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989) (reversing because jury instructions failed to inform jury that it could take into consideration disparate treatment and punishment given other participants in).

believing a lot of the testimony about the details of the crime, given the conflicting testimony. But jurors could infer appellant's much greater dangerousness from the prosecutor's claim that Hatcher's testimony served to protect Cummings' life. The state cannot show that its argument could not reasonably have affected the jury's death recommendation. Appellant was deprived of his right to a fair sentencing on the evidence under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing.

II. WHETHER THE COURT ERRED IN LETTING THE STATE PRESENT DET. BROCK'S TESTIMONY THAT HE WAS "TRYING TO FIND THE TRUTH" IN HIS INVESTIGATION.

On direct examination, Det. Brock testified that he was trying to find the truth in his investigation. The judge erred in overruling the defense's objection to this testimony: witnesses may not vouch for their own credibility or for the credibility of others. The error was not harmless beyond a reasonable doubt. It occurred in a context in which Brock was testifying that he thoroughly investigated the case against appellant in that he interviewed many persons who did not testify at trial and he assembled a book of evidence whose contents were never disclosed. The jury would take his testimony to mean that the statements of these non-witnesses and the contents of this book supported the state's case for guilt. The error could reasonably have affected the verdict, and this Court should order a new trial.

A. *The court erred in overruling the defense's objection when Det. Brock testified on direct examination that he was trying to find the truth.*

Det. Brock testified that he interviewed many witnesses and took many taped statements, and made a wide-ranging investigation. R17 1830-35. The following then occurred (R17 1835):

Q Your investigation was physically wide ranging, and wide ranging in terms of the number of people that you talked to?

A Yes.

Q Okay. It's appropriate for a homicide case; right?

A Absolutely.

Q Okay. No rush to judgment?

A Right.

Q No sudden -- no quick once-over in a homicide case?

A Just trying to find the truth.

Q Yes, sir.

MR. AKINS: Objection, Your Honor. Can we approach?

THE COURT: No, I'll overrule the objection.

Brock then continued to testify that he took statements from various persons and compiled a book of materials related to the case, and he displayed the book to the jury. R17 1835-37.

Later in Brock's testimony, the judge heard argument on the defense objection out of the jury's presence (R17 1869-79):

> MR. AKINS: While we have the chance, Judge, I would like to clarify my objection and attempt to approach on Detective Brock's testimony about finding truthful -- I can't --
>
> THE COURT: "Only looking to find the truth."
>
> MR. AKINS: "Just trying to find the truth." And -- which suggests -- at this point I would move for a mistrial and ask the Court to look at State versus Acosta, it's a Fourth DCA case, it is out of Fort Pierce, Judge Makemson, I happened to be the defense attorney, it was reversed when the detective testified about the truthful nature of the evidence.
>
> THE COURT: Okay. Well, I think in that particular case it was truthful nature of the evidence as "I'm trying to find the truth"; as opposed to commenting on what he did find, he's saying he's trying to find the truth. I don't think there's anything wrong with

> that. I'll deny the mistrial. I would hope all detectives would testify that they're looking for the truth. That doesn't mean that they can say "What I found is the truth."
>
> MR. SEYMOUR: And it also explains why the investigation keeps going. That was the context in which it was made.
>
> THE COURT: I think given the context that it was done it was -- and the way it was said, it's fine. ... .

Brock later testified that he took appellant into custody. R17 1873-74.

This Court reviews evidentiary decisions for an abuse of discretion, with the important provisos that judges' discretion is limited by the rules of evidence, and judges lack discretion to make rulings contrary to the law or the facts:

> This Court reviews evidentiary rulings for abuse of discretion. A judge's discretion is limited by the rules of evidence, Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003), and by the principles of stare decisis. Cf. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) ("Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness."). A trial court ruling constitutes an abuse of discretion if it is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

Johnson v. State, -So. 2d-, 2007 WL 1933048 (Fla. July 5, 2007).

Further, this Court reviews de novo an evidentiary ruling involving a question of law. See Linn v. Fossum, 946 So. 2d 1032, 1036 (Fla. 2006) ("Because we must decide as a matter of law whether the rules of evidence allow an expert to testify on

direct examination that he or she consulted with other experts, we apply a de novo standard of review.").

At bar, the judge made a ruling contrary to law. Witnesses may not bolster their own credibility or the credibility of other witnesses. In the case cited by defense counsel, Acosta v. State, 798 So. 2d 809 (Fla. 4th DCA 2001), a detective testified that, during his investigation, one witness "appeared to be truthful." The Fourth DCA found error, and wrote:

> It is clearly error for one witness to testify as to the credibility of another witness. Boatwright v. State, 452 So. 2d 666, 668 (Fla. 4th DCA 1984) ("It is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness."). It is especially harmful where the vouching witness is a police officer because of the great weight afforded an officer's testimony. Page v. State, 733 So. 2d 1079 (Fla. 4th DCA 1999).

Likewise, in Garcia v. State, 949 So. 2d 980, 993 (Fla. 2006), this Court disapproved of a witness's testimony that she gave her social security number to her employer, which testimony apparently served to show good character in that the witness complied with the law. This Court found the testimony improperly bolstered her credibility. See also Olivera v. State, 813 So. 2d 996 (Fla. 4th DCA 2002) (error to deny mistrial when witness said he took lie detector test, even though he did not indicate that he passed it). In general, "the good character of a witness may not be supported unless it has been impeached **by evidence**." Whitted v. State, 362 So. 2d 668, 673 (Fla. 1978) (er-

ror to allow evidence of witnesses' good character for veracity after defense challenged their credibility in opening statement).

Even if the witness's credibility has been attacked by evidence, it may not be bolstered by otherwise inadmissible evidence. Cf. Olivera (statement about lie detector test made in response to hostile cross-examination challenging witness's credibility); Paul v. State, 790 So. 2d 508, (Fla. 5th DCA 2001) (even though defense challenged witness's credibility on cross-examination, state could present testimony vouching for witness's credibility only by reputation evidence; error to present vouching evidence based solely on personal observation); Harris v. State, 438 So. 2d 787, 797 (Fla. 1983) (in response to defense claim that life sentence without the possibility of parole for 25 years was sufficient punishment, state improperly argued defendant would eventually be released from prison; reversal not required because judge took immediate corrective action); Tindal v. State, 803 So. 2d 806 (Fla. 4th DCA 2001) (defense's remarks about eyewitness's failure to identify defendant did not authorize state to suggest in rebuttal that defendant had threatened her).

At bar, Det. Brock, the lead detective, bolstered his own credibility and testimony by saying that he was engaged in a quest for the truth interviewing witnesses throughout South

Florida. Further, he showed the jury corroboration of his quest: he held up for them a book of "printed materials ... that are part of this case". R17 1836. The defense had not attacked his credibility, and even if it had done so, the state could not have properly rehabilitated his credibility with his self-vouching testimony that he was looking for the truth. The judge erred in overruling the defense objection.

B. *Det. Brock's testimony that he was trying to find the truth was not harmless beyond a reasonable doubt.*

The state must show that the error was harmless beyond a reasonable doubt under State v. DiGuilio. "The focus is on the effect of the error on the trier-of-fact." Williams, 863 So. 2d at 1189-90 (quoting State v. DiGuilio). Further, the "burden to show the error was harmless must remain on the state." Id. "Context is crucial" in the analysis. See Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1272 (Fla. 2006). See also State v. Jones, 867 So. 2d 398, 400 (Fla. 2004) ("this Court has evaluated the prosecutor's action in context rather than focusing on the challenged statement in isolation.").

At bar, as noted in the previous point, the state had a serious problem with the credibility of its two main witnesses. The state diverted the jury's attention from the problems with the testimony of Cummings and Hatcher by impressing the jury with the fact that the police had undertaken a disinterested investigation of every possible witness in the case. From this

testimony, the jury could conclude that there was no evidence refuting the state's theory of the case: Det. Brock's search for the truth led to appellant's arrest. R17 1873-74. While the judge told the jurors repeatedly that they could base their verdict solely on the evidence in the case, here they **did hear evidence** that the lead detective went out on a mission to "find the truth" throughout South Florida, interviewed many persons, and did not engage in a rush to judgment. The judge **overruled the defense objection in their presence**, so they must have concluded that they could legitimately consider as evidence the fact that Det. Brock sought to "find the truth."

