IN THE SUPREME COURT OF FLORIDA

WILLIAM DEPARVINE,	:	
Appellant,	:	
vs.	:	Case No.SC06-0155
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER 0236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

State Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

William Deparvine (appellant) was charged by indictment on January 28, 2004 for the Hillsborough County murders of Richard and Karla Van Dusen, as well as armed kidnapping (two counts), and armed carjacking (one count) (1/71-74). The two murder counts allege only that appellant "did unlawfully and feloniously kill a human being" by shooting him with a firearm (as to Richard Van Dusen) and by shooting her with a firearm and/or stabbing her with a sharp object (as to Karla Van Dusen); the indictment contains no allegation by the grand jury either that the killings were premeditated or that they occurred during the commission of an enumerated felony (1/71). Appellant was tried before Judge J. Rogers Padgett and a jury, and on August 3, 2005 he was found guilty of two counts of first degree murder and one count of carjacking (13/2299-2302; 40/3737). [Judgments of acquittal were granted mid-trial on the two kidnapping counts (37/3109-10)]. Following the penalty phase, the jury returned two 8-4 death recommendations (14/2412-13; 41/3930-31), and on January 9, 2006, finding four aggravating factors and giving little weight to mitigating factors, the judge imposed sentences of death (15/2558-62).

The state's case against appellant was based entirely on

circumstantial evidence. Seventy-one prosecution witnesses and eighteen defense witnesses testified in the first phase of the trial (see 13/2305-07). Due to page limitations, and because appellant is not challenging sufficiency of the evidence (except as to carjacking, Issue IV), undersigned appellate counsel will forego a detailed summary of the testimony. Facts pertaining to each issue raised are set forth in the argument portion of the brief.

The bodies of Richard and Karla Van Dusen were found on the morning of November 26, 2003 on a dirt road near the residence of Wayne Reshard in northern Hillsborough County (28/1809-10; 29/1899-1913,1924-35;30/2041;31/2175-78;33/2452-53,2460;37/3212-13,3218-19). Each had been shot in the head; Karla was also stabbed twice in the chest (29/1957-58,1970-83,1981-83). Their Jeep Cherokee was found in the parking lot at a business (Artistic Doors) 1.3 miles away (28/1812-13;29/2016-19;30/2035-47,2097-2107, 2113-17;31/2184-85,2221;33/2455).

The prosecution's theory of the case (see opening statement, 28/1803-23) was that appellant killed the Van Dusens to facilitate, or avoid detection for, the theft of their 1971 Chevrolet Cheyenne pickup truck (see 14/2527; 15/2560). According to the state, appellant had coveted such a truck for some time, and had entered into separate negotiations with the Van Dusens and with the owner of another truck (George Harrington) (see 40/3661, 3663;14/2525;32/2328-

68;38/3280-96;39/3405-19).Appellant convinced the Van Dusens he was a legitimate buyer, and earlier in the day on November 25 Rick Van Dusen had completed, signed, and gotten notarized a bill of sale stating a purchase price of $6500 paid in full(Exh.Vol.3/260-63;32/2396,2401-03;33/2496-2502;2602-8;38/3253-58,3326-27;39/3450-53). The prosecution contended that appellant never had any money, or any intention, to pay for the truck (and further contended that the Rolex watch he said he had sold to fund the purchase never existed). Instead, appellant, on the pretext of getting the paperwork done, lured the Van Dusens to an isolated location, where he caught them off guard and shot them in the front seat of their Jeep Cherokee (see 14/2525-26). [The Chevy truck having been left at another location, because - - according to the prosecutor - - appellant was afraid it would be seen or would leave tire tracks at the crime scene]. Appellant then, according to the state's hypothesis, drove the jeep to the parking area at Artistic Doors, took the keys (so that nobody else could move the jeep away from the ID card), and dropped on the pavement a Florida identification card belonging to Henry Sullivan (a black male who was a former neighbor of appellant), as a red herring (see 14/2526). Although none of the tire tracks at either the dirt road where the bodies were found or the parking area where the jeep was abandoned could have been made by the Chevy truck (34/2705-17), the state's hypothesis was that appellant, having use the jeep to get back

to the truck [see Issue IV, infra], then drove the truck back to his apartment. Weeks later, while the Van Dusens deaths were under investigation (and after he had been questioned by police and the truck had been impounded) appellant went to the clerk of court's office and applied for a replacement title. [The original title was never located]. (See 32/2396-06;34/2685-90,2762-68;38/3247-58,3322-24,3340-41,3348,3351-52,3365;39/3399-3402,3463).

Appellant's testimony in his defense (see opening statement, 28/1823-45) was that the Van Dusens brought the truck early in the evening to his apartment building in central St. Petersburg, where he paid for it in cash (using funds obtained by selling a Rolex watch which he'd inherited in prison from a terminally ill inmate he'd befriended, 38/3299-3300); Rick gave him the completed bill of sale, but had misplaced the title (38/3329-44). Appellant testified that he never left the vicinity of his apartment building that night, and he did not kill the Van Dusens (38/3344, 3380).

Blood (mostly that of the Van Dusens) was found throughout the front seat of the Jeep, while a thorough processing of the Chevy truck did not indicate any blood in that vehicle (35/2835-40,2872-75;36/2932-33,2939;33/2487-95,2636;see28/1836-37;40/3626-30). DNA matching appellant's profile was found at six locations (visible red spots of suspected blood) on the Jeep's steering wheel(28/1820-21;31/2280-90;35/2841-44,2875-76,2887-91;36/2907-08,2928-30);

the prosecutor contended that it got there at the time of the murders, while appellant testified that he had opened a scab while priming the carburator after the truck had run out of gas during a test drive two days earlier; he must have gotten drops of blood on the wheel while driving the Jeep back to the Van

Dusens' house (38/3312-20).[1] [Peter Wilson, a co-worker who had traveled with Rick in the Jeep from Lakeland to Lake Wales and back on the afternoon before the murders did not observe any stains on the steering wheel. Wilson, however, was in the passenger seat (and did not even notice whether or not there was a Sunpass transponder in the jeep); moreover it was uncertain whether the swabs came from the front or the back of the steering wheel (32/2377-84; 31/2290; 35/2876)]. The state's two DNA experts acknowledged that there was no scientific way to determine how long any of the samples containing DNA had been at the locations where they were found (36/2907-08, 2947).

SUMMARY OF THE ARGUMENT

(1) Statements made by Karla Van Dusen in a telephone

[1] After they ran out of gas three quarters of a mile from the house, appellant testified, he and Rick walked back to the house to get a can of gas and then Rick drove the Jeep back to where the truck was. After pouring the small amount of gas into the tank, Rick drove the truck to a gas station to fill up, and appellant drove the Jeep back to the Van Dusens' house

conversation with her mother were harmful and inadmissible hearsay; they could not be introduced under the "spontaneous statement" exception because Karla was not under the influence of a startling event; and because her statements were narrative rather than sensory, they referred to past and anticipated future occurrences, and they do not show the absence of retrospective mental action or reflective thought. (2) The indictment failed to charge a crime, and was fundamentally and jurisdictionally defective, because it alleged neither of the alternative elements (premeditation or felony murder) necessary to charge first degree murder. (3) The trial court committed fundamental error, and impermissibly constructively amended the grand jury indictment, by instructing the jury on and giving them a verdict option of premeditated murder. (4) The evidence was legally insufficient to prove carjacking, and the trial court's jury instruction failed to ensure jury unanimity on the carjacking count. (5) The state's introduction of excessive and extremely emotional "victim impact" evidence violated Fourteenth Amendment safeguards. (6) A prospective juror, Daryl Rucker, was improperly excused for cause on grounds broader than those permitted by the Adams, Witt, and Gray decisions; his views on the death penalty in no way indicated any inability to follow the law or abide by his oath. (7) Florida's capital sentencing scheme, which emphasizes the role of the judge over

(..continued)
(38/3313-14,3318-19).

the jury, is constitutionally invalid under Ring. (8) The judge's sentencing order fails to clearly indicate what mitigating circumstances he found, and fails to address or evaluate Dr. Rosen's Spencer hearing testimony and report that appellant suffers from several psychiatric conditions which affect his behavior.

ARGUMENT

ISSUE I THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE, UNDER THE "SPONTANEOUS STATEMENT" HEARSAY EXCEPTION, EVIDENCE OF OUT-OF-COURT STATEMENTS MADE BY KARLA VAN DUSEN DURING A TELEPHONE CONVERSATION WITH HER MOTHER, BILLIE FERRIS.

A. Billie Ferris' Hearsay Testimony in the Context of the Circumstantial Evidence

Appellant's convictions were based entirely on circumstantial evidence.[2] The prosecution's hypothesis was that appellant shot and killed Rick and Karla Van Dusen in order to facilitate, or avoid detection for, the theft of their 1971 Chevrolet Cheyenne pickup truck. The defense's contention was that appellant bought the truck, and someone else killed the Van Dusens. It was undisputed that appellant and Rick Van Dusen had been in negotiation for the sale of the vehicle, and that Rick had completed, signed, and had notarized a bill of sale indicating a total purchase price of $6500 (Exh.Vol.3/260-63;see 32/2396,2401-03;33/2496-2502,2602-08;38/3253-58,3326-27,3450-53).The prosecution argued (1) that Rick would not likely have sold the truck at that price, and (2) that appellant had neither the ability nor the intention to pay for it; instead - - according to the state's hypothesis - - he lured the Van Dusens to a remote location, where he

[2] The trial judge exercised his discretion to give the jury the circumstantial evidence instruction (39/3573-74;40/3725-26).

shot them to death inside their Jeep Cherokee. The defense's contention, based also on circumstantial evidence coupled with appellant's testimony, was that the Van Dusens delivered the truck as planned to appellant at his apartment in central St. Petersburg, where he paid the $5000 balance of the purchase price in cash. After the Van Dusens left his apartment - - with Karla driving the Jeep and Rick having gotten into a different red truck with another man who had apparently been waiting for them - - appellant never saw them again. (See 38/3329-44).

The state and the defense presented voluminous and conflicting evidence and inferences regarding such matters as the value and condition of the old but classic Chevy pickup truck (going to the question of whether Rick Van Dusen would likely have sold it for the amount appellant said - - and the bill of sale indicated - - he paid for it); appellant's access or lack of access to sufficient funds to buy the truck; Rick Van Dusen's motivation or lack of motivation to lower the price for a quick sale; appellant's prior negotiations with another potential truck seller, George Harrington, etc. While DNA matching appellant's profile was found on the steering wheel of the Van Dusens' Jeep, there was disagreement as to when and how it got there; the state asserted that the DNA placed appellant in the Jeep at the time the Van Dusens' were shot, while appellant testified that he had opened a scab while priming the carburator after the truck had run out of

gas during a test drive two days earlier; he must have gotten drops of blood on the wheel while driving the Jeep back to the Van Dusens' house (while Rick was taking the truck to a gas station)(38/3312-20). (The only other time he was ever in the Jeep, appellant testified, was very briefly in the back seat, parked outside his apartment complex on Tuesday, November 25, when he paid the $5000 balance and Rick gave him the bill of sale but couldn't find the title (38/3337;39/3410-11)). A neighbor of the Van Dusens in Tierra Verde, Martha Baker, testified for the defense that she heard Karla Van Dusen, whom she knew well, on her back porch talking with a male (whom Ms. Baker didn't think was Rick) between 7:15 and 7:50 p.m.; a time frame inconsistent with the state's hypothesis that appellant was the killer (37/3137-54,see 40/3651/55). The prosecutor argued that Ms. Baker must be mistaken because Sunpass records did not indicate that the transponder in Karla's Jeep Cherokee ever re-entered Tierra Verde (see 40/3701-03).

In this context, the state had only a single piece of circumstantial evidence which, if believed by the trier of fact, directly and irreconcilably contradicted appellant's version of the events. The hearsay testimony of Billie Ferris (Karla Van Dusen's mother) that Karla had told her she was "following Rick and the guy that bought the truck", that he "knows where to get the paperwork done tonight" and he had cash to pay for the truck, was devastatingly harmful; it was

the critical piece of evidence in the state's case, because it was the only evidence placing appellant with the Van Dusens at any time after he said they'd left his apartment complex, and it was the only evidence placing the red Chevy pickup truck anywhere north of central St. Petersburg where appellant lived.

B. Billie Ferris' Testimony and The Defense Objections Thereto

In pretrial motions (before Judge Ronald Ficarrotta) and at trial (before Judge J. Rogers Padgett), the defense moved to exclude as inadmissible hearsay certain statements allegedly made by Karla Van Dusen during a 37 minute telephone conversation with her mother, Billie Ferris (1/110,112,116-23,167-74;2/197-201,209-15,239-41;13/2140-42,2169-79;14/2441-43;17-421-29;28/1799). The phone conversation took place around 6:00-6:30 p.m. on Tuesday, November 25, 2003, the day before the Van Dusens' bodies were found; time of death, according to the associate medical examiner, was between 10 p.m. and 8 a.m. on the 25th or 26th. Defense counsel, citing Hutchinson v. State, 882 So. 2d 943,951 (Fla. 2004), contended, inter alia, that Karla's statements did not meet the criteria for admissibility as "spontaneous statements" under §90.803(1) of Florida's Evidence Code, because Karla was not under the influence of any startling event at the time the statements were made (2/199,209-11,239-41;13/2140-41).

The prosecutor contended nevertheless that Karla's statements to her mother were admissible under the "spontaneous statement" exception (1/140,145-47;2/222-29), and characterized this Court's analysis in Hutchinson as (1) wrong, (2) dicta, and (3) inconsistent with Federal Rule of Evidence 803(1)("present sense impression")(1/157-63;2/227). The prosecutor asserted that other than Hutchinson "there is no other case or authority for the premise for the spontaneous statement to be admissible it has to be preceded by [a startling] event" (2/227).

Defense counsel, in reply, pointed out that contrary to the state's suggestion, this Court's analysis in Hutchinson was far from "novel"; instead it was an accurate restatement of longstanding Florida law on the subject, i.e., that both the "excited utterance" and "spontaneous statement" exceptions require a startling event as a predicate (1/167-71). See Jano v. State, 510 So.2d 615 (Fla. 4th DCA 1987), approved in State v. Jano, 524 So.2d 660 (Fla. 1988); Hargrove v. State, 530 So. 2d 441,442 (Fla. 4th DCA 1988); Quiles v. State, 523 So.2d 1261,1263 (Fla. 2d DCA 1988); Blue v. State, 513 So.2d 754 (Fla. 4th DCA 1987); Lyles v. State, 412 So.2d 458,460-61 (Fla. 2d DCA 1982).

Judge Ficarrotta, distinguishing Hutchinson on the basis of "indicia of reliability", ruled pre-trial that Karla's statements to her mother could be introduced under the "spontaneous statement" exception (2/255-58). Defense counsel

renewed his hearsay objection at trial immediately before opening statements and twice again when Billie Ferris testified; Judge Padgett adhered to Judge Ficarrotta's prior ruling and overruled the objections (28/1799;29/1868-69).

During opening statements, the prosecutor three times emphasized the significance of Karla Van Dusen's statements to her mother during their phone conversation (28/1808,1818,1822). Billie Ferris testified that she is 72 years old and lives in North Carolina (29/1864). In the early evening on Tuesday, November 25, 2003 she received a telephone call at home from her daughter Karla (29/1867-68). Ms. Ferris did not remember exactly how long the conversation lasted, but she described Karla as a "long talker" (29/1870,1875). [Cell phone records subsequently introduced by the state indicated that a call from Karla's cell phone to Billie Ferris' number began at approximately 5:55 p.m. and lasted about 37 minutes (see 36/3022-23,3033,3048)]. Karla talked about a few other things first, and then Ms. Ferris heard a car motor running and asked Karla if she was in the car (29/1868-69,1879). Over renewed objection, Ms. Ferris testified that Karla continued by saying "I'm following Rick and the guy that bought the truck. He knows where to get the paperwork done tonight" (29/1869). The prosecutor asked Ms. Ferris whether Karla had indicated how the guy was going to pay for the truck that night (29/1869). Ms. Ferris replied that Karla told her the guy had cash (29/1869). The conversation then turned to

various other subjects (29/1870-71,1875-82). The next night, Ms. Ferris learned from a family member of Karla's death (29/1870-71).

The prosecutor subsequently used Ms. Ferris' testimony to cross-examine appellant and challenge his assertion that the Van Dusens left the truck with him at his apartment:

> Q. [Mr. Pruner]: And you would agree, wouldn't you, that it's logical to conclude that you were the man Karla Van Dusen was describing to Billie Ferris when she told her mom she was following Rick and the man that bought the truck?
>
> A. [Appellant]: No. I didn't go any place with them. The only time she was following the man that bought the truck is when we went around the block. That's the only time. (39/3470)

It was in closing argument, however, where the prosecutor ratcheted up the emphasis. He used it to begin his very brief (7 pages of mostly introductory comment) initial closing argument:

> The evidence has shown you beyond and to the exclusion of any reasonable doubt that on November 25th and into the 26th of 2003, the lives of Rick and Karla Van Dusen, lives of success and love for one another ended tragically after their lives crossed that of this defendant [William] Deparvine.
>
> The evidence has shown you beyond and to the exclusion of every reasonable doubt that <u>they died shortly after Karla Van Dusen told her mother I'm following Rick and the guy who bought the truck. He knows where we can get the paperwork done and he's got cash.</u> (40/3594)(emphasis supplied)

In his much longer rebuttal closing argument, the prosecutor returned to the subject:

> And what is this phone call 704-471-0831? That's the phone call to Billie Ferris. Now, Mr. Skye made a lot of attempts to dissuade you that Billie Ferris knows what she's talking about.
>
> But what did Billie Ferris tell you and what could she not be impeached on that fact? Karla called her and said I'm following Rick and the guy that bought the truck. He knows where to get the paperwork done. And there's paperwork left to be done. This title is not complete. He knows where to get the paperwork done and he has cash.
>
> That conversation starts four minutes after the 5:50 conversation. He wants to tell you it happened some 20, 30 minutes after - - after they left. But his time line is not - - is not accurate. It is plain wrong. The cell phone records show you that because the Van Dusen's cell phones are hitting off of Tierra Verde at 5:33 and don't get to downtown until approximately 5:45, 5:50 when, in fact, they are downtown and finally making contact with this defendant.
>
> And she's identifying the person she's following as the buyer of the truck. (40/3699-3700)(emphasis supplied).

