

IN THE SUPREME COURT OF FLORIDA

STEVEN DOUGLAS HAYWARD,)
)
 Appellant,)
)
v.) CASE NO. SC07-1234
)
STATE OF FLORIDA,)
)
 Appellee.)

)

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court
Of Nineteenth the Judicial Circuit
In and For St. Lucie County, Florida

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STATEMENT OF THE CASE AND FACTS

An indictment charged Steven Douglas Hayward, appellant, with first degree murder, armed robbery, armed burglary of a conveyance, and possession of a firearm by a convicted felon. R1 3-4. A jury convicted him of all offenses as charged, R7 1146-47, and recommended a death sentence by an 8-4 vote. R7 1189. The court entered judgment and sentence, including a death sentence for the murder. R8 1294-1304. He appeals.

A. The state contended that appellant robbed and shot Daniel Destefano as Destefano was delivering newspapers to a Fort Pierce convenience store, and that Destefano then shot appellant, who left a trail of blood at and away from the scene. Appellant contended that he had witnessed the robbery and shooting, and that he had been shot accidentally when he picked up and dropped a gun that had been left on the pavement during the struggle.

The shooting occurred before dawn on February 1, 2005 near a rooming house. A tenant, Roosevelt McDowell, heard two small gunshots and someone hollering "I don't have no more. I don't have no more." around 3 or 4:30 a.m. R24 1518-20. About 10 or 15 minutes later he heard one big gunshot. R24 1519-20. McDowell looked outside and saw a car (identified as Destefano's) at a convenience store with the driver's door and the hood open. R24 1521-23. A "Mexican guy" was standing or down on one knee, and a black man with dreadlocks was standing nearby. R24 1523-25. The black man was in the car and then walked by the Mexican to the light, looking at his hand. R24 1526. The Mexican, who had been saying, "I don't

have no more," got up and walked across the street, limping a little bit and holding his side, and McDowell did not see him again. R24 1526, 1529. The black man tried to wrap his own hand, which was leaking something, and went around behind a building. R24 1528, 1535. The black man was wearing a hat and not a stocking cap. R24 1537, 1539.

Calvin Williams was driving around 4:00 a.m. and came upon a man (Destefano) in the road. R24 1471. The man asked him to stop, saying he needed help, he had been shot. Id. He was very serious. R24 1479. He did not look good at all, he was bent over, his hand on his knee, before he got in the truck. R24 1472. Williams had him sit on a planter, and called 911 on a pay phone. Id. The truck windows were down and Williams did not hear gunshots. R24 1476. He did not see anyone else in the area. Id.

Officer Grecco received a dispatch at 4:15 and arrived two minutes later. R24 1483. He encountered Destefano about 200 yards from the crime scene. R24 1484. Destefano was a little bit pale, had very wide eyes, a look that Grecco had seen in someone who was hurt. R24 1485. He was kind of almost like panting, shallow breathing, had a hole, and was bleeding. Id. He had a look kind of towards fear, very excited, and looked pretty scared. Id. He was scared, frightened, terrified. R24 1513. He said he had been shot and where he thought he had been shot. R24 1486. EMTs arrived and began treating him. R24 1487. They shoed Grecco away as they worked on Destefano, but, before they took him away, Grecco got a statement about what he had been doing. R24 1487-88. Over

defense hearsay and Confrontation Clause objections, T24 1488-1510,¹ Grecco said he asked Destefano what had happened and Destefano said: he was delivering newspapers and a black male with a black stocking cap over his face had run up and attempted to rob him; the man shot him and he attempted to shoot back; he didn't believe he shot the man; Destefano had a .357,² and didn't know what happened to it. R24 1513-14. Grecco was with him for 10-15 minutes at the most, and Destefano was not verbal by the time the ambulance left. R24 1514.

The medical examiner testified that Destefano died from a gunshot to the chest. The bullet went at a 45° angle, passing through the left lung, diaphragm, liver, and intestines, where it was found. R25 1653-54. It caused internal bleeding, but one might see little or no blood at the scene because of a lack of external bleeding. R25 1655-56, 1653. The person would start to become light-headed, start to become dizzy, and would start to pass out as time went by. R25 1656. Destefano also had a gunshot to the left thigh; the bullet traveled horizontally and lodged against the femur. R25 1628. The wound could have slightly impaired his ability to walk. Id. The medical examiner could not tell the sequence of the shots. R25 1620.

