IN THE SUPREME COURT OF FLORIDA

RUSSELL HUDSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC06-748
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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Bold emphasis in quotations is supplied. Underlined emphasis is in the original.

STATEMENT OF THE CASE AND FACTS

A jury convicted Russell Hudson, appellant, of first degree murder of Lance Peller, and armed kidnapping of Jennifer Fizzuoglio. R4 686-88. It recommended a death sentence by a 7-5 vote. R4 747. The court adjudicated him guilty, and imposed a death sentence for the murder and a life sentence for the kidnapping. R4 794-800. He appeals.

A. Around 9:15 p.m. on Saturday, October 20, 2001, Peller died in his apartment at the Tivoli Park complex in Fort Lauderdale of a single gunshot to the top of the head slightly behind the center line. T12 1599-1601. He would have instantly lost consciousness, and died in a minute. T12 1613, 1607. He had cocaine and cocaine metabolites in his blood, indicating ingestion probably within 30-45 minutes of death, and MDMA (ecstasy) was in his urine. T12 1602, 1611.

Peller called Robert Pritchard around 7 p.m., saying he needed a gun because someone had been sent to his place to kill him. T6 703-05. He did not seem nervous. T6 705. He said he

had bailed the man out the week before, and the man was not going to kill him because he was a friend. T6 705-06. It had to do with drugs, Peller was underselling another dealer, and the guy was going to kill him. Id. He said, "he's not going to kill me because he's a friend of mine", and "everything will be alright." T6 706-07. Pritchard thought everything would be okay as Peller "did not sound upset to me." T6 709. Peller thought he could get out of anything. Id. During the conversation, which lasted about 15 minutes, he sounded perfectly calm, he was a very calm individual. T6 713-14, 708.

Sixteen-year-old Jonathan Faley and Brandon Webb were hanging out, and Webb called Peller around 9 p.m. T6 721, 727. Peller said he was busy and to call back; he did not sound upset, scared, anything like that; it sounded like he had a drug deal going down. T6 755, 773.

Unable to get through to him again, they went to his apartment and found him in a puddle of blood in the bathroom. T6 722-23, 725-26, 751-62. The place was a mess, there was cocaine residue in the living room. T6 763. Webb searched for drugs. T6 726-27, 761.[1] Faley said Webb did cocaine on a mirror, but Webb denied it, saying they had already done 3-4 grams. T6 729,

[1] The state's theory was that Peller was the teenagers' drug supplier and they wanted to buy drugs from him that night. T6 686-87 (state's opening statement). Officers found GHB, cocaine, other drugs, and thousands of dollars in Peller's apartment. T10 1335-36.

764-65. They left, but Webb returned in his mother's Suburban, shook Peller, then did cocaine. T6 766-68. Officers arrived as he was leaving at 11:28. T6 768, 792, 802-04.

A deputy found the keys of Peller's Town Car in its ignition, and the car was warm to the touch sometime between 11:28 p.m. and 2:00 a.m. T6 812-13.

Before 11:00 p.m., Jennifer Fizzuoglio's red Mustang was seen, its motor running and no one inside, at a Presbyterian church. T7 827-29. The keys were in the engine the next day and the battery was dead. T7 827-46, 901-02. State's 4-Y, a corroded and jammed Smith and Wesson SW9A gray semiautomatic, serial PAV2775, with a round in the chamber and five in the clip, was found near the same church in July 2002. T8 1028-39, 1042. The bullet in Peller's body was fired from state's 4-Y. T10 1265. On August 28, 2001, Peller had reported the gun missing in a burglary. T7 942-44.

Robert Moreau, who lived with Vincent Bianchi in Tivoli Park, got a call from appellant asking for a ride from a Dairy Queen near where the Mustang and gun were later found, and Moreau picked him up around 10:45 to 11:15 on October 20. T7 955-57, T11 1468. Moreau said he looked regular, quiet, calm, like normal, explaining he "was normal to me. Somebody else might have thought differently"; "out of it" was normal to him.

T7 961-62. Saturday "was a drug night." T7 970. They later went separately to Club Stereo. T7 962-63.

At 10:46 a.m., October 21, a sale at an Exxon station was charged to Peller's credit card. T8 988-98, T11 1455-58, 1464.

The mother of Jeff Stromoski, appellant's roommate, had given Stromoski a black Nissan with a standard shift, and he let appellant make the payments and use the car. T8 1006, 1025. A couple of times he saw a bag in which appellant had a gun. T8 1009-11. About two weeks before the murder, Stromoski peeked in the bag and saw the gun, which was not medium sized, was not shiny, was not a revolver, it was an automatic type. T8 1012-16. It looked like State's 4-Y. T8 1015-16.

Around 10:10 p.m. on October 20, Fizzuoglio flagged down Deputy Bauer at SW 10th Street in Deerfield Beach. T8 1046-49.[2] She was screaming and crying and hysterical and tried to get in Bauer's car, saying someone was trying to kill her, saying the incident was at the Tivoli complex. T8 1050-51, 1059-60. She seemed intoxicated and said she had just used cocaine. T8 1067. She said she saw her friend get shot. Id. Backup officers said she was very upset, screaming, crying and rambling on, claiming she had seen somebody shot, and said she was doing co-

[2] Thomas Dunn, a motorist, testified that around midnight that night he saw a hysterical woman in the area; she said someone was trying to kill her and she wanted him to get her out of there. T12 1585-87. Dunn drove away and his wife called 911. T12 1587. He did not see a red Mustang: all he saw was "her and

caine. T8 1077, 1079. She said "they" had armor piercing ammo. T8 1096, 1103-04. Bauer did not see anyone drive in an erratic manner or anything like that. T8 1064-65. Fizzuoglio was taken to a hospital, and she looked distraught when two men picked her up at the hospital the next morning. T8 1057-58, 1105-07.

Deputy Feick was in uniform and in a patrol car in the parking lot at Peller's apartment on the evening of October 21, and other officers were around. T8 111. Appellant arrived in a car, got in a black Nissan and began backing out. T8 1110-13, 1118. Feick stopped him and opened the door. T8 1114. Appellant got out, saying it was his roommate's car. T8 1115. Feick handcuffed him and asked for identification, and appellant took his wallet from his pocket with his hands cuffed behind his back. T8 1115, 1121. Inside were his, Fizzuoglio's and Peller's licenses, and Peller's credit and social security cards. T8 1115-16, T11 1462. In the Nissan were a paper with the name Lance Romance and two of Peller's phone numbers, and a nine millimeter cartridge. T11 1469, T12 1559. Peller was known as Lance Romance. T12 1559.

DNA testing of latex gloves in the apartment showed at least three persons, maybe more, touched them. T10 1227, 1229. The mixture on the gloves could not include or exclude Peller, appellant, Fizzuoglio, Faley, or Webb. T10 1231. There was a

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no other vehicles or people." T12 1589.

trace amount not consistent with any of them, so "even if these people are part of that mixture, there's still an unknown person that came into contact with the gloves." Id. Perhaps more than one other person touched them. Id. No one could be conclusively excluded or included. T10 1233. A bloodstain on Fizzuoglio's shirt did not match her, appellant, Peller, Faley or Webb. T10 1234-35, 1240-41. No DNA was on the gun. T10 1233-34. Fizzuoglio's DNA matched a sample from her car's driver's seat. T10 1220. A sample on the gearshift matched an officer and had a partial profile of another donor. T10 1221-22. A steering wheel swab matched appellant, and others were consistent with a mixture of appellant and Fizzuoglio. T10 1243-44. Fingerprints in the apartment matched Peller and Fizzuoglio. T9 1155-56. Appellant's prints were on a glass on the kitchen counter and on sunglasses in the Nissan and a Marlboro pack. T9 1157. Fibers on the bullet in the body matched a Dolphins towel in Peller's apartment. T9 1187-88.

On the night of October 20, Det. Carmody spoke with Fizzuoglio at the hospital. She was very upset and mad that deputies had not believed her, and did not want to make a statement, but then talked about the incident. T10 1314-17. Carmody looked for log sheets at the two Tivoli entrances. T10 1320. One did not have a log sheet, and the other's log seemed useless. Id. The log showed a pair named Philippe and Jennifer

arrived at 9:10,[3] around the time of the murder, but he did not check that address or tag number. T10 1367-68. He did not check out the report that Peller's car was warm to the touch around 11:30 p.m. on October 20. T10 1369. He spoke with Fizzuoglio again on October 21, and she made a taped statement, and picked appellant in a photo lineup. T10 1325-33.

Carmody testified from notes he took as Det. Bukata questioned appellant on October 21: Appellant said he went to Peller's on the afternoon of the 20th to get marijuana for resale. T10 1346. He asked to use Fizzuoglio's Mustang; she drove because he could not drive a standard shift. T10 1346-47. She left while he did the sale. T10 1347. Moreau picked him up around 6:30 or 7. T10 1347-48. Appellant said he had been at Peller's some other time that day. T10 1346. He learned about Peller's death at Club Stereo, then went to Club Space in Miami with Catleen Dilger. T10 1347, 1373, 1369-70. Before he went to get his car, he stopped at an apartment at Tivoli to get keys. T10 1374. Carmody said the officers focused on Fizzuoglio and her car and did not make pointed questions about

[3] As will be seen, Luis Felipe Mejia's name figures prominently in the case. In the transcript, his name is also spelled "Phillipe," "Philipe," "Filipe," "Filippe," and "Flilepe." Det. Bukata said the man who passed through the gate around the time of the murder, T10 1367-68, spelled his name Phillipe whereas Mejia spelled his name Felipe, T12 1576, but he agreed that "Phillipe" may have been the guard's spelling. T12 1578. The spelling of other names also varies in the transcripts: Bukata's name is sometimes spelled "Bucata," and Peller's name

the murder. T10 1348. Appellant said they should look into Philippe Mejia. Id.

Bukata's account of the October 21-22 interrogation was similar. He added that appellant said Mejia sold Peller "rolls" (ecstasy pills), and Peller owed Mejia about $4000. T11 1426. Appellant denied kidnapping Fizzuoglio. T11 1431-32. Bukata said someone saw him when she jumped out, and appellant replied that no one in a tow truck saw him. T11 1432. Bukata said he had not mentioned a tow truck, and appellant paused and said, well, I guess it's a good guess on my part. Id. He said he would not hurt a fly and Peller was a good friend and had recently bonded him out. T11 1434. He said Felipe may have had something to do with the murder. Id. Peller gave him two ounces of cocaine. T11 1435. On the way to the jail, appellant said he would never get out and Fizzuoglio was a liar and a bitch. T11 1440.

Det. Libman took notes when Bukata questioned appellant again on October 31, 2001. T10 1288. They discussed Peller's drug dealing and his bonding appellant out. T10 1292. They discussed a phone call, how appellant tried to help Peller, who was price-gouging or undercutting and upsetting people. Id. Appellant mentioned Judd (Justin Dilger, T10 1370) who was afraid of Philippe. Id. Mejia was a supplier and Peller was

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appears as "Pella.

undercutting people dealing him drugs. Mejia was Judd's mentor. T10 1293. Appellant denied killing Lance, Mejia did. Id. Appellant was scared of Philippe. Id. A bullet in his car might have his prints. Id. Philippe asked him three weeks prior to take care of the problem and offered a gun. Id. Appellant did cocaine with Lance at his house, two lines. Id. Appellant asked Philippe if it could be solved without killing him and Philippe said no. Id. He tried to save Peller's life. T10 1302. Peller wanted to be "the Scar Face and a drug lord figure" and appellant warned him he was making people upset. Id. Appellant denied killing him, but said he might know who did. Id. He believed Phillipe was responsible. T10 1303. Libman wrote, "Judd would do it himself," but Libman was not sure if it referred to homicide. T10 1304.[4] Appellant spoke to Philippe on the phone and tried to save Peller's life. Id. Mejia was a supplier and Lance was undercutting everyone. T10 1305. Three weeks before the murder, Philippe said something to appellant about taking care of the problem (Peller) and offered a gun. T10 1306.

Carmody replaced Libman during the October 31 interrogation, T10 1294, and testified: Appellant went to warn Peller about

[4] Libman and the other detectives testified from notes about the investigation and seemed to have little independent recollection about what was said. R10 1302, 1370-71, 1292-93, 1296, R11 1427-28. Libman and Bucata made their notes on the same pad. R10 1299. In 90 minutes of interrogation, Libman took

undercutting, taking customers away and selling drugs for a lesser price, and that the person sent him to take care of Peller with a gun. T10 1356. Appellant told the officers he was willing to take whatever he had to, he accepted what was going on; he was a dead man one way or the other, on the street or locked up, it made no difference at that point. Id. If he said someone else did it, he would be a dead man one way or the other and did not mind doing his time. T10 1379. Mejia sent him to the house. T10 1356. When Bukata tried to get him to talk on tape, he laughed and said he was not stupid, and the officers took him to jail. T10 1357.

Bukata testified that on October 31 appellant said he called Mejia from Peller's to try to save Peller, but Mejia said no, meaning there was no way to get out of it. T11 1478-79. About three weeks earlier, Mejia asked him to take care of a problem (Peller), and offered a gun. T11 1479-80. On a break, appellant told how he feared for his life, if he opened his mouth he would be killed; he was very nervous. T11 1480. When Bukata later asked about Mejia, appellant seemed to be crying, weeping and was scared. T11 1482. Bukata was talking about fully cooperating by telling him about Mejia so he could pursue him. T11 1483. Appellant said he could not talk about it, he was a dead man either way, did not want to talk about Mejia any more. T11

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four pages of notes. R10 1300-01.

1484.

Bukata secretly taped the discussion while driving appellant back to the jail on October 31. On the tape, appellant said he told Mejia no, and went to try to save Peller or get him out of the county. T12 1500-01. Under Mejia's plan, appellant would go to Peller's home, but Mejia did not know he was there when they talked on the phone. T12 1501-02. Mejia was going to provide everything necessary because Peller was back stabbing him. T12 1502. Appellant wanted to go in before anyone made a move and get Peller out; Peller asked him to call Mejia and see if he could do something to get him out from under it, but Mejia said, "Nope", they had to handle the problem. T12 1502-03. Mejia sought to groom appellant as his second in command; he would be the one Mejia would contact and he would get the dope and rolls. T12 1507.

Bukata was aware of indications there were people outside the apartment at the time of the murder. T12 1538. Also, Moreau told him that Mejia was at Moreau's apartment a five minute walk to Peller's on the night of the murder. T12 1519-20, 1560. In Mejia's car, Bukata found a piece of paper with appellant's name, an arrest number corresponding to appellant's arrest in the present case, the jail's mail address, and the notation "Send money order only, to you." T12 1524-25. After interviewing Mejia, Bukata contacted immigration, which took him

into custody on November 13, 2001, and he was soon deported to Spain. T12 1531, 1562-63.

Appellant never said to Bukata that he was responsible for Peller's death; he denied it every time. T12 1551.

John Coyne, a drug dealer who bought from Peller, said that several weeks after he heard about the murder appellant called him from jail. T12 1622-23. He said that if he hadn't done it, somebody would have done it to him. T12 1623-24. Another time, he asked Coyne to go by Jennifer's to look for a red Mustang. T12 1624-25. Coyne once asked why she hadn't died, and appellant said he had no qualms with any woman or child, men are different. T12 1626. They discussed various women giving an alibi. T12 1626-27.

Fizzuoglio testified that she called Peller on October 20 to say she was coming over and he said alright. T13 1656. He sounded fine. T13 1657. She left her place between 8 and 8:30, and arrived about that time. T13 1658-59. He smiled and hugged her. T13 1659. Appellant was there; he looked at her and shook his head like no. T13 1660. Peller got a call and appellant tried to talk with her. T13 1661. A CD case with cocaine residue was on the table. T13 1662. Peller got off the phone and appellant went toward the bathroom, then turned and crouched with a gun Id. Peller asked how he got his gun. T13 1665. Appellant replied: "Tell me what I want to hear, Lance." T13

1666. Fizzuoglio freaked out and offered money if it had to do with money. Id. The two men were "just going back and forth," having "like a conversation between two people." Id. Appellant picked up a cell phone and said, "Do I have to do this now? Somebody showed up?" T13 1667. Fizzuoglio heard the name Justin. T13 1668. Appellant then wanted to do cocaine. Id.

