IN THE SUPREME COURT OF FLORIDA

RAY JACKSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC07-1233
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_________________________	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

RAY JACKSON,)
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Appellant,)
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vs.) CASE NUMBER SC07-1233
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STATE OF FLORIDA,)
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Appellee.)
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STATEMENT OF THE CASE

On May 3, 2005, the grand jury in and for Volusia County returned an indictment charging appellant with one count of first degree murder in violation of Sections 782.04(1)(a)1 and/or 2, Florida Statutes (2004) and one count of kidnaping in violation of Sections 787.01(1)(a) and (2), Florida Statutes (2004). (Vol. I, 5-6) On June 28, 2005, the state filed its notice of intent to seek the death penalty. (Vol. I, 42) On October 19, 2006, appellant filed a motion in limine seeking to prevent any reference to appellant possessing a gun on other occasions. (Vol. I, 159-161) Following a hearing on February 16, 2007, the trial court granted the motion limiting any testimony concerning appellant's possession of a gun to the date in question. (Vol. V, 811-812; Vol. III, 501) On April 2, 2007, the state

filed a motion to consolidate appellant's case with that of the codefendant, Michael Wooten. (Vol. III, 543-544) Just prior to commencement of jury selection, the trial court granted the motion to consolidate over the objection of defense counsel. (Vol. VI, 847-852; Vol. III, 555)

Appellant proceeded to jury trial on April 9, 2007 with the Honorable R. Michael Hutcheson, circuit court judge, presiding. (Vol. VI-XV, 843-2386; Vol. XVI-XXV, 1-1489) Prior to commencement of the trial, Judge Hutcheson granted the state's motion in limine to permit evidence of drugs, drug usage, and drug sales to show positions of trust. (Vol. XVI 29-32) The defense objected to this on the grounds that these were collateral crimes for which no notice was given, the evidence of drug sales was irrelevant and the prejudice far outweighed any probative value it may have. (Vol. XVI, 30) Over defense objection, the trial court allowed the evidence and ruled that it was not similar fact evidence. (Vol. XVI, 32) Judge Hutcheson further granted the state's motion in limine to include any mention of the fact that the victim may have had AIDS. (Vol. XVI, 36-42) The court excluded the AIDS issue but allowed testimony concerning the lifestyle of the victim. (Vol. XVI, 41) During the testimony of state witness Latisha Allen, the defense sought to question her concerning an incident shortly before her deposition where another state witness, Calvin Morris, came to see her and had a taser. (Vol.

XXI, 665-671) The trial court disallowed this testimony because Allen testified that she did not feel intimidated and was not sure if this was connected to the instant case. (Vol. XXI, 665-671) During the testimony of state witness Frederick Hunt, defense counsel moved for a mistrial when Hunt blurted out, in violation of a pretrial motion in limine ruling, that appellant "always carries a little pistol with him right here in his little waistband." (Vol. XXI, 791) The trial court ruled that the witness clearly violated the pretrial order but denied the motion for mistrial since the comment did not rise to the level of the mistrial. The trial court further noted that he was not sure if that statement would ever become relevant. (Vol. XXI, 795) The trial court offered to give a cautionary instruction but the defense believed that no cautionary instruction could remove the prejudicial taint and declined. (Vol. XXI, 791) A little later during Hunt's testimony, after he denied that he told a fellow inmate that he had lied on appellant, the prosecutor asked "Is this the Quintin Wallace, Mr. Hunt, that was convicted in this courthouse for killing a baby?" (Vol. XXII, 981) Defense counsel immediately objected and moved for a mistrial arguing that it was improper impeachment and that this inflamed the jury. (Vol. XXII, 981) The state responded that it was a proper question because it goes to his bias and it will come out in evidence anyway. (Vol. XXII, 982) The trial court denied the motion for mistrial but agreed that it was

improper to ask Hunt that question although he believed it would come out in evidence anyway. (Vol. XXII, 984) The trial court did instruct the jury to disregard that statement. (Vol. XXII, 987) Subsequently, during the testimony of Quintin Wallace, the state was permitted to elicit the nature of the offense for which Wallace was convicted. (Vol. XXIII, 1082-1085) After the state was permitted to elicit testimony that codefendant Wooten threatened Calvin Morris during jury selection, appellant moved to sever his case arguing that the prejudice would pour over to appellant and that somehow the jury will assume that appellant knew of and agreed to the threat. (Vol. XXIII, 1237-1240) The trial court denied the motion to sever but noted that the issue was preserved for appellate review. (Vol. XXIII, 1240) At the close of the state's case and again at the close of all the evidence, defense counsel moved for a judgment of acquittal arguing that there was no evidence that the death of the victim was caused by the criminal act of another since the medical examiner could not give a cause of death. (Vol. XXIII, 1030, 1037) The trial court denied the motion . (Vol. XXIII, 1038) Defense counsel requested a special jury instruction on circumstantial evidence which the trial court declined to give. (Vol. XXIII, 1132-1136, 1179-1183) During the state's rebuttal argument, defense counsel objected when the prosecutor again highlighted the nature of Quintin Wallace's convictions. (Vol. XXV, 1393) This objection was

overruled. (Vol. XXV, 1393) Following deliberations, the jury returned a verdict finding appellant guilty of first degree premeditated murder and first degree felony murder and guilty of kidnaping. (Vol. XXV, 1469)

Appellant proceeded to a penalty phase on May 7, 2007. (Vols. XXVI-XXX, 1-651) During the charge conference in the penalty phase, appellant requested numerous jury instructions which were denied including the standard instruction on reasonable doubt and the standard instruction on the defendant not testifying. (Vol. XXIX, 516-542) The trial court denied these requested instructions saying that he would not repeat them "they [the jury] should remember this." (Vol. XXIX, 524, 536) Following deliberations, the jury returned an advisory recommendation that appellant be sentenced to death. (XXX 650)

The trial court conducted a ***Spencer*** hearing on June 15, 2007. (Vol. XV, 2387-2420) Appellant appeared for sentencing on June 21, 2007. (Vol. XV, 2421-2450) Judge Hutcheson adjudicated appellant guilty and sentenced appellant to death for the first degree murder conviction finding three aggravators and no statutory mitigating factors and a consecutive sentence of life as a prison releasee reoffender for the kidnaping conviction. (Vol. XV, 2421-2450; Vol. IV, 704-713) Judge Hutcheson filed his written findings of fact in support of the death penalty. (Vol. IV, 696-703)

Appellant filed a timely notice of appeal on June 28, 2007. (Vol. IV, 719) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (Vol. IV, 734, 736)

STATEMENT OF THE FACTS

Pallis Paulk was a young woman who lived a very free and risky lifestyle. Although she was the mother of a young daughter, her uncle had court ordered custody of the child because of Pallis' lifestyle. (Vol. XVII 129, 135) Pallis used drugs including marijuana, cocaine and ecstacy on a regular basis. (Vol. XVII 173-174, 154, 137) Although Pallis was not a "street walking" prostitute, she did have sex with men and women for money and also procured women to have sex with men for money. (Vol. XVII 177, 174-175; XX 486) Pallis' mother died of AIDS and the rumor on the streets was that Pallis suffered from AIDS although that may not have been true. (Vol. XVII 151, 154, 174) Sometime late in October, 2004, Pallis went by her uncle's house with Christmas presents for her daughter. (Vol. XVII 131) Pallis's uncle figured it would be sometime until he heard from Pallis again because she was going to turn herself into the police on some outstanding warrants. (Vol. XVII 131) Larry Paulk, Pallis's uncle, testified that he previously told the police that he last saw Pallis in November, around Thanksgiving, but it was actually in October. (Vol. XVII 136) Fayonna Paulk, Pallis's first cousin, lived with Pallis until November 1, 2004. (Vol. XVII 141-142) Although they stopped living together, Fayonna saw Pallis nearly every day. (Vol. XVII 142) On a Sunday in early November, 2004, Fayonna saw Pallis at

Club Vibes in Deland, Florida. (Vol. XVII 142) After that date, Fayonna never heard from Pallis again. (Vol. XVII 136) After several weeks, Fayonna filed a missing persons report on November 26, 2004. (Vol. XVII 147, 132) Another cousin Jessica Smith, also had contact with Pallis on a daily basis. (Vol. XVII 165-166) On a Monday evening in early November 2004 she saw Pallis for the last time at the Southside Inn and Pallis seemed fine. (Vol. XVII 166-167) On that night, Pallis told Jessica she had a date although Jessica did not see the person and did not know who this was. (Vol. XVII 175) Susanne Raines, a Daytona Beach police officer was assigned to investigate a missing person claim of Pallis Paulk. (Vol. XVII 158-159) In connection with the investigation, Raines attempted to contact Calvin Morris, Jimbo Vreen and a black male named Ray. (Vol. XVII 160-161) During her investigation, Raines realized that Pallis had outstanding warrants for violation of probation. (Vol. XVII 162) Raines testified that it was fairly common for people with warrants to stay missing to avoid incarceration. (Vol. XVII 163)

In the late morning of April 17, 2005, Michael Jansen, his two sons and their dog were walking through the woods at the end of Dunn St. and Williamson Blvd. (Vol. XVII 182) Jansen came upon what appeared to several bones and upon closer examination Jansen thought they found a human leg bone. (Vol. XVII 183)

Jansen's dog then found a shallow grave with more bones. (Vol. XVI 184) Jansen drove home, looked up on the internet human bones and decided that the bones were indeed human and called the police and then went back to the area and showed the police where he found them. (Vol. XVII 184) Officer Steven Copsidas, was dispatched to the wooded area behind the Carolina Club Apartments where he waited to meet with Michael Jansen. (Vol. XVII 186) Jansen lead the officers to a shallow grave with bones in it. (Vol. XVII 187) Copsidas secured the area and waited for the medical examiner to come. (Vol. XVII 187)

Thomas Beaver, a forensic pathologist, was the chief medical examiner for Volusia County in April, 2005. (Vol. XVIII 231, 234) On April 17, 2005, Beaver was called to an area in the woods near the intersection of Dunn and Williamson. (Vol. XVIII 235) Numerous bones were found around the area. (Vol. XVIII 238-241) The bones were collected and returned to the medical examiner's office where they were x-rayed. (Vol. XVIII 243) Beaver was unable to conduct a normal autopsy since all of the soft tissue was gone and the internal organs were nonidentifiable. (Vol. XVIII 243-244) The state of the bones were consistent with having been in a grave for six months. (Vol. XVIII 244) Beaver sent the body to an anthropologist for an examination. (Vol. XVIII 244) No clothing were found in the area but some hair extensions were found. (Vol. XVIII 245-246) Beaver did

not observe any obvious signs of injury which was very rare. (Vol. XVIII 247) The remains were examined at the anthropology lab at the University of Florida where they were able to establish the sex and the approximate age of the body but no cause of death. (Vol. XVIII 248) The remains were ultimately identified through forensic dental examinations. (Vol. XVIII 249) Dr. Beaver observed no gunshots wounds, stab wounds, or blunt force injuries. (Vol. XVIII 252) Dr. Beaver was also unable to give any time of death. (Vol. XVIII 253) Dr. Beaver determined that this was a homicide because of the report that the victim had "gone missing" and that she was placed in a shallow grave and this was not the way death comes normally to people. (Vol. XVIII 250) The official cause of death was homicidal violence of undetermined etiology, with no definitive injuries. (Vol. XVIII 250) Dr. Beaver admitted that his opinion that this was homicide was based more on human nature than on any scientific conclusions. (Vol. XVIII 259) A toxicology report was prepared which showed positive results for the presence of alcohol, cocaine and ecstasy. (Vol. XVIII 266-267)