Shortly thereafter, the prosecutor pointed out that the Van Dusens' cell phones were not used after 6:37 p.m.:

> . . .after they have been in uninterrupted travel from the point right down near Mr. Deparvine's neighborhood from which they pick him up and Karla told Billie Ferris I'm following Rick and they guy that called - -bought the truck. (40/3704)

Finally, as his argument to the jury built to its climax, the prosecutor invoked the bond between a mother and her child:

> If someone's going to do you wrong, they're going to do you wrong. That was the defendant's words and the defendant's credo. Tragically for Richard and Karla Van Dusen, this defendant chose to do them wrong and did them wrong that led to their death.

Now, ladies and gentlemen, throughout a child's life, he or she sends unspoken messages to his or her mother. The infant's cry will trigger biological responses to the breast-feeding mother. The mother, from the mood of her child, can determine whether the child is happy or in love or afraid.

And unbeknownst to Karla Van Dusen, she identified her killer to her mother on that telephone when she said I'm following Rick and the person who bought that truck. He knows where to get the paperwork done. She identified William Deparvine with her words and he left his blood at the scene and he was in possession of that truck that he coveted.

Ladies and Gentlemen, I ask you to return a verdict of guilt as to all counts. It has been proven beyond and to the exclusion of every reasonable doubt. And thank you for your time and attention. (40/3708-09)(emphasis supplied)

C. Karla's Statements in the Phone Conversation with Her Mother (1) were Hearsay; (2) were Introduced for the Truth of the Matters Asserted; and (3) were not Admissible Under the "Spontaneous Statement" Exception of Florida's Evidence Code

Hearsay is an out-of-court statement testified to by a person other than the declarant which is offered for the truth of the matter asserted. Hutchinson v. State, supra, 882 So.2d at 950; Stoll v. State, 762 So.2d 870,876 (Fla. 2000). In the absence of an applicable exception, hearsay evidence is inadmissible. Hutchinson, at 951. A trial court's discretion in ruling on the admissibility of hearsay is narrowly limited by the rules of evidence [see, e.g. Taylor v. State, 601 So.2d 1304,1305 (Fla. 4th DCA 1992); Sybers v. State, 841 So.2d 532,545 (Fla. 1st DCA 2003)][3], and where hearsay has been introduced by the prosecution in obtaining a criminal conviction the state has the "burden of demonstrating that the requirements of the evidence code have been met." Jano v. State, supra, 510 So.2d at 616, decision approved in State v. Jano, supra, 524 So.2d at 663.

At the outset, undersigned counsel wishes to make it clear that he is not contending on appeal that Karla's statements to her mother were "testimonial" within the meaning

[3] See, generally, Johnston v. State, 863 So.2d 271,278 (Fla. 2003); Childers v. State, 936 So.2d 585,592 (Fla. 1st DCA 2006); Michael v. State, 884 So.2d 83 (Fla. 2d DCA 2004); Hinojosa v. State, 857 so.2d 308,309 (Fla. 2d DCA 2003); Nardone v. State, 798 So.2d 870,874 (Fla. 4th DCA 2001), each noting that the trial court's discretion in ruling on

of Crawford v. Washington, 541 U.S. 36 (2004). In Crawford, the U.S. Supreme Court drew a distinction between testimonial hearsay (which is inadmissible under the Confrontation Clause of the U.S. Constitution unless certain prerequisites, including a prior opportunity for cross-examination, are satisfied) and nontestimonial hearsay (the admissibility of which is determined under state evidentiary law). See Davis v. Washington, 547 U.S. ____, 126 S.Ct. 2266,2273, 165 L.Ed.2d 224 (2006); Drach v. Bruce, 136 P.3d 390,399 (Kan. 2006); Hodges v. Commonwealth, 634 S.E.2d 680, 688-89 (Va. 2006). Since, as in Hodges, the out-of-court statements in the instant case are nontestimonial, their admissibility or inadmissibility "is determined under the law of hearsay rather than the Confrontation Clause". 634 S.E.2d at 689.[4]

Judge Ficarrotta's ruling allowing the prosecution to introduce as "spontaneous statements" under Section 90.803(1) Karla's statements during the phone conversation with her mother (that she was following Rick and the guy that bought the truck, that he knew where to get the paperwork done tonight, and that he had cash) was clear and harmful error for at least three related reasons. First, there was no indication that Karla was under the influence of any startling

(..continued)
evidentiary matters is limited by the rules of evidence.

[4] The trial court allowed the introduction of Karla's statements under the Florida Evidence Code's "spontaneous statement" exception, and defense counsel's main objection was that this exception was inapplicable. To the extent that arguments based on Crawford were incorporated below, appellant through undersigned counsel waives those argument on appeal.

event at the time the statements were made; to the contrary, they were made during a long and apparently leisurely conversation in which many topics were discussed. Secondly, there is no authority under Florida law for a trial judge to allow the introduction of otherwise inadmissible hearsay based upon a conclusion that it has sufficient "indicia of reliability". Thirdly, Karla's statements were narrative rather than descriptive or sensory, and they conveyed information concerning past events and anticipated future events.

In Hutchinson v. State, supra, the state introduced the testimony of Pruitt (a friend of one of the murder victims, Renee) concerning a telephone conversation between the two women on the night of the murders. Renee had told Pruitt that she'd had a big fight with Hutchinson, and he had taken some of his things and left. While Pruitt's testimony was admitted at trial under the "excited utterance" exception (90.803(2)), it was the state which raised the contention on appeal that the testimony "was admissible as either an excited utterance or a spontaneous statement" (under §90.803(1)) 882 So.2d at 950. Addressing both contentions, this Court wrote:

> Both the excited utterance and the spontaneous statement exceptions require the declarant to be laboring under the influence of a startling event at the time that the statement is made. See State v. Jano, 524 So.2d 660,662 (Fla. 1988) (explaining that the excited utterance exception and the spontaneous statement exception are primarily distinguishable by the time lapse between the event and the statement describing the event). Although the spontaneous statement and excited utterance exceptions to the

> hearsay rule overlap to some degree, there are two main differences. See id. at 661. First, the exceptions differ in the amount of time that may lapse between the event and the statement. See id. at 661-62. The excited utterance must be made before there is time for reflection, and the spontaneous statement must be made while perceiving the event or immediately thereafter. See id. Second, the exceptions differ in the statement describing the event. See id. An excited utterance "relates" to the event and includes acts, statements, occurrences and circumstances, see State v. Snowden, 345 So.2d 856,860 (Fla. 1st DCA 1977), while the spontaneous statement describes the event. See Jano, at 662.

882 So.2d at 951 (emphasis supplied).

Plainly, then, there has to be a startling event for either of the statutory exceptions to apply. A description and/or narrative of mundane occurrences will not qualify.

The prosecution dealt with its Hutchinson problem below by complaining that it was wrongly decided and by characterizing it as dicta (1/157-63;2/227). However, while trial judges are free to express disagreement with decisions of higher courts, they are not free to rule contrary to controlling precedent. See, e.g. Hernandez v. Garwood, 390 So.2d 357, 359 (Fla. 1980); State v. Bamber, 592 So.2d 1129,1132 (Fla. 2d DCA 1991); Herrmann v. State, 728 So.2d 266, 267 (Fla. 2d DCA 1999). Moreover, even assuming arguendo that this Court's thorough analysis in Hutchinson could be characterized as dicta, that does not justify a trial judge ruling the opposite way. Dicta of the highest court should be given persuasive weight by lower appellate courts and

certainly by trial courts unless it is contrary to previous decisions of the highest court. Milligan v. State, 177 So.2d 75,76 (Fla. 2d DCA 1965); O'Sullivan v. City of Deerfield Beach, 232 So.2d 33,35 (Fla. 4th DCA 1970); U.S. Fidelity and Guaranty Co. v. State Farm Mental Ins. Co., 369 So.2d 410, 412 n.4 (Fla. 3d DCA 1979); State Commission on Ethics v. Sullivan, 430 So.2d 928,942 (Fla. 1st DCA 1983); Griffin v. State, 705 So.2d 572,574 (Fla. 4th DCA 1998); Stafford v. Meek, 762 So.2d 925,977 n.1 (Fla. 3d DCA 2000). See also Black's Law Dictionary, (7th Ed. 1999), p. 465, quoting Lile, Brief Making and the Use of Law Books, 307 (3d ed. 1914)("[I]t must not be forgotten that dicta are frequently, and indeed usually, correct", and noting that the use of dicta to illustrate a point or to trace the history of a doctrine - - even where not essential to the narrow holding of the specific case before the court - - "is often extremely useful to the profession").

In the instant case, the prosecutor's attempt to characterize Hutchinson as a rogue opinion (2/227) was - - as pointed out by defense counsel (1/167-71) - - simply wrong. To the contrary, it was an accurate statement of what has always been recognized by Florida caselaw, that both of the overlapping "excited utterance" and "spontaneous statement" hearsay exceptions require as a predicate a showing that the declarant was laboring under the influence of a startling event (the primary differences between the two exceptions

being (1) the allowable time lapse between the startling event and the statement, and (2) the excited utterance "relates to" the event while the spontaneous statement "describes" the event). Hutchinson, 882 So.2d at 951; Jano (Supreme Court), 524 So.2d at 660-62; Jano (Fourth DCA), 510 So.2d 616-18; Quiles, 523 So.2d at 1263; Blue, 513 So.2d at 755-56; Lyles, 412 So.2d at 460.

It is also worth noting that both the "spontaneous statement" and "excited utterance" hearsay exceptions are components of what used to be referred to as the "res gestae" exception. See State v. Jano, 524 So.2d at 661; Jano, 510 So.2d at 616-17. As explained in Carver v. State, 344 So.2d 1328,1331 (Fla. 1st DCA 1997), quoted in Jano v. State, 510 So.2d at 617:

> The term "res gestae" comprehends a situation which presents a startling or unusual occurrence sufficient to produce a spontaneous and instinctive reaction, during which interval certain statements are made under such circumstances as to show lack of forethought or deliberate design in the formulation of content. [Footnote omitted].

See also State v. Snowden, 345 So.2d 856,860 (Fla. 1st DCA 1977).

Although the "res gestae" terminology has fallen into disfavor, it was noted in State v. Adams, 683 So.2d 517,520 (Fla. 2d DCA 1996) that:

> . . .various components of the res gestae rule, including those discussed in Snowden, were carried over into the [Evidence] Code and, therefore, the

rule as now embodied in the Code still lives on as a part of Florida's law of evidence.

> We begin our analysis with a recognition of our previous acknowledgement that "[t]he former res gestae exception to the hearsay rule is not included in the new evidence code." State v. Johnson, 382 So.2d 765,766 (Fla. 2d DCA 1980). As we further noted in Johnson, however, "[u]nder the new code, the res gestae rule has been broken down into its various components." Id. Other courts have subsequently recognized this concept. See, e.g., Jano v. State, 510 So.2d 615,616 (Fla. 4th DCA 1987)(exceptions under sections 90.803(1)(spontaneous statement) and 90.803(2)(excited utterance), Florida Statutes (1979), encompass evidence frequently considered under what was referred to as the res gestae exception prior to the adoption of the Florida Evidence Code), approved, State v. Jano, 524 So.2d 660,661 (Fla. 1988)(excited utterance exception not new theory of Florida evidence but one of a group of exceptions subsumed under the old term of res gestae); Monarca v. State, 412 So.2d 443, 445 (Fla. 4th DCA 1982)(general philosophies of the res gestae exception to hearsay rule carried over into present evidence code, section 90.803, Florida Statutes (1979)); Alexander v. State, 627 So.2d 35,43 (Fla. 1st DCA 1993)(testimony improperly excluded because admissible under the res gestae rule now codified in sections 90.803(1), (2), and (3), Florida Statutes (1991), which define the conditions for admissibility of (1) spontaneous statements, (2) excited utterances, and (3) then existing mental and emotional conditions of the declarant), review denied, 637 So.2d 236 (Fla. 1994); Stiles v. State, 672 So.2d 850 (Fla. 4th DCA 1996)(agreeing with analysis of Alexander). Thus, as one well-recognized and oft-cited commentator on the law of Florida evidence has so aptly observed, "instead of including the phrase res gestae, or including a res gestae exception, the Code specifically enumerates each of the exceptions which were previously admissible under the res gestae label." Ehrhardt, Florida Evidence, § 803 at 598 (1996 ed.)(footnotes omitted).

Therefore, the supposed "dicta" in this Court's analysis in Hutchinson of the overlapping hearsay exceptions codified

in § 90.803(1) and § 90.803(2) was an accurate restatement of existing Florida law, both pre-Code and post-Code. To introduce evidence of Karla's out-of-court statements to her mother, the state had the burden of demonstrating that the predicate requirements for the statutory exception were met [Jano v. State, 510 So.2d at 616], and in the absence of any indication of a startling event the state failed to meet its burden.

To his credit, Judge Ficarrotta did not accept the prosecutor's invitation to disregard Hutchinson on the theory that this Court's analysis was wrong or dictum. Instead he distinguished it on the ground that in the instant case "[u]nlike Hutchinson, the requisite indicia of reliability is present" (2/256). However, absent the predicate of a startling event, indicia of reliability will not justify the introduction of hearsay under the "spontaneous statement" exception. As the Fourth DCA explained in Jano v. State, 510 So.2d at 619 (footnote omitted), decision approved in State v. Jano, supra, 524 So.2d at 663:

> It may be true that the child's statements in this case were in fact reliable: she loved her father; she had no known motive to lie; there was corroboration of abuse; and the statements were spontaneous and apparently not contrived. But reliability is not the issue of law before this court. The Florida legislature had the opportunity to include a general safety valve exception to the hearsay rule, one where evidence is deemed reliable but is not otherwise admissible – see Rule 803(24), Federal Rules of Evidence – but chose not to include such a provision in the Florida Code.

One of the chief reasons for the adoption of Florida's Evidence Code was to lend certainty and predictability to the law of evidence, and a "residual" or "catch-all" exception allowing introduction of hearsay statements based on a trial court's finding of reliability would have negated this purpose; consequently Florida (unlike the federal system) has no such provision. See State v. Smith, 573 So.2d 306,315 n.7 (Fla. 1990); R.U. v. Department of Children and Families, 782 So.2d 1024 (Fla. 4th DCA 2001); Blandenburg v. State, 890 So.2d 267,271

(Fla. 1st DCA 2004).[5]

§ 90.803(1) contains an exception which calls for the exclusion of a hearsay statement which otherwise qualifies as a "spontaneous statement" when the circumstances indicate a lack of trustworthiness. That is altogether different than

[5] Moreover, circumstantial indications of a declarant's motivation or lack of motivation to fabricate are not the only factors bearing on the inherent unreliability of hearsay. Hearsay statements involve not only the speaker but also the hearer, and the content of the statements may become jumbled in the transmission. See Schmunk v. State, 714 P.2d 724,737 (Wyo. 1986)(recognizing the potential for inaccuracies and even falsehoods in second-hand hearsay statements offered in evidence). The hearsay statements introduced in the instant case comprised a small segment of a casual 37 minute phone conversation, the details of which had no particular significance to Billie Ferris at the time of the conversation. It is also worth noting that prior to trial the state moved to take Billie Ferris' deposition to perpetuate testimony, asserting that she was 72 years old, in declining health, and had recently suffered a minor stroke (though also claiming that the stroke had not affected her memory or

what the trial judge did here, which was to allow the introduction of statements which do not meet the criteria for admissibility as spontaneous statements, based on his conclusion that they had "indicia of reliability". That, quite simply, is the catch-all exception which does not exist under Florida law.

Finally, even assuming arguendo that (notwithstanding Hutchinson and the prior Florida caselaw) the "spontaneous statement" exception did not require a showing that the speaker was reacting instinctively to a startling event, Karla's statements to her mother would still be inadmissible. The prosecution, in seeking the introduction of Karla's statements, contended inter alia that Florida's "spontaneous statement" exception should be construed in the same way as the federal "present sense impression" exception (Federal Rule of Evidence 803(1)), which does not require a startling event (1/161). The state asserted:

> Florida's rule was modeled after, and is nearly identical to, Fed. Rule of Evidence 803(1), which provides:
>
> > (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> One influential evidence hornbook unambiguously concludes that ". . .no exciting event or condition is required for present sense impressions". McCormick on Evidence, Fifth Edition, Vol. 2, Section 271, p. 202. According to that learned treatise, this is a fundamental distinction between

(..continued)
speech)(12/2076-77).

> "present sense impressions" and "excited utterances". (1/161)

Professor Ehrhardt agrees with that view, and expresses the opinion that although Florida's exception is entitled "spontaneous statement" rather than "present sense impression" the admissibility requirements are the same. Ehrhardt, Florida Evidence, (2006 Ed.), § 803.1, p.856-57,859.

However, Karla's statements during the telephone conversation would not qualify as "present sense impressions" under federal evidentiary rules (or those of other states with similar hearsay exceptions) because they are narrative rather than sensory, and because they report past occurrences and anticipated future events.

