IN THE SUPREME COURT OF FLORIDA

PINKEY W. CARTER, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC06-156

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Appellant, PINKEY W. CARTER, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the direct appeal of capital case involving a triple homicide. Carter was sentenced to life for one of the murders and to death for the other two murders. Carter was indicted by a grand jury, on January 15, 2004, for three counts of first-degree murder with a firearm of (1) Glenn Pafford; (2) Elizabeth Smith Reed and (3) Courtney Nicole Smith. (R. Vol. 1 12-13). The murders were committed on July 24, 2002. (R. Vol. 1 12-13).

The defendant filed numerous pre-trial motions, including a motion to suppress statements, admissions and confessions made

to Detective Ford after his arrest in Kentucky, asserting that the statements were obtained in violation of *Miranda* and after the invocation of the right to counsel. (R. Vol. III 358-359). The trial court reserved ruling on the motion until it heard the proffer. (R. Vol. III 360). The defendant also filed a motion in limine concerning weapons seeking the exclusion of testimony that Carter had an additional rifle or handguns when he crossed the border in Mexico and which the trial court granted. (R. Vol. III 415-416; 417). Carter also filed a notice of waiver of the mitigating circumstance of no significant prior criminal history (R. Vol. III 423). Defense requested that Dr. Krop be appointed as a confidential mental health expert which the trial court granted. (Vol. V 752-753). The defendant entered a waiver of speedy trial and moved for three continuances. (Vol. V 757-758; Vol. VI 955, 964;990). The trial court held hearings on the various pre-trial motions. (Vol. V 790-951).

Jury selection began on September 19, 2005 and lasted two days. (T. Vol. IX 1-200; Vol. X 201-400; Vol. XI 401-600; Vol. XII 601-800; Vol. XIII 801-808). Prior to jury selection, the trial court conducted a *Nixon* inquiry.[1] (T. Vol. IX 4). Defense counsel explained the their defense was going to be a concession

[1] *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000) (*Nixon II*); *Nixon v. State*, 857 So.2d 172 (Fla. 2003)(Nixon III).

that Carter committed these crimes during voir dire and opening statements but the two murders were second degree and one of the murders was manslaughter. (T. Vol. IX 4). Carter personally agreed to the trial strategy of conceding to the lesser included offenses (T. Vol. IX 4-5). The final jury panel was Susan Brink; George Cammon; Barbara Pedrazoli; Marilyn Highland; Brian Swallow; Maria Miller; Mary Gasior; Teresa Elmore; Margaret Rusnak, Michael Shields; Dixie Borthwick and James Ayers with alternates Julie Smith and Robert O'Neil. (T. Vol. XIII 808).

Guilt phase began on September 21, 2005. The jury was sworn. (T. Vol. XIII 827). Judge Lance Day presided at the pre-trial hearings, the guilt phase, the penalty phase, the *Spencer* hearing[2] and sentencing.[3] Carter was represented by Public Defender Bill White and Assistant Public Defender Alan Chipperfield. Both defense counsel are death certified attorneys. (T. Vol. IX 6). One of the two prosecutors, Mose Floyd was not death certified yet. (T. Vol. IX 7).

The trial court gave preliminary instructions to the jury. (T. Vol. XIII 827-837). The prosecutor presented opening statements

---

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

[3] Chief Judge Donald Moran presided at one point during the guilt phase when Judge Day's father suffered a heart attack during closing arguments. (T. Vol. XVIII 1811-1815). All evidence was taken in front of Judge Day.

explaining that Carter murdered the three victims. (T. Vol. XIII 840-858). Defense counsel also presented an opening statement. (T. Vol. XIII 859-877). After opening, the trial court conducted a second *Nixon* inquiry in which Carter renewed his agreement to the strategy. (T. Vol. XIII 878-879).

During the guilt phase, the State presented twenty-four witnesses: (1) Richard Smith; (2) Donald Schoenfeld; (3) Norma Buchanan; (4) Michelle Royal; (5) Antonella Leatherwood; (6) Margarita Arruza; (7) Jack Harley; (8) Richard Perfetto; (9) Cristan Carter; (10) Terry Booth; (11) Steven Carter; (12) Cynthia Starling; (13) Detective Charles Ford; (14) Bonnie Miller; (15) Howard Rawlins; (16) William Roeske; (17) Rogelio Gonzalez; (18) Ismeal Sandoval; (19) Alejandro Madrigal; recall of Charles Ford (20) Thomas Pulley; (21) Officer Edward R. Sullivan; (22) Trooper Brad Smith; (23) Trooper Brian Duval; (24) Former Trooper James Mills.

Richard Smith, Ms. Reed's son, testified that he was living with his mother in her home at 7029 Barkwood Drive on the date of the murder, July 24, 2002. (T. Vol. XIII 881-882). He was fourteen at the time. (T. Vol. XIII 882). His sister, little brother and little sister lived with them. (T. Vol. XIII 883). His older sister, Courtney was 16 years old; his little brother, Brian Reed (BJ), was about 8 years old and his little sister,

Rebecca was 8 years old at the time. (T. Vol. XIII 883). His mom, Mr. Pafford, his sister, his little sister and his little brother were all at the house on July 23, 2002. (T. Vol. XIII 883-884). Mr. Pafford who was a manager at Publix where he worked, was dating his mom. (T. Vol. XIII 884). Mr. Pafford and his mom had been dating a couple of months. (T. Vol. XIII 884). Mr. Pafford owned a red Chevy truck which he drive over to his mom's house that night. (T. Vol. XIII 885). The defendant, Chip Carter, called the house at around 11:00 or 11:30 and he answered the phone. (T. Vol. XIII 887). Carter asked if his mom was there and he answered: "No". (T. Vol. XIII 888). It was a lie, his mom was home, but his mom did not want to talk to Carter. (T. Vol. XIII 888-889). He went to sleep in his bedroom which he shared with his little brother. (T. Vol. XIII 889). A loud bang awake him. (T. Vol. XIII 890). Someone, which sounded like his sister, screamed "call 911 oh, my God, call 911" (T. Vol. XIII 890). He heard more pops. (T. Vol. XIII 891). He went to get his BB gun which was in the gun cabinet next to his bed. (T. Vol. XIII 892). He ran into the living room with his BB gun. (T. Vol. XIII 892). He saw his sister Courtney on the floor. (T. Vol. XIII 892). He tried to talk to her but she only made gurgling sounds. (T. Vol. XIII 893). He then saw his mom across the living room. (T. Vol. XIII 894). His mother was

laying down across the wall. (T. Vol. XIII 895). He stepped over his sister and went to his mother. (T. Vol. XIII 895). His mother wasn't moving and wasn't making any noise. (T. Vol. XIII 896). Mr. Pafford was behind the couch. (T. Vol. XIII 896). He could tell that Mr. Pafford was also dead. (T. Vol. XIII 896). He could still smell gunpowder. (T. Vol. XIII 896). He told his little brother and sister to go hide under their beds. (T. Vol. XIII 896-897). He did not hear any truck leaving. (T. Vol. XIII 897). He called 911. (T. Vol. XIII 897). The police arrived and grabbed him and put him in the cop car. (T. Vol. XIII 898). He throw the BB gun under his bed so the police would not think he was involved. (T. Vol. XIII 898). Rescue came and took his sister. (T. Vol. XIII 898). The prosecutor introduced photographs of the murder scene as exhibits #3,4,5,6,7,8,9,10,11. (T. Vol. XIII 899-907). Chip Carter had .22 rifles. (T. Vol. XIII 904). He could not remember whether the front door was open or not. (T. Vol. XIII 909). The backyard fence was pushed in. (T. Vol. XIII 910). Chip Carter had a relationship with his mother and he lived with them in their house. (T. Vol. XIII 911). His mother and Carter had an off and on relationship. (T. Vol. XIII 911). They would have arguments. (T. Vol. XIII 911). He and Mr. Pafford worked at the Bartram Road Publix. (T. Vol. XIII 912). His mother had worked

at that Publix as well. (T. Vol. XIII 912). He saw Carter sitting in his truck, in the back of the ABC Liquor store's parking lot, after Carter had moved out of the house. (T. Vol. XIII 912). Carter continued to call his mother after they broke up. (T. Vol. XIII 913). At time his mom would talk with carter and at times she would not. (T. Vol. XIII 913). He and Carter went hunting together twice. (T. Vol. XIII 913-914). He identified exhibit #12 as the rifle that Carter owned. (T. Vol. XIII 914). He identified a photograph of carter's truck. (T. Vol. XIII 915-916). He was not sure if the voice screaming call 911 was his sister or his mother's. (T. Vol. XIII 922). They had two or three dogs, chihuahuas, at that time who were running around the house that night. (T. Vol. XIII 923). There were motion lights in the backyard. (T. Vol. XIII 937). The French doors in the living room near Mr. Pafford's body led to the backyard. (T. Vol. XIII 938). In his mind, the voice was his sister's. (T. Vol. XIII 941). The trial court excluded a incident of Carter slapping Courtney. (T. Vol. XIII 942-945). Carter and his sister Courtney did not get along. (T. Vol. XIII 952).

Sergeant Donald Schoenfeld with the Jacksonville Sheriff's Office (JSO), testified for the prosecution. (T. Vol. XIII 958). He worked the 6:30pm to 6:00 am shift on July 24, 2002. (T. Vol.

XIII 959). He responded first to the Reed home. (T. Vol. XIII 959). He took probably less than two minutes for him to arrive at the house. (T. Vol. XIII 960). Sergeant Hike was with him in his car and Officer Donker in his own patrol car also responded. (T. Vol. XIII 960). Sergeant Schoenfeld knocked on the door and Rick Smith answered. (T. Vol. XIII 961). He removed Rick when he saw a body. (T. Vol. XIII 961). He observed three victims inside. (T. Vol. XIII 962). They conducted a protective sweep and found two younger children in the first bedroom. (T. Vol. XIII 963). They got the children out holding a bedspread in front of them so they would not see the victims. (T. Vol. XIII 964). Rescue removed Courtney. (T. Vol. XIII 965). He called the homicide detectives and the evidence technicians. (T. Vol. XIII 966). Sergeant Schoenfeld worked as an off duty security y officer at the Bartram Road Publix and knew Mr. Pafford. (T. Vol. XIII 968). He, Sergeant Hike and the canine officer, Officer Sullivan, conducted a search of the backyard (T. Vol. XIII 970-971). The dog did not alert and they found no one. (T. Vol. XIII 972). Sergeant Schoenfeld did not see a fence pulled down. (T. Vol. XIII 972).

Detective Norma Buchanan of the JSO testified for the prosecution. (T. Vol. XIII 975). She was an evidence technician at the time. (T. Vol. XIII 976). She arrived at about 1:00 in

the morning to the home. (T. Vol. XIII 976). She saw two victims but the third victim had been removed by rescue. (T. Vol. XIII 977). She and the other evidence technician took photographs; measured for a diagram; marked evidence and made a videotape of the crime scene. (T. Vol. XIII 977). They took the photographs introduced as state's exhibit 1,2,3,4,5,6,7,8,9 and 10 (T. Vol. XIII 977-978). Mr. Pafford had a set of keys in his right hand. (T. Vol. XIII 987,988). A shell casing was beside his left hand. (T. Vol. XIII 989). Another shell casing was beside his feet. (T. Vol. XIII 989). There was a pair of shoes on the sofa. (T. Vol. XIII 991). Ms. Reed had a shell casing on her back. (T. Vol. XIII 991). Another shell casing was discovered later behind the fornt door. (T. Vol. XIII 996). A red ball cap was also recovered from the living room. (T. Vol. XIII 998). State's exhibits #30,31,32,33,34, and 35 were the shell casing recovered form the scene. (T. Vol. XIV 1006-1007). State exhibit #37 was the diagram she prepared. (T. Vol. XIV 1007). Most of the fingerprint taken were not of value. (T. Vol. XIV 1010). She did get fingerprints of value from the front door which was introduced as exhibit #37. (T. Vol. XIV 1011). She saw blood on the outside of the front door but thinks to was from the rescue moving Courtney. (T. Vol. XIV 1014). Numerous persons including other officers and rescue had

entered the house. (T. Vol. XIV 1014). An adult could not have exited from the French doors without moving Pafford's body. (T. Vol. XIV 1017). The French doors opened inward into the living room. (T. Vol. XIV 1018). She did not recall the condition of the backyard fence. (T. Vol. XIV 1026). There was an inquiry of one of the jurors who knew a witness but neither side objected to her continuing as a juror. (T. Vol. XIV 1029-1035).

Michelle Royal, a latent print analyst with the JSO, testified. (T. Vol. XIV 1050). There was no latent prints on the shell casings. (T. Vol. XIV 1055). The print from the front door was of no value. (T. Vol. XIV 1056).

Antonella Leatherwood, who was employed as the grocery manager at the Monument Publix, testified. (T. Vol. XIV 1059). She knew Ms. Reed when Ms. Reed was the price clerk at the Bartram Road Publix. (T. Vol. XIV 1060). Ms. Reed worked from 5:00 until 2:00 in the afternoon when she would take care of her children who had come home from school (T. Vol. XIV 1061). She also knew the defendant. Carter would call Ms. Reed at work many times. (T. Vol. XIV 1061-1062). Defense counsel moved for mistrial based on her reaction to the victim's photographs. (T. Vol. XIV 1067-1068). The trial court denied the motion. (T. Vol. XIV 1071,1075). She identified the victims. (T. Vol. XIV 1077). Ms. Reed often left her doors unlocked. (T. Vol. XIV 1076).

Dr. Margarita Arruza, who was a board certified forensic pathologist and the chief medical examiner, testified. (T. Vol. XIV 1079-1080). She performed the autopsies on the victims. (T. Vol. XIV 1082). Mr. Pafford died from multiple gunshot wounds. (T. Vol. XIV 1082). Mr. Pafford was 5 feet and ten inches tall and weighed 179 pounds. (T. Vol. XIV 1083). He was 49 years old. (T. Vol. XIV 1083). He had three gunshot wounds to the head. (T. Vol. XIV 1083). The gunshot wound on his right jaw showed stripping which occurs when the gun is shot near the person. (T. Vol. XIV 1086-1087). One of the shot was a straight shot from front to back which impacted the spine at C-3. (T. Vol. XIV 1087). Another shot was to the back of the head at an upward angle. (T. Vol. XIV 1088). Another shot was in the right jaw. (T. Vol. XIV 1088). Each shot was fatal. (T. Vol. XIV 1091). Mr. Pafford was probably shot first in the chin and his body starting going down and then he was shot in the back of the head and then he was shot a third time on the ground. (T. Vol. XIV 1095). There were no defense wounds on Mr. Pafford. (T. Vol. XIV 1096).

As to the autopsy of Ms. Reed, the cause of death was also multiple gunshots. (T. Vol. XIV 1096-1097). Ms. Reed weighted 180 pounds. (T. Vol. XIV 1097). She had two gunshot wounds; both to her left ear. (T. Vol. XIV 1100,1103). Both were fatal.

(T. Vol. XIV 1103). She was not shot while on the ground and there was no stippling. (T. Vol. XIV 1103).

The autopsy of Courtney Smith was performed by Dr. Areford, (T. Vol. XIV 1105). She was taking to Shands and died two days later. (T. Vol. XIV 1107). She had a single gunshot wound to the left top of her head. (T. Vol. XIV 1107-1109). She was 16 years old. (T. Vol. XIV 1110). There was no stippling. (T. Vol. XIV 1111). There was infinite possibilities as to what position Courtney was in when shot. (T. Vol. XIV 1112). She cannot say which of the victims was shot first or in what order. (T. Vol. XIV 1115).

Jack Harley, who worked for Bell South, testified that he obtained the phone records for 744-4863 in response to a subpoena.(T. Vol. XIV 1119). At 11:24 on July 23, 2002 a call was made from number (904) 356-6938 to Ms. Reed phone. (T. Vol. XIV 1122). The call lasted 7 seconds. (T. Vol. XIV 1122).

Richard Perfetto, who was a friend of Mr. Pafford testified regarding an encounter one night at the Seafood Kitchen Restaurant. (T. Vol. XIV 1123). He, Mr. Pafford and Ms. Reed where having dinner there sometime in the winter of 2001, when Carter interrupted them. (T. Vol. XIV 1123-1128). Carter said I have seven years in this relationship and we'll finish this

later. On cross, he was impeached with his statement that the police where called. (T. Vol. XIV 1135).

Cristan Carter, who lived in the house directly behind Ms. Reed's house, testified. (T. Vol. XIV 1136-1151). Two weeks prior to the murder, Mr. Carter, at about 9:00, saw a man walking in his yard. The man ran to his red King cab Dodge and drove away when confronted. The day after the murder, he observed that fence in their backyard pulled down and the plants were trampled. He identified carter as the man.

Terry Booth, who was a neighbor, testified that a few days before the murder he saw a red Dodge truck park. (T. Vol. XIV 1152-1168). A man got out and was walking between two neighbor's houses. He then got back in the truck and drove off. The next day he saw the same truck driving slowly down the street. He was impeached with a prior statement that it was not a King cab. He could not identify Carter as the man.

Steven Carter, who is the defendant's brother, testified. (T. Vol. XIV 1168-1188). His mother is Lena Watley and her phone number was 356-6938. The defendant, Carter, was living with his mother in her upstairs apartment on July 23, 2002. The defendant told him he was going to shot pool that night. His brother's red truck did not have a gun rack. His brother owned guns including rifles. Their mother wake him on July 24 with a

note. He then called his sister. He went looking for his brother at Ms. Reed's house. He gave the detective that come to their home the two notes. The notes were introduced as State exhibits # 56 and 57. His brother was a good shot. He had seen Ms. Reed and the defendant together two day prior to the murders. (T. Vol. XIV 1185). His brother and Ms. Reed were not living together at the time.