They all did cocaine and appellant began freaking out. T13 1669. He was saying there were people outside, if he did not do this somebody else would do it and kill everybody including him. T13 1670. Fizzuglio cried and Peller freaked out and could not breathe. Id. Appellant told Fizzuoglio to calm down. Id. He was looking out windows, out the peephole, saying people outside were going to come in and finish the job if he did not do it. Id. When he got on the phone, she thought they might get out of there. T13 1670-71. He was telling them to hide, and Peller entered the bathroom, and she knelt in the bedroom. T13 1671. She thought appellant was paranoid about people being outside. T13 1671-72. Peller asked to use the phone; appellant kicked him a phone and Peller made a call. T13 1672-73.[5] Fizzuoglio knelt in the kitchen, and appellant came over and asked if she was going to go along with this. T13 1674. She thought she was going to die and kept saying she had a baby and wanted to see her son. Id.

[5] Peller called his father's number at 9:13 p.m. T11 1443.

Appellant walked to the front door and was "banging his head and banking [sic] his head against the door." T13 1674-75. He grabbed a blanket and shot Peller in the bathroom. T13 1675. There was only one shot. T13 1676. Fizzuoglio was freaking out and appellant told her if she did not stop she was next. Id. He put on latex gloves and began going through things, talking about a ring. T13 1676-78. He said she was going to live. T13 1678-79. He asked her to go to the living room, but she wanted to stay near him so he did not psyche himself up to kill her. Id. He was taking things and giving her pictures of herself and Peller. T13 1680. "He was like: Look, don't you want to keep these?", and she could not believe it. Id. There was cocaine in the kitchen, and he said you could die one or two ways, with a straw up your nose or with a bullet, and they both did cocaine. T13 1681. He was handing her stuff. Id. He had a scale, Peller's wallet, her keys, their cell phones, he had stuff in his pocket. T13 1683. At some point while they were in the apartment she heard the name Mitch. T13 1684-85. She never saw anyone outside. T13 1685. She thought she was going to die. T13 1686.

He said he lost his keys and they would use her car. Id. Lance's neighbor was looking down from the stairs. T13 1688. As appellant pulled out, he drove like he did not know how to

drive a stick shift. T13 1688-89. The gun was under his leg. T13 1689. He was on the phone, trying to figure out where to go; when he got off the phone, he said, "I'm sorry. I have to do this." T13 1691.

She jumped from the car as it was moving, and ran across the street and into a ditch at the I-95 ramp, and he got out, yelling, "I'm not going to kill you." T13 1692-96. She banged on cars and jumped on a tow truck, and appellant pulled alongside and he and the driver were talking, screaming. T13 1696. She ran to a police car, and while she was with the deputy, appellant pulled up and stopped, and she did not see him after that. T13 1696-97.

She went from the hospital to a friend's, and then to Richie Post's house. T13 1719. She told Post what happened and he made a call. T13 1720. Believing he was talking to Justin, she left quickly. Id. Some months later, black men followed her and pulled a gun on her. T13 1766-67. Another time, more than one car tried to run her off the road. T13 1768.

Fizzuoglio said Peller was the type who figured he could get out of things. T13 1761. The state rested after her testimony.

Justin Dilger testified for the defense. He saw appellant on the afternoon of October 20, and appellant seemed pretty wasted, like he had been partying by himself all day. T14 1823, 27. He asked Dilger for money, but Dilger had none. Id. Ap-

pellant was drinking and Dilger believed he was “rolling” (doing ecstasy) or doing cocaine. T14 1833. Dilger bought drugs from Peller all the time, T14 1824, and called Peller’s house a few times for drugs between 7:30 and 9:00 p.m., with no answer. T14 1834, 1838-39. He did not get a call from appellant between 8:30 and 9:30 p.m. T14 1825. Dilger had been Mejia’s body-guard, and had heard discussion of having Peller killed, but did not hear Mejia make such statements. T14 1815, 1825, 1833-34. Mejia had a problem with Peller. T14 1832.

Franklin Womack said he was warned by Dilger three or four days before the murder to avoid Peller, something might happen to Peller and to Womack also if he was around. T14 1849, 1851. He tried to warn Peller, but worried about himself. T14 1850. He called Peller around 9:30 p.m. on October 20, but there had been no answer so he went to Dilger’s around 10 to buy ecstasy. T14 1845-46, 1852-54. At Club Stereo that night Dilger told Womack about Peller’s death. T14 1847-48. Womack was worried about Mejia, who worked in drugs with Dilger and the two were extremely close. T14 1851, 1844-45.

Ray Castano testified Dilger had been Mejia’s bodyguard and sold drugs he got from Mejia. T14 1858-60. More than once, Dilger said Peller was places he shouldn’t be, taking away customers or something, and over stepping territories. T14 1865. Dilger said he was going to kill Peller, but he did not do it:

he was with Castano in Boca Raton around 9 or 9:30 on October 20. T14 1866-67. Castano did not notice if he was on the phone then. Id. At a club that night, Dilger said about Peller: "It's done." T14 1864.

Richard Post said Dilger sold ecstasy and cocaine for Mejia. T15 1886-87. Post and Dilger sold each other drugs, and Post got drugs from Peller, a very close friend. T15 1884, 1886. On October 21, Fizzuoglio came to Post's place. T15 1885. She was very hard to understand, crying and hyperventilating, and said Mitch ("Fat Bastard") was looking through the window from outside or was inside the house or something, and Ernesto Gonzalez was involved to a certain degree. T15 1894-95, 1907, 1909. Post's sworn police statement said Jennifer had said Fat Bastard was in the apartment. T15 1896. She said appellant shot Peller. T15 1910. While she was at Post's, he called Dilger to find out what happened and why. T15 1893. He wanted her out because he was scared about what she knew. T15 1909.

On Friday October 19, Post and Peller went to clubs and returned to Peller's apartment, where Post stayed past midnight. T15 1901-03. At deposition, he said he was alone that Friday night because Peller and Fizzuoglio had plans, and he only spoke with Peller by phone on October 20. T15 1911-12. He saw Fizzuoglio at Peller's Thursday or Friday night. T15 1891-92. On the night of October 20-21, Dilger was at Club Stereo in a

sort of panic. T15 1889. Dilger and Mejia were together. Id. The conversation was very short, which was not like Dilger. T15 1890. Mejia was pretty much the same way. Id. At deposition, Post said he saw appellant enter with them, but at trial he said he only saw Dilger and Mejia enter together. T15 1905. When he testified, Post was a prisoner with seven felony convictions. T15 1882-83.

Appellant testified on his own behalf. He was one of eight or nine people selling drugs for Mejia. T15 1925. Peller sold for Mejia, but fell from favor because of his relationship with Mejia's girlfriend, Fizzuoglio, a strip club dancer. T15 1926-28. On the night of October 19, appellant, Peller, and Fizzuoglio went to the Voodoo Lounge, where appellant was going to sell drugs. T15 1930-32, 1934. Peller knocked over drinks paying a waitress. T15 1934-36. Appellant picked up Peller's wallet, which was wet from the spilt drinks, and took out the credit cards, drying everything. T15 1936. He grabbed everything and got Peller out after Peller got belligerent with a bouncer. T15 1936-37. When they had come in, Fizzuoglio gave Peller her license, and it wound up in Peller's wallet. T15 1937-38. She went off with friends, and appellant spent the night at Peller's. T15 1938-39.

The next day, appellant visited Dilger, who owed him $400 for cocaine, but Dilger did not have it. T15 1942. Mejia ar-

rived and began talking real trash and appellant left. T15 1942-43. Mejia wanted Peller to leave his property alone and get out of his territory. T15 1943-44. About three weeks or a month before, Mejia had made deadly remarks about Peller, he wanted to take him out, and offered a pistol, which appellant did not take. T15 1944-46. Appellant warned Peller, but Peller thought he could talk his way out of anything. T15 1945. On the 20th, Mejia said no matter what, we're going to take care of business, we meaning evidently him and Justin. T15 1945-46. Appellant took the threats seriously, and was going to go warn Peller and have him go to his parents. T15 1946-47.

Appellant got to Peller's about 4 or 4:30 p.m., and Fizzuoglio and Peller were arguing in the bedroom. T15 1947-48. Peller was raising his voice, which was very unusual. Id. After 45 minutes or an hour, appellant was able to tell Peller about Mejia and urged him to go to his parents' home or to appellant's. T15 1949-50. Peller seemed not to take it seriously, and went back to talk with Fizzuoglio for another hour. T15 1950. Peller asked him to deliver a pound of pot to a customer who would meet him at Dairy Queen. T15 1952. Peller had been arguing with Fizzuoglio, so appellant suggested she go along, and he could drive her car; he had never driven a Mustang. T15 1953. He did not think she was up to driving. T15 1953-54.

While they waited at Dairy Queen, Fizzuoglio drove off at 6:30 and never came back. T15 1956-57. The buyer did not arrive until nine, and appellant called Moreau to pick him up. R15 1958. After showering at Moreau's, appellant went to Club Stereo. T15 1959.

At an after-hours party, Dilger said, "well, we got your buddy and you're next". T15 1961, 1969. Appellant went with Catleen Dilger and Tanera Durnales to a club in Miami. T15 1961-62. At an Exxon station he tried to make a purchase with a $50 bill, but the cashier couldn't change it, so he pulled out a credit card, forgetting that he had Peller's cards, and then he saw the receipt with Peller's name. T15 1962-63. He had been up two days and could not communicate very well with the clerk, so he just signed it. T15 1964. (The Spanish-speaking clerk had testified through an interpreter. T8 988.)

Eventually, Catleen drove him to get his keys at Moreau's apartment, and then to get his car at Peller's. T15 1966. They saw the police, but he thought it was just a patrol. T15 1967. He was unconcerned as he had done nothing wrong. Id. He was stopped when he began to back up his car. T15 1968. He saw men in white suits and remembered what Dilger said at the party, and realized what had happened. T15 1969. He thought Dilger or Mejia had killed Peller, but he did not tell the police because he was scared. T15 1970. One of Meji's runners, Ernesto Gon-

zalez, visited him in jail and said to keep his mouth shut or there would be real serious problems. T15 1971. That was why he told the police he was dead whether he talked or not; he thought he was next. Id. He denied shooting Peller and kidnapping Fizzuoglio. T15 1972. He did not speak to Dilger on the phone that night. Id. Peller never bonded him out; Bianchi bonded him out in August on a possession charge. T15 1973. He called Coyne from jail to ask Fizzuoglio why she had said he had done this. Id. He wore latex gloves at Peller's to bag cocaine, but did not do so on the 20th. T15 1975-76. He did not bury the gun at the church. T15 1976.

Appellant had five felony convictions. T15 1977. He denied that the murder weapon was the gun that he had while living with Stromoski, which was a Sisgauer. T15 2010-11. He denied telling Coyne that someone would kill him if he did not kill Peller, and denied saying he had no trouble with women and children. T15 2015. He said the officers did not read him his rights on October 22. T15 2016-17. On October 31, he did not want to go on tape because he was afraid for his life; he did not ask if they thought he was stupid. T15 2017-18. About three months earlier, Mejia wanted to groom him as his second in command. T15 2018. Appellant denied telling Bukata anything about a tow truck. T15 2022. The bullet in his car was from when he and Peller would go to a gun range. T15 2026. Bukata had him sign

two rights cards on the 31st, saying he had forgotten to do it the first time. T15 2027.

Jodi Teitelbaum testified in rebuttal that she and her boyfriend Ernesto Gonzalez had a Halloween party on October 19, 2001. T15 2034, 2036. Appellant arrived between 10 and 11 and left before 12. T15 2038. Fizzuoglio arrived between 12 and 2 and stayed until sunup. T15 2039. Teitelbaum took a lot of drugs that night. T15 2040.

B. In the second phase, Fizzuoglio said Peller looked like he had an anxiety attack when the gun came out; he kept breathing deep and was shallow breathing. T18 2243. She tried to calm him down so they could figure out something; they were scared. T18 2243-44. He finally calmed down; they were anxious. T18 2243. Appellant "freaked out," saying there were people outside, and Peller knew he was not going to get out alive. T18 2243-44. He asked appellant to let Fizzuoglio go, saying it had nothing to do with her, and appellant did not respond. T18 2244. Peller later asked to call his father to say goodbye, and appellant kicked him the phone. T18 2244-45. She did not hear what he said on the phone. T18 2245. He was shot maybe a minute or two later. Id. She did not know how much cocaine Peller did that day. T18 2247. Just before the shooting, appellant was freaking out. Id. He had made a call to see if he could get out of it. Id. She felt he did not want to do it. T18

2248. She did not know how many calls Peller made. Id. Appellant said people outside were going to kill everyone including him. T18 2248-49. They were in the apartment about 60-75 minutes. T18 2249. Right before the shooting appellant was freaking out, he was like psyching himself up to do it. T18 2250. The gun came out after she was there for three or four minutes. T18 2251.

Peller left his father a voice mail saying he was going to die and loved his parents. T18 2254-57. Bukata believed Dilger and Mejia were parties to the homicide. T18 2260.

Miami detective Butchko testified about appellant's second degree murder conviction in the 1987 death of Lloyd William Rosenbrock. Rosenbrock, age 55, was living with appellant, age 17. T18 2269, 2264. At a bar, Rosenbrock tried to get appellant to go with a guy to have sexual acts for money, but appellant refused. T18 2274. Back at Rosenbrock's apartment, Rosenbrock began to shout, saying he'd call the police and kick him out if he didn't do what Rosenbrock wanted. T18 2275. Rosenbrock went to the bedroom, and appellant drank three rum and Cokes. T18 2275-76. He got a butcher knife and went to the bedroom to scare Rosenbrock. T18 2276. Appellant turned on the light, and Rosenbrock hit him with an eight-inch glass ashtray. T18 2278-79. Appellant said he stabbed him about ten times, but Butchko said Rosenbrock was stabbed 35 times. T18 2279,

2294. Rosenbrock's only apparent source of income was as a police informant, but he lived in a very exclusive upscale neighborhood. T18 2296-97. He had a history of fraud and white-collar crime. Id. Appellant plead guilty in the case. T18 2295.

Dr. Kramer, a psychiatrist, testified for the defense that child abuse can lead to clinical depression, anxiety disorders, substance abuse, and intimacy problems. T19 2308-09.

George Rabakozy was a friend of appellant in school when Rabakozy lived with Robert Williams, a child molester and rapist who raped Rabakozy. T19 2323-24. Williams shared Rabakozy with other people from when he was 14 to 16. T19 2326. Williams got his hooks on appellant, and sexually abused appellant starting when appellant was about 13. T19 2326-28. He gave appellant cocaine to go with other guys, and sold him a few times a week. T19 2328-29.

Appellant went to live with Rosenbrock ("Captain Bill"), a john. T19 2329-30. Appellant was 14-15 when Williams introduced him to Rosenbrock. T19 2331. Rosenbrock "wanted ass": the johns wanted little boys. Id. Williams had 4-5 boys in his operation and pimped appellant to Captain Bill. T19 2331-32. Before going to Rosenbrock, appellant was a regular kid, great, happy, laughing. T19 2332-33.

James Hudson, appellant's father, divorced appellant's

mother Renee when appellant was two, and James had custody. T19 2336. Renee later lived across the street, but often would not let the boy see her. T19 2336-37. Appellant last saw her when she had a party for his sixth birthday. T19 2338. He was a good child, but ran way around age 13. Id. Drugs caused a problem, and James tried to get him counselors. T19 2339-40. Appellant went to live with Captain Bill, who sold children. T19 2340-41. James took him home and threatened Rosenbrock. T19 2341. Appellant had drugs and a car and wound up in prison. T19 2342. James, his wife, and his children visited appellant in prison. T19 2342. Appellant has an IQ of 151; after prison he worked at a gas station and then in computer tech support. T19 2344.