In 2004, a fifteen year old Calvin Morris would hang around with Pallis Paulk, his cousin with whom he grew up. (Vol. XVIII 302-303) Morris saw Pallis every day and rode around, smoked dope, and went to clubs with her. (Vol. XVIII 303) Although Morris knew appellant, he did not hang with him but would see him

at Tisha's house. (Vol. XVIII 306) Morris did not know Michael Wooten. (Vol. XVIII 306) In early November , Morris was driving around with a friend Marvin Fluker when he got a call from Pallis who told him "I got a lick for you, Cuz." (Vol. XVIII 310) Morris testified that this meant that Pallis had someone from whom they could steal. (Vol. XVIII 310) Morris and Fluker drove to an apartment at 304 Keech St. in Daytona Beach where Pallis was located. (Vol. XVIII 308) Fluker stayed in the car while Morris went up and knocked on the door and Pallis answered. (Vol. XVIII 312) Morris stepped just inside the apartment and saw appellant asleep in the bed. (Vol. XVIII 313) Morris figured that they were stealing from appellant so he went to the car to wait for Pallis. (Vol. XVIII 315) When Pallis came to the car she had a Sponge Bob bag with her and also had some men's jewelry consisting of a bracelet and a necklace. (Vol. XVIII 315) Inside the bag was some cocaine, marijuana, and $800.00. (Vol. XVIII 317) Pallis also had a cell phone that did not belong to her. (Vol. XVIII 318) Pallis got in the back seat and Morris dropped off Marvin after which he and Pallis drove to Sanford to pick up Morris' girlfriend. (Vol. XVIII 316, 318) While driving to Sanford and returning, Morris and Pallis smoked at least six joints. (Vol. XX 491; XVIII 318-319) On the return trip to Daytona, Pallis called Jimbo Vreen to try to obtain some X pills which are drugs which contain heroin. (Vol. XVIII 319) Pallis asked

Morris to take her to Jimbo's house but Morris told Pallis that she needed to go to her Aunt Margie's house and lie down. (Vol. XVIII 320-321) Morris was afraid that appellant would be out looking for Pallis because she had robbed him. (Vol. XVIII 322) Despite his concerns, Morris took Pallis to Jimbo's stopping at a store where Pallis bought clothing and shoes. (Vol. XVIII 322) Pallis also gave Morris $100.00. (Vol. XVIII 323)

Curtis "Jimbo" Vreen lived on Loomis Avenue with his mother, sister, and daughter. (Vol. XX 538, 542) Jimbo knew Pallis since they were approximately eight years old from church and he saw her nearly every other day. (Vol. XX 539) Pallis did not work but rather Jimbo knew her to party all the time. (Vol. XX 539) Vreen remembers a day in early November when Pallis came over at 3:00 a.m. to get some ecstasy. (Vol. XX 542) Pallis came with someone in a red hatchback although Vreen did not see who the other person was. (Vol. XX 543-544) Vreen gave Pallis half of a pill and she left. (Vol. XX 544) Later that day Pallis called Vreen again asking for more pills but Vreen told her he had none. (Vol. XX 545-546) After this phone call, appellant came looking for Pallis whom appellant told Vreen had robbed him the night before. (Vol. XX 547-548) Appellant was calm and not irate and left when Vreen told him that Pallis was not there. (Vol. XX 548) After appellant left, Pallis showed up and a short while later appellant returned.

(Vol. XX 549) When Calvin Morris pulled up to Vreen's house, Pallis got out and told Morris she would be right back. (Vol. XVIII 324) Pallis went inside the house and two minutes later a light skinned black person came out and Morris asked him about Pallis whom the man said was in the bathroom. (Vol. XVIII 324) According to Morris, that person was Michael Wooten. (Vol. XVIII 325) According to Vreen appellant showed up and asked Pallis "Where's my shit?" to which Pallis replied "I gave it to my cousin." (Vol. XX 550) Pallis and appellant left and Vreen went out on the porch after them. (Vol. XX 551) According to Vreen, there were two cars there, a gray Intrigue driven by Calvin Morris and a red hatchback. (Vol. XX 551) According to Vreen, appellant and Pallis went to Calvin's car and got some of Pallis's belongings in shoe boxes and then Pallis got into the back seat of the hatchback. (Vol. XX 554-555) Appellant got in the front passenger seat and Michael Wooten got in the driver seat. (Vol. XX 555) Vreen never saw any force being used but rather stated that Pallis got in the car of her own volition. (Vol. XX 554, 557) Calvin Morris disputed Vreen's testimony. According to Morris, when appellant and Pallis came out of the house, a two door hatchback pulled up in front of Calvin's car. (Vol. XVIII 327) According to Morris, this car was driven by a black male with dreads. (Vol. XVIII 339) Appellant came out of the house behind Pallis and appellant had a small gun tucked in the side of his pants. (Vol. XVIII

340) They came over to Morris's car and appellant asked Pallis where his stuff was. (Vol. XVIII 340) Pallis told appellant that she split the stuff with Morris and Morris told appellant that his marijuana was still there and gave it to him. (Vol. XVIII 341) Appellant told Pallis to come with him and although Pallis acted like she did not want to go she got in the backseat of the hatchback with appellant. (Vol. XVIII 342-343) As the hatchback pulled away Morris started to follow but according to Morris, appellant waved her gun outside of the window so Morris simply turned off and went to his grandmother's house. (Vol. XVIII 343-344) Neither Calvin Morris nor Curtis Vreen ever saw or heard from Pallis again. (Vol. XVIII 345; Vol. XX 556)

Sometime between Halloween and Thanksgiving, Sarah Key Calvin Morris's grandmother, recalls Calvin coming to her and telling her that Pallis had been taken by some men. (Vol. XX 529-530) Calvin recalls that he did not tell Sarah everything but did tell her that she should go and tell Aunt Margie to call the police. (Vol. XVIII 344) Despite his concern, Calvin did not call the police because he had warrants out for his own arrest. (Vol. XVIII 345) Sometime later, Calvin and his grandmother had stopped at a Texaco station and Calvin saw appellant and told his grandmother that he was one of the people that had taken Pallis. (Vol. XVIII 347; XX 532) Sarah Key asked appellant "do you know

Pallis?" to which appellant replied "something like that." (Vol. XX 532) Sarah then told appellant that if he saw Pallis to tell her that her grandmother and her baby want her home but appellant just walked on to his car. (Vol. XX 532)

On March 1, 2005, at a juvenile detention facility, Calvin Morris gave a police statement. He also looked at a lineup and selected appellant's photo from it. (Vol. XVIII 348-350) Morris was returned to Volusia County in May and was shown a second photo lineup but was unable to pick anyone out of this lineup even though Michael Wooten's picture was in this second lineup. (Vol. XVIII 351, 364-365) While Morris was in jail, appellant threatened to kill him. (Vol. XVIII 365)

Although Curtis Vreen did not see or hear from Pallis after the day that she left his house with appellant, he did begin to worry when he had not heard from her for several weeks. (Vol. XX 558) Approximately one and a half to two months later, Vreen saw appellant at a liquor store and asked him where Pallis was to which appellant replied "I'm like you, I don't know where she is." (Vol. XX 561) Vreen remembered that Pallis had been beaten up once in Orlando because she robbed some people. (Vol. XX 578) On the day that Pallis was at Vreen's house, Vreen did not believe there was anything wrong with Pallis going with appellant. (Vol. XX 582) Had there been a problem, Pallis would have signaled Vreen. (Vol. XX 582) Vreen testified that people threatened him thinking that he killed Pallis.

(Vol. XX 583) Vreen had no reason to think that appellant was going to harm Pallis. (Vol. XX 587)

Sergeant Byron Williams of the Daytona Beach Police Department was on duty on November 9, 2004 when he stopped Dewayne Thomas and arrested him for no valid driver's license. (Vol. XX 594-595) Another person was with Thomas and that person was Frederick "Buck" Hunt who was found in possession of marijuana. (Vol. XX 595-596) Hunt was not arrested but rather given a notice to appear. (Vol. XX 596) Williams called the owner of the car, Latisha Allen, to come and pick up the car. (Vol. XX 597)

In November, 2004, Latisha Allen lived in apartment C6 at 208 North Caroline Street in Daytona Beach. (Vol. XX 601-602) Although the apartment was only a two bedroom one bath apartment, Allen lived there with her boyfriend Dewayne Thomas, her son Demarcus Allen, Frederick "Buck" Hunt, and Charles Bush. (Vol. XX 603) At some point prior to November 9th, Michael Wooten stayed in the apartment with his girlfriend. (Vol. XX 604; XXI 729) Latisha met appellant in February, 2004 and he was like a father figure to her. (Vol. XX 605) Appellant helped Latisha out financially and although he had keys to her apartment he did not stay there. (Vol. XX 605) Approximately three or four months after Latisha met appellant, she met Michael Wooten. (Vol. XX 607) Appellant and

Wooten referred to each other as brothers and Latisha actually thought they were brothers. (Vol. XX 608) Towards the end of October, 2004, Latisha asked Wooten to leave and this caused a bit of a problem between Latisha and appellant. (Vol. XX 613)

On the morning of November 9, 2004, Latisha woke Hunt and told him that appellant and Wooten wanted to talk to him downstairs. (Vol. XXI 734) Hunt went down and talked to appellant who was standing by a red hatchback. (Vol. XXI 734) Appellant asked Hunt if he knew Pallis to which Hunt replied "Oh, yes, she got AIDS." (Vol. XXI 735) Appellant asked Hunt to call his cousin Jimbo to see if he had seen Pallis and then appellant handed Hunt a cell phone and he called Vreen. (Vol. XXI 735-736) Hunt asked Jimbo if he heard from Pallis and Jimbo said yes she had called. (Vol. XXI 736) Hunt asked Vreen for the number that she called from and Vreen gave Hunt a 453 number that Hunt then gave to appellant. (Vol. XXI 737) Appellant asked Hunt to see if Pallis had called from another number so Hunt asked Vreen who said to call him back. (Vol. XXI 738) Appellant and Wooten left and Hunt went back up to the apartment. (Vol. XXI 739) Later, Hunt and Dewayne left in Tisha's car to go to Vreen's to get some X pills. (Vol. XXI 741; XX 616) Vreen had no pills so Hunt and Dewayne decided to go to Soul City, an apartment complex, to get some pills. (Vol. XXI 742) Before leaving