Cynthia Starling, who was the defendant's sister, testified. (T. Vol. XIV 1188). Her brother was living with their mother at the time of the murders. Her brother Steve called her on the morning of July 24, 2002 at 2:35am about the notes. She called Ms. Reed house but there was no answer so she left a message. One of the notes was addressed to her. Her brother Chip Carter and Ms. Reed started dating around 1998. At a family cookout, Carter told her that Ms. Reed was dating an older man who was a manager at Publix. Detective Charles Ford of the JSO, who was the lead detective, testified. (T. Vol. XV 1212). Mr. Pafford had a set of keys in his hand. (T. Vol. XV 1214). Mr. Pafford's red GMC truck was parked outside Ms. Reed's home. (T. Vol. XV 1214). Ms. Reed's jeep and Miss Smith Toyota were also parked outside. (T. Vol. XV 1214). He observed casings. (T. Vol. XV 1216). A burnt orange ball cap was recovered from the living room. (T. Vol. XV 1218). He went to Carter's house and

received the two notes. (T. Vol. XV 1219). Carter did not show up for work at Publix the day after the murders. (T. Vol. XV 1219). The French doors in the living room opened inward. (T. Vol. XV 1225). Mr. Pafford's body was blocking those doors. (T. Vol. XV 1225). Mr. Pafford was barefoot. (T. Vol. XV 1226). A pair of men's shoes was on the couch. (T. Vol. XV 1226). There were no sings of forced entry. (T. Vol. XV 1226). Rick Smith had told him he heard a vehicle leaving. (T. Vol. XV 1229). Rick Smith had also told him that his mother was the one that screamed call 911. (T. Vol. XV 1229). There were puppies at the home. (T. Vol. XV 1230). Sergeant Schoenfeld, Sergeant Hike, Officer Donker, Officer Preston, and rescue personnel all entered the crime scene. (T. Vol. XV 1231). On redirect, the prosecutor noted that Rick Smith told them in an interview that the voice was a woman and he thought it was his sister's. (T. Vol. XV 1233). His assessment was that Mr. Pafford was shot first, then Ms. Reed and then Courtney. (T. Vol. XV 1235). In his deposition testimony, he stated that Rick Smith told him that he thought it was his mother's voice. (T. Vol. XV 1236). He had no evidence that Courtney was shot last. (T. Vol. XV 1237).

The trial court read the stipulation that Carter did not showing up for work on Wednesday July 24th or Thursday, July 25th, 2002 to the jury. (T. Vol. XV 1247).

Bonnie Miller, who is employed at Publix Employees Credit Union, testified. (T. Vol. XV 1248). The banks records showed that, on July 24, 2002, Carter withdrew money from $200.00 at the Roosevelt Mall Publix via his ATM card (T. Vol. XV 1257). The banks records also showed that Carter withdrew money on July 25, 2002 while in Lake City and on July 30th while in Valdosta via his ATM card (T. Vol. XV 1257). The banks records showed that Carter withdrew $120.00 and $100.00 at the Publix in Tallahassee on August 1, 2002 via his ATM card (T. Vol. XV 1256).

Howard Rawlins, who went to High School with the defendant, testified. (T. Vol. XV 1264). His black jeep, that he did not use, had a tag that was missing. (T. Vol. XV 1267). He did not give anyone permission to take the tag. (T. Vol. XV 1267).

William Roeske, who was a U.S. Border Patrol Agent, testified that he was a border agent on the Rio Grande in Texas. (T. Vol. XV 1269). On August 5th, 2002, he got a call to Roma, Texas. (T. Vol. XV 1271). There are a lot of border crossing in that area because the water of the Rio Grande is shallow. (T. Vol. XV 1272). He observed a red truck there. (T. Vol. XV 1272-1273).

He ran the truck's tag which came back as a jeep out of Georgia. (T. Vol. XV 1273). He contacted the Mexican Military on the other side of the border. (T. Vol. XV 1275).

Rogelio Gonzalez, who was a US border patrol agent, testified. (T. Vol. XV 1280). On August 5th, 2002, he saw the truck and the Mexican military. (T. Vol. XV 1281).

Officer Ismeal Sandoval, who was a deputy sheriff with Starr County in Texas, testified. (T. Vol. XV 1283). He received a dispatch on August 5th, 2002, regarding an abandoned truck. (T. Vol. XV 1283). The truck was 20-30 yards from the water of the Rio Grande. He ran a VIN check on the truck and was informed that the truck was wanted in connection to a triple homicide on Jacksonville, Florida. (T. Vol. XV 1287).

Alejandro Madrigal, a forensic DNA analyst with the Texas Department of Public Safety, testified that on August 7th, 2002, he examined a red truck. (T. Vol. XV 1289-1291). He took the photograph of the truck that was exhibit #13 and #63. (T. Vol. XV 1291). He recovered items from the truck (T. Vol. XV 1292). He luminol tested both the truck and the items for blood and no blood was detected. (T. Vol. XV 1292-1294). He also recovered .22 casings from the truck. (T. Vol. XV 1296).

Detective Charles Ford was recalled. (T. Vol. XV 1302). He went to Texas to recovered the truck. (T. Vol. XV 1303). He

went with a dive team from Mission County who searched the Rio grande and recovered the rifle. (T. Vol. XV 1306). They placed the rifle in PVC tubing to avoid rust. (T. Vol. XV 1309). He took the rifle and casing back to Florida via the JSO plane and delivered them to FDLE. (T. Vol. XV 1310). He identified the rifle as the firearm that he transported back. (T. Vol. XV 1311). He requested a rifle records search from ATF of the rifle. (T. Vol. XV 1312). The ATF records showed that the rifle was sold to Carter on December 1, 1977. (T. Vol. XV 1315). On December 24, 2002, the Jacksonville Sheriff's Office was informed that Caret was being detained by Mexico. (T. Vol. XV 1318).

Thomas Pulley, a FDLE senior crime analyst with the firearm identification section, testified. (T. XVI 1338). He was qualified as a firearm expert without objection. (T. XVI 1339). He testified that rifle cartridges leave unique, particular marks. He received six cartridges from the murder scene which were State's exhibit #30, 31,32,33,34 and 35. (T. XVI 1343). He compared these exhibits with the rifle (State's exhibit #84). (T. XVI 1344-1345). The rifle had a magazine which held 16 cartridges. (T. XVI 1349-1350). The rifle required that you pull the bolt back and release it to load the rifle. (T. XVI 1350). The rifle was not automatic; it was a semi automatic; it

required that you pull the trigger for each shot.(T. XVI 1352-1353). The bullet cartridge ejects after each shot to the right to a distance of 8 to 15 feet. (T. XVI 1353-1354). He also examined the actual bullets that where recovered from the victim's bodies. (T. XVI 1357-1358). He could not concluded that the actual bullets were from the rifle - an "inconclusive result." (T. XVI 1359). There were 11 unfired cartridges. (T. XVI 1360). He concluded that the cartridges were form the rifle. (T. XVI 1361). To fire the rifle you have to pull the trigger, release the trigger and then pull the trigger again. (T. XVI 1361). The shooter could have been at either the front door or beside the couch based on the cartridges position. (T. XVI 1362). Stippling occurs when the gun is within 18 to 24 inches from the person. (T. XVI 1363). There was stippling on Mr. Pafford's right jaw. (T. XVI 1364). The rifle was "quite close" to Mr. Pafford's jaw when fired, probably within 6 inches. (T. XVI 1365). The rifle was a semiautomatic .22 caliber rifle which can be fired "very quickly"; several rounds within second. (T. XVI 1368-1369). The trigger pull of the rifle was not measured because of the water damage. (T. XVI 1369). Spent casings move easily. (T. XVI 1374). The rifle had a total capacity of 17 with one round in the chamber and 16 in the

magazine. (T. XVI 1381). The rifle was hard to conceal because it was a “relatively long rifle” (T. XVI 1383).

Officer Edward R. Sullivan, who was a canine officer with the Jacksonville Sheriff’s Office, testified. (T. XVI 1391). He and his dog Tiko were called to the murder scene to do an area search for the possible suspect through the neighbor’s yards. (T. XVI 1392-1393). Tiko did not alert but that does not mean that a person did not jump over the back fence. (T. XVI 1395). Officer Sullivan jumped over the back yard fences in his search. (T. XVI 1396).

Trooper Brad Smith of the Kentucky State Police testified for the prosecution. (T. XVI 1398). Trooper Brian Duval of the Kentucky State Police also testified for the prosecution. (T. XVI 1403). Both testified that Carter’s appearance was different when they came in contact with him and carter gave them a false name of Chris Crews. (T. XVI 1405). Former Trooper James Mills of the Kentucky State Police also testified for the prosecution. (T. XVI 1408). He had arrested Carter based on the arrest warrant for murder from Jacksonville. (T. XVI 1409). No weapons were found on Carter or in his home. (T. XVI 1410).

The State recalled Officer Sullivan who testified that he did not jump the back fence of Ms. Reed’s home during his search.

(T. XVI 1411-1413). He did not recalled the fences at the scene. (T. XVI 1413).

Detective Charles H. Ford was recalled also to establish that Ms. Reed did not have an wedding or engagement ring on her body. (T. XVI 1415). Detective Ford testified that when to got Carter from Kentucky on January 6, 2004, Carter was not wearing glasses. (T. XVI 1416).

The State rested. (T. XVI 1416). Defense counsel moved for a judgment of acquittal arguing there was insufficient proof of premeditation. (T. XVI 1417). Defense counsel also argued that the burglary theory of felony murder was improper because there was no proof of the "unlawful entry" theory of burglary and the "remaining in" theory of burglary was a "pure legal fiction" because there was no proof of withdrawl of consent.(T. XVI 1417-1418). Defense counsel argued that the burglary statute was unconstitutional if it allowed burglary to be proved just because a crime took place inside a house. (T. XVI 1418). There was no evidence of withdraw of consent before Courtney was shot. (T. XVI 1419). The only evidence of withdrawl of consent as to Ms. Reed and Mr. Pafford was the shooting itself. (T. XVI 1419). Mr. Pafford could not withdraw consent because he had no authority because the house was not his. (T. XVI 1419). "Having created the burglary by the shootings" the burglary now elevates

the shooting to first degree murder. (T. XVI 1420). Defense counsel also argued that the killing of Courtney was accidental. (T. XVI 1419). The prosecutor the trial court argued the yell for 911 call proved the consent was withdrawn at that point and Carter entered the home armed with a gun with the intent to commit a crime - assault, battery or murder. (T. XVI 1422). The trial court denied the motion for judgement of acquittal. (T. XVI 1423).

The trial court explained to the defendant his absolute constitutional right not to testify and his absolute constitutional right to testify and that no one can make the decision except Carter himself. (T. XVI 1427). While the trial court encouraged Carter to discuss the matter with his attorneys that decision was Carter's and Carter's alone. (T. XVI 1427-1428). Carter stated on the record his agreement with his attorneys on the decision to testify. (T. XVI 1428).

The defense was a concession that Carter murdered the three victims but that the murder of Courtney Smith was an accident and the murders of Reed and Pafford were not first degree murders but were second degree murder due to jealousy, heat of passion and rage. (T. XVI 1440). The trial court inquired as to Carter's personal agreement with the trial strategy of conceding guilt in opening statement. (T. XVI 1429). Carter

stated his agreement. (T. XVI 1429). Carter stated that he had a copy of Defense counsel White's opening statement and he had read it. (T. XVI 1429).

Defense counsel raise the issue of Carter's leg brace. (T. XVI 1460). He was concerned about the jury seeing the brace during Carter's testimony. The judge inquired if there was a more flexible leg brace which there was not. (T. XVI 1462-1463). The parties agreed that the jury would be removed while the defendant was taken to the stand. (T. XVI 1463). The jury was excused prior to Carter taking the stand and then returned. (T. XVI 1487).

The Defense presented the testimony of five witnesses: (1) Lily Irene Cox; (2) Krista Gillespie; (3) the defendant, Pinkey Carter; (4) Charles Herndon and (5) Cynthia Starling. The Defense entered a stipulation that the defendant worked at Publix Super Market and was scheduled to work on Wednesday July 24, 2002 and Thursday July 25, 2002 but did not show up for work either day. (R. Vol. III 464)

Lily Irene Cox, who was Carter's land lady at the time of the murders, testified. (T. XVI 1472). She lived at 8829 McArthur Court South Jacksonville and rented out a garage apartment behind her house. (T. XVI 1472). Carter rented the apartment in

May of 2001 for nine months until December 2001. (T. XVI 1473). Ms. Reed would visit Carter when he lived in the garage apartment. (T. XVI 1473-1475). Ms. Cox did not know whether Ms. Reed would spend the night or not nor how long she would stay. (T. XVI 1476).

Krista Gillespie, who was a paralegal with the Public Defender's office, testified that regarding Ms. Reed phone records for both her home phone (744-4863) and her cell phone (614-5156). (T. XVI 1477-1478). She also testified regarding Carter's phone records for phone number (356-6938). (T. XVI 1478). The records were for June and July of 2002. (T. XVI 1478-1479). She prepared a summary of all the calls between Ms. reed and carter for that time period. (T. XVI 1480). In defense exhibit #8, yellow indicates Carter's call to Reed's home phone. (T. XVI 1482). Orange indicates Carter's call to Reed's cell phone.(T. XVI 1482). Blue indicates Reed's cell phone calls to Carter. (T. XVI 1482). Carter called Reed 125 times and Reed called Carter 37 times. (T. XVI 1484-1485). She testified that there were three times as many calls for Carter to Reed than there were from Reed to Carter. (T. XVI 1485). For some of the calls, Carter would call Reed and she would call back. (T. XVI 1486). The jury was excused prior to Carter taking the stand and then returned. (T. XVI 1487, 1488).

The defendant testified in the guilt phase. (T. XVI 1489). He testified that he was 47 years old at the time of the murders. (T. XVI 1490). He graduated from Pike County high school in Zebulon, Georgia. (T. XVI 1491). He then served in the Air Force for more than three years and was honorably discharged. (T. XVI 1491). HE then went to college at Oklahoma State University for two years but did not graduate. (T. XVI 1491). He had been employed by Publix for three years at as a team leader for the stock crew. (T. XVI 1491-1492). Carter admitted that he shot the three victims and was solely responsible for the murders. (T. XVI 1493). He admitted he wrote the note to his mother and the note to Cindy after the murders. (T. XVI 1493). He first met Liz Reed in July of 1997, but she was married at that time. (T. XVI 1494). They started dating in July of 1998 (T. XVI 1494). They were both working at the same Winn-Dixie store at that time. (T. XVI 1494-1495). He started living with Liz Reed and her four child, Courtney, Rick, Rebecca and BJ in September of 1998 (T. XVI 1495-1496). He helped Liz Reed buy a house at 7029 Barkwood Drive where they lived. The house was in Liz Reed's name. (T. XVI 1497). They separated in 2001 but kept in touch. (T. XVI 1498, 1500). He saw other women and she saw other men during the separation. (T. XVI 1500). He moved back in the house in January 2002. (T. XVI 1501). Carter

denied the incident at the Seafood Kitchen. (T. XVI 1502). They separated again in May and he moved out. (T. XVI 1510). Carter admitted the incident in the backyard with Christian Carter. (T. XVI 1515). He was jealous and wanted to see if Mr. Pafford was at the house with Ms. Reed. (T. XVI 1515). Mr. Pafford's ex-girlfriend had told Carter about the relationship between Mr. Pafford and Ms. Reed. (T. XVI 1515-1516). Mr. Pafford was a manager at Publix. (T. XVI 1516). Carter testified that Terry Booth was mistaken about seeing his red truck on the road behind ms. Reeds' house the weekend before the murders explaining that he would have no reason to be there during the day because Ms. Reed and Mr. Pafford worked during the day(T. XVI 1516-1517). Carter met with Ms. Reed on Sunday (T. XVI 1519). Ms. Reed give Carter pills for depression. (T. XVI 1520). Carter testified that he and Ms. Reed had plans to meet Tuesday night. (T. XVI 1521). When she did not show up, he drove by her house and saw Mr. Pafford's truck. (T. XVI 1522). Carter went home and took two of the pills and starting drinking whiskey. (T. XVI 1523). He called Ms. Reed's house. (T. XVI 1523). He had four or five glasses of whiskey between 9:15 and midnight. (T. XVI 1523). He took another pill. (T. XVI 1523). He called Ms. Reed's house again at approximately 11:30pm (T. XVI 1524). Carter testified he decided to go over to her house

to “get some answers.” (T. XVI 1524). His rifle was in his truck and was loaded. (T. XVI 1524-1525). He parked in the front yard of the house. (T. XVI 1526). He got the rifle from the backseat and took the rifle with him into the house. (T. XVI 1526). Carter testified that he took the rifle to make Ms. Reed talk to him. (T. XVI 1526). As he was approaching the door, Mr. Pafford walked out and Ms. Reed was standing in the door.(T. XVII 1532). It was pitch dark. (T. XVII 1590). Carter testified that he asked Ms. Reed why she was still seeing him if she was seeing Mr. Pafford? (T. XVII 1532). Ms. Reed responded that she was not still seeing Carter. (T. XVII 1532). Mr. Pafford asked Ms. Reed if she wanted him to stay and she said she wanted both of them to leave. (T. XVII 1532-1533). Carter stated he was not leaving until he got some answers. (T. XVII 1533). Ms. Reed opened the door more. (T. XVII 1533). Carter had his rifle concealed, holding it against his right leg. (T. XVII 1533). Carter entered the house and walked behind the couch. (T. XVII 1533). Carter was yelling that Ms. Reed was lying. (T. XVII 1534). Ms. Reed saw the rifle and grabbed it. (T. XVII 1534). Her daughter Courtney heard the commotion and ran into the living room. (T. XVII 1534). When Courtney saw the rifle she tried to go back to her room but the rifle “went off” (T. XVII 1534). Carter admitted that his finger was on the