George Lagogiannis owned a computer tech support company. When they met, appellant knew nothing about computers, but was a fast learner. T19 2350. He is an outstanding gentleman; he would bring groceries to Lagogiannis's family when Lagogiannis was working and watched the house when they were on vacation. T19 2351. He outgrew the company and went to another company. T19 2351-52. He told Lagogiannis about his murder conviction. T19 2352-53. He is very smart, a great personality, could adapt to any situation. T19 2355.

Gloria Squartino, appellant's girlfriend when they were 16, met him when she was in drug treatment. T19 2358-59. They used

a lot of drugs. Id. Appellant stayed with Capt. Bill Rosenbrock. Id. When Rosenbrock was murdered, the two partied, which was not rejoicing: "we were pretty much in shock and went for the liquor cabinet and what are we going to do." T19 2362-63.

Kim Hurtado was appellant's boss at a Mobil station after he got out of prison. He was incredible; customers and employees loved him; he had a heart of gold, gave everything he could. T19 2365. He cried like a baby about his past and his family, talked about being molested and living on the street. T19 2364, 2375. He adored his father. Id. When his father remarried, he no longer had a life with him, and began leaving home. T19 2369. His stepmother twice put him in mental institutions to get rid of him. Id. He and his brother lived with Hurtado and her children. T19 2369. He became guardian of her son Sean when she broke her back at work. T19 2370. He was very strict with Sean, got him to school, picked him up, made sure he had money. T19 2371-72. He would buy things for Hurtado and her daughter and his sister. T19 2373.

Sean Lee, Hurtado's son, said appellant was stricter than his parents about school and homework. T19 2382. He taught him about computers and helped with math, he became his guardian. T19 2382-83. Sean's father kicked Sean out and appellant did a

lot more for him than his father or stepfather. T19 2384. He gave Sean money for a school gym uniform and lunch. T19 2385.

Rosemary Hudson married appellant in 2000 and they lived together until 2001. T19 2388-89. He helped her very much with school and was a very good loving supportive husband at first. T19 2390-93. He trained people at a computer company; all her friends liked him. T19 2394. Drugs devastated their relationship. T19 2395.

Appellant's mother Renee Smith hardly saw him after he was two, and last saw him when he was about ten. T19 2397-98.

The court found in aggravation: appellant had a prior murder conviction; he had a contemporaneous kidnapping conviction; the murder was especially heinous atrocious and cruel; and it was committed in a cold, calculated, and premeditated manner without a pretense of moral or legal justification. R4 778-83. It gave each circumstance great weight. Id. It found in mitigation: appellant was abandoned by his mother; he suffered abuse as a child; he had a substantial history of drug abuse; he was not allowed contact with his siblings; he was the victim of sexual abuse; he could adapt to prison life; he was able to maintain stable employment and excel at his work; he cared for others; he established positive relationships; he exhibited good behavior while awaiting trial; he had skill with computers that he could teach to other inmates; and he was under the influence of drugs

at the time of the offense. R4 783-89. It gave each circumstance little weight. Id.

SUMMARY OF THE ARGUMENT

1. It was error to allow into evidence Peller's hearsay conversation with Pritchard. Peller did not make excited utterances or spontaneous statements. He had a calm discussion with ample time for reflection. The evidence was prejudicial as to guilt and as to penalty.

2. The state brought out on cross of appellant that Ernesto Gonzalez, who did not testify, had said he and appellant had stolen Peller's gun. The judge erroneously ruled that appellant had opened the door to the evidence. The evidence was prejudicial as to guilt and as to penalty.

3. The state told jurors it needed appellant to testify against the person he talked to on the phone, to give the state the other people involved, and prove who sent him to Peller's. The judge erred in allowing the argument, which improperly commented on constitutional rights. The judge did not recognize the error and took no corrective action, so the state must show it was harmless beyond a reasonable doubt. The argument was prejudicial as to guilt and as to penalty.

4. The judge erred in refusing to instruct jurors to consider the effect of appellant's actions only on Peller, and not on others present. The requested instruction correctly stated the law and addressed the evidence. The instructions given did not adequately cover this issue, as seen from the state's jury

argument. The state urged jurors to consider the suffering of both Fizzuoglio and Peller, their mental torture, their anguish, and the mental anguish of Fizzuoglio, Peller, and Peller's family. There is a reasonable possibility that the failure to give the instruction misled the jury at bar.

5. The state committed fundamental error in arguing to the jury that HAC applied to Fizzuoglio and Peller's family. It presented the jury a legally flawed theory and one cannot tell if the jury based its penalty verdict on the state's improper argument.

6. The judge erred in allowing Fizzuoglio's testimony at penalty that Peller knew he was going to die after appellant began to freak out. The testimony was speculation. Fizzuoglio did not have a basis for reading Peller's mind. The state used the evidence in arguing HAC to the jury, and the judge relied on it in finding HAC.

7. It was error to use HAC. The record does not show the extreme physical or mental torture that makes a murder especially heinous atrocious, or cruel. Appellant did not have the torturous intent needed to make a shooting HAC. The record does not show the extraordinary torturous acts that make a shooting HAC. The judge's findings were factually flawed.

8. It was error to use CCP. Appellant took cocaine, freaked out, became paranoid, told Peller and Fizzuoglio to

hide, and was banging his head against the door and freaking out just before the murder. He drank and used drugs earlier that day. Later that night he looked "normal" for a group of drug users in which "out of it" was normal and Saturday was a drug night. The judge's findings were factually flawed.

9. The judge made significant errors in his findings as to the aggravators, and gave little weight to each of the 14 mitigators without explanation or with explanations that lacked logic or justification or ignored the evidence.

10. The judge failed to make a written finding of sufficient aggravating circumstances to support the sentence within 30 days of sentencing. This Court should reduce the death sentence.

11. The death sentence is unconstitutional because the jury did not make a unanimous finding of sufficient aggravating circumstances.

ARGUMENT

1. WHETHER THE COURT ERRED IN ALLOWING HEARSAY TESTIMONY ABOUT PRITCHARD'S CONVERSATION WITH PELLER.

Peller was perfectly calm when he spoke to Pritchard, yet his statements were admitted as spontaneous statements or excited utterances. The judge erred in allowing this inadmissible hearsay, and the error was not harmless beyond a reasonable doubt. The state made it a major part of its case as to guilt, and also relied on it at sentencing. The judge used it in the

sentencing order. This Court should reverse.

A. Proceedings below.

After the jury was sworn, the state sought a ruling on Peller's statements to Pritchard as an exception to hearsay. T5 567. The proffer showed: Peller called from his apartment at 7 or 7:30 saying he wanted a gun; Pritchard suggested he call the police; in response to Pritchard's questioning, Peller said someone was there to kill him; he said it was someone he bonded out of jail; Peller was underselling drug dealers; the person was sent to kill him but was not going to because he was a friend. T5 574-75, 577. He sounded normal rather than excited, nervous or frustrated (T5 575):

Q ... How did Lance sound to you in that phone call?

A. Sounded like Lance.

Q. Did he sound excited, nervous, frustrated?

A. Sounded like Lance.

Pritchard did not call the police; Lance thought he could get out of anything. T5 582.

The defense made a hearsay objection and said no exception applied. T5 649. The state argued the statements were excited or spontaneous statements. T5 650-53. The judge ruled them admissible: "The motion to suppress the first telephone conversation with Robert Pritchard, who was in the courtroom for purposes of the hearing, that's denied." T6 672. He stood by his

ruling when appellant renewed his objection to the conversation during Pritchard's testimony. T6 705.

B. The evidence was inadmissible hearsay.

This Court reviews evidentiary decisions for an abuse of discretion, with the important provisos that a judge's discretion "is limited by the rules of evidence," Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003), and judges lack discretion to make rulings contrary to the law or the facts. Cf. Canakaris v. Canakaris, 382 So. 2d 1197, 1202-03 (Fla. 1980) ("Where a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law."), Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence"). The judge abused his discretion at bar: his ruling was contrary both to the law and to the facts.

Hearsay is an out of court utterance admitted to prove the truth of the matter asserted. See §90.801(1)(c). The state did not dispute that the evidence was hearsay. It sought admission under the exceptions for excited utterances and spontaneous statements. Section 90.803(1) and (2), Florida Statutes, defines the those two exceptions:

> (1) Spontaneous statement. A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such

> statement is made under circumstances that indicate its lack of trustworthiness.
>
> (2) Excited utterance. A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Both exceptions "require the declarant to be laboring under the influence of a startling event at the time that the statement is made." Hutchinson v. State, 882 So. 2d 943, 951 (Fla. 2004). Neither exception applies at bar.

1. The excited utterance exception did not apply.

To be an excited utterance, a statement must arise from excitement without time for reflection. This Court wrote in Evans v. State, 838 So. 2d 1090, 1093 (Fla. 2002):

> (1) the declarant must have experienced or witnessed an event startling enough to cause nervous excitement; (2) the statement must have been made while under the stress of excitement caused by the startling event; and (3) the statement must have been made before there was time to contrive or misrepresent.

The utterance "must be made before there is time for reflection." Hutchinson, 882 So. 2d at 951.

Peller's statements were not excited utterances. They occurred in a 15 minute conversation with no sign of "nervous excitement." Peller was not under the "stress of excitement," nor was he startled.

Peller had ample time for reflection, and he did reflect. He reflected that he wanted a gun to defend himself, and that he might get one from Pritchard. He reflected on Pritchard's sug-

gestion that he call the police. He reflected on Pritchard's questions and discussed his drug dealing, and his background with the man in his apartment. He reflected that the man probably would not kill him.

Peller was a healthy young man of apparently limitless self-confidence making his way in the drug world by undercutting others. The record does not show his statements were excited utterances.

2. The spontaneous statement exception did not apply.

As the name suggests, a "spontaneous statement" is "blurted out ... without prompting." See Mariano v. State, 933 So. 2d 111, 117-18 (Fla. 4th DCA 2006); J.A.S. v. State, 920 So. 2d 759, 763 (Fla. 2nd DCA 2006); McDonald v. State, 578 So. 2d 371, 373 (Fla. 1st DCA 1991) (victim "fled to a friend's apartment, where she blurted out a description of the incident"). There must be a lack of reflective thought:

> While the language in the statutory exception specifically includes the requirement that the purported spontaneous statements be made while the declarant perceives the event or condition, or immediately thereafter, contemporaneity is not the only requirement, but instead, the statement must also, of course, be spontaneous; that is, the statement must be made without the declarant first engaging in reflective thought. See Fratcher v. State, 621 So.2d 525, 526 (Fla. 4th DCA 1993); Sunn v. Colonial Penn Ins. Co., 556 So.2d 1156, 1157 (Fla. 3d DCA 1990).

J.M. v. State, 665 So. 2d 1135, 1137 (Fla. 5th DCA 1996). See also Ibar v. State, 938 So. 2d 451, 467 (Fla. 2006) (quoting

J.M.). Thus, in Fratcher, a prosecution for retail theft, the court found a contemporaneous statement inadmissible because the declarant had a motive for making the statement, which showed reflection:

> Finally, it was error to allow the store manager to testify that as he left the store when the alarm sounded he was approached by the defendant's sister and boyfriend who declared: "He took a pair of sunglasses." Had the court admitted the entire statement, the testimony would have revealed the following omitted part: "He has a pair of sunglasses that he didn't pay for. Could we just pay for them and forget about it?" This context reveals that the speaker engaged in reflective thought, thereby vitiating the spontaneity and reliability of the statement and reliability of the statement and destroying its admissibility under the spontaneous statement exception to the hearsay rule.

Fratcher, 621 So. 2d at 526. Also, the declarant must be under the influence of a startling event. See Hutchinson; Blue v. State, 513 So. 2d 754, 755-56 (Fla. 4th DCA 1987) ("some occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting") (quoting Lyles v. State, 412 So. 2d 458, 460 (Fla. 2nd DCA 1982)); McGauley v. State, 638 So. 2d 973, 974 (Fla. 4th DCA 1994) (statement in response to question admissible because witness was too excited to reflect).

Peller's statements did not fit this exception. He discussed various things during a 15 minute conversation. He talked about his drug dealing and about having bonded the man out of jail. He was not blurting things out. He had ample time

to reflect and did reflect. He did not labor under the influence of a startling event and was not in a state of nervous excitement that rendered spontaneous and unreflecting what he said. He did not call Pritchard to report an event, he called him about getting a gun. He was a drug dealer engaged in a rambling inconclusive discussion with a friend. As did the declarant in Fratcher, he had a motive for the call (to get a gun), which indicated reflection rather than spontaneity.

The state relied on Vigilone v. State, 861 So. 2d 511 (Fla. 5th DCA 2003) below. The discussion there is too brief to shed any light at bar. The court wrote after discussing a preservation issue:

> ... we agree with the trial court's ruling that the victim's hearsay statements made to the recipients of his telephone calls while he was kidnapped and being threatened, beaten, and forced to try to get money to pay his captors, was admissible either as a spontaneous statement or an excited utterance, pursuant to section 90.803(1) and (2). [FN omitted] The victim's calls for help and pleas for money to obtain his release are similar to a victim's 911 calls, which we have held are admissible pursuant to the excited utterance or spontaneous statement exception to the hearsay rule. State v. Skolar, 692 So. 2d 309 (Fla. 5th DCA 1997).[6]

Id. at 513. As Vigilone gave no further details about the

[6] Skolar was charged with murdering her boyfriend. The trial court ruled admissible a 911 call several hours before the murder reporting that Skolar had said her boyfriend had beaten her and that he "was at her house, would not leave, and was '**just trying to kill her and stuff**.'" Id. at 309-10. The appellate court found an abuse of discretion and ruled the evidence **inadmissible** as a spontaneous statement or excited utterance.

calls, one must assume a proper predicate supported the evidence's admission under the case law discussed above. Vigilone does not support admission at bar: Peller was not in a state of nervous excitement, he was not startled, he had time to reflect, and he did reflect.

C. The error was not harmless beyond a reasonable doubt.

Having injected error into the trial, the state must show it was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). It is simple common sense that the state used the evidence because it calculated that it would affect the outcome, and there is a reasonable likelihood that it did. The error at bar was not harmless beyond a reasonable doubt.

1. The error was prejudicial as to guilt.

The defense was that appellant left Peller's well before 7 p.m., and was not the killer. The state contended he was at there from seven until after nine. No other evidence put appellant and Peller at the apartment at seven: in fact, Peller's car was warm to the touch after 11:28 p.m., indicating he or someone had been using his car after seven. The case was largely a swearing match between appellant and Fizzuoglio. Appellant's testimony refuted Fizzuoglio's account. Jurors may have seen her as a drug user and strip club dancer with little

credibility. Compared with her, Pritchard seems to have had an unimpeachable character. The state used his testimony to put appellant at the scene with an intent to kill. He gave important corroboration for jurors before they would convict appellant.

Improper evidence contradicting the defense or corroborating the only eyewitness is generally not harmless beyond a reasonable doubt. Cf. Minnis v. State, 645 So. 2d 160 (Fla. 4th DCA 1994) (hearsay contradicting defense theory not harmless);[7] Rodriguez v. State, 842 So. 2d 1053 (Fla. 3rd DCA 2003) (evidence of restraining order corroborating victim's testimony not harmless where no other eyewitness); Perez v. State, 595 So. 2d 1096 (Fla. 3rd DCA 1992) (in case consisting of credibility contest between victim and defendant, hearsay bolstering robbery victim's testimony and evidence of defendant's possession of pornography not harmless); Hitchcock v. State, 636 So. 2d 572, 574 (Fla. 4th DCA 1994) (in case involving credibility determination, hearsay bolstering victim was prejudicial); Escoto v. State, 624 So. 2d 836 (Fla. 5th DCA 1993) (hearsay bolstering victim not

[7] In Minnis, a manslaughter case, Minnis told police he was not involved, but later said the shooting was an accident. An officer testified to a woman's statement that one victim said Minnis might have shot him, and to another woman's statement that she saw him run through a yard. The Fourth District reversed, writing that the "statement that the defendant was seen running through a yard and down the street **would negate his theory that the incident was an accident**." Minnis, 645 So. 2d at 161.

harmless). The evidence corroborated Fizzuoglio and contradicted appellant's testimony and was not harmless.