Det. Brock's testimony was not cumulative to the testimony of the other witnesses. Instead, it suggested – it **demonstrated** - additional undisclosed evidence unearthed in his search for the truth that led to appellant's arrest and prosecution. The state may not suggest that there is additional evidence of guilt. See Wilson v. State, 798 So. 2d 836 (Fla. 3d DCA 2001) (error to deny mistrial when prosecutor "impermissibly suggested to the jury that there was additional, undisclosed evidence of defendant's guilt"; citing cases). Appellant was deprived of his right to a fair jury trial on the basis of proper evidence under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Under the circumstances at bar, the error was not harmless beyond a reason-

able doubt, and this Court should order a new trial.

III. WHETHER THE COURT ERRED IN FINDING THE COLD, CALCULATED AND PREMEDITATED (CCP) CIRCUMSTANCE.

This Court has struck the cold, calculated and premeditated (CCP) circumstance in cases involving equivalent or even greater coldness, calculation and premeditation than at bar, and it should strike the circumstance at bar. Under the rule established in Rogers v. State, 511 So. 2d 526 (Fla. 1987), the state must prove beyond a reasonable doubt that the defendant had a careful plan or prearranged design to kill before the criminal episode began. The cases have strayed from Rogers, however, and applied the circumstance where the defendant did not form the intent to kill until after successful completion of the original purpose of the encounter (which did not happen at bar because appellant's intent to get information about "Rico" was thwarted), although those cases generally require a longer period of reflection than occurred at bar. The departure from Rogers has led to development of a hodgepodge of contradictory rules of thumb such that CCP can be applied to all but the narrowest category of premeditated murders. Under the correct rule set out in Rogers, this Court should strike CCP because the judge did not find that appellant intended to kill before arriving at Cummings' house. The use of CCP at bar was not harmless beyond a reasonable doubt because the judge gave it great weight, and the state relied heavily on CCP in its case for

death and argued to the jury that CCP could apply even if appellant did not have an intent to kill before the burglary began.

This Court reviews a finding of an aggravator to see if the trial court "applied the right rule of law ... and, if so, whether competent substantial evidence supports its finding." Diaz v. State, 860 So. 2d 960, 965 (Fla. 2003). In doing so, it examines the judge's specific factual findings. Id. at 967. Under this standard, this Court should strike CCP at bar.

A. *This Court has struck CCP in cases involving an equivalent or even greater level of coldness, calculation, and premeditation than the case at bar because the record did not show an intent to kill before the defendant encountered the victim.*

In Power v. State, 605 So. 2d 856 (Fla. 1992), Power armed himself with a gun, went to the home of a small 12 year-old girl who was waiting for a ride to school, waited while the terrified girl had her ride leave without her, abducted her, beat her, anally and vaginally assaulted her, hog-tied and double gagged her, and then stabbed her and let her bleed to death over 10 to 20 minutes, "casually" walked away eating her school lunch, and, when he encountered an armed deputy, robbed the deputy of his weapon and briefly spoke with the deputy before fleeing. Id. at 858-60, 863-64. He left no fingerprints at the scene and had a pair of gloves when arrested several days later. Id. at 859-60. The murder occurred on October 6, 1987, id. at 858, and the judge found that he had announced the intent to commit such a

murder two weeks before, on September 23, 1987. Id. at 864.

This Court struck CCP (id.):

> Power also contends that the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner. The trial court found:
>
> > It is clear from the evidence in this case and the testimony of the victims of the defendant's prior sexual assaults that the defendant had thought out, designed, prepared or adapted by forethought his method of attacking females....
> >
> > ....
> >
> > In this case he followed his previously designed method or plan of attack. He subdued Angeli Bare with the threat of violence and the use of a gun.... While she was helpless, without any pretense of moral or legal justification, he stabbed her in the neck, causing her to bleed to death in the manner he had previously thought out and described to his victim of September 23, 1987....
> >
> > The coldness with which this was accomplished was demonstrated by the defendant eating the victim's sandwich she had prepared for lunch as he walked away from the scene of this brutal murder and his lack of emotion or nervousness when confronting Deputy Welty.
>
> To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated, and premeditated manner, the evidence must show that the defendant had a "careful plan or prearranged design to kill." Rogers v. State, 511 So.2d 526, 533 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). None of the facts recited above establish that Power had a prearranged plan to kill Angeli Bare. Rather, the evidence establishes, at best, a plan to rape. Furthermore, even if it were permissible for a judge to rely on the circumstances of previous crimes to support the finding of an aggravating factor, such evidence, standing alone, can never establish, beyond a reasonable doubt, that the murder at issue was so aggravated. In any case, it

> is significant that none of the previous crimes committed by Power resulted in the death of the victim. It is thus impossible to infer that Power had a premeditated design to kill the victim in this case. Lastly, the eating of the victim's sandwich, an event that occurred after the commission of the murder, cannot sustain the necessary finding of heightened premeditation before the murder. Consequently, we hold that the trial court erred in finding this aggravating circumstance.

In Wyatt v. State, 641 So. 2d 1336 (Fla. 1994) (Wyatt I), two escaped convicts from North Carolina armed themselves with guns and entered a pizzeria. One stayed in front while Wyatt had the manager (William Edwards) open the safe. William's wife Frances and another employee (Bornoosh) were locked in the bathroom. Taking the money, Wyatt raped Frances, then shot all three. Id. at 1338. They "were subjected to at least twenty minutes of abuse prior to their deaths." Id. at 1340. After seeing his wife raped, William

> begged for his life and stated that he and Frances, his wife, had a two-year-old daughter at home. Wyatt shot him in the chest. Upon seeing her husband shot, Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized William Edwards was still alive he went back and shot him in the head.

Id. at 1340-41. This Court struck CCP (id.):

> Wyatt also claims that the trial court erred in finding the murder to have been committed in a cold, calculated, and premeditated manner. On this point, we tend to agree. Proof of the cold, calculated, and premeditated aggravating factor requires evidence of cal-

> culation prior to the murder, i.e., a careful plan or prearranged design to kill. Valdes v. State, 626 So. 2d 1316 (Fla. 1993), cert. denied, 512 U.S. 1227, 114 S.Ct. 2725, 129 L.Ed.2d 849 (1994); Sweet v. State, 624 So. 2d 1138 (Fla. 1993), cert. denied, 510 U.S. 1170, 114 S.Ct. 1206, 127 L.Ed.2d 553 (1994); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The evidence in the record is insufficient to sustain the level of premeditation required for the finding of this circumstance.

In Wyatt v. State, 641 So. 2d 355 (Fla. 1994) (Wyatt II), after committing the crimes in Wyatt I as part of a "crime spree throughout Florida," id. at 357, Wyatt abducted a woman from a bar near Tampa and drove her across the state to Indian River County, where he shot her in the head and left her body in a ditch. Id. at 357-58. He explained to a cell mate that he killed her "to see her die." Id. at 359. This Court struck CCP for reasons similar to those in Wyatt I. Wyatt II at 359.

In Thompson v. State, 619 So. 2d 261 (Fla. 1993), Thompson and another man deliberately and slowly tortured and beat a girl to death. This Court quoted the facts from a prior opinion in the case:[25]

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[25] The prior opinion also showed that Thompson formed the intent to kill early in the ordeal, and that Thompson, rather than his co-defendant, was responsible for the entire incident:

> In his fifth contention, the appellant argues that the trial court ignored certain evidence of domination by the accomplice Surace. We believe the argument is without merit. The record reflects that at the time of the **initial beating** of the victim, the appellant left the bedroom and told the witness, Barbara Savage, that he (appellant) was so angry he "**felt like killing**

> Thompson, Rocco Surace, Barbara Savage, and the victim Sally Ivester were staying in a motel room. The girls were instructed to contact their homes to obtain money. The victim received only $25 after telling the others that she thought she could get $200 or $300. Both men became furious. Surace ordered the victim into the bedroom, where he took off his chain belt and began hitting her in the face. Surace then forced her to undress, after which the appellant Thompson began to strike her with the chain. Both men continued to beat and torture the victim. They rammed a chair leg into the victim's vagina, tearing the inner wall and causing internal bleeding. They repeated the process with a night stick. The victim was tortured with lit cigarettes and lighters, and was forced to eat her sanitary napkin and lick spilt beer off the floor. This was followed by further severe beatings with the chain, club, and chair leg. The beatings were interrupted only when the victim was taken to a phone booth, where she was instructed to call her mother and request additional funds. After the call, the men resumed battering the victim in the motel room. The victim died as a result of internal bleeding and multiple injuries. The murder had been witnessed by Barbara Savage, who apparently feared equivalent treatment had she tried to leave the motel room.

Id. at 263. This Court struck CCP, writing at page 266:

> With regard to his next contention, we agree with Thompson and hold that the record does not support a finding that the homicide was committed in a cold, calculated, and premeditated manner. The evidence in this case does not establish that the defendant planned or prearranged to commit the murder **prior to the commencement of the conduct that led to the death of the victim**. Hamblen v. State, 527 So. 2d 800 (Fla.