trigger. (T. XVII 1534). Courtney fell instantly. (T. XVII 1534). Ms. Reed let go of the rifle and screamed dial 911. (T. XVII 1534). Ms. Reed starting running to her daughter but Carter shot her. (T. XVII 1534). He did not know why he shot her he "just did". (T. XVII 1535). He shot her twice. (T. XVII 1532). Carter denied having a plan to kill before entering the house. (T. XVII 1535). Carter testified that Mr. Pafford seemed to be in shock because he did not move (T. XVII 1536). After he shot Liz Reed, he aimed the rifle toward Mr. Pafford and shot him. (T. XVII 1536). Carter then heard Rebecca saying "Courtney, Courtney" (T. XVII 1538). Carter then left and went back to his brother's house. (T. XVII 1538-1539). He wrote two notes, one to his mother and one to his sister. (T. XVII 1539). Carter then left town and went to Valdosta Georgia. (T. XVII 1539-1540). Carter denied being on the backyard of the Reed's house the night of the murders, going through the back door or climbing over the backyard fence. (T. XVII 1540-1541). Carter admitted drive to Texas, crossing the Rio Grande in Mexico and dumping the murder weapon in to the Rio Grande. (T. XVII 1541). On cross, Carter was not sure whether the safety was on. (T. XVII 1547). Carter admitted that he was a "good shot", an "excellent shot", who had been hunting since he was 12 years old. (T. XVII 1553,1557,1558,1560). Carter admitted that after each shot you

have to “release the pressure for it to shot again.” (T. XVII 1554). To shot Ms. Reed, he aimed at her, pulled the trigger, released the trigger, and then shot again. (T. XVII 1555). Carter admitted he intended to kill Ms. Reed. (T. XVII 1555). Carter did not have a gun rack in his truck. (T. XVII 1563). Carter had followed Liz Reed a couple of times prior to the murders. (T. XVII 1570). The prosecutor pointed out that despite the pills and alcohol, Carter was able to hit each of the targets. (T. XVII 1572). He had physically be the house twice and had driving by three of four times. (T. XVII 1580). Carter knew the children were in the home. (T. XVII 1588). Carter admitted Ms. Reed never asked him inside. (T. XVII 1591). Carter then testified that by Ms. Reed opening the door, her actions invited him inside. (T. XVII 1591). She opened to door when Carter said I’m not leaving until you give me some answers. (T. XVII 1592). Ms. Reed was concerned about the neighbors. (T. XVII 1592). Carter testified he went in and then Pafford who laid his shoes on the couch. (T. XVII 1532). Rebecca Reed saw him as he was leaving. (T. XVII 1595). Ms. Reed returned the engagement ring. (T. XVII 1598). Carter did not have a key to the house because he returned his to Ms. Reed (T. XVII 1598). Carter claimed the shooting of Courtney was totally accidental. (T. XVII 1599). Carter testified that he had never been to the

Seafood Kitchen which was near the Publix where he worked. (T. XVII 1600). He took to rifle to get answer one way or another.(T. XVII 1601). Carter admitted that he was not going to leave until he got answers. (T. XVII 1601). Carter admitted that his intent was to commit assault if he had to. (T. XVII 1602). Carter denied that he shot Courtney last. (T. XVII 1603). Carter admitted that he knew that Rick Smith was lying when he said his mom was not home because he had driven by and saw that she and Mr. Pafford were at the house. (T. XVII 1603). He had seen Mr. Pafford's truck and Ms. Reed's jeep. (T. XVII 1603). He had driven by Ms. Reed's house three hours earlier. (T. XVII 1604). He drive by about 9:00. (T. XVII 1605). The prsoecutor asked Carter why he had not confronted Ms. Reed right then and Carter responded because he was upset. (T. XVII 1605). The depression pills and whisky had an effect on him. (T. XVII 1605). Carter had moved out twice at Ms. Reed's request. (T. XVII 1613). The rifle was on his right side. (T. XVII 1617). Carter had four to five drinks in a three hour period and was not falling down drunk. (T. XVII 1621). The pills did not give him thoughts about killing people. (T. XVII 1622). He denied climbing the back fence. (T. XVII 1628).

Defense counsel introduced a letter without objection from Carter's employer, Publix, establishing that Carter had list Ms.

Reed as the beneficiary of his company life insurance. (T. XVII 1629-1630).

The defense then called, Charles Herndon, of Washington Mutual Bank to testify that Ms. Reed's home mortgage that four loan payments were made on January 16, 2002 for a total of over $2,800.00. (T. XVII 1631-16). The mortgage payments were $702.61 per month. (T. XVII 1634). Ms. Reed was four months delinquent in her house payments. (T. XVII 1634). Ms. reed was the sole person on the loan. (T. XVII 1636). The bank's record did not show who actually made the payments. (T. XVII 1636).

Cynthia Starling, who was the defendant's sister, testified for the defense (T. XVII 1639). She is seven years younger than Carter and is the mother of two children (T. XVII 1640). Her family and Carter with the Reeds would spend holiday together. (T. XVII 1640). She would email Liz Reed each week (T. XVII 1641). She and her children were family with Liz Reed and her children (T. XVII 1641). She identified various photographs of her family with the Reeds on various vacation and cook-outs. (T. XVII 1641-1657).

The defense rested. (T. XVII 1660). After the jury was excused, defense counsel renewed his motion for judgment of acquittal arguing that there was insufficient evidence of the reflection necessary to establish premeditated murder.(T. XVII

1661). Defense counsel asserted that there was nothing to refute the defendant's trial testimony that the shooting of Courtney was an accident. Defense counsel also argued that felony murder based on the burglary did not apply because there was no proof of unlawful entry and the remaining in theory should not apply in this case. (T. XVII 1661). The prosecutor responded that according to Carter own trial testimony he forced his way in Ms. Reed's home. (T. XVII 1662). Carter's own trial testimony established a burglary with an aggravated assault.(T. XVII 1662).[4] The prosecutor asserted the physical evidence contradicted any claim that the shooting of Courtney was an accident.(T. XVII 1662). The trial court denied the motion for judgment of acquittal. (T. XVII 1662).

There was no rebuttal case presented by the State. (T. XVII 1662-1663). Defense counsel requested special instructions on voluntary intoxication and heat of passion. (T. XVII 1676) Carter filed two motions proposing two special jury instruction on heat of passion. (R. Vol. III 470,471). The trial court

---

[4] The prosecutor referred only to an assault. However, Carter's testimony was that he entered the home with a loaded .22 rifle, which, of course, is aggravated assault with a deadly weapon. The aggravated assault statute, § 784.021(1)(a), provides:
An "aggravated assault" is an assault: with a deadly weapon without intent to kill. *See State v. Iseley*, 944 So.2d 227, 228 n.1 (Fla. 2006)(defining aggravated assault).

denied both heat of passion proposed instructions.(R. Vol. III 472).

Defense counsel renewed his motion to declare 775.051, which abolished the intoxication defense, unconstitutional. (T. XVII 1676-1677; XVIII 1683-1686). The trial court conducted a charge conference. (T. XVIII 1683-1710). Defense counsel argued that it was a violation of due process to prohibit the defendant from presenting evidence that disproves the element of premeditation. (T. XVIII 1684). Defense counsel argued that the statute was procedural in nature. The trial court denied the requested intoxication instruction. (T. XVIII 1713). Defense counsel did not object to the burglary instruction but did object to the felony murder theory. (T. XVIII 1699-1703,1715). Defense counsel agreed to the special verdict forms. (T. XVIII 1710). Defense counsel renewed his judgment of acquittal arguing that felony murder did not apply, which the trial court denied. (T. XVIII 1715).

In the closing argument of guilt phase, the prosecutor argued that Carter had been planning these murders for three weeks; that was what Carter was doing in the backyard. (T. XVIII 1719,1721). The prosecutor explained that Carter shot Glenn Pafford three times in the head; Elizabeth Reed twice in the

head and Courtney Smith once in the head. (T. XVIII 1722). The prosecutor noted that the defense conceded Carter was guilty of killing these victims in jury selection and in opening argument but took the position that it was not first degree murder. (T. XVIII 1730). The prosecutor noted that casing No. 3 was on top of Ms. Reed's body. The prosecutor pointed out the discrepancies in Carter's testimony including that he walked into the house with a rifle at his side and no one saw the rifle and that Mr. Pafford did not run or move during all the shooting. (T. XVIII 1733,1735). The prosecutor highlighted the fact that Mr. Pafford was the only one shot straight in the face and the other victims were not because they were moving. (T. XVIII 1739). The prosecutor argued that premeditated murder was proven by the number of shots and the numbers of victims. (T. XVIII 1757). The prosecutor argued that felony murder was proven with burglary as the underlying felony and with an assault or battery as the intended crime. (T. XVIII 1758). The prosecutor argued both unlawful entry and unlawfully remaining in theories of burglary. (T. XVIII 1759-1760).

In the defense closing of guilt phase, defense counsel argued for second degree murder. (T. XVIII 1766,1769). He argued that the murder were a result of jealousy. He pointed out that the testimony was that casing can get knocked around easily and

there were several dogs lose. (T. XVIII 1780). He argued that the State had not proven that the murders did not occur in the order that Carter testified to them occurring in. (T. XVIII 1794,1798). Defense counsel noted that Carter drank and took pills. (T. XVIII 1845). Defense counsel argued that the murders were a result of alcohol and extreme jealously (T. XVIII 1849) Defense counsel argued against the remaining in theory of burglary in closing but not the unlawful entry. (T. XVIII 1860-1861).

In rebuttal closing, the prosecutor explained that a premediatated murder does not have to be planned. (T. XVIII 1863). The prosecutor argued any permission to enter is withdrawn at the point the person becomes dangerous. (T. XVIII 1864). The premeditation was bringing a loaded weapon into a home with the safety off and his finger on the trigger. (T. XVIII 1865).

On September 27, 2005 the trial court instructed the jury. (R. Vol. III 506-547; T. Vol. XIX 1918-1946). The jury was instructed on both premeditated murder and felony murder. (T. Vol. XIX 1921-1928). The jury was instructed that the underlying felony for felony murder was burglary and that Carter had to intent to commit one of the following offenses: assault, battery, aggravated assault, aggravated battery or murder when

he entered the house. (T. Vol. XIX 1923-1924). The trial court explained both the unlawful entry and the unlawful remaining in theories of burglary. (T. Vol. XIX 1924-1925). The trial court explained that unlawful entry meant that Carter did not have permission or consent of Elizabeth Reed to enter her home. (T. Vol. XIX 1924). The jury was not instructed on intoxication as a defense. Defense counsel had no additional objections to the jury instructions. (T. Vol. XIX 1953). The alternates, Julie Smith and Robert O'Neil were excused. (T. Vol. XIX 1946,1953). The jury deliberated for two hours and twenty-two minutes. (T. Vol. XIX 1951, 1955).

On September 27, 2005, the jury convicted the defendant of three counts of first degree as charged in the indictment. (R. Vol. IV 548-556; T. Vol. XIX 1955-1956). The verdicts were special verdicts finding Carter guilty of both premeditated murder and felony murder with burglary being the underlying felony. (R. Vol. IV 548-556; T. Vol. XIX 1955-1956). The jury also found the defendant discharged a firearm causing great bodily harm or death to another during the commission of the offense in each of the three counts. (T. Vol. XIX 1955-1956). The jury was polled. (T. Vol. XIX 1956-1958).

Carter filed a motion for new trial. (R. Vol. IV 557-563). On October 7, 2005, between the guilt and penalty phase, the trial

court held a hearing on the motion for new trial (T. Vol. XIX 1961-1964). The trial court denied the motion for new trial.(R. Vol. IV 564; T. Vol. XIX 1964). On October 7, 2005, between the guilt and penalty phase, the trial court also held a hearing on the various motions relating to the penalty phase. (T. Vol. XIX 1964-2078; T. Vol. XX 2085).

On September 12, 2005 Carter filed a notice of waiver of the PSI. (R. Vol. IV 646-647). Defense counsel expressed concern about non-statutory aggravation in any PSI and the defendant personally agreed to the waiver on the record. (Vol. VI 1092-1094). The trial court granted the motion and did not order a PSI. (Vol. VI 1095).

The penalty phase was conducted on October 12, 13, and 14, 2005. The trial court gave the jury preliminary instructions.((R. Vol. IV 620-623); T. Vol. XX 2110-2113). The prosecutor gave an opening statement (T. Vol. XX 2114-2125). Defense counsel also presenting opening statement arguing for life without the possibility of parole. (T. Vol. XX 2125-2145). The prosecutor presented (1) William Pafford, Mr. Pafford's father, who read a victim impact letter; (2) Jessie Pafford, Mr. Pafford's brother, who also read a victim impact letter; (3) Lisa Moredock, Mr. Pafford's ex-wife and mother of their son, who read a victim impact letter on behalf of Mr. Pafford's son;

(4) Rob Chapman who read a victim impact letter on behalf of the Publix “family”; (5) Antonella Leatherwood who read a victim impact letter; (6) Bryan Reed, Ms. Reed’s ex-husband who was the father of her two youngest children who read a victim impact letter on their behalf; (7) Rebecca Reed, Ms. Reed’s youngest daughter; who read a victim impact letter; (8) Kay Null, Ms. Reed’s step-mother; who read a victim impact letter; (9) Larry Smith, Rick’s father; who read a victim impact letter; (10) Rick Smith, Ms. Reed son; who read a victim impact letter. (T. Vol. XX 2146-2198).

The defense presented numerous witnesses (T. Vol. XX 2198-2279; XXI 2285-). They were lay witnesses including family, former high school girlfriend, football coach and friends. Defense counsel highlighted Carter service with the Air Force. (T. Vol. XXI 2317-2358). He presented the testimony of Carter’s high school teachers. (T. Vol. XXI 2358,2434). He presented the testimony of Carter’s college professor who led a club. (T. Vol. XXI 2476). Defense counsel introduced Carter’s good work history through his employment records, his former employers and co-workers at Winn-Dixie and Publix. (T. Vol. XXII 2547, 2587,2607). Defense counsel also presented model prisoner testimony. (T. Vol. XXII 2631).

Dr. Krop, who was appointed as a confidential mental health expert, did not testify. No mental health expert testimony was presented.

Carter did not testify at the penalty phase. The trial court conducted a right to testify inquiry. (T. Vol. XXIII 2728).

Defense counsel proffered as mitigation Carter's offer to plead guilty as charged and waive all appeals and post-conviction. (T. Vol. XXIII 2719). The prosecutor argued that it was not admissible. (T. Vol. XXIII 2723). The trial court ruled it was not admissible. (T. Vol. XXIII 2747).

The trial court held a jury instruction conference. (T. Vol. XXIII 2747-2815). The prosecutor presented closing argument. (T. Vol. XXIII 2817-2863). Defense counsel presented closing argument. (T. Vol. XXIII 2865-2879; T. Vol. XXIV 2883-2933). The trial court instructed the jury. (R. Vol. IV 624-639; T. Vol. XXIV 2936-2950). The jury instructions limited the aggravators to three aggravators regarding Mr. Pafford and Ms. Reed: (1) previously convicted of a capital offense explaining that the other murders were capital offenses; (2) committed while engaged in the commission of a burglary and (3) CCP (R. Vol. IV 626-631; T. Vol. XXIV 2938-2941). The trial court gave an expanded special instruction, over the prosecutor's objection, on

mitigation. The jury deliberated for two hours and eleven minutes.(T. Vol. XXIV 2953,2958).

On October 14, 2005, the jury recommended death for the murder of Pafford by a vote of nine (9) to three (3). (R. Vol. IV 640 (count I); T. Vol. XXIV 2959). The jury recommended death for the murder of Reed by a vote of eight (8) to four (4). (R. Vol. IV 642 (count II); T. Vol. XXIV 2960). The jury recommended life for the murder of Smith. (R. Vol. IV 645 (count III); T. Vol. XXIV 2960).

The State submitted a written sentencing memoranda in support of the two death sentences. (R. Vol IV 662-691). The prosecutor acknowledged that the statutory mitigating circumstance of no significant history of prior criminal activity applied. Defense counsel submitted a written sentencing memoranda in support of a life sentence. (R. Vol. IV 648-656). Defense counsel argued that a death sentence would not be proportional. He offered to waive all appeals and postconviction proceedings if the judge sentenced him to life. (R. Vol. IV 650). He asserted that the death recommendation were “not strong mandates for the death penalty”, “in view of the life recommendation for the murder of Courtney Smith.” (R. Vol. IV 650).

The trial court held a *Spencer* hearing on November 21, 2005. (Vol. VI 1099). The trial court explained that he would not

consider any additional aggravating circumstances that were not presented to the jury during penalty phase but would consider additional mitigating evidence. (Vol. VI 1103,1108,1110). The prosecutor stated that he would not be presenting any additional aggravating evidence. (Vol. VI 1104). The prosecutor proffered regarding the defendant prior arrest in Oklahoma relating to his prior wife. (Vol. VI 1112). The prosecutor felt that the defense had opened to door this evidence during penalty phase when defense witness, Jimmy Chhem, testified that Carter was a good man. (Vol. VI 1113-1114). Carter's prior wife, Carla Fenn, was the victim in Oklahoma of a assault with a deadly weapon in 1994. (Vol. VI 1115). There was no conviction that the State could use as aggravation. Carter was put in a deferred prosecution program. The prosecutor offered it as rebuttal to the mitigating testimony that Carter was a good man for whom violence was uncharacteristic. (Vol. VI 1116). The State presented two witnesses: (1) Cynthia Starling, the defendant's sister and (2) Sergeant Lewis Homme. Cynthia Starling testified to rebut mitigation regarding the Defendant's father being a horrific person that they did not want any contact with. (Vol. VI 1122-1124). She testified that their father, P.W., was "very bad dad" but both she and the defendant still have contact with him. (Vol. VI 1125-1130). The defendant's father visits Carter.