The "present sense impression" exception applies only to statements arising from direct sensory perception, not to information which the declarant has processed. See United States v. Guevara, 277 F.3d 111,127 (2d Cir. 2001); Citizens Financial Group Inc. v. Citizens Nat. Bank of Evans City, 383 F.3d 110,122 (3d Cir. 2004); Brown v. Keane, 355 F.3d 82,89 (2d Cir. 2004); United States v. Southern Indiana Gas and Electric Co., 258 F.Supp.2d 884,890 (S.D.Ind. 2003). "It must be certain from the circumstances that the utterance is a reflex product of immediate sensual impressions unaided by retrospective mental processes". State v. Phillips, 461 S.E.2d 75,89 (W.Va. 1995), quoting Commonwealth v. Farquharson, 326 A.2d 387,389 (Pa. 1974). The utterance must

be "instinctive, rather than deliberate". Phillips; Farguharson. Hearsay statements which convey or imply the declarant's knowledge of existing facts, or which anticipate future occurrences, do not constitute spontaneous "present sense impressions". See Phillips, 461 S.E.2d at 89; People v. Franklin, 782 P.2d 1202,1205 (Colo.App. 1989); State v. Martinez, 20 P.3d 1062,1067 (Wash.App. 2001)[6]; State v. Griffin, 528 S.E.2d 668,670 n.3 (S.C. 2000). As explained in Martinez, 20 P.3d at 1067, the statement must be a spontaneous or instinctive utterance evoked by the occurrence itself "unembellished by premeditation, reflection, or design. It is not a statement of memory or belief. [Citation omitted]. An answer to a question is not a present sense impression. [Citation omitted]."

[6] Overruled in part on other grounds in State v. Rangel-Reyes, 81 P.3d 157,160 n.1 (Wash. App. 2003).

In the instant case, Karla's statements to her mother were neither instinctive nor based on sensory perception; instead they conveyed information she had processed earlier. When she said "I'm following Rick and the guy that bought the truck", she was not describing what she was seeing. ["Following" could mean that she was constantly staying in visual contact with the truck, but it could also mean she'd been given directions to where they were going, or that the two vehicles were to meet at a designated exit or location]. Moreover, even assuming arguendo that Karla could see the back of the truck at the time she made the statement, there is no reason to believe she could see or describe who was in it with Rick. It she knew it was "the guy that bought the truck" it had to be based on information she processed earlier. Similarly, Karla's statements to Billie Ferris that the guy "knows where to get the paperwork done tonight" and that he had cash are narrative rather than descriptive. They are not spontaneous utterances based on sensory perceptions which Karla was presently experiencing; instead they are recollections of information which had been given to her at an earlier time. In addition, it was brought out on cross (under the rule of completeness) that Karla's conversation with her mother concerning the sale of the truck also included statements that Rick was glad to sell it; he'd had his fun with it and didn't want to bring it to South Carolina when they moved; and he'd had to drop the price a bit but he was OK with that (29/1877-

78). See Fratcher v. State, 621 So.2d 525 (Fla. 4th DCA 1993)(error to admit hearsay under "spontaneous statement" exception where context of statement reveals that speaker engaged in reflective thought); see also Hutchinson v. State, 882 So.2d at 952, quoting J.M. v. State, 665 So.2d 1135,1137 (Fla. 5th DCA 1996).

As in Commonwealth v. Farquharson, supra, 354 A.2d at 68, "[u]nder these circumstances the absence of retrospective mental action was not sufficiently clear to justify the admission of the evidence" under a present sense impression exception.

Hearsay exceptions should be construed narrowly, and should not be expanded to the point where they swallow the hearsay rule.[7] Karla's statements to her mother that she was following Rick and the guy who bought the truck, that he knew where to get the paperwork done, and that he had cash, were inadmissible under Florida law setting forth the predicate requirements for the "spontaneous statement" exception; and would also have been inadmissible under the "present sense impression" exception under federal evidentiary rules and those of a number of other states. Their introduction in this capital trial was prejudicial and reversible error.

[7] See, e.g. Schmunk v. State, 714 P.3d 724,737 (Wyo. 1986); State v. Dehaney, 803 A.2d 267,281 (Conn,. 2002); In re Dependency of Penelope B., 709 P.2d 1185,1194 (Wash. 1985); Cabrera v. State, 840 A.2d 1256,1268 (Del. 2004); People v. Rice, 747 N.E.2d 1035,1041 (Ill.App. 2001); Commonwealth v. Bond, 458 N.E.2d 1198,1200 (Mass.App. 1984); Castillo v. American Garment Finishers Corp, 965 S.W.2d 646,654 (Tex.App.-

(..continued)
El Paso 1998).

D. Karla's Statements Were Not Admissible Under Any of the Alternative Theories Suggested by the Prosecutor, such as the "State of Mind" Exception; or "to Show A Logical Sequence of Events"; or "to Prove or Explain Subsequent Conduct"

The basis for Judge Ficarrotta's ruling (adhered to by Judge Padgett at trial) allowing the state to introduce Karla's statements was his erroneous conclusion that they qualified as spontaneous statements under §90.803(1) (See 2/255-57). However, anticipating that the state will rely on a "tipsy coachman" argument on appeal, appellant will briefly address the assortment of alternative rationales suggested by the prosecutor below, contending that Karla statements could be introduced "to establish a logical sequence of events" (1/147-49, 2/231); or "to prove or explain subsequent conduct of the declarant" (1/148,2/230); or (as potential rebuttal evidence pertaining to the carjacking count), under the "state of mind" exception set forth in §90.803(3), to prove as an element of carjacking that appellant was in unlawful possession of the truck (1/148-52,2/223,229-30). [This last theory is unsupportable for many reasons, not the least of which is the fact that the indictment failed to specify which vehicle - - the Chevy pickup truck or the Jeep Cherokee - - was the subject of the charged carjacking, and the prosecutor claimed in opposing the defense's motion for JOA on that count that "the actual taking of the jeep is the actual carjacking" (37/3091). The prosecutor further contended that the murders and the taking of the jeep were contemporaneous, while the

truck was somewhere other than the scene of the shootings; according to the prosecutor's theory "he necessarily has to hijack the [Jeep] SUV to get back to the truck" (37/3090-91,3098). See Issue IV, infra].

A hearsay statement of a murder victim cannot be used to prove the state of mind or motive of the defendant. Woods v. State, 733 So.2d 980,987 (Fla. 1999); Stoll v. State, 762 So.2d 870,874 (Fla. 2000); Taylor v. State, 855 So.2d 1,18 (Fla. 2003). As for showing the victim's state of mind, this Court has emphasized that "a victim's state of mind is generally not a material issue in a murder case, except under very limited circumstances." Stoll v. State, supra 762 So.2d at 875 (emphasis supplied). See Woods, 733 So.2d at 987-88; Taylor, 855 So.2d at 18-19; Downs v. State, 574 So.2d 1095,1098 (Fla. 1991); Peterka v. State, 640 So.2d 59,69 (Fla. 1994); Brooks v. State, 787 So.2d 765,771 (Fla. 2001); Garcia v. State, 816 So.2d 554,568 (Fla. 2002). Among the exceptions to the general rule of inadmissibility are where the state of mind of the victim goes to an element of the crime [see, for example, Peede v. State, 474 So.2d 808,816 (Fla. 1985), where the victim's statements evincing extreme fear of Peede (her estranged husband) were relevant to prove an element of kidnapping, i.e. to show that she did not accompany him voluntarily but was forcibly abducted against her will]; or to rebut a claim made by the defense at trial that the victim's death resulted from self-defense, suicide, or accident. Woods,

at 987-88; Stoll, at 874-75; Taylor, at 18-19; Peterka, at 69; Brooks, at 771. In some circumstances, theories offered during the defense's case may make the victim's state of mind relevant to rebut such theories. See State v. Bradford, 658 So.2d 572,574-75 (Fla. 5th DCA 1995) in which the state sought certiorari review of a trial court's pretrial order in limine excluding the victim's statements of fear:

> This is not to say that the victim's statements are automatically admissible. In the present case, the victim's state of mind may or may not become an issue, depending upon the defendant's theory of the case. The victim's statements of fear are not admissible as proof that it was the defendant who killed her, but her statements of fear are admissible to rebut the defendant's theory that the victim willingly let him inside her car. If the defendant does not put forth the theory that the victim willingly let him in her car, then her state of mind would not be at issue.

Even under such circumstances, where the defense "opens the door" by putting forth a theory which pertains to the victim's state of mind, the victim's out-of-court statements may not be introduced as anticipatory rebuttal during the state's case in chief. State v. Bradford, 658 So.2d at 575; see Brooks v. State, 787 So.2d at 771; Taylor v. State, 855 So.2d at 20 n.21.

Moreover, unlike the situation in Peede v. State, supra, 474 So.2d at 816, Karla's state of mind at the time of her phone conversation with her mother was in no way relevant to prove an element of a charged offense. [Even if it had been the truck which was the subject of the alleged carjacking,

Karla's statement referring to "the guy that bought the truck" is entirely consistent with the possibility that the same guy later may have had her or Rick's consent to possess it; whether or not there was paperwork remaining to be done (see 2/229-30) goes to the question of title or legal ownership, which is not an element of carjacking. See §812.133(1). And since it was the jeep rather that the truck which the prosecutor claimed was carjacked, Karla's statements to her mother that she was following Rick and the guy who bought the truck, that he had cash and knew where to get the paperwork done, were even more thoroughly irrelevant to any element necessary to prove carjacking of the jeep].

Most importantly to the instant case, Florida appellate courts and those of other jurisdictions have consistently held that a murder victim's out-of-court statements evincing his or her state of mind cannot be used to prove the identity of the killer, or to rebut or impeach the defendant's contention that someone else committed the murder. Stoll, 762 So.2d at 875; Taylor, 855 So.2d at 20; State v. Bradford, 658 So.2d at 575. See, e.g., State v. Fulminante, 975 P.2d 75,90 (Ariz. 1999); State v. Canady, 911 P.2d 104,111-12 (Hawaii 1996); People v. Hernandez, 69 P.3d 446,467-68 (Cal. 2003); State v. Davi, 504 N.W.2d 844, 854 (S.D. 1993); Walker v. State 759 So.2d 422, 426-27 (Miss.App. 1999); cf. State v. Drummer, 775 P.2d 981,984 (Wash.App. 1989). Yet that is precisely how the prosecutor used Karla's statements, as demonstrated in his

opening statement to the jury (28/1822), his cross-examination of appellant (39/3470), and especially in his closing argument (40/3594,3700,3704), leading up to his climactic statement to the jury that Karla "identified her killer to her mother on that telephone. . .She identified William Deparvine with her words" (40/3709).

Plainly, then, the prosecutor did not introduce Karla's statements for any of the relatively innocuous purposes he claimed in his alternative theories. Instead, he introduced it as substantive evidence to support the state's contention -- in a circumstantial evidence trial - - that appellant was the person who killed the Van Dusens. As in Taylor v. State, supra, 855 So.2d at 20, it is abundantly clear from the prosecutor's closing argument and especially from his cross-examination of appellant (39/3470) that his purpose in introducing Karla's statements was not to show her subsequent acts or conduct, but rather as support for the state's contention that appellant subsequently killed her and her husband. As this Court said in Taylor:

> . . .some of Holzer's other statements might provide limited support explaining her subsequent conduct of letting Taylor into her car and driving away from Buddy Boy's in the direction of Green Cove Springs. However, it is clear that the State's interest in admitting the statements was not to prove her subsequent acts. Rather, the purpose in introducing the statements was to prove that Taylor had requested a ride all the way to Green Cove Springs, providing support for the State's theory that Taylor was the one who was in the car when she was murdered. In Brooks, we determined that the trial court had erred in allowing a homicide victim's hearsay statements to be admitted to show that the

> defendant had driven to the location where the victim was found murdered. See Brooks, 787 So.2d at 771. [Footnote 20 – In Brooks, the victim had said she was going to travel with a codefendant to go to the location where she was murdered. Id.] Similarly, in the instant case some of Holzer's statements indicated that Taylor had requested a ride all the way to Green Cove Springs. Thus, Holzer's statements could be probative of Taylor's state of mind, i.e., that he intended to ride with Holzer all the way to Green Cove Springs. See Woods, 733 So.2d at 987 (noting that out-of-court statements by the declarant, who was victim in the case, could not be used to prove the state of mind or motive of the defendant); see also Stoll, 762 So.2d at 875 (rejecting State's argument that hearsay statements should have been let in to rebut defendant's contention that someone else committed the murder because it did not fit within one of the narrow exceptions we have recognized for admitting a homicide victim's hearsay statements [Footnote omitted].

855 So.2d at 20 (emphasis supplied).

As for the concept of "logical sequence of events", that typically comes into play when hearsay evidence is introduced to explain the actions taken by law enforcement officers upon receiving certain information during the course of a criminal investigation. See, e.g., State v. Baird, 572 So.2d 904,907-08 (Fla. 1990); Conley v. State, 620 So.2d 180,182-83 (Fla. 1993); Keen V. State, 775 So.2d 263, 270-72 (Fla. 2000); Harris v. State, 544 So.2d 322, 324 (Fla. 4th DCA 1989); Daniels v. State, 606 So.2d 482,484 (Fla. 5th DCA 1992); Tumblin v. State, 747 so.2d 442,443-44 (Fla. 4th DCA 1999); Foster v. State, 804 So.2d 405 (Fla. 4th DCA 2001). Such statements are never admissible for their contents, or for the truth of the matters asserted [Conley, at 182-83; Keen, at

271; Harris, at 324; Daniels, at 484; Tumblin, at 443], and even where they may be admissible to explain the officer's subsequent actions, trial courts must ensure that their prejudicial impact does not exceed their very limited probative value [Baird, at 908; Conley, at 183; Keen, at 272; Daniels, at 484; Tumblin, at 444]. Despite these safeguards, hearsay ostensibly introduced to show a "logical sequence of events" is frequently misused by prosecutors as substantive evidence of a defendant's guilt. See Saintillus v. State, 869 So.2d 1280,1282 (Fla. 4th DCA 2004)("This type of testimony occurs with the persistence of venial sin. The state's insistence on attempting to adduce this particular brand of hearsay requires judges to be constantly on their guard against it"). In Foster v. State, 804 So.2d at 406, the appellate court cautioned trial judges that in most cases a "logical sequence of events" is simply not in issue.

In the instant case, the prosecutor did not use Karla's hearsay statements to show anybody's actions upon receiving certain information; he used it for its contents, as substantive evidence putting appellant in the truck with Rick, enabling him to challenge appellant's testimony on cross-examination (39/3470) and to argue - - devastatingly - - to the jury in his closing statement that Karla had identified her own killer (40/3708-09).

E. Harmful Error

A trial court's error in permitting the jury to hear

inadmissible evidence requires reversal for a new trial unless the error can be written off as "harmless"; the burden is on the state - - as beneficiary of the error - - to show beyond a reasonable doubt that the improper evidence could not have played a role in the jury's deliberations and could not have contributed to their verdict. State v. DiGuilio, 491 So.2d 1129,1138 (Fla. 1989); Lee v. State, 508 So.2d 1300,1303 (Fla. 1987); Stoll v. State, supra, 762 So.2d at 878-79.

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

DiGuilio, 491 So.2d at 1138; Lee, 508 So.2d at 1303.[8]

The state's burden, in order to prove the harmlessness of an error, is "most severe". Holland v. State, 503 So.2d 1250,1253 (Fla. 1987); Varona v. State, 674 So.2d 823,825 (Fla. 4th DCA 1996).

In the instant case, the prosecutor obviously believed that Karla's statements to her mother concerning the guy that

[8] The DiGuilio standard applies both to constitutional and nonconstitutional trial errors, including evidentiary errors under state law. See Goodwin v. State, 751 So.2d 537 (Fla. 1999); Knowles v. State, 848 So.2d 1055 (Fla. 2003); Ballard

bought the truck would have a major impact on the jury, because he fought vigorously to persuade the trial judge to allow him to introduce it [see Gunn v. State, 78 Fla. 599,83 So. 511 (1919); Farnell v. State, 214 So.2d 753,763 (Fla. 2d DCA 1968)], even to the extent of urging him not to follow the Hutchinson decision. The prosecutor confronted appellant on cross-examination with the accusatory implications of Karla's hearsay statements (39/3470). Even more tellingly, the prosecutor saw fit to call the jury's attention to Karla's statements no fewer than seven times during his opening and closing arguments (28/1808,1818,1822; 40/3594,3699-3700,3704,3708-09). See Stoll v. State, 762 So.2d at 878 (prejudice Stoll suffered as a result of improper admission of hearsay statements "was exacerbated by the State's reliance on this evidence during closing arguments"); Lee v. State, 508 So.2d at 1303 (erroneous admission of collateral crime evidence was not shown to be harmless where the potential for adverse impact on the jury was emphasized by the prosecutor's repeated references during closing argument).

Not only did the prosecutor repeatedly emphasize Karla's statements to the jury, he put a powerful emotional spin on it to climax his closing argument:

> Now, ladies and gentlemen, throughout a child's life, he or she sends unspoken messages to his or her mother. The infant's cry will trigger biological responses to the breast-feeding mother. The mother, from the mood of her child, can determine whether the child is happy or in love or

(..continued)
v. State, 899 So.2d 1186 (Fla. 1st DCA 2005).

afraid.

> And unbeknownst to Karla Van Dusen, she identified her killer to her mother on that telephone when she said I'm following Rick and the person who bought the truck. He knows where to get the paperwork done. She identified the William Deparvine with her words and he left his blood at the scene and he was in possession of that truck that he coveted.

(40/3708-09)

For the state to now claim on appeal that the introduction of Karla's statements was "harmless error" - - i.e. "We didn't need them anyway" - - will be disingenuous, to put it mildly. The state's case was based entirely on circumstantial evidence (much of it complex and convoluted), and Karla's statements were the keystone - - the only evidence which, if believed by the trier of fact, directly and irreconcilably contradicted appellant's testimony that he never left the vicinity of his apartment building after purchasing the truck from the Van Dusens.

