IN THE SUPREME COURT OF FLORIDA

APPEAL NO. SC06-2090

LOWER TRIBUNAL NO.: 2004-01378-CFAWS

STATE OF FLORIDA

vs.

TROY VICTORINO

ON DIRECT APPEAL FROM THE SEVENTH CIRCUIT IN AND FOR VOLUSIA COUNTY

AMENDED APPELLANTS BRIEF
CRIMINAL CASE

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PREFACE

This is an appeal from a judgment and sentence imposing the Death Penalty from the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, the Honorable William A. Parsons presiding. The Appellant is appealing his convictions and sentence of death.

The State of Florida was the plaintiff and will be referred to as "State" in this brief. Troy Victorino the will be refereed to as "Appellant" in this brief.

The record will be cited as [V.(Volume Number)]. The trial transcripts will be cited as [p (page number) and pp (page numbers)]. The references to supplemental records will be cited as [Supp.]

NOTICE OF SIMILAR CASE

A co-defendant, Jerone Hunter who was also sentenced to death in this case has a pending appeal in this court. Jerone Hunter v. State SC06-1963.

STATEMENT OF THE CASE

On August 6, 2004, six people asleep in their home, and a dog were beaten and killed with baseball bats. The victims of the crime were Erin Belanger, Michelle Nathan, Anthony Vega, Roberto Gonzalez, Francisco Ayo Roman, Jonathan Gleason, and a dog named George.

The alleged ringleader of the murders was Troy Victorino hereinafter referred to as "Appellant". It was alleged the Appellant, Jerone Hunter, and others were squatting in victim Erin Belanger's grandmother's home. The Appellant was in jail on an unrelated charge when Erin Belanger removed the Appellant's clothes and other personal belongings from the home. (V1, pp 1-3) (V1, pp 191-193).

When the Appellant was released from jail he attempted to get his belongings back but was unable to do so. It was alleged the Appellant enlisted the help of Jerone Hunter, Michael Salas, and Robert Cannon to commit the murders. Cannon pled guilty and was not tried with the others.

The Appellant and three co-defendants Michael Salas, Jerone Hunter, and Robert Anthony Cannon, were jointly indicted on August 23, 2004 by the Volusia County grand jury upon six counts of first degree murder, one count of conspiracy to commit murder, five counts of abuse of a dead human body, armed burglary of a dwelling with intent to commit murder, and cruelty to an animal for offenses alleged

to have occurred in Deltona, Florida, on August 6, 2004. (V1, pp 29-34). The Defendants were subsequently charged in a superseding Indictment in fourteen (14) counts filed on August 27, 2004, containing the same charges. (VI, pp 43-48). The State served notice of intent to seek the death penalty on September 1, 2004. (V1, p 52).

Before the jury trial began the Appellant filed a Motion for Severance. (V3, pp 516-517).

On October 21, 2005 a hearing on the Motion to Sever was held. The Appellant argued that a joinery of all of the defendants would deny him a fair trial for numerous reasons. At the hearing the State also advanced several arguments against the motion being granted. One of the arguments advanced was the inconvenience of trying the co-defendants separately. (V10, p 1662). The State argued to the trial court the hindrance it would thus place on its witnesses and the victims' families, declaring that such inconvenience outweighed the Appellant's constitutionally protected rights under the Eight Amendment and Fourteenth Amendment to the Constitution. (V10, pp 1661-1664).

On November 2, 2005, in a written order the trial court denied the Appellant's Motion for Severance. (V4, pp 721-729) The Appellant renewed the severance motion several times during the trial thereby preserving the issue for this appeal. (V29, p 1793) (V34, p 2552) (V38, p 3102-3103) (V40, pp 3337-3340).

Appellant counsel filed a pretrial motion to suppress the DNA samples taken from the Appellant. (V4, pp 634-635).

On August 26, 2005 an evidentiary hearing was held on the Appellant's motion to suppress DNA samples taken from the Appellant. (Supp.V1 pp 1-94). The trial court denied the motion to suppress the DNA samples taken from the Appellant. in a written order on September 12, 2005 (V4, pp 652-657).

Investigators gathered evidence from the Appellants residence at 1001 Ft. Smith Blvd in Deltona on August 8, 2004. (V33, p 2391). The Appellant filed a pretrial motion to suppress all evidence taken from the Ft. Smith residence. (V5, pp 941-946).

The evidentiary hearing on the motion to suppress all of the items taken from the Ft. Smith residence was held on March 27, 2006.

On April 6, 2006 the trial court issued a written order denying the motion to suppress the items taken from the Ft. Smith house. (V7, 1239-1257).

The trial court ruled that the actual owner of the residence, Mr. Melendez consented to the search. Furthermore, even though the affiant for the search warrant had no personal knowledge of the facts, he is not required to. He learned of the information from a wide array of sources. Also, the identified citizens who provided information were not anonymous tipsters that needed their information corroborated. Lastly, the affiant did not misrepresent anything. (V7 pp 1239-1253).

Robert Cannon, a co-defendant, pled guilty to six counts of murder, abuse of a dead human body with a weapon, conspiracy to commit aggravated battery, armed burglary of a dwelling, cruelty to animals. (V30, pp 1936-1939).

On April 10, 2006 in Deland Florida, Volusia County the jury trial of the remaining three defendants began. After an impartial jury could not be selected in Volusia County, venue for trial was changed to St. Johns County, Florida, on April 25, 2006. (V7, pp 1332-1335).

On May 26, 2006 the State filed a Notice of Intent to Rely on Evidence Of Prior Bad Acts or Other Crimes Pursuant to F.S. 90.404(2) requesting evidence of an August 5, 2004 shooting incident involving the Appellant be allowed into evidence at trial. (V7, pp 1361-1367, (V7, pp 1370-1371). The trial court granted the Notice of Intent to introduce the 404 evidence. (V8, pp 1402-1411).

On July 5, 2006 in St. Augustine, Florida, St. Johns County, the Appellant and co-defendants Salas and Hunter were tried jointly by a 12 person jury before the Honorable William A. Parsons. (V17, p 41).

On July 12, 2006 The Appellant requested additional peremptory challenges. The trial court denied the request. (V28 p 1687).

On July 25, 2006 The Appellant was convicted of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (count one); first degree premeditated and felony murders of Erin

Belanger, Francisco Ayo-Roman, Jonathan W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts two to seven); abuse of the dead human body of Erin Belanger (count eight); armed burglary of a dwelling with a weapon (count thirteen); and cruelty to an animal (count fourteen). The Appellant was found not guilty on counts nine through twelve. (V44, pp 4017-4019).

A penalty phase for the three defendants was held commencing July 27, 2006, in St. Johns County before the same jury. (V46, p 4123).

On August 1, 2006, the jury recommended a death sentence for the Appellant for four of the murder counts. (V51, pp 5051-5059). The court followed the jury recommendation and sentenced the Appellant to death on September 21, 2006. (V9, pp 1558-1579).

This appeal was timely filed on October 19, 2006. (V9, pp 1580-1581)

STATEMENT OF THE FACTS

On August 6, 2004 at 6:30 a.m., a visitor to the house at 3106 Telford Lane, Deltona, Florida, found the front door open and saw a body in the living room. (V29, p 1796-1798). The visitor called 911, and Volusia County Sheriff's deputies were dispatched to the scene. (V29, pp 1805-1806).

Inside, deputies and Florida Department of Law Enforcement personnel found the deceased bodies of four (4) men, two (2) women and a small dog (a Dachshund), to-wit: Erin Belanger, Francisco Roman and the dog were found in the back right master bedroom; Jonathan Gleason and Anthony Vega were found in living room; Michelle Nathan was found in the front left bedroom, and Roberto Gonzalez was found lying in the doorway to the back left bedroom. (V29, pp 1805-1818). All victims had signs of blunt force injuries to the head and other area of their bodies and also knife wounds to the neck and upper torso. (V29, pp 1805-1818).

FDLE crime scene technician, Stacy Colton, processed the crime scene at the murder scene. (V29, pp 1823-1826). Colton collected a knife handle and knife blade from the residence because there was blood on them and the victims appeared to have stab wounds. (V29, pp 1860-1861).

Colton photographed damage to the front door of the residence. (V29, p 1833). A heel print of a shoe was found in the center of the door 36 inches above the front

porch floor (V30, p 1923). Colton prepared a diagram of the home indicating the placement of the dead bodies and all of the items of evidence she collected from the residence (V29, pp 1840-1841). There was also a videotape of the crime scene that was introduced into evidence. The video showed the damage to the front door as well as all of the rooms of the residence. (V30, pp 1919-1920, State Exhibit 22).

There were four bats that were recovered from a retention pond and were processed for latent prints. There were no latent prints on the external surfaces. (V30, pp 2655, 2568, 1662). One bat contained four unidentified latent prints underneath the tape. (V35, pp 2658-2659, 2663).

Robert Cannon, a co-defendant, pled guilty to six counts of murder, abuse of a dead human body with a weapon, conspiracy to commit aggravated battery, armed burglary of a dwelling, cruelty to animals. In exchange for his guilty plea Cannon agreed to testify truthfully against his co-defendants and would receive a life sentence. (V30, pp 1936-1939).

After FDLE crime scene technician, Stacy Colton testified, the State called Cannon to testify. (V30, pp 1935-1936). At first Cannon answered all of the questions asked of him. He admitted he pled plead guilty to the murders. (V30, pp 1936-1939). After admitting to pleading guilty to the murders Cannon requested to speak to the Court, thereupon the jury was excused from the courtroom. (V30, p 1941).

While the jury was removed the State moved the court to allow Cannon to be treated as a hostile witness. The ore tenus motion was granted and the Appellant objected in a timely manner. (V30, pp 1945-1947).

After a brief recess the jury was brought back in. Again Cannon refused to testify. (V30, p 1948). The State again began to ask Cannon leading questions and again the Appellant objected. (V30, p 1948). Over repeated leading questions the trial court allowed the Appellant to have a standing objection to all of Cannons "testimony" (V30, p 1950). Finally after repeatedly refusing to answer any further questions, Cannon testified that it was the Appellants intention to kill everyone in the house. (V30, p 1951).

After repeated questioning by Appellants attorney, Cannon did not answer any questions. He stated he is not guilty and will not answer to anyone but the Lord. (V30, p 1953). After refusing to answer any questions Cannon on his own orally moved to withdraw his plea. (V30, p 1957). The Appellant moved for a mistrial and the trial court granted a standing objection to all the leading questions asked by the State thereby preserving the issue for this appeal. (V30, pp 1945-1947, 1950, V32, p 2233 pp 2226-2242).

The Appellant was unable to conduct any meaningful cross-examination of Cannon because he refused to answer any questions. Even thought the trial court ordered Cannon to answer the Appellants questions, Cannon refused. (V30, p 1948-

1963).

Brandon Graham testified that he was a friend of Salas and Cannon. Graham testified he met Hunter and Appellant only a few days before the murders. (V30, pp 1971-1973). Graham testified on August 1, 2004 all four of them went to the Telford residence to pick up some of Victorino's belongings. (V30, p 1974-1975). The four were accompanied by some girls. (V30, pp 1974-1975). The girls went into the house and retrieved Appellants CD case. (V30, p 1976). Graham, Hunter, Salas and Cannon were all armed with bats. (V30, p 2001). Appellant did not go up to the house. (V30, p 2004, V40, p 3392). An unknown person yelled that the police were on their way and everyone left. (V30, pp 1976-1977).

Over objection by the Appellant, Graham testified on August 4, 2004, Appellant and the group went to a park to fight some other kids, but no one showed up. (V30, 1981-1982). They later saw the group they intended to fight and the Appellant shot into their vehicle. (V30, p 1983).

The State had previously filed a Notice of Intent to Rely on Evidence Of Prior Bad Acts or Other Crimes Pursuant to F.S. 90.404 (2) on May 26, 2006 requesting this testimony be allowed into evidence at trial. (V7, pp 1361-1367, (V7, pp 1370-1371). The trial court granted the Notice of Intent to introduce the 404 evidence. (V8, pp 1402-1411). At the trial the Appellant timely objected to this testimony on the grounds that it was improper 404 evidence, thus preserving the issue for this

appeal. (V30, p 1979). The trial court allowed the introduction of the August 4, 2004 incident into evidence. (V30, p 1979).

Graham testified on August 5, 2007, he was at the Appellant and Hunter's residence 1001 Ft. Smith Boulevard. Graham testified Salas and Cannon were also present. (V30, p 1986-1987). Graham testified that the Appellant stated he wish he had a group to help him kill people with lead pipes. Graham said the other four all agreed to do it and he just shook his head in agreement. (V30, pp 1986-2012).

According to Graham the Appellant then started mapping out the Telford house and started to plan the murders. (V30, p 1986). Graham, Appellant, Hunter, Cannon and Salas were all together in Cannon's Expedition and they all had bats. (V30, p 1989). Graham was dropped off at Kristopher Craddock's house and he never rejoined the group that night. He was suppose to rejoin them later around 9:00 but would not answer their phone calls. (V30, pp 1923-1993).

The next morning after the murders, Graham found out that six people were murdered in Deltona. (V30, p 1994). Later in the day Graham saw all four Defendants at Salas' grandmother's house. (V30, p 1996). A few days later Graham informed the police of his knowledge about the murders at Telford Lane. (V30, pp 1997-1998). Kristopher Craddock testified at trial and corroborated Graham's version of the events. (V31 pp 2164-2188).

Deputy John McDonald testified that on July 30, 2004, he responded to 1590

Providence Blvd. The owner of home was Norma Reiddy and lived in Maine. Norma Reiddy was the grandmother of victim Erin Belanger. Belanger had called the police to report that there appeared to be people at the home that were not suppose to be there. (V30, pp 1996-1997); (V31, p 2045, p 2081). When Deputy McDonald arrived at the residence he met Amanda Francis and Brandon Sheets.

Sheets told Deputy McDonald, Joshua Spencer (Norman Reiddy's grandson) gave them permission to stay at the house. (V31, p 2099). Norma Reiddy had previously given a house key to Spencer when he lived with her. Ms. Reiddy believed Spencer had returned the house keys to her. (V31, p 2155). Norma Reiddy testified she had previously met the Appellant and he was cordial. (V31, p 2157) .

Amanda Francis told Deputy McDonald the Appellant gave them permission to be there. (V31, p 2099). Norma Reiddy was contacted and informed law enforcement that Erin Belanger was her granddaughter and no one had permission to be at the 1590 Providence home except Erin. (V31, pp 2095-2096).

Deputy Taylor Sierstorpff testified that on July 31, 2004 he responded to 1590 Providence Blvd. and met with Erin Belanger and Francisco Roman. They wanted to report some items were missing from the residence. (V31, pp 2105-2106). Sierstorpff testified he saw clothing, shoes and items in a box bearing the Appellant's name on them at the residence. Erin Belanger told Sierstorpff she knew Appellant had been staying in home. (V30, p 2109). The day before Deputy McDonald told Belanger to

return the items or get rid of them. (V30, p 2103).