(Vol. VI 1130). She felt their father, who was now 78 years old, had changed. (Vol. VI 1133). Sergeant Homme, who was a correctional officer, testified that found a note referring to escaping to Mexico in Carter's cell. (Vol. VI 1136-1138). The note, which read "I will escape viva La Mexico" was introduced as State exhibit #1. (Vol. VI 1138-1139,1149). Defense counsel objected as to relevance and the prosecutor explained that he rebutted the mitigation that Carter would be a model prisoner in the future. (Vol. VI 1139). Sergeant Homme also testified that Carter did not have his red armband, which denotes a prisoner considered to be a flight risk or a high profile case, when Carter was returned to his cell after the note was found. (Vol. VI 1140-1141). The armbands are attached by aluminum rivets and must be cut off. (Vol. VI 1142). Sergeant Homme also testified that Carter was not a bad inmate and did not attempt to escape. (Vol. VI 1143,1146).

The defense presented one witness at the *Spencer* hearing: (1) Officer Michelle Fletcher. (Vol. VI 1151). Officer Fletcher, who was a correctional officer, worked at the pretrial detention facility. (Vol. VI 1152). She testified at she had a lot of contact with defendant and he would try to keep other inmates out of trouble. (Vol. VI 1153). Carter would help the officers stops fights among the juvenile detainees. (Vol. VI 1153).

Carter got along with the other inmates and the guards. (Vol. VI 1154). Carter was “no trouble”, “very respectful”, “very obedient” and they had no problem out of him. (Vol. VI 1154). She was not working at the time of the armband missing incident and did not know about it. (Vol. VI 1156-1157). She was not aware of the escape note. (Vol. VI 1162).

A stipulation was entered that Carter had no disciplinary reports (DRs) at the jail. (Vol. VI 1162-1163). The trial court denied the written motion for new penalty phase. (Vol. VI 1163-1165).

Both the prosecutor and defense counsel discussed their written sentencing memorandums. (Vol. VI 1165). The prosecutor argued that the trial court should follow the jury’s recommendation of death for the murders of Pafford and Reed. (Vol. VI 1167). The prosecutor also advocated that the trial court follow the jury’s recommendation of life for the murder of Courtney Smith and did not request that the trial court override. (Vol. VI 1167-1168). Defense counsel argued that there was not sufficient evidence of the CCP aggravator. (Vol. VI 1170). He argued that Carter and Reed were together the Sunday before the murders. He also argued that if the evidence to support an aggravator is wholly circumstantial, then it must be inconsistent with the defendant’s version. (Vol. VI 1171).

Defense counsel asserted that Carter was jealous and emotional when the victim did not show up for a date. (Vol. VI 1171). Defense counsel argued that at least six jurors voted for life for the murder of Courtney Smith, three jurors voted for life for the murder of Glenn Pafford and four jurors voted for life for the murder of Liz Reed. (Vol. VI 1171-1172). He argued, relying on *State v. Steele*, 921 So.2d 538, 547 (Fla. 2005), that Florida is the only state that allows a death recommendation based on a simple majority vote and argued that this was certainly unusual and therefore, a violation of the Eighth Amendment. (Vol. VI 1172).

The trial court held a sentencing hearing on December 22, 2005. (R. Vol. VII 1177). Carter personally addressed the court stating that he was "physically responsible for these death" but was "not mentally responsible." (R. Vol. VII 1181). Defense counsel referred to a few recent local capital trials involving young victims where the perpetrators got life sentences either through life recommendations from the jury or plea bargains.(R. Vol. VII 1184). Defense counsel argued Carter's life was "more exemplary" than those other perpetrators. (R. Vol. VII 1186). Defense counsel referred to Carter's offer to pled guilty in exchange for a life sentence and waive all appeals and postconviction proceedings. (R. Vol. VII 1186-1187). Defense

counsel argued that the victim's family's wishes lead to death sentence in some cases and life sentence in other cases. (R. Vol. VII 1187-1188). The trial court read his sentencing order into the record. (R. Vol. VII 1189-1234).

The trial court sentenced Carter to death for Count I; to death for Count II and to a consecutive life sentence for Count III. (R. Vol. VII 1234).

In its 25 page sentencing order, the trial court explained the facts of this triple murder. (R. Vol. IV 694-719). The trial court, following the jury's life recommendation, imposed a life sentence for the murder of Courtney Smith. (R. Vol. IV 718). The trial court, following the jury's death recommendations, imposed two death sentences for the murder of Mr. Pafford and Ms. Reed. (R. Vol. IV 718). The trial court found three statutory aggravators in the murder of both victims: (1) previously convicted of a capital offense explaining that the other murders were capital offenses; (2) committed while engaged in the commission of a burglary and (3) CCP. The trial court found no statutory mitigators. (R. Vol. IV 707). The trial court, however, found seventeen (17) non-statutory mitigators. (R. Vol. IV 707-717). The trial court found the following non-statutory mitigators: (1) the Defendant was raised in a broken home with a deprived childhood, but he was able to rise above it

and become successful as a high school student and as an adult, which the trial court accorded “some” weight; (2) the Defendant was an above-average achiever in high school, junior college and college, which the trial court accorded “some” weight; (3) the Defendant was elected president of a prestigious majors club on campus at Oklahoma State University and worked with that club to help others which the trial court accorded “some” weight; (4) the Defendant enlisted and had a distinguished military record in the United States Air Force for almost four years, which the trial court accorded “some” weight; (5) the Defendant has been a good employee for many years and he has a consistent work record from a very young age and has also been a supervisor over other people, which the trial court accorded “some” weight; (6) the Defendant has been a good son to both his father and mother in spite of the fact that his father abandoned him as a child and he had the strength to reconcile with his father when he became an adult, which the trial court accorded “some” weight; (7) the Defendant has been a good brother to Steve Carter, Mike Carter, and Cindy Starling, and he protected Ms. Starling during their early years, which the trial court accorded “some” weight; (8) the Defendant saved a child's life when he was working as a lifeguard in Georgia, which the trial court accorded “some” weight; (9) the Defendant has been a loyal friend to many people

and made friends easily, which the trial court accorded “some” weight; (10) the Defendant has formed an especially close relationship with his nephew, Jacob, which the trial court accorded “some” weight; (11) the Defendant worked for a living in Kentucky while he was avoiding the police after committing this offense, which the trial court accorded “some” weight; (12) the Defendant has the potential to be a productive inmate which was demonstrated by the way he acted towards other inmates in the Duval County Jail and by his work record, which the trial court accorded “some” weight; (13) the Defendant has the support of his family and friends who continue to love him, which the trial court accorded “some” weight; (14) society can be protected by life sentences without parole, which the trial court accorded “some” weight; (15) the Defendant offered to plead guilty as charged for three consecutive life sentences, which the trial court accorded “some” weight; (16) the Defendant resisted adopting the racist traits of his father and has had positive race relations throughout his life, which the trial court accorded “some” weight; and (17) the Defendant's prior relationship with Elizabeth Reed and her children which the trial court accorded “some” weight. The trial court found that the “aggravating circumstances in this case far outweigh the mitigating circumstances.” The trial court found “that any of

the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed." The trial court sentenced Carter to death for the murders of victim Pafford and victim Reed and to life for victim Smith. (R. Vol. IV 720-726 - judgement & sentence).

SUMMARY OF ARGUMENT

ISSUE I

Carter asserts that the statute abolishing the intoxication defense violates due process. This Court recently held that section 775.051 does not violate due process or equal protection. Carter argues that this is a capital case but that distinction applies to the sentence, not the conviction. Moreover, the error, if any, was harmless. Even if Carter had been allowed to present an intoxication defense during the guilt phase, such a defense would have failed, as it usually does. As Judge Padovano has observed, "most experienced criminal lawyers and judges would be hard pressed to come up with a single example of a case in which the defense of voluntary intoxication succeeded." The trial court properly denied the defense request for a jury instruction on intoxication.

ISSUE II

Carter argues that the trial court improperly found the murders of Ms. Reed and Mr. Pafford to be cold, calculated and premeditated. Carter had been stalking the victim in the weeks prior to the murder. Moreover, according to his own testimony, Carter, just three hours prior to the murders drove by the house to see if Mr. Pafford was there. Carter entered Ms. Reed's

home, where he knew her four children would be present, armed with his loaded .22 rifle with the safety off. He shot Ms. Reed's sixteen year old daughter, Courtney, once in the head, and Ms. Reed twice in the head and Mr. Pafford three times in the head. He shot a total of six rounds, killing three people. The rifle was not an automatic weapon, Carter had to release the trigger for each shot and aim at each of the victims. Thus, the trial court properly found the CCP aggravator.

ISSUE III

Carter contends that the trial court improperly found the during the course of a burglary aggravator. Carter is basically arguing that *Delgado v. State*, 776 So.2d 233 (Fla. 2000) should be expanded to the "during a course of a burglary" aggravator. The legislature, however, has nullified *Delgado* twice. Carter also argues that the felony murder aggravator is an automatic aggravator. Both this Court and United States Supreme Court have repeatedly rejected this argument. Thus, the trial court properly found the burglary aggravator.

ISSUE IV

Carter asserts that the trial court abused its discretion by assigning great weight to the prior violent felony aggravator

and the during a course of a burglary aggravator in light of the life recommendation for the murder of Courtney Smith. Carter admits that the trial court correctly found these aggravators. First, the judge is not bound by a jury's determination of weight. According to this Court, the judge must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each. Moreover, a jury's life recommendation in one murder does not limit the judge's discretion in weighing aggravators in the other murders. Here, the jury recommended death for Pafford and Reed, so the jury agreed with the judge that aggravators outweighted mitigators as to those two murders. Thus, the trial court did not abuse its discretion in assigning great weight to both the prior violent felony aggravator and the burglary aggravator as to both Ms. Reed and Mr. Pafford.

ISSUE V

Carter asserts that the trial court's sentencing order lacks sufficient clarity. The trial court's twenty-five page sentencing
order is quite clear. It covers the aggravator and all the proposed mitigators advocated by the defense. In additional,

the trial court considered and found two non-statutory mitigators independently.

ISSUE VI

Carter asserts that the prosecution should be judicially estopped from seeking the death penalty based on a letter to Mexican officials from the prosecutor agreeing to forgo the death penalty in exchange for Carter's return. First, the State is not bound by the letter because the Mexican officials did not return Carter; rather, he was captured in the United States. Moreover, the State did not freely take an "inconsistent" position on the death penalty. The State was forced to agree to a life sentence by Mexico's policy and its reluctance to do so is clearly stated in the letter. Furthermore, the doctrine of judicial estoppel, if it applies at all, applies only to factual positions, not legal positions. Additionally, application of the doctrine in this manner would end plea negotiations in capital cases. Prosecutors often explore the possibility of a life sentence in exchange for a guilty plea during plea negotiations and would be required to forego seeking the death penalty under this logic. The trial court properly denied the motion to prohibit the State from seeking the death penalty.

ISSUE VII

Carter argues that this Court should recede from its decision in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), which held that Florida's death penalty statute was constitutional in the wake of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has consistently rejected *Ring* claims. Moreover, even if *Ring* applies in Florida, as both this Court and the United States Supreme Court have explained, a jury's recommendation of death necessarily means that the jury found at least one aggravator and therefore, Carter's death sentence complies with *Ring*. The trial court properly denied the motion to declare Florida's capital sentencing scheme unconstitutional.

ISSUE VIII

Carter contends that the jury instruction which informed the jury that their recommendation was a recommendation and it would be given great weight by the trial court was a violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This Court has repeatedly rejected hybrid *Ring/Caldwell* claims. There was no *Caldwell* violation. The judge is the final sentencer in Florida and the jury's recommendation is just that - a recommendation. *Ring* did not

change the law in this regard. Thus, the trial court properly informed the jury that their recommendation was a recommendation that would be given great weight.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY RULED THE STATUTE ABOLISHING THE INTOXICATION DEFENSE WAS CONSTITUTIONAL? (Restated)

Carter asserts that the statute abolishing the intoxication defense violates due process. This Court recently held that section 775.051 does not violate due process or equal protection. Carter argues that this is a capital case but that distinction applies to the sentence, not the conviction. Moreover, the error, if any, was harmless. Even if Carter had been allowed to present an intoxication defense during the guilt phase, such a defense would have failed, as it usually does. As Judge Padovano has observed, "most experienced criminal lawyers and judges would be hard pressed to come up with a single example of a case in which the defense of voluntary intoxication succeeded." The trial court properly denied the defense request for a jury instruction on intoxication.

The trial court's ruling

Carter filed a motion proposing a special jury instruction on voluntary intoxication. (R. Vol. III 467-468). The proposed instruction stated that where a mental element is an essential element of the crime and a person was so intoxicated that he was incapable of forming that mental state, that mental state would

not exist. The instruction stated that if you find that the defendant was so intoxicated from the voluntary use of alcohol as to be incapable of forming a premeditated design to kill, you should find the defendant not guilty of first degree murder. The trial court denied the proposed instruction.(R. Vol. III 469).

Carter also filed a motion to declare section 775.051 unconstitutional on its face and as applied. (R. Vol. III 473-491). He relied on Justice Ginsburg's concurring opinion in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), which was the necessary fifth vote, to argue that the statute was procedural in nature and was a new rule of evidence. Carter asserted that the statute violated the Eighth Amendment because this was a capital case, due process and equal protection. The trial court denied the motion.(R. Vol. III 492). During a motion for continuance, defense counsel argued Prozac as a basis for an involuntary intoxication defense and asserted the statute was unconstitutional in a first degree murder case. (R. Vol. VI 959). Defense counsel noted that even if he could not use intoxication in the guilt phase, it was admissible in the penalty phase. (R. Vol. VI 962).

At trial, Carter testified that he had four or five glasses of whiskey between 9:15 and midnight on the night of the murders.

(T. XVI 1523). Both sides argued intoxication in closing. In closing argument, the prosecutor pointed out that despite his drinking, Carter was able to drive over to the victim's house that night. (T. XVIII 1726). The prosecutor pointed out that despite his drinking, Carter was able to use the ATM machines right after the murders. (T. XVIII 1746-1747,1750,1753). The prosecutor did not argue that the defense does not exist; rather, he argued that the evidence did not show that Carter was intoxicated to the point he did not know what he was doing. (T. XVIII 1753-1754). Defense counsel noted that Carter drank and took pills. (T. XVIII 1845-1846). In rebuttal closing argument, the prosecutor disputed defendant's claim that he was so drugged up and boozed up that he didn't know what was going on and argued that the defendant was not doped up or boozed up when he killed". (T. XIX 1902). The prosecutor asserted that the defendant could not have made six accurate shots if he had been that intoxicated. (T. XIX 1902-1903). The prosecutor pointed out that Carter hit a moving target because Ms. Reed was moving when she was shot. (T. XIX 1903).

Defense counsel asked for a jury instruction on intoxication and renewed his motion to declare § 775.0514 unconstitutional. (T. XVII 1676-1677; XVIII 1683-1686). Defense counsel argued that it was a violation of due process to prohibit the defendant

from presenting evidence that disproves the element of premeditation. (T. XVIII 1684). Defense counsel argued that the statute was procedural in nature. The trial court denied the requested intoxication instruction and the motion. (T. XVIII 1713).

Preservation

This issue is preserved. The defendant filed a motion raising the same grounds he asserts as error on appeal and properly obtained a ruling. *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985)(explaining to preserve an issue for appeal, counsel must preserve the issue by making a specific objection to the admission of evidence on the same grounds as raised on appeal.).

The standard of review

"Whether challenged statutes are constitutional is a question of law which the appellate court reviews *de novo*." *Troy v. State*, 2006 WL 2987627, *5 (Fla. October 19, 2006)(reviewing the constitutionality of the intoxication statute *de novo*).

Merits

The voluntary intoxication not a defense statute, § 775.051, Florida Statutes (2002), provides:

> Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance as described in chapter 893 is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense

> and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02.

The Florida Legislature abolished the defense of voluntary intoxication as of October 1, 1999. Ch. 99-174, Laws of Fla. The impetus for the new statute was the United States Supreme Court's decision in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996)(plurality opinion)(concluding that a state may abolish the voluntary intoxication defense without violating due process). Justice Scalia, who wrote the plurality majority opinion, explained a prohibition on intoxication defenses "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences." *Egelhoff*, 518 U.S. at 50, 116 S.Ct. at 2020.

In *Troy v. State*, 2006 WL 2987627, *5 (Fla. October 19, 2006), this Court, in a capital case, rejected a due process and equal protection challenge to the statute that abolished the defense of intoxication. Troy argued that section 775.051, which prevented him from asserting a defense of voluntary intoxication, was constitutionally invalid because "it operates as an evidentiary proscription rather than a redefinition of mens rea." Troy asserted that there are significant differences

between the Montana statute at issue in *Egelhoff* and Florida's statute. The *Troy* Court discussed Justice Scalia's plurality opinion in *Egelhoff* finding that the Montana statute abolishing voluntary intoxication did not violate the due process clause. Justice Scalia noted that the common law did not allow for a defense of voluntary intoxication. The defense was a judicially created exception to the common law rule. The opinion concluded that the defense did not constitute a fundamental principle of justice, and that nothing in the due process clause prevents "[t]he people of Montana [from deciding] to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue."