Officers found blood on on the car door frame and on bank re-

¹ Appellant objected to the statements that the robber was a black man and wore a black stocking cap or mask. R14 1490-91.

² Destefano's fiancée testified he had a silver pistol for protection when delivering papers. R24 1462-63.

ceipts and a garage opener apparently taken from the car, and a trail of blood around the car and away from the scene. R25 1580-1608, 1618-26, 1674. A criminalist made a DNA match with appellant to these items and to blood on Destefano's pants and appellant's hooded jacket. R27 1939-52. The criminalist said that it was just as good a hypothetical as any other that appellant's blood got on Destefano when appellant was bleeding and contacted Destefano's body after seeing somebody else shoot and rob him. R27 1957. Officers found no gun or casings at the scene, and an officer said the absence of casings was consistent with use of a revolver. R25 1609-11.

On February 3, Officer Mace and other officers went to appellant's rooming house. R25 1687. They went to a back room and spoke with Dorothy ("Dot") Smith. R25 1689. While they spoke with her, appellant came out of a bathroom used by all the tenants. R25 1690-91. Questioned about a bandage around his hand, he said Dorothy had cut him in an altercation. R25 1691-92. At Mace's request, he undid his bandage and, according to Mace, his injury did not look like a cut, it looked like an infected hole that had split open. R25 1692-93. Mace went outside with appellant and asked him to come to the station to talk with a detective, and appellant agreed. R25 1693. As Mace started to transport him, appellant "said, sir, I'm not gonna lie to you, I got robbed last night and I think the guy shot me." R25 1693. Mace reported this to his supervisor at the scene. Id.

The state introduced a video of appellant's police interroga-

tion. Det. Coleman told him his girlfriend said he had come home and said that two black guys had robbed and shot him. R26 1743-44. Appellant said he had a few bags of weed and a man took his money. R26 1745. When the man got ready to turn around, appellant grabbed the man's gun and he did not realize he had been shot. Id. There was a Spanish man and a black man. R26 1746. That afternoon he had argued with his girlfriend, and went out with a friend and wound up hanging out, smoking a joint. R26 1749-50. He gave the black robber \$200 that he had received in pay at his job. R26 1750. He thought the gun was silver or black. R26 1751. He did not go to the hospital because he did not have money. R26 1752. After the robbery, he took off. Id. At the rooming house he told his girlfriend what happened and asked a man named Tony to sew him up. R26 1754, 1762. The TV news reported that the newspaper man got shot, and Tony told him about it. Id. His girlfriend said she was going to call the ambulance, but he told her not to, he had been on the same corner and got shot there too. R26 1754. The Mexican robber was small with a beer belly, and the black robber was bigger than appellant. R26 1757-58. A lady was sitting in front of the store and another man was in the area. R26 1758-59. Appellant found he had been shot when he ran around the building because he was leaking blood. R26 1759-60. He told his girlfriend he was not going to call an ambulance because he had no money, and when Tony said there was a man who got shot up there, appellant said he wasn't going to the hospital. R26 1764-65. He had been selling dope at the store. R26 1766, 1771. He had gotten the dope

earlier on 12th Street. R26 1769. The black robber had seen him sell the dope and asked for the money. R26 1772. The robbers took his money and his reefer. R26 1773-74.

The officers left the room and came back to continue the interrogation, and appellant nodded his head when they asked if he was in pain, and then he repeatedly said he need to call his mama, needed to call someone, needed to make a phone call. R26 1783-87. The officers persisted in the questioning and said they first needed to hear his story. Id. They then questioned him about his activities on the afternoon and night before the murder. R26 1787-89. He said he was selling dope when he was robbed and struggled for the robber's gun, and he took off bleeding when the gun fired. R26 1789. He discussed going to the rooming house and talking to his girlfriend and Tony. R26 1790. The officers said that the man and the woman at the scene told a different story and they did not see a Mexican. R26 1806-07. The officers suggested that the witnesses saw him approach somebody and say to give it up. R26 1807. Appellant denied touching the white man, and said there was no reason for his DNA or fingerprints to be on his car. R26 1809-10. He denied accusations that he shot a white man, and denied shooting anybody. R26 1813-14.