Kimberly Jenkins testified that she knew the six victims. (V31, pp 2115-2116). Jenkins testified she was at the Telford house on July 31, 2004 when the Appellant approached Erin Belanger about getting his property back. (V31, pp 2119-2120).

The Appellant had previously reported to the police that his property was stolen from the 1590 Providence residence. (V31, p 2138).

On the night of August 1, 2004, Erin Belanger called 911. Belanger reported that people were in front of her house and she needed help. Belanger stated she believed it was the Appellant and others attempting to retrieve their belongings. (V32, pp 2266-2286). Belanger placed a second 911 call and told the 911 operator that the same people were back banging on her door and she was afraid. (V32, pp 2296-2299, 2308)

Beverly Irving testified she was an assistant manager at the 7-Eleven store on Providence Blvd. in Deltona and was working on August 5, 2004. Irvin testified she ensured they the stores security tape was changed daily. The 7-Eleven stores security video was introduced into evidence. (V32, pp 2309-2310; 2311, 2323); (State Exhibit 28).

Jane Colaillo a video producer, created still photographs of faces and footwear of customers from the 7-Eleven tape. (V32, pp 2336-2337, State Exhibit 30). State Exhibit 30 was a poster board of still photos from 7-Eleven shortly before the

murders were committed showing the Appellant wearing Lugz boots. (V35, p 2733).

Richard Graves of the Volusia County Sheriff's Office processed the crime scene at the Telford residence. (V33, p 2361-2362). Graves also attended the autopsies of the six victims. (V33, p 2368). Graves collected hair and blood from all of six victims, (V33, p 2370, 2375, State Exhibit 31; V33, p 2379, State Exhibit 32; V33 p 2380, State Exhibit 2381; State Exhibit 34; V33, p 2383, State Exhibit 35; V33, p 2384, State Exhibit 36). Additionally Graves obtained a DNA sample from Appellant. (V33, p 2384); (State Exhibit 37).

Appellant filed a pretrial motion to suppress the DNA samples taken from the Appellant. (V4, pp 634-635).

On August 26, 2005 an evidentiary hearing was held on the Appellant's motion to suppress DNA samples taken from the Appellant. (Supp.V1 pp 1-94).

The Appellant testified he was arrested on August 7, 2004 around two o'clock in the afternoon and taken into custody. (Supp.V1, p 8). The Appellant was transported to the Operations Center. (Supp. V1, p 9).

The Appellant testified he sat and remained in the Sheriff's squad car until approximately 6-7:00 p.m. (Supp. V1, p 10). After being removed from the car, the Appellant said he was taken to an interrogation room. (Supp.V1, p 11). The Appellant testified he was interviewed by two Sheriff's Investigators, i.e., Lawrence Horzepa and Gregory Seymour. (Supp.V1, p 12). The Investigators verbally read the

Appellant his rights and then asked him to sign a waiver of them. (Supp.V1, p 12). The Appellant inquired as to whether he was under arrest for anything else or was a suspect, the Investigators responded in the negative. (Supp.V1, p 12). The Appellant signed the waiver form. (Supp.V1, p 12). After continuous questioning the Appellant adamantly denied participation in any crime and offered information of his whereabouts the evening of the homicide occurrence. (Supp.V1, p 13).

The Appellant testified after being left alone, he fell asleep in the Interrogation Room. (Supp.V1, p 13). Subsequently thereafter the Appellant testified two (2) uniformed Deputies entered the room accompanied by Investigator Gregory Seymour and told them they were going to obtain DNA samples. (Supp.V1, p 14). The Appellant said he refused and told the Officer he has to get a warrant. (Supp. V1, p 14).

According to the Appellant's testimony Officer's Charles Dowell and Richard Graves approached the Appellant. Investigator Gregory Seymour remained in the doorway. Then Officer Dowell grabbed the Appellant's already restrained hands and held them against the table. Office Graves forcibly grabbed the Appellant's cheek area with his right hand, applied pressure and opened the Appellant's mouth. Using his left hand, Office Graves inserted two swabs obtained swabbing, place them in a box, and laid them on the interrogation table. Then, while Officer Dowell continually restrained the Appellant's hands, he (Officer Graves) scraped his nails on to wax

paper, collected these items, then left. immediately. (Supp.V1, pp 14-16).

The Appellant testified at no time did the Appellant consent to the procuring of buccal swabs or nail scrapings. (Supp.V1, p 16) The Sheriff's Investigators had at that time available to them consent forms for such, but did not offer or receive one from the Appellant. It was also later found that the entire interrogation was video and audio recorded, unbeknownst to the Appellant. However, the video and audio recording was terminated prior to the forcible removal of the buccal swabs and nail scrapings for alleged privacy purposes. (V4 pp. 652-657).

The trial court denied the motion in a written order on September 12, 2005 (V4, pp 652-657). The Appellant renewed the motion before the DNA sample was allowed into evidence thereby preserving the issue for this appeal. (V33, pp 2386-2387).

Graves also gathered evidence from the Appellants residence at 1001 Ft. Smith Blvd in Deltona on August 8, 2004. (V33, p 2391). The Appellant filed a pretrial motion to suppress all evidence taken from the Ft. Smith residence. (V5, pp 941-946). On April 6,2006 the trial court issued a written order denying the motion to suppress the items taken from the Ft. Smith house. (V7, 1239-1257).

The suppression hearing took place on March 27, 2006. The trial court ruled that the actual owner of the residence, Mr. Melendez consented to the search. Furthermore, even though the affiant for the search warrant had no personal

knowledge of the facts, he is not required to. He learned of the information from a wide array of sources. Also, the identified citizens who provided information were not anonymous tipsters that needed their information corroborated. Lastly, the affiant did not misrepresent anything. (V7 pp 1239-1253).

Without objections photographs of the exterior of the Ft. Smith residence were admitted into evidence. (V33, p 2396, State Exhibit 39).

Other admitted evidence seized from the Ft. Smith residence included the Appellant's duffle bag and a pair of size 12 Lugz shoes. (V33, pp 2398-2399, pp 2401-2402, p 2420-2421, State Exhibit 40). The Appellant timely objected and renewed the pretrial motion to suppress the items before there admission thus preserving the issue for this appeal. (V33, pp 2400-2401, V4 pp 634-635).

Investigator Daniel Dewees collected four baseball bats from a retention pond. (V33, p 2481).

Investigator Lawrence Horzepa with the Volusia County Sheriff's Office testified that Appellant Victorino was located on Saturday, August 7, 2004 at a house on Ft. Smith Blvd. In Deltona, Florida and was arrested, (V34, pp 2511-2567). At that time, Hunter was found with Appellant Victorino and voluntarily came in for an interview. (V34, pp 2517-2519).

Horzepa testified that Hunter stated in his interview he was living with the Appellant at the Ft. Smith house. (V34, p 2523). Hunter said he went to the Telford

Lane house on the night of the murders because the people in that house had his stuff and identification and he wanted to get it back. (V34, p 2524). He arrived at the Telford house by Robert Anthony Cannon's Ford Expedition sometime after midnight. (V34, p 2524).

Hunter stated in the interview that he had an aluminum bat with him and that he knew Erin and her boyfriend lived there. (V34, p 2525). He stated he entered the front door and saw a white male in a recliner in the living room watching T.V. (V34, p 2526). Hunter stated he hit the male with the bat, because he thought he was lying. (V34, p 2526). Hunter could not remember how many times he hit this person, he was just swinging the bat. He stated that he hit him more than three (3) times and probably less then twelve (12) times. (V34, p 2527).

Hunter said he also struck Roberto Gonzalez in the back left bedroom and continued striking him with the bat. Hunter stated again that he was swinging and could not recall where the bats landed. (V34, p 2527). He stated that he hit him more than three (3) times and probably less then twelve (12) times. (V34, p 2527).

Horzepa testified Hunter said he left in Cannon's Expedition. (V34, p 2532). Hunter also told Horzepa he washed his clothes and shoes he was wearing that night at the Ft. Smith residence. (V34, p 2532).

On August 8, 2004 Horzepa also interviewed Michael Salas. (V34, p 2533-2534). Around 10:30 p.m. Cannon and Salas were detained in Cannon's Expedition.

(V34, p 2534-2535). Salas told Horzepa he went to the Telford residence on August 6, 2004 armed with a baseball bat. (V34, p 2541). Salas said he entered the Telford house and hit a "black dude" with a baseball bat in a back bedroom. (V34, p 2541). Salas said he only hit one person (Gonzalez). (V34, p 2560). Salas told Horzepa the location of the bats that were used in the murders. (V34, pp 2544, 2544).

Deputy Greg Yackel recovered the four bats in a retention pond in Debary, Florida. (V34, pp 2570-2573).

No fingerprints found in the Telford home matched any of the Defendants. (V35, p 2640). Fingerprints were lifted from one of the (4) four bats recovered from the retention pond but none of them matched the Defendants. (V35, pp 2658-2659). DNA samples taken from the bats matched victims Gonzalez, Belanger and Roman. (V36, p 2809-21810 pp 2814-2815,2816). A hair taken from a bat matched victim Nathan. (V36, pp 2888-2889).

When Cannon and Salas were stopped in the Expedition investigators found a size 12 Lugz boot box in the vehicle that had Appellants fingerprints on them. (V33, pp 2455-2457; V35, p 2659).

Investigators attained a footwear impression from a pay stub found in the Telford residence and it matched the Appellant's left boot. (V35, p 2679). An impression from a bed sheet at the Telford residence also matched the boot. (V35, p 2693).

Investigators also attained an impression from the front door at the Telford residence which matched the right boot. (V35, p 2705). A DNA sample taken from the Lugz boots matched the Appellant. (V36, p 2786). The Appellant objected to the DNA sample taken from the Appellant in a pretrial motion to suppress. (V4 pp 634-635). The motion to suppress DNA samples and results was denied. (V4 pp 652-657). The Appellant objected to the introduction of the DNA samples and results and renewed the motion to suppress preserve the issue for this appeal. (V36, p 2786). Blood was found on the Lugz boots matched victims Belanger and Roman. (V36, p 2794; pp 2801-2802).

A shoelace tested by FDLE contained a mixture of DNA from Hunter and victim Gonzalez. (V37, pp 2890-2892).

Miranda Torres testified she was a friend of Cannon and Salas and knew Troy Victorino and Jerone Hunter when they were neighbors for a short time. (V37, p 2920).

On the evening of August 5, 2004 before the murders, Miranda Torres said she saw all four defendants together in Cannon's Expedition. (V37, pp 2928-2929).

All of the defendants stipulated at trial that the victim's dog died of blunt force trauma. (V37, p 2944, p 2947).

Dr. Thomas Beaver, medical examiner, performed the autopsies on the victims. (V 38, pp 2976; 2981).

Dr. Beaver testified that victim, Vega, died of blunt force trauma to the head after about two blows to the head which were consistent with a baseball lat. (V38, pp 3011-3013). The second victim, Jonathan Gleason, died of blunt force trauma after at least three blows to the head by a cylindrical object consistent with a baseball bat. (V38, pp 3027-3028).

Dr. Beaver testified the third victim, Gonzalez, died of bunt force trauma to the head. (V38, p 3048). Michelle Nathan died of blunt force trauma after three to four blows to the head. (V38, pp 3058-3059). Mr. Roman died of blunt force trauma and had post-mortem stab wounds. (V38, pp 3063-3066). The sixth victim, Erin Belanger, died from blunt force trauma. (V38, p 3073). Ms. Belanger also had post-mortem stab wounds. (V38, p 3070). She also suffered an injury that was consistent with a baseball bat being pushed up through her vagina and it her abdominal cavity. (V38, pp 3070-3074).

Dr. Beaver also testified that in his opinion the baseball bat blows on the victims were pre-mortem and were painful. (V38, p 3092). After Dr. Beaver testified the State rested. (V38, p 3100).

After the State rested the Appellant renewed the motion for mistrial based on Cannons refusal to testify. (V38, p 3102). The Appellant renewed all of the death penalty motions including declaring the Florida death penalty statute unconstitutional. (V38, p 3102). The Appellant also motioned the court for a

judgment of acquittal based on insufficient evidence and renewed the severance motion. (V38, p 3103). The Appellant had previously filed a motion to sever the trial (V3, pp 516-517). The motion to sever was denied by the court (V4 pp 721-729). The trial court denied all of the other Appellant's motions. (V38, pp 3103-3104).

Counsel for the co-defendant Hunter made an opening statement that essentially argued that Hunter was utilizing the defense of duress and the Appellant threatened him into committing the murders. (V40, pp 3332-3333).

After Hunter's counsel made his opening statement and it became apparent that his defense would be to blame everything on the Appellant. The opening statement also alluded to a possible defense of duress. The Appellant moved for a mistrial based on severance, antagonistic defenses of duress. (V40, pp 3337-3340). These motions were denied by the trial court. (V40, pp 3340-3341).

The Appellant testified in his own defense. (V39, p 3213). The Appellant testified he used to live at 1590 Providence Blvd. with Joshua Spencer, (Reiddy's grandson). (V39, p 3213). The Appellant said he had the key to the Providence home. (V39, pp 3214-3215) (Defendant Exhibit 1).

The Appellant said while he was away from the 1590 Providence home the police went over there and removed Amanda Francis, arrested Brandon Sheets and towed his vehicle away. The Appellant also lost some personal property from inside the home. (V39, pp 3215-3216).

The Appellant said he went to Joshua's cousin (Erin Belanger) home on Saturday, July 31, 2004. The Appellant discussed with Belanger about getting his property back. (V39, pp 3218-3219). The Appellant did receive two bags of clothing from Roman. (V39, p 3219). The Appellant called the police to report that some of his property was still missing. (V39, p 3220). The Appellant testified he never made any threats to Erin Belanger. (V39, p 3221). The Appellant said his encounter with Erin Belanger was peaceful. (V39, p 3222).

The Appellant testified that he worked on August 5, 2004. (V39, p 3222). The Appellant said he was living at the Ft. Smith house on August 5, 2004. (V39, p 3222). Appellant said he never saw Brandon Graham, Robert Cannon or Michael Salas at the Ft. Smith residence the day of August 5, 2004. (V39, p 3223). The Appellant did say he saw Jerone Hunter at the Ft. Smith house on August 5, 2004. (V 39, p 3223).

The Appellant testified that Cannon gave him a ride to a friends home on Sky Street in Deltona. (V39, p 3225). The Appellant said he went to the Sky Street residence to retrieve his belongings. (V39, p 3225). The Appellant said he loaded the stuff in Cannon's Expedition. (V39, p 3225). Cannon drove the Appellant to the Sky Street residence. (V39, p 3226).