> **Sally** (the victim)." We also agree that the trial judge was not required to ignore the fact that this appellant testified at the Surace trial that the **appellant himself was responsible for the entire incident**. We find the trial judge did not "ignore" the evidence of Surace's domination of appellant. He simply declined to find the record justified such a conclusion, and we agree.

Thompson v. State, 389 So. 2d 197, 200 (Fla. 1980).

> 1988). We find that the improper use of the "cold, calculated, and premeditated" aggravating factor was harmless error under the circumstances of this case.

In Green v. State, 583 So. 2d 647 (Fla. 1991), Green stabbed Mr. and Mrs. Nichols, his landlord and landlady, after they had brought eviction proceedings against him. He selected the largest butcher knife in his house, went to the Nichols home, and stabbed Mrs. Nichols 14 times. He then murdered Mr. Nichols in the bedroom, stabbing him 28 times and stuffing bed covers into his mouth. Id. at 649. He went home, changed his clothes, went to a bar, and made his way from Tampa to Fort Lauderdale. Id. This Court struck CCP writing at page 652-53:

> Regarding Green's third claim, we agree that the trial court erred in applying the aggravating circumstance that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, as that aggravating circumstance has been defined. This aggravating circumstance is principally reserved for murders characterized as execution or contract murders or those involving the elimination of witnesses. Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Proof of this aggravating circumstance requires evidence of calculation prior to the murder. See Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). There is insufficient evidence in the record to justify this aggravating factor.

In Hamblen v. State, 527 So. 2d 800 (Fla. 1988) the case on which Thompson relied, Hamblen apparently murdered a woman in Texas and then drove a rental car to Florida where he decided to commit a robbery to pay the rental fee. He robbed a store clerk, made her disrobe in a dressing room and then shot her

(accidentally, he claimed). As he was taking her to another part of the store, she pressed a silent alarm, and Hamblen became angry. He took her back to the dressing room and murdered her with a single shot at close range to the head. Hamblen, 527 So. 2d at 801. This Court struck CCP writing at page 805:

> In the instant case, the evidence does not indicate that Hamblen had a conscious intention of killing Ms. Edwards when he decided to rob the Sensual Woman. It was only after he became angered because Ms. Edwards pressed the alarm button that he decided to kill her. Unlike those cases in which robbery victims have been transported to other locations and killed some time later, e.g., Parker v. State, 476 So. 2d 134 (Fla. 1985); Smith v. State, 424 So. 2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983), Hamblen's conduct was more akin to a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance. Notwithstanding, we are convinced that the elimination of this aggravating circumstance would not have resulted in Hamblen's receiving a life sentence. See Bassett v. State, 449 So. 2d 803 (Fla. 1984); Brown v. State, 381 So. 2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

The facts at bar do not show more coldness, calculation, and premeditation than the facts in the foregoing cases. It does not show the level of calm coldness, calculation, and premeditation involved when Power went into the home, waited while the terrified girl turned away a potential rescuer saying their lives were in danger, then abducted, bound, gagged, raped and stabbed her out of a premeditated design that she bleed to death. It does not show the level involved in Wyatt I when

Wyatt shot a man begging in front of his wife, then shot the wife, then shot a clerk, saying he could hear the bullet coming, and then went back to finish the first man off. Nor do the facts at bar compare with Wyatt's actions in Wyatt II when, after having already murdered three people, he abducted a woman across the state and shot her in a ditch just "to see her die." The case at bar does not show the slow, careful torturing of a girl with lighted cigarettes and brutal sexual assaults with pieces of furniture such as occurred in Thompson's case. The sentence violates the Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing.

B. *Rogers v. State, 511 So. 2d 526 (Fla. 1987) established the rule that CCP requires proof of an intent to kill before the crime begins. Rogers constitutionally narrowed CCP and made clear the circumstances in which it applies. Nevertheless, this Court has since applied CCP in cases without proof of such prior intent before the criminal episode began, with the result that contradictory rules of thumb have arisen from case law such that CCP will apply to almost all premeditated murders, contrary to the constitutional requirement that the circumstance genuinely narrow the category of persons to be sentenced to death.*

CCP must be carefully applied to a clear and narrow set of circumstances to prevent it from becoming unconstitutional. Under a narrow construction, it should apply only where the defendant had a careful plan or prearranged design to kill before encountering the victim. This Court established such a rule twenty years ago, but has gradually abandoned the rule. There has arisen instead a body of case law setting out contradictory factors for consideration of the circumstance. These factors may be used to apply CCP to almost any murder involving minimal premeditation. The better rule requires narrow application of the circumstance to cases in which the state proves the defendant had a careful plan or prearranged design to kill before encountering the victim. At bar, the state did not prove that appellant had a careful plan or prearranged design to kill before arriving at the house in Okeechobee, and hence the circumstance does not apply at bar. As argued below, R1 124-133, the circumstance is unconstitutional on its face and as applied under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

1. In 1987, CCP was narrowed to allow application only where the state proved the defendant had a careful plan or prearranged design to kill before encountering the victim; this construction served the constitutional requirements that aggravators genuinely narrow the category of persons eligible for the death penalty and that penal statutes be strictly construed in favor of the defendant.

In the early and much-sited case of Rogers v. State, 511 So. 2d 526 (Fla. 1987), this Court struck CCP because the state did not prove that Rogers did not have an intent to kill before committing a grocery store robbery in which he murdered a man. Rogers committed the murder because the man "was playing hero and I shot the son of a bitch." Id. at 529. Rogers and McDermid had carefully planned the robbery, obtaining a rental car, bringing semiautomatic weapons, casing the store, and wearing masks and gloves. Id. When the cashier could not open her register, the men began to flee, but then Rogers stayed behind to shoot the victim down and then, once he had fallen, shot him twice more execution-style as he lay face forward on the floor. Id. Rogers had seen the man slip out of the back during the robbery and decided to delay his flight until he could gun him down. Id. This Court wrote that, although the record showed "ample evidence" of premeditation, it did not support CCP because it did not show "a careful plan or prearranged design to kill anyone during the robbery." Id. at 533. Hence, it concluded that the murder was not "calculated," and struck CCP. Id. [26] Rogers formed the basis of opinions such as Power and Green, in which this Court struck CCP.

[26] See also McKinney v. State, 579 So. 2d 80, 84-85 (Fla. 1991) ("the evidence must beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began"); Ponticelli v. State, 593 So. 2d 483, 490 (Fla. 1991),

The construction in Rogers serves important constitutional purposes. "To avoid arbitrary and capricious punishment, this aggravating circumstance 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). Rogers provides a bright line for application by the trial courts and serves the constitutionally necessary purpose of narrowing the circumstance.

Further, provisions of the criminal code, including section 921.141, Florida Statutes, must be strictly construed in favor of the accused under section 775.021(1), Florida Statutes. This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. See Dunn v. United States, 442 U.S. 100, 112 (1979); Perkins v. State, 576 So. 2d 1310, 1312-13 (Fla. 1991). It applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." Carawan v. State, 515 So. 2d 161, 165 (Fla. 1987); Borjas v. State, 790 So. 2d 1114, 1115 (Fla. 4th DCA 2001). Specifically, it applies to the aggravating circumstances in sec-

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vacated on other grounds Ponticelli v. Florida, 506 U.S. 802 (1992), (upholding CCP because evidence established that "these were execution-style murders that were carefully planned before the crime began.").

tion 921.141. See Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (sentence of imprisonment circumstance). Rogers serves the necessary constitutional function of strictly construing the statute in favor of the accused.

> 2. Although this Court has upheld CCP in cases in which the defendant apparently did not decide to kill until after encountering the victim, those cases generally involved the defendant deciding to kill after considerable reflection after successfully completing the original criminal purpose.