They told him he needed to help himself, that he was like a person in a canoe headed toward a big set of falls and they were going to help him out, they were going to reach in and pull him out. R26 1815-17. They asked why he thought they had come with 20 police cars looking for him. R26 1818. They were giving him the

opportunity to talk, opening the door wide for him, giving him a hand up, they were there to help him and he should help himself. R26 1820.

He said he needed a pain pill and they told him they would take care of him. R26 1821. The officers said appellant was going down for the whole thing, the man had died and he better start telling the truth right away. R1821-22. Appellant then said that he was sitting on a crate and saw a man shoot the man, he saw them fighting. R26 1822. The man dropped the gun and appellant reached to pick it up and was watching for him because he thought he was coming back and the gun fell and shot appellant. R26 1823. Both men had a gun. R26 1824. The robber had gone right by appellant and grabbed the other man. Id. Appellant had been smoking a joint when the robbery started. R26 1827. The white man never fired a shot and he thought the robber shot him one time. R26 1828. Appellant sold the gun for \$50. R26 1829. At the scene, appellant went in the car to see if there was more stuff, and when he later told his girlfriend not to call the ambulance it was because he would still be in for robbery because he went inside the car. R26 1829-30.

The officers said they were going to pull appellant from the canoe and help him, but he had to start telling the truth. R26 1831. They were there to help him and he needed to help himself. R26 1832-33. They did not think it was premeditated. R26 1833-34. They were opening the door for him. R26 1834. He could help himself. R26 1835.

Det. Coleman testified to the jury that neither the woman (Jenni Crenshaw) nor McDowell identified appellant, and both said they did not see the perpetrator. R26 1841.

Dorothy Smith, appellant's girlfriend, said she and appellant got into an argument about rent money the day before the murder and he left. R27 1852. Before dawn (she put the time around five, a little before daybreak, or while it was still dark) he knocked at the window and asked her to open the back door. R27 1853. He came inside and said two men had jumped out a Chevy and shot him and tried to rob him. R27 1854. She thought he was saying that so he would not have to pay rent until she saw his hand, which was slit open. R27 1855. He was knocking on doors asking people to sew up his hand, but no one would do it. Id. He had on boots, blue jeans, a shirt and a black or blue Orlando Magic jacket with a star on the zipper or on the jacket. R27 1855-56. She asked him to go to the hospital and asked if he wanted her to call the police and he said no. R27 1856. He was sweating and shaking, and she thought he might die or collapse. R27 1856-57. She suggested calling an ambulance and he unplugged the phone, although he later plugged the phone back in. R27 1857. She went to the store around 8 or 8:30, and they watched TV before she left. R27 1857-58. The TV said someone got shot on 17th Street, and she asked him about that. R27 1858. He said he didn't do that, that they tried to rob him on 18th Street. R27 1859. At some point he put \$10 in the drawer and she got it. R27 1859. There was blood on the bill. R27 1860. She saw the police at the store. R27 1860. Appellant

was not there when she got back home. R27 1861. There were clothes everywhere and he had packed his bag. R27 1861. He later returned, and said he was leaving, but she persuaded him to stay. R27 1861-62. She suggested going to the hospital or calling the police, and he said the police would not believe him and the hospital would do nothing for him. R27 1863. The next day he sold a silver gun to Montavious Gatlin, known as Prophet, for \$100. R27 1863-64. (The name is also spelled "Profit" in the transcripts.)

The state put into evidence CDs of two phone calls between appellant and Smith. On the first, Smith said the officers had gotten his jacket and threatened to take her to prison. R27 1876-79. Appellant said he had lied to her because he did not want her to know anything, and she could have told the police only the lie that he told her. R27 1881, 1883. He told the detective the same thing he told her and Tony. R27 1884. He told him he watched the robbery and heard three or four shots, and said he did not shoot anybody. R27 1888. He picked up the gun and was looking to see where the black man went and the gun fell and went off. R27 1888-89. Smith said the police kept trying to threaten her. R27 1891-92. Appellant said he told the officer his jacket was a Magic Johnson jacket, he did not shoot the man, and he could be charged only with picking up a gun after a fight. R27 1892. Smith said the police threatened her with prison. R27 1896. She said they didn't have the gun and appellant told her not to say that. Id.