This Court adopted the reasoning of two district court decisions. *Barrett v. State*, 862 So.2d 44 (Fla. 2d DCA 2003); *Cuc v. State*, 834 So.2d 378 (Fla. 4th DCA 2003). The *Troy* Court explained: "As was the case with the Montana statute under Justice Ginsburg's analysis, section 775.051 effects a substantive change in the definition of mens rea, and it is not simply an evidentiary rule."

Several other states have enacted such statutes and their respective state courts have, likewise, upheld their statutes. *See e.g. People v. Atkins*, 18 P.3d 660 (Cal. 2001)(rejecting the argument that exclusion of evidence, under section 22, of

voluntary intoxication violated due process by denying the defendant of the opportunity to prove he did not possess the required mental state).

Carter argues that this is a capital case but that distinction applies to the sentence, not the conviction. Intoxication is still admissible, as mitigation, in the penalty phase after the enactment of the statute; it is just not a defense in the guilt phase. So, the fact that this is a capital case is irrelevant to what is solely a guilt phase issue. Thus, the trial court properly refused to instruction the jury on the non-existent defense of voluntary intoxication.

Harmless Error

The error, if any, in failing to instruct the jury regarding the intoxication defense was harmless. To establish the intoxication defense, prior to the enactment of the statute abolishing such a defense, the defendant had to be rendered temporarily insane due to his drinking. *Cirack v. State*, 201 So.2d 706 (Fla.1967)(stating the law recognizes "insanity super-induced by the long and continued use of intoxicants so as to produce fixed and settled frenzy or insanity either permanent or intermittent); *Cochran v. State*, 65 Fla. 91, 61 So. 187 (Fla. 1913)(requiring a jury instruction when the intoxication defense is asserted); *Garner v. State*, 28 Fla. 113, 9 So. 835 (Fla.

1891)(establishing voluntary intoxication as a defense in Florida). According to his own testimony, Carter had four to five drinks in a three hour period and "was not falling down drunk." (T. XVII 1621-1622) Even if Carter had been allowed to present an intoxication defense during the guilt phase, such a defense would fail, as it usually does. *Odom v. State*, 782 So.2d 510, 512 (Fla. 1st DCA 2001)(Padovano, J., concurring)(noting that "voluntary intoxication rarely offers a realistic chance of success" and observing "[m]ost experienced criminal lawyers and judges would be hard pressed to come up with a single example of a case in which the defense of voluntary intoxication succeeded.").

ISSUE II

WHETHER THE TRIAL COURT PROPERLY FOUND THE MURDERS OF VICTIMS REED AND PAFFORD TO BE COLD, CALCULATED AND PREMEDITATED? (Restated)

Carter argues that the trial court improperly found the murders of Ms. Reed and Mr. Pafford to be cold, calculated and premeditated. Carter had been stalking the victim in the weeks prior to the murder. Moreover, according to his own testimony, Carter, just three hours prior to the murders drove by the house to see if Mr. Pafford was there. Carter entered Ms. Reed's home, where he knew her four children would be present, armed

with his loaded .22 rifle with the safety off. He shot Ms. Reed's sixteen year old daughter, Courtney, once in the head, and Ms. Reed twice in the head and Mr. Pafford three times in the head. He shot a total of six rounds, killing three people. The rifle was not an automatic weapon, Carter had to release the trigger for each shot and aim at each of the victims. Thus, the trial court properly found the CCP aggravator.

The trial court's ruling

Carter's defense counsel, Alan Chipperfield, filed a motion to prohibit the trial court from instructing the jury on HAC or CCP. (R. Vol. I 29-30). He argued that both were vague, overbroad and had been inconsistently applied. He also argued that both aggravators, as a matter of law, did not apply in this particular case without making any case specific argument or citing any particular case. (R. Vol. I 29-30). The trial court granted the motion with regard to the HAC aggravator without objection from the State but denied the motion with regard to the CCP aggravator. (R. Vol. I 31). Carter filed a motion to declare the CCP aggravator unconstitutional which the trial court denied. (R. Vol. I 87-104; 105).

At the motion hearing prior to the penalty phase, defense counsel objected to an instruction on CCP (T. Vol. XIX 1990-2012). Defense counsel attempted to distinguish ***Diaz v. State***,

860 So.2d 960 (Fla. 2003) where CCP was found and affirmed in a similar situation. (T. Vol. XIX 2000). The prosecutor noted that Carter's own testimony was that he had driven buy the house three hours earlier. The trial court denied the motion. (T. Vol. XIX 2012).

In the trial court's sentencing order finding CCP as to victim Pafford, the trial court stated:

> The trial testimony in the guilt phase of this case proves beyond all reasonable doubt the existence of this aggravating circumstance. Christian Carter, Ms. Reed's neighbor, testified that he encountered the Defendant in his side yard sometime between 9:00 p.m. and 10:00 p.m. ten days to two weeks prior to the instant murders. Christian Carter testified that the Defendant appeared to be coming from his backyard which abutted Ms. Reed's backyard. Christian Carter testified that when he begun to use a telephone the Defendant became nervous and ran toward a red truck parked across the street from Mr. Carter's home and drove away. Terry Booth, Christian Carter's neighbor, testified that he also saw a red Dodge truck parked on his street and a man walking between neighbors' houses the Friday before the instant murders occurred. Mr. Booth testified that he saw the man look in his direction then look at a telephone pole, and after about five minutes, the man walked back to the truck and drove away. Mr. Booth testified that the next day, he saw the same red Dodge truck parked on his street. Finally, Mr. Booth testified that the man in the truck looked like the suspect the police were looking for regarding the instant murders.
>
> At trial, the Defendant admitted that he had indeed been in Christian Carter's yard a couple of weeks before the murders. The Defendant testified that he was in the yard because he was jealous that Ms. Reed was seeing Glenn Pafford and wanted to confirm if Mr. Pafford was at Ms. Reed's home. The Defendant stated he conducted this surveillance because he was jealous that Ms. Reed was seeing Mr. Pafford. The Defendant admitted he drove past Ms. Reed's home at approximately 9:00 p.m. on July 23, 2002, and saw both Ms. Reed's and Ms. Smith's cars along

with Mr. Pafford's truck in the driveway. The Defendant admitted that he then drove home and called Ms. Reed's home around 11:15 p.m. The Defendant testified that he spoke by phone to Rick Smith, Ms. Reed's son. Rick Smith told the Defendant that Ms. Reed was not home. This testimony was corroborated by Rick Smith who testified that the Defendant called Ms. Reed's home between 11:00 and 11:30 p.m. on July 23, 2002, and because Ms. Reed did not want to speak with the Defendant, he told the Defendant that his mother was not home. The Defendant's and Rick Smith's testimony was further corroborated by Jack Harley of BellSouth, who testified that the Defendant's telephone records showed a telephone call to Ms. Reed's home at 11:24 p.m. on July 23, 2002.

The Defendant admitted driving to Ms. Reed's home with a fully loaded .22 caliber rifle in his truck and when he arrived at her home he got out of his truck carrying the rifle. The Defendant admitted he took the rifle to prevent Ms. Reed from saying that she was not going to talk to him and to ensure that she answered his questions regarding their relationship. The Defendant testified that when he entered Ms. Reed's home, he concealed the rifle against his leg so that no one would see it. The Defendant also testified that his finger was on the trigger. The Defendant testified that he told Ms. Reed and Mr. Pafford that he was not going to leave Ms. Reed's home until he had answers to his questions regarding his relationship with Ms Reed. The Defendant testified that when Ms. Reed saw the rifle, she grabbed for it. The Defendant and Ms. Reed struggled over the rifle, and during this struggle the rifle discharged striking Courtney Smith once in the head. The Defendant admitted that he then intentionally shot Ms. Reed twice in the head and then intentionally shot Glenn Pafford three times in the head, including one shot at point blank range. The Defendant further admitted that he was a "good shot" and that of his shots hit their intended targets. However, he testified that he did not intentionally aim at Courtney Smith when she was shot once in the head. The Defendant testified that after shooting Glenn Pafford, Elizabeth Reed and Courtney Smith, he walked, rifle in hand, to his pickup truck and drove away.

Dr. Margarita Arruza, a forensic pathologist and the Medical Examiner for the City of Jacksonville, testified concerning the wounds suffered by Glenn Pafford. Dr. Arruza testified that Mr. Pafford suffered three gunshot wounds to the head. The first gunshot wound was a straight

shot through Mr. Pafford's chin. The bullet fractured the jaw, went through the tongue and the epiglottis and impacted against the cervical spine at the level C-3 as it traveled in a straight line from front to back. Dr. Arruza testified that Mr. Pafford could have been standing when he was shot through the chin based on the trajectory of the bullet.

The second gunshot wound was to the top portion of the back of Mr. Pafford's head. This bullet traveled through the scalp, the skull and the brain and was recovered from the right frontal region of Mr. Pafford's brain. The trajectory of this bullet's path was from the back of Mr. Pafford's skull to the front, from left side of Mr. Pafford's skull to the right and at an upward angle. Dr. Arruza testified, based on the trajectory of the bullet, that Mr. Pafford's head was pointed down and his body was in a downward position as if going down almost to a kneeling position.

The third gunshot wound as a close range shot to the right side of Mr. Pafford's jaw as evident by gunpowder stippling. This bullet's path was the right side of Mr. Pafford's jaw to the left side of his skull and at an upward angle. Dr. Arruza testified the gunshot wound to Mr. Pafford's jaw was consistent with this body already being on the ground and the rifle being pointed right at his head at close range.

Dr. Arruza testified that the evidence of the three gunshot wounds was consistent with the theory that Mr. Pafford was shot first in the chin, that his body started going down and then he was shot in the back of the head and then fell to the ground. Then as Mr. Pafford lay on the ground he was shot again, this time in the jaw. Dr. Arruza testified that each bullet wound suffered by Mr. Pafford was a fatal wound and that each would have caused immediate unconsciousness. The trial testimony in the guilt phase of this case proves beyond all reasonable doubt the existence and establishment of this aggravating circumstance. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(Vol. IV 699-702).

In the trial court’s sentencing order finding CCP as to victim Reed, the trial court stated:

The trial testimony in the guilt phase of this case proves beyond all reasonable doubt the existence of this aggravating circumstance. Christian Carter, Ms. Reed's neighbor, testified that he encountered the Defendant in his side yard sometime between 9:00 p.m. and 10:00 p.m. ten days to two weeks prior to the instant murders. Christian Carter testified that the Defendant appeared to be coming from his backyard which abutted Ms. Reed's backyard. Christian Carter testified that when he began to use a telephone the Defendant became nervous and ran toward a red truck parked across the street from Mr. Carter's home and drove away. Terry Booth, Christian Carter's neighbor, testified that he also saw a red Dodge truck parked on his street and a man talking between neighbors' houses the Friday before the instant murders occurred. Mr. Booth testified that he saw the man look in his direction then look at a telephone pole, and after about five minutes, the man walked back to the truck and drove away. Mr. Booth testified that the next day, he saw the same red Dodge truck parked on his street. Finally, Mr. Booth testified that the man in the truck looked like the suspect the police were looking for regarding the instant murders.

At trial, the Defendant admitted that he had indeed been in Christian Carter's yard a couple of weeks before the murders. The Defendant testified that he was in the yard because he was jealous that Ms. Reed was seeing Glenn Pafford and wanted to confirm if Mr. Pafford was at Ms. Reed's home. The Defendant stated he conducted this surveillance because he was jealous that Ms. Reed was seeing Mr. Pafford. The Defendant admitted he drove past Ms. Reed's home at approximately 9:00 p.m. on July 23, 2002, and saw both Ms. Reed's and Ms. Smith's cars along with Mr. Pafford's truck in the driveway. The Defendant admitted that he then drove home and called Ms. Reed's home around 11:15 p.m. the Defendant testified that he spoke by phone to Rick Smith, Ms. Reed's son. Rick Smith told the Defendant that Ms. Reed was not home. This testimony was corroborated by Rick Smith who testified that the Defendant called Ms. Reed's home between 11:00 and 11:30 p.m. on July 23, 2002, and because Ms. Reed did not want to speak with the Defendant, he told the Defendant that his mother was not home. The Defendant's and Rick Smith's testimony was further corroborated by Jack Harley of BellSouth, who testified that the Defendant's telephone records showed a telephone call to Ms. Reed's home at 11:24 p.m. on July 23, 2002.

The Defendant admitted driving to Ms. Reed's home with a fully loaded .22 caliber rifle in his truck and when he arrived at her home he got out of his truck carrying the rifle. The Defendant admitted he took the rifle to prevent Ms. Reed from saying that she was not going to talk to him and to ensure that she answered his questions regarding their relationship. The Defendant testified that when he entered Ms. Reed's home, he concealed the rifle against his leg so that no one would see it. The Defendant also testified that his finger was on the trigger. The Defendant testified that he told Ms. Reed and Mr. Pafford that he was not going to leave Ms. Reed's home until he had answers to his questions regarding his relationship with Ms. Reed. The Defendant testified that when Ms. Reed saw the rifle, she grabbed for it. The Defendant and Ms. Reed struggled over the rifle, and during this struggle the rifle discharged striking Courtney Smith once in the head. The Defendant admitted that he then intentionally shot Ms. Reed twice in the head and then intentionally shot Glenn Pafford three times in the head, including one shot at point blank range. The Defendant further admitted that he was a "good shot" and that all of his shots hit their intended targets. However, he testified that he did not intentionally aim at Courtney Smith when she was shot once in the head. The Defendant testified that after shooting Glenn Pafford, Elizabeth Reed and Courtney Smith, he walked rifle in hand to his pickup truck and drove away.

Dr. Margarita Arruza, a forensic pathologist and the Medical Examiner for the City of Jacksonville, testified concerning the wounds suffered by Elizabeth Reed. Dr. Arruza testified that Elizabeth Reed suffered two gunshot wounds to her left ear. The first gunshot wound went through the helix or top of Ms. Reed's left ear. The bullet went through Ms. Reed's left ear, skull, and brain, and ended up in the right orbital region as it traveled from the left to the right and from the back to the front of her head. Dr. Arruza testified, based on the trajectory of the bullet, that Ms. Reed could not have been lying down when she was shot.

Dr. Arruza testified that she could not determine which of the two gunshot wounds to Ms Reed's head occurred first. Dr. Arruza testified that each bullet wound suffered by Ms. Reed was a fatal wound and that each would have caused immediate unconsciousness. The trial testimony in the guilt phase of this case proves beyond all reasonable doubt the existence and establishment of this aggravating

> circumstance. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(Vol. IV 703-706).

Preservation

This issue is preserved. Defense counsel argued against the CCP aggravator.

Standard of Review

This Court's review of claims that the trial court improperly found an aggravating circumstance is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports his finding. *England v. State*, 940 So.2d 389, 402 (Fla. 2006)(citing *Hutchinson v. State*, 882 So.2d 943, 958 (Fla. 2004)).

Merits

In *Dennis v. State*, 817 So.2d 741 (Fla. 2002), the Florida Supreme Court affirmed a finding of CCP in a double murder. Dennis murdered his ex-girlfriend and her new lover, Barnes. Dennis had been romantically involved with Lumpkins for five years and they had a child together. Both victims were beaten with a shotgun. One month prior to the murders, Dennis found out where she and Barnes lived. The trial court found four aggravating circumstances: (1) that the defendant had been

convicted of a prior capital felony (the contemporaneous murder); (2) that the murder was committed in the course of a felony (burglary); (3) that the murder was especially heinous, atrocious, or cruel (HAC); and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). Dennis challenged the CCP finding arguing that the murders were "rage" killings, not planned murders. *Dennis*, 817 So.2d at 765. The Court noted that to prove the CCP aggravator, the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. The trial court noted in his order that Dennis "took pains to obtain and use a weapon that could not be traced to him" and he "was clearly following and/or stalking the victims." Dennis had inquired information on where the victim's now lived from a former girlfriend. Dennis had punctured the tire of the victims' car, rendering it flat, enabling him to arrive at the apartment ahead of the victims and wait for their arrival. This Court found the trial court's findings "amply supported by the record." See also *Diaz v. State*, 860 So.2d 960, 969 (Fla. 2003)(finding competent substantial evidence to support the trial court's finding of CCP in the context of the murder of the father of a former girlfriend in light of the ample evidence of

Diaz's calculated planning on the days preceding the murder where he took his gun and several rounds of replacement ammunition to former girlfriend's parent's house and rejecting an argument that a domestic dispute tends to negate CCP where at the time of the murder, they no longer lived together and noting "[t]his Court has never approved a 'domestic dispute' exception to the imposition of the death penalty" citing *Pope v. State*, 679 So.2d 710 (Fla.1996)).