At bar, the state told the judge that Peller's statements to Pritchard were "highly relevant." T5 652. It said Peller's statement that he had bonded the man out was "highly relevant" to show appellant was the killer. T5 652-53. It dwelt on the hearsay in opening statement. T6 679-81. It called Pritchard as its first witness. It discussed his testimony in final argument, arguing it helped establish that appellant was the killer and refute the defense. T16 2061-62, 2085, 2150. The error was not harmless beyond a reasonable doubt. It deprived appellant of his right to a fair trial on competent evidence under the Due Process, Jury, Confrontation and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

2. The error was prejudicial as to penalty.

An error harmless as to guilt may be harmful as to penalty. Gonzalez v. State, 700 So. 2d 1217 (Fla. 1997) (codefendant's confession harmless as to guilt, but prejudicial as to penalty); Burns v. State, 609 So. 2d 600, 607 (Fla. 1992) (background information about deceased harmless as to guilt, but prejudicial as to penalty).

The state told jurors the evidence showed HAC since for "**[t]wo hours and twenty minutes**, that we know of" Peller felt he

was going to die, basing this time on "**when he called his friend Bob Pritchard**". T6 2406-07. He "was dying **from 7:00** until 9:15, 9:20." T19 2408. He was tortured "over **two hours**." T19 2409. the state asked jurors "to look the facts of [appellant] being there **from 7:00** to 9:15, 9:20." T19 2412. The "time frame" showed appellant "was there for **two-plus hours** thinking about it." T19 2414.

Without the improper evidence establishing this "time frame" of "over two hours," jurors may have rejected HAC and CCP, or given them less weight. The vote for death was 7-5. The change of **one vote** could have changed the outcome. The state cannot show beyond a reasonable doubt that the error did not affect the penalty verdict as it cannot show beyond a reasonable doubt that it did not affect at least one of the seven jurors who voted for death.

The judge relied on Pritchard's account to establish HAC. He used it to find that Peller "anticipated his death for approximately **two hours** and fifteen minutes", R4 781, and to find CCP, writing that appellant discussed the impending murder for "**two hours** and fifteen minutes." T5 782. Without the evidence, he may not have found HAC or CCP or may have given them less weight.

The error deprived appellant of a fair and lawful penalty decision under section 921.141, Florida Statutes, and Due Proc-

ess, Jury, Confrontation and Cruel Unusual Punishment Clauses of the state and federal constitutions. At a minimum, it requires new jury sentencing proceedings or resentencing by the judge.

2. WHETHER THE COURT ERRED IN ALLOWING ERNESTO GONZALEZ'S STATEMENT THAT APPELLANT STOLE PELLER'S GUN.

On cross of appellant, the state brought out that Ernesto Gonzalez, who did not testify at trial, had said that he and appellant stole Peller's gun. When the defense objected, the state claimed appellant had opened the door in responding to its cross-examination. The judge overruled the objection and later denied a mistrial, saying appellant "created the situation." His ruling was contrary to the facts since the state created the situation, and it was contrary to the law since the state may not use cross examination to open the door to inadmissible evidence. As he did not recognize any error and took no corrective action, the state must show the error was harmless beyond a reasonable doubt. The state argued the evidence to the jury and it was not harmless beyond a reasonable doubt. This Court should reverse.

The state asked appellant on cross if he had seen the murder weapon before, and he said he had. T15 2010. In response to further questioning, he said it was not his gun, which was a Sigsauer, and he had seen Peller's gun at Peller's house and knew it was stolen. T15 2011. Cross continued (T15 2011-14):

Q No idea who stole that gun?

A I have ideas.

Q Do you know?

A Um --

Q Do you know?

A Now I do.

Q Now you do? Who stole the gun?

A Ernesto Gonzalez.

Q How do you know that?

A Through reading discovery, his statement.

Q His statement? Ernesto Gonzalez admits to stealing that gun in his statement?

A He admits to burglarizing Lance’s apartment.

Q With who?

MR. BARON [defense counsel]: Objection, your Honor.

MR. HOLDEN [ASA]: He brought it out.

MR. BARON: It was response to a question.

MR. HOLDEN: He brought it out.

THE COURT: That’s a question, it’s overruled.

BY MR. HOLDEN:

Q Ernesto Gonzalez admits to burglarizing that house with who?

A He claims it was with me.

Q With you?

A He claims it was with me, it wasn’t.

Q Okay, but that's in his statement, too; right?

A Sure.

Q He claims it's himself, and he claims it's you and it's that gun right there that we are talking about that was at Lance Peller's house?

A He's trying to get himself from under thirty years.

MR. BARON: Judge, can we approach? Objection. Can we approach?

THE COURT: Sure.

(Thereupon, a sidebar conference was had on the record outside the hearing of the jury.)

MR. BARON: A statement has got to a --

MR. HOLDEN: Excuse me.

MR. BARON: -- the State is opening the door by the questions, Mr. Hudson is being responsive, I objected. I have objected, I'm asking for a mis-trial. That information should not come before this jury it has nothing to do with this case.

MR. HOLDEN: Judge, it's his own very volition, I never asked him, he told me himself, "I know where the gun came from now."

THE COURT: I agree, I think it's only natural to follow-up, to ask where he left that hanging, since he created the situation. Your motion for mis-trial is denied.

(Thereupon, the sidebar conference was concluded.)

BY MR. HOLDEN:

Q Listen to my question. The gun that you're talking about is the same gun that I just showed you that's in evidence, has been declared the murder weapon in Lance Peller, which is State's 101; right?

A What's the question?

Q That you say Ernesto Gonzalez says in his statement that you and him took that gun from Lance Peller's house during the burglary?

A Yes.

A. The issue was preserved for review.

Although counsel did not identify a specific legal basis when the matter came up, the state immediately argued the evidence was admissible because "He brought it out." T15 2012.[8] It claimed appellant opened the door in response to **its** questioning as to whether he had any idea or knew who stole the gun. The defense replied that appellant merely responded to the state's question. Id. The judge then overruled the objection without asking for a basis. Id. It appears that he understood its nature from the context. Cf. §90.104(1)(a) and (b), Fla. Stat. (specific ground required if "not apparent from the context"); Reyes v. State, 580 So. 2d 309, 310-11 n.4 (Fla. 3rd DCA 1991) (hearsay; "we do not agree that the defendant's general objection to such obviously impermissible testimony did not preserve the issue for appellate review. See S 90.104(1)(b), Fla.Stat. (1989)."); Woods v. State, 733 So. 2d 980, 987 (Fla. 1999) ("vague" objection preserved hearsay issue when basis clear from

[8] The state argued no other ground for the evidence's admission. Lest it now press the tipsy coachman into service, appellant notes that hearsay evidence of a collateral crime is inadmissible. See Petersen v. State, 650 So. 2d 223 (Fla. 5th DCA 1995). If the state thought the evidence was otherwise admissi-

context); Simmons v. Baptist Hosp. of Miami, Inc., 454 So. 2d 681, 682 (Fla. 3rd DCA 1984) (objections made "both on specific grounds and on grounds ... apparent from the context").

A ruling on the merits disposes a claim of waiver. In Savoie v. State, 422 So. 2d 308 (Fla. 1982), the judge denied a mid-trial motion to suppress both on the merits and on the ground of waiver because it was untimely. This Court wrote that the ruling on the merits dispensed with any claim of waiver: "The trial judge considered the motion on the merits, and we find that this renders the waiver issue moot." Id. at 310.

At bar, the judge ruled on the merits and shortly afterward agreed with the state's door-opening argument:[9] "I agree, I think it's only natural to follow-up, to ask where he left that hanging, since he created the situation. Your motion for mistrial is denied." T15 2013.

B. The ruling that the evidence was admissible on the ground that appellant "created the situation" was contrary to the law and the facts.

A judge's discretion on evidentiary rulings "is limited by the rules of evidence," Johnston, 863 So. 2d at 278, and judges do not have discretion to make rulings contrary to the law or

---

ble, it would surely have introduced it in its case.

[9] As for ASA Holden's statement at the bench that "I never asked him, he told me himself, 'I know where the gun came from now.'" the record shows that he brought the subject up and then hammered away at it, asking: "You know Lance's gun got stolen; right?", "No idea who stole that gun?", "Do you know?" (twice) before appellant said, "Now I do."

facts. Cf. Canakaris, 382 So. 2d at 1202-1203; Cooter & Gell, 496 U.S. at 405. The ruling at bar was contrary to the facts because it was the state that created the situation, and contrary to the law because the state may not use cross-examination to open the door to inadmissible evidence.

Like any other witness, appellant had to answer proper questions on cross. But his taking the stand did not authorize the improper cross-examination the state used to bring up the hearsay claim that he stole the gun. The state, not appellant created the situation

The state may not use cross to open the door to inadmissible evidence. In Taylor v. State, 855 So. 2d 1 (Fla. 2003), the state cross-examined the defendant's wife about privileged matters, contending that the door had been opened. This Court found error, writing "**it was the State's questioning** that 'opened the door' and elicited the privileged information" (id. at 26-27):

> In the instant case, no privileged material was revealed until the State asked Mrs. Taylor how she knew that McJunkin did not have enough money and she responded that "maybe" Taylor had told her. The State then proceeded to ask about the privileged conversation leading to the question, "And he told you that Michael needed money to get back to Arkansas?" to which Mrs. Taylor responded "Yes." At this point, Mrs. Taylor had answered the State's question, and therefore there was no way to prevent the privileged material from being revealed. [Cit.] However, defense counsel's subsequent objection revoked any implicit waiver regarding further testimony about privileged matters.FN29 Thus, the court erred in requiring Mrs. Taylor to continue answering questions with regard to privileged material. First, **it was the State's ques-**

> **tioning that "opened the door" and elicited the privileged information**. Second, Taylor's counsel immediately interrupted the proceedings after Mrs. Taylor's brief answer, which prompted the judge to send the jury out, and the parties presented arguments before the trial court overruled Taylor's objection. See Evans v. State, 800 So. 2d 182, 188 (Fla. 2001) (stating that even where a witness is able to answer a question before objection, "an objection need not always be made at the moment an examination enters impermissible areas of inquiry"); Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984). But see Woodel v. State, 804 So. 2d 316, 323 (Fla. 2001) (finding that defendant waived marital privilege by waiting two days after prosecutor commented on the marital privilege before moving for mistrial). Third, if the trial court had sustained Taylor's objection, the court could have instructed the jury to disregard Mrs. Taylor's testimony as to the privileged conversation. See Jackson, 451 So. 2d at 461. And, finally, even if a limited waiver of the privilege occurred, Taylor's objection would have revoked the waiver. ... .
>
> FN29. The State argues that Taylor consented to the disclosure of a significant part of the matter or communication by placing Mrs. Taylor on the stand and eliciting testimony about her purchase of the bus ticket. However, Mrs. Taylor was not asked about her communications with Taylor during direct examination. Calling a witness who holds a testimonial privilege to the stand will not necessarily waive that privilege. Cf. Brookings v. State, 495 So. 2d 135, 139 (Fla. 1986) (holding that client who testified to facts, but did not discuss substance of communication, did not waive attorney-client privilege because "[i]t is the communication with the counsel that is privileged, not the facts").

Ousley v. State, 763 So. 2d 1256 (Fla. 3rd DCA 2000), is similar. At his murder trial, Ousley denied owning a weapon at the time of trial or on the day of the crime. On cross, the state led him to say he never had done so, then impeached him with prior weapon possession convictions. The Third District disapproved,

writing that, since "the 'impeachment' was only of testimony **first elicited by the prosecutor on cross examination**, it was entirely unjustified." Id. at 1256-57.

Robertson v. State, 829 So. 2d 901 (Fla. 2002), affirmed the rule against using cross to create a door-opening situation. At Robertson's murder trial, the state asked on cross if he had ever threatened anyone close to him with an AK-47, then used his answer as a basis for presenting evidence of a prior assault. This Court disapproved. It wrote that "to open the door, 'the **defense must first offer** misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled.'" Id at 913. The "'opening the door' concept allows the cross-examination to reveal the whole story of a transaction **only partly explained in direct examination**." Id. This Court concluded (id.):

> … . Because the State could not introduce the evidence of Robertson's alleged prior threat to his ex-wife as Williams rule evidence, the State cannot rely on the law of impeachment to introduce the same evidence through the back door by asking an impermissible question regarding an alleged prior crime.

Similarly, the state could not rely on the law of impeachment to introduce Gonzalez's hearsay statement through the back door at bar. Appellant said nothing about the theft of Peller's gun on direct: he only said he did not bury the gun found at the church, T15 1976, and he refused Mejia's offer of a pistol. T15 1945-46. Under Mosley and Robertson, he did not open the

door to cross as to whether he and Gonzalez stole Peller's gun. He was compelled to answer the state's questions. But the fact that he answered them did not open the door to Gonzalez's accusation.

C. The error was not harmless beyond a reasonable doubt.

1. The error was prejudicial as to guilt.

At bar, the evidence was not harmless beyond a reasonable doubt. Evidence of another crime "is presumed prejudicial because of the danger that a jury will take the bad character or propensity to commit a crime as evidence of guilt of the crime charged." Valley v. State, 919 So. 2d 617 (Fla. 4th DCA 2006). See also Gore v. State, 719 So. 2d 1197, 1199 (Fla. 1998) ("presumed harmful"); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990) ("presumptively harmful").

Appellant explained to the jury why he had Peller's and Fizzuoglio's effects, and how he had been at the scene and in Fizzuoglio's car. He said he sought to thwart the plot to kill Peller. The state contended he was part of the plot. Jurors would conclude from Gonzalez's statement that appellant stole the gun as part of the plot.

The evidence that appellant had the murder weapon was: (1) Fizzuoglio's testimony that appellant had the gun and that Peller asked how he got his gun; and (2) Jeff Stromoski's testimony that he believed it was the same gun that appellant had in a

bag. Appellant's testimony refuted Fizzuoglio's. The jury could have concluded that her testimony was not sufficiently credible to convict a man and condemn him to death for murder. It could also have easily discounted Stromoski's identification of the gun in the bag. He did not examine the gun. He only saw the bag a couple of times, and testified to only one time that he saw the gun. He "peeked and looked inside the bag," and remembered seeing a gun. R8 1014. His vague description of the gun showed he was no expert on firearm identification. He said it wasn't a very big gun, it was medium sized, not shiny, it wasn't a revolver, it was an automatic type. R8 1016.

Thus, Gonzalez's statement that he and appellant stole the gun was very helpful to the state to put the murder weapon in appellant's hand.

Further, the state compounded this prejudicial effect by repeating the evidence in final argument (R16 2146):

> Also, when the Defendant took the stand and told us one other thing. According to what he told us, according to Ernesto Gonzalez, he was involved in the burglary back on 8/29 when the gun was stolen. Remember when we talked to the deputy about the gun being taken, the night of the gun being taken, he tells us that.

Cf. Rivera v. State, 807 So. 2d 721, 722 (Fla. 3rd DCA 2002) ("reference during closing argument to the officer's inadmissible testimony compounded the error."); Brooks v. State, 918 So. 2d 181, 201 (Fla. 2005) (state "compounded the error by imper-

missibly relying on the impeachment as substantive evidence in closing arguments").