Appellant's convictions of murder and carjacking should be reversed for a new trial.

ISSUE II APPELLANT WAS TRIED UNDER A CAPITAL INDICTMENT WHICH WAS FATALLY, FUNDAMENTALLY, AND JURISDICTIONALLY DEFECTIVE, WHERE THE COUNTS PURPORTING TO CHARGE FIRST-DEGREE MURDER FAILED TO ALLEGE EITHER PREMEDITATION OR FELONY MURDER.

The two murder counts of the indictment alleged only that appellant "did unlawfully and feloniously kill a human being" by shooting him with a firearm (as to Richard Van Dusen) and

by shooting her with a firearm and/or stabbing her with a sharp object (as to Karla Van Dusen); the indictment contained no finding by the grand jury either that the killings were premeditated or that they occurred during the commission of an enumerated felony (1/71). The defense pointed out in a pretrial motion for statement of particulars that the indictment failed to state, inter alia, whether the state was proceeding on a theory of premeditation or felony murder or both (11/1913-15, see 12/2111;19/698), and subsequently moved for judgment of acquittal at trial based on failure of these counts of the indictment to charge first-degree murder (36/3053-55;37/3058-68;39/3539;40/3584-85;41/3782-83;14/2434-37,2461-65;42/3938-48,3960-64).The prosecutor contended that the defect was technical, nonfundamental, and therefore waived by defense counsel's failure to raise the matter earlier; the trial judge agreed with the state's position, though he ultimately acknowledged that it was a close call (42/3963).

As this Court recognized in State v. Gray, 435 So.2d 816,818 (Fla. 1983):

> [A] conviction on a charge not made by the indictment or information is a denial of due process of law. Thornhill v. Alabama, 310 U.S. 88,60 S.Ct. 736,84 L.Ed. 1093 (1940); DeJonge v. Oregon, 299 U.S. 353,57 S.Ct. 255, 81 L.Ed. 278 (1937). If the charging instrument completely fails to charge a crime, therefore, a conviction thereon violates due process. Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any

> time-before trial, after trial, on appeal, or by habeas corpus. [Citations omitted].

See, e.g. State v. Dye, 346 So.2d 538,541 (Fla. 1977); K.C. v. State, 524 So.2d 658,659 (Fla. 1988); Velasquez v. State, 654 So.2d 1227 (Fla. 2d DCA 1995); Looney v. State, 756 So.2d 239 (Fla. 2d DCA 2000); Scala v. State, 770 So.2d 732 (Fla. 4th DCA 2000)

Consistently with the analysis in Gray, many appellate courts have recognized that the failure of an indictment to charge a crime is jurisdictional, nonwaivable (even by a guilty plea), and

can be raised at any time.[9] See State v. Paetehr, 7 P.3d 708,712-

13 (Ore.App.2000)("The jurisdictional function requires that the indictment is the product of a grand jury and ensures that the defendant is tried only for an offense that is based on facts found by the grand jury indicting him").

While Florida, unlike Oregon, has no constitutional provision requiring a grand jury indictment for any felony prosecution [see Paetehr, 7 P.3d at 712; State v. Burnett, 60 P.3d 547,551 (Ore.App. 2002)], the Florida Constitution does require a grand jury indictment to commence prosecution for the capital crime of first degree murder. Article I, Section 15(a). This requirement is jurisdictional, and a trial for a capital crime conducted without a valid grand jury indictment is void. Lowe v. Stack, 326 So.2d 1,3 (Fla. 1974); Hunter v. State, 358 So.2d 557 (Fla. 4th DCA 1978); Bell v. State, 360 So.2d 6 (Fla. 2d DCA 1978); Bradley v. State, 374 So.2d 1154 (Fla. 3d DCA 1979); Howard v. State, 385 So.2d 739 (Fla. 3d DCA 1980).

The caselaw relied on by the prosecutor below (37/3063-68;41/3960-64) is completely distinguishable. In DuBoise v.

[9] See, e.g., State v. Huss, 657 N.W.2d 447,453 (Iowa 2003)(citing Illinois v. Somerville, 410 U.S. 458,459-60 (1973)); Kitzke v. State, 55 P.2d 696,699 (Wyo. 2002); Gordon v. Nagle, 647 So.2d 91,94(Ala. 1994); People v. Owen, 122 P.3d 1006,1008 (Colo.App. 2005) United States v. Edrington, 726 F.2d 1029,1031 (5th Cir. 1984); United States v. Harper, 901 F2d. 471,473 (5th Cir. 1990); United States v. Osiemi, 980 F.2d 344,345 (5th Cir. 1993); United States v. Peter, 310 F.3d 709,713 (11th Cir. 2002).

State, 520 So.2d 260,264-65 (Fla. 1988) and Ford v. State, 802 So.2d 1121,1130 (Fla. 2001) the defect in the indictment did not

involve the first-degree murder count, but rather a noncapital count of sexual battery (DuBoise) or child abuse (Ford). [Mesa v. State, 632 So.2d 1094 (Fla. 3d DCA 1994) involves a noncapital sentencing enhancement for use of a firearm]. Therefore, the trial court's jurisdiction to proceed on the capital indictment was not in issue in those cases, and neither DuBoise nor Ford had a right protected by the Florida Constitution to a grand jury finding of each essential element of the noncapital offense. Moreover, DuBoise indicates that a charging document which omits an element of the crime may nevertheless be sufficient to support a conviction when it "references a specific section of the criminal code which sufficiently details all the elements of the offense." (emphasis supplied).[10] When a criminal statute simply sets forth a list of elements which, taken together, constitute the charged crime, then perhaps it could be said, under the rationale of DuBoise, that a citation to the statute number indicates that the grand jury must have found each of the required elements. But where, as in the case of first-degree murder (or, for example, kidnapping, see §787.01(1)(a)1 through 4), a criminal statute contains alternative elements set forth in different subsections, then a general citation to the statute number (without, at minimum, a further citation to the subsection or subsections setting forth the alternative

[10] In Ford, the indictment not only cited the statute number of the noncapital offense, but the text of the indictment "also stated specific grounds." 802 So.2d 1130 and n.16.

element[s] which the grand jury is alleging) does not "sufficiently detail all the elements of the offense" under the rationale of DuBoise.[11]

In Jackson v. State, 284 N.W.2d 685,689 (Wis. App. 1979), the Court of Appeals of Wisconsin noted that that state's theft statute:

> . . .contains five distinct alternative elements of the offense. Without proof of one of these alternative elements, there is no crime of theft. The State must plead one of these alternative elements of the offense in the complaint or information. Without one of these alternative elements in the complaint or information, no crime is charged; therefore, the complaint or information is jurisdictionally defective and void.

See also People v. Lutz, 367 N.E.2d 1353,1354-55 (Ill. App. 1977)(and cases cited therein)(charging documents which failed to charge either of the alternative elements constituting the offense of battery were fatally defective and void); Richmond v. State, 623 A.2d 630 (Md.1993)("although a number of alternative elements are available, one of the alternative states of mind must be alleged together with one of the alternative types of assault in order to allege a crime").

As the United States Supreme Court wrote in Russell v. United States, 369 U.S. 749,770 (1962):

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[11] Premeditated murder is set forth as an alternative element in §782.04(1)(a)1. Felony murder is set forth in §782.04(1)(a)2. The indictment in the instant case contains only a citation to §782.04(1), which encompasses all forms of first degree murder, including unlawful distribution of controlled substances under subsection 3. (1/71,73). See

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

See, e.g., State v. Plaster, 843 N.E.2d 1261,1266 (Ohio App. 5 Dist. 2005).

In Lightbourne v. State, 438 So.2d 380,384 (Fla. 1983), this Court said:

> . . .the offense of first degree murder may be committed in several ways, including murder by premeditated design or a felony murder supported by various felonies, among which are included the felonies of burglary and sexual battery. The instant indictment tracked the statute and adequately placed the defendant on notice that he was charged with first degree murder resulting from any one or a combination of the three specific methods in the indictment. The single offense of first-degree murder may be proven by alternate methods, so it follows that the charging instrument should be free to include such alternate bases for conviction.

The fundamental, jurisdictional defect in the instant case is that the indictment alleged none of the alternative bases for a conviction of first-degree murder, and therefore failed to charge a crime.[12] [Moreover, the alternate elements

(..continued)
State v. Ingleton, 653 So.2d 443,446 (Fla. 5th DCA 1995).

[12] Appellant's trial attorney expressed the belief that while the indictment failed to charge the crime of first-degree murder, it might be sufficient to charge manslaughter (37/3062,3067-68;41/3938-39,3947). Undersigned appellate counsel disagrees, and contends that the indictment fails to

are not interchangeable, since an allegation of premeditation will permit an instruction on felony murder if there is supporting evidence, while the converse is not true; an allegation of felony murder will not permit an instruction on premeditation. See Lightbourne, 438 So.2d at 384; Ables v. State, 338 So.2d 1095,1097 (Fla. 1st DCA 1976)]. Such a defect can neither be waived, nor cured by speculation as to what evidence may have been presented to the grand jury or what the grand jury may have found. Since an indictment cannot be expressly or constructively amended by a prosecutor or a court [see Issue III], the only way this case can constitutionally proceed to a capital trial is by resubmission to a grand jury. [There is no double jeopardy bar to further proceedings, or to a trial in the event that the state obtains a valid grand jury indictment charging first degree murder (or files an information charging a lesser degree of murder), because the earlier trial on the jurisdictionally defective indictment was void [see Hunter, 358 So.2d at 558-59; Bell, 360 So.2d at 7-8; Bradley, 374 So.2d at 1155; Howard, 385 So.2d at 740]; hence jeopardy has never attached.

(..continued)
charge any crime. [Since a charging document which fails to charge a crime is fundamentally and jurisdictionally defective, and such an issue can be raised at any time, appellate counsel is not bound by trial counsel's arguments]. The murder counts allege neither premeditation; nor felony murder; nor depraved mind (an essential element of second degree murder); nor culpable negligence; nor any type of intent (an intent element is required for a conviction of manslaughter by act or procurement). See Looney v. State, 756 So.2d 239 (Fla. 2d DCA 2000); Jefferies v. State, 849 So.2d 401,403-04 (Fla. 2d DCA 2003); cf. Hall v. State, ____ So.2d

The state will undoubtedly complain on appeal of "sandbagging" by defense counsel. In this regard, it should be pointed out that the prosecution has responsibilities too. See Stuart v. State, 360 So.2d 406,413 (Fla. 1978); quoted in State v. Salzero, 714 So.2d 445,448 (Fla. 1998)(Anstead, J. concurring) ("[N]o concept of a duty of open dealing before the court can justify requiring the defense to do the state's job"). If the prosecutor had proofread the indictment when it was drafted or when it was filed, the defect could presumably have been avoided, or remedied by resubmission. If the prosecutor had bothered to look the indictment over when - - six and a half weeks before the trial began - - defense counsel filed a motion requesting a statement of particulars as to (1) aggravating circumstances, and (2) "whether the State is seeking a conviction of first degree murder on a theory of premeditation or felony murder, or both", because "[t]he Indictment fails to state any of these particulars" (11/1913-14), the prosecutor could have gone back to the grand jury and sought a superseding indictment. See Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997). While it is certainly true that the trend of the law is to overlook technical deficiencies in pleading, this was no mere technical defect. The indictment failed to charge a crime; it was fatally, fundamentally, and jurisdictionally defective; the constitutional requirement of Article I, Section 15(a) was

(..continued)
_____ (Fla. 2d DCA 2006)[2006 WL 342257].

violated; appellant's capital trial was void and his convictions and death sentences cannot stand.

ISSUE III THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR, AND CONSTRUCTIVELY AMENDED THE GRAND JURY INDICTMENT, BY GIVING THE JURY THE OPTION TO CONVICT APPELLANT OF PREMEDITATED MURDER.

"The law is well settled in Florida that where an offense can be committed in more than one way, the trial court commits fundamental error when it instructs the jury on an alternative theory not charged in the information" or indictment. Eaton v. State, 908 So.2d 1164,1165 (Fla. 1st DCA 2005)(and cases cited therein); see e.g. Hodges v. State, 878 So.2d 401 (Fla. 4th DCA 2004); Braggs v. State, 789 So.2d 1151 (Fla. 3d DCA 2001); Taylor v. State, 760 So.2d 298 (Fla. 4th DCA 2000); Abbate v. State, 745 So.2d 409 (Fla. 4th DCA 1999). Since a conviction based upon proof of an uncharged element is a nullity, no objection below is required. Hodges, at 402-03; Braggs, at 1154; Abbate, at 410. [In the instant case, during the charge conference, defense counsel objected to the proposed verdict form on the ground that, due to the failure of the indictment to allege either premeditation or felony murder, "I think it gives the jury choices they really don't have" (40/3584-85)].

The problem in this case is that neither the text of the indictment nor the general citation to the first degree murder

statute indicates which of the alternative elements the grand jury found, or whether it found both. And as recognized in Russell v. United States, guesswork as to what was in the minds of the grand jury is an impermissible violation of a basic protection.

The specific allegations giving rise to a charge of first degree murder have significant consequences, in that they determine the verdict options which are available to the jury. If the indictment alleges both premeditation and felony murder, then the jury may be instructed on both, and may convict on either or both. See Lightbourne v. State, 438 So.2d 380,384 (Fla. 1983). If the indictment alleges premeditation only, an instruction and/or conviction based on felony murder is still permissible under Florida law. Lightbourne, at 384; see, e.g., Knight v. State, 338 So.2d 201,204 (Fla. 1976). The converse, however, is not true; an indictment charging only felony murder will not support an instruction or a conviction based on premeditation. Ables v. State, 338 So.2d 1095,1097 (Fla. 1st DCA 1976). In Lightbourne, the text of the indictment alleged both that the killing was done with "a premeditated design to effect the death of a human being", and also that it occurred during a burglary and/or sexual battery. 438 So.2d at 383. This Court, after reaffirming that an indictment for first degree murder should be free to include both of the alternate bases for conviction, stated:

> The defendant's final challenge under Point I is that the indictment could be construed as charging

> only felony murder and that charging only felony murder and proving premeditated murder is impermissible under Ables v. State, 338 So.2d 1095 (Fla. 1st DCA 1976), cert. denied, 346 So.2d 1247 (Fla. 1977). The indictment herein clearly incorporates an allegation that the murder was premeditated in design. The Ables decision involved a case in which premeditated murder was never alleged, and as such that case is clearly distinguishable from the instant case.

In the instant case, in contrast, the indictment alleged neither of the alternate bases for conviction. The text of the indictment nowhere mentions premeditation, or even anything that could be construed as suggesting premeditation. Nor does the indictment contain any reference to subsection 1 of the first degree murder statute, which sets forth premeditation as an alternative element. [The only statutory reference is to the first degree murder statute as a whole, which provides no clue as to which element or elements the grand jury intended to allege].

Neither the prosecutor nor the trial court can amend a grand jury indictment; this can only be accomplished by resubmitting the case to the grand jury and asking it to return a superseding indictment. See Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997); Perez v. State, 371 So.2d 714,716 (Fla. 2d DCA 1979); Russell v. State, 349 So.2d 1225,1226 (Fla. 2d DCA 1977); Fla.R.Crim.P. 3.140(j) and the Committee Note thereto. Nor can the trial court "constructively amend" a grand jury indictment by giving jury instructions or affording verdict options which broaden or

expand the allegations contained in the indictment. [A judge may, on the other hand, narrow the indictment by deleting or withdrawing surplus allegations, and may allow mere technical alterations (or "variances") as long as they do not involve essential elements of the charged offense]. See Ingleton v. State, 700 So.2d 735,739-40 (Fla. 5th DCA 1997); Huene v. State, 570 So.2d 1031 (Fla. 1st DCA 1990); Stirone v. United States, 361 U.S. 212,215-19 (1960); United States v. Miller, 471 U.S. 130,138-145 (1985).[13]

In the instant case, there is nothing in the caption or text of the indictment to show that appellant was charged with premeditated murder, yet the trial judge gave instructions and verdict options which allowed the jury to convict appellant of first degree murder based on premeditation (40/3714-15;13/2299-2300). This amounted to an impermissible "constructive amendment", and it was fundamental error under Florida law. Eaton; Hodges; Braggs; Taylor; Abbate.[14]

[13] See, e.g. United States v. Mangieri, 694 F.2d 1270,1277 (D.C.Cir. 1982); United States v. Lemire, 720 F.2d 1327,1345 (D.C. Cir. 1983); United States v. Gonzalez, 661 F.2d 488, 492 (11th Cir. 1981); United States v. Bissell, 866 F.2d 1343,1356 (11th Cir. 1989); State v. Elliott, 585 A.2d 304,307 (N.H. 1990); State v. Prevost, 689 A.2d 121,122 (N.H. 1997); Michael v. State, 805 P.2d 371,373-74 (Alaska 1991); Commonwealth v. Barbosa, 658 N.E.2d 966,970-71 (Mass. 1995); Commonwealth v. Ruidiaz, 841 N.E.2d 720,722-23 (Mass. App. 2006); State v. Blankenship, 480 S.E.2d 178,182-83 (W.Va. 1996); Wooley v. United States, 697 A.2d 777 (U.S.D.C. 1997); State v. Goodson, 77 S.W.3d 240,244 (Tenn.Crim.App. 2001); State v. Plaster, 843 So.2d 1261,1265-67 (Ohio App. 5 Dist. 2005).