This Court has stated that CCP murder can be indicated by the circumstances showing such facts as advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *Diaz v. State*, 860 So.2d 960, 970 (Fla. 2003)(citing *Swafford v. State*, 533 So.2d 270 (Fla. 1988)). All three of these factors are present. Carter entered the victim's home at 12:30am with a loaded .22 rifle with the safety off. Carter knew Pafford was present and, as he admitted in his testimony, he knew that the victim's four children would be present as well. His explanation was that he brought the rifle "to get answers" but one does not get answers with a gun. Furthermore, Carter by own admission, simply shot Ms. Reed twice and then Mr. Pafford three times without explanation. This was not a group discussion; it was mass murder. There was no provocation. *Hutchinson v. State*, 882

So.2d 943, 956 (Fla. 2004)(concluding there was no sudden provocation where former live-in boyfriend killed a mother and her three children because there was an hour or an hour and a half between the argument between former boyfriend and mother and the murders concluding considering the time between the argument and the actual murders, as well as the time taken between each shooting, a rational trier of fact could find premeditation). Even resistance is not really present. According to Carter's testimony, Ms. Reed grabbed the rifle but, even if that were true, she was no threat to Carter. She was the one on the business end of the rifle. He was the one with his finger on the trigger. He would have had no trouble winning the alleged struggle for the rifle. According to Carter's own testimony, Mr. Pafford was in shock and did not move much less take any threatening actions toward Carter. The sixteen year old Courtney was attempting to run away when shot. These murders were carried out as a matter of course. Carter shot Reed twice in the head and Pafford three times in the head and Courtney once in the head. Carter was, by his own admission, an excellent shot. The rifle was not an automatic weapon; it required Carter release the trigger between shots. Carter was also required to aim the rifle at each victim who were at opposite ends of the living room. He shot a total of six round,

killing three people. The trial court properly found these murders to be CCP.

Harmless Error

The error, if any, was harmless. While this Court has held that CCP is one of the "most serious aggravators set out in the statutory scheme," the prior violent felony aggravator, when that prior felony is a murder, is equally serious. *Farina v. State*, 937 So.2d 612, 625 (Fla. 2006)(noting that HAC and CCP were among "the most serious aggravators set out in the statutory scheme" citing *Larkins v. State*, 739 So.2d 90, 95 (Fla.1999)). In this case the defendant murdered three people including a teenager. In its sentencing order, the trial court specifically concluded "that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed." The error, if any, in finding the CCP aggravator was harmless.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY FOUND AND INSTRUCTED THE JURY ON THE DURING THE COURSE OF A BURGLARY AGGRAVATOR? (Restated)

Carter contends that the trial court improperly found the during the course of a burglary aggravator. Carter is basically arguing that *Delgado v. State*, 776 So.2d 233 (Fla. 2000) should be expanded to the "during a course of a burglary" aggravator.

The legislature, however, has nullified *Delgado* twice. Carter also argues that the felony murder aggravator is an automatic aggravator. Both this Court and United States Supreme Court have repeatedly rejected this argument. Thus, the trial court properly found the burglary aggravator.

The trial court's ruling

During a pretrial hearing, the defense asked for notice of the underlying felony for the felony murder charge because he could not conceive of a felony that would form the basis for felony murder which the trial court denied. (Vol. V 819-821). During pretrial hearings, defense counsel argued the felony murder aggravator did not narrow the class. (Vol. V 864). The defendant filed a motion requesting a special verdict, arguing that the State would violate double jeopardy by seeking the CCP aggravator if the jury convicted only of felony murder, thereby acquitting him of premeditated murder, and citing *Mackerley v. State*, 777 So.2d 969 (Fla. 2001) which the trial court reserved ruling on. (R. Vol. I 32-34; Vol. V 821). The prosecutor agreed to the special verdicts. (Vol. VI 1046-1048). The trial court reserved ruling on the special verdict form until the charge conference at the request of defense counsel. (Vol. VI 1049).

Carter filed a motion to declare the during the course of a felony aggravator unconstitutional which the trial court denied. (R. Vol. I 106-113; 114).

Carter also filed a motion to prohibit instruction on the felony murder aggravating circumstance. (R. Vol. IV 573). He argued that during the penalty phase, the State should be prohibited from arguing the during a course of a burglary aggravator because "the State has progressed from a simple shooting inside a home to felony murder and then to felony murder supporting an aggravator for the death penalty." He asserted that there was no evidence of unlawful entry or remaining in as required to prove burglary. He argued it was akin to doubling. The trial court denied the motion. (R. Vol. IV 575).

At trial, according to Carter's own trial testimony, Ms. Reed said she wanted both of them to leave. (T. XVII 1532-1533). Carter admitted Ms. Reed never asked him inside. (T. XVII 1591). Carter then testified that by opening the door, her actions invited him inside. (T. XVII 1591). She opened the door when Carter said I'm not leaving until you give me some answers. (T. XVII 1592). He took the rifle to get answers "one way or another." (T. XVII 1601). Carter admitted that he was not going to leave until he got answers. (T. XVII 1601).

After the defense rested, defense counsel renewed his motion for judgment of acquittal arguing that felony murder based on the burglary did not apply because there was no proof of unlawful entry and the remaining in theory should not apply in this case. (T. XVII 1661). Defense counsel objected to the felony murder theory during the guilt phase charge conference. (T. XVIII 1715). The verdicts were special verdicts finding Carter guilty of both premeditated murder and felony murder with burglary being the underlying felony. (R. Vol. IV 548-556).

The trial court found the during the course of a burglary aggravator in relation to both victim Pafford and victim Reed and found that Carter intended to commit at least an assault when entering the victim's home.

Preservation

This issue is partially preserved. While defense counsel made a similar argument; the argument on appeal is greatly expanded. It is not the exact same argument. Defense counsel did not argue that *Delgado* should be expanded to the burglary aggravator.

The standard of review

This Court's review of claims that the trial court improperly found an aggravating circumstance is limited to determining whether the trial judge applied the correct rule of law and, if

so, whether competent, substantial evidence supports his finding. *England v. State*, 940 So.2d 389, 402 (Fla. 2006)(citing *Hutchinson v. State*, 882 So.2d 943, 958 (Fla. 2004)).

Merits

Carter is basically arguing that *Delgado v. State*, 776 So.2d 233 (Fla. 2000) should be expanded to the "during a course of a burglary" aggravator. In *Delgado*, the Florida Supreme Court held if a person has consent to enter, he cannot be convicted of burglary under the "remaining in" theory unless the person surreptitiously remains on the premises. *Delgado*, 776 So.2d at 240. The *Delgado* Court concluded that the prosecutor could not use the criminal act to prove revocation of the consent to enter. The legislature then passed an amendment to the burglary statute which stated that the decision in *Delgado* was contrary to the legislative intent and the decision and its progeny were nullified. ch. 2001-58, Laws of Fla. This Court then held, in *State v. Ruiz*, 863 So.2d 1205 (Fla. 2003), that the amendment was limited to burglaries that occurred after the operational date of February 1, 2000 as announced in the amendment. Justice Wells dissented in *Ruiz* advocating that the Court recede from *Delgado*. The legislature then passed another amendment to the burglary statute which stated that the decision in *Ruiz* was contrary to the legislative intent and the decision was

nullified. Ch. 2004-93, Laws of Fla. The legislature expressed its intent to have the burglary statute interpreted "untainted by *Delgado v. State*, 776 So.2d 233 (Fla. 2000)."[5] *Delgado* and its

---

[5] This amendment provided, in pertinent part:

> (4) The Legislature finds that the cases of *Floyd v. State*, 850 So.2d 383 (Fla.2002); *Fitzpatrick v. State*, 859 So.2d 486 (Fla.2003); and *State v. Ruiz/State v. Braggs* [863 So.2d 1205], Slip Opinion Nos. SC02-389/SC02-524 were decided contrary to the Legislative intent expressed in this section. The Legislature finds that these cases were decided in such a manner as to give subsection (1) no effect. The February 1, 2000, date reflected in subsection (2) does not refer to an arbitrary date relating to the date offenses were committed, but to a date before which the law relating to burglary was untainted by Delgado v. State, 776 So.2d 233 (Fla.2000).
>
> (5) The Legislature provides the following special rules of construction to apply to this section:
>
> > (a) All subsections in this section shall be construed to give effect to subsection (1);
> >
> > (b) Notwithstanding s. 775.021(1), this section shall be construed to give the interpretation of the burglary statute announced in *Delgado v. State*, 776 So.2d 233 (Fla.2000), and its progeny, no effect; and
> >
> > (c) If language in this section is susceptible to differing constructions, it shall be construed in such manner as to approximate the law relating to burglary as if *Delgado v. State*, 776 So.2d 233 (Fla.2000) was never issued.
>
> (6) This section shall apply retroactively.

progeny have been superceded by statute twice. *Delgado* is no longer valid law.

Furthermore, this burglary occurred on July 24, 2002. This was well after the February 1, 2000 operational date of the first *Delgado* amendment. *Floyd v. State*, 850 So.2d 383, 402, n. 29 (Fla. 2002). It is the amendment, not *Delgado*, that controls.

Delgado, even if it were still valid law, would not apply to this case. *Delgado* dealt with the situation where the person originally had consent to enter and under what circumstances that original consent could be said to be revoked. *Delgado* and its progeny concerned the unlawful "remaining in" type of burglary. This, however, is an "unlawful entry" case, not a unlawful "remaining in" case. (T. Vol. XIX 1924-1925). Here, there was no consent to enter the victim's home in the first place. According to Carter's own trial testimony, while he was outside the home, Ms. Reed said she wanted both Carter and Pafford to leave. (T. XVII 1532-1533). While Carter testified that Ms. Reed opened the door, that was only after he refused to leave. (T. XVII 1592). Carter was implicitly threatening to cause a scene and disturb the neighbors and awake her four sleeping children. His voice was loud. Moreover, prior to driving over to Ms. Reed's home, Carter called her house at

11:24, and was informed by Reed's son, Rick Smith, that his mother was not home, which he testified did not believe because he had driven by three hours earlier and saw Mr. Pafford there. Carter's own testimony was that he intended to commit aggravated assault "if he had to". Carter was going to force Ms. Reed to see him regardless of her wishes. Carter never had consent to enter Ms. Reed's home - far from it - she specifically asked Carter to leave before he entered her house. Carter basically barged into the victim's house, armed with a loaded rifle, against the owner's expressed wishes. The problem of an invited guest turning criminal or violent that was at issue in *Delgado* is not at issue here. Carter was not an invited guest. The entire problem of what constitutes revocation of that consent addressed by *Delgado* is not present in this case. *Delgado* does not apply to cases, as this one, where the defendant entered without consent. Consent obtained by refusing to leave is no consent at all. *Cf Johnson v. State,* 921 So.2d 490, 508 (Fla. 2005)(concluding that Johnson was not entitled to relief pursuant to *Miller* (a precursor to *Delgado)* because he obtained entry under false pretenses and consent obtained by trick or fraud is actually no consent at all and will not serve as a defense to burglary citing *Schrack v. State*, 793 So.2d 1102 (Fla. 4th DCA 2001) and *Alvarez v. State*, 768 So.2d 1224 (Fla.

3d DCA 2000)); *Schrack v. State*, 793 So.2d 1102, 1104 (Fla. 4th DCA 2001)(explaining that "*Delgado*, however, concerns only the situation where the defendant enters the premises with the occupant's consent."); *Alvarez v. State*, 768 So.2d 1224, 1225 (Fla. 3d DCA 2000)(explaining that *Delgado* held only that a person known to the occupant who was consensually invited into her premises may not be held guilty of a burglary merely because she later commits an offense within the structure.). Carter's reliance on Justice Almon's dissent in *Davis v. State*, 737 So.2d 480, 484-487 (Ala. 1999), is misplaced. Obviously, this was the dissent. Most importantly, the logic of the dissent, which is "every murder committed indoors" becomes a capital murder ignores the entire foundation for the crime of burglary. It was the "'mere' fact that the murder occurred inside a dwelling" made it a capital crime at common law. The concept of burglary was that a felony was committed inside a dwelling versus outdoors. As this Court has explained "the privilege of non-retreat from the home stems not from the sanctity of property rights, but from the time-honored principle that the home is the ultimate sanctuary." *Weiand v. State*, 732 So.2d 1044, 1052 (Fla. 1999). That is the entire basis for the crime of burglary. Burglary was never a property crime. As the California Supreme Court explained:

> The interest sought to be protected by the common law crime of burglary was clear. At common law, burglary was the breaking and entering of a dwelling in the nighttime. The predominant factor underlying common law burglary was the desire to protect the security of the home, and the person within his home. Burglary was not an offense against property, real or personal, but an offense against the habitation.

People v. Davis, 958 P.2d 1083, 1088 (Cal. 1998)(citing Note, *Statutory Burglary-The Magic of Four Walls and a Roof*, 100 U. Pa. L.Rev. 411 (1951)); See also Model Penal Code Commentaries (1980) com. to § 221.1, p. 67 (observing that the "notable severity of burglary penalties is accounted for by the fact that the offense was originally confined to violent nighttime assault on a dwelling. The dwelling was and remains each man's castle, the final refuge from which he need not flee even if the alternative is to take the life of an assailant. It is the place of security for his family, as well as his most cherished possessions. Thus it is perhaps understandable that the offense should have been a capital felony at common law…."). The entire rationale for the crime of burglary was that it was worse to enter a home with the intent to harm the person whose home it was than to harm the person outside their home. The "mere" fact that the murder occurred inside a dwelling was the crime of burglary. Justice Almon admits that when there is a struggle, "the killer will understand that he is not welcome." *Davis*, 737 So.2d at 485. But the phrase "not welcome" in legal terms means

revocation of consent to enter. Justice Almon states that there is no capital offense of "murder of a person in the person's home." Yes, there is. It is burglary with premeditated murder as the underlying felony. Justice Almon, in a footnote, suggests that he would not be "offended" if the Alabama legislature created a capital offense of "murder of a person in that person's home." *Davis*, 737 So.2d at 486, n.3. This is exactly what the Florida Legislature did albeit it in different words.

Moreover, here, there was no original consent to enter that was then revoked. Carter's own version of events was that Ms. Reed asked him to leave. She never willingly consented to Carter's entry. There was no original consent to enter in this case. Ms. Reed told Carter to leave while he was outside the front door but he ignored her expressed wishes and entered her home against her wishes. Even Justice Almon would find burglary under the facts of this case. Here, there is no "guessing" into a capital conviction. *Davis*, 737 So.2d at 486.

Carter also asserts that when a premeditated murder occurs inside a home, the during the course of a burglary aggravator becomes an automatic aggravator. Carter acknowledges this Court's holding in *Blanco v. State*, 706 So.2d 7, 11 (Fla.1997). This Court "has consistently rejected claims that the

aggravating circumstance that the murder was committed in the course of committing a specified felony is unconstitutional because it constitutes an automatic aggravator and does not narrow the class of persons eligible for the death penalty." *Rogers v. State*, 2007 WL 108367, *11 (Fla. January 18, 2007)(citing *Arbelaez v. State*, 898 So.2d 25, 46-47 (Fla. 2005)(quoting *Ault v. State*, 866 So.2d 674, 686 (Fla. 2003)). The United States Supreme Court, likewise, has rejected the claim that using the same fact as the basis of a conviction and as a basis for an aggravating circumstance violates the Eighth Amendment. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). There is a serious flaw in the logic of aggravators being "automatic." Yes, certain fact patterns give rise to certain aggravators. For example, if a woman victim were raped, beaten, and then strangled to death, this would "automatically" give rise to the HAC aggravator.; *Banks v. State*, 700 So.2d 363, 366 (Fla. 1997)(affirming finding of HAC where victim was sexually battered before being shot citing *Swafford v. State*, 533 So.2d 270, 277 (Fla.1988) and *Lightbourne v. State*, 438 So.2d 380, 391 (Fla.1983)); *Hitchcock v. State*, 578 So.2d 685, 693 (Fla. 1990)(upholding HAC aggravator and stating that strangulations are nearly *per se*

heinous). But counsel fails to explain what the constitutional problem with that is. The trial court properly found the during a course of a burglary aggravator.

Harmless error

The error, if any, was harmless. Carter seems to be limiting his attack to the aggravator, not the conviction. But as to the conviction, even if the merger doctrine applied, because the jury found Carter guilty of both premeditated and felony murder by special verdict, any flaw in the felony murder theory does not matter. The verdicts were special verdicts finding Carter guilty of both premeditated murder and felony murder with burglary being the underlying felony. (R. Vol. IV 548-556). The cases reversing convictions when one of the theories is legally invalid involve general verdicts. *Yates v. United States*, 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957)(holding a general verdict is invalid when it rests on multiple bases, one of which is legally invalid because "it is impossible to tell which ground the jury selected."); *Fitzpatrick v. State*, 859 So.2d 486 (Fla.2003)(reversing first degree murder conviction due to improper definition of burglary as the basis for the felony murder conviction where a general verdict was employed citing *Mackerley v. State*, 777 So.2d 969 (Fla. 2001)); Cf. *Brooks v. State*, 918 So.2d 181, 221 (Fla. 2005)(Pariente, C.J.,

dissenting from denial of rehearing)(averring that reversal of a first degree murder conviction was required because "the general verdict of guilt precludes us from determining whether the jury relied upon the valid premeditated murder theory or the legally invalid felony murder theory."); *Brooks v. State*, 918 So.2d 181, 221 (Fla. 2005)(Lewis, J., dissenting)(noting "the jury in the instant matter entered only a general verdict finding Brooks guilty of first-degree murder after being instructed on both theories."). Where, as here, there is a special verdict, any flaw in one theory does not undermine the validity of the other theory. *United States v. Najjar*, 300 F.3d 466, 480 & n.3 (4th Cir. 2002)(explaining that a special verdict, as opposed to general verdict, obviates any *Yates* problem by allowing a court to determine upon what factual and legal basis the jury decided a given question and affirming convictions regardless of an *Yates* problem because they rest on at least one valid theory of liability specifically found by the jury and thus any error was harmless); *Tenner v. Gilmore*, 184 F.3d 608, 612 (7th Cir. 1999)(explaining that "[s]pecial verdicts avoid the *Yates* problem, because the court then can be confident that the facts as the jury believed them to be are a legally proper basis of conviction."). Any *Yates* problem was cured by the special verdict form. The premeditated theory is legally sufficient to

sustain the first degree murder conviction regardless of the validity of the felony murder theory.