The state apparently also played the second conversation, although the transcript of it appears separately from the trial tran-

script. R4 488-512. Appellant said he picked up the gun, and it fell and fired. R4 490. He told Smith to get "them three pounds of reefer" or a pound and a half of reefer, that he had told her to hide. R4 497-98. Smith replied that he should not be talking like that on the phone, he was setting her up, and he said she did not understand. R4 498. Appellant said the police knew there was no reefer in the room because they searched it. R4 501. Smith later said that the police said "they found out we sold a three fifty-seven and they say why you lying to us." R4 502. Later still, appellant said he stole the gun and sold it and when he saw the gun on the ground it was easy money, and he looked in the car after he got the gun, which had gone off when he picked it up and dropped it. R4 504-05. He told Smith to give something to his brother Charles. R4 510-11.

On August 16, 2005, the murder weapon, a .22 caliber revolver, was found in a laundry that had been used in common by the tenants at the rooming house before the building was sold in July 2005. R27 1964-66, 1970-75; R28 2015-18. Bloodstains under the grip of the gun matched appellant, although the criminalist could not say that appellant fired the gun. R28 2030-32.

Appellant testified on his own behalf. He said he and his girlfriend had an argument and he went out and bought marijuana. R28 2050-52. He said Smith did not ask for rent money. R28 2074-75. He eventually wound up at 17th Street, where an old lady was sitting in front of a building. R28 2052-53. He was sitting on a crate and saw the newspaper man make a delivery and start to get

back in his car. R28 2053. A man came up to the victim and said something like give me what you got. Id. They were arguing and the robber, a black man, hit the victim and the gun went off and they struggled. R28 1053-54. The robber had on a mask, a stocking cap, R29 2146, and picked the victim up and brought him toward the car and they were struggling. R28 2054. Two shots went off and then another one. Id. The robber picked something off the ground and then went inside the car before walking away. R28 2054-55. The robber left with a silver or plastic gun and the white man got up and walked away. R28 2055, R29 2165. Appellant saw the gun on the ground and thought he could sell it. Id. He reached down to pick up the gun while still watching the men. Id. The gun fell from his hand and apparently went off and shot his hand and he saw blood when he reached down and picked up the gun. Id. It was not a loud bang when his hand was shot. R29 2144 He touched his hand and it split open. R28 2056.

He wasn't thinking clearly and he looked to see if he could get anything in the car. Id. He bled while he was looking in the car. Id. He then followed the same path as the robber. Id. He didn't tell the police the truth about the way he went because he was in trouble for touching the gun because he was a convicted felon, and that's why he told the police he never touched the gun or went in the car. R28 2057. He had eleven felony convictions, two petty theft convictions. R28 2058-59.

He went home and got Smith to open the window. R28 2059. Inside the rooming house, he asked if anyone had something to sew his

hand. Id. Smith said he needed to go to the hospital, but he said he couldn't because his blood was at the scene. R28 2060. He lied to her about what happened so she couldn't tell the police that he went in the car. Id. He told her two men robbed him. Id. Tony said he needed to go to the hospital, but he told Tony that he had no money for the hospital. R28 2061. Tony came back in about ten minutes and said somebody else got robbed, and appellant said he couldn't go to the hospital because he knew what happened and was there when it occurred. Id. Smith said he needed to go to the hospital and she grabbed the phone but he unplugged it. R28 2062. Appellant denied putting a ten dollar bill in the dresser. R28 2086. He never possessed or sold a silver gun. R28 2062. He sold the .22 to Profit, and he assumed Profit put it in the laundry room. R28 2063. It was the only gun appellant had. R28 2063-64.

He was behind the door when Dorothy opened it to the police two days later. R28 2065. They said they were looking for Abraham Johnson and one of the officers had a shotgun. Id. When the officers came in, appellant had cocaine rocks in his pocket and he hid them in the apartment. R28 2066, R29 2132. An officer told appellant to let him see his hand, and, after he looked at it, asked him what happened to his hand. R28 2067. Appellant said to ask Smith, and she said she cut him. Id. Det. Flaherty told Mace to "take him down," Mace handcuffed appellant and took him out the door. R28 2068. Officers also had Profit in handcuffs. Id. Appellant was taken to the station and handcuffed in a room. Id.

When they said the victim had died, he realized he had to tell

the truth because the police were implicating him in murder. R28 2105.