Notwithstanding the foregoing cases, this Court has also upheld CCP in cases in which the defendant apparently did not decide to kill until after encountering or confronting the victim.[27] But those cases did not involve frustration of the origi-

[27] Many cases uphold CCP where the defendant intended to commit the murder before encountering the victim. See Monlyn v. State, 705 So. 2d 1 (Fla. 1997) (Monlyn said he was going to kill victim when he got out of prison); Foster v. State, 778 So. 2d 906 (Fla. 2000) (murder planned before going to victim's home); Brown v. State, 721 So. 2d 274 (Fla. 1998) (Brown admitted to FBI that, before encountering victim, he and another man had discussed finding a car and killing the person who owned it); Sexton v. State, 775 So. 2d 923 (Fla. 2000) (murder planned for 2-3 weeks); Evans v. State, 800 So. 2d 182 (Fla. 2001) (victim was to be wheelman in robbery, but drove off with getaway car; defendant went to victim's residence, awaited his return, ambushed him and murdered him); Barnhill v. State, 834 So. 2d 836 (Fla. 2002) (defendant entered victim's home and waited for two hours for opportunity to kill him pursuant to pre-conceived plan); Dennis v. State, 817 So. 2d 741 (Fla. 2002) (defendant began planning murder when girlfriend moved out); Sireci v. State, 825 So. 2d 882 (Fla. 2002) (murder planned "from the very beginning of the robbery plot"); Lynch v. State, 841 So. 2d 362 (Fla. 2003) (murder planned for two days, as evidenced by letter Lynch gave wife to send to victim's family to give them closure); Conahan v. State, 844 So. 2d 629 (Fla. 2003) (pursuant to pattern established by prior crime, Conahan obtained equipment to ritually murder victim); Anderson v. State, 841 So. 2d 390

nal criminal intent and involved much more time spent planning the murder than occurred at bar. Such cases do not apply at bar because appellant's original purpose was to force Nutter to give

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(Fla. 2003) (defendant announced plan to kill two days before murder); Doorbal v. State, 837 So. 2d 940 (Fla. 2003) (murder planned as part of elaborate scheme of extortion and murder); Lugo v. State, 845 So. 2d 74 (Fla. 2003) (same; codefendant of Doorbal); Lawrence v. State, 846 So. 2d 440 (Fla. 2003) (murder part of "detailed, preconceived plan to murder and mutilate a woman"); Harris v. State, 843 So. 2d 856 (Fla. 2003) (murder planned for weeks); Duest v. State, 855 So. 2d 33 (Fla. 2003) (after being picked up in bar by victim, Duest left victim's home, went to get knife, returned to stab victim to death); Owen v. Crosby, 854 So. 2d 182 (Fla. 2003) (victim killed as part of plan to obtain sexual gratification by having sex with dying female); Owen v. State, 862 So. 2d 687 (Fla. 2003) (same); Conde v. State, 860 So. 2d 930 (Fla. 2003) (prostitute murdered as part of ongoing pattern of five prior murders); Diaz v. State, 860 So. 2d 960 (Fla. 2003) (Diaz went to murder girlfriend at her home, murdered father when girlfriend escaped); Davis v. State, 859 So. 2d 465 (Fla. 2003) (Davis and others planned murder at restaurant before going to victim's home); Smith v. State, 866 So. 2d 51 (Fla. 2004) (after previously threatening victims, Pearce confined them when they arrived and summoned Smith to house to participate in murders); Pearce v. State, 880 So. 2d 561 (Fla. 2004) (same; co-defendant of Smith; Pearce threatened teenagers if they returned empty-handed from drug deal, then murdered them after they returned empty-handed); Brooks v. State, 918 So. 2d 181 (Fla. 2005) (Brooks murdered mother and baby pursuant to murder-for-hire scheme for insurance proceeds).

Some cases have also upheld CCP where the defendant acted with such swiftness as to indicate a prior plan to kill. See McCoy v. State, 853 So. 2d 396 (Fla. 2003) (as part of 13 minute continuous sequence of events, McCoy rushed store manager as she opened back door, forced her to turn off the alarm and surveillance equipment, made her open safes, then shot her without any resistance); Jennings v. State, 718 So. 2d 144, 152 (Fla. 1998) (robbery and murders occurred in 10 minutes, showing "ruthless efficiency" and "methodic succession of events"); Anderson v. State, 863 So. 2d 169 (Fla. 2003) (as part of complex robbery scheme, defendant herded bank employees together and shot them).

him information about the FBI informant and the state did not prove that the decision to kill was made until after the original intent was frustrated.

In Looney v. State, 803 So. 2d 656 (Fla. 2001), Looney and others decided to steal some cars. Arming themselves, they got entry into a home where they bound and gagged two women and ransacked the place. Deciding to leave no witnesses, they shot the women and burned the house down, and left in the women's cars. Id. at 662-63. This Court upheld CCP in a detailed examination of the evidence. It held the murders were cold because the women were bound and gagged for two hours and the defendants had ample time to calmly reflect on their actions. Id. at 678. It held they were calculated because the defendants armed themselves in advance, discussed the murders, killed the women execution style, and poured accelerants throughout the home before setting it afire, so that the murder was calculated under Knight v. State, 746 So. 2d 423 (Fla. 1988), which upheld CCP when the defendant decided to commit the murder during a "lengthy journey to his final destination". Looney, 803 So. 2d at 679. It found heightened premeditation because the men could have left the bound and helpless victims without committing the murders. Id. (Hertz v. State, 803 So. 2d 629, 649-51 (Fla. 2001) involves a similar analysis regarding Looney's co-defendant).

In Connor v. State, 803 So. 2d 598 (Fla. 2001), the defendant contemplated the murder for a day before strangling a girl he had kidnapped, and this Court upheld CCP.

In Nelson v. State, 850 So. 2d 514 (Fla. 2003), the defendant broke into the home of an elderly woman some time after midnight, sexually assaulted her, and kidnapped her in the trunk of her car. He kept her in the trunk for six hours before taking her to a remote area where he killed her some time after 9:30 a.m. Id. at 518-19, 525. This Court affirmed CCP writing at page 527:

> … . We find that regardless of whether Nelson intended to kill Brace at the time he entered her house, his act of driving around with the victim in the trunk for several hours and taking her to two remote locations before killing her indicates that, at the least, he conceived the plan to kill her during that extended period.FN9 See Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) (finding that "[e]ven if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill"); see also Connor v. State, 803 So. 2d 598, 611 (Fla. 2001) (affirming CCP where the trial court's finding included the fact that Connor hid victim for one whole day before killing her), cert. denied, 535 U.S. 1103, 122 S.Ct. 2308, 152 L.Ed.2d 1063 (2002).
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> FN9. The evidence at trial was that Brace was alive as late as 9:30 a.m. on November 17, 1997, when Steven Weir felt a bump on the trunk of the car.

In Caballero v. State, 851 So. 2d 655 (Fla. 2003), Caballero and Brown decided to rob a woman. They tied her up and forced her to give information about her credit cards and bank account.

She remained tied up while Caballero went to withdraw money from her accounts. Caballero and Brown discussed at length their decision to kill her. Id. at 658-59, 660-61. This Court upheld CCP based on the judge's finding that Caballero and Brown discussed and planned the murder before the fatal incident began, and that Caballero had an extended period of time in which to reflect upon the actions in which he was going to participate. Id. at 661.

Alston v. State, 723 So. 2d 148 (Fla. 1998), and Chamberlain v. State, 881 So. 2d 1087 (Fla. 2004), likewise involved unthwarted robberies in which the defendants spent a long time planning to commit the murder. Alston kidnapped and robbed a college student, taking him in the trunk of his car to a remote location where he was murdered. Alston, 723 So. 2d at 151-53. Chamberlain and others committed a robbery in which one of the two victims was killed in a struggle (this Court struck CCP as to this murder). They then considered what to do and determined to get rid of the other witnesses. They woke up a woman who was sleeping in the house, herded her and the other robbery victim into a bathroom and murdered them. Chamberlain, 881 So. 2d at 1092-93. In both cases, the defendants successfully completed the robberies and then decided to eliminate witnesses.

Apparently similar is Ibar v. State, 938 So. 2d 451 (Fla. 2006) in which two disguised men committed a home invasion rob-

bery in which three persons were shot. They may not have decided to commit the murders until after successfully committing the robbery.

In Parker v. State, 873 So. 2d 270 (Fla. 2004), a group of robbers abducted a store clerk to a remote location at late at night and methodically killed her. Again, they successfully completed the robberies and then decided to eliminate the witness.

Thus, cases have made an exception to Rogers where the criminal has successfully completed the original crime, and then, after careful contemplation, decided to kill the victim.

Appellant acknowledges that Durocher v. State, 596 So. 2d 997 (Fla. 1992), is contrary to his argument. While awaiting sentencing on a first-degree murder charge, Durocher contacted a detective and said he wanted to confess to another murder if he could be guaranteed a death sentence. The detective declined to make the promise, but Durocher nevertheless confessed that: He had wanted to rob someone and steal a car. He passed by a store and decided to rob it, and went to his mother's house and got a shotgun. When he went back to the store to rob the clerk, the clerk said he did not have any money on the premises. Durocher then decided "it would probably be better to go ahead and kill him then that way the police could not pin it on me," and he shot the clerk, wiped his fingerprints, locked up the store, and

stole the clerk's car. Id. at 999, 1001. This Court upheld CCP with the bare comment: "This sequence of events demonstrates the calculation and planning necessary to the heightened premeditation required to find the cold, calculated, and premeditated aggravator." Id. at 1001.