Vreen's, Hunt got the second phone number that appellant had asked about. (Vol. XXI 732) The number was written on a paper which Hunt stuck in his pocket. (Vol. XXI 742) Before Hunt and Dewayne could get to Soul City, they were stopped by a policeman and Dewayne was arrested for no valid driver's license. (Vol. XXI 743) Hunt was placed in handcuffs for possession of marijuana but ultimately released with a notice to appear. (Vol. XXI 743) Dewayne's aunt went and told Latisha that Dewayne had been arrested so Latisha went to pick up her car which was a blue Buick which Latisha had bought from appellant. (Vol. XX 616-617) Dewayne was taken to jail and Tisha drove Hunt to the hospital to tell Dewayne's mother that he had been arrested. (Vol. XXI 744; Vol. XX 618) Hunt asked Tisha to stop at Soul City on the way but she refused. (Vol. XXI 745) After they left the hospital, Tisha and Hunt returned to her apartment. (Vol. XXI 745; Vol. XX 620) Upon their arrival in the parking lot, they observed Michael Wooten going up the stairs carrying a blue bag. (Vol. XX 620; Vol. XXI 745) Hunt did not recognize any vehicles in the parking lot although Tisha believed she saw a red hatchback parked there. (Vol. XXI 746; Vol. XX 622) When Hunt and Latisha went into the apartment, they saw appellant sitting in the hallway in a chair next to the bathroom. (Vol. XX 623; Vol. XXI 746) Hunt gave appellant the paper with the phone number on it and appellant looked at it and said "Yeah" but he did not

need it. (Vol. XXI 747) Appellant then told Hunt to go look in the bathroom which Hunt did. (Vol. XXI 747) Hunt saw Pallis in the bathtub. (Vol. XXI 747) Pallis did not appear injured and did not appear to be in distress. (Vol. XXI 748) Hunt exited the bathroom and went and sat on the couch in the living room. (Vol. XXI 749) Appellant called Latisha over to him so she went and sat on his lap. (Vol. XX 624; Vol. XXI 749) Appellant told Latisha he had been robbed and when she asked him who did it, appellant told her to look in her son's room. (Vol. XX 625) There was nothing in that room so Latisha looked in the bathroom and saw a woman sitting in the tub with her hands tied behind her with an extension cord. (Vol. XX 625-626) The woman appeared calm and Latisha asked her name and she replied something with an "S". (Vol. XX 626) When Latisha asked the woman what happened she replied "I'm straight." which meant she was okay. (Vol. XX 628-629) The woman said it was her own fault. (Vol. XX 629) Appellant came in and told Latisha to leave the bathroom. (Vol. XX 630) As she passed Michael Wooten, Wooten said something to the effect "don't be dumb like she is." (Vol. XXI 751; Vol. XX 631) As Latisha left the bathroom, appellant asked her for a douche so she went into the bedroom and got one and gave it to appellant. (Vol. XX 632; Vol. XXI 751) Latisha told appellant that she loved him and did not want him to do anything that would take him away from them. (Vol. XX 632) Appellant

told Latisha he was not going anywhere and when she asked him if he was going to kill the woman, appellant nodded yes. (Vol. XX 633) Shortly thereafter, Latisha left the house to go bond Dewayne out of jail. (Vol. XXI 640)

At the bondman's office, Dewayne's cousin locked the keys in the car so Latisha called appellant who said he would take care of it. (Vol. XXI 641-642) Appellant's wife Tonya showed up with a set of keys. (Vol. XXI 642) Latisha went back home and everything was okay and then went out to the jail only to find that Dewayne had already been released. (Vol. XXI 643) When Latisha returned from the jail, Dewayne, Charles Bush, and Hunt were at the apartment but appellant, Wooten and the woman were gone and it was dark. (Vol. XXI 645) At the time that Tisha left the apartment, there were numerous people there. (Vol. XXI 751) These people included appellant, Wooten, Pallis, Hunt, Charles Bush, Iraee Davis, and three young children, Tyler, G-Red and Boss. (Vol. XXI 751) As Tisha was getting ready to go bond her boyfriend out of jail, Hunt asked her if she would take him back to Soul City but once again Tisha refused. (Vol. XXI 753) Hunt then grabbed a bicycle and rode to Jimbo Vreen's house but he was not there. (Vol. XXI 753) Hunt asked if he could use the phone and he called Vreen who told Hunt to meet him in the second parking lot at Soul City. (Vol. XXI 754) Hunt rode over to Soul City, met Vreen who gave him two X pills after which Hunt

returned to the apartment. (Vol. XXI 754) All the same people were still there but only appellant and Wooten were going in and out of the bathroom. (Vol. XXI 755) Appellant asked if anyone wanted to have some fun with Pallis which meant did anyone want to have sex with her but no one took appellant up on the offer. (Vol. XXI 756) In the blue Walmart bag that Wooten had been carrying, there were rags, garden gloves, latex gloves, and white plastic ties. (Vol. XXI 757) At one point, appellant asked someone to go to the store to get him some duct tape. (Vol. XXI 758) Someone did go to the store and returned with a roll of duct tape which they gave to Wooten. (Vol. XXI 759) Appellant had gloves on and he and Wooten went into the bathroom. (Vol. XXI 760) Hunt heard tape being used. (Vol. XXI 760) Wooten took the blue bag and left the apartment but returned. (Vol. XXI 762) Appellant asked Hunt to go down to the car to get a rag for him. (Vol. XXI 762) The car was a blue Delta 88 backed into the first space. (Vol. XXI 763) Hunt opened the trunk and got a rag out of the Walmart bag and noticed that there were speakers in the trunk. (Vol. XXI 763) Hunt does not know how the Delta 88 got into the parking lot. (Vol. XXI 763) Hunt went upstairs and gave the rag to appellant while Hicks stayed down at the car. (Vol. XXI 766) Later appellant sent Bush and Brentson Thomas out to watch that no one was coming. (Vol. XXI 766) Appellant told Hunt that he needed him to help him and Hunt said okay. (Vol.

XXI 767) Appellant went into the bathroom and got Pallis and lifted her over his shoulder and carried her out of the bathroom. (Vol. XXI 768) Pallis had duct tape around her hands and ankles. (Vol. XXI 768) Hunt turned the lights off and opened the door for appellant. (Vol. XXI 769) Pallis was not saying anything. (Vol. XXI 769) As appellant carried Pallis down to the car he asked Davis if anyone was coming and Davis said no. (Vol. XXI 770) Hunt followed appellant and heard Pallis say "please Ray, don't put me in the trunk. Please, Ray, I'm sorry. I'm sorry. Please don't put me in the trunk." (Vol. XXI 770) Appellant laid Pallis in the trunk and she stopped pleading. (Vol. XXI 771) She did however put her legs straight up making it hard to close the trunk. (Vol. XXI 771) Hunt observed appellant punch Pallis in the face with a closed fist. (Vol. XXI 772) Pallis was not struggling or saying anything. (Vol. XXI 772) Hunt hit Pallis in the back of the legs to get them to go into the trunk and this worked and they were able to close the trunk lid. (Vol. XXI 772-773) Wooten got in the passenger side of the Delta 88 while the rest of them all returned to the apartment. (Vol. XXI 773) Appellant got the keys to the car and went out. (Vol. XXI 774) Hunt asked appellant if he needed him to help and appellant said no. (Vol. XXI 774) Hunt saw appellant go downstairs, get in the car and leave. (Vol. XXI 774) Everybody else left that night and Hunt never saw Pallis after that night. (Vol. XXI 775) Hunt then proceeded to

get high on the X pills he had obtained from Vreen. (Vol. XXI 776) Later, Latisha returned with her boyfriend and asked if they were gone and Hunt told her yes. (Vol. XXI 776) Latisha noticed that the bathroom smelled like bleach when she returned. (Vol. XXI 646) Latisha never notified the authorities about what she had seen in the apartment. (Vol. XXI 646) Although Latisha continued to see appellant and Wooten after this, Latisha's relationship with appellant was not the same. (Vol. XXI 647) Appellant told Latisha not to run her mouth about what she had seen. (Vol. XXI 647) Once Latisha asked appellant if the woman had drowned but appellant told her no. (Vol. XXI 648) The next day, Hunt was summoned to appellant's apartment on Keech Street. (Vol. XXI 777) Appellant asked Hunt if he was okay and Hunt said he was. (Vol. XXI 778) They all smoked some marijuana and at some point appellant said if he wanted to leave he had to leave right then but that if appellant went to sleep he had to wait until he awoke so Hunt stayed. (Vol. XXI 778-779) Eventually Hunt and appellant became close and Hunt ultimately moved in with appellant. (Vol. XXI 780, 649) Hunt sold drugs for appellant, answered his phone for him, went to the store for him and generally ran errands for him. (Vol. XXI 780) At some point, Hunt heard about a body being found and told appellant but it turned out not to be Pallis. (Vol. XXI 781) When Hunt told appellant about a body being found behind a motel, appellant immediately called

someone and told them to go to “Spizzot which is slang for the spot, step lightly and call back when you find out.” (Vol. XXI 782) Appellant dropped Hunt off at the house and left and when he returned Hunt asked him if everything was okay and appellant said yes. (Vol. XXI 783) One of Pallis’s family members called appellant and Hunt answered his phone. (Vol. XXI 783) The caller cussed out Hunt and told him if he saw appellant whom he referred to as “the fucking nigger”, Hunt should tell him they know he did something to Pallis. (Vol. XXI 783) Hunt told appellant about the phone call and appellant said he was not worried because “they ain’t got no body they ain’t got no case.” (Vol. XXI 784) Later, Charlie Bush moved in with Hunt and appellant and Hunt began a sexual relationship with Bush. (Vol. XXI 786) Eventually Hunt had a falling out with appellant over money he believed that appellant owed him. (Vol. XXI 789) Hunt and his brother went to appellant to get his money and appellant accused Hunt of talking about him which Hunt denied. (Vol. XXI 790) Hunt told appellant to “take his money from him.” (Vol. XXI 790) Sometime after this argument with appellant, Pallis’s body was found. (Vol. XXII 833) Appellant’s wife took Hunt to church after which Hunt decided to go to the police. (Vol. XXII 834) Hunt gave several statements to the police and in each one omitted certain facts. (Vol. XXII 837-838) Ultimately, Hunt was arrested and charged with kidnaping. (Vol. XXII 837) Although Hunt

has agreed to testify and to cooperate there have been no promises made to him. (Vol. XXII 864) When Hunt was arrested Wooten came by and wanted Hunt to tell the authorities that he had lied to them. (Vol. XXII 865-866) Hunt admitted that he sent a letter to Charles Bush's attorney asking her to file a motion to dismiss and offering to say that Bush had nothing to do with this event, which was not true. (Vol. XXII 866, 892) Bush also admitted that in none of the four statements he gave to the police did he ever say that appellant punched Pallis in the face but that he said it for the first time in a deposition in February, 2007. (Vol. XXII 931) Hunt admitted that appellant had never said that he killed Pallis. (Vol. XXII 936) Hunt said that the reason he went to the police is that appellant's wife told him that appellant had threatened to kill him. (Vol. XXII 950-951) While in jail, Hunt met an inmate named Quintin Wallace but denied ever discussing the case with him. (Vol. XXII 979) Hunt denied ever telling Wallace that he lied about Mike Wooten and lied about Ray Jackson. (Vol. XXII 979-981)