[14] The error cannot be deemed "harmless" based on the fact that the jury's verdict reflected a finding of felony murder in

ISSUE IV THE EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE CARJACKING; IN ADDITION THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY FAILING TO ENSURE JURY UNANIMITY ON THE CARJACKING COUNT, WHERE THE INDICTMENT AND INSTRUCTIONS FAILED TO SPECIFY WHICH VEHICLE - - THE JEEP CHEROKEE OR THE CHEVY PICKUP TRUCK - - WAS THE SUBJECT OF THE ALLEGED CARJACKING.

Under the state's theory of the events, two vehicles were involved in this criminal episode. The Van Dusens were shot to death in their Jeep Cherokee. However, the prosecutor contended below that the motive for the Van Dusens' murder was because appellant coveted their classic Chevrolet pickup truck (37/3089,3091,3097;40/3361,3663;14/2525-26).

The state's circumstantial evidence, through cell phone technology, showed a northbound movement of Rick and Karla's phones, with their last recorded cell phone activity occurring at 6:37 p.m. in the vicinity of Oldsmar (see 28/1807-09;33/2558-75;34/2704;36/3004-49;40/3700,3704-05). [The only evidence in the entire case putting the red Chevy pickup truck anyplace north of central St. Pete, where appellant's apartment building was located, was the inadmissible hearsay testimony of Billie Ferris; that phone call began at 5:54:45

(..continued)
addition to a finding of premeditation, because (1) the indictment failed to allege felony murder either, and (2) the evidence was insufficient to prove carjacking (or the lesser included offense of robbery) as to either the truck or the jeep [see Issue IV]; therefore the state failed to prove the underlying felony necessary for a conviction of first degree murder on a felony murder theory.

p.m. and lasted 37 minutes (see 36/3022-23)]. The medical examiner estimated the time of the Van Dusens' deaths as occurring within a ten hour window period between 10 p.m. and 8 a.m. (29/1992-93)[15] There was no evidence concerning anything that may have transpired between the Van Dusens and appellant (assuming without conceding his identity as the killer) during the hours after the last phone activity and before the homicides, and there was no evidence whatsoever regarding the whereabouts of the truck. [The FDLE tire track examiner testified that the 1971 Chevrolet Cheyenne pickup truck could not have made any of the tire impressions which were found

at the dirt road where the bodies were discovered or at the business location 1.3 miles away where the Jeep Cherokee was abandoned (34/2705-17)].

The state's hypothesis was that at some point during the night appellant must have dropped off the truck at another location and then lured the Van Dusens to an isolated dirt road under false pretenses, where he caught them off guard and

[15] The prosecution suggested that the shootings occurred around 2:30 a.m. when a neighbor named Adelaide Ferrer heard what she thought were firecrackers (although the sounds came from the opposite direction from where the bodies were found), while the defense suggested that the shootings took place between 5 and 6 a.m. (a time frame when phone records indicated that appellant was retrieving a message in the vicinity of his central St. Petersburg apartment) when Wayne Reshard was awakened by the barking of his dogs (see 31/2176-77,2215-17;34/2665-78;37/3181-82,3210-28;40/3641-42,3706). Investigators who responded to the scene after 8:30 a.m. observed what appeared to be wet or liquid blood pooled by the wound to Rick Van Dusen's head (29/1910-12,1938-40;see40/3637-

shot them in the front seat of their jeep (37/3095;see 14/2526).

Defense counsel, in moving for judgment of acquittal due to legally insufficient evidence on the carjacking count (37/3080-84), pointed out that the indictment failed to specify which vehicle - - the truck or the jeep - - was the subject of the alleged carjacking (37/3081-82). [Count 5 of the indictment alleges that appellant, by force or violence, took from the Van Dusens "certain property, to wit: a motor vehicle", and in the course of the carjacking discharged a firearm, resulting in the Van Dusens' deaths (1/72-73)]. During the first part of the discussion of the JOA motion, the prosecutor argued interchangeably that the truck was the subject of the alleged carjacking (37/3089,3096) and that it was the jeep (37/3091)("The actual. . . the actual taking of the jeep is the actual carjacking"). The judge, confused, asked the prosecutor to clarify his position:

> . . .a minute ago you just said the robbery of the truck. Now earlier you said it was a robbery of the SUV.
>
> MR. PRUNER: Well, let me see if I can articulate it. The ultimate goal is the unlawful taking - -
>
> THE COURT: Of the truck.
>
> MR. PRUNER: - - of the truck. To obtain that ultimate goal, he necessarily has to hijack the SUV to get back to the truck.
> (37/3097-98)

The prosecutor hypothesized that appellant couldn't risk

(..continued)
41).

having the truck at the crime scene because somebody might see it or it might leave tire tracks (37/3097-3102).

> MR. PRUNER: . . .this is all a nice academic exercise, but the fact of the matter is that jeep is moved from where the Van Dusens are killed up to the other location to get back to the truck.
>
> THE COURT: Right.
>
> MR. PRUNER: He had to take the jeep to get away from the crime scene.
>
> THE COURT: He had to carjack the SUV to do the crime of stealing the truck.
>
> MR. PRUNER: Right. . . .
> (37/3100)

The trial judge denied appellant's motions for judgment of acquittal on the two murder counts and the carjacking count (37/3109-10); while he granted judgments of acquittal on the two kidnapping counts on the basis of the void in the evidence regarding what occurred in the time frame before the Van Dusens' deaths; there was no evidence that they were ever confined or transported against their wills (37/3009-10,see 37/3075-80,3092-94,3104-06).

In his closing argument to the jury, the prosecutor barely mentioned the carjacking charge, and never argued the theory that it was the act of moving the jeep, in order to get back to the location where the truck was parked, that constituted the charged carjacking. Instead, he presented to the jury the much simpler argument that appellant killed the Van Dusens because he coveted their truck, and he intended to

acquire it by any means necessary (40/3661,3663,3705). The trial court's instructions likewise gave the jury no guidance; they simply tracked the indictment and referred to the taking of "a motor vehicle" (40/3719-24).

Since - - after defense counsel pointed out that the indictment failed to specify which vehicle was the subject of the alleged carjacking - - the prosecutor (in response to the judge's request for clarification) said it was the jeep, the jury should have been instructed accordingly. Without such an instruction, there is an obvious and constitutionally unacceptable risk that the jury either (1) convicted appellant of an uncharged (and unproven) crime, i.e. carjacking of the truck or (2) that the jurors may not have been in unanimous agreement as to which act - - the taking of the truck or the taking of the jeep - - constituted the carjacking. Under the unique circumstances involved here, reversal is required. See Perley v. State, ____ So.2d ____ (Fla. 4th DCA 2007)[2007 WL 247935](finding fundamental error); Robinson v. State, 881 So.2d 29 (Fla. 1st DCA 2004)(preserved error); State v. Weaver, 964 P.2d 713,717-21 (Mont. 1998)(fundamental error); Ngo v. State, 175 S.W.3d 738 (Tex.Crim.App. 2005)(fundamental error); see, generally, Bins v. United States, 331 F.2d 390,393 (5th Cir. 1964); United States v. Karam, 37 F.3d 1280,1286 (8th Cir. 1994).

Florida's constitution guarantees the accused's right to a unanimous verdict [Perley; Robinson], and "[u]nanimity in

this context means that each and every juror agrees that the defendant committed the same, single, specific criminal act." Ngo, 175 S.W.3d at 745. If the prosecution believed it could prove two separate instances of carjacking, then it should have charged them (or asked the grand jury to charge them) in two separate counts. Perley. When asked for clarification of its theory, the state chose the jeep; the jury should have been so instructed, and the trial court's failure to do so resulted in a violation of due process and the right to a unanimous jury verdict. Perley; Robinson; Weaver; Ngo. See also Walls v. State, 926 So.2d 1156,1180 (Fla. 2006)(fundamental error in jury instructions occurs only when omission is pertinent or material to what the jury must consider in order to convict).

Additionally, the evidence was legally insufficient to prove carjacking as to either vehicle. The taking of property after a murder is not a robbery (and hence not a carjacking)[16] when the taking was not the motive for the murder. Mahn v. State, 714 So.2d 391,397 (Fla. 1998); Gore v. State, 784 So.2d 418,430 (Fla. 2001); Rogers v. State, 783 So.2d 980,990 (Fla. 2001). In the instant case, according to the prosecutor's own theory, the taking

[16] Carjacking in Florida can be defined as a robbery in which the property taken is a motor vehicle; robbery is a necessarily lesser included offense of carjacking. Fryer v. State, 732 So.2d 30,32 (Fla. 5th DCA 1999).

of the jeep was not the motive for the Van Dusens' murders. The motive for the murders, according to him, was to "facilitate the theft of their truck" (14/2527)(see the trial judge's sentencing order, 15/2560) and to "leave alive no witnesses that could rebut his claim of lawful ownership" (14/2526). [To analogize, a murder committed from a motive (in whole or in part) to steal the victim's wallet would be a robbery, but the taking of a murder victim's wallet for the purpose of disposing of it in a dumpster a mile away in order to impede identification would not be a robbery]. Under the state's own hypothesis, the moving of the jeep was incidental to the murders - - perhaps part of an attempted cover-up – - but it had nothing to do with the motive for the murders.

As for a potential claim on appeal (inconsistent with the state's argument in successfully opposing the defense motion for JOA) that the carjacking charge and conviction could be based on the taking of the truck, the problem - - as in Eutzy v. State, 458 So.2d 755,758 (Fla. 1984) - - is the "utter void" in the evidence regarding what may have occurred in the hours before the Van Dusens were killed, and especially the absence of evidence as to when or under what circumstances appellant obtained possession of the truck. Since the state's own evidence established that appellant had convinced the Van Dusens that he was a legitimate buyer, and since the prosecutor throughout the trial portrayed appellant as a con man and the Van Dusens as naïve and trusting, it cannot be

assumed that - - even if legal title had not yet been transferred - - the Van Dusens did not at some point consensually relinquish possession of the truck. [Another possibility, consistent with the state's speculative kidnapping theory, is that appellant may have forcibly taken the truck from the Van Dusens earlier in the evening. If so, that would be a separate carjacking - - uncharged and unproven - - but not the carjacking charged in the indictment (since this hypothetical earlier crime could not have involved the discharging of a firearm resulting in the Van Dusens' deaths)].

To summarize, the circumstantial evidence taken in the light most favorable to the state may have proven a murder committed for financial gain, and to facilitate (or avoid detection for) the theft of the truck, but that does not necessarily establish a robbery or carjacking. See, for example, the facts of Craig v. State, 510 So.2d 857,859-60 (Fla. 1987). Appellant's conviction of carjacking should be reversed for discharge (insufficiency of the evidence) or for a new trial (failure of indictment and instructions to preserve appellant's right to a unanimous jury verdict). Since there was no valid underlying felony to support a felony murder conviction, and since the trial court's jury instruction on premeditation impermissibly broadened the grand jury's indictment which contained no allegation of premeditation [Issue III], appellant's convictions for first

degree murder must also fail.

ISSUE V THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EXCESSIVE AND UNDULY EMOTIONAL "VICTIM IMPACT" EVIDENCE, WHICH DOMINATED THE PENALTY PROCEEDING AND RENDERED IT FUNDAMENTALLY UNFAIR.

A. Presentation of Excessive and/or Unduly Emotional Victim Impact Evidence Violates the Fourteenth Amendment of the U.S. Constitution And is Improper under the Balancing Provision of Florida's Evidence Code.

Within constitutional limitations, Payne v. Tennessee, 501 U.S. 808 (1991) allows (but does not require) a state to authorize the introduction of victim impact evidence in a capital penalty proceeding. This does not, however, mean "the floodgates have opened". Cargle v. State, 909 P.2d 806,826 (Okl. Cr. 1996). Although victim impact evidence is not entirely precluded by the Eighth Amendment, the introduction before the jury of excessive or inflammatory victim impact evidence may render the penalty proceedings fundamentally unfair, thus implicating the Due Process Clause of the Fourteenth Amendment. Payne v. Tennessee, supra, 501 U.S. at 825; State v. Nesbit, 978 S.W.2d 872,891 (Tenn. 1998); see also State v. Muhammad, 678 A2d 164,180-181 (N.J. 1996); State v. Bernard, 608 So. 2d 966,972 (La.1992); State v. Clark, 990 P.2d 793,809 (N.M. 1999); State v. Barden, 572 S.E.2d 108,141 (N.C. 2002). In Payne, all nine Justices recognized that unduly emotional victim impact evidence may destroy the reliability and fairness of a capital sentencing proceeding, and that the Fourteenth Amendment provides a remedy. The

opinion of the Court (authored by Justice Rehnquist, joined by Justices White, O'Connor, Scalia, Kennedy, and Souter) states:

> In the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.

Payne v. Tennessee, 501 U.S. at 825.

Justice O'Connor, joined by White and Kennedy, concurring, wrote:

> The possibility that [victim impact] evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally based rule that this evidence may never be admitted. Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial.
>
> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth amendment erects no per se bar." Ante, at 827, 115 L.Ed.2d, at 736. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.

Payne, 501 U.S. at 831.

Justice Souter, joined by Justice Kennedy, in another concurring opinion observed that while victim impact evidence "can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation":

> . . .there is a traditional guard against the inflammatory risk, in the trial judge's authority

> and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal.

Payne, 501 U.S. at 836.

[The three dissenting Justices - - Marshall, Blackmun, and Stevens - - would have adhered to the prior precedent of Booth v. Maryland, 482 U.S. 496 (1987) holding that victim impact evidence at a capital sentencing proceeding is inadmissible per se].

Under current Florida law, victim impact evidence is admissible within the parameters set in the Payne decision. Windom v. State, 656 So.2d 432,438 (Fla. 1995); see Fla. Stat. § 921.141(7). Those parameters necessarily include the due process limitations emphasized in Payne. In addition, as with any type of evidence, victim impact evidence should be excluded if its probative value is outweighed by its prejudicial impact. Fla. Stat. § 90.403. See Johnston v. State, 743 So.2d 22, 23 (Fla. 2d DCA 1999)(holding that the trial judge erred by entering a pre-trial blanket order excluding all victim impact evidence without regard to the nature of the evidence the state intended to present; and noting that the state did not contend that a trial judge is forbidden from applying the § 90.403 balancing test to specific evidence of victim impact sought to be introduced at trial). In Cargle v. State, supra, 909 P2d at 826, the Oklahoma Court of Criminal Appeals stated that victim impact

evidence is subject to the balancing provisions of that state's prejudice vs. probative value statute (12 O.S. 1991, § 2403, the first sentence of which is nearly identical to the first sentence of Florida's § 90.403), and further noted, "However, we believe §2403 is not the ending place, but the starting point. The underlying principles in Payne seem to indicate more scrutiny is needed." See also State v. Nesbit, supra, 978 S.W.2d at 891 (Tennessee's Rule 403 prejudice vs. probative value balancing test applies to victim impact evidence); State v. Muhammad, supra, 678 A2d at 176 and 180 (New Jersey Rule of Evidence 403 applies to victim impact evidence; this is the traditional guard against inflammatory risk, discussed by Justice Souter concurring in Payne, which enables the court to control the proceedings consistently with due process).

A jury's penalty verdict should not be based on emotional reaction, but rather upon a reasoned analysis of the evidence in light of the applicable law. See Bertilotti v. State, 476 So.2d 130,134 (Fla. 1985). For this reason, the state's presentation of evidence concerning the personal characteristics of a murder victim should constitute a "quick glimpse", not a eulogy. See Cargle, 909 P.2d at 828; State v. Clark, 990 P.2d at 809; both quoting Justice O'Connor's concurring opinion in Payne. As the Louisiana Supreme Court pointed out in State v. Irish, 807 So.2d 208,215 (La. 2002) "introduction of detailed descriptions of the good qualities

of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision." See also State v. Bernard, supra, 608 So. 2d at 971 (the more detailed the victim impact evidence, and the more marginal its relevance, the greater is the risk that an arbitrary factor will be injected into the jury's sentencing deliberations).

Along similar lines, the New Jersey Supreme Court has recognized that the greater the number of survivors who are permitted to present victim impact evidence before the jury, the greater the potential for undue prejudice. For this reason, "absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the make an informed assessment of the defendant's moral culpability and blameworthiness." State v. Muhammed, 678 A2d at 180.

B. Defense Objections to the Victim Impact Evidence in Appellant's Penalty Trial

Prior to trial, appellant moved to exclude victim impact evidence, and to declare Fla. Stat. § 921.141(7)

unconstitutional (12/1975-98). Without waiving his broader objection, appellant also moved to limit any victim impact evidence to, inter alia, the testimony of one adult witness, noting the various Justices' recognition in Payne that victim impact evidence can be so extensive and/or inflammatory as to violate due process under the Fourteenth Amendment (12/2004-09). In the alternative, and again without waiving either of his broader objections, appellant moved to redact certain specified portions of the victim impact statements (13/2329-41); moved to limit presentation of victim impact evidence to the trial judge alone, during the Spencer hearing, so that the jury's recommendation would not be influenced by the emotional impact of such testimony (12/2010-13); and moved to videotape any victim impact testimony, in order to facilitate appellate review of its emotional delivery; "[t]he manner and style of presentation of victim impact evidence is highly emotional and inflammatory and...can subvert a reasoned and objective evaluation by a jury" (12/2014-15).

At a pretrial hearing on June 30, 2005, Judge Ficarrotta denied the motions to declare the statute unconstitutional, to exclude all victim impact evidence, to limit its presentation to one adult witness, and to limit its presentation to the trial judge alone (19/710-20; 12/2106-07,2112,2133). On the motion to videotape, when defense counsel inquired whether the state would agree to it, the prosecutor replied no; "It's always a matter of the Court's authority to conduct the trial

in any manner that the Court so desires. Although I don't understand why this testimony should be treated any differently than any other testimony" (19/720). The judge denied the motion to videotape (19/720;12/2107,2133).