On the morning of February 1, appellant had on a Orlando Magic jacket and a pair of jeans, and was not wearing any type of mask or stocking cap. R28 2069. The hood of his jacket was not up; it got bloody when he pulled it over his head when he was taking the jacket off when he got home. R29 2153. He denied that he came into contact with Destefano, and said his blood could have gotten on Destefano's pants when an officer took them to the crime scene. R28 2070-72, R29 2155.³

B. In the penalty phase of jury proceedings, the state presented evidence that appellant had previously been convicted of the second degree murder and robbery in the death of Sabian Darosh. Michael Ferris said he was outside a bar when he heard shooting. Appellant and another man were shooting Uzis into the ground. R31 2394-95. Appellant told Darosh to lie down, but Darosh turned away and appellant shot him in the leg, apparently striking a major artery. R31 1297-98. The gun jammed as appellant tried to fire at Darosh again. R31 2400. Appellant left with two other men. Id. Darosh died of his wound. R31 2401.

³ Officer Garrason testified that Officer Holmes brought Destefano's pants from the hospital to the crime scene. R25 1628. Garrason did not remember how the pants were packaged. R25 1630, 1638-39. Garrason took the pants directly to his van outside the crime scene, and he did not see Holmes take them out of the bag and rub them in the blood in the parking lot. R25 1639. Holmes himself did not testify, and Garrason did not testify to knowing what Holmes did before Garrason noticed him at the crime scene.

Lt. Tedder said appellant originally denied taking part in the murder and said the persons involved were from Fort Lauderdale. R21 2412-13. Interviewed again, he said he was at the bar and ran from the scene, and men from Fort Lauderdale committed the murder. R31 2414. The state put into evidence his convictions for murder and two counts of robbery. R7 1183, R31 2426.

Destefano's sister, fiancée, and mother made statements about Destefano. R31 2428-38.

Dr. Reardon, a psychologist, testified for the defense. Appellant was the product of an affair that his mother had, and his older siblings were half siblings. His father used alcohol frequently, nearly daily, and was typically intoxicated in the home in the evening. The father was able to work and was a functional alcoholic. He was typically not available for any kind of interaction of significance while he was in the home. His relationship with appellant amounted to offering appellant alcohol starting when he was approximately five years old. R31 2442-43.

In prison, appellant volunteered to do kitchen work and volunteered to help others in sports activities as a sports referee. R32 2443-44.

The father did not provide emotional support or appropriate guidance, and appellant relied on his older siblings growing up and he sought to please others. R31 2443. He had limited contact with his mother since she was a primary support for the family, working at least one full time job during his childhood. R31 2444.

Appellant was the product of a dysfunctional family. His father was inaccessible and usually intoxicated, but his family apparently did not see the lack of support from the father as an unusual thing. Id.

Reardon testified that appellant was a loving family member and his family maintained contact and support for him while he was in prison. R31 2444-45.

School records showed appellant was consistently significantly below age and grade level, and test scores indicated that, despite his average intellectual ability, his academic function was far below what he should have been able to achieve. In part the school problems were related to a vision problem. In seventh grade, he was up to almost a fifth grade math level in math, a second grade reading level and a third grade spelling level. R31 2445-46.

He had a full scale IQ of 91, just barely within the average range, and was put in special education classes because of his problem scores. He showed some progress but remained considerably below his age grade level throughout his time in school. He showed below average achievement on 10 or 13 areas assessed by the Standard Achievement Test when he was 15, just before he stopped attending school. He earned a G.E.D. in the Department of Corrections. R31 2447-48.

Nothing in his history indicated significant psychosis. He expressed suicidal thoughts while in the Department of Corrections. R31 2448.

Appellant had a history of substance abuse beginning when he drank alcohol at home at his father's instigation. He kept drinking in his teenage years and began to use marijuana. He used cocaine a couple of times, but did not continue. R31 2449-50.

Appellant had one son who was born while he was in prison and was taken to visit with him when he was in prison, and he had a chance to spend time with his son after his release. R31 2450.

The Department of Corrections confirmed that appellant worked in the community, which allowed him to provide financial support for his son. His DOC work history showed that he received outstanding and satisfactory ratings for his work. R31 2451-52.

Appellant was rated as having a good adjustment to prison, and he had a positive attitude. This rating was after the suicidal thinking: once he had made that change, his behavior and attitude improved. His adjustment to prison life also improved significantly. R31 2452.