The error was not harmless beyond a reasonable doubt. It deprived appellant of his right to a fair trial on competent evidence under the Due Process, Jury, Confrontation and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

2. The error was prejudicial as to penalty.

Jurors could have taken the evidence as showing that appellant was part of a plan to murder Peller from the time of the burglary two months before. They could use it to support CCP or give it added weight. The vote for death was 7-5. **One vote** could have changed the outcome. The state cannot show beyond a reasonable doubt that the error did not affect at least one of the seven jurors who voted for death. The error deprived appellant of a fair and lawful penalty determination under section 921.141, Florida Statutes, and Due Process, Jury, Confrontation and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing.

3. WHETHER IT WAS ERROR TO LET THE STATE COMMENT ON APPELLANT'S FAILURE TO TESTIFY AGAINST OTHERS.

The state told jurors it needed someone to testify against the person appellant spoke to on the phone. Appellant contended the argument improperly commented on his right not to testify and to remain silent, and moved for a mistrial. The judge ruled

it was a fair comment on the evidence (T16 2086-87) (e.s.):

> [MR. HOLDEN:] ... . The Defendant also told detectives that he would accept the charges and that he's willing to spend the rest of his life in prison for what happened. The detectives are saying at the same time, why, why don't you tell us, why should that other guy get out there and be able to roam around free. Give us that guy you were on the phone with, who's calling the shots. Because the guy who pulled the trigger is the guy with the gun, we'd also like the guy who's on the phone, that's why our investigation continues, but we need someone to tell us who's on the phone **and to testify**.
>
> [Defense approaches bench for sidebar]
>
> MR. BARON: Your Honor, this argument is consistent with the comment or questioning during the testimony,[10] concerning I believe it's a indirect comment on my client's right not to testify, not to give information because he gave some testimony. I believe what Mr. Holden is indicating is an indirect comment on my client's right to remain silent and I'm renewing my motion for a mistrial based upon the comments and the evidence in trial.
>
> MR. HOLDEN: You know, Judge, if they didn't ask him during direct examination, why didn't you tell the police these issues, but they asked him why did you tell the police this, that's when he gave his story.
>
> THE COURT: It's a fair comment on the evidence. Motion for mistrial is denied.

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[10] Bukata had said on direct that the investigation was ongoing up to time of trial. T12 1522. He said the same on cross, and also said only appellant had been charged in the ongoing investigation. T12 1530, 1563. On redirect, the state asked if the ongoing investigation was about who appellant spoke to on the phone, and appellant moved for a mistrial, arguing it was a comment on silence. T12 1564-67. The judge ruled appellant opened the door, although appellant pointed out that the state brought up the ongoing investigation on direct. Id. Bukata then said he was investigating Mejia and Dilger as conspirators, and his ongoing investigation was to locate Mejia. T12 1568, 1573-74. (This even though Bukata had gotten Mejia deported. T12 1531, 1562-63.)

(Thereupon, the sidebar conference was concluded.)

> MR. HOLDEN: He asked him, that's what we want, we want the guy on the other end of that phone. Who is it? That's why it's an ongoing investigation. There's more than one person involved in this, no question about it, but we need one [sic] someone to give us those other people. We know you, Russell Hudson, pulled the trigger and took Lance Peller's life, no doubt about it, but who sent you there and how do we prove who sent you there. That's the ongoing investigation.

The judge erred: the comment was not a proper comment on the evidence; it was an improper comment on silence. The comment was prejudicial and this Court should reverse.

A. The state made an improper comment on silence.

A comment on the right to remain silent "is serious error." Rimmer v. State, 825 So. 2d 304, 322 (Fla. 2002). Such comments are "of almost unlimited variety." State v. DiGuilio, 491 So. 2d at 1132. This Court views such a remark from the jury's perspective. It considers whether the remark is "fairly susceptible of being interpreted **by the jury** as a comment on silence." Fitzpatrick v. State, 900 So. 2d 495, 516 (Fla. 2005).

Even if a defendant testifies at trial, the state may not comment on his or her failure to testify at a separate proceeding. See Simpson v. State, 418 So. 2d 984 (Fla. 1982) (comment, on cross of defendant, on failure to testify before grand jury was improper comment on silence); Grunewald v. U.S., 353 U.S. 391 (1957) (same); Willinsky v. State, 360 So. 2d 760 (Fla.

1978) (same; failure to testify at preliminary hearing).

Jurors would reasonably interpret the comment as a comment on silence. The state said it needed someone to **testify** against the person on the phone with appellant. Since appellant was the only logical person that could do so, jurors would understand that it referred to his not testifying against Mejia. Cf. Mannarino v. State, 869 So. 2d 650 (Fla. 4th DCA 2004) (error to deny mistrial for comment that there was no explanation for defendant's possession of stolen credit cards where only he could make explanation); Smith v. State, 843 So. 2d 1010, 1011 (Fla. 1st DCA 2003) (error to deny mistrial for comment that no one said Smith "was not the guy" when only he could have done so; citing cases); Watts (error to deny mistrial for comment that nobody testified to contradict officer where only Watts could have done so); Dixon v. State, 627 So. 2d 19 (Fla. 2nd DCA 1993) (error to deny mistrial for comment that only one participant in crime testified where only Dixon could have been other participant).

Here, jurors would reasonably take the state's argument as a comment on appellant's failure to testify against Mejia. Hence, the state made an improper comment on silence.

B. The state did not make a fair comment on the evidence.

The judge ruled the state made "a fair comment on the evidence." T16 2087. Apparently he referred to Bukata's discus-

sion with appellant on October 31, which did not support the state's comment. Bukata talked to appellant "about him fully cooperating, telling me about Felipe Mejia so that I can persue [sic] Felipe." T12 1483. In the car, Bukata asked him to think about what they had talked about, and he replied that he realized that, from Bukata's viewpoint, why should he go down and "let him [Mejia] float around the world, you know, and, and just, you know, scott free." T12 1499-1500. Bukata asked, "But if he, if he's the guy that asked you to kill Lance your friend, and he's the guy that is, I guess, responsible indirectly for his death, why would he be able to roam?" T12 1500. They discussed the call to Mejia. T12 1500-01. Appellant acknowledged that he had identified Mejia's photo, T12 1506-07, and he described Mejia's vehicles. T12 1509-10.

Thus, Bukata talked to appellant about fully cooperating and **telling him** about Mejia so he could **pursue** him. He did not mention **testifying** against Mejia. There was no talk of the officers wanting appellant to **prove** who sent him there.

The statement that "we need someone ... to **testify**" was not a fair comment on the evidence. It was reasonably susceptible of being taken **by the jury** as referring to appellant's failure to testify against Mejia.

C. The standard of review is whether the error was harmless beyond a reasonable doubt.

As the judge did not recognize the error and took no correc-

tive measures, the state must show the comment was harmless beyond a reasonable doubt. Compare State v. DiGuilio, 491 So. 2d at 1139 (harmless beyond reasonable doubt standard applied when judge denied motion for mistrial as to comment on silence without taking corrective action)[11] to Goodwin v. State, 751 So. 2d 537, 547 (Fla. 1999) ("harmless error analysis under DiGuilio is not necessary where … the trial court recognized the error, sustained the objection and gave a curative instruction"). See also Watts (applying harmless-beyond-reasonable-doubt standard to denial of mistrial where judge did not recognize error and took no corrective action). This Court wrote regarding the denial of a mistrial during the state's final argument in Parker v. State, 873 So. 2d 270, 284, n. 10 (Fla. 2004):

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

[11] The DCA opinion shows that DiGuilio moved for a mistrial without making, and without the court ruling on, an objection: "At that point, defense counsel interrupted, asked the court to excuse the jury, and promptly moved for a mistrial on the ground that the foregoing testimony was an impermissible comment on defendant's right to remain silent. The motion was denied and the trial continued." DiGuilio v. State, 451 So. 2d 487, 488 (Fla. 5th DCA 1984).

front of the jury or give a curative instruction. Hence, harmless error analysis under State v. DiGuilio is appropriate.

D. The improper argument was prejudicial.

This Court reverses for an improper argument if it was so prejudicial as to vitiate the entire trial. Duest v. State, 462 So. 2d 446, 448 (Fla. 1985). Comments on silence have a "substantial likelihood" of vitiating the trial:

> It is clear that comments on silence are high risk errors because there is a **substantial likelihood that meaningful comments will vitiate the right to a fair trial** by influencing the jury verdict ... .

State v. DiGuilio, 491 So. 2d at 1136-37; Watts v. State, 921 So. 2d 722, 724 (Fla. 4th DCA 2006).

A court must reverse unless it can "see from the record" that the argument did not prejudice the accused. Scippio v. State, 943 So. 2d 942, 944 (Fla. 4th DCA 2006); McCall v. State, 120 Fla. 707, 728, 163 So. 38 (1935) (question is whether court "can see from the record that the conduct of the prosecuting attorney did not prejudice the accused, and unless this conclusion can be reached the judgment must be reversed"); Robinson v. State, 881 So. 2d 29, 31 (Fla. 1st DCA 2004) (quoting McCall).

The comment at bar was prejudicial and was not harmless beyond a reasonable doubt. It vitiated the trial; one cannot see from the record that it did not prejudice appellant. The judge compounded the error by finding no error and allowing the argument. Cf. Wheeler v. State, 425 So. 2d 109, 111 (Fla. 1st DCA

1982) (improper argument; "The court's overruling of the objection compounded the prejudice.").

The case boiled down to a credibility contest between appellant and Jennifer Fizzuoglio. The comment went to appellant's credibility. It sought to have jurors hold against him the fact that he did not help prosecute others, to penalize him for not giving the state the other people, and to convict him because the state needed his testimony to proceed against Mejia. It distracted jurors from the case before them, and offered a reason to convict other than the evidence as to guilt. It deprived appellant of his rights under the state and federal constitutions to a fair trial on competent evidence, to remain silent, and to due process, a fair jury trial, and to be free of cruel and unusual punishment. Art. I, §§ 9, 16, 17, and 22, Fla. Const., Amends. 5, 6, 8, and 14, U.S. Const. This Court should order a new trial.

There was separate prejudice as to penalty. Jurors could have given more weight to CCP thinking appellant coldly refused to testify against his supposed co-conspirators. They could have used the comment to diminish the weight of mitigation for the same reason. They could also have lessened its weight on the ground that appellant's failure to testify for the state against others made him less subject to rehabilitation and more fit for execution. One cannot say beyond a reasonable doubt

that the argument did not affect at least one of the jurors who voted for death. It deprived appellant of his rights under the state and federal constitutions to a fair trial on competent evidence, to remain silent, to due process, a jury trial, and confrontation of witness, and to be free of cruel and unusual punishment. Art. I, §§ 9, 16, 17, and 22, Fla. Const., Amends. 5, 6, 8, and 14, U.S. Const. This Court should order jury re-sentencing.

4. WHETHER THE COURT ERRED IN DENYING THE DEFENSE'S REQUESTED JURY INSTRUCTION ON HAC.

The judge denied a requested defense jury instruction that HAC addresses the effect of the defendant's actions on the murder victim and not their effect on others present. Appellee then used the instructions as given to urge consideration of the terror and suffering of Jennifer Fizzuoglio and even Peller's family as to HAC. The judge committed reversible error in denying the requested instruction.

A. Proceedings below.

The defense requested that the court instruct the jury:

> In determining whether the killing was especially heinous, atrocious, or cruel, you are considering only the effect defendant's actions had upon the victim, and not the effect the actions had upon other people who were present but were not killed.

R4 729; SR 64-65. The state agreed that HAC "just has to do

with the victim, Lance Peller, in this case" but argued the standard instruction covered the matter. SR 64-65. The judge did not announce an immediate ruling, but later denied the requested instruction without explanation in a written order. R4 729. Appellant unsuccessfully renewed the request at the start of the jury penalty proceedings. T18 2211-12.[12]

In argument to the jury, the state urged jurors to consider the effect of appellant's acts on others as supporting HAC. Discussing HAC, T19 2409-11, it asked why appellant told Peller and Fizzuoglio there were people outside and continued (T19 2409):

> No one ever saw anybody outside. Why was he doing that **to the people** inside the apartment?
>
> Could it be to make **Jennifer and** Lance Peller more nervous about what's going through - could it be to make **them suffer** more about what's happening? Why would he go around saying that?

After discussing appellant's phone call, it continued (id.):

> And I'll submit to you the evidence shows that he **tortured them mentally** through this event; so much so that Lance Peller couldn't catch his breath, so much so he had to call his father and mother to say goodbye.

After briefly discussing CCP, it returned to HAC, **reading from the instruction** and then saying (T19 2411-12):

> **That part right there, describing heinous, atrocious and cruel** - that's what I talked to you about when he is running around saying there's people outside,

[12] The judge noted that he had granted a request modifying a separate part of the HAC instruction. Id.; R4 730.

there's nobody there.

> The minutes of anguish **these folks** are going through at that time, **that's what we're talking about. That's what it's about.**
>
> ... .
>
> Torturous murder [sic] are those that show extreme an [sic] outrageous deprative [sic] as exemplified by desire to inflict high degree of pain and or - see, folks, right there or - or B the utter indifference to [or] the enjoyment of **the suffering of another**.[13] **That's heinous and atrocious and cruel**, the mental anguish that he put **these folks** through - Lance Peller **and his family**.

B. Appellant was entitled to the special instruction.

A defendant is entitled to a special instruction if (1) the evidence supports it, (2) the standard instruction does not adequately cover the issue, and (3) the special instruction correctly states the law and is not misleading or confusing. See Stephens v. State, 787 So. 2d 747, 756-57 (Fla. 2001). The requested instruction satisfied these three criteria.

First, as appellant noted below, the requested instruction addressed the evidence: "I don't want any type of overlapping to Jennifer Fizzuoglio, and that is why I'm asking for this instruction." SR 64-65. The judge said he knew the defense was concerned that Fizzuoglio's being "freaked out by virtue of the killing ... in [the jurors'] minds could constitute heinous,

[13] The state here referred to the standard instruction, which was given to the jury at bar and which said that torturous murders are exemplified by "[u]tter indifference to, or enjoyment of the suffering of another." R4 739.

atrocious and cruel", and about the "impact on somebody else as opposed to the actual killing itself." SR 65. Nevertheless, he was apparently persuaded by appellee's argument that the standard instructions covered the issue.

Second, it correctly stated the law and was not misleading or confusing: the murder's effect on another is irrelevant to HAC.[14] In Clark v. State, 443 So. 2d 973 (Fla. 1983) two men murdered a woman as her wounded husband begged for her life. His suffering was not relevant to HAC: "as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, **it is the effect upon the victim herself that must be considered** in determining the existence of this aggravating factor." Id. at 977.

Clark relied on Riley v. State, 366 So. 2d 19 (Fla. 1979). Riley and another man robbed a store owned by a father and son. They threatened the father and son and another man with guns, made them lie down, bound and gagged them, and shot them in the head. Only the son survived. This Court held that HAC could

[14] ASA Holden **agreed** at the charge conference that the proposed instruction correctly stated the law, and said it would be illogical to consider the effect on another as to HAC: "it's not logical because the victim in the kidnapping and the killing, it has nothing to do with her, **it just has to do with the victim, Lance Peller**, in this case." SR 64. He argued, however, that the standard instruction covered the issue, saying they were "kind of specific to that" and "**pertained to the victim in this case**." SR 65. He made just the "not logical" argument to the jury that HAC covered the suffering of Fizzuoglio and even Peller's family.

not be based on the effect of the father's murder on the son, writing at page 21:

> ... . **Here the atrocity described by the prosecutor and apparently accepted by the trial judge was the son's having to see his father's execution death. There was nothing atrocious (for death penalty purposes) done to the victim, however**, who died instantaneously from a gunshot in the head. As to this aspect, the case is similar to Cooper v. State, 336 So. 2d 1133 (Fla. 1976), where we ruled that a like killing was not heinous and atrocious within the meaning of Section 921.141(5)(h).

Thus, Florida law supported the requested instruction at bar.

Third, as appellee's final argument shows, the standard instructions did not cover this issue. They did not explicitly limit consideration to the effect on the victim. Appellee **read from the instructions given and told jurors HAC included the effect of the murder on "another,"** including Fizzuoglio and Peller's family.