The Appellant acknowledged that he did go to the 7-Eleven on August 5, 2004. (V39, p 3227). The Appellant said he went to the 7-Eleven to buy a pack of

cigarettes and get something to drink. (V39, p 3227).

The Appellant testified that after he went to 7-Eleven he asked Cannon to take him to a bar called Papa Joes. (V39, p 3227). Before being dropped off at Papa Joes the Appellant said he asked to stop at the Ft. Smith house to change shoes. (V39, pp 3227-3228).

The Appellant testified he went into the residence and changed shoes. (V39, p 3228). The Appellant testified he then was dropped off at Papa Joes bar. (V39, p 3229). The Appellant testified he spent the evening at Papa Joes with Lillian Olmo, Eunice Vega and Mr. Pacheco. (V39, p 3229).

The Appellant testified he was picked up about 1:00 a.m. by Cannon. (V9, p 3229). The Appellant said he was then dropped off at the Ft. Smith house. (V39, p 3229). The Appellant said he went to bed and woke up the next day around 9:00 a.m. (V39, p 3230).

Finally the Appellant testified that he was innocent. (V39, p 3231).

Salas testified that he and Cannon first met the Appellant and Hunter on Sunday, August 1, 2004, five days before the alleged murders occurred. V40, pp 3446. He testified that on that date a girl they knew called Cannon crying and asked if they would help her get her stolen clothes back. (V40, p 3447).

Cannon and Salas agreed to help her and picked her and her two sisters up in Cannon's Expedition. (V40, p 3447). She then directed them to a house where they

picked up the Appellant and Hunter and first met at that time. (V40, p 3449). Appellant told them his clothes and Hunter's, as well as the girl's, were also stolen by these people from a house where he and Hunter had been living on Providence Blvd. (V40, p 3450). Appellant directed Cannon to a house at 3106 Telford Lane where these people lived. (V40, p 3450).

When they arrived at the house, the three girls, Cannon, Salas, and a friend named Brandon Graham went to the front door. (V40, p 3452-3454). Appellant stayed in the car. An argument ensued by the girls when Francisco Roman answered the door. Each side displayed weapons, and Roman called the police. At that point, Cannon, Salas, the girls, et al. got back in Cannon's Expedition and left. (V40, pp 3454-3458). No fight occurred, and no one was injured. Cannon dropped off the Appellant, Hunter and the girls, and then Cannon, Salas and Graham went home for the remainder of the evening. (V40, p 3459). They had no contact with the Appellant or Hunter the following Monday or Tuesday. (V40, p 3461).

On Wednesday night, August 4, 2004, Salas and Cannon were jumped and beat up at a skating rink by a group of teenagers in an incident unrelated to the Sunday night incident at Telford Lane. (V40, p 3465). Salas and Cannon called some friends to help them for a one-on-one re-match. They all met outside of a Little Caesars pizza shop. Where by coincidence Hunter came walking out and asked them what was going on. (V40, p 3465). Hunter asked to join them and had them call the

Appellant to come along also, whom they picked-up. (V40, pp 3471-3473), (V40, p 3476). Cannon brought some bats in his vehicle. (V40 p 3473).

When they arrived at Manny Rodriguez Park, the place of the re-match, the other side did not show up. (V40, p 3473). Subsequently Cannon and the Salas drove the Appellant and Hunter back to their home on Fort Smith Blvd. (V40, p 3482).

Salas testified the following day, Thursday, August 5, 2004, Hunter called Cannon and said the Appellant wanted him to come pick them up. (V40, p 3487).

Salas testified when they arrived Hunter came out and said Appellant wanted them to come inside. (V41, p 3492). They did, and shortly thereafter Appellant began talking about wanting to get his stuff back and how the police were not doing anything. (V41, p 3494). He said he had seen a movie where people went into a house with poles and beat-up the people inside. (V41, p 3494). Appellant said if he had a group, he would do that to those people. (V41, p 3494). Neither Salas nor Cannon ever saw this movie and did not know what the Appellant was talking about. (V41, p 3493).

Salas testified Appellant then got up and stood over them as they sat and asked each of them one by one, if they would be "down" with this. (V41, p 3495). Salas felt intimidated and said, yes. Cannon and Graham felt intimidated and agreed. Hunter also agreed. (V41, p 3495). According to Salas' testimony at trial, the Appellant had them all get in Cannon's Expedition and drive to his friend's houses to

look for bullets for Cannon's gun. (V41, p 3497). Along the way, they dropped Graham off at friend's house and later dropped Appellant and Hunter off at the Fort Smith house at the end of the afternoon. (V41, p 3499). Appellant testified at trial that the meeting never occurred and denied ever asking anyone to go over to the Telford house. (V39, pp 3222-3223).

Salas testified that he and Cannon returned to their apartment and discussed whether to go back or not. (V41, p 3501). Salas testified Appellant Victorino never said at the meeting that he wanted to kill anyone, just go the house and get his stuff back and rough the people up if necessary. (V41, p 3502). Based on that, about 9:00 P.M., Cannon and the Salas returned to Fort Smith and picked-up the Appellant and Hunter. (V41, p 3564). Hunter seemed different at this time, more agitated than in the afternoon. (V41, p 3502). They made various stops, the last being dropping Appellant off at a restaurant and bar known as Papa Joe's. (V41, p 3507). Appellant testified at trial that he was dropped off at Papa Joes by the co-defendants and later picked up and dropped off at the Ft. Smith residence. (V39, p 3228).

Saturday, August 7th, Appellant and Hunter were arrested at noon. (V39, p 3228). Appellant gave a voluntary statement to the investigators. (V39, p 3228).

The Appellant denied any involvement in the murders. (V39, p 3228).

All three defendants were convicted of conspiracy, burglary of a dwelling with a weapon, and the murders of all six victims. In addition, Appellant was found guilty

of killing the dog and abusing the dead body of Belanger. Hunter was convicted of abusing the dead bodies of Gonzalez, Gleason and Vega. As for the specific findings as to each defendant: The Appellant was convicted of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (count one); first degree premeditated and felony murders of Erin Belanger, Francisco Ayo-Roman, Jonathan W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts two to seven); abuse of the dead human body of Erin Belanger (count eight); armed burglary of a dwelling with a weapon (count thirteen); and cruelty to an animal (count fourteen). Appellant was found not guilty on counts nine through twelve. (V44, pp 4017-4019).

Hunter was convicted of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (count one); first degree premeditated and felony murders of Erin Belanger, Francisco Ayo-Roman, Jonathan W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts two to seven); abuse of the dead human bodies of Roberto Manuel Gonzalez, Jonathan W. Gleason and Anthony Vega (counts ten through twelve); and armed burglary of a dwelling with a weapon (count thirteen). The defendant was found not guilty on counts eight, nine, and fourteen. (V42, pp 4021-4022).

Michael Salas was convicted of conspiracy (to commit aggravated battery,

murder, armed burglary of a dwelling, and tampering with physical evidence) (count one); first degree premeditated and felony murders of Erin Belanger, Francisco Ayo-Roman, Jonathan W. Gleason, Roberto Manuel Gonzalez, Michelle Ann Nathan, and Anthony Vega (counts two to seven); and armed burglary of a dwelling with a weapon (count thirteen). Salas was found not guilty on counts eight through twelve and count fourteen. (V42, pp 4024-4026).

The penalty phase began on July 27, 2006. (V45, p 4053).

The first witness in the Appellant's penalty phase was Dr. Joseph Wu. Dr. Wu testified that he is a board certified psychiatrist. Dr. Wu also has a medical doctor's degree. (V45, p 4148). Dr. Wu testified he is an associate professor at the College of Medicine at the University of California Irvine. (V46, p 4151). Dr. Wu testified he is the director of the Brain Imaging Center at the university. (V46, p 4151). Dr. Wu testified he has interpreted over 5000 PET scans in the field of neuropsychiatry. (V46, pp 4160-4161). Dr. Wu testified he has testified as a PET scan expert in court. (V46, p 4164). Dr. Wu testified he was asked to evaluate the Appellants brain PET scan. (V46, p 4167).

Dr. Wu found abnormalities in the Appellants PET scan. (V46, p 4190). Dr. Wu testified in reviewing the Appellants PET scan there was a pattern of metabolic hyofrontality with decreased ventral frontal metabolism relative to occipital metabolism. There are metabolic decreases in parietal lobule relative to the frontal

lobe. The preliminary impression is that it is an abnormal scan. (V46, p 4191).

Dr. Wu testified that Appellants scan pattern shows his frontal lobe is lower than would be normal for someone without some type of brain abnormality.
The frontal lobe is the area of the brain that controls your behavior, your impulse and your ability to put the breaks on. In other words to help people curb inappropriate behavior. (V46, p 4192).

The Appellants PET scan was introduced into evidence. (V49, p 4211, Defendant exhibit 1). Dr. Wu testified that Appellants PET scan is consistent with historical events in the Appellant's life, a history of several instances of possible head trauma, a history of in-patient psychiatric hospitalization as a child with multiple suicide attempts and with auditory hallucinations (V46, p 4220). Dr. Wu testified the Appellant's history would be consistent with recurrent depressions. Dr. Wu said if this condition is left undiagnosed an untreated you can have individuals in a manic state that can have extreme rage, disproportionate rage, in a manic state. (V46, p 4220).

Dr. Charles Golden a neuropsyschologist testified in the penalty phase. (V47, p 4267). Dr. Golden conducted a neuropsychological and psychological evaluation of the Appellant. (V47, p 4270). Dr. Golden testified he was provided medical records from the Appellant.

Dr. Golden testified he reviewed medical records from Shriner's Hospital

when the Appellant was about ten years old. He also testified he reviewed records from the Department of Child and Family Services in New York State. Dr. Golden also reviewed records of a psychological evaluation that was done by the Department of Corrections in 1999 and some school records from high school. Dr. Golden also reviewed some Department of Corrections in 1998 that were from the mental health department. Dr. Golden also reviewed some medical records from Elmhurst Hospital when the Appellant was about nine years old. (V47, p 4271).

Dr. Golden testified he discussed the records and his testing of the Appellant with Dr. Wu. (V47, p 4271). Dr. Golden testified he referred the Appellant to Dr. Wu to conduct a PET scan. (V47, pp 4271-4272).

Dr. Golden conducted a variety of tests on the Appellant. (V47, p 4272). Among the test conducted on the Appellant was the Wechsler memory scale, the Rorschach ink blot test (personality function). (V47, p 4272). The TOMM test is administered to see if a person is malingering. (V47, p 4272). Other tests were the trail making test, which is a measure of executive functioning and the Wechsler adult intelligence scale three test. (V47, p 4272).

Dr. Golden testified the Appellant was administered the Wisconsin Category test and the FAS which is a test for word fluency. (V47, p 4273). The last test was the Connors performance test that measures attentional types of abilities.

Dr. Golden testified the Appellant was very cooperative. The malingering test

indicated he was putting forth a good effort on the tests. (V47, p 4273).

Dr. Golden testified the Appellant tested average intelligence and average memory skill. (V47, p 4273).

Dr. Golden testified the Appellant did very poorly on the Executive testing. (V47, p 4276). The executive test differs from other tests because the other tests tell you what to do. The executive test requires the person to figure out how to do the test yourself. (V47, p 4274).

Dr. Golden testified the executive tests are usually a measure of impulsiveness. (V47, p 4277).

Dr. Golden also testified the Appellant has a distortion of reality and a lot of anger deep inside of him. (V47, p 4281).

Dr. Golden testified that Appellant neuropsychological pattern (the executive impairment is largely the frontal lobe of the brain). (V47, p 4283).

Dr. Golden testified the Appellant has a history of physical abuse in the family. (V47, p 4284).

Dr. Golden testified in according to the medical records from the Department of Children and Families (NY) the Appellant came to school with bruises, bruises of a belt buckle on him, all sorts of severe beatings. (V47, p 4284). According to the school records the Appellant's mother stated that was the way we handled our children. (V47, p 4285).

Dr. Golden testified that according to records the Appellant was sexually abused by a baby sitter at age four. Also at age nine the Appellant said he was hearing voices calling him names and cursing him. (V47, p 4285).

According to records that Dr. Golden reviewed it was reported the Appellant would go to bed with a baseball bat to protect him because he was going to be murdered in his sleep or that his family was going to be murdered. (V47, p 4286).

Dr. Golden testified one thing that was very clear in the charts was that every time the Appellant went into a hospital or outpatient training his family never told the truth. The family never told the whole history of what happened. According to Dr. Golden this is a big problem. (V47, p 4286).

Dr. Golden testified everyone reached a diagnosis but a different one and the wrong one, depending upon what the family was telling them and what they were keeping secret from them. (V47, p 4287).

Dr. Golden testified the Department of Correction was also unable to properly diagnose the Appellant because he did not have a detailed history of the Appellant. (V47, p 4287).

Dr. Golden testified the family took the Appellant out of hospitals against medical advice. (V47, p 4287).

Dr. Golden testified because the Appellant never received proper treatment he became more and more dysfunctional. (V47, p 4288).

Dr. Golden testified the Appellant told him he wasn't guilty. (V47, p 4317).

The next person to testify was Dr. Jeffery Danziger. (V47, p. 4320). Dr. Danziger testified he is a board certified in general psychiatry. (V47, p 4322).

Dr. Danziger testified his involvement in the case was to see if there are any psychiatric diagnoses. (V47, p 4324). Dr. Danziger said he reviewed all the medical records that were provided to him. (V47, p 4325).

Dr. Danziger also interviewed the Appellant's mother, Sharon Victorino. (V47, p 4326).

Dr. Danziger testified that if you have a childhood of depravation of abuse and mistreatment, you have a greatly increased risk of depression, of anxiety, of substance abuse, and future aggression and criminal conduct. (V47, p 4331).

Dr. Danziger testified in reviewing the Appellants life timeline he noted there were allegations of sexual molestation. Dr. Danziger testified this is devastating for young children, confusing, problematic and leads to long term effects. (V47, p 4332).

Dr. Danziger also testified the Appellant showing up for school with bruises and welts from belt buckles is also significant. (V47, pp 4332-4333). After reviewing the Appellant records from the hospitals Dr. Danziger testified it is very unusual to see the psychiatric distress in someone who is not even ten years old. (V47, p 4335-4336).

Dr. Danziger testified the Appellants father was charged with breaking the

femur of the Appellant's brother. (V47, p 4337). Dr. Danziger testified growing up in a violent environment is toxic to children. (V47, p 4337).

Dr. Danziger testified at age sixteen or seventeen Appellant was denied admission to a psychiatric facility because of lack of insurance. (V47, p 4342).

At sixteen years of age the Appellant was sentenced to the Department of Corrections as an adult for five years. (V47, p 4343).

Dr. Danziger testified at age twenty the Appellant was sentenced to seven years in prison. (V47, p4345).