Tisha recalls that Hunt and appellant had a big argument on the same day that she went with Hunt to the police department. (Vol. XXI 674) Hunt was very upset when they went to the police department and before that day, Hunt had never expressed any fear of appellant. (Vol. XXI 676) Tisha previously testified that all of these events occurred on December 8th. (Vol. XXI 678) Tisha also testified that

she did not want Fred at her house because he believed that Hunt had something to do with the disappearance of Pallis and previously testified that she felt Hunt had more to do with it than anyone else. (Vol. XXI 682-683)

In 2004, V'Shawn Miles lived in Daytona Beach and hung out at the clubs. (Vol. XXIII 993) The talk around the community was that Pallis was missing. (Vol. XXIII 995) Miles often saw appellant around town usually with Buck Hunt. (Vol. XXIII 995) One time Miles was in the car smoking weed with appellant and Miles asked appellant if he killed Pallis to which appellant replied "no body no case." (Vol. XXIII 996) Miles asked appellant if Pallis robbed him and appellant replied "you should not fuck with people's things." (Vol. XXIII 997)

Kelly May, a senior crime analyst with FDLE, processed the crime scene and assisted in the documentation and collection of evidence. (Vol. XVII 193-197; XXIII 1005) At the gravesite May collected two Negroid head hairs and one Caucasian head hair which were suitable for comparison. (Vol. XXIII 1005) However, no comparison was ever done for these hairs that were found either by FDLE or by the FBI. (Vol. XXIII 1013-1014)

Brian Skipper of the Daytona Beach Police Department head of the investigation of the so-called serial killer in Daytona Beach. (Vol. XXIII 1054) Three bodies were found in 2005 and 2006 in various areas of the Daytona Beach.

(Vol. XXIII 1057-1058) One body was found naked in an area near where the remains of Pallis Paulk were found. (Vol. XXIII 1056, 1058) All of the victims lived a high risk lifestyle highlighted by drug use and prostitution. (Vol. XXIII 1060) Pallis Paulk was never considered part of the serial killings. (Vol. XXIII 1064)

Quintin Wallace testified that he met Michael Wooten and Buck Hunt at the county jail. (Vol. XXIII 1073-1074) Hunt told Wallace that he lied about both Wooten and Jackson and although he was sorry he lied he seemed sort of proud about it. (Vol. XXIII 1075) Hunt further told Wallace that Wooten was not around when this supposedly happened. (Vol. XXIII 1075) Wallace is currently serving a sentence following his convictions. (Vol. XXIII 1073-1082) Over objection, Wallace testified that he is serving a twenty five year sentence for the aggravated manslaughter of a child and that he feels he was wrongfully convicted on the word of a snitch. (Vol. XXIII 1084) However, the information that he received from Hunt came before he was convicted and before the snitch came forward in his case. (Vol. XXIII 1085)

Michael Wooten testified that he lived his entire life in Jacksonville. (Vol. XXIII 1195) In November of 2004, Wooten came to Daytona Beach to see his girlfriend Cecila Preston who lived in the same apartment building as Latisha

Allen. (Vol. XXIII 1196) Wooten knew Latisha and occasionally spent the night with his girlfriend at her apartment. (Vol. XXIII 1197-1198) Wooten testified that he was not in Daytona Beach on November 9, 2004 because this was the day after his mother's birthday and he spent the week with her in Jacksonville. (Vol. XXIII 1199) Wooten testified that he did not own a red hatchback in November , 2004 although he did buy one in February, 2005. (Vol. XXIII 1200) Wooten testified that he had nothing to do with Pallis being kidnaped and in fact he worked that day in Jacksonville. (Vol. XXIII 1204-1205) Calvin Morris testified that he was sitting in the audience with Pallis's family during jury selection. (Vol. XXIII 1250) Morris testified that he was familiar with sign language and finger spelling and testified that Wooten's signed to him "fuck you, I'm going to kill you." (Vol. XXIII 1251) Nancy Olbert, a victim advocate, who was also sitting in the audience during jury selection testified that she detected that Wooten was using sign language and finger spelling although she could not make out what he was signing. (Vol. XXIII 1246-1247) Wooten denied ever threatening Calvin Morris. (Vol. XXIII 1235)

Jameel Mclaury testified that he owned a red two door GEO hatchback which he sold to Michael Wooten for $400.00 in February 2005. (Vol. XXI 693-694, 697)

Penalty Phase

By stipulation, it was established that appellant had a prior conviction for robbery on September 7, 1994 and prior convictions for battery on a law enforcement officer and resisting an officer with violence on March 23, 1998. (Vol. XXVI 132)

Evelyn Thayer, appellant's mother, testified that appellant was born May 29, 1975. She had another son Roderick born March 17, 1980 and a daughter Raina born April 11, 1982. (Vol. XXVIII 388-390) Raina died two months and five days after she was born from SIDS. (Vol. XXVIII 392) Shortly after her daughter died, Thayer separated from her husband because he was abusive and beat her often. (Vol. XXVIII 392) Appellant witnessed the beatings by his step father on his mother and became quite depressed. (Vol. XXVIII 393) Thayer's husband also beat appellant and locked him out of his house. (Vol. XXVIII 394) Thayer testified that she came from an abusive home where her mother beat her. (Vol. XXVIII 396) Thayer's mother was an alcoholic. (Vol. XXVIII 400) Thayer herself is bipolar and appellant suffers from schizophrenia. (Vol. XXVIII 400) Both Thayer's sister and her brother also suffers from schizophrenia and her brother is currently residing at the state hospital in MacClenny. (Vol. XXVIII 400)

At eight years of age, appellant tried to commit suicide and was sent to the

state mental hospital for over a year. (Vol. XXVIII 403) Appellant became very depressed when his sister died and thereafter became aggressive. (Vol. XXVIII 408) Appellant was in the hospital when he was eight and again when he was ten years of age. (Vol. XXVIII 412) At seven years of age, appellant misbehaved at school so Thayer went to the school and gave him a beating and then sent appellant back to class. (Vol. XXVIII 414) Mental health problems are very common in Thayer's family. (Vol. XXVIII 414) Thayer became addicted to crack cocaine in 1986 and finally was able to quit twenty years later. (Vol. XXVIII 416-417) While pregnant with appellant, Thayer would smoke marijuana laced with angel dust. (Vol. XXVIII 430) Appellant's biological father is currently serving time in Brevard Correctional Institution. (Vol. XXVIII 422) Appellant's brother has been committed to MacClenny for over ten years. (Vol. XXVIII 424) Thayer herself suffers from full blown AIDS. (Vol. XXVIII 405)

Dorothy Brown, Evelyn Thayer's mother, testified that she tried to raise appellant but appellant's mother would not bring him to her. (Vol. XXVII 170) Brown testified as to the mental problems which were prevalent in her family including the fact that her son is currently residing in state hospital. (Vol. XXVII 167) Appellant's mother, had mental problems and suffered from depression. (Vol. XXVII 174) Evelyn Thayer was not a good mother and often neglected

appellant due to her drug problems. (Vol. XXVII 176-177)

Roderick Thayer, appellant's younger brother, testified that growing up they had no father and consequently appellant was the father figure to Roderick. (Vol. XXVII 148-149) Their mother was a drug abuser and would disappear for weeks at a time leaving appellant to care for himself and Roderick. (Vol. XXVII 150) Roderick testified that his mother used cocaine and would have a parade of men in and out of the household some of whom were quite abusive to his mother. (XXVII 151-152) Once when Roderick was outside playing some kids came and told him that appellant was trying to hang himself. (Vol. XXVII 154) Roderick went to try to stop him and an ambulance came and took appellant away. (Vol. XXVII 154) After that occurrence, Roderick was placed in a foster home as was appellant. (Vol. XXVII 155) Roderick heard that appellant was mistreated in his foster home. (Vol. XXVII 155) Roderick's aunt got him out of foster care and moved him to Georgia and eventually to Oklahoma where Roderick graduated high school and entered the Air Force. (Vol. XXVII 157-160) Roderick testified that his aunt tried to get appellant out of foster care but was unable to. (Vol. XXVII 157) Luscious Robinson, appellant's and Roderick's cousin, testified that Roderick came to stay with him when they were able to get him out of foster care. (Vol. XXVII 190-191) Robinson testified that his parents tried to get appellant out of foster care but were

simply unable to do so. (Vol. XXVII 192)

Tonya Jackson is married to appellant. (Vol. XXVII 259) They were married August 5, 2001 at the Baker Correctional Institution. (Vol. XXVII 260-261) After being released from prison, Tonya and appellant lived in Holly Hill. (Vol. XXVII 263) In October and November 2004 Tonya and appellant had some marital problems and separated but attempted to work them out. (Vol. XXVII 264-265) Appellant always worked first cooking bar-b-que and then starting his own auto detailing business. (Vol. XXVII 265-266) Appellant also helped run a daycare in Holly Hill. (Vol. XXVII 267) Tonya testified that the children loved appellant who taught them how to fly kites. (Vol. XXVII 267-268) Appellant was always a hard worker and a good provider and very generous to everyone. (Vol. XXVII 270-271) Appellant has a daughter and a son whom he loves very much and sees nearly everyday. (Vol. XXVII 272-276) Since appellant has been in jail, his children visit him regularly. (Vol. XXVII 277) Appellant has also been a father figure to Tonya's fourteen year old daughter. (Vol. XXVII 278)