C. Prejudicial error occurred.

Decisions as to jury instructions will not be disturbed absent prejudicial error, which occurs when, **under the circumstances of the case**, there is a reasonable possibility that not giving a requested instruction **could have misled** jurors:

> Decisions regarding jury instructions are within the sound discretion of the trial court and should not be disturbed on appeal absent prejudicial error. Prejudicial error requiring a reversal of judgment or a new trial occurs only where "the error complained of has resulted in a miscarriage of justice." §59.041, Fla.Stat. (1989). A "miscarriage of justice" arises where instructions are "reasonably calculated to confuse or mislead" the jury. Florida Power & Light Co.

v. McCollum, 140 So. 2d 569, 569 (Fla. 1962).

> **Under the circumstances presented in this case**, we find there was no "reasonable possibility that the jury **could have been misled** by the failure to give the instruction." [Cit.]

Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990). See also Coday v. State, 946 So. 2d 988, 994 (Fla. 2006) (quoting and following Goldschmidt); Barkett v. Gomez, 908 So. 2d 1084, 1086 (Fla. 3rd DCA 2005) (there is "prejudicial error when there is a reasonable possibility that the jury **could have been misled** by the failure to give the instruction"); Chandler v. State, 744 So. 2d 1058, 1060-61 (Fla. 4th DCA 1999) (court reviews "to determine 'whether there was a reasonable possibility that the jury **could have been misled** by the failure to give that instruction.'").

Prejudicial error occurred at bar. There is a reasonable possibility that the jury could have been misled by the failure to give the instruction.

Appellee relied on the instructions as given in telling jurors to consider the effect of appellant's actions on "the people" in the apartment, and asked if his actions served to "make Jennifer and Lance Peller more nervous" and make "them" suffer. It said he "tortured them mentally." It said the "anguish these folks" suffered was "what [HAC]'s about." It said HAC involved "the mental anguish that he put these folks through - Lance Peller and his family." Because of the refusal to give

the requested instruction, the jury could have been misled to think these were legitimate considerations.

Appellee's argument at bar mapped out the way to misapplication of HAC.[15] But the jurors could have found their way into error even without such argument. They were left without proper guidance as to how to treat evidence that Fizzuoglio was freaked out, panicked and fearful and wanted to see her baby. Appellee's argument merely underscored the prejudicial effect by making concrete the reasonable possibility that the jurors were misled.

In Emory v. Florida Freedom Newspapers, 687 So. 2d 846 (Fla. 4th DCA 1997), Emory sued for injuries in a traffic accident. An expert testified, apparently without objection, that subsequent surgery was unnecessary and may have worsened his condition. Id. at 847. The defense said the evidence served only to show

[15] Although the defense did not object to the argument, it is important not to lose sight of the fact that the error was denial of the instruction. Appellee compounded that error in its argument. Cf. Spruce Creek Development Co., of Ocala, Inc. v. Drew, 746 So. 2d 1109, 1116 (Fla. 5th DCA 1999) (unobjected-to jury arguments compounded objected-to instructional error), disapproved on other grounds, Willis Shaw Exp., Inc. v. Hilyer Sod, Inc., 849 So. 2d 276 (Fla. 2003); Butler v. State, 493 So. 2d 451, 453 (Fla. 1986) ("Any assertion that the errant jury instruction was harmless beyond a reasonable doubt is clearly rebutted when the jury instruction is combined with comments made by the prosecutor during closing argument."); Quaggin v. State, 752 So. 2d 19, 24 (Fla. 5th DCA 2000) (unobjected-to jury arguments compounded objected-to instructional error: "Although this statement was not objected to and thus was not preserved, we agree that it contributes to the error in the instructions, to which an objection was made.").

that the surgery's cost was unnecessary and hence not compensable. Id. at 848. The judge refused Emory's requested instruction that the defendant could be liable for the results of negligent treatment. The court's opinion nowhere shows that Emory objected to the evidence or that the defense ever argued that negligent treatment relieved it of liability. Nevertheless, the Fourth District found an abuse of discretion in denying the instruction. It held there was a reasonable possibility that the failure to give the instruction could have misled the jury: "Absent such an instruction, the jury may have erroneously concluded that the surgery was a substantial cause of Emory's injuries which served to sever the causal link between Emory's injuries and the automobile accident, for which Florida Freedom was admittedly responsible." Id. The jury was "left without any instruction as to how to treat this evidence." Id.

At bar, absent the requested instruction, the jury may have erroneously concluded that HAC applied because of the suffering of Fizzuoglio and even Peller's family. It was "left without any instruction as to how to treat" both Fizzuoglio's dramatic testimony of her own mental state and the effect of Peller's phone call on his family. There is a reasonable possibility that they could have been misled by the failure to give the requested instruction.

It is true that appellee also argued that Peller feared his death for an extended time. But jurors could have discounted such argument given Peller's unconcern when talking to Pritchard, Fizzuoglio, and Webb on the phone, his general attitude that he could talk his way out of anything, and the fact that he was on drugs. How much easier for them to focus on Fizzuoglio's vivid testimony of her own mental state and the effect of the phone call on Peller's family in finding HAC!

As noted elsewhere in this brief, the sufficiency of the evidence for HAC was doubtful. The effect of the killing on others could have led jurors to find HAC even when, properly considered, they may have rejected it. Even if the jurors might have properly found HAC, they may have improperly given it more weight because of the effect on Fizzuoglio and Peller's family.

The vote for death was 7-5. The change of **one vote** could have changed the outcome. Appellee cannot show beyond a reasonable doubt that the error did not affect the verdict as it cannot show beyond a reasonable doubt that it did not affect at least one of the seven jurors who voted for death. The error deprived appellant of a fair and lawful jury determination under section 921.141, Florida Statutes, and Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order jury resentencing.

5. WHETHER FUNDAMENTAL ERROR OCCURRED IN THE STATE'S JURY ARGUMENT ON HAC.

As shown in Point 4, the state presented the jury with a legally invalid theory of HAC under Clark and Riley, repeatedly urging consideration of the mental torture and anguish of Fizzuoglio and Peller's family. T19 2409-12. It made this argument even though it had previously told the judge that HAC applied only to Peller. SR 64-65. One cannot tell if the jury based the 7-5 penalty verdict on the state's legally invalid theory. Even without a defense objection, fundamental error occurred.

Fundamental error occurs when one cannot tell if a verdict rests on a valid or an invalid theory of law. See Tape v. State, 661 So. 2d 1287 (Fla. 4th DCA 1995) (fundamental error occurred where court could not determine if jury rested verdict on legally invalid theory of attempted felony murder). Mills v. Maryland, 486 U.S. 367, 376 (1988) states:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict.

See also Yates v. United States, 354 U.S. 298, 312 (1957) ("a verdict [must be] set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"), receded from on other grounds Burks v. U.S., 437 U.S. 1 (1978).

At bar, the verdict may have rested on a legally invalid ground. It violated the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and must be set aside with a remand for jury resentencing.

6. WHETHER THE COURT ERRED IN ALLOWING FIZZUOGLIO'S TESTIMONY THAT PELLER KNEW HE WAS GOING TO DIE.

Fizzuoglio testified at phase two that, after appellant freaked out and said there were people outside, "Lance knew at that point that he wasn't going to make it out of there alive." T18 2243-44. The judge overruled without comment appellant's objection that the testimony was speculation. Id. The judge erred, and his error was not harmless beyond a reasonable doubt.

"Testimony based on speculation should be excluded as inadmissible." Jones v. State, 908 So. 2d 615, 621 (Fla. 4th DCA 2005). Jones was charged with soliciting Ruiz to murder Hunt, a witness against Jones in another case. They had many discussions about the plan, during which he told Ruiz to make sure Hunt never made it to the courtroom. Over a defense objection of speculation and hearsay, Ruiz testified that he assumed Jones meant for him to kill Hunt. On appeal, the court held the testimony was not speculative because "there was clearly evidence of a basis for Ruiz to know Jones' subjective meaning of the phrase he spoke to Ruiz" given the "multiple discussions regarding what Ruiz was going to do to Hunt." Id. at 622. Under Jones, error occurred at bar: the record does not "clearly"

show a basis for Fizzuoglio to know Peller's thoughts. Fizzuoglio and Peller did not engage in "multiple discussions" of the topic from which Fizzuoglio would know when Peller would know he was not going to make it out alive.

Also, unlike Ruiz, engaged in a series of cold-blooded one-on-one discussions, Fizzuoglio formed her opinion in a situation of drug use and extreme stress that would affect her perception. She had been out partying with drugs the night before the murder. T13 1652-54. She slept most of the next day before calling Peller. T13 1655-56. When appellant pulled out the gun, she "started freaking out and crying." T13 1666. She could not follow the men's conversation. Id. She was crying while appellant was on the phone. T13 1668. The three of them then did cocaine. T13 1669. Appellant began freaking out, Peller was freaking out, and Fizzuoglio was crying. T13 1670.

"The rules of evidence may be relaxed during the penalty phase of a capital trial, but they **emphatically are not to be completely ignored**." Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995). See also Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994) ("While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded").

Section 921.141(1), Florida Statutes (2003), provides:

> ... . Any such evidence which the court deems to have probative value may be received, regardless of its ad-

> missibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

The statute hardly authorizes speculative mind-reading which is even less susceptible to rebuttal than hearsay evidence. The judge erred in allowing the testimony at bar.

The error was not harmless beyond a reasonable doubt. Appellee used the evidence in jury argument as to HAC (T19 2407-08):

> Jennifer Fizzuoglio came to his apartment at eight o'clock. **That's why I brought her back**. Because, remember, **she said he started hyperventilating knowing he is going to die**.
>
> He started hyperventilating after eight o'clock.
>
> And he even got up and said: Hey, let her go. This is between me and you. Let her go.
>
> **He still knows at this point in time that he is going to die** - the mental anxiety that he is going through.

The judge relied on it in finding HAC, which he gave great weight in the sentencing order (R4 781):

> After each did a line of Cocaine, the Defendant started to freak out telling Ms. Fizzuoglio and Mr. Peller that there were people outside and if he did not kill Mr. Peller all three of them would be killed. *Penalty Phase Transcript dated June 24, 2004, p. 2243*. Ms. Fizzuoglio testified that "Lance knew at the point that he wasn't going to make it out of there alive." *Transcript, p. 2244*.

Jurors could easily have relied on the incompetent evidence in finding HAC. Even if they properly found HAC, they may have given it more weight because of the improper evidence. The

change of one vote could have changed the outcome. Appellee cannot show beyond a reasonable doubt that the error did not affect at least one juror who voted for death.[16] The judge's decision was also affected: he considered the evidence proper (he ruled it admissible) and relied on it in his sentencing order. The error deprived appellant of a fair and lawful penalty determination under section 921.141, Florida Statutes, and Due Process, Jury, and Cruel Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing.

7. WHETHER HAC WAS USED IN ERROR.

Appellant did not have the torturous intent that makes a **shooting** especially heinous, atrocious or cruel (HAC). Peller did not suffer the extreme physical or mental torture required by HAC. The judge made findings not supported by the record. This Court should reverse the sentence because of the erroneous use of HAC.

A. Appellant did not act with the torturous intent that HAC requires in shooting cases.

HAC applies to murders that are "both conscienceless or pitiless and unnecessarily torturous to the victim." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). See also State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), Boyd v. State, 910 So. 2d

[16] Appellee said it recalled Fizzuoglio specifically to present the evidence. T19 2407-08. Thus, it calculated that the evidence would affect the verdict.

167, 191 (Fla. 2005). It requires an intent to cause unnecessary and prolonged suffering in **shooting** cases.[17]

In Bonifay v. State, 626 So. 2d 1310, 1311 (Fla. 1993), Bonifay shot a clerk from outside a store, then went inside where the clerk was lying on the floor "begging for his life and talking about his wife and children." Bonifay said to shut up and shot him twice. This Court struck HAC as there was **no torturous intent** (id. at 1313):

> The record fails to demonstrate any **intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim**. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor **absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering**.

In Diaz v. State, 860 So. 2d 960, 967 (Fla. 2003), Diaz shot Lissa Shaw in her garage. As she fled, he pointed the gun at her father, Charles. Diaz chased him into the house, where his quadriplegic wife watched him try to calm Diaz down. Diaz pulled the trigger, but the gun was out of bullets. He reloaded and Charles ran to the bathroom, where Diaz hunted him down and shot him repeatedly. Diaz, 860 So. 2d at 963-64. This Court struck HAC, relying on cases "where no evidence showed that the defendant **intended to cause the victim unnecessary and prolonged**

[17] By contrast, in cases involving strangulation, stabbing, savage beatings, etc., there is generally not a strict requirement of such an intent because the very nature of the killing makes it HAC. Cf. Overton v. State, 801 So. 2d 877, 901 (Fla. 2001) (strangulation is "nearly per se heinous").

suffering." Id. at 967.

At bar, appellant did not have a torturous intent. He did not taunt or beat Peller, he did not commit acts showing intent to cause unnecessary, prolonged suffering. He took cocaine, was freaked out, was paranoid, and banged his head against the door before the shooting. Torturous intent was the furthest thing from his mind.

B. This Court has struck HAC in comparable or more aggravated cases.

This Court has struck HAC in cases involving more suffering. Cf. Maharaj v. State, 597 So. 2d 786 (Fla. 1992) (Maharaj confronted father and son, shot father in leg, had cohort tie them up, shot father when he lunged at him, began questioning son, shot father as he crawled away, restrained son who broke loose, took son upstairs and shot him as he faced wall; HAC struck for son's murder);[18] Hartley v. State, 686 So. 2d 1316 (Fla. 1996) (juvenile drug dealer abducted by men with gun to head, forced to drive to school, shot five times); Green v. State, 641 So. 2d 391 (Fla. 1994) (Green accosted man and woman, tied man's hands behind back, fired gun but no one was hit, abducted pair, threatened to kill woman when she tried to escape, man got gun and fired at him and yelled for woman to escape, she fled, man found shot with hands tied behind back); Reaves v. State, 639

[18] Maharaj was sentenced to life for the father's murder.

So. 2d 1 (Fla. 1994) (deputy begging for life shot four times); Street v. State, 636 So. 2d 1297 (Fla. 1994) (Street took Officer Boles' gun in struggle, shot other officer three times, then shot Boles three times, ran out of bullets, went back for other officer's gun, chased wounded Boles around car and shot him in chest; one shot fired in firm contact with shirt under bullet-proof vest; HAC struck for Boles' murder);[19] Robertson v. State, 611 So. 2d 1228 (Fla. 1993) (gunman accosted couple in car, demanded money from man then shot him, demanded woman's rings and shot her as she wept and screamed she had no money); Santos v. State, 591 So. 2d 160 (Fla. 1991) (man chased down screaming woman with little girl in her arms, grabbed her, spun her around, shot her and girl);[20] Cook v. State, 542 So. 2d 964 (Fla. 1989) (defendant forced way into closed restaurant, tried to rob worker who did not speak English, hit him with metal rod and shot him, then shot man's wife as she screamed and grabbed his knees); Wyatt v. State, 641 So. 2d 355 (Fla. 1994) (Wyatt I) (woman taken from bar, driven across state, shot in head in a ditch "to see her die").

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[19] The judge did not find the other officer's murder HAC.

[20] Two days before, the woman had taken a death threat from Santos so seriously that she summoned the police. Hence she was in fear for her life for a long time. Cf. Pooler v. State, 704 So. 2d 1375, 1378 (Fla. 1997) (victim "learned of Pooler's threat to kill her some two days before she was killed, giving her ample time to ponder her fate"). The facts at bar do not

The present case does not have the marked horror and terror of the prolonged ordeal of the son in Maharaj who was bound and saw his father shot repeatedly, tried to escape, and was marched upstairs to his death. It does not show the fear and mental torture experienced by Officer Boles in Street, who was robbed of his gun, saw a fellow officer shot, was shot himself, saw Street get another gun, was chased bleeding around his car, and shot with the gun shoved under his armor. It does not show the fear and aguish of the mother in Santos, who was under a death threat for two days, was tracked down while walking with her children and ran screaming with her baby to flee the murderous attack. It is less heinous, atrocious, or cruel than the murder in Green in which a man was kidnapped with his hands tied behind his back, struggled for his life, saw his companion escape, and was later shot while still bound, helpless and alone. It does not have the prolonged anticipation of death of Wyatt I in which the woman was driven all the way across the state to be shot in a ditch. This Court struck HAC in those cases, and should do so here.