The trial court gave little weight to the statutory mitigator of mental health in its sentencing order issued on September 21, 2006. (V9, pp 1558-1579). Therein the trial court acknowledged the Appellant had a form of brain damage, and long prior and ongoing history of mental illness. The court stated in the sentencing order the witnesses' for the defense did not specify a 'specific' illness, and the prosecution offered the testimony of a qualified medical x-ray technician contesting the results of the PET (Position Emission Tomography) scan and neurological and mental health experts presented by the defense . (V9, pp 1558-1579).

A number of achievement awards earned by the Appellant was introduced into evidence. They were a Department of Education Certificates of Achievement. A automotive collision repair refinishing course certificate. (V47, p 4357, Penalty Phase Exhibit 2; p 4358).

Also introduced was a certificate of appreciation for significant contribution of services as a sponsor, volunteer in the national forest. (V47, p 4358, Penalty Phase Exhibit 3).

A number one apple award was presented to the Appellant for a job well done from the public school system. That award was introduced into evidence. (V47, p 4358, Penalty Phase Exhibit 4.)

In 1989 the Appellant was presented a Volusia County Good Kid Award. (V47, p 4358, Penalty Phase Exhibit 5.)

Dr. Danziger testified during this time period the Appellant was doing better. (V47, p 4358).

The Appellant was also presented with a school certificate for completing the FINS program in 1991. (V47, p 4358, Penalty Phase Exhibit 5).

Also introduced in the penalty phase was Certificate of Completion of the Growth Orientation Program in 1997. (V47, p 4358, Penalty Phase Exhibit 7).

The Appellant completed a Vital Issues Project. (V47, p 4359, Penalty Phase Exhibit 8). The Appellant also received an achievement award from Alcoholic Anonymous. (V47, p 4359, Penalty Phase Exhibit 9).

The Appellant's brother, Antonio Victorino testified in the penalty phase. (V47, pp 4374-4375).

Antonio testified the family knew the Appellant had a chemical imbalance.

(V47, p 4376). Antonio testified the imbalance went untreated because the family could not afford the medicine. (V47, p 4377).

Although Antonio was over seven feet tall he never played basketball. When asked why, Antonio said it was because of bad decision by his father [broken femur]. (V47, p. 4377)

Yvonne Pizarro testified she knew the Appellant for several years through her children. (V47, p 4378). Ms. Pizarro testified the Appellant helped her sick husband fix his car and boat. (V47, p 4379). Ms. Pizarro also talked about the Appellant being a peacemaker when other kids would fight. (V47, p 4379).

Ms. Pizarro testified she had never known the Appellant to be violent and was welcomed in her house. (V47, p 4380).

John Pacheco testified on the Appellants behalf in the penalty phase. (V47, p 4384). Mr. Pacheco testified the Appellant was very good at working on cars. (V47, p 4388). Pacheco also testified the Appellant worked very hard. (V47, p 4388).

The Appellant's sister, Maritsa Victorino, testified on behalf of the Appellant. (V47, p 4393). His sister testified the Appellant was subjected to corporal punishment. (V47, p 4394). She testified that the Appellant usually got more [punishment] than the rest of us. (V47, p 4394).

The Appellants mother, Sharon Victorino, testified on behalf of the Appellant. (V47, p 4395). Ms. Victorino testified she has six living children. (V47, p 4396). She

testified her and the Appellant went to church three times a week when he was child. (V47, p 4397).

Ms. Victorino testified one time the Appellant came home with a blank piece of paper from an exam. (V47, p 4398). Ms. Victorino testified the Appellant was subjected to corporal punishment for his behavior. (V47, p 4398).

Ms. Victorino testified the Appellant never had any counseling when he was child. (V47, p 4399). She testified she and her husband were strict disciplinarians and that meant corporal punishment. (V47, p 4399).

Ms. Victorino testified she removed the Appellant from that school and enrolled him in a school about two hours away called Maspeth. (V47, p 4400).

According to Ms. Victorino one of the Appellant's teachers was worried about the Appellant being suicidal and she recommended he get some counseling. (V47, p 4401).

Ms. Victorino testified she took the Appellant to a mental hospital and unwittingly signed some papers and left him there. (V47, p 4401). This happened when the Appellant was eight years old. (V47, p 4401).

Ms. Victorino testified she went back to the hospital the next day to get the Appellant back. (V47, p 4402).

Ms. Victorino testified the family moved to Deltona, Florida. (V47, p 4404). After three weeks in the neighborhood the Appellant and his brother were building a

fort in the backyard. (V47, p 4404). Ms. Victorino testified the Appellant came in the house and asked if he could go with another boy to get some wood. (V47, p 4405). Five minutes later one of Ms. Victorino's sons came in and said a man had the Appellant in a headlock down the street. (V47, p 4405). The man told Ms. Victorino the Appellant had removed wood shelves from a vacant house. (V47, p 4405). The Appellant was arrested and charged with Burglary of Dwelling and several other charges. (V47, p 4405). The Appellant was ten years old when this happened.

Ms. Victorino testified one time the Appellant was going to be recognized for being a good student on a boat cruise but they only had one car so they had to wait for their father to come home. (V47, p 4407). They missed the boat and the Appellant consoled his mom saying it was alright. (V47, p 4407).

Ms. Victorino testified when the Appellant was sixteen he got into trouble and was sentenced as a youthful offender. (V47, p 4410). The Appellant never went to the youthful offender boot camp and instead was sent to adult prison. (V47, p 4410)

The jury recommended a sentence of death for Hunter for his murders of Gleason (10-2 vote), Gonzalez (9-3) vote, Nathan (10-2 vote), and Vega (9-3 vote). The jury recommended life for his murders for Belanger and Roman. (V51, pp 5059-5061). The trial court imposed a sentence of death.

The jury recommended a sentence of life imprisonment for Salas for all six murder. (V51, pp 5056-5068). The trial court imposed a sentence of life for Salas.

(V51, pp 5079, 5087-89).

The jury recommended a sentence of death for Appellant for his murders of Belanger, Roman, Gleason, and Gonzalez. The jury recommended life for his murder of Nathan and Vega. (V51, pp 5051-5053). The trial court imposed a sentence of death. (V9, pp 1558-1579)

The Appellant timely filed his notice of appeal and his initial brief follows. (V9, pp 1580-1581).

SUMMARY OF ARGUMENT

The foremost issue the Appellant raises is the trial Courts repeated denial of the motion for severance. From the early stages of the case, the Appellant was being labeled “the ringleader” by the media as well as his co-defendants. There is nothing more prolific in the Appellants appeal than that of the severance issue.

Before the trial, all three of the Appellants co-defendants gave statements to law enforcement. During the first severance hearing, the defense raised the obvious Bruton problems. The trial court ordered that although the statements would not be allowed to be introduced into evidence the investigator would be allowed to testify to what they were told by the co-defendants. This tactic clearly circumvents what Bruton stands for; this clearly was fundamental error and denied the Appellant a fair trial.

Furthermore, the co-defendants counsel in their opening statement blamed the Appellant for everything. The co-defendants attorneys told the jury their clients acted out of the domination of the appellant. This is not a legal defense to a first-degree premeditated murder. The trial court abused its discretion and committed reversible error by allowing the co-defendants to argue this type of defense.

At the severance, motion hearing the prosecution argued against the severance stating that one trial was necessary because of the costs associated of trying four

defendants separately and for the victims' families. The Appellant submits these arguments put forth by the prosecution were clearly misplaced.

During the penalty phase, the co-defendants continued their onslaught of the Appellant. There was absolutely no way the Appellant received a fair trial by being tried together with his co-defendants. The Appellant was clearly denied a fair trial and if not for any other reason the entire case against the Appellant should be reversed and he be allowed to be tried alone. Not only did the Appellant have to defend himself against the prosecution, he also unfairly had to defend himself against his co-defendants.

1. WHETHER THE TRIAL COURT ERRED WHEN DENYING THE APPELLANT'S MOTIONS FOR SUPPRESSION OF DNA SAMPLES

When reviewing a motion to suppress the standard of review for the trial court's factual findings is whether competent, substantial evidence supports the findings, while the trial court's application of the law to the facts is reviewed de nova. *State v. Irizarry*, 948 So.2d 39, 42 (5th DCA 2006).

The Appellant objected to the DNA sample taken from the Appellant in a pretrial motion to suppress. (V4 pp 634-635). The motion to suppress DNA samples and results was denied. (V4 pp 652-657). The Appellant renewed the motion to preserve the issue for this appeal. (V36, p 2786).

In analyzing whether a Defendant/Appellant's consent to search is voluntary, a Court should consider the totality of the circumstances around the granting of consent to the search. See *Norman v. State*, 379 So. 2d 643, at 646-47 (Fla. 1980).

When the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given. See *Reynolds v. State*, 592 SO. 2d 1082, at 1086 (Fla. 1992) and *Washington v. State*, 653 So. 2d 362 (Fla. 1995).

Fla. Rules of Criminal Procedure 3.220(c) reads in pertinent part that: "a

judicial officer 'may' require the accused to submit samples of blood, hair and other materials from the accused body, even that criminal rule is properly invoked 'only after' an information or indictment has been filed against the person from whom the samples are sought and the rule is still subject to constitutional limitations."

The Untied States Supreme Court in *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643 (1985). and Fourth District Court of Appeals in *Bartlett v. Hanowi*, 626 So. 2d 1040 (Fla. 4th DCA 1993) and *SaRacusa v. State*, 528 So. 2d 520 (Fla. 4th DCA 1988) held that:

> "The Defendant's constitutional rights were violated by compelling the Defendant to appear in a live line-up and submit to a blood test in connection with an investigation of several crimes unrelated to the charge(s) for which he was being held." i.e. Saracusa, supra.

On August 26, 2005 an evidentiary hearing was held on the Appellant's motion to suppress DNA samples taken from the Appellant. (Supp.V1, pp 1-94).

The Appellant testified he was arrested on August 7, 2004 around two o'clock in the afternoon and taken into custody. (Supp.V1, p 8). The Appellant was transported to the Operations Center. (Supp. V1, p 9).

The Appellant testified he sat and remained in the Sheriff's squad car until approximately 6-7:00 p.m. (Supp. V1, p 10). After being removed from the car, the Appellant said he was taken to an interrogation room. (Supp.V1, p 11). The Appellant

testified he was interviewed by two Sheriff's Investigators, i.e., Lawrence Horzepa and Gregory Seymour. (Supp.V1, p 12). The Investigators verbally read the Appellant his rights and then asked him to sign a waiver of them. (Supp.V1, p 12). The Appellant inquired as to whether he was under arrest for anything else or was a suspect, the Investigators responded in the negative. (Supp.V1, p 12). The Appellant signed the Waiver Form. (Supp.V1, p 12). After continuous questioning the Appellant adamantly denied participation in any crime and offered information of his whereabouts the evening of the homicide occurrence. (Supp.V1, p 13).

The Appellant testified after being left alone, he fell asleep in the Interrogation Room. (Supp.V1, p 13). Subsequently thereafter the Appellant testified two (2) uniformed Deputies entered the room accompanied by Investigator Gregory Seymour and told them they were going to obtain DNA samples. (Supp.V1, p 14). The Appellant said he refused and told the Officer he has to get a warrant. (Supp. V1, p 14).

According to the Appellant's testimony Officer's Charles Dowell and Richard Graves approached the Appellant. Investigator Gregory Seymour remained in the doorway. Then Officer Dowell grabbed the Appellant's already restrained hands and held them against the table. Office Graves forcibly grabbed the Appellant's cheek area with his right hand, applied pressure and opened the Appellant's mouth. Using his left hand, Office Graves inserted two swabs obtained swabbing, place them in a

box, and laid them on the interrogation table. Then, while Officer Dowell continually restrained the Appellant's hands, he (Officer Graves) scraped his nails on to wax paper, collected these items, then left. immediately. (Supp.V1, pp 14-16).

The Appellant testified at no time did the Appellant consent to the procuring of buccal swabs or nail scrapings. (Supp.V1, p 16) The Sheriff's Investigators had at that time available to them consent forms for such, but did not offer or receive one from the Appellant. It was also later found that the entire interrogation was video and audio recorded, unbeknownst to the Appellant. However, the video and audio recording was terminated prior to the forcible removal of the buccal swabs and nail scrapings for alleged privacy purposes. (V4 pp. 652-657).

In furtherance of the Appellant's contentions it has been determined that: "to excuse the failure of the police to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement." *United States v. Johnson*, 22 F. 3d 674, 683 (6th Cir. 1994).

Such a denial of suppression of the said samples was a clear violation of the Appellants rights under the Fourth Amendment and application of the inevitable discovery doctrine and excusal of the Fourth Amendment requirement to obtain a warrant or valid consent is an abuse of the trial court's discretion, when the Constitution guarantees the Appellant certain rights under the law.

2. WHETHER THE TRIAL COURT ERRED IN ITS FAILURE TO SUPPRESS EVIDENCE SEIZED AT APPELLANT'S RESIDENCE

The Appellant filed a motion to Suppress all of the evidence that was seized by law enforcement at 1001 Ft. Smith residence. (V5 pp 941-946). The trial court denied the motion in a written order on April 6, 2006. (V7, pp 1239-1253).

The Appellant challenged the veracity of a sworn statement used by police investigators to procure a search warrant.

Investigator Laloo, the affiant for the search warrant, took an inadequate oath, had no personal knowledge of facts supporting the affidavit, failed to corroborate most of the information and misrepresented information on the affidavit, and failed to advise the magistrate that she had no personal knowledge even though she swore to the contrary in her oath.

"A person who manifests an intention to be under oath is in fact under oath…" *United States v. Brooks*, 285 F.3d 1102 (8th Cir. 2002)

Further undisputed facts support the contention that the Affiant never witnessed, discussed or observed the interrogation of any codefendants or the Appellant and that the Affiant had recklessly failed to add where or whom he obtained the information from (fellow officers). (V7 pp 1239-1253).

In *State v. Marrow*, 459 So. 2d 321 (Fla. App. 3 Dist. 1984) the Court

affirmed the Trial Court's decision to suppress evidence seized pursuant to a search warrant upon holding that:

1. Where, as here, the Affiant clearly implied that the critical conversation discussed in the Affidavit was between the confidential informant and him, even though the Affiant did not expressly state the he "personally" spoke to or interviewed the informant. See, e.g., *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.ed2d 667 (1978); *United States v. Davis*, 714 F.2d 896 (9th Cir. 1983); *State v. Stokes*, 548 So. 2d 188 (Fla. 1989); *State v. Beney*, 523 So.2d 744 (Fla. App. 5 Dist. 1988) and *Debord v. State*, 422 So. 2d 881 (Fla. 2d DCA 1982), the Affiant's statement is at least recklessly false.
2. The fact that probable cause existed and could have been readily shown by a truthful Affidavit stating that the Affiant's information came from a fellow officer does not change the result. Since it is the truth of the Affiant's statement, not the truth of the confidential informant's statement that is material to the Magistrate's decision to issue the search warrant, *United States v. Davis*, 714 F.2d 896.; and
3. Since after the required exclusion of the false information concerning the confidential informant, see *Franks v. Delaware*, 438 U.S. @172, 98 S.Ct. @2684, there are not sufficient facts in the Affidavit to support a finding of

probable cause, thus rendering the warrant issued in this instance on August 8, 2004, invalid, and the fruits of its search poisonous in nature.