Appellant respectfully submits that Durocher cannot be squared with the foregoing body of case law and shows little more than ordinary premeditation: Durocher decided to kill the clerk, and then he killed him. The decision cannot be squared with Rogers and Hill v. State, 515 So. 2d 176 (Fla. 1987). Rogers could have escaped and was escaping when he decided to turn back and shoot the victim repeatedly because he had played the hero. In Hill, Hill and Jackson were committing a bank robbery when the police arrived. Hill safely escaped out the back while Jackson was detained in front of the building. But instead of fleeing, Hill went up to the officers from behind and shot them. Citing to Rogers, this Court struck CCP because it found "an absence of any evidence that appellant carefully planned or prearranged to kill a person or persons during the course of this robbery."

Further, the facts of Durocher do not show as much cold, calculated premeditation as cases such as Wyatt I, Wyatt II, Power, Green, Thompson and Hamblen. Thompson said early in the criminal episode that he felt like killing the victim, and then

he and Surace slowly and deliberately beat and tortured her to death. In Wyatt II, Wyatt decided to kill the woman in the ditch just "to see her die." He decided to kill the three people at the pizzeria in Wyatt I and told one of his victims to listen close to hear the bullet coming. He then coldly and deliberately finished off the manager. Power coldly and deliberately murdered the schoolgirl who he had rendered helpless by binding and gagging her, committing the murder in a manner he had contemplated 13 days before. Green who took a large butcher knife to the Nichols home, stabbed the wife, then went to the bedroom and stabbed the husband and crammed a bedcover into his mouth. Hamblen decided to kill the woman after she set off a silent alarm, took her to the dressing room and shot her. Both in Thompson and Wyatt II the defendants articulated in words their deliberate intent to kill, and the actions of the defendants in the other cases declared a purposefulness equivalent to or greater than Durocher's.

3. Rules for CCP are so contradictory as to allow its application to almost all premeditated murders.

Without the guidance of the rule set out in Rogers, the cases have developed conflicting rules of thumb which can be applied to almost all premeditated murders.[28]

a. Absent the guidance of Rogers, the cases have developed contradictory rules for application of CCP.

Cases have upheld CCP because the murderer did not conceal his identity and because he did conceal his identity.[29] Compare Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993) (CCP upheld because Sweet "attempted to cover his face with a pants leg, and he said nothing upon entering the apartment") and Ibar (home invasion robbery-murder by two disguised men; CCP upheld) to Parker v. State, 873 So. 2d 270 (Fla. 2004) (upholding CCP because "None of the three defendants took steps to conceal their identity").

Cases have upheld CCP when the defendant armed himself ahead of time[30] and have also upheld it when the defendant armed himself after arriving at the scene. Compare Franklin v. State,

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[28] Appellant raised the issue of inconsistent application of such factors at length as part of his pre-trial motion challenging CCP. R1 127-30. The judge denied the motion. R2 228.

[29] Appellant submits that failure to conceal one's identity is equally consistent with simple arrogance or lack of careful planning as it is with CCP. Inarguably, robberies, burglaries, second degree murders and other crimes are committed everyday by persons who are not masked.

[30] Appellant submits that advance procurement of a weapon cannot logically be used to differentiate between an ordinary armed felony murder, a premeditated murder, and a murder which is CCP.

No. SC04-1267, -So.2d – (Fla. June 21, 2007) (CCP indicated by advance procurement of a weapon) to Mason v. State, 438 So.2d 374 (Fla. 1983) (CCP upheld when burglar armed himself after entering victim's home).

Cases have upheld CCP because the defendant removed the victim to a remote location, and other cases have struck it when the defendant removed the victim to a remote location.[31] Compare Preston v. State, 444 So. 2d 939 (Fla. 1984), vacated on other grounds 528 So. 2d 896 (Fla. 1988) (striking CCP where defendant robbed store clerk, kidnapped her, drove her to location 1 ½ miles away, walked her 500 feet from car, where her virtually naked body was found, stabbed and slashed with "multiple stab wounds and lacerations resulting in near decapitation" and crossmark carved into her forehead) and Wyatt II (striking CCP where Wyatt abducted a woman from a bar near Tampa and drove her across the state to Indian River County, where he shot her in the head "to see her die") to Nelson v. State, 850 So. 2d 514, 527 (Fla. 2003) ("regardless of whether Nelson intended to kill Brace at the time he entered her house, his act of driving around with the victim in the trunk for several hours and taking her to two remote locations before killing her indicates that,

[31] Appellant submits that abduction to a remote location cannot logically support CCP, since one can infer a lack of an intent to kill from an abduction of the victim: a criminal could effect his escape by abandoning a victim in a remote location and thus delaying the victim's ability to report the crime.

at the least, he conceived the plan to kill her during that extended period").

Cases have struck CCP when the defendant had the opportunity to leave, but instead stayed and killed, and they have upheld CCP based on that fact.[32] Compare Hill (when police arrived during robbery, Hill safely escaped out the back, but, rather than flee, he went up to officers from behind and shot them; CCP struck) and Rogers (while co-defendant fled, Rogers turned back and shot victim three times)[33] to Alston, 723 So. 2d at 162 ("We have previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder.").

Similarly, cases uphold CCP because the defendant has acted

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[32] Appellant submits that the staying and killing rather than leaving does not even prove simple premeditation. One may be guilty of only second degree murder in such circumstances. Cf. Thompson v. State, 944 So. 2d 546 (Fla. 4th DCA 2006) (after disabled 87-year-old victim fell to ground during struggle, defendant took gun from victim's pocket and shot him while he lay on ground "as defenseless as a turtle"; evidence supported second degree murder conviction); Adkins v. State, 32 Fla. L. Weekly D1425 (Fla. 3d DCA June 6, 2007) (Adkins got out of his car when approached by victim, victim slapped Adkins, who got out firearm and chased victim down, shooting him in back; Adkins found guilty of second degree murder); Lidiano v. State, 32 Fla. L. Weekly D1224 (Fla. 3d DCA May 09, 2007) (restaurant patron thrown out of restaurant, returned and fired at manager and waitress; patron convicted of attempted second degree murder).

[33] See also Power (after abducing, hog-tying, and gagging girl, defendant slit her throat; CCP struck).

quickly and the felony and the killing happen in rapid succession, but others have upheld it because the defendant has not acted quickly. Compare Jennings (robbery and murders occurred in 10 minutes, showing "ruthless efficiency" and "methodic succession of events") and McCoy (same 13 minute continuous sequence of events) to Knight v. State, 746 So. 2d 423, 436 (Fla. 1988) ("Even if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill.").

Cases have upheld CCP when the victim is bound or does not resist and they have struck it in such situations. Compare Power (CCP struck where Power abducted, hog-tied and gagged schoolgirl before murdering her) and Geralds (CCP struck where Geralds bound woman before killing her) and Wyatt I (victims did not struggle or resist) to Looney (victims did not struggle or resist; CCP upheld).

Likewise, cases have upheld CCP when the victim resisted and have struck it when the victim resisted. Compare Boyett v. State, 688 So. 2d 308 (Fla. 1996) (defendant shot man defending himself with baseball bat; CCP not struck) to Street v. State, 636 So. 2d 1297 (Fla. 1994) (CCP struck where officer struggled with Street and was shot as he tried to flee). See also Hendrix v. State, 637 So. 2d 916 (Fla. 1994) (upholding CCP when one

victim did not resist and one victim did resist).

The recent commission of another murder supports CCP in some cases but not in others. Compare Zack v. State, 753 So. 2d 9, 21 (Fla. 2000) (defendant's recent commission of another murder supported CCP) to Wyatt (striking CCP where defendant committed murder shortly after committing three other murders).

Cases have based CCP on the defendant's prior general discussion of committing a future crime and other cases have said that such evidence is irrelevant to CCP. Compare Jennings, 718 So. 2d at 152 ("The scenario of events supports the elements of a calculated plan and heightened premeditation. We begin with witness Chainey's testimony that, approximately two years before these crimes, Jennings made general statements and gestures to the effect that if he ever needed any money, he would simply rob someplace or someone and eliminate any witnesses by slitting their throats.") to Hardy v. State, 716 So. 2d 761, 766 (Fla. 1998) (defendant sentenced for murder of deputy; "general statement made several weeks before the murder in reference to what Hardy would do if he were involved in a situation similar to Rodney King ... [cannot be construed] as sufficient evidence of a cold, calculated, and premeditated plan.") and Perry v. State, 801 So. 2d 78, 91-92 (Fla. 2001) ("Perry's statement about being able to kill someone with a knife by cutting the jugular vein **was not relevant** to proving the cold, calculated, and premedi-

tated (CCP) aggravating circumstance"; quoting and following Hardy).

b. As a result, CCP can apply to all but a very narrow category of premeditated murders.