C. This case does not have the extraordinary additional torturous acts necessary to make a shooting HAC.

To apply to a shooting HAC requires extraordinary additional torturous acts such as abduction to a remote area, sexual bat-

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show such a long period of fear of death.

tery, numerous non-fatal painful wounds, or the witnessing of the murders of family murders or close friends. Cf. Hutchinson (nine-year-old saw murder of mother, sister and brother with shotgun blasts, saw defendant rack another round, suffered defensive wound when shot in arm, tried to flee, fell looking at defendant who followed him and fired the last shot through his right ear);[21] Ibar (masked armed men entered home, beat owner almost continually in presence of two women, pushed one woman to floor, chased down and bound other, shot owner in women's presence, shot women seven minutes later); Parker v. State, 873 So. 2d 270 (Fla. 2004) (store clerk taken by robbers to remote area, asking what they were going to do to her, had hair ripped from head in car, voided bladder while alive, suffered excruciatingly painful stab wound to abdomen while she struggled, got defensive wound to hand in struggle); Lynch v. State, 841 So. 2d 362 (Fla. 2003) (terrified 13-year-old girl held hostage until mother came home, saw mother brutally murdered, was heard screaming and very, very upset while Lynch was on phone, Lynch told 911 girl was terrified before shootings and asked why he was doing this to her; judge **did not** find the mother's murder especially HAC, even though Lynch confronted her at her door, shot her in the

[21] This Court divided 3-3 as to whether HAC applied to this murder; the trial judge did not apply HAC to the other children's murders, and imposed a life sentence for the mother's murder.

leg, pulled her inside, she was screaming and bloody from the waist down, and then shot her again five to seven minutes later in the girl's presence); Hertz v. State, 803 So. 2d 629 (Fla. 2001) (men forced way into women's home at gunpoint, bound and gagged them, stole property, poured accelerants throughout home, went back to women, shot them after one of them said she would rather die being burnt up than shot and begged not to be shot in the head); Evans v. State, 800 So. 2d 182 (Fla. 2001) (gunman played with scope and laser, pointing it at victim, who was beaten, bound and gagged, marched outside, still bound and gagged, and told he was looking at the last three people he would ever see).[22] The case at bar does not have similar horrific facts.

[22] A long line of cases striking HAC in prior decades is similar. Cf. Henyard v. State, 689 So. 2d 239 (Fla. 1996) (after seeing mother raped and shot, screaming little girls driven to another area and shot dead); Farinas v. State, 569 So. 2d 425 (1990) (Farinas kidnapped pleading victim, later shot her as she ran screaming and begging for help, repeatedly unjammed gun and shot her twice more as she lay paralyzed but conscious); Zeigler v. State, 580 So. 2d 127 (1991) (victim "shot twice, neither being the cause of death, and while still alive and struggling he was beaten savagely on the head with a blunt instrument"); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994) (Wyatt II) (Wyatt pistol whipped store manager, raped his wife in his presence, shot manager as he pled for wife's life, shot wife, shot co-worker who had witnessed the other crimes, telling him to listen real close to hear the bullet coming, went back and shot manager again); Douglas v. State, 575 So. 2d 165 (Fla. 1991) (Douglas abducted couple, said he felt like blowing their brains out, made them engage in sex acts at gun point, fired rifle in air, hit man so hard that rifle stock shattered, shot him in head); Pooler, (Pooler went to woman's home, shot her fleeing brother, tried to abduct woman as she begged begged him not to kill brother and

The Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions require that aggravators

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vomited in her hands, broke through locked door, chased her down, hit her head with gun, pulled her to car screaming and begging for her life, pulled her back to building as she struggled, shot her five times, pausing to ask if she wanted some more; HAC upheld for woman's murder); Alston v. State, 723 So. 2d 148 (Fla. 1998) (victim forced into his own car, repeatedly begged for life, was taken to remote area, and vividly contemplated death, was shot by Ellison, remained alive as Alston spoke to Ellison, was moaning and held up hand to fend off further attacks as Alston shot him twice); Walls v. State, 641 So. 2d 381 (Fla. 1994) (Walls entered home at night and deliberately awakened couple, made woman tie man up, tied woman up, was attacked by man who got loose, beat struggling man, slashed his throat, shot him several times, wrestled with crying woman, ripped her clothes, shot her as she was curled up crying; HAC upheld for woman's murder); Swaffword v. State, 533 So. 2d 270 (Fla. 1988) (victim taken to remote area, raped, shot nine times, including shots to torso and extremities apparently before rape; killer had to stop and reload at least once); ; Jackson v. State, 522 So. 2d 802, 804 (Fla. 1988) (Jackson shot McKay, took him to remote area and shot him again, then shot Milton and made him get in bag and lie on car floor, took him to remote area despite pleas for medical treatment, and shot him again; HAC upheld for Milton's murder); Henderson v. State, 463 So. 2d 196 (Fla. 1985) (three hitchhikers bound, gagged, shot one-by-one in each other's presence); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) (drug smuggler shot one man, bound and gagged his three friends and kept them in small van with man's body throughout night, took them to remote area and killed them); Francois v. State, 407 So. 2d 885 (Fla. 1981) (armed masked burglars tied up eight people, robbed them, shot two in one room, took rest to another room, made them lie down, shot each with shotgun); Smith v. State, 424 So. 2d 726 (Fla. 1982) (robbers took clerk to motel, raped her repeatedly, took her to remote area, shot her three times); Bolender v. State, 422 So. 2d 833 (Fla. 1982) (victims held at gunpoint, ordered to strip, beaten and tortured throughout evening); Mills v. State, 462 So. 2d 1075 (Fla. 1985) (Mills held knife to victim's throat, forced him to drive to remote area, repeatedly implying he would be killed, tied hands behind back, hit head with tire iron, chased him as he fled, killed him with shotgun blast); Alford v. State, 307 So. 2d 433 (Fla. 1975) (13-year-old girl abducted, raped, blindfolded, repeatedly shot, body left on trash pile).

"genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). The use of HAC at bar would violate this rule. Instead of genuinely narrowing HAC, it would apply it to any murder involving an awareness of impending death. It would expand rather than narrow the number of eligible persons.

D. The judge made findings unsupported by the record.

This Court reviews to see if substantial competent evidence supports the judge's findings. See Diaz, 860 So. 2d at 967 ("competent substantial evidence does not support a finding that this factor applies. We first note that portions of the sentencing order finding HAC are not supported by competent substantial evidence."). Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) says:

> Ordinarily, it is within the trial court's discretion to decide whether a mitigating circumstance is proven. [Cit.] This does not mean, however, that we are bound to accept the trial court's findings when, as here, they are based on misconstruction of undisputed facts and a misapprehension of law.

At bar, the judge made findings unsupported by the record.

1. The judge wrote that Peller anticipated his death for approximately two hours and 15 minutes from the call to

Pritchard until the shooting. R4 781. He based this finding on Pritchard's incompetent hearsay account, which, even if admissible, does not support the finding. Pritchard said Peller **did not seem nervous** and said the man was going to kill him, but then said he was **not going to be killed**, that everything **was going to be alright**. T6 705-07. He "**did not sound upset**." T6 709. **He sounded perfectly calm, he was a very calm individual**. T6 713-14. He did not have an anticipation of death, much less the terrorized anticipation required by HAC.

Likewise, Peller said alright and **sounded fine** when Fizzuoglio called. T13 1656-57. He did not seem nervous when she arrived: he **smiled and hugged her**, and even took a call. T13 1658-61. When appellant pulled out the gun, Peller looked like he had an anxiety attack, and he kept breathing deep and was shallow breathing, but he calmed down and they were anxious. T18 2243. Anxiety from having a gun pointed at one is **not** the same as the acute terror needed to make a murder HAC. Cf. Majaraj, Hartley. Further, evidence indicated he had done cocaine (there was a CD case with cocaine residue on the table, T13 1662), which could have caused breathing irregularities. Regardless, appellant **did not say he was going to kill him**: he said to tell him "what I want to hear". T13 1666.

2. The judge relied on Fizzuoglio's incompetent testimony that Peller knew he was not going to get out alive when they

took cocaine and appellant freaked out. R4 781, T13 1668-69. Even if one accepted such incompetent speculative evidence, he was still calm and **did not sound upset, scared, anything like that** when Webb called at 9:00. T6 773.

3. The judge wrote that appellant heard Peller's call to his father. R4 781. The evidence does not support this finding. Fizzuoglio did not hear Peller talking on the phone, and appellant was with her at that point. T13 1672-74, T18 2245. Appellant then began banging his head against the door. T13 1674-75.

4. The judge wrote that appellant led Peller to believe there might be a way for him to live, "then dashed his hopes several times." R4 781. The record simply does not show that.

5. The judge wrote that Peller's fear and panic "must have" grown with the passage of every minute. R4 781. This speculative finding is contrary to the evidence that Peller was calm even at 9:00.

E. The erroneous use of HAC requires resentencing.

The erroneous use of HAC was not harmless beyond a reasonable doubt. The state presented Fizzuoglio's testimony about it, and argued it extensively to the jury. T19 2406-09, 2411-13. Cf. Bonifay, 626 So.2d at 1313 (as HAC was "extensively argued" to jury, erroneous finding required jury resentencing); Perez v. State, 919 So. 2d 347, 381-82 (Fla. 2005) (given

state's emphasis on HAC, erroneous finding required jury resentencing). The judge gave it "great weight." R4 781. Although he said he would have given death even without CCP, R4 790, he did not say the same about HAC. The jury voted 7-5 for death. Cf. Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998) (noting 8-4 recommendation in holding erroneous use of CCP circumstance was not harmless); Omelus v. State, 584 So. 2d 563 (Fla. 1991) (same, HAC); Preston v. State, 564 So. 2d 120, 123 (Fla. 1990) (noting 7-5 recommendation in reversing after striking prior violent felony circumstance). There was strong mitigation of appellant's prolonged sexual abuse by a child-molesting pimp, self-improvement, positive personality traits, and long-term drug abuse, and his overcoming the effects of imprisonment. The use of HAC was not harmless beyond a reasonable doubt. The sentence violates Florida law and the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing.

8. WHETHER CCP WAS USED IN ERROR.

The record does not support the cold, calculated and premeditated (CCP) aggravator. This Court has struck CCP in cases involving much more coldness, planning and premeditation.

CCP requires proof that:

> the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit

> murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted).

Appellant did not act with cool and calm reflection according to a careful plan: he took cocaine, freaked out, became paranoid, and was banging his head against the door.

A. This Court has struck CCP in cases involving colder and more calculated murders.

In White v. State, 616 So. 2d 21, 22-23 (Fla. 1993), White broke into the home of Scantling, who had a restraining order against him, and attacked her and a friend with a crowbar on July 7. Jailed for this attack, he said on July 9 that he would kill Scantling if he was bonded out. True to his word, he got a shotgun, tracked her down and murdered her. At 4:30 p.m. on July 10, he got a shotgun at a pawn shop. He did not seem to the pawnbroker to be under the influence of alcohol or drugs. At 5 p.m., he found Scantling, shot her as she tried to run, then went up to her and shot her again, telling a witness, "I told you so." He seemed sober and in a very good mood when a cab driver picked him up at 5:40 p.m. He had cocaine, valium and marijuana residue in his urine when arrested the next day, but testing did not show if he took them before the murder. His sister said he was intoxicated on July 10, and a friend said he

was high on cocaine between 3:30 and 4:30 p.m. The jury rejected his intoxication defense. At penalty, he put on evidence of his self-report of extensive drug use. Id. at 22-23.

The trial court found CCP in sentencing White. It also found that the murder occurred while he was high on cocaine and "while he (questionably) was under the influence of extreme mental or emotional disturbance" and that his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (questionably) was substantially impaired.", and: "Personality change caused by a drug problem; upset and jealous caused by severed relationship with victim." Id at 24. This Court struck CCP because there was evidence of excessive drug use and the judge explicitly found that White was high on cocaine at the time of the murder (id. at 25):

> While the record establishes that the killing was premeditated, the evidence of White's excessive drug use and the trial judge's express finding that White committed this offense "while he was high on cocaine" leads us to find that this aggravating factor was not established beyond a reasonable doubt and that the jury should not have been instructed that it could consider this aggravating factor in recommending the imposition of the death penalty.

Under White, CCP does not apply at bar. Both appellant and White were under the influence of cocaine, and White was calmer and acted with more careful execution than appellant.

At bar, Fizzuoglio saw cocaine residue on the coffee table when she came in, T13 1662; Peller took a call with no interfer-

ence by appellant, T13 1661; appellant took out the gun and told Peller to tell him what he wanted to hear (without saying he was going to kill him), T13 1662, 1666; appellant made a call and then **started freaking out** after they snorted cocaine, T13 1667-69; he was **paranoid about people being outside** and was telling them to hide, T13 1671-72; he went to the front door and was **banging his head against the door** and was **freaking out** immediately before he shot Peller. T13 1674-75, T18 2247.

There was also evidence of excessive drug use. Appellant seemed pretty wasted at Dilger's place that afternoon, like he had been partying by himself all day. T14 1827. He was drinking and Dilger thought he was doing ecstasy or cocaine. T14 1833, 1836. That night he seemed normal for a group in which "out of it" was normal and Saturday was a drug night. T7 962, 970. The judge found he had a substantial history of drug abuse and was **under the influence of cocaine at the time of the murder**. R4 785-86, 789.

In White, the defendant had a fully formed intent to kill days before the murder. The state did not establish a similar level of premeditation prior to appellant's arrival at the apartment. Peller told Pritchard a guy had been sent to kill him, but said "he's not going to kill me because he's a friend of mine". T6 706-07. Peller did not seem nervous. T6 705. He said, "everything will be alright." T6 707. Appellant told the

police Mejia wanted Peller killed, and appellant went to Peller's to **warn** him, and while there he called Mejia to try to persuade him not to kill Peller, but Mejia insisted on the murder. T10 1292, 1302-06, 1356; T11 1478-80; T12 1500-03. According to Fizzuoglio, appellant did not kill Peller until after talking on the phone, taking cocaine, freaking out, and banging his head on the door. By contrast, White attacked Scantling in the past, said in jail that he would kill her, got a gun from a pawnshop, hunted her down, shot her twice, and left in a very good mood.

In Wyatt II, two escaped convicts entered a pizzeria staffed by the manager, his wife, and a youth. Wyatt pistol-whipped the manager, then undressed his wife and raped her. The manager begged for his life, saying they had a baby at home. Wyatt shot him in the chest. He shot the wife in the head as she knelt weeping. The youth began to pray and Wyatt put a gun to his ear, told him to listen real close to hear the bullet coming, and shot him. Seeing the manager was still alive, he went back and shot him in the head. 641 So.2d at 1340-41. He presented **no mitigation**, and the judge **found none**. Id. at 1338, 1340. This Court struck CCP because there was not "a careful plan or prearranged design to kill." Id. at 1341. The case at bar involved much less cold calculated premeditation than Wyatt II.

B. The judge made findings unsupported by the record.

This Court reviews a finding of an aggravator to see if the court "applied the right rule of law ... and, if so, whether competent substantial evidence supports its finding." Diaz, 860 So. 2d at 965. In doing so, it examines the judge's specific factual findings. Id. at 967.

1. The judge wrote: "Evidence was adduced at trial that the Defendant talked about killing Lance Peller several weeks before the killing." R4 782. The evidence was that appellant said **Mejia** wanted him to kill Peller and **appellant went to warn Peller**. The judge then wrote that the evidence "clearly shows the Defendant arrived at Lance Peller's apartment with a loaded firearm." Id. Even if true, this is not dispositive under White and Wyatt II.