In *State v. Beney*, 523 So. 2d @745, the Court agreed that such an Affidavit implies direct knowledge rather than the second and third hand, information actually relied on, which seriously affects the findings of probable cause.

In *State v. Beney*, 523 So. 2d @746, The Fifth (5th) DCA further rendered that while observations of other officer's engaged in a common investigation are a reliable basis for a warrant applied for by one of their numbers, "to comply with the requirement of particularity and to enable the magistrate to make an independent probable cause evaluation, the Agent must state in his Affidavit that he is relying upon other officers." See, *United States v. Kirk*, 781 F. 2d 1498, 1505 (11th Cir. 1986) as the Court noted in, *United States v. Broward*, 594 F. 2d 345, 351 (2d Cir. 1979), cert. denied 442 U.S. 941, 99 S. Ct. 2882, 61 L. Ed. 2d 310 (1979); the police should use other available methods for protecting informants other than inserting false information into the Affidavit.

The statements of Jerone Hunter, Michael Salas and Robert Cannon, was not information the Investigator/Affiant was privy to and the deliberate deception by the Affiant, regardless of whether it was purposefully or accidental is a requirement of no authority and requires suppression of such evidentiary items which were fruits of the search. See *State v. Stokes*, supra, *State v. Beney*, supra; *Debord v. State*, supra,

United States v. Leon, infra, *United States v. Davis*, supra and *Franks v. Delaware*, supra and those cases cited therein.

The "good faith exemption" of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed 2d 677 (1984) is inapplicable where the Leon Court cautioned that:

> "Suppression therefore remains an appropriate remedy if the Magistrate or Judge in issuing a warrant was misled by information in an Affidavit that the Affiant knew there was false or would have known was false except for his reckless disregard of the truth."

468 U.S. @923, 104 S. Ct. @3421, citing, *Franks v. Delaware*, supra and *Frank v. State*, 912 So. 2d 329 (Fla. 5th DCA 2005); *Sneed v. State*, 876 So. 2d 1235 @1238 (Fla. 3rd DCA 2004). Moreover, the fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error. *United State v. Davis*, 714 F. 2d 896 (9th Cir. 1983) and *State v. Beney*, 523 So. 2d @746 (Fla. 5th DCA 1988).

The suppression hearing took place on March 27, 2006. On April 6,2006 the trial court issued a written order denying the motion to suppress the items taken from the Ft. Smith house. (V7, 1239-1257).

The trial court ruled that the actual owner of the residence, Mr. Melendez consented to the search. Furthermore, even though the affiant for the search warrant had no personal knowledge of the facts, he is not required to. He learned of the

information from a wide array of sources. Also, the identified citizens who provided information were not anonymous tipsters that needed their information corroborated. Lastly, the affiant did not misrepresent anything. (V7 pp 1239-1253).

3. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT THE APPELLANT'S MOTION FOR SEVERANCE

The trial court's denial of the Appellant's Motion for Severance is reviewed for an abuse of discretion by the Appellate Court. See *Rutherford v. State*, 902 So. 2d 211 (Fla. 5th DCA 2005); *Dupree v. State*, 705 So. 2d 90 (Fla. 4th DCA 1998); *U.S. v. Novton*, 271 F.3d 968 (C.A. 11 Fla. 201); *U.S. v. Diaz*, 248 F.3d 1065 (C.A. 11 Fla. 2001).

Prior to the commencement of trial the Appellant filed a Motion for Severance. (V3, pp 516-517). A hearing on the motion was held on October 21, 2005. (V10 pp 1623-1686). At the beginning of trial, counsel for the Appellant moved for a renewal of his Motion for Severance and was denied by the trial court. (V29, p 1793).

At the pre-trial hearing on October 21, 2005, Appellant's counsel argued that the statements of the co-defendants were in fact inadmissible against the Appellant pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20. Led 2d 476 (1968). (V10, pp 1629-1630). In addition to such, Appellant's counsel argued the necessity of a fair determination of guilt or innocence on evidence against himself and not against his co-defendants. (V10, p 1632).

On October 21, 2005 a hearing on the motion to sever was held. At the State advanced several arguments against the motion being granted. The first argument

advanced was the inconvenience of trying the co-defendants separately. (V10, p 1662). The State argued to the trial court the hindrance it would thus place on its witnesses and the victims' families, declaring that such inconvenience outweighed the Appellant's constitutionally protected rights under the Eight Amendment and Fourteenth Amendment to the Constitution. (V10, pp 1661-1664).

The speed and economy of a joint trial should hold no weight in the fair determination of guilt or innocence of the Defendant's rights to a fair and impartial trial as to himself. *Lee v. State*, 534 So. 2d 1226 (Fla. 1st DCA 1988; *Crim v. State*, 398 So. 2d 810 (Fla. 1981) and the right to be free from Cruel and Unusual Punishment under the Eighth Amendment of the Constitution.

Another argument put forward by the State in their argument against a severance was that a joinder of the four defendants was necessary to prove the conspiracy to commit first degree murder. (V10 pp. 1640-1642).

The mens rea of conspiracy has two aspects. First, conspirators much have intent to enter into an agreement. Second conspirators must possess a specific intent to commit some unlawful objective. That objective must be to commit an unlawful act or a lawful act in an unlawful manner.

At trial the State called Robert Cannon to testify. (V30, p 1936). Had Cannon testified as planned his testimony would have been sufficient to establish the conspiracy charge. (V10, pp 1936-1954).

The State introduced at trial the testimony of Brandon Graham. (V30, p 1970), (V30, pp 1970-2020). The testimony of Brandon Graham was sufficient to establish the probability of a conspiracy. The Appellant therefore would submit the argument by the State that a joinder of trial with his co-defendants was necessary to prove the conspiracy count was misplaced and unnecessary to meet the elements of such. (V30, pp 1970-1998).

Another solution to the out of court statements of the co-defendants put forth by the State was to ask witness' who interviewed the other defendants what was told to them. (V10, p 1644).

The trial court, in its pretrial and trial orders denied the Appellant's Motion for Severance. (V4, pp 721-729) (V3, pp 516-517) (V29, p 1793) (V34, p 2552) (V38, p 3102) citing *Lugo v. State*, 843 So. 2d 74 (Fla. 2003) and those case(s) cited therein; quoting:

"There is always some prejudice in any trial where more than one offense or offenders are tried together. But such 'garden variety' prejudices, in and of itself, will not suffice [to justify severance of charge(s) joined in one indictment]." (V4, pp 721-729).

The Court further expanded its analysis quoting from *McCray v. State*, 461 So. 2d 804 @ 806 (Fla. 1986) There the Court determined:

"The existence of antagonistic defenses is not enough to justify the severance of

co-defendants." (V4, pp 721-729).

Where each defendant accused his codefendants of being solely responsible for the murder, trial court, which was aware that such accusations would be made at trial, abused it's discretion in denying the Appellant's Motion for Severance. See *Rowe v. State*, 404 So. 2d 1176 (Fla. 1st DCA 1981).

At the severance hearing on October 21,2005 the trial court was told by Cannon's attorney he was planning on using a duress defense. (V30, pp 1635-1636). Although the State properly informed the court that was not a valid defense the court failed to properly address the issue at the hearing or in it's ruling. (V10, p 1662).

The trial court was again put on notice in opening statements by both counsel for the co-defendants that they planned on introducing testimony at trial of duress and that their clients acted under the domination of the Appellant. (V29, pp 1780-1793). When a defendant accuses his co-defendants of being solely responsible for the murders, and where the trial court is aware of such a position, the trial court should grant the motion to sever. Rowe v. State, 404 So2d. 1176 (Fla 1st DCA 1981).

It is well settled in a first degree murder case, "duress or domination of another" is not a legal defense defense. (V29, pp 1780-1793). *Wright v. State*, 402 So. 2d 193 (Fla. 3d DCA 1981) and was adopted by legislature in July 1998, See Fla. R. Crim Proc, General Jury Instructions 3.6(K).

In *Crofton v. State*, 491 So. 2d 317 (Fla. 1st DCA 1986) the Trial Court did not

abuse its discretion in denying severance motion, despite Defendants claim of possibility of antagonistic defenses, where no direct evidence implicating Defendant was offered by her Co-defendants theory of defense and facts and defenses were known prior to Judge's ruling rather than unexpectedly arising during course of trial.

Unlike Crofton, the trial court in the instant case was fully aware of the co-defendants attempt to present the theory of duress or necessity, in conflict with the Appellant's alibi defense. (V5 pp 932-934).

Other cases addressing severance issues; the Supreme Court of Florida in *Espinosa v. State*, 589 So. 2d 887 (Fla. 1991), reversed on other grounds 112 S. Ct. 2926, 505 U.S. 1079, 120 L. Ed 3d 854 rehearing denied 113 S. Ct. 26, 505 U.S. 1245, 120 L. Ed. 2d 951, on remand 626 So. 2d 165. See also, *Jones v. Moore*, 794 So. 2d 570 (Fla. 2001); *McLean v. State*, 754 So. 2d 176 (Fla. 2d DCA 2000) and *Johnson v. State*, 720 So. 2d 232 (Fla. 1998).

In comparison, the Appellant offered evidence and the testimony of witnesses' of an alibi. (V39, pp 3228). However, the co-defendants thereafter blamed their participation in the murders as a matter of duress and necessity. Hunter and Salas' testimony was that they feared the Appellant and had no choice but to participate in the murders. (V40, pp 3328-3343)

In *Daniels v. State*, 634 So. 2d 187 (Fla. 3d DCA 1994) and *Viniegra v. State*, 604 So. @d 803 (Fla. 3d DCA 1992) determined that where the defenses of three

Defendants being prosecuted for robbery were not antagonistic 'entitling' Defendant to sever his trial from that of his Codefendants, where 'all' Defendants denied participation in robbery and none of the Defendant's attempted to blame others, and all three Defendants seemed to be working closely together with common strategy of impeaching State's witnesses and suggesting that others might be responsible for robberies.

Unlike the aforementioned case, the co-defendants here sought to persuade the jury and trial court that they acted under the specific domination of the Appellant. (V40, pp 3328-3343). Clearly, the denial of the Appellant's severance motion should have been granted. From the onset and throughout the trial, the co-defendants blaming the Appellant for the crimes denied him a fair trial. Not only did the Appellant have to defend himself against the prosecution, he also had to defend himself against his co-defendants. (V40, pp. 3371-3441), (V40-41, pp. 3441-3644).

The Appellant contends that the trial court by denying the Motion to Sever submitted him to cruel and unusual punishment in violation of his Eighth Amendment and his Fourteenth Amendment rights to have his guilt or innocence determined on the evidence against him and a fair trial.

Florida Rules of Criminal Procedure 3.152 (2006) and the Fourteenth Amendment of the Constitution infer that the severance of co-defendants trials should be granted when evidence sought to be admitted applies only to one co-

defendant, but which may be improperly influential to the jury as to the charge against other defendants. See *Miller v. State*, 765 So. 2d 1072 (Fla. 4th DCA 2000); and *Bryan v. State*, 100 Fla. 779, 130 So. 35 (Fla. 1930). There is no doubt that the co-defendants blaming of the Appellant for the crimes charged clearly influenced the jury's finding of the Appellants guilt. (V40-V41, pp. 3371-3644).

As the Appellant also acknowledges that, a severance is not necessary when the evidence is "presented in such a manner that the jury can distinguish the evidence relating to each Defendants acts, conduct and statements and can then apply the law intelligently and without confusion to determine the individual Defendant's guilt or innocence. See *Gordon v. State*, 863 So. 2d 1215 (Fla. 2004); *Farina v. State*, 801 So. 2d 44 (Fla. 2001) and *McLean v. State*, 754 So. 2d 17 (Fla. 2d DCA 2000).

The failure to sever also resulted in jury confusion. Besides the defendants putting forth antagonistic defenses, the State presented evidence in volumes, with no distinction to who the evidence was in reference to. Over the objection of defense counsel, the State further submitted evidence in which was admissible to Robert Cannon who was not on trial due to plea negotiations, and the other two co-defendants with no delineation as to its applicability. Counsel objected to the relevancy of evidence approximately twenty-four (24) times. (V33, pp 2410, 2413, 2450, 2463, 2469, 2473); (V34, pp 2521, 2537, 2548, 2591, 2595, 2613). The court overruled, but did not offer limiting instructions in order to preserve the Appellant's

Fourteenth Amendment rights to have his guilt or innocence determined based on the evidence against him. Such a broad admission of evidence has been determined to merit severance of Appellants when the dangers of misapplication of such would serve to submit the Defendant to a "rub off" of guilt by the association in a trial court setting. See *U.S. v. Kelly*, 349 F. 2d 720 @756-59 (2d Cir. App. 1965) cert. denied 348 U.S. 947, 86 S.Ct. 1467, 16 L. Ed 2d 544 (1966.

Pursuant to the Appellate Courts in this State and the United States in whole, have determined that the 'convenience of trying Co-Defendants together is not in and of itself sufficient reason to deny any motion to sever Co-Defendants for Trial." See *Miller v. State*, 694 So. 2d 884 (Fla. 2d DCA 1997). In *United State v. Donawali*, 447, F. 2d 940 (9th Cir. App. 1971) the Court of Appeals determined:

"The Court must weigh, case by case, that advantage and economy of a joint trial to the administration of justice against possible prejudice to a Defendant. It needs not exercise its discretion by ordering separate trials unless a joint trial is manifestly prejudicial." *U.S. v. De La Cruz Bellinger*, 422 F. 2d 723 (9th Cir. App. 1970).

The trial court was again made aware of the antagonistic defenses that were going to be employed by the other defendants when opening statements were made by trial counsel of co-defendant Michael Salas. His counsel presented to the jury his intention to submit testimony that his client acted under the duress and domination of the Appellant. (V29, pp 1780). After the opening statement by Salas' trial counsel

the Appellant again moved for severance. (V29, pg. 1793).

In *Crum v. State*, 398 So. 2d 810 (Fla. 1981) the Supreme Court of Florida determined;

"Defendant's motion for severance, which was made at opening of trial for opening statement which was based on facts that were not known prior to trial and which was based on knowledge that co-defendant would accuse the Appellant of being solely responsible for murder for which both were charged, was not untimely and its denial constituted an abuse of discretion."

Counsel for Jerone Hunter reserved his opening statement. However his counsel employed the exact same strategy when giving his opening statement at the close of the prosecution case in chief. (V40, pp 3328-3343). Again the Appellant was forced to move for mistrial and severance. (V40 p 3468).