From the foregoing, one can rely on any of a wide range of contradictory indicators in declaring almost any premeditated murder CCP. CCP should genuinely narrow the category of those eligible for death under the Cruel and Unusual Punishment Clauses of the state and federal constitutions. See Porter and Zant. Instead, it has expanded to cover almost all premeditated murders.

For example, Diaz says as to the coldness element: "This element **generally has been found absent only** for 'heated' murders of passion, in which the loss of emotional control **is evident from the facts**." 860 So. 2d at 969. This statement turns the requirement of Porter and Zant on its head: First, by applying the element to all murders except "'heated' murders of passion," it limits its application to murders that are hardly premeditated at all and differ little from second degree murders. Second, it uses a **presumption** that applies the element **unless** the evidence affirmatively disproves it.

The same is true for the calculation and premeditation elements of CCP. Although they theoretically differ from the coldness element, in fact all three elements blend together so that proof of one is proof of another. In Ibar, the murders were

"cold" because they were "**execution-style** killings" in that Ibar had **time to reflect** and shot the victims in the back of the head. 938 So. 2d at 473. The **same facts** made the killings calculated because murders are calculated "where a defendant arms himself in advance, **kills execution-style**, and **has time to coldly and calmly decide to kill**". Id. The **same fact of having time to coldly decide to kill** then supported the element of heightened premeditation: "Because the videotape shows that the murders were **not committed immediately upon the intruders' entrance** to the home, that the victims were tied up, and that Sucharski was beaten for more than twenty minutes, it is evident that the defendants **could have left the scene before killing the three victims**. Thus, the calculated element of CCP is met." Id. at 474.

Thus, if one starts with the premise of Diaz that presumes application of the coldness element except to cases that are hardly first degree murders at all, and adds to it the analysis of Ibar, which applies the facts supporting coldness to all three elements, one has a circumstance that can apply to almost all murders and is not applied in a "genuinely narrow" way.

To avoid this unconstitutional expansion of CCP, Rogers serves to keep CCP within constitutional bounds. Under a strict reading of CCP, the circumstance cannot apply at bar because the state did not prove that appellant planned to kill before he ar-

rived at the house.

C. This Court should strike CCP because the judge found facts that reflect a carefully planned burglary, but the judge did not find a plan to kill formulated before appellant got to the house, and the state argued to the jury that CCP could apply even where the intent to kill was formed after the burglary began and the original purpose was thwarted.

The judge's findings showed that the **burglary rather than the murder** was well planned, and does not show the heightened planning required by the CCP circumstance, and the state told the jury it need not find that appellant intended to kill before the burglary began, so that it is very likely that the jury found CCP without finding a prior intent to kill.

1. The facts found by the judge do not support CCP.

First, the judge found many facts consistent with an intent to commit a burglary in order to obtain information from Nutter at gunpoint: Nutter did not threaten or resist appellant; her child was present; appellant directed the events; appellant and the others drove from Miami to Okeechobee County at night; the porch light was unscrewed; the phone was disconnected; two firearms were brought to the house, one for appellant and one for Hatcher; duct tape was brought and was used to bind Nutter; plastic bags were planned to be used to increase Nutter's panic.[34] R4 658-59.

[34] The judge did not point to any evidence showing that the plastic bags were used to increase the terror of the victim.

Next, the judge found facts consistent with a decision to kill made only after the original purpose was thwarted: he found there was "planning to cause a slow death by asphyxiation[35] with the duct tape and bags, only to then state that it was 'taking too long,' at which time the Defendant directed the co-Defendant to 'cut their throats,' to then, after the co-Defendant refused, directing the co-Defendant to separate the victims, put a pillow over their heads and shoot them. When the other victim, (Ronze Cummings) didn't die after the first shot, the Defendant told the co-Defendant to 'shoot him again,' and he did." R4 659.

Finally, the judge found other facts consistent with an intent to commit a burglary to confront Nutter and get information from her: having Hatcher do acts that would leave forensic evidence; not committing any theft except for stealing the car; and having Nutter take the car while appellant left the area. Id.

The facts found by the judge do not support CCP since they do not show appellant intended to kill before he got to the house.

In Crump v. State, 622 So. 2d 963 (Fla. 1993), Crump bound and strangled a prostitute. Ten months later, he committed an

[35] The judge did not say what evidence supported this finding of an intent to cause a slow death.

identical crime. Id. at 966. This Court struck CCP, writing at page 972:

> Crump argues that the State has failed to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any moral or legal justification. Section 921.141(5)(i). We agree. This Court has adopted the term "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., Hamblen v. State, 527 So 2d 800, 805 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The State can show heightened premeditation by the manner of the killing, but **the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit the murder before the crime began**. Hamblen, 527 So. 2d at 805; Rogers, 511 So. 2d at 533. However, the Court has found that heightened premeditation is inconsistent when the killing occurs in a fit of rage. Mitchell v. State, 527 So. 2d 179, 182 (Fla.), cert. denied, 488 U.S. 960, 109 S.Ct. 404, 102 L.Ed.2d 392 (1988).
>
> Applying these principles to the instant case, we disagree with the trial judge's finding that the State proved beyond a reasonable doubt that Crump killed Clark with the necessary heightened premeditation. In the sentencing order, the trial judge relied on the Williams rule evidence to show that heightened premeditation exists.FN4 We find that the State did not prove beyond a reasonable doubt that Crump had a careful prearranged plan to kill the victim **before inviting her into his truck**. Thus, the State failed to prove beyond a reasonable doubt the aggravating circumstance of cold, calculated, and premeditated without any pretense of moral or legal justification.
>
> FN4. The sentencing order provides in pertinent part:
>
> > The defendant, while in possession of a restraint device, invited the victim into his truck, bound her wrists, and after manually strangling her, dumped her nude body near a cemetery.

Likewise, this Court struck CCP in Castro v. State, 644 So. 2d 987 (Fla. 1994) because the evidence showed a careful plan to rob rather than to kill. Deciding he needed a car, Castro encountered Austin Scott, and struck up a conversation. He left on the pretext of getting some money, but instead, he got a knife from a nearby apartment. Returning, he persuaded Scott not to leave, and they drank a beer. Scott tried to leave again, and Castro "grabbed Scott by the throat and squeezed so hard that blood came out of Scott's mouth." As his victim struggled, Castro said, "Hey, man, you've lost. Dig it?" He then got the knife and stabbed Scott repeatedly. Having fulfilled his plan, he took Scott's car. Id. at 989. This Court struck CCP because the evidence showed a plan to rob, but not a careful design and heightened premeditation to kill:

> Turning to the next issue, we agree with Castro that the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This aggravating factor requires "a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder." Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985). **While the record reflects that Castro planned to rob Scott, it does not show the careful design and heightened premeditation necessary to find that the murder was committed in a cold, calculated, and premeditated manner**. Although this aggravating factor does not apply, three other aggravating factors support the death penalty and there is a weak case for mitigation. Thus, any error is harmless beyond a reasonable doubt, State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986), and the trial court did not err in instructing the jury on this factor.

Id. at 991 (footnote concerning heinousness circumstance omitted).

In Hill, as already discussed, Hill and Jackson stole a car in Mobile and drove to Pensacola where they robbed a savings and loan. When the police arrived, Hill safely escaped out the back, but Jackson went out the front door and was arrested. Rather than flee, Hill went up to the officers from behind and shot them, killing one and wounding the other. 515 So. 2d at 177. This Court struck CCP because the evidence did not show that Hill "carefully planned or prearranged to kill a person or persons during the course of this robbery." Id. at 179.

In Barwick v. State, 660 So. 2d 685 (Fla. 1995), receded from on other grounds Topps v. State, 865 So. 2d 1253 (Fla. 2004) the defendant saw Rebecca Wendt sunbathing around noon, then went to her apartment during the night and stabbed her repeatedly and stole her money. Id. at 688-89. He said he only intended to steal from her but lost control and stabbed her when she resisted. Id. Forensic evidence refuted his claim, showing that he attempted to commit a sexual battery. Id. at 689 and 694-95. Despite the evidence that Barwick had stalked Wendt down and killed her, this Court rejected the judge's finding of CCP, writing at page 696:

> Barwick also challenges the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner. With regard to this aggravator,

the trial court found:

> The defendant in a calculated manner selected his victim and watched for an opportune time. He planned his crimes, selected a knife, gloves for his hands, and a mask for his face so that he could not be identified. When struggling with the victim the mask was pulled from his face, and knowing that he could be identified, he proceeded in a cold, calculated manner, and with premeditation to kill her without any pretense of moral or legal justification. The defendant had planned a sexual battery or burglary or robbery or all three, had armed himself to further those purposes and when a killing became necessary, without any moral or legal justification or remorse, he killed her.