The trial and penalty phase were held before Judge Padgett. On August 4, 2005, on the morning of the penalty phase, the defense motion to redact portions of the victim impact statements was heard (41/3748-60). Defense counsel again made it clear that she was not waiving any of her prior objections regarding victim impact (41/3748). On the requests for redaction, Judge Padgett overruled most of the objections but granted several (41/3749-60). Among the aspects of the testimony which the judge allowed were references by Rick Van Dusen's daughters to the fact that in 1998 they had lost their mother (Rick's ex-wife; they had been separated and divorced for many years prior to her illness) to cancer, and that the family had had to watch her suffer for 15 months (13/2331-32;41/3749-50,3817-18,3826,3828).

As the redaction hearing progressed, defense counsel pointed out that victim impact evidence is "clearly subject to 90.403 and I think the more repetitiveness, the more things that are said, the more impact it will have, even though it should have no impact on the jury's decision" (41/3753). It was initially indicated that the state was going to present four victim impact witnesses (41/3757). Neither the prosecutor nor the judge had ever done a case before with four

victim impact witnesses, although the prosecutor had seen caselaw where seven or eight had been permitted, and he pointed out that this case involved two victims and therefore two bereaved families (41/3757-58). [Soon after this discussion, it was realized that there was a fifth victim impact witness scheduled to testify, whose statement had been disclosed that morning (41/3759)]. Defense counsel asserted the objection that victim impact is "not supposed to become a feature of the penalty phase"; the statements were redundant and would prejudicially impact appellant's right to a fair penalty trial before the jury (41/3760). Judge Padgett overruled the objection (41/3760).

The penalty phase which immediately followed was a one-day proceeding, with the jury's deliberations and verdict taking place immediately following the presentation of evidence and argument. The state called seven witnesses (five of them for victim impact purposes) and the defense three. The victim impact witnesses were Michelle Kroger (Rick Van Dusen's youngest daughter); Jay Myers (Karla Van Dusen's son); Rene Koppeny (Rick's daughter, whose statement was read by an unrelated person); Jacqueline Bonn (Rick's sister, whose testimony was read by another sister of Rick's, Morene Cancelino); and Billie Ferris (Karla's mother)(41/3816,3822,3826,3829,3832). Defense counsel asked for and received a standing objection to each witness' testimony (41/3814,3822,3825,3829,3832-33). At the outset of

Michelle Kroger's testimony, the prosecutor placed a poster board, containing five color photographs (one 8"x10" and four 5"x7") of her father Rick and various members of his family, on an easel directly in front of the jury box (41/3816;see 14/2446). This composite had not been marked as an exhibit, and had not been addressed at the redaction hearing (41/3816). Defense counsel's objection to these photographs was overruled (41/3816), and they remained displayed to the jury during the entirety of Ms. Kroger's testimony (see 14/2446).

Jay Myers, Karla's son, placed an 8"x10" framed photograph of his mother on the witness stand facing the jurors; it remained there throughout his testimony (see 14/2446).

The fifth and final victim impact witness, Karla's mother Billie Ferris, at the end of reading her written statement said she could not write any more, it was too painful, but "I do have pictures of their very last birthday party" (41/3836). Defense counsel objected and asked to approach the bench; the judge said "No. Overruled" (41/3837)[17] The prosecutor then had Ms. Ferris show the jury the recent birthday party photos, and also a photograph of Karla as a small child around age five; "This is my little girl and this is what she grew up to be" (41/3837;see 14/2246-47; Exhibits Vol. 10, p.1529,1526-30).

[17] See Terrazas v. State, 696 So.2d 1309,1310 n.1 (Fla. 2d DCA 1997); Kelvin v. State, 610 So.2d 1359,1366 (Fla. 1st DCA 1992)(criticizing trial judges for refusing to allow counsel to approach the bench in order to make objections outside the hearing of the jury).

At the beginning and end of the victim impact presentation, and in his charge to the jury, the trial judge instructed the jurors that the victim impact evidence is not part of any aggravating circumstance nor is it part of any factor they could consider in rendering their penalty verdict; yet they may still consider it as "evidence in the case" (41/3185, 3837-38,3924-25). After deliberations the jury recommended the death penalty by a vote of 8-4 on each count (14/2412-13;41/3930-31).

In its motion for new trial (and the hearing thereon) and in the Spencer hearing, the defense reasserted its objections that the victim impact testimony (with the accompanying photos) was unduly emotional and repetitive, that it became the feature of the penalty phase, and that it rendered the proceedings fundamentally unfair under the Due Process Clause of the Fourteenth Amendment (14/2445-48;42/3957-60,4031-32,4034). Defense counsel represented in the motion for new trial:

> It is clear that the presentation of this "victim impact" evidence had an immediate and highly emotional [e]ffect on the jurors. The undersigned attorneys aver, that six of the juror members were openly crying from the time the first witness, Ms. Kroger testified, until the last witness, Ms. Ferris closed her statements by showing the childhood photograph of her daughter, Karla Van Dusen. (14/2447;see 42/4032).

Defense counsel attached to the motion articles from the next day's St. Petersburg Times and Tampa Tribune stating that

"The jury spent much of Thursday listening to the Van Dusens' family talk about their loss. Several jurors cried" (14/2455-56); "When [Jay] Myers read his statement, he choked back tears" (14/2456); "But it was the testimony of the Van Dusens - - the people who have watched every minute of the nine-day trial - - that caused five jurors to cry" (14/2459)(see 14/2457,42/3958,4032). The prosecutor did not dispute defense counsel's contention that jurors were crying and sobbing during the victim impact presentation; he said "It's no surprise that the defense doesn't like victim impact statements or the present sentencing scheme" (42/4034) and "It is emotional testimony, just as it was emotional testimony of Mr. Deparvine's daughters to the jury" (42/4036). [The testimony of appellant's daughters, Kelly Cousineau (41/3884-87) and Katina Holthus (41/3888-91), which was relevant to mitigating circumstances, can be compared with the victim impact testimony of the five Van Dusen family members set forth in part C].

C. The Victim Impact Testimony

Undersigned counsel cannot condense or paraphrase the victim impact testimony without compromising his contention that it was excessive, repetitive, and emotionally charged to the point where it could easily have overpowered jurors' ability to exclude it from their weighing of aggravating and mitigating circumstances in accordance with the judge's instructions. The testimony is as follows:

MR. PRUNER [Prosecutor]: How are you related to Richard Van Dusen?

A: I'm his youngest daughter.

[At this point, Ms. Kroger identifies, over defense objection, the photographs on the poster board of her father and various family members].

BY MR. PRUNER:

Q: Have you prepared at my request a statement describing the uniqueness of your father, Richard Van Dusen, as an individual and the loss to the community including the family as a result of his death?

A: Yes, I have.

Q: And is that what you have written in front of you?

A: Yes, it is.

Q: Please read it at this time.

A: Okay. On November 26th, 2003 I lost my father. He was the only parent I had left as I had lost my mother seven years ago to a battle of cancer. My father was a special man who touched the lives of many people. He was a son, a father, a grandfather, a husband and a best friend to many people.

I wish I had the time to tell all of you about the 31 years of memories I had with my father. But since I don't, I would like to share with you some of the special memories I now hold so dearly. We moved to Florida from up state New York when I was five years old. My father was transferred with his job.

My father took my sister and I to our pool to teach us how to swim. We both wore a swimming float most of the afternoon. My father told us to try going down the slide without the float and he would catch us. When we came down the slide, he didn't catch us, but he let us swim on our own. Needless to say, we swam like fish without our floats after that.

I could remember when I was about eight years old, my dad and I would get up early on a cool Sunday morning, just the two of us, as my mother and sister liked to sleep in. We would go down to Clearwater Beach in his old corvette and eat donuts and drink hot chocolate. We would then walk along the beach and talk about the future and growing up.

I always looked forward to our Sunday mornings together. My father always attended out school functions, dance recitals and Girl Scout functions. He chaperoned on many class field trips. Even after my parents divorced, he played an active role in our lives. We went on several family vacations and had many family parties.

My father loved the out doors and often took us to the beach and had Sunday family picnics. His favorite place for a picnic was Fred Howard Park in Tarpon Springs. Even as teenagers we remained close to my father. My friends and I would often stop by his house just to say hi.

My friends always loved going to my dad’s house because they thought he was cool. He definitely was a people person and could talk to anyone about anything. I know if he were to walk in here right now, he would leave knowing each one of your names and something about each one of you. That was him. He genuinely cared about people.

My mother passed away just after I was engaged. I told my father I did not want a wedding if my mother could not be there. He told me my mother would want me to have a beautiful wedding and he would see to it that I did. Well, he did just that. He gave my husband and me a beautiful wedding with wonderful memories.

We were both smiling ear to ear as he walked me down the aisle. He even snuck in a message to my husband and me in our wedding video to say how proud he was of me and how happy he was for us. Now there are so many family celebrations, joys and memories that my father is no longer a part of.

I graduated from nursing school last year and wish my father could have been there to see me receive my diploma. He was so proud that I went back to college and we often talked about my schooling and the duties I had as a student nurse. He taught us we can do anything we want. Now I’m

six months pregnant with our first child and my father is not here to share this blessing with us.

He wanted us to have a baby so he would have a grandchild living close to him. He would tell me that when I had a baby, he would baby sit any time we wanted. My dad was a good person. He always saw the good in people and never had a bad thing to say about anybody. He was a trusting person, I guess too trusting. He always had time to lend a helping hand.

He shared his compassion for life by giving of himself to his family and also through charities such as the Big Brother, Big Sister program, Adopt A Grandparent program and Toys For Tots at Christmas time. A gift of life has not just been taken from my father, but all who knew him. There are no more memories to be made with my father who still had so much life yet to give the world.

They say time heals all wounds, but I can honestly say this is one that will never heal. My child will never know his or her grandfather. Although I can share his love of life in giving with him or her, I do not know if there are any words to ever explain to him or her what really happened to their grandpa.

Every day is a day of pain and suffering. I want so much to call my dad and tell him what my doctor said. I want to call him and ask him to meet us for dinner as we often did. I have to stop in my tracks as I realize my dad is no longer here for me to call him to do any of these things. The pain is still very much present in my life on a daily basis and I yearn for his return, although I know that is impossible. I don't think there are any words to fully describe the impact this crime has had in our lives.

Jay Myers (41/3822-25)

Q: And how are you related to Karla Van Dusen?

A: She's my mother.

Q: Have you prepared at my request a statement concerning the uniqueness of your mother as an individual and the loss to the community as a result of her death?

A: (Indicating affirmatively.)

Q: Please read it for us.

. . . . . .

THE WITNESS: Nothing can put into words the impact of my mother's death has had on my own life or on the lives of everyone that knew her. She was a wonderful woman full of cheer, goodwill and love for every living thing. The proudest thing that she ever claimed to be, however, was a mother.

She raised me practically alone to be first and foremost a kind person even to those who honed me. She always made sure that I was the type of person who would be friendly to outcasts in my classes in school, to give the homeless man on the street the quarter that I was going to buy a candy bar with, to always be a gentlemen even when those around me seemed to disregard traditional manners.

Later in life, she eventually became my best friend. Even going off to college, I spent with her every day and never missed a chance to tell her I love you. There is nothing in this world I couldn't talk with her about. She helped me through the tough times in life with her loving advice concerning everything from my love life to how I shouldn't party too much and try to better my future.

Basically I was robbed of more than a loving mother when she was taken from me. I was robbed of my best friend, my confidante and the one person who had always sacrificed herself and her wants to make sure that I had the best life that she could provide for me.

She was moving up to the Carolinas to be closer to her family, namely me and her mother. She and I had planned for her to become the office manager of my dental practice and she could not wait to start taking office management classes and continuing her court reporting career.

Well, now my office is close to being finished and my ideal office manager cannot be with me. And now I'm engaged to a wonderful woman who my mother will not be around any to see the happiness that I'm experiencing as I begin a new chapter of my life.

She will never know her grandchildren, never, something she talked about before I even had thoughts of marriage. She will never touch another child's life as Ducy the clown in her children's hospital ministry. She will never bring another smile to a stranger that she passes on the street.

She lives only in my memory and that's how she will continue to affect people's lives in many generations from now. My mother, Karla, was a wonderful woman taken from this world far too soon. Millions of lives that she both directly and indirectly made better continue to weep long in the future in her absence. Wherever you are, mom, I love you. I miss you.

Rene Koppeny (read by Christine Crawford)(41/3826-28)

In 1998 my sister and I lost our mother to cancer. We watched her suffer for 15 months. Even though my parents had been separated for 16 years, my father, Rick Van Dusen, was right by our side helping us through everything from my mom's illness, making the funeral arrangements and helping us deal with our loss.

My father was even there for support of my mother taking her to treatment. That was the kind of man he was. Our lives changed forever on November 26th, 2003. That was the night I was called and told that my father and stepmother had been killed. After my mom died, I felt that I had still love and support of my other parent, my father, and now he is gone, too.

I was 33 years old at my father's death and now I have lost both of my parents. His absence in my life is now an empty place in my heart that only he could fill. I miss the sound of his voice, his laughter, his smile and his zest for life. To try to sum up what an enormous part he played in my life would be a futile task.

My father was my advisor, my confidante and my friend. He was a grandfather to my four children, the man who would take them fishing, teach them to swim, play ball and sit and read stories to them. Now he won't be there for his grandchildren to watch them grow and my four children will miss out on having a grandfather – grandfather in their lives.

My dad's birthday was September 21st, so was mine. How many children can say that their birthday was their parent's. I can. My dad always told me we shared a special bond because I was born on his birthday. When I was growing up, my father and I would always do something special together on our birthday.

Then after I was older and on my own, it was always a race to the phone to see who would get the first happy birthday call. Now almost two years after my father's death, I dread my birthday and try to remember the very last birthday that we shared. My father and I had a very special relationship. He was an awesome man who touched the lives of so many.

Though he had a rich full life with family and friends, he still had a large enough heart to become part of the Big Brothers program. Also at every Christmas year, Christmas time he would go shopping for Toys for Tots. He was a positive influence in all who he came in contact with and had so much to offer. We have all suffered a tremendous loss.

Not a day goes by that I don't think about what happened to my dad and wonder why. People say that time heals all wounds, but I find that every day that passes by, I miss my father more and more. Losing my mother to cancer, we had a chance to say good-bye. We never got the chance to say good-bye to our dad.

Jacqueline Bonn (read by Morene Cancelino; both Ms. Bonn and Ms. Cancelino are sisters of Rick Van Dusen)(41/3829-31)

I am Jacqueline Marie Bonn, the sister of Rick Van Dusen and sister-in-law of Karla Van Dusen. The remorse of their loss is as fresh today as it was in November of 2003. I cannot separate the two of them because they shared a special love, not only for each other, but for each member of our family and for anyone who knew them.

They were so positive of life and made each day become a vibrant memory of the beauty and sacredness of being alive. Rick's impact at work inspired his co-workers and clients to enjoy their activities and deliver expertise and commitment to whatever task was entrusted to them.

I talked personally to many of his co-workers and they related so many lasting experiences they will embrace because of my brother. They have left his office intact and do not plan to remove his personal belongings in the near future. Rick was a big brother to the handicapped in the Tampa area and spent many of his evenings and weekends making unfortunate children feel very loved and proud to share time with him.

Rick always made me happy because he loved life so much and he made each moment count by loving and giving of himself. Karla and I often communicated by letter writing since I do not live in Florida. Her letters always told of her love for Rick and our family and of their many activities together as a married couple.

Karla always related how proud she was to have married Rick and to be a member of our family. She never took a moment for granted. She graduated from clown school and spent many of her evenings and weekends entertaining invalids and hospital patients with her talent and her loving heart.

My parents always looked forward to spending weekends with her and Rick. They would prepare special meals and activities that would delight our mom and dad. They always related their special times with Rick and Karla on the phone as soon as they returned home. Karla always wrote that she loved me and my husband, children and grandchildren and that if there was anything that we needed if only to talk, she was there for us.

I considered Karla as my sister. Rick and Karla will always be alive in our memories and in our hearts because they gave their life of love to us through their deeds and their vibrant outlook in being alive. Our family gatherings will never be the same. Their grandchildren will miss their loving ways and we will always leave to go home wondering how more blessed we would have been if Rick and Karla had been present.

We all thank God they have been with us if only for a short time as husband and wife. Those blessings will have to sustain us for the rest of [our] lives.

Billie Ferris (41/3832-37)

I was asked to prepare a statement in early 2004. I wrote my statement on – from the 1st of April through the 18th of May and finally got it mailed in. I have been asked to write a statement describing the impact my daughter's murder has had on my life. I don't know if I can adequately do that. Every day I feel a different way.

When I found the letter she has written in the past, when I think of a plan that we made together, when I look at her picture, when someone shares a memory, all these things and many more bring different feelings. Christmas gifts that she had bought earlier are still under my bed. Her jacket is hanging on the back of my guest room door.

Her pajamas are still in the drawer. A lot of her personal possessions are stored in my basement. My young grandchildren who Karla loved dearly and often mailed small and all occasion gifts and cards to are hurt beyond words. Their ages are six and ten. They ask my why and I can't tell them. They missed school during their early grieving process.

My 27 year old grandson, Karla's only child, still cries uncontrollably on occasion and it tears me apart. I don't know how to help him except to cry with him. Karla raised him practically alone. They were extremely close. Theirs was the home his friends always felt comfortable to visit. She was a perfect mother and very caring and compassionate daughter.

She was my best friend and confidante. I shared my entire life with her. She accepted my faults and never judged. She constantly told me of her admiration and respect for me. She shared her innermost thoughts with me. I'm 71 years old and I find that I fear the future because she is not here.

She had promised to be with me through the difficulties of growing old. She was extremely protective of me. I have an –email on my computer that's still there which she wrote not long before her death expressing her worry over my health because she said I want you with me for a very long time.