Clearly to require the Appellant to defend himself against the manifestly prejudicial statements made by both co-defendants counsel denied the Appellant a fair trial. Denial of severance on this surprise and illegal defense by his codefendants denied the Appellant his protected fundamental rights to a fair and impartial trial under the Fourteenth Amendment and submitted him to Cruel and Unusual Punishment under the Eighth Amendment of the Constitution. The Appellant's motion for mistrial should have been granted by the trial court. (V40 p 3468).

The Appellate Courts have determined that antagonistic defenses alone not rise to

the level of trial prejudice. See *McCray v. State*, supra; but may support severance if so prejudicial; coupled with: the denial of the severance on the basis that evidence admissible against his codefendants were not admissible against himself. Clearly, the Appellant was unfairly prejudiced by being tried together with his codefendants. The denial of the severance motion was fundamental error.

Even if the trial court properly refused to sever the defendants during the guilt phase, it was fundamental error when it did not grant the motion for severance in the penalty phase.

As expected the co-defendants argued in the penalty phase that they acted under the domination of the Appellant. (V48 pp 4455, 4460) (V48 pp 4586-4596). This argument only furthered the prejudice to the Appellant in the penalty phase. There is no doubt the Appellant was denied a fair trial in the guilt phase as well as the penalty phase and if for any other reason his judgment and sentence should be reversed on this issue.

4. WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF ALLEGED PRIOR BAD ACTS BY THE APPELLANT

The standard of review on this issue is whether the trial court abused its discretion. Prior bad acts are inadmissible in a trial in which the Defendant is not charged with in the Indictment. *Bundy v. State*, 455 So. 2d. 330 (Fla. 1984).

The trial court abused it's discretion in permitting the admission of alleged 'prior bad acts' not charged in the indictment or at all necessary to prove a fact in issue.

Over objection by the Appellant, Graham testified on August 4, 2004, Appellant and the group went to a park to fight some other kids, but no one showed up. (V30, 1981-1982). They later saw the group they intended to fight and the Appellant shot into their vehicle. (V30, p 1983).

Generally, any evidence relevant to prove a material fact at issue is admissible unless precluded by a specific rule of exclusion. See 90.402, Fla. Stat.; *Zack v. State*, 753 So. 2d. 9 (Fla. 2000) and *Butler v. State*, 842 So. 2d 817. Collateral crime evidence codified in 90.404, Fla. Stat. is also relevant and admissible if used to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. However, even relevant evidence will be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or if

introduced to prove a Defendant's bad character or propensity to commit the crime charged. See *Butler v. State*, supra: *Gore v. State*, 719 So. 2d 1197 (Fla. 1998); *Williams v. State*, 621 So. 2d 413 (Fla. 1993); *State v. DiGuillio.* 491 So. 2d 1129 (Fla. 1986).

The only limitations to the rule of relevancy are that the State should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence solely for the purpose of showing bad character or propensity, in which event it would not be relevant, and such evidence, even if relevant, should not be admitted if its probative value is substantially outweighed by undue prejudice.

On May 26,2006 the State filed a Notice of Intent to Rely on Evidence of Prior Bad Acts or Other Crimes Pursuant to F.S. 90.404 (2) requesting this testimony of an alleged shooting incident involving the Appellant, his co-defendants, and Brandon Graham be allowed into evidence at trial. (V7, pp 1361-1367, (V7, pp 1370-1371).

In a written order on July 12, 2006, the trial court granted the Notice of Intent to introduce the 404 evidence. (V8, pp 1402-1411).

At trial the Appellant timely objected to this testimony as improper 404 evidence thus preserving the issue for this appeal. (V30, p 1979). The trial court allowed the introduction of the August 4, 2004 incident into evidence. (V30, p 1979).

Thus, the trial court abused its discretion in permitting such into evidence and concluding its own theory prior to hearing the evidence in the trial, biasing the

Appellant from being tried on the evidence against him and not improper inferences. Such violated the Appellant's constitutionally protected rights under the Fourteenth Amendment, submitted him to cruel and unusual punishment under the Eighth Amendment.

The Appellants trial began on April 10, 2006. The voir dire proceeded until April 13, 2006 when it became readily apparent that an impartial jury could not be selected. (V7 pp 1321-1322).

On April 21, 2006, the trial court re-opened discovery. (V7, pp 1330-1331). However, trial was officially in recess. On May 26,2006 the State filed a Notice of Intent to use the above-mentioned shooting incident into evidence pursuant to Fla. Cr. Rule 404. The Appellant argued the notice violated the ten (10) day time limitation stated in the rule involving Williams rule evidence. The Appellant would submit the ten (10) day time limitation expired on March 31,2006; ten days before jury selection began on April 10, 2006. (V7, pp 1361-1367).

The legislative intent of this statute was to ensure fair notice that could properly be investigated and prepared. The prosecution sought to invoke such under Fla. Stat. 90.404 (A and B) and failed to disclose such prior to trial and sought the availability of a recess, which no allotment is provided for in the statute. Even if discovery was re-opened, the Appellant was officially still in trial.

The trial courts admission of this evidence violates Fla. Statute 90.404 and his

protected rights under the Sixth, Eight and Fourteenth Amendments to the United States Constitution and such was an abuse of the trial courts discretion' which is subject to this Court's review on appeal.

5. WHETHER THE TRIAL COURT ERRED BY NOT GRANTING A JUDGEMENT FOR ACQUITAL WHEN THE STATE FAILED TO PROVE TO THE CHARGE AGAINST HIM

The standard of review of a trial court's denial of a motion for judgment of acquittal is de nova. *Fowler v. State,* 921 So2d 708, 711 (Fla. 2d DCA 2006).

Appellant contends that although the State proved the victims E. Belanger, F. Roman, J. Gleason, R. Gonzalez, M. Nathan and A. Vega were killed, a dog was killed, the home was burglarized and the body of E. Belanger was mutilated, and a pair of size 12 Lugz boots was found that were most likely at the crime scene and the boots had two DNA contributors, one being the Appellant and the other unknown., (V36, pp 2789-2790).

In *Cox v State*, 555 So. 2d 352 (Fla. 1989) the Court held that "one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden." Id @353 (quoting Davis, 90 So. 2d @631). If the States evidence is not inconsistent with the Defendant's hypothesis of innocence, then no jury could return a verdict in favor of the State. *State v. Law*, 559 So. 2d 187 @ 189 (Fla. 1989). In Cox, investigators found a hair, some O-type blood and a boot print, none of which was definitely the Defendants in the victims car; 555 So. 2d @ 553.

In comparison with the Appellant's case, the Prosecution presented a pair of size 12 Lugz boots which contained the wearer DNA for the Appellant and an unknown contributor. (V36, pp 2789-2790). The boots contained blood spatter of 3 victims, that of E. Belanger, F. Roman and A. Vega. Tread marks, which most likely were the boots and one identified set was found at the crime scene. (V36, pp 2792-2804). The unknown wearer DNA was not compared to the DNA of additional suspects (in re: Brandon Graham, Abiquel Vasquez).

The Appellant testified he did wear the boots earlier in the evening but returned home prior to arriving at the bar, "Papa Joes" so he could change into comfortable dancing shoes (to wit: size 12, brown K-Swiss boots). V39; pp. 3027-3028. The Appellant contends that any evidence of his DNA inside the Lugz boots is equally susceptible to an inference that he had owned them, but did not have them on during the time of the murders as he was elsewhere with friends, which went unrequited by the State. (The State neither presented evidence that Appellant had the boots on at the time of the homicides only that he had them on earlier that evening).

Appellant similarly notes that his fingerprints were not found at the crime scene or on the murder weapons, or on the alleged vehicle in which was alleged to be at the crime scene and contained items of the victims. Neither was saliva, semen or hair linked the Appellant to the murders.. (V35, p 2640).

The Appellant contends that the evidence of another wearer DNA and the

circumstances surrounding the boots in question present a circumstantial case.

The Appellant's Motion for Judgment of Acquittal should have been granted.

6. WHETHER THE TRIAL COURT ERONEOUSLY APPLIED FLORIDA STATUTE 921.141(5)(H), FINDING THE AGGRAVATOR HEINOUS, ATROCIOUS, AND CRUEL

The Appellant argues that the evidence in this case fails to support the finding that the murders were heinous, atrocious or cruel (HAC). Appellant contends that the evidence indicates that the four victims the Appellant was sentenced to death for, in fact, were rendered unconscious or dead immediately after the first blow was delivered and that the evidence supports the attacks were committed stealthily and lacked mental or physical torture.(V38, pp 2976-3094).

The Appellant also contends that post-mortem injuries are not to be considered when applying this aggravator. See, *Jackson v. State*; 451 So. 2d 458 (1984); *Pope v. State*, 441 So. 2d 1073 (Fla. 1983), *Halliwell v. State*, 323 So. 2d 557 (Fla. 1975). He argues therefore, that absent additional evidence that the purportedly acted to unnecessarily torture the victims or inflict a high degree of pain and suffering, the killings in his case are not heinous, atrocious or cruel.

In *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002) and *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), the Supreme Court stated:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile;

> and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The cold, calculated and premeditated and aggravating factor, "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Rimmer,* at 327; *Brown v. State*, 721 S. 2d 274 (Fla. 1998) (citing, *Stano v. State*, 460 So. 2d 890 @893 (Fla. 1984)). Thus, the Florida Supreme Court has consistently held that instantaneous or near instantaneous death, which are unaccompanied by any additional acts by the Defendant to mentally or physically torture the victims, are not heinous, atrocious or cruel. See, *Ferrell v. State*, 686 So. 2d 1324 @1330 (Fla. 1996).

"Execution style killings are not generally HAC unless the State has presented other evidence to show some physical or mental torture of the victim." *Hartley v. State*, 686 SO. 2d 1316 (Fla 1996) (same); *Donaldson v. State*, 722 SO. 2d 177 (Fla. 1998).

The record here does not reveal any actions by Appellant to torture the victims

or subject them to pain and prolonged suffering. As previously determined by this Court, any injuries or trauma caused after death is prohibited from being weighed as evidence of this aggravating factor. See, *Jackson*, supra. It is evident by the record that the trial court considered this factor, despite it's acknowledgment of the prohibition of such. Where absent post-mortem injury, there exists no evidence supporting the finding of the (HAC) aggravator. V38; pp. 2976-3094.

The fact that the Appellant purportedly forced his way into the home is sufficient to support that the victims knew that they would be killed or laid there in fear of their impending deaths. See, Ferrell, 686 SO. 2d @1330 ("speculation that the victim may have realized that the Defendants intended more than a robbery when forcing the victim to drive to the field is insufficient to support this aggravating factor.") *Menendez v. State*, 368 So. 2d 1278, 1282 (Fla. 1979) and *Rimmer v. State*, 825 So. 2d 304, 328 (Fla. 2002).

The record in this case does not evince that the Appellant acted with extreme and outrageous depravity or that he inflicted a high degree of physical or mental pain.

The medical examiner in this case testified that the primary blows distributed to the victims heads rendered them either dead instantly or instantly rendered them unconscious, and based on this testimony the victims were killed in a very short time (perhaps seconds) and would have experienced a very short period of mental anguish if any at all. Ferrell, supra, counsels the Court that it is only the mental aguish

experienced by any of the victims subsequent to the murders of the others that should be considered when evaluating whether the HAC aggravator has been established. The record reflects no evidence supporting this aggravator where each victim the Appellant was sentenced to death for were in separate rooms or were paired in separate rooms. (V38 pp 2976-3094).

The finding of this factor contributed greatly to the Appellant's sentences of death, and application of this unsupported aggravating factor submitted him to cruel and unusual punishment in violation of the Appellant's Eighth Amendment rights under the Constitution, and basic equal rights under the Fourteenth Amendment of the U.S. Constitution, rendering the "HAC" aggravator misapplied in this instance.

The Appellant contends that Section 921.141(5)(H) Florida Statutes (the "HAC" factor) is unconstitutional based on violations of Article I, Sections II, IX, XVI, XVII and XXII of the Florida Constitution; Article II, Section III of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

Section 921.141(5) (H) creates the following aggravating factor utilized to impose the death penalty:

"The capital felony was especially heinous, atrocious or cruel."

The Constitutional power and authority to create substantive legislation is vested solely in the Florida Legislature by Article III, Section I of the Florida

Constitution. Persons in one branch of government, e.g., the Judicial branch, are constitutionally proscribed from exercising any powers appertaining to another branch, the Legislative branch, Article II, Section III, Florida Constitution.

In a "weighing state" such a Florida, a statutory aggravating factor must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sanction on the defendant compared to others found guilty of murder. See, *Lowefield v. Phelps*, 484 U.S. 321, 108 S. Ct. 546, 554 (1988); *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L.Ed 2d 235 (1933). Section 921.141(5)(H) Florida Statutes does neither.

As written and promulgated by Florida's Legislature, Section 921.141(5) (H), Fla. Stat., is overly broad and vague. *Espinosa v. Florida*, 505 U.S. 1079 (1992); *Shell v. Mississippi*, 498 U.S. 1 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988). The terms "heinous," "atrocious," and "cruel" do not provide sufficient guidance as to which murders and factual situations are encompassed. This statutory aggravating factor can be applied to virtually any first-degree murder. It thus enables arbitrary, capricious, unguided and unfettered imposition of the death penalty in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the U.S. Constitution; and Article I, Section(s) 2, 9, 16, 17 and 22 for the Florida Constitution.

The vague statutory language promotes imposition of the death penalty for improper and unconstitutional reasons such as race, gender, ethnicity and/or religion.

The "HAC" factor also encompasses considerations set forth in other aggravating circumstances and therefore the same aspects of a homicide is considered multiple times as justification for imposition of the death penalty. The standard jury instruction for this statutory aggravating factor is unconstitutional for these same reasons.

Because the statute is unconstitutionally vague as written, Florida juries, trial courts and the Supreme Court of Florida have applied Section 921.141(5)(H), Fla. Stat., in arbitrary, capricious, unreasonable, inconsistent and frivolous ways. Use of this statutory aggravating factor in this manner violates the fundamentally protected rights under the Florida and United States constitutions. The evidence in support hereof is thus documented in the case(s) involving the "HAC") factor in Florida. See. *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002); *Ocha v. State*, 27 FLW 5617 (Fla. 2002); *Chavez v. State*, 27 FLW 5517 (Fla. 2002); *Cox v. State*, 819 So. 2d 705 (Fla. 2002); *Hurst v. State*, 819 So. 2d 689 (Fla. 2002).

In *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), cert. denied 416 U.S. 943 (1973), the Florida Supreme Court established its own working definition of the unconstitutionally vague terms contained in Sec. 921.141(5)(H) Fla.Stat., In conducting approximately 30 years of appellate review of death sentences since Dixon, this standard has proved to be unconstitutionally vague and malleable.