Dr. Jeffrey Danziger, a psychiatrist, testified that he reviewed the indictment, deposition of appellant's mother, appellant's records from MacClenny State Hospital and the Department of Corrections medical and psychiatric records of appellant. (Vol. XXVIII 302) Danziger testified that appellant was admitted to a

state hospital when he was eight years of age and stayed for over a year which is very striking in and of itself. (Vol. XXVIII 304-305) This admission followed an attempted suicide by hanging which is extremely severe and shows a great level of seriousness. (Vol. XXVIII 305) Dr. Danziger says it is very rare to see an eight year old in a state hospital and one can only get admitted to MacClenny under a state court order. (Vol. XXVIII 306) Danziger testified that you would not place an eight year old in MacClenny unless there was absolutely no other alternative. (Vol. XXVIII 387) The records from appellant's stay at MacClenny indicated he was described as aggressive, difficult to handle, and self destructive. (Vol. XXVIII 308) Appellant came from a very poor family life with a mother who separated twice while appellant was very young and the younger sister who died of crib death which affected appellant very severely. (Vol. XXVIII 308) Appellant was unable to manage things at home and was placed on anti-depressants and anti-psychotic medication which is very unusual for an eight year old. (Vol. XXVIII 308-309) Appellant also suffers from a conduct disorder as a result of being under-socialized and aggressive. (Vol. XXVIII 309) Appellant's biological father was in and out of prison and his step father was abusive and violent. (Vol. XXVIII 310) Appellant witnessed his mother being beaten by his step father and he was also beaten. (Vol. XXVIII 310) Appellant's mother was diagnosed with bipolar disease

and indicated that there was a strong family history of mental illness. (Vol. XXVIII 310) Appellant's mother's ability to care for appellant was limited due to her history of drug abuse and prostitution. (Vol. XXVIII 310) All of these factors add up to a very horrific home life for appellant. (Vol. XXVIII 311) Appellant is particularly at risk for mental illness having been exposed to drugs in utero. (Vol. XXVIII 312) Upon appellant's discharge from MacClenny at ten years of age, he was not returned to his family but rather was sent to a group home that was supervised and monitored by the state. (Vol. XXVIII 213) Appellant was in and out of foster homes and group homes and also spent some time in Boys Town. (Vol. XXVIII 314) During this time appellant reported hearing voices especially that of his sister who died. (Vol. XXVIII 315) Sometime around age thirteen, appellant was admitted to Rivendell Hospital (now Indian River Hospital), for psychiatric care. (Vol. XXVIII 316) Appellant went to prison in the fall of 1994 where the medical records revealed a long history of mental health intervention since age five. (Vol. XXVIII 317) Appellant was diagnosed with schizophrenia and placed on anti-psychotic medications. (Vol. XXVIII 317) The records also noted a possible history of traumatic brain injury due to loss of consciousness for periods of hours. (Vol. XXVIII 317) However in 1994, appellant was not showing any sort of psychotic symptoms so the prison officials simply thought that

appellant had an impulse control disorder and suffered from poly-substance abuse. (Vol. XXVIII 317)

Danziger interviewed appellant in April, 2006 and concluded that appellant suffers from bipolar type II. (Vol. XVIII 318) Appellant suffers from mood swings and in times of depression he suffers feelings of hopelessness, worthlessness, and suicidal ideations. (Vol. XXVIII 319) During his manic phase appellant experiences increased energy, grandiose thinking, and spends money recklessly. (Vol. XXVIII 718) During his manic period, appellant would sometimes go for weeks on three hours of sleep and during these times he would believe he had a purpose such as starting a non-profit agency to help people. (Vol. XXVIII 320) Appellant is a classic bipolar person. (Vol. XXVIII 321)

SUMMARY OF THE ARGUMENTS

Point I

When impeaching a witness with prior criminal convictions, the party attempting the impeachment is limited to asking only if they have ever been convicted and how many times. Unless the witness has made some effort to mislead the jury about their prior criminal record, a person may not delve into the nature of the prior conviction.

Point II

Unless a defendant places his character into evidence, it is error to elicit testimony of other criminal activities on the part of the accused where the only purpose served is to inflame the jury against him. Therefore evidence that the accused may have carried a gun and engaged in drug sales were inadmissible where neither had any connection to the offense for which appellant was on trial.

Point III

An accused is entitled to have the jury properly instructed on the law applicable to his theory of defense. While the standard jury instructions no longer contain an instruction on circumstantial evidence, in a case such as the instant case it was critical that the jury be given the precise law regarding the evaluation of

circumstantial evidence.

Point IV

In order to prove murder, the state must prove that the victim was killed by the criminal agency of another. In the instant case there was no evidence to show that the victim died through the criminal agency of the accused or anyone for that matter.

Point V

An accused is entitled to have the jury instructed in the penalty phase on the law applicable for the issues raised. It is absolutely essential that the jury be properly instructed on the burden of proof by which they should guage whether the state has proven aggravating factors.

Point VI

The instant case was not appropriate for the application of the cold calculated and premeditated aggravating factor.

Point VII

The imposition of the death penalty in the instant case is proportionately unwarranted.

ARGUMENTS

POINT I

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER IMPEACHMENT BY THE STATE COUPLED WITH IMPROPER ARGUMENT TO THE JURY BY THE PROSECUTOR.

At trial, one of the key state witnesses was Frederick Hunt, a codefendant. The defense, in an attempt to attack the credibility of Hunt and to set the stage for the presentation of its own evidence, questioned Hunt about prior statements he may have made to a fellow inmate in the county jail that Hunt previously lied to the authorities about appellant and Michael Wooten. (Vol. XXII 979-981) The prosecutor, Ed Davis, then stated "Is this the Quintin Wallace, Mr. Hunt, that was convicted in this courthouse for killing a baby?" to which Hunt answered "Yes." (Vol. XXII 981) Defense counsel immediately objected and moved for a mistrial arguing that this was completely improper impeachment and certainly had a negative influence on the jury. (Vol. XXII 981) The court agreed that it was improper to ask Hunt that question but agreed with the state that the information would come out anyway because it would go to the witness's bias. (Vol. XXII

984) The trial court denied the motion for mistrial but instructed the jury to disregard the question. (Vol. XXII 986) The defense then called Quintin Wallace as a witness who testified that while he was in county jail he spoke with Frederick Hunt who told him that he had lied about Michael Wooten and appellant and although he said he was sorry he lied Wallace testified that Hunt seemed sort of proud about it. (XXIII 1073-1075) During a proffer, the state argued that it wanted to get into the details of Wallace's conviction in order to show his bias against the state for what he considered a wrongful conviction. The defense argued that this was like comparing apples to oranges in that there was no showing any bias against the state from these comments and there was no connection to the defendants. (Vol. XXIII 1077-1082) The trial court allowed the questioning and the state was able to elicit that Wallace was serving a twenty five year sentence for aggravated manslaughter of a child. (Vol. XXIII 1084) Further, the state was able to elicit that Wallace felt he was wrongly convicted on the word of a snitch. (Vol. XXIII 1084) However, Wallace testified on redirect that the information from Hunt came before Wallace was convicted and before a snitch had come forward in Wallace's case. (Vol. XXIII 1085)

During the state's rebuttal closing argument, the prosecutor stated:

> And then we have the defense presenting Quintin Wallace and wants you to give some credence, I assume,

> to Quintin Wallace, **who is a convicted child killer** who has no use for snitches.

(Vol. XXV 1393) Defense counsel objected on the grounds that this constituted improper argument but the trial court simply overruled the argument and the state again noted that Wallace was convicted of aggravated manslaughter of a child. (Vol. XXV 1393) Appellant contends that the questions by the prosecutor and the comments in closing argument were highly improper and extremely prejudicial so as to destroy any resemblance of a fair trial for appellant.

The general rule for impeachment by prior convictions, as codified in ***Section 90.610, Florida Statutes (2004)*** is that it is restricted to determining that if the witness has previously been convicted of a crime and if so, how many times. ***Fotopoulos v. State***, 608 So.2d 784, 791 (Fla. 1992); ***Fulton v. State***, 335 So.2d 280, 284 (Fla. 1976). A prosecutor is not allowed to delve into the nature of the prior convictions or the circumstances surrounding them. ***Ross v. State***, 913 So.2d 1184 (Fla. 4th DCA 2005) An exception exists, however, when the person attempts to mislead the jury about the prior convictions by, for example, trying to minimize them. In such a case, the state is entitled to inquire further regarding the convictions to dispel any false impression given. ***Fotopoulos***, 608 So.2d at 791. In ***Lawhorne v. State***, 500 So. 2d 519 (Fla. 1986), this Court explained:

> [W]hile the impeaching party may only inquire as to the

> existence of convictions and their numbers (or, if the matter be denied, may show the convictions by documentary evidence) the party presenting the testimony of the witness may delve into the nature or circumstances of the convictions for the purpose of rehabilitating the witness by attempting to diminish the effect of the disclosures.

Id. at 522. ***See also Jackson v. State***, 947 So.2d 480 (Fla. 3rd DCA 2006)

In the instant case, the trial court immediately realized that the first statement by the prosecutor to the witness Hunt regarding Quintin Wallace was absolutely improper. Yet despite this, the trial court denied the motion for mistrial and ruled, incredibly, that the evidence would come in anyway. However, there was simply no way that this evidence should have ever come before the jury. Wallace testified that he had two felony convictions. The state, properly, questioned Wallace about his motivation and asked if he might have felt that he was wrongfully convicted and thus had some bias against the state. However, this line of questioning did not, and in fact should not, include the disclosure of the nature of the convictions. It was totally irrelevant whether Quintin Wallace was convicted of manslaughter, or disorderly conduct. Additionally, the error even more egregious because of the nature of Wallace's conviction. Most people consider crimes against children to be the worst crimes a person could commit. Indeed, one needs only peruse the jury selection portion of the instant case to

ascertain the jury's feelings regarding crimes against children. This exhortation on the part of the prosecutor to not believe this "baby killer" is not only improper but highly prejudicial. The error cannot be deemed harmless. The main state witness was Frederick Hunt. Hunt himself admitted lying on numerous occasions. The defense properly sought to discredit Hunt's testimony. For the state to improperly destroy the credibility of the defense witness Wallace, in essence destroyed the ability of the defense to attack the credibility of Hunt. Again, it is important to remember that there was no evidence of how the victim died or when the victim died. The state's case was built on circumstantial evidence and there certainly is no way that these highly improper comments by the prosecutor could be deemed harmless. Appellant is entitled to a new trial.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL ERRED IN ALLOWING INTO EVIDENCE MATTERS THAT HAD NO RELEVANCE BUT WERE PREJUDICIAL.

Prior to trial defense counsel sought a pretrial order preventing the state from eliciting any testimony that appellant may have possessed a gun on any other occasions other than the offense charged. (Vol. V 811-812) This motion was granted. When witness Frederick Hunt testified concerning an argument that he had with appellant about money he believed was owed to him, Hunt testified "He [appellant] always carries a little pistol with him right him in this little waist ban (indicating)." Defense counsel immediately objected and moved for a mistrial arguing that this was a clear violation of the pretrial order. The trial court agreed that it was a violation and was not sure if such evidence would ever become relevant but because it was only incidental, the trial court denied the motion for mistrial. (Vol. XXI 791-795) Although the trial court offered to give it cautionary instruction, defense counsel declined it believing that any such instruction could not remove the prejudicial taint.

Similarly, prior to trial the state sought a motion in limine to permit evidence

of drugs, drug usage, and drug sales ostensibly to show positions of trust and also argued that such evidence would be “inextricably intertwined” with the facts of the instant case. (Vol. XVI 29-32) Defense counsel objected to any evidence of drug sales because this constituted collateral crimes for which no notice was given and that such evidence was irrelevant and that any probative value was far outweighed by the prejudice. (Vol. XVI 30) The trial court allowed such evidence over the objection of defense counsel. (Vol. XVI 32) Subsequently, state witness Frederick Hunt testified that after the events in question, he moved in with appellant and sold drugs for him. (Vol. XXI 780)

Finally, over defense objection, the state was permitted to elicit from Frederick Hunt the fact that appellant’s wife told him that appellant threatened to kill him. (Vol. XXII 947) The court ruled that the defense opened the door to such testimony when it questioned Hunt’s motive in going to the police. (Vol. XXII 947) Appellant contends that these comments by the state witness Frederick Hunt were highly prejudicial and warrant a new trial.