At the time of the murder, appellant had a cyst in his mouth that needed medical attention, and he didn't have money to pay for treatment. He also had problems with his foot and teeth and could not pay for treatment. R31 2452-53.

Dr. Reardon testified appellant had sufficient intellectual ability to undergo rehabilitation. He demonstrated several skill areas he could use in prison, including plumbing and working with cement. He could learn additional skills, and he had satisfactory and outstanding ratings in the work that he had done. He showed a special ability to apply himself in learning academic skills. Hav-

ing gone from a childhood history of academic problems, he later applied himself and took a GED preparation course and was successful in that. He had already demonstrated, and he could demonstrate again in the context of DOC, that he had the potential for rehabilitation in the controlled environment of prison. R31 2454-55.

Terrance Hayward, appellant's older half brother, testified about appellant's family background. When appellant was five, his father moved in and Terrance's father moved out. Appellant's father, Tony Johnson, was an alcoholic and did not hide it. Terrance loved and cared about appellant. R31 2465-67.

Appellant's older half-sister, Theresa Williams, also testified about the family. Like Terrance, she had a different father than did appellant. Her father was Carl Hayward. Between appellant's birth and age five, his mother took care of him, and was also the father figure, as Carl worked out of town and was not around much. The other children also had to assume that role. Appellant's dad was a pretty obvious alcoholic. Their mother had to work two jobs to take care of them because neither Carl nor appellant's dad was there. Theresa had to take care of the kids and cook for them. A lot of times the children got on Steve, and they beat him a lot. Theresa moved out when she was 17. R31 2469-74.

Debra Fleury, another older sister, testified that appellant's stepfather could not provide appellant parental support. Their mother was busy working two jobs, trying to support the family. She provided a good clean home, and food and clothing as best she could, but she was out of the home a lot. Appellant got parental

guidance pretty much from his siblings. Once in a while Theresa had to give him a whooping, that was the way he was disciplined, the way he was taught. Between ages 13 and 14, he started getting in trouble and running the streets. He was hard headed, a little angry. A little cousin came to live with them and took his place as the baby boy, pushing appellant to the side. R31 2477-80.

Barbara Johnson, appellant's mother, also testified. She had six children and appellant was the baby. She also undertook to care for a nephew, who was treated as a brother in the family after appellant. She was not married to appellant's father, Tony Johnson, when appellant was born, and Johnson did not move in until appellant was five. During appellant's first five years, she worked as a cook in restaurants, and at some point had two jobs to support the family. Appellant moved out around age 14. He did not do very well in school. She tried to get him help from law enforcement, but never got any help. It would have been pretty evident to anyone in the house that his father was an alcoholic, and looking back it had an effect on him. She tried to get help for him, but could not afford it even after he got out of jail. R31 2484-89.

C. At the Spencer hearing, appellant's mother testified that, at the time when it was happening she did not realize it, but she had since heard that appellant's two older brothers were beating him up. R36 2759-60. The boys denied it, but the lady across the street told her they were beating him up. Id.

Debra Fleury testified that the family situation was worse than portrayed in the testimony before the jury. R36 2763. Her

oldest brother, Derrick, was in prison in Georgia for armed robbery, and her brother Leon was in prison and had a drug problem. Id. Leon had twice wiped out their mother's checking account by writing checks. R36 2763-64. Her sister was a recovering drug addict. R36 2764. Terence, who had testified before the jury, was doing good in the military, but then he got on drugs, he was discharged from the military and it got worse, and he ended up on crack and was arrested. Id. She summarized the situation (id.):

So out of the six of us that my mother had, five of my brothers and sisters, all of them have been in jail or -- or are in prison right now, or are in a drug rehab where they cannot function as normal people in society. When I say that, I mean they don't have their homes, they don't have their kids. They're doing the best they can with what they have to do.

Appellant's father had some anger problems and he was an alcoholic and was not a father figure. R36 2765. The family was very dysfunctional and "only one person of my mother's children is not in jail and doing the things they're supposed to be doing and not in jail or in prison or robbing people or whatever." R36 2766.

D. In sentencing appellant to death, the court found in aggravation that appellant had previously been convicted of the violent felonies of second degree murder and two counts of armed robbery, to which factor it gave extremely great weight, and it merged two other circumstances and gave them great weight as a single circumstance: that he committed the murder while engaged in a robbery and committed it for pecuniary gain. R8 1269-74.