The supplemental definitions authored by the Florida Supreme Court violate the separation of powers doctrine. Imposition of the death penalty contrary to the

provision in the State Constitution establishing the separation of powers doctrine denies due process and thus violates the Fourteenth Amendment to the U.S. Constitution:

> "The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States (citations omitted). It is possible, therefore, that the double jeopardy clause does not through the Fourteenth Amendment, circumscribe the penal authority of State courts in the same manner that it limits the power of Federal courts. The due process clause of the Fourteenth Amendment however would presumably prohibit State courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by State law."

Whalen v. United States, 445 U.S. 684, 689, 100 S. Ct. 1432, 1436, 63 L.Ed 2d 315 FN 4 (1980) (emphasis added).

Therefore, Section 921.141(5)(H), Fla. Stat. as an aggravating factor to justify imposition of the death penalty is unconstitutional and violates the Appellants rights under Article I, Section(s) 2, 9, 16, 17 and 22 of the Florida Constitution; and the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

7. WHETHER THE TRIAL COURT ERRED IN ITS APPLICATION OF SECTION 921.141(5)(I) COLD, CALCULATED, PREMEDITATED (CCP)

The Appellant contends that the trial court erred, and thus, abused its discretion in its application of Section 921.141(5) (I) Fla. Stat. in order to effectuate a death sentence. The application of the cold, calculated or premeditated (CCP) aggravator is not, and was not supported by the evidence or facts established in this case.

Pursuant to *Mitchell v. State*, 527 So. 2d 179, 182 (Fla. 1988) the Florida Supreme Court has determined: the "cold" element precludes application of the circumstance to a killing "consummated by one in a rage" as the Trial Court in this instance made a reference to in it's application.

The "calculated" element is precluded pursuant to *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987); and *McKinney v. State*, 579 So. 2d 80, 85 (Fla. 1991), where the Florida Supreme Court has determined that absent "a careful plan or prearranged design" evidencing "heightened pre meditation" or "plan or arranged to commit murder before the crime began" as evidenced by the record, and testimony received during the prosecution, there existed no intent to commit murder, or battery. The allegation was that there existed a conspiracy to commit a burglary. The testimony elicited from the codefendants during the presentation of the defense, did not contain

the "trustworthiness" necessary to apply the "calculated" or "premeditated" aggravator in order to support the sentence of death imposed.

The evidence, factually did and does not support the trial court's application of Section 921.141(5)(I), Fla. Stat. and it's application based on personal beliefs, unsupported by evidence, fundamentally denied the Appellant of his due process rights and equal protection clause(s) under Article I, Section(s) 9 and 16 of the Florida Constitution and the Fourteenth Amendment of the U.S. Constitution.

In *Wright v. State*, 473 So. 2d 1277 (Fla. 1985) cert. den. 106- S. Ct. 870 (1986). Therein, the Defendant killed a burglary victim "because she recognized him, and he did not want to go back to prison;" the court held that the trial court erred by applying the CCP circumstance. The trial court here determined that because the appellant knew the victim(s) on a personal basis prior to the homicides that the CCP aggravator was merited and given great weight without foundation or support through evidence, the trial court applied this aggravator to support the sentence of death for the murders of the victims.

The application of the CCP aggravator, pursuant to Section 921.141(5)(I) Fla. Stat. was held inappropriate when "the State presented no evidence that this murder was planned and, in fact, the instruments of death were all from the victim's premises." See *Harris v. State*, 438 So. 2d 787 (Fla. 1983), cert. den. 466 U.S. 963 (1984). The prosecution, as evidenced by the record, failed to offer evidence that the

appellant brought the weapons utilized to the crime scene. The only evidence surmised was that "two" of the bats out of four located in a drainage ditch were utilized in the homicides. The weapons in fact did not obtain fingerprints or DNA of the Appellant linking them to him.

The evidence supports that the weapons were located via the assistance of co-defendant Salas. (V34, pp 544). Nothing supports the allegation that the victim(s) were murdered by any weapons brought to the crime scene or that the Appellant was armed at the time her purportedly entered the residence, which also remains unsupported by evidence, and the application of the CCP aggravator, pursuant to this reasoning is error and violated the Appellant's constitutional protections which are guaranteed under Article I, Section(s) 9 and 16, Fla. Constitution and the Fourteenth Amendment under the U.S. Constitution. Such said violations denied him further of his Sixth and Eighth amendment rights.

This circumstance has constantly been rejected even with the evidence that the weapons were bought to the scene of the crime(s). See *Amoros v. State*, 531 So. 2d 1256 (Fla. 1988); *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988) and *Lloyd v. State*, 524 So. 2d 396 (Fla. 1988). In Lloyd, the defendant arrived at the victim's house with a .38 caliber pistol, demanding money and ordering the victim and her daughter into the bathroom. The victim was shot twice, the fatal shot being fired in contact with her head. The Supreme Court disapproved of the CCP aggravator, explaining that while

there was a "suspicion that this was a contract killing" such was not proven beyond a reasonable doubt by the prosecution.

In *Rogers v. State*, supra the Supreme Court determined that where there is ample evidence to support premeditation "we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation," and the definition of 'calculation' consists of a careful plan or pre-arranged design, which is absent and unavailable with the evidence provided in this instance, nullifying the application of the CCP aggravator as it was erroneously applied to this instance in order to effectuate a sentence of death. See also *Smith v. State*, 515 So. 2d 182 (Fla. 1987).

The Appellant contends that the trial court abused its discretion and applied the cold, calculated and premeditated aggravator under Section 921.141(5) (I), Fla. Stat. and utilized it greatly to support a sentence of death.

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instruction on the instant circumstance assures arbitrariness and maximizes discretion in reaching the penalty verdict. The Florida Supreme Court has promulgated standard jury instructions for use in the trial courts in this State. Although the trial courts may substitute correct statements of law when standard jury instructions are incorrect, the institutional effect of the standard instructions renders Florida's capital sentencing scheme unconstitutional. All jury

recommendations in cases resulting in a death sentence in the trial court affect proportionality review, leading to arbitrary application of the death penalty in Florida where the jury's recommendation has been infected by the unconstitutional circumstance.

The instant circumstance is vague on its face, and the instruction based on it also is too vague to provide the constitutionally required guidance; failing to inform the jury of the following limiting constructions of the circumstance, under the CCP aggravator.

Any holding that jury instructions in Florida capital sentencing proceedings need not be definite directly conflicts with the cruel and unusual punishment clauses of State and Federal Constitutions under the Eighth Amendment and Article I, Section 17 of the U.S. and Florida Constitution denied the Appellant of his Constitutional rights under Article I, Section 16 Fla. Constitution. And denied him due process of law under the Fourteenth Amendment and Article I, Section 9 of the Florida and U.S. Constitution and requires correction by the Florida Supreme Court.

8. WHETHER THE TRIAL COURT ERRED WHEN DIMNISHING THE WEIGHT ACCORDED TO A MENTAL MITIGATING CIRCUMSTANCE

In *Globe v. State*, 877 So. 2d 663 (Fla. 2004) the Florida Supreme Court reiterated it's previous determinations in capital offenses where the Trial Court erred in diminishing the weight to be accorded to a mental health mitigating circumstance.

The Florida Supreme Court, in *Francis v. State*, 808 So.2d 110, 140 (Fla. 2001) considered whether the trial court improperly considered the Defendant's sanity and competency in diminishing the weight accorded to a mental health mitigating circumstance. The Supreme Court recited the applicable law as follows:

> A finding of sanity does not preclude consideration of the statutory mitigating factors concerning a defendant's mental condition. *Morgan v. State*, 639 So. 2d 6, 13 (Fla. 1994) (finding error in Trial Court's rejection of mental mitigators on the basis that the defendant was sane); *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993) (remanding for resentencing where Trial Court failed to find statutory mental mitigation because the defendant was sane even though evidence indicated that defendant suffered from organic brain damage and that he was in an acute psychotic state at the time of the murder); *Huckaby v.*

State, 343 So. 2d 29, 33-34 (Fla. 1977) (the Supreme Court of Florida vacated the death sentence, where the Trial Court completely ignored evidence of mental mitigation partially on the basis that the defendant understood the difference between right and wrong); c.f. *Smith v. State*, 407 So. 2d 894, 902 (Fla. 1981).

Mental health experts established in Francis, supra that the defendant suffered from mental illness, although both experts testified that the defendant could at all times distinguish between right and wrong and was capable of planning and executing the crimes as well as his attempts at covering up his misdeeds afterward. The court held in Francis that the trial court did not refuse to consider mental mitigation, "noting" that the trial court gave the mitigator "some weight" and noted that "the weight to be assigned to a mitigating factor lies within the sound discretion of the Trial Court." (Citing *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000)); and *Campbell v. State*, 571 So. 2d 415, 420 (Fla. 1990).

The trial court refused to consider the statutory mitigator of mental health in its sentencing order issued on September 21, 2006. V9; pp. 1558-1579. Therein the trial court acknowledged the Appellant had a form of brain damage, and long prior and ongoing history of mental illness. The court determined that because the witnesses for the defense did not specify a 'specific' illness, and the prosecution offered the testimony of an unqualified medical x-ray technician contesting the

results of the PET (Position Emission Tomography) scan and qualified neurological and mental health experts presented by the defense.

The trial court abused its discretion and determined that despite extensive supporting evidence, the Appellant did not establish this mitigator and refused to afford it the weight it merits. The Florida Supreme Court established that this mitigator presented with evidence is to be afforded weight. See, *Morgan, supra; Knowles, supra*; *Huckaby, supra; Smith, supra*. The trial court may not completely ignore evidence of mental mitigation because it has become emotionally involved in the matter. Such abusive decisiveness has consistently been condemned by the Florida Supreme Court.

Competent, substantial evidence exists to support Appellant's mental mitigator under Florida Statutes Section 921.141(7)(B).

The United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death. See *Hitchcock v. Dugger*, 481 U.S. 393, 394, 107 S. Ct. 1821, 95 L. Ed 2d 347 (1987); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

Here, despite evidence to the contrary, the trial court found that the Appellant did not establish this mitigator as permitted under the statutes. Thus, the Appellant contends that the trial court abused its discretion and refused to consider or afford

weight to the mental health mitigator, which the Appellant firmly established, thus violated his constitutionally protected rights to be free from cruel and unusual punishment under Article I, Section 16 and the Eighth Amendment violated his rights under the Fourteenth Amendment and Article I, Section 17, requiring vacating of his sentences of death and remanding for new penalty phase proceedings in accord with the laws of this State.

9. WHETHER THE APPELLANTS SENTENCE OF DEATH WAS EXTREMELY DISPARATE IN COMPARSION TO HIS EQUALLY CULPABLE CO-DEFENDANTS

The Supreme Court has established precedent that a co-defendant's sentence may be relevant to a proportionality analysis, where a co-defendant is equally or more culpable. See, *Cardona v. State*, 641 So. 2d 361 (Fla. 1994); *Scott v. Sugger*, 604 So. 2d 465, 468-69 (Fla. 1992); *Hayes v. State*, 581 So. 2d 121, 127 (Fla. 1991); *Diaz v. State*, 513 So. 2d 1045, 1049 (Fla. 1987).

The record in this case does not support the trial court's finding that Appellant was the more culpable for the four defendants. Therefore, disparate treatment is not justified.

In prior cases, the Supreme Court has approved the imposition of the death sentence when the "circumstances" indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime. See *Tafero v. State*, 403 So. 2d 355 (Fla. 1981) cert. denied 455 U.S. 983, 102 S. Ct. 1492, 71 L.Ed 2d 694 (1982).

The codefendants testified in their own defense attempting to lay blame on Appellant, in order to escape a sentence of death.

The jury found all of the defendants guilty of six counts of capital felony murder, finding them equally culpable of the same offense(s) applicable under the death penalty. (V8, pp 1425-1458). The jury recommended a life sentence as to one codefendant, death for the Appellant and another codefendant. The fourth co-defendant, Robert Cannon, entered a guilty plea to all fourteen counts and later refused to comply with the plea.

There is insufficient evidence from which the jury and trial court could have concluded that Appellant was the dominant force behind the homicide(s). Therefore, the sentences Appellant received were extremely disparate and would fail extremely under the proportionality review.

The fundamental fairness of the due process clause and basic equal rights of the Appellant guarantee him equal proportionality of his sentences, and the application of the law. The guarantee of such is protected under the Fourteenth

Amendment and Article I, Section(s) 9 and 17 of the Florida Constitution. The denial of proportional sentence extremely disparate from his codefendants is a violation of his protected rights to be free from cruel and unusual punishment.

10. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN INSERTING THE CONJUNCTION "AND/OR BETWEEN THE APPELLANT'S NAME AND THE NAMES OF THE CO-DEFENDANTS HUNTER AND SALAS IN ALL THE JURY INSTRUCTIONS ON THE SUBSTANTIVE CRIMINAL CHARGES, INCLUDING THE PRINCIPAL INSTRUCTION

The cases hold that include the "and/or" conjunction between the names of codefendants in the jury instructions under facts like the instant case results in fundamental error because it creates a situation in which the jury may have convicted the Appellant solely upon a finding that the codefendants conduct satisfied an element of the offense. *Harris v. State*, 31 Fla. L. Weekly D1691 (Fla. 3D DCA, 2006); *Davis v. State*, 895 So. 2d 1195 (Fla. 2d DCA 2005); *Concepcion v. State*, 857 So. 2d 299 (Fla. 5th DCA 2003); *Williams v. State*, 774 SO. 2d 841 (Fla. 4th DCA 2000); *Dempsey v. State*, 31 Fla. L. Weekly D2663 (Fla. 4th DCA 2006).

The trial court instructed the jury as to criminal conspiracy under Count I as

follows:

> Criminal Conspiracy. To prove the crime of criminal conspiracy, as charged in Count I of the Indictment, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. The intent of Troy Victorino (Appellant) and/or Jerone Hunter and/or Michael Salas were that the offense of aggravated battery, murder, armed burglary of a dwelling and tampering with physical evidence would be committed.
> 2. In order to carry out the intent, Troy Victorino (Appellant) and/or Jerone Hunter and/or Michael Salas agreed, conspired, combined or confederated with each other to cause aggravated battery, murder, armed burglary of a dwelling and tampering with physical evidence to be committed either by them, or one of the, or by some other person. It is not necessary that the agreement, conspiracy, combination or confederation to commit aggravated battery, murder, armed burglary of a dwelling and tampering with physical evidence be expressed in any particular words, or that words pass between the conspirators. It is not necessary that Troy Victorino (Appellant) and/or Jerone Hunter and/or Michael Salas do any act in furtherance of the offenses conspired. (V8, pp 1446-1452).

This instruction allowed the jury to convict the Appellant of conspiracy based upon the intent or actions of the codefendants Hunter and Salas.