The admissibility of evidence lies in the sound discretion of the trial court and trial court’s decision on the matter will be affirmed absence a showing of abuse of discretion. ***Mendoza v. State***, 700 So.2d 670 (Fla. 1997) Similarly a ruling a motion for mistrial is within the sound discretion of the trial court. ***Power***

v. State, 605 So.2d 856 (Fla. 1992) A defendant's character cannot be assailed by the state in a criminal prosecution unless good character of the accused has first been introduced. ***Young v. State***, 141 Fla. 29, 195 So. 569(1939). ***See also Section 90.404(1), Florida Statutes (2007).*** Evidence of prior bad acts on the part of the accused are inadmissible when the only purpose is to show propensity on the part of the defendant to commit crimes or simply to put the defendant in a bad light. ***Williams v. State***, 110 So.2d 654 (Fla. 1959). The erroneous admission of irrelevant collateral crimes evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity of the crime that is demonstrated as evidence of guilt of the crime charged. ***Straight v. State***, 396 So. 2d 903 (Fla. 1981); ***Castro v. State***, 547 So.2d 111 (Fla. 1989).

In the instant case, defense counsel secured a pretrial ruling specifically prohibiting the state from eliciting testimony concerning appellant's possession of a gun on any occasion other than the charged event. Yet despite this ruling, Frederick Hunt still testified that appellant always carried a gun. This could serve no purpose other than to put appellant in a bad light. Similarly, the evidence that appellant sold drugs was totally irrelevant to any issue at trial. The fact that the state was permitted to elicit testimony from a state witness that at some point after the event in question one of its own witnesses assisted in selling drugs for

appellant was in no way connected to events charged. It in no way proved what the state alleged it did in that it did not show any sort of position of trust that was relevant to any issue at trial. Additionally, there is simply no way to conclude that this totally separate and irrelevant evidence of other crimes is inextricably intertwined with the events that occurred, according to the state, on November 9, 2004. Finally and perhaps most damaging, state witness Hunt was able to testify that appellant had threatened to kill him. The trial court ruled that somehow the defense opened the door to this simply by questioning Hunt on his motivation for reporting anything to the police. However, it is important to note that this was not evidence that Hunt had first hand. Rather, it was hearsay upon hearsay. Hunt was permitted to testify that someone else told him that appellant told them that he was going to kill Hunt. Arguably, it may have been relevant if appellant personally threatened Hunt. That did not happen. Rather, Hunt was able to testify to evidence that was otherwise totally inadmissible. Nothing prevented the state from calling appellant's wife to testify to this. However, they chose not to. The state should not be able to backdoor the rules of procedure. All of these comments by the state witness Hunt were clearly improper. All of them constituted impermissible attacks on the character of appellant who had not testified in the trial. These comments served no purpose other than to place appellant in a bad light with the jury.

Because this case came down basically to a credibility of the witnesses situation, the effect of these highly prejudicial comments on the jury cannot be overstated. This is particularly true when the witness who testified to each of these attacks was himself a codefendant and was someone who even other state witnesses believed had more to do with the disappearance Pallis Paulk than anyone else. (Vol. XXI 682-683) Appellant is entitled to a new trial.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST WITH INSTRUCTION REGARDING CIRCUMSTANTIAL EVIDENCE.

At the charge conference, defense counsel requested an instruction on circumstantial evidence. (Vol. XXIII 1132-1136) When the issue was revisited it became clear that defense was requesting the former standard jury instruction on circumstantial evidence and although defense counsel noted that the decision to give this was discretionary argued that it was important in this case because it went directly to the theory of defense. (Vol. XXIII 1179-1183) The trial court declined to give the instruction. (Vol. XXIII 1183) Appellant contends that under the special circumstances of this case the trial court's denial was error.

The trial court has wide discretion in instructing the jury, and the court's decision regarding the charge to the jury is reviewed with the presumption of correctness on appeal. ***Carpenter v. State***, 785 So.2d 1182, 1199-1200 (Fla. 2001) A trial court has a fundamental responsibility to give the jury full, fair, complete and accurate instructions on the law. ***Foster v. State***, 603 So.2d 1312 (Fla. 1st DCA 1992) The standard jury instructions, though presumed correct, not always

are. ***See Yohn v. State***, 476 So.2d 123 (Fla. 1985) (standard jury instruction concerning the law of insanity incorrect); ***Sochor v. Florida***, 504 U.S. 527 (1992)(standard jury instruction concerning especially heinous, atrocious or cruel statutory aggravating factor unconstitutionally vague); ***Jackson v. State***, 648 So.2d 85 (Fla. 1994)(standard jury instruction on cold, calculated and premeditated aggravating factors unconstitutional). As the court noted in ***Steele v. State***, 561 So.2d 638, 645(Fla. 1st DCA 1990):

> While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case.

With regard to the instruction on circumstantial evidence, appellant acknowledges that in its decision in ***In re Standard Jury Instructions in Criminal Cases,*** 431 So.2d 594 (Fla. 1981) this Court noted that the standard jury instruction on circumstantial evidence has been eliminated. However, this Court allowed for the possibility that the instruction could still be given in the appropriate case:

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge in his or her discretion, feels that such is necessary under the peculiar facts specific case.

Id at 595. Thus, while the giving of an instruction on circumstantial evidence is

discretionary, it should be given where the facts support it. In fact, in a criminal proceeding, a trial court's discretion in this regard is rather narrow because a criminal defendant is entitled to have the jury instructed on his or her theory of defense, if there is any evidence to support this theory and so long as the theory is recognized as valid under the law of the state. ***Worley v. State***, 848 So.2d 491, 492 (Fla. 5th DCA 2003); ***David v. State***, 922 So.2d 438, 444 (Fla. 5th DCA 2006)

The instant case presented a clear case of circumstantial evidence. No cause of death could be ascertained. No time of death could be ascertained. While there was evidence that appellant may have kidnaped the victim or at least held her against her will, there is no direct evidence that appellant killed the victim. Even the state's theory allows for the possibility that someone else actually killed the victim. The state's theory was that the victim stole from appellant and appellant needed to show others that no one could do this to him. If that were the case, then this objective was accomplished simply by the abduction and imprisonment of the victim. Additionally, the very risky lifestyle that the victim lived made it very possible that she died from some other cause. None of that could be ruled out by the medical examiner. Under these facts, it was critical that the jury understood the law with regard to circumstantial evidence: that the evidence not only must be consistent with the theory of guilt, but must be inconsistent with any other

reasonable hypothesis of innocence. While the jury certainly was instructed on reasonable doubt and burden of proof, under these particular facts it was critical to have that additional instruction on the law concerning circumstantial evidence. Certainly argument of counsel cannot be a substitute for proper instructions. Indeed, argument of counsel is never meant to be a substitute for the trial court's instructions concerning the law. ***United States v. Pedigo***, 12 F.3rd 618, 626 (7th cir. 1993); ***Fitzgerald v. Mountain States Tel. and Tel. Co.***, 68 F.3rd 1257, 1262 (10th cir. 1995) Appellant was entitled to an instruction on circumstantial evidence and the failure of the trial court to give one constitutes reversible error. Appellant is entitled to a new trial.

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE FAILED TO SHOW THAT THE VICTIM DIED BY THE CRIMINAL AGENCY OF ANOTHER.

At the conclusion of all the evidence, defense counsel moved for a judgment of acquittal specifically arguing that there was no evidence that the death of Paulis Paulk was caused by the criminal act of another. (Vol. XXIII 1030, 1037) At best, the evidence showed that Paulis Paulk was placed in the trunk of a vehicle which was then driven away. Several months later the remains of Paulis Paulk were found in a shallow grave. The trial court denied the motion on the grounds that Dr. Beavers's testimony was enough to prove that this was a homicide. (XXIII 1036)

STANDARD OF REVIEW

The trial court and the appellate court are equally capable of determining whether it is proper to grant a judgment of acquittal. ***State v. Smyly***, 646 So.2d 238 (Fla. 4th DCA 1994). If the trial judge was correct in reaching an issue of law and ruling on the motion, the proper standard of review is the *de novo* standard. A special standard of review of this sufficiency of the evidence applies when a conviction is based wholly on circumstance evidence. ***State v. Law***, 559

So.2d 187 (Fla. 1989). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. ***Id***. at 188; ***Sibold v. State***, 889 So.2d 1000 (Fla. 5th DCA 2004).

ARGUMENT

The due process clause of the Florida and federal constitutions protect an accused against conviction for a criminal charge except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which he is charged. ***In re Winship,*** 397 U.S. 358, 364(1970). The state bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt. ***Cox v. State***, 555 So.2d 352(1989). In order for the state to prove premeditated first degree murder through circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. ***Long v. State***, 689 So.2d 1055 (Fla. 1997). The question of whether the evidence is inconsistent with any other reasonable inference is usually a question of fact for the jury. ***Benford v. State***, 589 So.2d 245 (Fla. 1991). Nevertheless, a jury's verdict on this issue must be reversed on appeal if the verdict is not supported by competent, substantial evidence. ***Long, supra*** at 1058. Evidence that creates nothing more than a strong suspicion that a defendant committed the crime is not

sufficient to support a conviction. ***Cox v. State***, 555 So.2d 352 (Fla. 1989); ***Scott v. State***, 581 So.2d 887 (Fla. 1991). Circumstantial evidence must lead "to a reasonable and moral certainly that the accused and no one else committed the offense charged." ***Hall v. State***, 90 Fla. 719, 720, 107 So.246, 247(1925).

One of this court's functions in reviewing capital cases is to see if there is competent, substantial evidence to support the verdict. ***Cox, supra*** at 353; ***Williams v. State***, 437 So.2d 133 (Fla. 1983). When evidence of guilt is circumstantial, a special standard of review of the sufficiency of the evidence applies:

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. ***Jaramillo v. State***, 417 So.2d 257 (Fla. 1982). Where the only proof of guilt is circumstantial, no matter how strongly the evidence suggests guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. ***McArthur v. State***, 351 So.2d 972 (Fla. 1977); ***Mayo v. State***, 71 So.2d 899 (Fla. 1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
>
> * * *
>
> [However, a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence in which the jury can exclude every reasonable hypothesis except that of guilt. ***Wilson v.***

> ***State***, 493 So.2d 1019, 1022(Fla. 1986). Consistent with the standard set forth in ***Lynch*** [v. State, 293 So.2d 44 (Fla. 1974)], if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So.2d at 45(1974). The state's evidence would be as a matter of law "insufficient to warrant a conviction." ***Fla. R. Crim.P. 3.380.***

State v. Law, 559 So.2d 187, 188-189 (Fla. 1989).