> We conclude that the evidence presented does not demonstrate that Barwick had a careful plan or prearranged design to kill the victim. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). "A plan to kill cannot be inferred solely from a plan to commit or the commission of another felony." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); see also Sochor v. State, 619 So. 2d 285, 292 (Fla.), cert. denied, 510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 596 (1993); Power v. State, 605 So. 2d 856, 864 (Fla. 1992), cert. denied, 507 U.S. 1037, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993); Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985). **Here, the evidence suggests that Barwick planned to rape, rob, and burglarize rather than kill Rebecca**. Because the murder was not committed in a calculated manner, we conclude that the trial court erred in finding the heightened premeditation necessary to establish this aggravator. The cold, calculated, and premeditated aggravator is therefore stricken.

At bar, the judge's order pointed to nothing showing a careful design to kill and heightened premeditation before the criminal episode. The record shows the purpose of the trip to Okeechobee was to get information about "Rico." Hatcher testi-

fied that appellant was asking where Rico was, saying "if he don't get his answers, 'somebody is going to die tonight.'" R16 1657-58.[36] Cummings testified that appellant was talking to Nutter, seeking information from her. R14 1468-69. She said she didn't know what he was talking about, and: "It just kept going back and forth. 'She know why I'm down here.' He said 'before -- before I leave tonight, somebody die tonight.'" R14 1472. This evidence does not establish that appellant went there to kill and the judge **did not specifically find that appellant had a prearranged designed to kill**. If such had been appellant's intent, he would not have interrogated Nutter and would not have bound her up. Cf. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992) ("the fact that the victim was bound first rather than immediately killed shows that the homicide was not planned"). The facts found by the judge were consistent with appellant having killed Nutter out of frustration at not getting an answer as to Rico's whereabouts. Cf. Williams v. State, -So.2d-, 32 Fla. L. Weekly S347 (Fla. June 21, 2007) (striking CCP because evidence did not refute possibility that

[36] Significantly, the judge did not rely on either Hatcher's testimony that appellant said somebody was going to die if he did not get answers and Cummings' testimony that appellant said someone was going to die during his questioning of Nutter. Given the numerous contradictions in their testimony, the judge could have, and apparently did, disregard their testimony on this point. Regardless their statements do not show an intent to kill before the burglary began.

Williams wanted victim to act as mediator with girlfriend, became enraged when she refused, and attacked and murdered her).

2. The state contended to the jury that CCP could apply because the intent to kill was formed after the burglary began and the original intent was frustrated, so that the jury would likely have found CCP even without finding a prior intent to kill.

In arguing CCP to the jury, appellee contended that the evidence "would certainly suggest, since [appellant] never got any answers" to his questions about Rico, appellant intended to kill "all along," R19 2187-88, and then continued by arguing that, regardless, the intent to kill was present after the original intent to get information was thwarted (R19 2188-89):

> … . But at a minimum, and we're talking here not about the fact that there is premeditation, you've already determined that by your verdict, but cold, calculated or CCP, what we call CCP, requires more, requires heightened premeditation; more premeditation than you would see in most killings, not the kind of premeditation where you look at somebody "I'm going to kill you," and shoot them in the head. More premeditation than simply a decision or intent that's formed with some opportunity to reflect or think about it.
>
> Here you've got minimum, minimum, you've got both people secured, you've got Jeannie Nutter taken to one bedroom, got Ronze Cummings taken to another bedroom, you've got -- this is all before the murder is committed. You've got some period where they're waiting for them to die as a result of the suffocation because of the Wal-Mart bags and that's not working, so they take them into the bedrooms, and we have testimony from two -- we have testimony from two people that Neil Salazar says to Julius Hatcher "Cut their throats" and before the murder is committed, this is all going on and all being directed by Neil Salazar, and Julius Hatcher is given a gun, told what to do with it by Neil Salazar, he clearly has a fully formed conscious intent that this be carried out, Neil Salazar, who has told Julius

> Hatcher "If you don't hurry up and do what I tell you, I'm going to drop you here." And then Julius Hatcher goes in the bedroom and shoots Jeannie Nutter once in the head. Clearly cold, calculated and premeditated. … .

From this argument, the jury would naturally conclude that CCP would apply even if appellant did not intend to kill before arriving at the house.

D. *The error was not harmless beyond a reasonable doubt*.

When an error occurs in penalty proceedings, the burden is on the State to prove beyond a reasonable doubt that the error did not contribute to the sentence. See Perry, 801 So. 2d at 91. Under the federal and state constitutions, this rule applies to errors in the finding of aggravating circumstances. See Parker v. Dugger, 498 U.S. 308, 321 (1991). See also Elledge v. State, 346 So. 2d 998, 1003 (1977) ("Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered.").

At bar, the state emphasized CCP in the jury sentencing proceedings. R19 2187-89. Further, CCP has historically received significant weight. See Morton v. State, 789 So. 2d 324, 331 (Fla. 2001) ("CCP and HAC ... 'are two of the most serious ag-

gravators set out in the statutory sentencing scheme.'"). Further, appellant presented many mitigators and the jury could reasonably have considered the lenient treatment of Hatcher could justify a life sentence without the CCP circumstance. (The state said in its penalty argument that the treatment of Hatcher was "the real issue in this case." R19 2189.) This Court should order new jury sentencing proceedings. See Perry and Perez v. State, 919 So. 2d 347, 381-82 (Fla. 2005).

IV. WHETHER THE COURT ERRED IN ALLOWING APPELLEE TO ARGUE TO THE JURY THAT CUMMINGS AND HATCHER WERE TERRORIZED DURING THE BURGLARY.

In its second-phase argument to the jury, appellee argued that the purpose of the burglary was to "terrorize" and that both Cummings and Hatcher were terrorized. R19 2177-78. Appellant objected that the argument presented non-statutory aggravation. R19 2178-79. Appellee replied that the term "terrorize" went to a theory of kidnapping and gave weight to the aggravator. R19 2179-80. The judge allowed the argument because he thought that it properly went to the separate aggravator of heinousness (R19 2180):

> THE COURT: You want -- I thought you were -- all right, I'm going to -- I'll overrule the objection. I think that given the fact that heinous, atrocious and cruel is to be argued probably in the next five minutes or so, and one of the words used for that is torturous, terrorized -- they don't use "terrorize," they use "torturous," but I think given the facts and circumstances and the future instructions they'll receive that it is permitted. So I'll overrule the objection.

Appellant's objection was well founded, and the judge erred in overruling it. The state may not rely on a non-statutory aggravating circumstance. See, e.g., Colina v. State, 570 So. 2d 929 (Fla. 1990) (reversing sentence because of presentation of evidence of nonstatutory circumstance of lack of remorse); Elledge (reversing sentence because of presentation of nonstatutory circumstance of criminal conduct for which there was no conviction); Blair v. State, 406 So. 2d 1103 (Fla. 1981) (error

to consider nonstatutory aggravator of manner of disposal of victim's body). Reliance on nonstatutory aggravation deprived appellant of his right to a fair jury trial on the evidence under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

The state had no basis for its claim that it could argue a kidnapping theory. It did not ask for an instruction on either kidnapping or kidnapping felony murder in either phase of the jury trial, and the judge did not instruct on such a theory. Further, the judge erred in ruling that the terrorizing of both Cummings and Nutter could be relevant to the heinousness (HAC) circumstance. The terror or fear of Cummings was not relevant to HAC, which looks to the effect of the defendant's acts on the **murder victim**. In Clark v. State, 443 So. 2d 973 (Fla. 1983) two men murdered a woman as her wounded husband begged for her life. His suffering was not relevant to HAC: "as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, **it is the effect upon the victim herself that must be considered** in determining the existence of this aggravating factor." Id. at 977.

Clark relied on Riley v. State, 366 So. 2d 19 (Fla. 1979). Riley and a cohort robbed a store's manager and two owners, a father and son. The robbers threatened all three men with guns, made them lie down, bound and gagged them, and shot them in the

head. The father and the store manager died, but the son survived. This Court held that HAC could not be based on the effect of the father's murder on the son, writing at page 21:

> ... . **Here the atrocity described by the prosecutor and apparently accepted by the trial judge was the son's having to see his father's execution death.** There was nothing atrocious (for death penalty purposes) done to the victim, however, who died instantaneously from a gunshot in the head. … .