The State proceeded against the Appellant and codefendants Hunter and Salas upon theories of both premeditated murder and felony murder, as set forth in the indictment. (V1 pp 29-34). The trial court instructed the jury as to first degree pre-meditated murder under Count two (2) as followed in the record. (V8 pp 1446-1452). The court instructed the jury identically with respect to the remaining first degree murder counts three through seven (3-7) in regard to victims Francisco Roman, Jonathan Gleason, Roberto Gonzalez, Michele Nathan and Anthony Vega.

Thus, the jury could have convicted the Appellant of first degree premeditated murder based solely on the intent and criminal acts of codefendant Hunter or Salas, even if the Appellant did not kill the victims or harbor premeditated intent to kill.

Similarly, the trial court instructed the jury as to first degree felony murder, as followed in the record. The trial court also instructed the jury identically as to first degree, felony murder for each of the other victims in Courts III-VII, namely Francisco Roman, Jonathan Gleason, Michelle Nathan, Anthony Vega and Robert Gonzalez.

As a result, the jury could have and did convict the Appellant of first degree felony murder based solely on a finding that the codefendants Hunter or Salas were guilty of burglary and the co-defendants actually killed the victim, even if the

Appellant was not guilty of burglary and did not kill the victim(s).

The trial court instructed the jury as to the crime of burglary as followed in the record. Thus, even if the Appellant did not intend to commit murder upon entering the home, the jury could have convicted the Appellant of burglary based upon the intent of Hunter or Salas to commit murder.

The trial court instructed the jury similarly as to principals as followed in the record. The jury could have convicted the Appellant as a principal based upon the intent of criminal acts of co-defendants Hunter or Salas, even if the Appellant did not possess such intent or commit such act.

The Appellant testified he had no intent to commit murder, was not present at the scene, did not kill or assist anyone in killing. He testified that he was not present at the murder scene, prior to, during or after the homicide occurrences and presented alibi witnesses to this effect to the court and went unrebutted by prosecutors.

Regardless, this testimony, witness testimony, lack of evidence and closing argument were to no avail because the jury was instructed by the court that it could nevertheless convict the Appellant based upon the criminal acts and intent of Jerone Hunter and/or Michael Salas.

The trial court committed fundamental error in using the conjunction “and/or” between the names of the Appellant and each of the codefendants in the jury instructions in the cause. Fundamental error is not subject to harmless error analysis

because by its very nature, fundamental error has to be considered harmful. See, *Reed v. State*, 837 SO. 2d 366 (Fla. 2002).

The issue of fundamental basic due process of law rights may be addressed by the reviewing court absent objection. Due to the fundamental fairness of the Constitutional guarantees, the Appellant was denied a fair trial and due process of law due to the erroneous jury instructions, violating his protected constitutional rights under the Fourteenth Amendment, and Article I, Sections 9 and 16 of the Florida Constitution. His convictions should be reversed and the case remanded for a new trial.

11. THE TRIAL COURT ABUSED IT'S DISCRETION IN IT'S REFUSAL TO CHANGE THE VENUE OF THE TRIAL A SUFFICIENT DISTANCE TO ENSURE AN IMPARTIAL JURY FREE FROM TAINT

On April 25, 2006 the trial court issued a written order changing venue from Volusia County to St. Johns County. (V7 pp 1332-1335). St. Johns County is also in the Seventh Circuit. The Appellant would submit the trial court erred by no changing venue out of the seventh Circuit.

The granting or denying of a Motion for Change of Venue is within the sound

discretion of the trial court and the trial court's decision should not be disturbed absent a demonstration of a palpable abuse or grossly improvident exercise of discretion. See*: Tindall v. Smith*, 601 So. 2d 627 (Fla. App. 2 Dist. 1992)

12. WHETHER THE DEATH PENALTY STATUTES IN THE STATE OF FLORIDA ARE UNCONSTITUTIONAL AS APPLIED

The jury recommended by a vote of 10-2 to impose vote of death in the Appellant's penalty phase trial. (V9, pp 1531-1579). The Appellant argues because the vote was not unanimous he should receive a sentence of life. Additionally the Appellant argue that Florida Death Penalty Statute is unconstitutional as applied.

> In *Ring v. Arizona*, 522 U.S.584, 122 S.Ct. 2428 (2002), the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment..

For several reasons, a Florida jury's advisory sentencing recommendation in conformity with Section 921.141, Florida Statutes, cannot be equated with a verdict for Sixth Amendment purposes. *First*, an advisory jury in Florida does not make findings of fact. *See, e.g.*, *Hunter v. State*, 660 So.2d 244 (Fla. 1995) (citing *Hildwin v. State*, 531 So.2d 124, 128 (Fla.1988), *aff'd*, 490 U.S. 638 (1989)); *see also Combs v. State*, 525 So.2d 853, 859 (Fla. 1988) ("unlike . . . states where the jury is the sentence," a Florida "jury's advisory recommendation is not supported by findings of fact. . . . [B]both [the Florida Supreme Court] and the sentencing judge can only

speculate as to what factors the jury found in making its recommendation . . . .")
(Shaw, J., concurring).

When the jury's sentencing recommendation is not unanimous, a factual finding of death eligibility cannot be inferred from a recommendation of death. Florida's statute does not define eligibility for the death penalty by the existence of one aggravating circumstance, but rather by the existence of "sufficient" aggravating circumstances to justify imposition of a death sentence. §921.141(2) & (3), Fla. Stat. (Supp. 1996). One aggravating circumstance is necessary under Florida law but one statutory aggravating circumstance is not always "sufficient" to render the defendant eligible for the death penalty. Consequently, even if the jury unanimously finds facts at the first phase of the case that would establish the existence of one aggravating circumstance, such a finding does not, as a matter of law, establish death eligibility under the Florida statute. Because the jury is not required to make any separate finding on the question of eligibility, it is not possible to tell in the case of a non-unanimous recommendation whether dissenting jurors disagreed as to eligibility, as to the ultimate weighing of aggravating and mitigating circumstances, or both

The present procedure in Florida effectively conceals the jurors' improper application of invalid aggravating circumstances and/or their rejection of valid mitigating considerations that, though adequately proved, are not considered in the sentencing process. The "bedrock" findings that provide such important insight into

the judge's analysis do not exist to review the jurors' analysis.

The constitutional infirmities in the Florida statute cannot be remedied by a court altering the standard jury instructions to effectively rewrite the statute. First, section 921.141(3), expressly allocates the fact finding function to the trial judge, requiring written findings of fact *by the judge* "notwithstanding the recommendation of a majority of the jury." If the judge does not make the requisite findings, the statute unambiguously directs that the trial court "*shall impose* sentence of life imprisonment." *Id*. The statute therefore expressly forbids a trial judge from imposing a sentence of death based solely on the jury's recommendation.

It is also impermissible and unconstitutional to treat the jury's recommendation as a verdict because (1) the jury is repeatedly instructed that its verdict is merely "advisory" and a "recommendation" and that the "the final decision as to what punishment shall be imposed is the responsibility of the judge," and; (2) the statute does not require the jury's recommendation to be unanimous. 921.141(3), Fla. Stat.; Fla. Std. Jury

The findings required by Section 921.141 cannot be made, consistent with the requirements of the Sixth and Fourteenth Amendments as established in *Ring.* As Section 775.082(1) states, without those findings "such person shall be punished by life in prison." The same conclusion is reflected in Section 921.141(3) -- the court

"shall impose sentence of life imprisonment" if it does not make the "findings requiring the death sentence" -- and *Ring* establishes that it would be unconstitutional and prohibited by the Sixth and Fourteenth Amendment for a Court to make those findings.

Florida's capital sentencing procedure is unconstitutional under the holding and reasoning of *Ring v. Arizona*, and under Florida law that requires elements of an offense to be alleged in the charging document and found by a jury unanimously and beyond a reasonable doubt. This court must therefore enter an order precluding imposition of the death penalty in this case, because, in the event the defendant is convicted of first-degree murder, a life sentence without the possibility of parole is the only sentence that this court currently may impose under Florida's capital sentencing statute without violating the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution.

13. WHETHER THE TRIAL COURT VIOLATED THE APPELLANTS DUE PROCESS RIGHTS

The Florida Statutes §907.041(4)(f) establish that a pre-trial detention hearing shall be held within 5 days of the filing by the State Attorney of a Complaint to seek pre trial detention . . . It is also well founded law of court and procedure under Rule

3.130(A) that "Except when previously released in a lawful manner, every arrested person shall be taken before a judicial officer, either in person, or by electronic audio visual device in the discretion of the court within 24 hours of arrest…"

The fundamental violations here are that the trial court on April 13, 2006, four calendar work days after the beginning of the first stage of the trial process, on April 10, 2006, arrested the defendant during voir dire pursuant to the warrant issued for the same that the defendant was on trial. (V15, pp 2333-2434).

And formally initiating the constitutional procedure for criminal offenses, trial counsel for the defendant then objected to the court on the fundamental denial of the due process of law.' counsel engaged the court, explaining that the trial process had officially begun and that it was error to have a criminal defendant on trial for a crime in which he did not receive equal protection under the law to due process

14. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT ADDITIONAL PEREMPTORY CHALLENGES.

The Appellant contends that the trial court severely prejudiced him by refusing to permit him extra peremptory challenges where the Appellant only had ten (10). However, the State had an accumulated amount totaling 30 challenges.

The trial court, in denying the Appellant 'equal footing' as the statutes require,

effectively denied the Appellant a fair trial, where after the Appellants ten (10) challenges were exhausted, the State still maintained a minimum of 15 peremptory challenges, enabling them to strike an entire jury panel and seat one to their express desire, as the Appellant was unable to participate in the voir dire proceedings and he was essentially denied his fundamental rights to a fair and impartial Jury as well as his right to participate in the voir dire selection.

The Appellant requested and was denied additional challenges. (V28, p 1687).

15. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN CO-DEFENDANT CANNON REFUSED TO ANSWER ANY QUESTIONS BY THE DEFENSE.

Before the trial began Robert Cannon entered guilty pleas to the murders. In exchange for the guilty pleas Cannon was to receive a life in prison with no parole and testify truthfully at trial.

Cannon addressed the court and advised that he would not answer any questions. Counsel objected to the prior in court statements made by the co-defendant. The State had the co-defendant declared an adverse/hostile witness by the trial court, counsel objected. The State then continued to question the co-defendant about statements made out of court and asked him to confirm or deny such. Defense

counsel then continuously objected to such entering a ‘standing objection to such’. (V30, pp 1936-1965).

The co-defendant refused to confirm or deny the statements read by the Prosecutor. Defense counsel attempted to cross-examine the witness on his prior confirmation of being at the crime scene with the Appellant. The witness refused to testify or answer any questions, re-iterating his desire to have a trial. Counsel moved the court to order the witness to answer the question and the co-defendant refused and was thereafter dismissed from the court.

Counsel joined in a motion for a mistrial to the court due to the Bruton type violation and irreparable damage done to the Appellant. The court denied the motion for mistrial. (V30, p. 1965).

Cannon made an implication that the Appellant was at the crime scene and this statement was made in front of the jury. After the witness refused to testify further he was excused from the court. The trial court did not offer any ‘curative instructions’ to the Jury and the court’s allowing of such testimony had in fact violated the Defendant’s constitutionally protected rights under Article I, Section(s) 9 and 16 and U.S. Constitution Amendment(s) Six and Fourteen. Such an error over the objection(s) and motion of counsel was extremely prejudiced and bias in nature. Such testimony left uncured so infected the minds of the jury that the Appellant was subjected to an unwavering partial Jury and the error was so harmful as to delve into

the basic fundamental rights of the Appellant.

The trial court as a matter of law subjected the Appellant to a co-defendant unwilling to testify in violation of the Fifth Amendment., further denying the Appellant his rights under the confrontation clause of the Sixth Amendment and the taint contributed severely to the Appellants conviction being fundamentally harmful in error.

16. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL AS WARRANTED

A trial court's ruling on a Motion for Mistrial is subject to an abuse of discretion standard of review. *Perez v. State*, 919 So. 2d 347 (Fla. 2005*); Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999

The Appellant contends here that the trial court should have granted a mistrial and permitted the Appellant severance of him from his co-defendants once upon the objection of trial counsel the court was notified of the co-defendants intent to essentially prosecute the Appellant and rely on a non-applicable defense to an intentional homicide.

It is well established precedence that duress or necessity is not a defense to an intentional homicide. See General Jury instruction 3.6(16) and, *Wright v State* 402 So. 2d 193 (Fla. 3d DCA 1981). Trial Court recognized such only after the charge hearing, however, the reversible error had been committed.

17. WHETHER THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT EVIDENCE AGAINST THE APPELLANT INTO TRIAL

The facts and record in this cause reflect that the Appellant was on trial jointly with two other co-defendant's and that evidence that was admissible against the co-defendants and not against him was admitted into the trial court in front of the jury an estimated total of 23 times, over the objection of defense counsel and that the trial court did not offer curative limiting instructions or otherwise advise the jury on the weight given to certain evidence.

The Appellant submits that the presentment of such evidence absent some limitations on scope or cautionary instructions over the objection of counsel submitted him to extreme prejudice and mislead the jury as to the evidence against the Appellant and that pursuant to Florida's Evidence Code, Statute §90.403 such evidence was in fact inadmissible a

Therefore, the Appellant contends that trial court erred in its admission of irrelevant evidence over the Appellant's objection and that such admission violated his fundamental rights under the law, and that the evidence absent any instructions was a contributing factor to the Jury's determination of guilt and the defendant was critically prejudiced by such and such admission is and was in fact harmful in error.

18. THERE WAS CUMALITIVE ERRORS DURING THE APPELLANT'S TRIAL THAT DENIED HIM HIS CONSTITIUTIONAL RIGHT TO A FAIR TRIAL UNDER THE CONSTITIUTION

The Appellant claims that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments because the sheer number and types of errors involved, when considered as a whole, virtually dictate the sentence and verdict he would received.

The Supreme Court of Florida has deemed it to be appropriate to evaluate claims of error cumulatively to determine if the errors collectively warrant a new trial. *Rogers v. State*, 32 Fl. L. Wkly 541 @546.

The Appellant contends that absent the errors by the trial court, the evidence would have produced a drastically different result in the trial, and that the denial of the Appellant's fundamental rights singularly or cumulatively requires a reversal of his sentences and convictions by this court.

CONCLUSION

Based on the foregoing arguments the Appellant respectfully submits his judgment and sentence be reversed and he be granted a new trial.

CERTIFICATE OF FONT

That Appellant certifies that this brief is typed in New Times Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand/courier delivery/U.S. mail/e-mail to the Florida Supreme Court, 500 South Duval Street, Tallassee, Florida 32399-1927, Office of the State Attorney, 251 North Ridgewood Ave. Daytona Beach Florida 32114; by U. S. Mail delivery to the Office of the Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118; and to the Defendant/Appellant this _____ day of April 2008.

_____
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