In the instant case, the state's evidence did not show a time of death, a location of death, or a cause of death. Dr. Beavers, a forensic pathologist, testified that in his opinion the cause of death was a homicide. Yet this was not based on any scientific evidence whatsoever. Rather, Dr. Beavers stated that his opinion was based on the fact that the victim apparently "went missing" and ended up in a shallow grave. However, he could not give any cause of death. There was no evidence of any gunshot wound or trauma. While the fact that the remains of the victim were found in a shallow grave it may indicate that she met her fate in a criminal manner, it is reasonably possible that she could have met her fate in an accidental fashion. It is possible that the victim died accidently and whoever may have been with the victim at the time panicked and simply buried the body. This is especially reasonable given the high risk lifestyle the victim lived. The victim clearly abused drugs, indiscriminately slept around, and may have carried the HIV

virus or even had full blown AIDs. This risky lifestyle certainly could have resulted in an accidental death. If the death occurred at a time when the victim's companions were also enjoying the fruits of this risky lifestyle, it is entirely reasonable that panic could have caused the victim to be buried in the shallow grave.

The state's theory of the case was that the victim stole from appellant and that appellant killed her to make an example. Certainly the evidence shows that appellant may have indeed kidnaped the victim. There was also some evidence that appellant was asked if he intended to kill the victim he may have nodded in the affirmative. However, the fact remains that the last time anyone saw the victim she was alive, albeit bound and placed in the trunk of the vehicle. There is no evidence to show when the victim may have been killed. The evidence is as susceptible to an interpretation that appellant released the victim after "teaching her a lesson" and the victim at some later point met her fate. The fact that no one saw her after this particular date is not necessarily proof that she was dead. The evidence shows that the victim had outstanding warrants at the time of her disappearance. The evidence further showed that it would not be unusual for someone with outstanding warrants to "disappear" in an effort to avoid arrest. The only certainty is that the victim's remains were found many months later. There is

simply insufficient evidence to prove that the victim died as a result of the criminal act or agency of another.

In ***Eierle v. State***, 358 So.2d 1160(Fla. 3rd DCA 1978), the defendant was convicted of first degree murder of his wife and argued on appeal that a judgment of acquittal should have been entered because the evidence was insufficient to establish the death of the deceased was caused by the criminal agency of another. In rejecting this contention, the District Court of Appeal noted that the review of the evidence revealed that the deceased wife of the defendant was discovered dead by the police laying face down in a cemented septic tank eighteen inches below the ground in a freshly dug area in the defendant's backyard. The defendant had been seen by a neighbor shortly prior thereto digging in the area. The defendant had also threatened to kill the deceased and was last seen in her company shortly prior to the discovery of the dead body. An autopsy was performed and according to the medical examiner the deceased met her death by suffocation or strangulation. Under these facts, the court had no problem in holding that the evidence was sufficient to establish that the deceased met her death by the criminal agency of another. In ***Glee v. State***, 731 So.2d 807 (Fla. 5th DCA 1999) the defendant was convicted of second degree murder and argued on appeal that the court erred in denying a judgment of acquittal on the grounds that

the evidence failed to show the victim died as a result of someone's criminal agency. In rejecting this contention, the district court noted that a medical examiner testified that he had been able to determine by a process of exclusion that the victim died as a result of a homicide and not as a result of a drug or alcohol overdose or of natural causes. The doctor further testified that the process of exclusion was an accepted methodology in forensic medicine. This, the court ruled, was sufficient to establish criminal agency and to contradict the hypothesis that the victim died of natural causes or an overdose. The facts of the instant case present no such evidence. Again, it is important to note that Dr. Beavers based his conclusion that this was a homicide on the fact that the victim "went missing" and ended up in a shallow grave. Dr. Beavers did not rule out any other causes such as the doctor in ***Glee***. Also, there was no connection between the location of the body and appellant as was the case in ***Eierle***. While appellant is alleged to have made the comment "no body, no case," there is no evidence that appellant ever admitted to killing the victim. While the evidence may be suggestive of guilt, applying the special standard of review in a circumstantial evidence case, it is equally consistent with a reasonable hypothesis of innocence. The trial court erred in denying appellant's motion for judgment of acquittal. This Court must reverse this conviction for first degree murder and remand the cause with instruction to

discharge him as to that offense.

POINT V

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTIONS IN THE PENALTY PHASE.

Appellant filed written requests for numerous special jury instructions at the penalty phase. (Vol. IV 611-669) At the charge conference, defense counsel also requested the standard jury instruction on reasonable doubt as well as the standard instruction on the defendant not testifying but the trial court refused saying that it was not going to repeat any instructions that were given in the guilt phase stating "they [the jury] should remember it" and noting that the attorneys could argue the instructions as a reminder. (Vol. XXIX 523-524, 535-536) Appellant contends on appeal that the trial court committed reversible error in denying these requested instructions as well as special instruction eighteen (Vol. IV 644-645) nineteen (Vol. IV 646-647) twenty five (Vol. IV 654-655) thirty two (Vol. IV 667) and thirty three (Vol. IV 668-669).

Due process of law applies "with no less force at the penalty phase of the trial in a capital case" than at the guilt determining phase of any criminal trial. ***Presnell v. Georgia***, 439 U.S. 14, 16-17(1978). The need for

adequate jury instructions to guide the recommendation in capital cases was expressly noted in ***Gregg v. Georgia***, 428 U.S. 153, 192-193(1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law... When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

In ***Guzman v. State***, 644 So.2d 996 (Fla. 1994), this Court noted that trial courts, in most cases, should follow the standard jury instructions. However, this Court acknowledged that there will be cases that require some deviation from the standard jury instructions. The requested jury instructions by appellant were all correct statements of the law. They also were particularly critical to the case at hand. The standard to be applied for proof of aggravating circumstances is beyond a reasonable doubt. Yet the trial court in the instant case refused to even instruct the jury on reasonable doubt. While it is true that the jury was instructed on reasonable doubt during the guilt phase, there was a two week delay between the end of the guilt phase and the beginning of the penalty phase. It is axiomatic that the jury at the very least must be instructed on the applicable law of the case. To

expect the jury to simply remember something they were told two weeks prior is unreasonable at best. Similarly, the jury should be told that appellant had the right not to testify in the penalty phase and that they should not hold that against him. This was especially critical because the codefendant, Michael Wooten, had previously testified in the guilt phase. Thus, the jury never heard from appellant during the entire proceedings. The trial court's statement that the jury should remember these instructions is simply unrealistic and its statement that the attorneys were free to remind the jury of them was equally unrealistic since the jury was specifically told "please remember that what the attorneys say, either oral or written, is not evidence." (Vol. XXX 570) Besides, argument of counsel is never an acceptable substitute for proper jury instructions from the court. The requested instructions that the jury should only consider the three prior convictions as a single aggravating circumstance was also quite critical in this case. The state only relied on three aggravating circumstances. Obviously, each one of these is very important. It is now questionable whether appellant's prior conviction for battery on a law enforcement officer would even qualify as a prior violent felony in light of this Court's opinion in ***State v. Hearns***, 961 So.2d 211 (Fla. 2007) wherein this Court held that battery on a law enforcement officer was not a "forcible felony" that could be used to enhance a subsequent felony as a violent career

criminal. Since battery on a law enforcement officer can be committed simply by the unwanted touching of a police officer this prior conviction should not be considered in determining whether a defendant has a prior conviction for a violent felony. However, in the instant case, the jury was instructed on just the exact opposite, i.e. the offense of battery on a law enforcement officer is a crime of violence. Defense counsel's special requested instruction twenty five was in addition to the standard instruction on cold calculated and premeditated which informs the jury that they can consider any mental health defects of the accused in determining whether this factor applies. This was especially critical in the instant case where Dr. Danziger testified as to appellant's mental health problems. Although this Court has in the past ruled that instructions on individual mitigating circumstances are not required, appellant urges this Court to reconsider. A jury needs to be told that certain aspects of a defendant's upbringing are, as a matter of law, mitigating factors. Rather they are left with the catch all instruction that the jury is to consider any other aspect of the defendant's upbringing. Appellant is entitled to a new penalty phase.

POINT VI

IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In sentencing appellant to death, Judge Hutcheson found that the murder was committed in a cold calculated and premeditated manner without any pretense of moral or legal justification. In support of this finding the trial court stated:

> The case law indicates for this aggravator to be established that (1) the murder was a product of a cool calm reflection and not any act done by someone in any emotional frenzy, panic, or a rage, (2) that the defendant had a careful plan or prearranged design to commit murder before the killing, (3) the defendant showed heightened premeditation, and (4) there was no pretense of legal or moral justification on the part of the defendant. ***Jackson v. State***, 648 So.2d 85(Fla. 1994); ***Nelson v. State***, 748 So.2d 237 (Fla. 1998). For the reasons to be stated in the following paragraphs, this Court finds that the murder was committed in a cold, calculated and premeditated manner.
>
> There was a significant amount of evidence introduced during the trial touching upon this aggravating factor. The victim was in the defendant's apartment and while the defendant was sleeping, the victim stole money, drugs, and other items from the

defendant and left the apartment in an automobile driven by her cousin. Upon waking, the defendant discovered the theft and began searching for the victim. This included activities such as calling friends and acquaintances to see if they had seen the victim or knew her whereabouts and going to various residences where the defendant thought the victim might be found. During the events of November 9, 2004, the defendant found the victim at a counsen's house. The defendant then was seen placing the victim in the back seat of an automobile and at that time, the defendant was seen to have a handgun on his person. When witness Calvin Morris attempted to follow that automobile in this vehicle, the defendant waived the gun out of the window seemingly to scare the following witness off. The defendant then took the victim to the apartment of Latisha Allen, where he had stayed before. The victim was kept in Ms. Allen's apartment for several hours and was left bound and tied in the bathtub until nightfall came. The defendant at any time could have changed his mind and released the victim, but he chose not to. Because of the above, the "cold" component of this aggravator is established beyond all reasonable doubt and it is clear that the defendant acted coolly and calmly after due reflection and was not being controlled by any emotional frenzy, panic, or fit of rage.