2. The judge wrote: "For the following two hours and fifteen minutes, the Defendant discussed the impending murder with his victim." R4 782. This conclusion is not supported by the record. At 7 p.m., Peller told Pritchard someone had come to kill him, but was not going to kill him, and **Peller was unconcerned, he was perfectly calm**. There is no evidence of any other discussion to the effect that appellant was going to kill him before Fizzuoglio arrived around 8 or 8:30. Instead, Peller seemed fine when Fizzuoglio called him. When she arrived, he hugged her and greeted her with no sign of concern. He took a call with no interference from appellant, and with no show of

concern. When appellant produced the gun he only told Peller to tell him what he wanted to hear. Fizzuoglio freaked out and did not understand what they were talking about, but thought it was **about money**. T13 1666. She did not say they were discussing Peller's murder. Although she said Peller knew he was not going to get out alive when appellant began freaking out, such incompetent testimony does not show CCP as appellant was not at all calm. Peller **did not sound upset, scared, anything like that** at 9 when Webb called. T6 773. He just told Webb to call him back. The record does not show a two and a half hour discussion of impending murder.

3. The judge wrote that Peller offered no resistance. R4 782. Even if true (Fizzuoglio did not see what happened in the bathroom), this is of no consequence. This Court has struck CCP when the victim did not resist. See Wyatt II (three victims did not struggle or resist); Power v. State, 605 So. 2d 856 (Fla. 1992) (defendant bound and double-gagged girl before stabbing her). It has struck CCP when the victim resisted. See Street (officer struggled with Street, was shot as he tried to flee). It has upheld it when the victim did not resist and when the victim did resist. See Looney v. State, 803 So. 2d 656, 678 (Fla. 2001) (victims did not struggle or resist); Boyett v. State, 688 So. 2d 308 (Fla. 1996) (defendant shot man defending himself with baseball bat; CCP not struck); Hendrix v. State,

637 So. 2d 916 (Fla. 1994) (defendant shot man; when man's wife fought him he slashed her throat; CCP upheld for both crimes).

This is not to say that lack of resistance is never relevant. Its role in finding CCP depends on the facts. In cases relying on lack of resistance, the defendant has carefully incapacitated the victim and acted with cold efficiency. Cf. Pearce v. State, 880 So. 2d 561, 576-77 (Fla. 2004) (victims taken to remote area and murdered separately), Looney. At bar, appellant did not incapacitate Peller and act with cold efficiency. Peller moved about the apartment and communicated by telephone, and appellant was freaked out, paranoid, and was banging his head against the door before the killing. Under the facts, whether or not Peller resisted is an irrelevant consideration.

4. The judge wrote the murder was committed "execution style". R4 782. This Court has not defined the term "execution style," but the cases use it for calm, deliberate, unemotional killings. Cf. Ibar, (three victims subdued and methodically killed one by one; no indication of agitated emotional state); Pearce (victims taken to remote area and methodically killed in separate locations; no evidence of frenzied emotional state); Parker (victim taken to remote area and shot with no evidence of anything other than cold calculated intent to kill). The case at bar does not involve this sort of cold, calm shooting.

Shooting someone in the head with a purposeful intent to

kill, however, does not make a murder CCP. Cf. Wyatt I (Wyatt shot woman in top of head "just to see her die"); Wyatt II (murders not CCP even though Wyatt methodically shot three persons, telling one to listen for the bullet coming); Santos (man hunted down woman and little girl and shot them in the head); Darling v. State, 808 So. 2d 145, 157 (Fla. 2002) (trial court did not find CCP although defendant, after raping victim, killed her "execution-style, by a gunshot wound purposefully inflicted by placing the gun tightly against a throw pillow held directly next to the victim's head").

C. The judge relied on cases that do not support CCP at bar.

In finding CCP, the judge mainly relied on Gordon v. State, 704 So. 2d 107 (Fla. 1997). R4 782. Gordon stalked the victim for a month, and beat, blindfolded, bound, gagged, and hogtied him before drowning him in a bathtub. Id. at 109-109. The crime "was painstakingly planned for months, and ... included harassment and extensive surveillance of the victim at work and home." Id. at 114. There is no indication that Gordon freaked out, was paranoid, and was banging his head at the time of the murder. At bar, appellant apparently did not finally decide to kill Peller until he was banging his head on the door just before the shooting.[23] This Court **will not** uphold CCP where the

[23] In fact, the state's theory was that appellant banged his head against the door to "get psyched up to do it." T6 684.

evidence is susceptible to "divergent interpretations." Gordon, id. at 114 (quoting Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992)).

The judge wrote at R4 782-83 that appellant's

> "degree of deliberate ruthlessness" can be seen when, after letting Lance use the phone to call his father to say good-bye, he shot Lance, an unarmed victim, in the head. There is nothing in the evidence that depicts the murder to have been spontaneous, hasty or impulsive.

The judge ignored undisputed evidence that appellant was freaked out, paranoid, and banging his head on the door right before the murder. Shooting an unarmed victim in the head after letting him use the telephone does not make a murder CCP. Cf. Wyatt II; Santos; Farinas v. State, 569 So. 2d 425, 427 (1990) (defendant shot victim in back, causing instant paralysis, "then approached the victim as she lay face down and, after unjamming his gun three times, fired two shots into the back of her head."; CCP struck). Wyatt I struck CCP although, after committing the three murders in Wyatt II, Wyatt drove the victim the state and shot her in head in a ditch "to see her die" (641 So. 2d at 359):

> The trial court found that the gunshot wound to the top of Nydegger's head was consistent with an execution-style killing. However, proof of the cold, calculated, and premeditated circumstance requires evidence of calculation prior to the murder, i.e., a careful plan or prearranged design to kill.

The judge also cited McCray v. State, 416 So. 2d 804 (Fla. 1982). After burglarizing a van, McCray and others left, but later returned and found the victim sitting in the van. McCray said he didn't want to leave empty-handed, went to the victim, yelled, "This is for you, mother fucker," and shot him three times. The evidence conflicted as to whether the victim shot first. This Court **struck** CCP. McCray does not support CCP here. The judge also cited Farina v. State, 801 So. 2d 44 (Fla. 2001). There, robbers put four robbery victims in a freezer and then calmly decided to kill them to eliminate witnesses, although only one of them died. The case at bar does not show the calm deliberation involved in Farina.

D. The erroneous use of CCP was not harmless beyond a reasonable doubt.

The state argued CCP extensively to the jury. T19 2409-11, 2413-15. The judge gave it "great weight." R4 783. The jury recommended death by a 7-5 vote. Appellant presented strong mitigation of sexual abuse, imprisonment, self-improvement, positive personality traits, and long-term drug abuse. The judge said he would impose death even without CCP, R4 790, but this statement is not dispositive. See Geralds v. State, 674 So. 2d 96, 104, n. 15 (Fla. 1996). The sentence violates Florida law and the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should order resentencing under Bonifay, Perez, Mahn, Omelus,

and Preston.

9. WHETHER THE COURT ERRED IN ITS WEIGHING OF SENTENCING CIRCUMSTANCES.

"Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard." Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000). Even under this standard, the judge's discretion is not limitless. The judge is bound by prior law, the facts, and the rule of reason. The abuse-of-discretion-standard

> requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.

Canakaris, 382 So. 2d at 1203. An erroneous view of the facts gives rise to an abuse of discretion. See Cooter & Gell, 496 U.S. at 405 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."); Diaz, 860 So. 2d at 967 (abuse of discretion in finding HAC where evidence did not support parts of findings); Ault v. State, 866 So. 2d 674, 684 (Fla. 2003) (discretion abused in striking juror based on factual error).

A court abuses its discretion by ignoring significant evidence. Cf. Ross v. State, 474 So. 2d 1170 (Fla. 1985) (error to accept Ross's testimony at sentencing that he was sober without

considering family's testimony about his drinking problems and testimony of state's main witness that Ross said he had been drinking at time of murder); Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977) (judge ignored evidence of mental mitigation); Travelodge v. Pierre-Gilles, 625 So. 2d 1280, 1282 (Fla. 1st DCA 1993) ("it appears that the judge of compensation claims has either overlooked or ignored evidence in the record"); Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993) (even if mitigation waived court may not ignore mitigation in PSI and psychiatric report). This rule applies even to distributions of assets, which receive extremely deferential review under Canakaris. Cf. Calamore v. Calamore, 555 So. 2d 1302 (Fla. 4th DCA 1990) (judge ignored evidence of tax consequence of retirement plan).

As shown in Points 6 and 7 above, the findings of HAC and CCP were factually flawed. The decision to give them great weight should be reversed for reconsideration under a correct view of the evidence.

Further, the judge mechanically gave "little weight" to each mitigator he found. So far as he explained the assignment of "little weight" to some of them, the explanations were flawed.

1. In giving little weight to appellant's being under the influence of drugs at the time of the crime, the judge wrote the "**only evidence** of drug use" came from Fizzuoglio's testimony about the three lines of cocaine and "[o]ther than that testi-

mony, there is **no indication of additional drug use** by the Defendant." R4 789. The judge ignored Justin Dilger's testimony that on the afternoon of the murder appellant seemed pretty wasted, like he had been partying by himself all day. T14 1827. Appellant was drinking and Dilger believed he was doing ecstasy or cocaine. T14 1833. Fizzuoglio saw cocaine residue on the table when she arrived. T13 1662. Moreau said appellant looked normal that night, explaining that "out of it" was normal to him, and Saturday "was a drug night." T7 961-62, 970.

Further, the judge ignored Fizzuoglio's account of the cocaine's remarkable effect on appellant: after taking it he freaked out, became paranoid, talked about people being outside, banged his head on the door, and later went about bizarrely giving Fizzuoglio mementos. The judge erred in mechanically giving the circumstance little weight without fully considering the evidence.

2. Likewise, the judge gave little weight to appellant's substantial history of drug use, writing there was "no evidence" he was under the influence of drugs other "than the one line of Cocaine done just prior to the actual time of the murder." R4 786. In addition to ignoring the evidence discussed above, the judge ignored the unrebutted testimony of George Rabokozy, Gloria Squartino, and Rosemary Hudson as to appellant's long history of drug use.

3. As to sexual abuse, the judge wrote that "Defense counsel argue[d]" appellant was sexually abused and was in a child prostitution ring, and then discussed only the testimony of Dr. Kramer. He completely ignored the undisputed testimony of George Rabakozy and James Hudson and **the state's own evidence** about Rosenbrock. He abused his discretion by mechanically giving the mitigator little weight without considering this unrebutted evidence. He said he gave it little weight because there was "no real connection" between it and the murder. This ruling was without logic and justification so that it was an abuse of discretion under Canakaris. "Evidence is mitigating if, ... in the totality of the defendant's life ..., it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Evans v. State, 808 So. 2d 92, 107 (Fla. 2001). To apply little weight to a mitigator simply because it was not tied directly to the murder creates a rule that effectively eliminates an entire class of mitigation from playing a significant role in the decision of life or death.

4. The judge gave little weight to evidence that appellant established positive relationships because they "did not prevent him from committing the brutal murder of Lance Peller." R4 788. This ruling is without logic or justification. By definition, **no mitigating evidence** can ever have **prevented** the commission of the murder: mitigating evidence is presented only when a murder

has occurred. The judge's ruling presents a logical impossibility. It defies common sense. The judge abused his discretion.

From the foregoing, the judge made significant errors in his findings as to the aggravators, and simply gave little weight to each mitigator without explanation or with explanations lacking logic of justification. Although judges have considerable discretion in making their findings, that discretion is limited by the law, the facts, and the rule of reason. Confronted with a sentencing order so flawed in its findings and its reasoning as the one at bar, this Court should order resentencing.

10. WHETHER THE JUDGE FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

Under section 921.141(3), Florida Statues, the trial court "shall set forth in writing its findings" that there are (1) "sufficient" aggravating circumstances exist to justify the death penalty and (2) insufficient mitigating circumstances to outweigh the aggravators. The legislature directed in §941.141 (3) that a life sentence must be imposed if the trial court "does not make the findings requiring the death sentence" within 30 days.[24] At bar, the judge filed the sentencing order within 30 days, but he did not make "the findings requiring death."

[24] §921.141(3) reads as follows:

(3) Findings in support of sentence of death. -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of

As noted above, the statute requires two specific findings. The judge skipped the required finding of "sufficient" aggravating circumstances, and merely weighed the aggravators against the mitigators. R447. The failure to make the required finding of sufficient aggravating circumstances requires vacating the death sentence and imposition of a life sentence.

11. WHETHER APPELLANT'S SENTENCE MUST BE REVERSED UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR FURMAN v. GEORGIA, 408 U.S. 238, 313 (1972).

Under section 775.082(1), Florida Statutes, one convicted of a capital felony shall be punished by death "if the proceeding

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> life imprisonment or death, but if the court imposes a sentence of death, it shall be set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> > (a) That **sufficient aggravating circumstances** exist as enumerated in subsection (5), and
> >
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court **shall impose sentence of life imprisonment** in accordance with s.775.082.

held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death", and that otherwise there shall be a life sentence. Under section 921.141, the jury is to determine whether "sufficient aggravating circumstances exist" and whether there are "sufficient mitigating circumstances exist which outweigh the aggravating circumstances", and the court must find that "sufficient aggravating circumstances exist" to support a death sentence, and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

The statute must be strictly construed in favor of the defendant. See §775.021(1), Fla. Stat. (provisions of criminal code must be "construed most favorably to the accused"); Borjas v. State, 790 So. 2d 1114, 1115 (Fla. 4th DCA 2001) (rule is founded on due process requirements of state and federal constitutions); State v. Rife, 789 So. 2d 288, 294 (Fla. 2001) (rule applies to sentencing statutes); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (rule applies to capital sentencing statute).

Under the statutory and constitutional rule of strict construction, one is not eligible for a death sentence without "sufficient aggravating circumstances" and insufficient mitigation to overcome them.

Under Ring v. Arizona, 536 U.S. 584 (2002), the question of

death eligibility must be determined beyond a reasonable doubt by a jury pursuant to the Jury and Due Process Clauses. The jury proceeding at bar did not comport with the requirements of the Jury and Due Process Clauses of the state and federal constitutions: the jury rendered a bare-majority advisory non-unanimous verdict in which it was not required to find "sufficient aggravating circumstances" by proof beyond a reasonable doubt and the normal rules of evidence did not apply.

Appellant recognizes that this Court has rejected similar arguments, e.g., Bottoson v. Moore, 833 So. 2d 693 (2002), but submits that such decisions did not consider the rule that the statute must be strictly construed so that death eligibility requires sufficient aggravating circumstances and insufficient mitigation.

Further, so far as Bottoson held a first degree murder conviction without more makes one death eligible, it makes appellant's sentence unconstitutional under the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Under Furman v. Georgia, 408 U.S. 238, 313 (1972), there must be a narrowing of the category of death eligible persons. Cf. Jurek v. Texas, 428 U.S. 262, 276 (1976) (statute constitutional because by "narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder

case before a death sentence may even be considered"); Gregg v. Georgia, 428 U.S. 153, 196-97 (1976); Lowenfield v. Phelps, 484 U.S. 231, 245 (1988) (constitutionally required "narrowing function" occurred when jury found defendant guilty of three murders under state death-eligibility requirement that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person").

Although the jury unanimously found appellant guilty of murder, it did not make a finding of "sufficient aggravating circumstances". This issue presents a pure question of law subject to de novo review. This Court should reverse the death sentence and remand for imposition of a life sentence.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to by First-Class U.S. Mail on Sandra Jaggard, Assistant Attorney General, Counsel for Appellee, Suite 950, 444 Brickell Avenue, Miami, Florida 33133 on 13 April 2007.

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Attorney for Russell Hudson

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12

point Courier, a font that is not spaced proportionately.

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Attorney for Russell Hudson