As to the aggravator, it is harmless as well. Even if the burglary aggravator is stricken, two stronger aggravators remain. Both CCP and the prior violent aggravator remain. While this Court has held that CCP is one of the "most serious aggravators set out in the statutory scheme," the prior violent felony aggravator, when that prior felony is a murder, is equally serious. *Farina v. State*, 937 So.2d 612, 625 (Fla. 2006)(noting that HAC and CCP were among "the most serious aggravators set out in the statutory scheme" citing *Larkins v. State*, 739 So.2d 90, 95 (Fla.1999)). Here, the prior violent felony aggravator is based on the contemporaneous murders of the three victims. Most findings of prior violent felony aggravator based on contemporaneous murders involve one other murder victim, not two, as here. In other words, the prior violent felony aggravator is particularly strong in this case both because the felony involved is a murder and there are two other victims. In its sentencing order, the trial court specifically concluded "that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders

of Glenn Pafford and Elizabeth Reed." The error, if any, in finding the burglary aggravator was harmless.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ASSIGNING GREAT WEIGHT TO TWO OF THE AGGRAVATORS? (Restated)

Carter asserts that the trial court abused its discretion by assigning great weight to the prior violent felony aggravator and the during a course of a burglary aggravator in light of the life recommendation for the murder of Courtney Smith. Carter admits that the trial court correctly found these aggravators. First, the judge is not bound by a jury's determination of weight. According to this Court, the judge must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each. Moreover, a jury's life recommendation in one murder does not limit the judge's discretion in weighing aggravators in the other murders. Here, the jury recommended death for Pafford and Reed, so the jury agreed with the judge that aggravators outweighted mitigators as to those two murders. Thus, the trial court did not abuse its discretion in assigning great weight to both the prior violent felony aggravator and the burglary aggravator as to both Ms. Reed and Mr. Pafford.

The trial court's ruling

The trial court assigned great weight to both aggravators as to both victims, Ms. Reed and Mr. Pafford. (R. VI 698, 699, 702,703)

The standard of review

The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard. ***Buzia v. State***, 926 So.2d 1203, 1216 (Fla. 2006)(citing ***Sexton v. State***, 775 So.2d 923, 934 (Fla. 2000)). Discretion is abused "only where no reasonable man would take the view adopted by the trial court." ***Buzia***, 926 So.2d at 1216.

Merits

As this Court has explained, under section 921.141(3), Florida Statutes, the trial court must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each. ***State v. Steele***, 921 So.2d 538, 546 (Fla. 2005)(rejecting an argument requiring specific jury findings on aggravators because the findings "could unduly influence the trial court's own determination of how to sentence the defendant."). A judge is not bound by a jury's determination of the weight to be given the aggravators and mitigators. So, even if the jury rejects an aggravator, the judge is not required to do likewise.

But, in fact, in this case, we do not know what weight the jurors assigned to these two aggravators. For example, while the jury found the murder of Courtney Smith to be premeditated, they were not instructed on CCP as to her murder. The defendant admitted, on the stand, that he intended to murder Reed and Pafford but claimed that he did not intend to murder Smith. According to the defendant, Smith was shot while he was struggling with her mother for the rifle. The jury could have found and assigned great weight to the burglary aggravator but found that the mitigation outweighed that aggravator without the CCP aggravator.

Moreover, a jury's life recommendation in one murder does not limit the judge's discretion in weighing aggravators in the other murders. Here, the jury recommended death for Pafford and Reed, so the jury agreed with the judge that aggravators outweighted mitigators as to those two murders. Thus, the trial court did not abuse its discretion in assigning great weight to both the prior violent felony aggravator and the during a course of a burglary aggravator as to both Ms. Reed and Mr. Pafford.

Harmless error

The error, if any, was harmless. The trial court also assigned great weight to the CCP aggravator. In its sentencing order, the trial court specifically concluded "that any of the

considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed." The trial court would have sentenced Carter to death regardless of the weight assigned to these two aggravators.

ISSUE V

WHETHER THE TRIAL COURT'S SENTENCING ORDER IS SUFFICIENTLY CLEAR? (Restated)

Carter asserts that the trial court's sentencing order lacks sufficient clarity. The trial court's twenty-five page sentencing order is quite clear. It covers the aggravator and all the proposed mitigators advocated by the defense. In additional, the trial court considered and found two non-statutory mitigators independently.

The trial court's ruling

Defense counsel, in his written sentencing memoranda, asserted that the death recommendation were "not strong mandates for the death penalty", "in view of the life recommendation for the murder of Courtney Smith." (R. Vol. IV 650). The trial court wrote a twenty-five page sentencing order. (R. Vol. IV 694-718).

Preservation

This issue is partially preserved. Defense counsel argued that the judge should consider the life recommendation in one of the murders in sentencing as to the other two murders. However, any claim regarding lack of clarity was not preserved. Carter did not file a motion to correct the sentencing order pointing out any alleged deficiencies.

The standard of review

The standard of review for clarity of the sentencing order is unclear but it seems odd to defer to the trial court in an area that concerns appellate review. So, the standard is probably *de novo.*

Merits

This Court has held that the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. *Foster v. State*, 778 So.2d 906, 919-20 (Fla. 2000).

In *Dennis v. State*, 817 So.2d 741, 763 (Fla. 2002), this Court rejected a clarity challenge to the judge's sentencing order. Dennis claimed that the trial court's sentencing order provided an inadequate basis for review because it contained several factual inaccuracies in its application of the HAC aggravator. The trial court's findings included a statement that family members testified that Dennis had physically abused his ex-girlfriend, who was one of the murder victims but, in fact, "none of the witnesses produced at trial or during the penalty phase provided such testimony." However, there was other testimony that established the abuse. The Court concluded "notwithstanding the factual inaccuracies in the sentencing order, there was ample evidence supporting the lower court's rejection of this mitigating circumstance." Moreover, the Court explained that "[a]ny inaccuracies in the finer details of the injuries endured by the victims were inconsequential to the HAC finding." The Court concluded that despite Dennis's arguments to the contrary, the trial court's sentencing order revealed "a thorough consideration of the aggravating and mitigating circumstances at issue."

Here, like *Dennis*, the trial court's twenty-five (25) page sentencing order revealed "a thorough consideration of the aggravating and mitigating circumstances at issue." But, here,

unlike *Dennis*, opposing counsel is not even asserting that there are any factual errors in the sentencing order in this case. The sentencing order contains two pages of facts. (R. Vol. IV 695-697). It discusses the three aggravators as to victim Pafford for five pages. It then discusses the three aggravators as to victim Reed for five pages as well. It has a separate section for statutory mitigation explaining that the defense did not present any statutory mitigating evidence but noting that the judge independently looked for any statutory mitigation but found none. (R. Vol. IV 707). The order then addressed each of the non-statutory mitigators proposed by the defense in its written sentencing memo. (R. Vol. IV 707). The trial court then independently looked at and found two additional non-statutory mitigators not presented by the defense sentencing memorandum which it gave some weight. (R. Vol. IV 707).

Carter seems to be asserting that the trial court erred in not considering the jury's life recommendation as to one victim as mitigating evidence in the sentencing of the other two victims. A life recommendation is not mitigating evidence. It is not evidence at all; rather, it is a jury's legal conclusion. A life recommendation certainly does not meet the textbook definition of mitigating evidence. It is not the defendant's background, character or future conduct. Instead, it is the

jury's conduct, or more accurately, the jury's legal conclusion. So, a life recommendation is not mitigation.

Moreover, of course, the jury knew that they recommended life. The jury considered the evidence underlying their life recommendation in its death recommendation; the underlying facts and evidence that led to the life recommendation were obviously considered by the jury in reaching their two death recommendations. Carter seems to be asserting that the jury's recommendation of life is inconsistent with the jury's recommendation of death in the other two murders because the mitigation in necessarily the same. The aggravators and the evidence, however, were not the same. Carter's testimony was that he accidentally shot Courtney but just plain shot Ms. Reed and Mr. Pafford. Surely, appellate counsel is not suggesting that the jury could not consider the defendant's own testimony in reaching their life recommendation as to Courtney or in reaching their death recommendations as to victims Pafford and Reed.

Carter also argues that the trial court failed to consider the mitigation cumulatively. The trial court, in its sentencing order, does not have a section entitled cumulative mitigation as a separate mitigator to be considered by itself. But that is understandable. Cumulative mitigation is part of the weighing

process. That is what the weighing process does - considers the weight of the aggravators cumulatively with the weight of the mitigators cumulatively. The trial court weighs the aggravators against the mitigation cumulatively including the quality of both the aggravators and mitigators. *Waldrop v. State*, 859 So.2d 1181 (Ala. 2002)(reasoning that the weighing process is not a factual determination and is not susceptible to any quantum of proof; rather, the weighing process is a moral or legal judgment); *Ford v. Strickland,* 696 F.2d 804, 818 (11th Cir. 1983)(observing that while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not). Indeed, this Court's opinions, which are often considerably longer than any sentencing order, do not discuss the mitigation cumulatively. There is no requirement that the judge reduce his weighing to writing and this Court should not create one. The United States Supreme Court has held that the sentencer in a capital case need not be instructed as to how to weigh particular facts when making a sentencing decision. See *Harris v. Alabama*, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995)(rejecting the notion that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required, quoting

Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that "the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer). This Court certainly does not need a written paragraph on weighing for appellate review because it does not reweigh on appeal. *Holland v. State*, 773 So.2d 1065, 1078 (Fla. 2000)(explaining that "[t]his Court's function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge" citing *Bates v. State*, 750 So.2d 6 (Fla. 1999)). This Court only reweighs aggravation with mitigation after it strikes an aggravator. The trial court's sentencing order is sufficiently clear for appellate review.

ISSUE VI

WHETHER THE PROSECUTION IS JUDICIALLY ESTOPPED FOR SEEKING THE DEATH PENALTY BASED ON A LETTER TO MEXICAN OFFICIALS? (Restated)

Carter asserts that the prosecution should be judicially estopped from seeking the death penalty based on a letter to Mexican officials from the prosecutor agreeing to forgo the death penalty in exchange for Carter's return. First, the State is not bound by the letter because the Mexican officials did not

return Carter; rather, he was captured in the United States. Moreover, the State did not freely take an "inconsistent" position on the death penalty. The State was forced to agree to a life sentence by Mexico's policy and its reluctance to do so is clearly stated in the letter. Furthermore, the doctrine of judicial estoppel, if it applies at all, applies only to factual positions, not legal positions. Additionally, application of the doctrine in this manner would end plea negotiations in capital cases. Prosecutors often explore the possibility of a life sentence in exchange for a guilty plea during plea negotiations and would be required to forego seeking the death penalty under this logic. The trial court properly denied the motion to prohibit the State from seeking the death penalty.

The trial court's ruling

Carter filed a motion to prohibit the State from seeking the death penalty based on the letter to the Mexican Consulate. (R. Vol. II 323-326). A copy of the letter was attached to the motion. The motion admitted that "the Mexican Government had nothing to do with his arrest" and "[h]e was arrested in the United States without their participation or cooperation." Carter argued that the State was acting capriciously and arbitrarily. Carter asserted that the State should be estopped, based on federal and state due process, from seeking a death

sentence based on their earlier “inconsistent” position taken in the letter expressing satisfaction with a life sentence. During pretrial hearings, defense counsel argued the motion asserting that the prosecutor was willing to accept a life sentence at one point and their seeking death was inconsistent with their position in the letter. (Vol. V 911-919). The trial court did not think the positions were inconsistent because the prosecutor, in the letter, made it clear that he was agreeing to a life sentence reluctantly and because it was the only way the Mexican officials would agree to return him. (Vol. V 919). The trial court viewed the prosecutor as being “essentially” under “duress” (Vol. V 920). Defense counsel argued that once a decision for life had been made, it could not be changed. (Vol. V 920). The trial court noted that the Mexican government did not help find Carter, nor help capture him and “they certainly didn’t turn him over”. (Vol. V 921). The prosecutor explained that he and the State Attorney met with a representative of the Mexican government, at the consulate in Orlando, who told them that Mexico extradition policy was not to extradite or help in any way finding a person if the State was seeking death. (Vol. V 921-922). The representative stated that only if they wrote a letter agreeing not to seek the death penalty would the Mexican government cooperate. (Vol. V 922). The prosecutor stated “did

not want to do this and we did not want to waive the death penalty." (Vol. V 923). The prosecutor explained that Carter was caught in Kentucky "with no help or assistance at all from Mexico." (Vol. V 923). The prosecutor agreed that if Mexico had extradited him, the State would have been bound by the letter. (Vol. V 926). The prosecutor noted that the agreement in the letter was a quid pro quo for Mexico's cooperation. (Vol. V 926). The trial court denied the motion. (R. Vol. II 327; Vol. V 927).

Carter also filed a motion for a pre-trial ruling as to the admissibility, during the penalty phase, of the letter to the Mexican Consulate. (R. Vol. II 328-330). He argued that he should be able to inform the jury, in the penalty phase, that the State took inconsistent positions on the death penalty in this case. Carter asserted that the letter showed that, at one time, the State decided to accept a life sentence. In this motion, defendant admitted that the letter was "conditional." (R. Vol. II 328). The trial court denied the motion. (R. Vol. II 331).

At the motion hearing prior to the penalty phase, defense counsel renewed his motion as to the admissibility of the letter during the penalty phase. (T. XIX 1974-1975). The prosecutor explained that they were basically "coerced" by the Mexican

government. (T. XIX 1976). The trial court granted the motion. (T. XIX 1977). Defense counsel objected to the elected State Attorney being allowed to testify as to his decision to rebut a claim that the state was taking inconsistent position on the death penalty in this case. (T. XIX 1981-1982). Defense counsel noted that it would open a "huge can of worms' if Mr. Shorstein testified as to the appropriateness of the death penalty. (T. XIX 1985). The trial court ruled, if the defense admitted the letter, the State could call a witness to rebut. (T. XIX 1985). The prosecutor noted that the letter was like plea negotiations which are not admissible. (T. XIX 1987). The trial court then reversed its prior ruling and reversed ruling to think about the matter. (T. XIX 1987). Defense counsel renewed the motion. (T. XIX 2037). The trial court denied the motion. (T. Vol. XIX 2039).

Preservation

This issue is preserved. The defendant filed a motion raising the same grounds he asserts as error on appeal and properly obtained a ruling. *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985)(explaining to preserve an issue for appeal, counsel must preserve the issue by making a specific objection to the admission of evidence on the same grounds as raised on appeal.).

The standard of review

The trial court's application of judicial estoppel is reviewed for abuse of discretion. *Stephens v. Tolbert*, 471 F.3d 1173, 1175 (11th Cir. 2006); *In re Ark-La-Tex Timber Co., Inc.*, 2007 WL 210364 (5th Cir. January 29, 2007)(noting that judicial estoppel is an equitable doctrine invoked by the court within its sound discretion).

Merits

The letter does not bind the State. If the letter was viewed as a contract, as plea bargains are, then the State would be bound by the terms if it received the benefit of its bargain - *i.e,*. the return of Carter. But, here, the State did not receive the benefit of its bargain. The Mexican officials did not return Carter; the Kentucky State Police captured him in Kentucky. It was clear from the letter that the prosecutor only agreed to forgo a death sentence as a *quid pro quo* for Carter's return. The offer of a life sentence become null and void when Mexico did not return Carter. *Cf. Hoffman v. State*, 474 So.2d 1178, 1182 (Fla. 1985)(affirming death sentence and rejecting a claim that the state improperly sought death penalty to punish defendant for not testifying against co-defendant as the plea bargain required, in exchange for a life sentence, because "[w]hen he refused to go along, the agreement became null and void as if it had never existed" and observing that "a defendant

cannot be allowed to arrange a plea bargain, back out of his part of the bargain, and yet insist the prosecutor uphold his end of the agreement.”). There is no contract-like obligation on the part of the State.

The doctrine of judicial estoppel does not apply either. This Court has explained the doctrine of judicial estoppel as “an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings.” *Blumberg v. USAA Casualty Insurance Co.*, 790 So.2d 1061, 1066 (Fla. 2001)(citations omitted). The doctrine prevents parties from “making a mockery of justice by inconsistent pleadings,” and “playing fast and loose with the courts.” *Blumberg*, 790 So.2d at 1066 (citations omitted). The United States Supreme Court has listed three factors that are often used in determining whether to apply the doctrine of judicial estoppel: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position; (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-751, 121

S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001). None of the three factors apply here.

As this Court has stated, for judicial estoppel to apply, “the position assumed in the former trial must have been successfully maintained.” *Blumberg*, 790 So.2d at 1066. There was no prior proceeding in this case. *Stephens v. Tolbert*, 471 F.3d 1173, 1177 (11th Cir. 2006)(rejecting a judicial estoppel claim where party had not persuaded a previous court to accept their earlier arguments); *JSZ Financial Co., Inc. v. Whipple*, 939 So.2d 1189, 1191 (Fla. 4th DCA 2006)(while noting that both parties have made statements in their briefs in prior appeals inconsistent with the ones they are now espousing but neither position was successfully maintained because the court never reached the merits of the issue in the prior proceedings, and therefore, judicial estoppel does not apply).

Furthermore, the doctrine was designed to protect the integrity of the courts. The letter was written by the prosecutor to the Mexican Government. There was no judicial or quasi-judicial involvement. The prosecution was not playing "fast and loose" with the courts. The prosecution was not “playing” with the courts at all. The other player was the Mexican government, not any Florida court.