Although I have three sons, Karla was the one of my children who planned the family affairs and

arranged to have us all together for birthdays and Christmas and so forth. She was very much family oriented and I thank God every day that she instilled those values in her son, my grandson Jay. Even in his grief and sorrow, he has taken her place in carrying on family traditions.

She was looking forward to moving back home. And although I could not let her know how I had missed her since she moved to Florida three years ago, I always supported her choices in life as she supported mine. We allowed each other to make our decisions without judging.

I was really pleased with her and Rick's plan to move closer to me. Until she married and moved to Florida, we had never lived more than 40 miles apart. When Karla called me the night of her death, she was very excited about selling the truck and possibly having found a buyer for the house since it meant they would be moving sooner than they had expected.

Karla's church life meant a lot to her. She was a Christian in every sense of the word. She spent a great amount of time while in Florida searching for a church where she could participate in the activities that she had enjoyed in her Spartanburg church and was looking forward to continuing those activities when she returned.

She sang with her choir, sometimes solo. She played hand bells. She filled in on the piano. She participated in church plays and pageants, fund raisers and so forth. She was a member of a Christian clown group visiting hospitals and children's homes. She also went to a Christian clown school in Florida.

She would dress as a clown and did face painting at different church activities. Karla always participated in angel tree projects visiting and buying gifts for underprivileged children, including those who parents were in prison. I feel totally lost without my daughter.

We depended on each other for the closest kind of friendship. We had planned trips to visit out of state family and friends that we hadn't seen in years. We also shopped together. Karla was not perfect. She was more than that to me. Please know

that my daughter's entire family will grieve until we join her in heaven.

She made a favorable impression on everyone who ever met her and is missed by numerous people in the business world as well as both family and friends. She had much to offer and always gave her all in both business and social situations. Not only has our family suffered loss, I think our country has lost two good productive citizens who were always giving of themselves for the benefit of others. I cannot write more. It's too painful. I do have pictures of their very last birthday party.

. . . . . .

Q: Without describing it, do you have pictures you'd like to show?

A: All right.

Q: A picture of your daughter?

A: This is my little girl and this is what she grew up to be.

D. The Emotionally Charged Victim Impact Testimony Dominated the Penalty Phase and Compromised its Fundamental Fairness

It should come as no surprise that half the jury was in tears. This was not a "quick glimpse" of Rick and Karla's personal characteristics; it could have been their memorial service. The emotionally charged testimony and photographs -- including the one of Karla as a small child shown to the jurors by her mother at the climax of the state's victim impact presentation - - could only have swayed the jurors toward a visceral, as opposed to a reasoned, recommendation of death. The natural human reaction after seeing and hearing the family members' anguish at such length and in such detail,

would be to want to give them some small measure of retribution or closure. Conversely, jurors could easily have felt that their return of a life recommendation after such a presentation would be perceived by the family members as a heartless slap in the face.

The victim impact evidence in the instant case thoroughly dominated the penalty proceedings before the jury, in quantity but even more importantly in intensity. In addition, the jury heard the victim impact presentation on the same day as its deliberations and life-or-death verdict. Contrast Gibbs v. State, 904 So.2d 432,436 (Fla. 4th DCA 2002)(tape containing emotional outbursts "was admitted on the second day of trial, and the trial continued for several more days, thus dissipating its emotional impact by the time the jury deliberated").

Heightening the emotional impact of the testimony were the accompanying photographs of the victims in life. Five of these were displayed to the jury on an easel throughout the testimony of Rick Van Dusen's daughter; another framed photograph was placed on the witness stand facing the jurors by Karla Van Dusen's son, and remained in view throughout his testimony; and several more photos of the victims' last birthday party, along with the one of Karla as a little girl, were shown to the jury by her grief stricken mother. [See Cargle v. State, supra, 909 P.2d at 825 and 829 (adult victim's sister's verbal portrayal of victim "as a cute child

at age four" was irrelevant to proper purposes of victim impact evidence)]. As in Ruiz v. State, 743 So.2d 1,8 (Fla. 1999), it can only be concluded that these photographs were offered - - and presented in the manner they were - - in order to inflame the jury. And even if that were not the motivation, it was certainly the effect, especially in light of the fact that many jurors were crying. Contrast Branch v. State, 685 So.2d 1250,1253 (Fla. 1996), in which this Court, after noting that a photograph of a murder victim can demonstrate his or her uniqueness as an individual, recognized that such evidence can also have an emotional impact on jurors. However, "the [emotional] effect is minimized where the photo is a basic portrayal of the victim, presented to the jury in a routine manner." In Branch, a single photo of the victim was introduced; it was taken several weeks before her death. The photo was introduced, in the absence of the jurors, at the conclusion of the state's case; and it was not shown to the jury until the prosecutor displayed it briefly during closing argument.

In Cargle v. State, supra, the Oklahoma Court of Criminal Appeals held that in a capital sentencing proceeding the probative value of photographs of the victim in life is substantially outweighed by its prejudicial impact. This holding was later superseded by a statutory amendment allowing the introduction of one photograph "to show the general appearance and condition of the victim while alive." Title 12

O.S. Supp. 2003, §2403; see Coddington v. State, 142 P.3d 437,452-53 (Ok.Cr.2006). The judge retains the discretion to exclude the photograph if he determines that its prejudicial effect outweighs its probative value. 142 P.2d at 453.

In the instant case, on the same day as its deliberations and verdict, the jury heard the detailed and emotional testimony of five witnesses, while looking at numerous photographs which could only have intensified their identification with the victims and their sympathy for the family. Then came the emotional climax when Karla's elderly mother showed the photo, taken some forty years earlier, of her daughter as a small child; "This is my little girl and this what she grew up to be". The state's presentation of excessive and unduly emotional victim impact evidence can render a capital sentencing proceeding fundamentally unfair and violative of the Fourteenth Amendment. Payne v. Tennessee, supra (opinion of the Court and concurring opinions); Cargle; Nesbit; Muhammad; Bernard; Clark; Barden. This happened here, and it compromised the integrity of the jury's penalty recommendation. Appellant's death sentence is constitutionally infirm, and must be reversed for a new penalty trial before a newly impaneled jury.

E. The Emotionally Inflammatory Victim Impact Evidence Should Also have Been Excluded or Curtailed Under §90.403 of Florida's Evidence Code

Even apart from the Fourteenth Amendment's limitations on victim impact evidence, the trial court should have excluded,

or at least curtailed, the state's presentation of the family witnesses and photographs under §90.403 [see defense counsel's objection on this ground, 41/3753], because its overwhelming emotional impact greatly exceeded its marginal probative value. [Johnston v. State, 743 So.2d 22,23 (Fla. 2d DCA 1999) strongly suggests that the §90.403 balancing test is applicable to victim impact evidence; and the supreme courts of other states which have virtually identical prejudice/probative value evidentiary statutes have expressly so held. Cargle v. State (Oklahoma), 909 P.2d at 826; State v. Nesbit (Tennessee), 978 S.W.2d at 891; State v. Muhammad (New Jersey), 678 A.2d at 176 and 180].

Under Florida law, relevant evidence is defined as evidence "tending to prove or disprove a material fact" [Fla. Stat. §90.401]; a material fact is one "which is of consequence to the outcome of the action." Amoros v. State, 531 So.2d 1256,1260 (Fla. 1988); Stephens v. State 787 So.2d 747,759 (Fla. 2001); Shaw v. Jain, 914 So.2d 458,460 (Fla. 1st DCA 2005). Under Florida's capital sentencing system, the jury's penalty verdict is based on its weighing of the aggravating factors (strictly limited to those enumerated in the statute) which are proven by the evidence beyond a reasonable doubt, against the mitigating factors (which may arise from any circumstances related to the crime or the defendant) which the jury is reasonably convinced exists. See Coday v. State, ____So.2d____ (Fla. 2006)[2006 WL

3028248],p.10; quoting Fla.Std.JuryInstr.(Crim)[7.11 Penalty Proceedings – Capital Cases]. Unlike the mitigators, the statutory list of aggravating factors is exclusive and no others may be used for that purpose; "We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death". Miller v. State, 373 So.2d 882,885 (Fla. 1979); see Steele v. State, 921 So.2d 538,544 (Fla. 2005).

When, in response to Payne, the Florida legislature amended the death penalty statute to permit the introduction of victim impact evidence [§921.141(7)], it created an anomaly, because the designated purpose of the evidence is "to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community members by the victim's death"; yet this was not added to the list of aggravating factors or made a component of any aggravating factor. See Windom v. State, 656 So.2d at 438. As stated in State v. Maxwell, 647 So.2d 871,872 (Fla. 4th DCA 1995), approved in Maxwell v. State, 657 So.2d 1157 (Fla. 1995), "Victim impact evidence is not an aggravating factor. It is neither aggravating nor mitigating evidence. Rather, it is other evidence, which is not required to be weighed against, or offset by, statutory factors" (emphasis in opinion).

Therefore, victim impact evidence is relevant, because the legislature said so, to show the victims' uniqueness as human beings and the resultant loss to the community, but it

is not relevant to anything the jury can weigh in determining whether to recommend death or life imprisonment. This, in turn, gives rise to jury instructions which tell the jurors that, while they may not consider the victim impact evidence as part of any aggravating factor nor as part of any factor they may consider in rendering their penalty verdict, they may nevertheless consider it as "evidence in the case" (41/3815,3837-38,3924-25).

Accordingly, the probative value of victim impact evidence is minimal, which is all the more reason - - in addition to the Fourteenth Amendment concerns recognized in Payne - - why it should be restricted to a "quick glimpse" of the victim's personal characteristics, and not allowed to become a eulogy or an outpouring of anguish. Conversely, when victim impact evidence is presented as it was in the instant case, the risk of prejudice from inflamed emotions is extreme.

This Court has emphasized that a jury's penalty verdict should not be based on emotional reaction, but rather upon a reasoned analysis of the evidence in light of the applicable law. Bertilotti v. State, 476 So.2d at 134.

One of the main purposes of §90.403 is to ensure that jury deliberations will be based only upon a reasoned analysis of the law and the pertinent facts, uninfluenced by inflamed emotions. See e.g. State v. McClain, 525 So.2d 420,422 (Fla. 1988); Brown v. State, 719 So.2d 882,885 (Fla. 1998); Muhammad v. State, 782 So.2d 343, 359 (Fla. 2001); Taylor v. State, 640

So.2d 1127,1134 (Fla. 1st DCA 1994); State v. Tagner, 673 So.2d 57,60 (Fla. 4th DCA 1996); State v. Gerry, 855 So.2d 157,159-60 (Fla. 5th DCA 2003). Where the probative value of challenged evidence is "minimal" [McClain]; "very little" [Muhammad]; or "tenuous" [Taylor], the tendency of the evidence to elicit a strong emotional reaction is subject to even greater scrutiny. Since victim impact testimony is not relevant to prove any aggravating factor, and thus is not a proper component of the jury's weighing process of aggravators against mitigators, but instead is "other" evidence in the case, essentially for the purpose of providing some background information about the victims, its prejudicial impact and its potential to inflame, confuse, or distract the jurors from their proper task must be carefully examined.

In the instant case, the victim impact testimony was so impassioned that it would inevitably have a powerful emotional impact on the jurors. That it did have such an impact is demonstrated by the fact (as asserted by defense counsel and two newspapers, and not disputed by the prosecutor, see 42/4036, or the trial judge) that many jurors were crying during the family members' testimony. The effect of this intense victim impact presentation, which dominated the one-day penalty phase, could not be dissipated by an instruction to consider it only as "evidence in the case" and not as part of any aggravating factor. Two or more jurors (the penalty vote was 8-4) could easily have been convinced that only a

death sentence would bring the families retribution or closure, or that a life recommendation would add to their pain. Section 90.403, as well as the Fourteenth Amendment, required the trial judge - - if he were not going to exclude it altogether or restrict its presentation to the Spencer hearing - - to sharply curtail the victim impact presentation to guard against the jury's penalty recommendation being influenced by inflamed emotions. His failure to do so, over repeated defense objections on these and related grounds, requires reversal for a new penalty trial.

ISSUE VI THE TRIAL COURT ERRED, AND VIOLATED THE APPLICABLE CONSTITUTIONAL STANDARD, BY EXCLUDING FOR CAUSE JUROR DARYL RUCKER, WHOSE VIEWS ON THE DEATH PENALTY WOULD NOT HAVE PREVENTED OR IMPAIRED THE PERFORMANCE OF HIS DUTIES AS A JUROR IN ACCORDANCE WITH HIS OATH AND THE COURT'S INSTRUCTIONS.

In Gray v. Mississippi, 481 U.S. 648, 658 (1987), the United States Supreme Court emphasized:

> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, 469 U.S. at 423, 105 S.Ct. at 851. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stacks[s] the deck against the [defendant]. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 U.S. at 523, 88 S.Ct. at 1778.

Accordingly, the law is clear that a juror may not be excluded for cause merely because he or she has personal reservations about (or even opposition to) the death penalty, whether for religious, philosophical, political, or other reasons. In Gray, the U.S. Supreme Court reaffirmed that "the relevant inquiry is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" This strict standard has been established in such decisions as Adams v. Texas, 448 U.S. 38,45 (1980); Wainwright v. Witt, 469 U.S. 412,424 (1985); O'Connell v. State, 480 So. 2d 1284, 1286

(Fla. 1986); Farina v. State, 680 So. 2d 392,396-98 (Fla. 1996); and Ault v. State, 866 So. 2d 674,683-86 (Fla. 2003). The Sixth and Fourteenth Amendment basis of that standard was emphasized in Gray, 481 U.S. at 658-59. Similarly this Court recognized in Farina v. State, supra, 680 So. 2d at 398, that the Witherspoon-Witt standard "is rooted in the constitutional right to an impartial jury, which goes to the integrity of the legal system", and is "so basic to a fair trial that its infraction cannot be considered harmless".

If a juror with reservations about capital punishment is barred from jury service on any broader basis than inability to follow the law or abide by his oath, a death sentence resulting from that trial cannot be carried out. Adams v. Texas, 448 U.S. at 48. The burden of demonstrating that a challenged juror will not follow the law in accordance with his oath and the instructions of the court is on the party seeking his exclusion; i.e., the state. Witt, 469 U.S. at 423. The erroneous exclusion of a qualified juror under the Witt standard is not subject to "harmless error" analysis (regardless of whether or not the prosecution has any remaining peremptory challenges). Gray v. Mississippi, 481 U.S. at 668, see 659-668; Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So. 2d 171,174-75 (Fla. 1983); Farina v. State, supra, 680 So. 2d at 397-98; Ault v. State, supra, 866 So. 2d at 686. Instead, the U.S. Supreme Court has established and this Court has recognized "a per se rule

[requiring] the vacation of a death sentence when a juror who is qualified to serve is nonetheless excused for cause". Farina, 680 So. 2d at 397, citing Davis and Gray. The appropriate relief is a new penalty proceeding before a new jury. Chandler, 442 So. 2d at 175; Farina, 680 So. 2d at 399; Ault, 866 So. 2d at 683.

The critical question, then, is whether Daryl Rucker's views rendered him unqualified to serve as a juror in a capital trial, or whether - - to the contrary - - he was fully capable of performing his duties in accordance with his oath and the trial court's instructions on the law.

Mr. Rucker was 48 years old, marred with two children, employed by I.B.M. as database consultant. He had a four-year college degree, and had served as foreperson on a criminal jury in Georgia some fifteen years earlier (23/1262; 24/1278-80). He was "pretty much" okay with the prosecutor's explanations of premeditated murder and felony murder (24/1293-94). The prosecutor had offered hypothetical examples of felony murder involving an accidental shooting or a younger offender:

> MR. PRUNER [prosecutor]: It can be troublesome, but again, if proven beyond a reasonable doubt with the facts I gave you, could you follow the law if that was the circumstances?
>
> JUROR RUCKER: If that's the law, it's the law. (24/1294)

Mr. Rucker accepted the concept of presumption of

innocence (24/1340-41), and if the judge instructed the jury not to draw any adverse inference from a defendant's exercise of his right not to testify, he would have no problem with that (24/1344). Mr. Rucker, because of his job, had above average familiarity with cell phone technology (24/1314, 1320-21). He initially indicated that in the unlikely event that there was disagreement between an expert's testimony on that subject and his own prior knowledge, he would go home and look it up (24/1321-23). However, if instructed by the judge that he shouldn't do that, Mr. Rucker stated "Then I would not do that" (24/1323). If given a more general instruction that he was to base his verdict solely upon the evidence he heard in the case, and upon nothing else, Mr. Rucker replied, "Well, that's what I'd have to do" (24/1323).

The juror was asked by the prosecutor:

> Mr. Rucker, what is your view of the death penalty, sir, in general?
>
> MR. RUCKER: In general, I do not have a problem with it except in the application of it to children and the mentally retarded.
>
> MR. PRUNER: Okay. Absent those circumstances?
>
> MR. RUCKER: Not a problem.
>
> MR. PRUNER: You can consider it?
>
> MR. RUCKER: Yes.
>
> MR. PRUNER: Are you the type of person that can perform the weighing and balancing of the aggravating circumstances evidence with the mitigating circumstances evidence?
>
> MR. RUCKER: Yes.

MR. PRUNER: And what you determine to be the appropriate case, case by case basis, can you find yourself voting either for life or for death?

MR. RUCKER: Yes. (24/1350)

Asked whether he would consider a defendant's family background and life history as mitigation, Mr. Rucker indicated that he would consider such evidence, but the weight he would accord it would depend (24/1377-79). When each juror was asked whether they thought they would be a good juror on this case (24/1381), Mr. Rucker's response was, "I'm a critical thinker and I can sit back and weigh the evidence and come to a logical conclusion" (24/1384).