More generally, to allow the use of nonstatutory aggravation for the purpose of adding weight to the aggravating circumstances would destroy the rule forbidding nonstatutory aggravation. For instance, the state could use such nonstatutory aggravation as lack of remorse or the manner of disposing of the body as an argument for giving more weight to CCP. Likewise, it could use a claim of future dangerousness to support giving weight to a prior violent felony. Strict limitation of aggravators is necessary to reserve the death penalty for only the most aggravated murders.

"While wide latitude is permitted in closing argument, see Breedlove v. State, 413 So. 2d 1, 8 (Fla.1982), this latitude does not extend to permit improper argument." Gore v. State, 719 So. 2d 1197, 1200 (Fla. 1998). At bar, appellee's argument improperly used a nonstatutory aggravator in its jury argument. This Court should find error in the judge's ruling allowing the argument.

Under the standard articulated in Point I of this brief, the

error was not harmless beyond a reasonable doubt. Appellee emphasized the felony murder circumstance in its final argument. R19 2178-82. It said appellant "terrorized the two occupants until the decision or until the actions were taken to kill them," R19 2178, he committed the burglary "for the purpose of terrorizing the occupants," R19 2178, until "at some point the decision to kill replaced that of simply terrorizing them," id., and he "terrorize[d] them with questions." R19 2178. It argued that the circumstance should receive "a lot of weight." Id. Given this insistent repetition, **with the judge's blessing**, appellee cannot not reasonably say that its deliberate argument did not affect the jury's verdict. This Court should order resentencing.

V. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED (CCP) CIRCUMSTANCE ON THE GROUND THAT IT FAILED TO REQUIRE THAT THE STATE PROVE THAT APPELLANT INTENDED TO KILL BEFORE THE CRIME BEGAN.

Appellant moved before trial to have the cold, calculated and premeditated (CCP) circumstance declared unconstitutional facially and as applied. R1 124-133. He argued that the circumstance violated the fifth, sixth, eighth, and fourteenth amendments to the federal constitution and article I, sections 9, 16, 17, 21, and 22 of the state constitution. R1 125. Among other things, he argued that the standard jury instruction failed to require that the state prove beyond a reasonable doubt an intent to kill before the crime began. R1 132. The judge denied the motion. R2 228. At the penalty phase, appellant renewed his objections to CCP and other circumstances. R19 2069.

The trial court erred. As contended in Point III above, CCP, when properly construed and constitutionally limited, requires that the defendant have intended to kill before the criminal episode began under Rogers, McKinney and other cases. The standard jury instruction, which was given at bar,[37] did not

[37] The judge instructed the jury (R19 2217-18):

> Four, the crime for which the Defendant is to be sentenced was committed in a cold and calculated and premeditated manner and without any pretense or moral or legal justification. Cold means the murder was the product of calm and cool reflection. Calculated means having a careful plan or prearranged design to commit

require such proof and relieved the state of its burden. Hence, it was unconstitutional. This error tainted the resulting penalty verdict and appellant's sentence. Cf. Espinosa v. Florida, 505 U.S. 1079 (1992) (unconstitutional jury instruction on heinousness circumstance rendered sentence unconstitutional).

The error was not harmless beyond a reasonable doubt. The state's argument to the jury, R19 2187-89, and the judge's sentencing order, R4 658-59, placed great reliance on CCP, and the state encouraged the jury to apply CCP even if it did not find that appellant intended to kill before the criminal episode began. R19 2187-89. This Court should order resentencing.

> murder.
>
> As I had previously defined for you, a killing is premeditated if it occurs after the Defendant consciously decides to kill. The decision must be present in the mind at the time of the killing, the law does not fix an exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing.
>
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required. A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated and premeditated nature of the murder.

VI. WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant contends that section 921.141, Florida Sttutes, is unconstitutional on several grounds. He concedes that this Court has rejected essentially similar arguments in, e.g., Johnson v. State, -So. 2d-, 2007 WL 1933048 (Fla. July 5, 2007).

A. Under Ring v. Arizona, 536 U.S. 584 (2002), the question of death eligibility must be determined beyond a reasonable doubt by a jury pursuant to the Jury and Due Process Clauses. The jury proceeding under section 921.141 does not comport with the requirements of the Jury and Due Process Clauses of the state and federal constitutions because the jury renders an advisory non-unanimous verdict at which it is not required to make the eligibility determination by proof beyond a reasonable doubt and the normal rules of evidence do not apply. Hence, Florida's death penalty sentencing scheme is unconstitutional, and this Court should vacate appellant's death sentence.

So far as Bottoson v. Moore, 833 So. 2d 693 (2002) stands for the proposition that a conviction for first degree murder without more makes the defendant death eligible, it renders Florida's death sentencing scheme unconstitutional under the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Under Furman v. Georgia, 408 U.S. 238, 313 (1972), there must be a narrowing of the category of death eligible persons. Cf. Jurek v. Texas, 428 U.S. 262,

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

B. As already noted, Bottoson held that one becomes eligible for the death penalty by a mere finding of guilt of first degree murder. If this is true, Florida's death penalty statute is unconstitutional because it does not narrow the category of death eligible defendants as required by Furman v. Georgia, 408 U.S. 238 (1972).

C. Section 921.141 sets no standard for the proof of mitigating evidence. But the standard jury instructions limit jurors to consideration of mitigation after being "reasonably convinced" of its existence. The instruction improperly invades the province of the Legislature, incorrectly states the law, and limits the consideration of constitutional mitigating evidence.

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

D. The Cruel and Unusual Punishment, Jury, and Due Process Clauses of the state and federal constitutions forbid imposition of a death penalty where the jury has been mislead as to its role in the sentencing process. See Caldwell v. Mississippi, 472 U.S. 320 (1985). Under Ring, the state may not obtain a death sentence unless the jury makes a finding of the predicate facts that make a defendant eligible for a death sentence. Under section 921.141, Florida Statutes, one is not eligible for a death sentence unless there is a finding of "sufficient aggravating circumstances" and the mitigation does not outweigh these aggravators. Hence, under Ring, a defendant may not be sentenced to death unless the jury makes these findings. At bar, The judge erred in instructing the jury that its penalty verdict was advisory, since, under Ring, the verdict is not merely advisory, but is a necessary predicate for a death sentence. This Court should order resentencing.

E. The Cruel and Unusual Punishment, Jury, and Due Process Clauses of the state and federal constitutions forbid imposition of a death penalty where the jury has failed to properly consider mitigation and is not properly guided by the jury instructions in its penalty deliberations. Section 921.141 requires

that the jury find sufficient aggravating circumstances, and must determine whether sufficient mitigating circumstances exist to outweigh them, but sets out no method by which the jury is to do this.

The statute is silent as to whether the mitigating circumstances are to be determined unanimously, or by a substantial majority, a bare majority, a plurality, or only by individual jurors. The Constitution requires strict guidance to the jury in capital sentencing. The eighth amendment requires a higher standard of definiteness than does the Due Process Clause with respect to jury instructions in capital cases, and jury instructions which preclude the full consideration of mitigating evidence are improper. Cf. Hitchcock v. Dugger, 481 U.S. 393 (1987). Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990) disapproved instructions that did not adequately guide the jury as to how many votes were necessary to determine the existence of mitigating circumstances. Under section 921.141, the jury has no guidance as to whether there is a threshold number of votes required before mitigating evidence can be determined. Given the standard instructions, the jury could conclude that there is such a threshold and could in consequence be misled into failing to consider mitigating evidence. Accordingly, section 921.141 is unconstitutional.

The statute is silent as to how the jury is to go about determining the existence of aggravating circumstances. It is unconstitutional because it does not provide for how many votes are necessary to find any particular aggravating circumstances.

Since the jury is usually instructed as to several aggravators, it is possible for a jury to return a death verdict without even a majority of the jurors finding any one aggravating circumstance. This situation is contrary to the constitutional requirement of definiteness in sentencing determinations and the general due process requirement that verdicts in criminal cases be rendered by at least a substantial majority of the jury.

Since jurors could reasonably construe the law as authorizing a death verdict where not even a majority of them agree as to any one aggravating circumstance, Florida's death penalty statute is unconstitutional for failure to channel the sentencer's discretion as required by the state and federal constitutions.

F. In view of the foregoing, appellant’s sentence denied his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and it must be vacated.

CONCLUSION

Appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to by courier on Leslie Campbell, Counsel for Appellee, Assistant Attorney General, Counsel for Appellee, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, on 16 July 2007.

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Attorney for Neil K. Salazar

CERTIFICATE OF FONT SIZE

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

_____

Attorney for Neil K. Salazar