Moreover, judicial estoppel applies to factual positions, not legal positions. *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 288 F.3d 491, 504 (2d Cir. 2002)(limiting application of judicial estoppel to inconsistent factual position, not legal conclusions); *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 226 (4th Cir. 2001)(noting "the position sought to be estopped must be one of fact rather than law or legal theory."); Rand G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244, 1254, 1262 (1986)(explaining that the policy underlying the doctrine, is simple and sound: a party who commits perjury should be forced to eat his words but it is necessarily limited to factual inconsistencies); Kira A. Davis, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law,* 89 Cornell L. Rev. 191, 196 (2003)(advocating that the doctrine of judicial estoppel should bar contradictory assertions of law applied to fact, but that it should not bar contradictory positions of pure law). The doctrine, which is designed to protect the judicial system from parties lying to the court about the particular facts of a case, simply does not apply to legal arguments. *See, e.g.* Fed. R. Civ. P. 8 (allowing parties to plead and prove inconsistent theories of liability). Whether

or not to seek the death penalty is a legal position, not a factual one. The doctrine of judicial estoppel does not apply.

Even if the doctrine applies, the prosecutor did not voluntarily take inconsistent positions on the death penalty. As the defendant's own motion acknowledges, the position was conditional. The letter itself makes clear that the prosecutor was agreeing to forego the death penalty "reluctantly" because he understood that it was "the only way" the Mexican officials would agree to Carter's return. This was not a freely taken position by the prosecutor. A party may not be forced to take a position by a foreign government and then have a third party assert judicial estoppel against that party. Judicial estoppel can never apply where the party did not voluntarily take the position that is claimed to be "inconsistent". It is clear that the State's actual position was always that it wished to obtain a death sentence in this case. There was no voluntary inconsistent positions taken by the State in this case.

Additionally, Florida courts rarely apply the doctrine of judicial estoppel against defendants in criminal cases, even when a defendant takes factually inconsistent positions. *Monfiston v. State*, 2006 WL 3788123, *1 (Fla. 4th DCA December 27, 2006)(rejecting the state's argument that Monfiston waived the right to assert the *Roberts* issue regarding incompletely

worded *Miranda* warnings by taking the position that no *Miranda* warnings were read at all in the earlier motion to suppress,). If judicial estoppel is going to be applied against the State, it should be applied against defendants as well. When the trial court tentatively granted the motion to admit the letter, defense counsel objected to the prosecutor calling the State Attorney to explain his position. If such evidence is admitted, the State must be provided the opportunity to explain any inconsistency. So, if the letter was admissible, Mr. Shorstein's testimony about the appropriateness of the death penalty was also admissible. This, indeed, opens a "huge can of worms", just as defense counsel stated.

Furthermore, Carter's real argument is that, if the prosecution, at any point in the case, offers a life sentence, they should be required to forever forego seeking a death sentence. But consider the effect of that principle on plea bargaining. If the State offers a life sentence, in exchange for a guilty plea, during plea negotiations which ultimately fail, the State would be estopped from seeking a death penalty in that case. Such a position would, of course, virtually end plea negotiations in capital cases. *Cf. United Kingdom v. United States*, 238 F.3d 1312, 1324 (11th Cir. 2001)(concluding that judicial estoppel did not apply where the U.S. Government

previously voluntarily disclosed certain materials to the British Government but later declined to disclose other material and noting that a contrary holding might effectively discourage the Government from attempting to solve potential document production disputes voluntarily when confronted with future requests from courts or persons abroad). As a policy matter, this Court should not invoke the doctrine. The trial court properly denied the motion to prohibit the State from seeking the death penalty.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED THE MOTION TO DECLARE FLORIDA'S CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL BASED ON *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)? (Restated)

Carter argues that this Court should recede from its decision in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), which held that Florida's death penalty statute was constitutional in the wake of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has consistently rejected *Ring* claims. Moreover, even if *Ring* applies in Florida, as both this Court and the United States Supreme Court have explained, a jury's recommendation of death necessarily means that the jury found at least one aggravator and therefore, Carter's death sentence

complies with *Ring*. The trial court properly denied the motion to declare Florida's capital sentencing scheme unconstitutional.

The trial court's ruling

Carter filed a motion to declare Florida's capital sentencing scheme to be unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). (R. Vol. II 239-254). The motion argued that Florida's death penalty statute was unconstitutional "in spite of" *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002). The defendant argued the motion during a pretrial hearing. (Vol. V 852-856). The trial court denied the motion. (R. Vol. II 255; Vol. V 856).

Preservation

This issue is preserved. The defendant filed a motion raising the same grounds he asserts as error on appeal and properly obtained a ruling. *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985)(explaining to preserve an issue for appeal, counsel must preserve the issue by making a specific objection to the admission of evidence on the same grounds as raised on appeal.).

The standard of review

Whether a statute complies with the Sixth Amendment right to a jury trial is a question of law reviewed *de novo*. *Cf. United States v. Paz*, 405 F.3d 946, 948 (11th Cir. 2005)(reviewing *Apprendi/Booker* claim *de novo*); *Simmons v. State*, 2006 WL

3313741, *2 (Fla. 2006)(holding rulings on the constitutionality of the statutes are subject to *de novo* citing ***City of Miami v. McGrath***, 824 So.2d 143, 146 (Fla. 2002)(stating that constitutionality of a state statute is a pure question of law subject to *de novo* review)).

Merits

Opposing counsel's argument completely ignores the reasoning of this Court's decision in ***State v. Steele***, 921 So.2d 538, 547 (Fla. 2005). In ***Steele***, this Court explained that, even if ***Ring*** applied in Florida, it would require only that the jury make a finding that at least one aggravator existed. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation of a sentence of death. ***Steele***, 921 So.2d at 546. The ***Steele*** Court relied on ***Jones v. United States***, 526 U.S. 227, 250-251, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), in which the United States Supreme Court explained that, in ***Hildwin v. Florida***, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." So, according to the Florida Supreme Court in ***Steele***, a jury's recommendation of

death means that the jury found an aggravator, which is all *Ring* requires. Both this Court and the United States Supreme Court have explained that a jury's recommendation of death means the jury necessarily found one aggravator.

Here, Carter's jury recommended death for two of the three victims. His jury necessarily found an aggravator in relation to both victims, Reed and Pafford, which is all that *Ring* requires. Carter makes no case specific argument that *Ring* was violated in his particular case. Rather, he asserts a general attack on Florida's death penalty statute based on *Ring* and, under the facts of this case, he has no standing to do so. In Florida, only a capital defendant whose jury recommended life and, to whom the prior violent felony aggravator did not apply, has standing to raise a *Ring* claim.

Furthermore, as this Court has repeatedly explained, due to the *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) exemption, *Ring* does not apply to cases where the prior violent felony aggravator is found. *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003)(explaining that the prior violent felony aggravator is exempted from an *Apprendi* analysis citing *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)); *Marshall v. Crosby*, 911 So.2d 1129, 1135 (Fla. 2005)(stating, in a jury

override case, that: “We have repeatedly relied on the presence of the prior violent felony aggravating circumstance when denying *Ring* claims” citing numerous cases in a footnote and concluding that Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence outside the scope of *Ring*'s requirements); *Weaver v. State*, 894 So.2d 178, 201, n.21 (Fla. 2004)(explaining, “[a]s we have previously held many times, even if *Ring* applied in Florida, the jury's unanimous determination that the defendant committed other violent felonies involving another victim would make the defendant eligible for the death penalty, thus complying with *Ring*.). Carter was convicted by this jury of three capital contemporaneous murders. For each of the two death sentences, he had two prior murder convictions based on the contemporaneous murders of the other two victims murders. *Green v. State*, 907 So.2d 489, 503 (Fla. 2005)(rejecting a *Ring* challenge where the prior violent felony aggravator was present based on two contemporaneous murders explaining these prior violent felony convictions alone satisfy constitutional mandates because the convictions were rendered by a jury and determined beyond a reasonable doubt). Thus, the trial court properly ruled that Florida’s death penalty statute was not unconstitutional in the wake of *Ring*.

ISSUE VIII

WHETHER THE TRIAL COURT REFERRING TO THE JURY'S DEATH RECOMMENDATION AS A RECOMMENDATION VIOLATES *CALDWELL V. MISSISSIPPI*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)? (Restated)

Carter contends that the jury instruction which informed the jury that their recommendation was a recommendation and it would be given great weight by the trial court was a violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This Court has repeatedly rejected hybrid *Ring/Caldwell* claims. There was no *Caldwell* violation. The judge is the final sentencer in Florida and the jury's recommendation is just that - a recommendation. *Ring* did not change the law in this regard. Thus, the trial court properly informed the jury that their recommendation was a recommendation that would be given great weight.

The trial court's ruling

The defendant filed a motion to prohibit misleading references to the advisory role of the jury at sentencing citing *Caldwell*. (R. Vol. I 38-39). He argued that each reference by the prosecutor to the jury's advisory role should be accompanied by the statement that the law requires the judge give great weight

to the jury's recommendation. The motion did not cite *Ring* nor the Sixth Amendment. The argument was based on due process.

The defendant also filed a motion to prohibit any reference to the jury's role at the penalty phase as being "advisory" or to the jury's penalty phase verdict as being a "recommendation". (R. Vol. III 425-428). Carter cited both *Caldwell* and *Ring* in this motion and relied on Justice Lewis' concurring opinion in *Bottoson* expressing concern that Florida's standard jury instruction may no longer be valid, in the wake of *Ring*. *Bottoson*, 833 So.2d at 725 (Lewis, J., concurring). Carter asserted that the jury role's was not merely advisory and that the recommendation should be referred to as a verdict. During pretrial hearings, defense counsel argued the motion. (Vol. V 875-876; Vol. VI 1075-1077). The trial court denied this motion. (R. Vol. III 429; Vol. VI 1077).

The trial court gave the following preliminary instructions at the beginning of the penalty phase:

> I am required to assign and give great weight to your recommendation and cannot override it unless reasonable men and women would not differ on the need to depart from the recommendation. It is only under rare circumstances that I could impose a sentence other than what you recommend."

(R. Vol. IV 621). The trial court had added language at the defense counsels' request over the prosecutor's objection. (T.

Vol. XX 2096). At the end of the penalty phase, the trial court instructed the jury:

> ... As you have been told the final decision as to what punishment shall be imposed is the responsibility of the judge.

(R. Vol. IV 625). The trial court repeatedly used the term "advisory sentence" in his penalty phase jury instructions. (R. Vol. IV 624-639).

Preservation

This issue is preserved. The defendant filed a motion raising the same grounds he asserts as error on appeal and properly obtained a ruling. *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985)(explaining to preserve an issue for appeal, counsel must preserve the issue by making a specific objection to the admission of evidence on the same grounds as raised on appeal.).

The standard of review

A trial court's decision regarding jury instructions is reviewed for an abuse of discretion. *James v. State*, 695 So.2d 1229, 1236 (Fla. 1997)(stating that a trial court has wide discretion in instructing the jury and that the court's rulings on the instructions given to the jury are reviewed with a presumption of correctness);See also *Aumuller v. State,* 2006 WL 3524033, *5 (Fla. 2d DCA 2006)(citing *Bozeman v. State*, 714 So.2d 570, 572 (Fla. 1st DCA 1998)).

Merits

This Court has repeatedly rejected hybrid *Ring/Caldwell* claims. *Robinson v. State*, 865 So.2d 1259, 1266 (Fla. 2004)(concluding that *Ring* does not require that this Court reconsider *Caldwell* because *Caldwell* and *Ring* involve independent concerns - *Ring*'s focus is on jury findings that render a defendant eligible for the death penalty, while *Caldwell*'s focus is on the jury's role in the decision to recommend a sentence); *Hannon v. State,* 941 So.2d 1109, 1150 (Fla. 2006)(denying a hybrid claim under *Ring/Caldwell* in a habeas petition citing *Robinson v. State*, 865 So.2d 1259, 1266 (Fla. 2004). While Justice Pariente believes that trial judges should inform jurors that they are the finders of fact on aggravating circumstances, this is not Carter's argument. *Taylor v. State*, 937 So.2d 590, 604-605 (Fla. 2006)(Pariente, J., concurring); *Globe v. State*, 877 So.2d 663, 680 (Fla. 2004)(Pariente, J., concurring)(concluding, that in light of *Ring*, "[a]t the very least, jurors should be told that they are the finders of fact on aggravating circumstances"). Rather, Carter is complaining that jurors are informed that the judge is the final sentencer and that their recommendation of life will be given great weight, both of which are correct statements of the law. Carter is not complaining of an omission in the jury

instruction rather he is complaining of what he views as a misstatement of law.

Carter argues that the statement that the judge is the final sentencer is not a correct statement of the law in light of *Ring*. However, this is a correct statement of the law even in the wake of *Ring*. The judge is the final sentencer in Florida according to the death penalty statute. *Ring* did not address whether the jury must be the final sentencer. Indeed, the *Ring* Court, in a footnote, noted that Ring was not challenging whether the judge could be the final or ultimate sentencer. *Ring*, 536 U.S., at 597, 122 S.Ct., at 2437, n. 4. (noting "Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. See *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)(plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required.")). So, the plurality of four justices did not address the issue of the Sixth Amendment and who may be final sentencer. However, Justice Scalia's concurring opinion, which was joined by Justice Thomas, makes it clear that the ultimate decision regarding the specific sentence can be left to a judge. *Ring*, 536 U.S., at 612-613, 122 S.Ct., at 2445 (explaining that "today's judgment has nothing to do with jury sentencing" and "those states that

leave the ultimate life or death decision to the judge may continue to do so".). *Ring* does not invalidate Florida's statute which provides that the judge makes the ultimate life or death decision. That the judge is the final sentencer was, and is, a correct statement of Florida law.

Furthermore, when the judge instructs the jury that their recommendation will be given great weight, he is, in fact, exaggerating, not diminishing, the jury's role in sentencing in Florida. Here, the trial court instructed the jury: "It is only under rare circumstances that I could impose a sentence other than what you recommend." (R. Vol. IV 621). Actually, as this Court has explained, it is only a jury's recommendation of <u>life</u> that is entitled to great weight. *Muhammad v. State*, 782 So.2d 343, 362 (Fla. 2001)(explaining that the statement that the jury's recommendation should be given "great weight" is limited to a jury's recommendation of life and finding error where a trial court gave a jury's recommendation of death great weight); *Weaver v. State*, 894 So.2d 178, 197-201 (Fla. 2004)(reversing a trial court's override of the jury's life recommendation because it violated *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), and explaining that the jury's life recommendation changes the analytical dynamic and magnifies the ultimate effect of mitigation on the defendant's sentence and remanding for the

imposition of a life sentence). A jury's recommendation of death, however, may be completely ignored by the judge. A judge may receive a death recommendation from the jury and simply ignore it and impose life. Such a decision is unreviewable by any appellate court due to double jeopardy. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). So, a jury instructed that its recommendation will be given great weight and "only under rare circumstances" can the judge impose a different sentence, the jury, no doubt, thinks that that means either a death recommendation or a life recommendation will be given great weight, when, in fact, only a life recommendation will be given such weight. This is exaggerating, not diminishing, their role. There was no *Caldwell* violation.

SUFFICIENCY OF THE EVIDENCE

Although not raised as an issue on appeal, this Court normally has an independent duty to address the sufficiency of the evidence for a conviction. *Buzia v. State*, 926 So.2d 1203, 1217 (Fla. 2006)(explaining that "[a]lthough Buzia has not challenged the sufficiency of the evidence, we have the independent duty to review the record in each death penalty case to determine whether competent, substantial evidence supports the murder conviction); Fla. R. App. P. 9.142(a)(6)(stating: "In death

penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). Here, however, Carter took the stand and admitted he was the perpetrator. Carter told the jury, under oath, that he committed these murders. The only dispute was about premeditation and premeditation is a question of fact for the jury. *Perry v. State*, 801 So.2d 78, 84 (Fla. 2001). Accordingly, competent, substantial evidence supports the verdict.

PROPORTIONALITY

Although not raised as an issue on appeal, this Court has an independent duty to address the proportionality of the death sentence. *England v. State*, 940 So.2d 389, 407 (Fla. 2006)(noting: "this Court conducts a review of each death sentence for proportionality, regardless of whether the issue is raised on appeal."); Fla. R. App. P. 9.142(a)(6)(stating: "In death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). Here there are three aggravators, including the prior violent felony aggravator for the murder of these three (3) victims and no substantial

mitigation such as mental mitigation. *Dennis v. State*, 817 So.2d 741, 766 (Fla. 2002)(finding two death sentences to be proportionate "given the substantial aggravation" and "the absence of any significant mitigation" in a ex-girlfriend and new lover double murder because record refuted the claim that these murders were committed in the heat of a domestic dispute where there were four aggravating circumstances: (1) that the defendant had been convicted of a prior capital felony (the contemporaneous murder); (2) that the murder was committed in the course of a felony (burglary); (3) that the murder was especially heinous, atrocious, or cruel (HAC); and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP) and the main mitigation was that defendant was under the influence of extreme mental or emotional disturbance which was given little weight citing *Way v. State*, 760 So.2d 903, 921 (Fla. 2000)(finding death sentence proportional in double murder where the defendant bludgeoned his wife and daughter with a hammer and where the trial court found the prior violent felony (contemporaneous murder), felony murder (arson), and HAC aggravators balanced against no substantial mental mitigation)). Here, unlike *Dennis*, a third party minor was also murdered. Carter entered a home at night, which he knew four children

would be present, armed with a loaded rifle, and murdered three people including one of these children.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the convictions and death sentences.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, FL 32301 this 9th day of February, 2007.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

[F:\Users\Cap_Coll\charmain\death\Carter\carterDABA2.wpd --- 2/16/07,10:34 AM]