Likewise, the "calculated' component has also been proved beyond all reasonable doubt. The evidence at the trial shows the defendant engaged in a careful plan or prearranged design to commit this murder. The defendant was convinced that the victim had stolen from him. He commenced searching for the victim and found her and took her to Ms. Allen's apartment, a place where he felt he would be safe and secure with the victim. The victim was first placed in a bathtub and her hands tied with an extension cord. The defendant decided he needed more substantial bindings and sent others to a department store to obtain duct tape, plastic ties, and

other items. This clearly indicates that the defendant decided he needed to have a better way to secure the victim to prevent her from fighting or getting away once she realized her life was in danger. The evidence shows the defendant waited until dark to remove the victim, still bound, from the bathtub and he had the automobile backed up to the bottom of the stairs and utilized some of his friends and associates to act as lookouts while he removed the victim from Ms. Allen's apartment. The defendant carried the victim down the stairs over his shoulder and attempted to place her into the open trunk of the automobile rather than the passenger area. At that point, the victim started struggling and pushing or kicking with her legs to try to prevent the trunk lid from being closed and was pleading for her life when the defendant struck her several times in the face and with the help of the co-defendant got the trunk lid closed. The evidence further indicated that the defendant obtained a douche from Ms. Allen, and the victim's body was located some approximate six months later buried in a remote location without any clothing. The reasonable inference would be that this was a clear intent on the part of the defendant to remove any potential evidence such as DNA or other evidence that may link the defendant to the body. Subsequently, when the defendant was asked about the disappearance of the victim, but prior to the discovery of her body, some six months later, he said "no body, no case" indicating that if the body disappeared and was never discovered, then there would be no criminal charges lodged.

As to the "premeditated" component of this aggravator, that also has been proved beyond all reasonable doubt. Over the course of several hours that the victim was bound in the bathtub of Ms. Allen's apartment, the victim was shown many times to others as an example not to do anything that the defendant would not want or appreciate. A reasonable inference would be that the defendant would not show her off if he had not

> already formed the intent to kill her as showing her off would not be a very good warning to others if he then released her. Most importantly, as to the heightened premeditation, Ms. Allen, after she was shown the victim tied up in the bathtub of Ms. Allen's apartment, spoke directly to the defendant and asked him "are you gonna kill her". Ms. Allen testified at the trial that the defendant nodded his head yes and spoke the word "yes".
>
> As to the "no pretense of any moral or legal justification", this component of the aggravator has also been proved beyond all reasonable doubt. There was no evidence whatsoever introduced during the trial from either side as to any moral or legal justification for the crime and the defense did not argue any.
>
> Accordingly, this aggravator has been proved beyond all reasonable doubt and the Court fives it extremely great weight.

(Vol. IV 697-699)

At least one commentator has exposed the inconsistency with which this Court has reviewed this aggravating circumstance. ***Kennedy,*** "Florida's Cold, Calculated and Premeditated Aggravating Circumstance in Death Penalty Cases", 17 Stetson L. rev. 47 (1987). It does appear, however, that the "cold, calculated, and premeditated" aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before the murder itself'." ***Perry v. State***, 522 So.2d 817 (Fla. 1988). ***See also Garron v. State***, 528 So.2d 353 (Fla. 1988)(heightened premeditation aggravating factor was intended to apply to execution or contracts-

style killings). This Court has held that this factor requires proof of "a careful plan or prearranged design." ***Mitchell v. State***, 527 So.2d 129 (Fla. 1988). While the heinous, atrocious and cruel factor focusing primarily on the suffering of the victim and the nature of the crime itself, the cold, calculated, and premeditated factor focuses on the state of mind of the perpetrator. ***Mason v. State***, 438 So.2d 374 (Fla. 1983); ***Michael v. State***, 437 So.2d 138 (Fla. 1983) As stated in ***Preston v. State***, 444 So.2d 939, 946 (Fla. 1984):

> [the cold, calculated, and premeditated] aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events where a substantial period of reflection and thought by the perpetrator. ***See, e.g., Jent v. State***, (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); ***Middleton v. State***, 426 So.2d 548 (Fla. 1982)(defendant confessed he sat with a shotgun in his hand for an hour, looking at the victim as she slept and thinking about killing her);***Bolender v. State***, 522 So.2d 833 (Fla. 1982), ***cert. denied***, ___ U.S. ___, 103 Sup.Ct. 2111, 77 L.Ed. 2d 315 (1983)(defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

An intentional or deliberate killing during the commission of another felony does not necessarily qualify for the premeditation aggravating circumstance. ***Maxwell v. State***, 443 So.2d 967 (Fla. 1983). However, where additional facts show greater planning prior to or during the killing, the homicide

becomes "execution style." ***E.g., Routly v. State***, 447 So.2d 1257 (Fla. 1983)(burglary victim bound and transported to a remote area before he was killed with a gunshot); ***Rose v. State***, 472 So.2d 1155 (Fla. 1985)(defendant had to search for a concrete block, walked to the victim, and asked the victim to sit up and struck him six to eight times). In sum, the cold calculated and premeditated aggravating factor applies to the manner of killing characterized by a heightened premeditation beyond that required to establish premeditated murder. ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985).

Applying the law to the instant case, is clear that the murder of Pallis Paulk is not cold, calculated and premeditated. Even the trial court's findings reflect something less than this aggravating circumstance. For instance, the evidence shows that the victim stole from appellant. Understandably, appellant was upset over this occurrence. According to the state's own theory and that found by the trial court, appellant was going to teach Pallis a lesson. It is important to remember that appellant was also convicted of kidnaping with the intent to terrorize. All of the actions of appellant with regard to the placing of the victim in the bathtub and again in the trunk of the car were essential elements of the kidnaping offense. To use these same factors to support the finding of cold calculated and premeditated would constitute, under the facts of this case

impermissible doubling. Pallis Paulk apparently understood that she did something wrong. The state's witnesses testified that she was calm and collected and admitted to them that she did something wrong. There is no indication that Pallis Paulk knew she was going to die. The only struggle made by Pallis Paulk was to be prevented from being placed in the trunk of the car. There is no evidence to support the trial court's conclusion that she was kicking but rather only that she stuck her legs straight up to prevent the trunk from being closed. Most importantly, there is absolutely no evidence as to the manner in which the death of Pallis Paulk occurred. The medical examiner could come up with no cause of death. However, he ruled out gunshot, stabbing, or blunt trauma. Under these circumstances, it is certainly possible that the victim died accidently. Finally, the trial court found that there was no pretense of any moral or legal justification. However, the state's own case made out a pretense of justification. According to Websters Collegiate dictionary (1981) "pretense" is defined as "a claim made or implied especially one not supported by fact; pretext." Thus, by its very definition, a pretense is something that is false. In the instant case, appellant is not arguing that there is any actual moral or legal justification for the death of Pallis Paulk. However there may have been a **pretense of justification** as the evidence clearly showed that Pallis Paulk robbed appellant.

In summary, the facts of the instant case do not make out a situation for the application of the cold calculated and premeditated aggravating factor. Rather, the evidence upon which the trial court based its decision were factors that were essential to convict appellant of kidnaping, which was also found as an aggravator. Impermissibly doubling up the aggravating factors based on the same facts is improper. Thus, the trial court erred in finding the factor of cold calculated and premeditated.

POINT VII

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

In reviewing a death sentence, this Court must consider and compare the circumstances of the case at issue with the circumstances of other decisions to determine if the death penalty is appropriate. ***Livingston v. State***, 565 So.2d 1288 (Fla. 1988). In the instant case, the trial court found three aggravating factors, that the capital murder was committed in the course of a kidnaping, that appellant had a prior conviction for a violent felony and that the murder was committed in a cold, calculated and premeditated manner.[1] The trial court found several mitigating factors. This Court has noted that the death penalty, unique in its finality and total rejection of the possibility of rehabilitation, was intended by the legislature to be applied "to only the most aggravated and unmitigated of most serious crimes." ***State v. Dixon***, 283 So.2d 1, 7 (Fla. 1973); ***Holsworth v. State***, 522 So.2d 348(Fla. 1988). A comparison to the instant case to other cases decided by this Court leads to the conclusion that the death penalty is not proportionately

[1] Appellant is contending that there was insufficient evidence to support the CCP factor. See Point V, supra.

warranted in this case. ***Blakley v. State***, 561 So.2d 560 (Fla. 1990)(death sentence was disproportionate despite finding two aggravating circumstances: heinous atrocious and cruel and cold, calculated and premeditated); ***Livingston v. State,*** 565 So.2d 1288 (Fla. 1988)(death penalty disproportionate despite finding two aggravating circumstances: previous conviction of a violent felony and commission of the murder during an armed robbery); ***Farinas v. State***, 569 So.2d 1425 (Fla. 1990)(death sentence not proportionate where defendant convicted of first degree murder of girlfriend even though trial court properly found two aggravating circumstances: capital felony was committed while defendant was engaged in the commission of a kidnaping, and the capital felony was especially heinous, atrocious and cruel); ***Fitzpatrick v. State***, 527 So.2d 809(Fla. 1988)(death penalty not proportionate despite finding of five aggravating circumstances and three mitigating circumstances); ***Wilson v. State***, 493 So.2d 1019(Fla. 1986)(death sentence not proportionately warranted despite trial court's proper findings of two aggravating circumstances and no mitigating circumstances).

In ***Kramer v. State***, 619 So.2d 274 (Fla. 1993) this Court held that the death penalty was disproportionate despite findings from the trial court that the murder was heinous, atrocious and cruel and that the defendant had a prior conviction for a violent felony. In that case, the evidence demonstrated that

Kramer systematically pulverized the victim as he tried to get away and fend off the blows. Kramer delivered a minimum of nine to ten blows; none but the final two would have been fatal. The evidence showed that the attack began in an upper portion of an embankment and proceeded down approximately fifteen feet to the culvert, and then further down the culvert to the final resting place of the victim. The final blows which were delivered with a concrete block were inflicted while the victim's head was lying against the cement. Additionally, the prior violent felony that Kramer had was a near identical attack on a previous victim with a concrete block. Despite these facts, this Court had no problem reducing the penalty to life where these two aggravating factors were offset by the mitigation including Kramer's alcoholism, mental stress, sever loss of emotional control, and potential for productive functioning in the structured environment of prison. In the instant case, one of the aggravating factors was simply a status factor which exists in nearly every felony murder. A second aggravating factor while present, should be discounted due to the remoteness of the prior convictions. The robbery conviction occurred in 1994 while appellant was apparently was suffering from some mental stress. The other prior convictions, battery on a law enforcement officer and resisting arrest with violence, should also be discounted particularly since this Court in ***State v. Hearns***, 961 So.2d 211 (Fla. 2007) has specifically held

that a battery on a law enforcement officer is not “forcible felony” that could be used to enhance a subsequent felony as a violent career criminal. This is so because the offense of battery on a police officer can be committed simply by unwanted touching of a police officer. The final aggravating factor found by the trial court in the instant case is the cold calculating and premeditated factor which appellant contends has simply not been proven. Therefore, when the proper aggravators are considered, the instant case is surely not one of the most aggravated and least mitigated cases. This Court must vacate appellant’s death sentence and remand the cause with instructions to resentence him to life.

CONCLUSION

Based upon the foregoing reasons and authorities cited herein, Appellant respectfully requests this Honorable Court to vacate his judgment and sentence and remand the cause with instructions to discharge him from the murder charge and to grant a new trial on the kidnaping charge. Alternatively, appellant respectfully requests this Honorable Court to vacate his judgment and sentence and remand with instructions to sentence him to life or to grant a new penalty phase.

Respectfully submitted,
JAMES S. PURDY
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Ray Jackson, #973885, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026 this 14th day of April, 2008.

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MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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MICHAEL S. BECKER
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