The prosecutor's asserted basis for challenging Mr. Rucker for cause arose from the following questions and answers:

MR. PRUNER: Mr. Rucker, what do you think about the idea of circumstantial evidence to prove an element of the offense, whether it be state of mind or identity?

MR. RUCKER: We're talking about death case, so circumstantial evidence has got to take me to – I've got to apply a higher standard to that. So you've got to come - - I don't want to - - I would be very hesitant to apply the death penalty to somebody based on circumstantial evidence.

If the logic took me there and I could connect all the dots freely, not parts - - but when you're talking about an offense of this magnitude, circumstantial evidence is - - I need facts.

MR. PRUNER: Well, okay. Let me address a few things with you. And again, I'm not trying to parse your words or anything. Circumstantial evidence is evidence - - facts from which you can draw conclusions. It's evidence based on fact, but it

requires you to infer and conclude something. It's not guess work, so it would be evidence for you to consider.

Let me ask you then - - I referred to this or talked about this a little bit yesterday afternoon and I don't want to go into at this point your view on the death penalty. We'll talk about that in a bit.

But it is the state's obligation in this case as in any criminal case to prove the case beyond a reasonable doubt, prove the defendant's guilt beyond a reasonable doubt. And that's the same burden of [proof] whether it's a shoplifting case, a drunken driving case or a death penalty case. It's the same standard.

Obviously the evidence is going to be different. You're not going to have a dead body in a shoplifting case, but it's the same burden of proof. By your previous comments, sir, are you suggesting, sir, that because there's a potential down the road for death to be a sentence that you would require the state to prove its case to a higher standard of proof than beyond a reasonable doubt?

MR. RUCKER: Well, not to - - I would require the state to - - yeah, I think that is what I'm saying. I would require a higher standard or an elimination of the - - the doubt factor. I would not - - I would not readily convict someone and give them death. Now, a conviction is one thing. The death penalty is another.

A conviction I can arrive at using the inference that you're speaking of, but the application of the final judgment would be - - would have to meet a higher standard.

MR. PRUNER: Okay. All right. I think I understand what you're telling me, sir. Would you - - let me go back to the original question. Court you consider circumstantial evidence in the guilt phase of a death penalty case?

MR. RUCKER: Yes, it could be considered.

MR. PRUNER: All right. Thank you, sir. (24/1298-1300) (emphasis supplied)

Later, during defense counsel's voir dire, Mr. Rucker was asked if he agreed with juror Seay that a fair trial required consideration of both aggravating circumstances and mitigating circumstances (24/1371-72):

> MR. RUCKER: That everyone should have a fair trial, absolutely. I'm not predisposed to the death penalty by any means. Like I said earlier, when it comes to that phase, just - - the burden of proof has to be a little bit more sure for me. But I have absolutely no problem with applying it if you worked your way into that position.
>
> MS. WARD [defense counsel]: Okay. And to talk about that for a minute, you've already - - we've already gone beyond a reasonable doubt and you found someone guilty. So you're already sure about that when you get to a penalty phase.
>
> MR. RUCKER: Okay. Right.
>
> MS. WARD: Okay. So at the penalty phase, you can follow the law and make the state prove aggravating circumstances beyond a reasonable doubt, right?
>
> MR. RUCKER: Right.
>
> MS. WARD: And you understand that the defense has a lesser burden. You only have to be reasonably convinced that mitigating circumstance exist to find that it applies to Mr. Deparvine.
>
> MR. RUCKER: Right. (24/1372-73) (emphasis supplied)

Over defense objection, the state moved successfully to excuse Mr. Rucker for cause (24/1387,1391). The prosecutor, conflating the guilt phase and penalty phase, mischaracterized the juror's answers as follows:

> MR. PRUNER: ...I asked him point blank are you telling me that because the death penalty is a potential crime that you'd require a higher standard of proof than beyond a reasonable doubt and he said

> I guess I am and he volunteered the same to Ms. [Ward] - - (24/1387)(emphasis supplied)

The judge said "Yeah, you're right. Okay" (24/1387). Defense counsel objected to the court's ruling, and when the judge immediately moved on to the next juror ("What about this guy?"), defense counsel instead began asserting the grounds for his objection to the excusal of Mr. Rucker ("I don't think that rules for cause and what Mr. Pruner just said - -"). At that point, the judge cut him off, repeating "What about this guy?" (24/1387); making it clear that he intended to move on.[18] See Nieves v. State, 678 So. 2d 468 (Fla. 5th DCA 1996)(rejecting state's contention that defense failed to preserve issue where "it appears from the record that the trial court may have interrupted a proper objection". See also State v. Rosa, 774 So. 2d 730 (Fla. 2d DCA 2000). [Appellate courts in other jurisdictions, including Texas, California, Connecticut, and Maine, have similarly found that defense objections were preserved for review (and were not waived for failure to articulate the grounds for the objections) when defense counsel began to articulate the grounds but was interrupted or cut off by the trial judge. See Bray v. State, 478 SW2d 89 (Tex. Cr. App. 1972); Riles v. State, 1993 WL 531453 (Tex. App.-Houston 1993)(not designated

[18] The judge, as he went through the challenges, rarely identified the jurors by name, saying "What about this guy?"; "This lady?"; "This guy here still okay?"; "This lady here?"; "This fellow here?" (24/1387-89)

for publication) (citing Bray for this proposition)[19]; Gains v. State, 966 SW2d 838,841 (Tex. App.-Houston 1998); People v. Boyette, 58 P.2d 391,411-12 (Cal. 2002); People v. Leffel, 196 Cal. App. 3d 1310,1317-18,242 Cal. Rptr. 456,460 (1987); State v. Hamilton, 886 A.2d 443, 448 n.3 (Conn.App. 2005); State v. Greenwood, 385 A.2d 803,804 (Me. 1978)].

Later in the jury selection proceeding, before the alternates were chosen and again immediately before the jury was sworn, defense counsel renewed his prior motions and objections and accepted the jury "only subject to all of those motions...[a]nd all our prior objections" (27/1734,1787; see also motion for new trial, 14/2443). Accordingly, this issue is preserved for appellate review. Joiner v. State, 618 So.2d 174 (Fla. 1993); Ault v. State, supra, 886 So.2d at 683; Puryear v. State, 891 So.2d 2 (Fla. 2d DCA 2004); see Berry v. State, 792 So.2d 611,612 (Fla. 4th DCA 2001)("under the current state of the law counsel would be well-advised to renew all objections made during the selection of the jury, before the jury is sworn").

The state failed to meet its burden of establishing that Mr. Rucker was an unqualified juror under the Witt standard, and the trial judge abused his discretion by granting the state's challenge for cause. See Ault v. State, supra, 866 So.2d at 683-84. "The test for determining juror competency

[19] Under Texas' rules, unpublished opinions may be cited with the notation "not designated for publication" but have no precedential value.

is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Ault, at 683, citing Lusk v. State, 446 So.2d 1039,1041 (Fla. 1984). "In a capital case, it is reversible error to exclude for cause a juror who can follow his or her instructions and oath in regard to the death penalty." Farina v. State, supra, 680 So.2d at 396. Exclusion of a juror on any grounds broader than this is constitutionally impermissible. Wainwright v. Witt; Gray v. Mississippi. As this Court has recognized, " a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty". Barnhill v. State, 834 So.2d 836,844 (Fla. 2002); Blackwelder v. State, 851 So.2d 650,652 (Fla. 2003).

Contrary to the prosecutor's implication, Mr. Rucker did not come to the conclusion that because death was a possible penalty, he would require a higher standard of proof than reasonable doubt to convict the defendant of first-degree murder. Instead, after giving an explanation of circumstantial evidence and the reasonable doubt standard, the prosecutor asked Mr. Rucker whether, because there was a potential down the road for death to be a sentence, he would require the state to prove its case to a higher standard than reasonable doubt (24/1298-99). The juror answered that "a conviction is one thing. The death penalty is another. A

conviction I can arrive at using the inference that you're speaking of, but the application of the final judgment would be...would have to meet a higher standard" (24/1299-1300). When the prosecutor followed this up by returning to the original question of whether he could consider circumstantial evidence in the guilt phase of a death penalty case, Mr. Rucker answered that he could (24/1300). As for his views on the death penalty, he had no problem with it, except in application to children and the mentally retarded. [In this respect, Mr. Rucker's views mirrored the current state of the law, since the Constitution prohibits execution of the mentally retarded and adolescents under seventeen. See Atkins v. Virginia, 536 U.S. 304 (2002); Brennan v. State, 754 So.2d 1,5-11 (Fla. 1999)]. Absent those circumstances, the juror stated that it would not be a problem for him to consider a death sentence, and he could weigh and balance the aggravating and mitigating factors (24/1350). On a case-by-case basis, he could envision himself voting for life or voting for death (24/1350).

During subsequent questioning, Mr. Rucker made it perfectly clear that the concerns he'd expressed about the conclusiveness of the circumstantial evidence related to the penalty determination, rather than the guilt-phase verdict ("I'm not predisposed to the death penalty by any means. Like I said earlier, when it comes to that phase, just - - the burden of proof has to be a little bit more sure for me. But

I would have absolutely no problem with applying it you worked your way into that position") (24/1372). He understood that if the case progressed to a penalty phase, that would mean that the jury had already found the defendant guilty beyond a reasonable doubt. Asked again whether, in the penalty phase, he would follow the law with regard to the proving and consideration of aggravating and mitigating circumstances, Mr. Rucker reaffirmed that he could do so (24/1371-73).

[By way of contrast there were two other prospective jurors, Ms. Herrera and Mr. Fanning, who did state that they would (Herrera) or possibly would (Fanning) require the state to prove its case to a higher standard than reasonable doubt in the guilt phase of the trial, due to the possibility that a death sentence could be imposed at the conclusion of all the proceedings (26/1559-61,27/1652-53). As the prosecutor properly framed the question to Mr. Fanning:

> I'm asking if because the death penalty is a possibility, in the first phase of this trial when the question before the jury is has the state proved its case beyond a reasonable doubt, are you going to require evidence more than that, evidence that meets a standard higher than beyond a reasonable doubt because of the prospect of the death penalty? (27/1653)

Thus, as to jurors Herrera and Fanning, the state met its burden under Witt of showing that their views on the death penalty would prevent or substantially impair the performance of their duties as jurors in accordance with their oaths and the court's instructions. The trial court, without objection

by the defense, properly excused these two jurors for cause (26/1610-12;27-1653)].

Mr. Rucker, on the other hand, never said anything which established anything other than that he would be a consciencious juror who would weigh the evidence and circumstances and fairly consider both penalties. He was not even opposed to the death penalty in principle. He never indicated any unwillingness or reluctance to follow the law or the court's instructions, and, in fact, every time he was asked what he would do if his personal views or inclinations happened to conflict with the court's instructions he said he would follow the law and the instructions (24/1294,1323-24). Mr. Rucker's expressed position was that he could convict a defendant of first-degree murder based on circumstantial evidence and the reasonable doubt standard. However, to vote for a death sentence in the second phase he would want the evidence to be a little more conclusive, although he would have no problem voting for death if he were satisfied. The prosecutor never asked Mr. Rucker what he would do if the judge instructed him to the contrary, for the simple reason that there is no instruction or law to the contrary. Mr. Rucker was simply expressing a concern that many, perhaps even most, consciencious capital jurors share; that before you forfeit a human life a heightened degree of certainty is warranted. See Hannon v. State, 941 So.2d 1109,1129-30 (Fla. 2006)(opinion of the Court); Way v. State, 760 So.2d 903,922-

24 (Fla. 2000)(Pariente, J. concurring); Tarver v. Hopper, 169 F.3d 710,715-16 (11th Cir. 1999).

As appellate courts have long recognized, the jurors' level of certainty of the defendant's guilt - - or any lingering uncertainty on that score - - is often crucial to their life-or-death decision. The Justices of this Court are well aware that jurors do not ignore such concerns in the penalty phase, nor does the law require them to. See Hannon, 941 So.2d at 1129-30 and n.13(recognizing the "common sense and grounded logic" underlying the idea of mitigating a death sentence because of lingering doubts as to guilt); see also Geimer and Amsterdam, Why Jurors Vote Life or Death: Operative Facts in Ten Florida Death Penalty Cases, 15 Am.J.Crim.L. 1,28 (1988) (existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in cases where jury recommended a life sentence). The federal Eleventh Circuit, quoting Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum.L.Rev. 1538,1563 (1998), stated in Tarver v. Hopper, 169 F.3d at 715-16:

> "Residual doubt" over the defendant's guilt is the most powerful "mitigating" fact.-[The study] suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.

See also King v. Strickland, 748 F.2d 1462,1464 (11th Cir.

1984); Johnson v. Kemp, 615 F.Supp. 355,364 (S.D.Ga. 1985); State v. Fry, 126 P.3d 516,523 (N.M. 2005)

As this Court recognized in Hannon, 941 So.2d at 1129, the U.S. Supreme Court has never conclusively resolved whether, or under what circumstances, there exists any constitutional right to present residual doubt evidence or argument. See Oregon v. Guzek, ____ U.S. ____, 126 S.Ct. 1226,1232, 163 L.Ed2d 1112 (2006). In the instant case, however, to try to justify the exclusion of Mr. Rucker under the Witt standard, the state will necessarily have to argue a much more extreme position; i.e., that any juror may be purged from a capital jury if he indicates that he would want more conclusive evidence to recommend the ultimate (and, once executed, uncorrectable) penalty of death than that necessary to return a guilty verdict in the first phase. To exclude a juror on that basis would make a mockery of the Witt standard, since jurors who would consider the strength or weakness of the evidence of guilt in making the life-or-death recommendation - - like Mr. Rucker - - are entirely capable of abiding by their oaths and the law. The presence of such a juror would frustrate no legitimate interest of the state in administering a constitutional capital sentencing scheme. See Gray v. Mississippi.

Mr. Rucker's views were in no way incompatible with his oath or the law, and it was constitutional error to remove him from appellant's jury based on those views. See also Fuselier

v. State, 468 So.2d 45,53-55 (Miss. 1985), (fact that jurors "would be hesitant to inflict the death penalty in a case based entirely on circumstantial evidence does not constitute grounds to excuse them for cause" under the Witt standard; there was no indication from the jurors' comments they would be prevented or substantially impaired in performing their duties as jurors, or that they would be unable to decide the facts impartially and conscienciously apply the law).

The excusal for cause of Mr. Rucker from appellant's jury on grounds much broader that those constitutionally permissible under the Witt standard requires reversal of his death sentence for a new penalty proceeding before a fairly selected jury.

ISSUE VII FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLE OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A SENTENCE OF DEATH, IS CONSTITUTIONALLY INVALID UNDER RING V. ARIZONA, 536 U.S. 584 (2002).

Ring v. Arizona, 536 U.S. 584 (2002) declared unconstitutional the capital sentencing schemes then used in Arizona, Colorado, Idaho, Montana, and Nebraska, in which the judge, rather than a jury, was responsible for (1) the factfinding of an aggravating circumstance necessary for imposition of the death penalty, as well as (2) the ultimate decision whether to impose a death sentence. Four states - - Alabama, Delaware, Florida, and Indiana - - were considered to have "hybrid" capital sentencing schemes, the

constitutionality of which were called into question, but not necessarily resolved, by Ring. See 536 U.S. at 621 (O'Connor, J., dissenting).

Appellant submits that - - unlike Alabama, Delaware, and Indiana - - Florida is a "judge sentencing" state within the meaning and constitutional analysis of Ring, and therefore its entire capital sentencing scheme violates the Sixth Amendment. As this Court recognized in State v. Steele, 921 So.2d 538,548 (Fla. 2006), Florida is now the only state in the country that does not require a unanimous jury verdict in order to decide that aggravators exist and to recommend a sentence of death. Even more tellingly, this Court recently reaffirmed in Troy v. State, ____ So.2d ____ (Fla. 2006)[2006 WL 2987627] that Florida's procedure "emphasizes the role of the circuit judge over the trial jury in the decision to impose a sentence of death". The Court also quoted and highlighted the following statement from Spencer v. State, 615 So.2d 688,690-91 (Fla. 1993): "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed."

The jury's advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with the minimum Sixth Amendment requirements of Ring. [The issue was thoroughly preserved below (see 12/2016-42,2133;19/720-23;42/3971,4029-31,4034)]. Florida's capital

sentencing scheme, and appellant's death sentence, are constitutionally invalid.

ISSUE VIII THE TRIAL COURT'S SENTENCING ORDER IS DEFECTIVE FOR FAILURE TO CLEARLY INDICATE WHAT MITIGATING CIRCUMSTANCES HE FOUND.

The trial court's sentencing order fails to clearly indicate what mitigating circumstances he found (15/2561), and is insufficient to comply with the standards set by this Court. See e.g. Woodel v. State, 804 So.2d 316,326-27 (Fla. 2001); Bryant v. State, 656 So.2d 426,429 (Fla. 1995); Mann v. State, 420 So.2d 578,581 (Fla. 1982). Moreover - - while it mentions appellant's childhood emotional deprivation and his relative inability to form and maintain close relationships - - the sentencing order entirely fails to address or evaluate the Spencer hearing testimony (and report) of Dr. Rosen that appellant suffers from several recognized mental health disorders (15/2561;see 14/2493,2518-23;42/3979-83).

CONCLUSION: Appellant respectfully requests that this Court reverse his convictions and death sentences and remand for a new trial [Issues I, III]; resubmission of the case to a grand jury, if the state opts to charge appellant with a capital crime [Issue II]; discharge or a new trial on the carjacking count [Issue IV]; a new penalty trial [Issues V, VI]; resentencing by the trial judge [Issue VIII]; or imposition of a sentence of life imprisonment [Issue VII].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Bill McCollum, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of March, 2007.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SB/tll