The court refused to consider in mitigation the fact that the murder was not premeditated and not cold and calculated and was not especially heinous, atrocious or cruel. R8 1275-77.

The court did find in mitigation that appellant: would serve a life sentence (very little weight), was deprived of a father role model during much of his childhood (some weight), was a loved member of his family (little weight), had academic problems throughout his school years (little weight), made a satisfactory adjustment to prison (little weight), was experiencing stress at the time of the offense (little weight), had substantial capacity for rehabilitation (little weight). R8 1277-89.

The court did not find in mitigation that appellant tried to get along with his peers, that he provided support for his son, that his family members had suffered mental illness, that he had a satisfactory work history. R8 1280-86.

The defense had also argued in mitigation that appellant did not suffer from any intellectual or psychiatric deficit and therefore could live in an open prison environment without being a threat or danger to others. The judge said that this factor was a conglomeration of other proposed mitigators, and ruled that it would reincorporate its findings and determination of any weight with regard to those mitigators. R8 1289.

SUMMARY OF THE ARGUMENT

1. The court erred in allowing into evidence Destefano's statement, in response to questioning by Officer Grecco, that the robber was a black man in a stocking mask. The statement was not admissible as an excited utterance, as Destefano had ample time to reflect and the state did not show a continuous state of excitement that deprived him of the power of reflection. It also was not admissible as a dying declaration, as the state did not show that he believed death was imminent and inevitable, and he had no hope of recovery. Even if the statement were admissible hearsay, its use violated the Confrontation Clause. Destefano made the statement in response to police questioning a half hour or more after being shot. Hence, the statement was testimonial and inadmissible. Further, it could not be admitted under any possible exception for dying declarations or rule of forfeiture.

2. The court erred in denying the motion to suppress. A group of officers confronted appellant in the narrow hallway at the entrance to his tiny room in a rooming house. A reasonable person in this situation would assume the police had command of the situation and would acquiesce to their authority. They asked appellant to remove his bandage from his hand and questioned him about his injury. A detective ordered his removal from the building, and outside he was asked to go in hand restraints to the police station. While in hand restraints and being placed in the back of a police car, he said he had been robbed and shot. He was taken to the police station and chained down to prevent his escape. He was

then questioned by two detectives. Throughout this sequence of events, appellant complied with the apparent authority of the police and was detained. Further, the police did not have probable cause to detain appellant. They had no physical evidence linking appellant to the crime, no murder weapon, and nothing putting appellant at the scene of the crime.

3. The judge erred in overruling appellant's objections to recorded conversations between appellant and Dorothy Smith. On the recordings, appellant directed Smith to sell a large amount of "reefer." The state maintained, with no evidentiary support, that the "reefer" was the murder weapon. Even though appellant testified that "reefer" referred to cocaine, the state argued to the jury that the "reefer" was the murder weapon, contending that appellant had control over the murder weapon after his jailing and urged Smith to dispose of it. Also on the recordings, appellant told Smith he had "to fight the mother-fucking judge with a dumb-ass lawyer and a dumb-ass bitch on my side." The state made no showing of the relevancy of this remark, which put appellant's character in a bad light. Finally, the recording showed appellant reacting with anger and indifference to Smith's statements to appellant that she was pregnant with his child and that she loved him. This evidence had no relevance to any issue before the jury, and again served only to put appellant's character in a bad light.

4. The evidence did not show that appellant killed Destefano as part of a premeditated design to take his life, so that appellant's murder conviction should be reversed.

5. The evidence also did not show that appellant was the person who robbed and killed Destefano, so that appellant's convictions must be reversed.

6. The standard jury instruction used at bar as to premeditation did not accurately describe to the jury the statutory element of "premeditated design." The judge erred in overruling appellant's objection to the standard instruction, and this Court should order a new trial.

7. The court erred in allowing the state to present the jury with victim impact evidence which the state used to compare the characters of appellant and Destefano.

8. Appellant's 8-4 advisory jury sentence is unreliable and his death sentence should be reversed.

9. Florida's death penalty procedure, in its present form, operates in an unconstitutional manner.

ARGUMENT

1. WHETHER THE COURT ERRED IN ALLOWING INTO EVIDENCE DESTEFANO'S STATEMENTS TO OFFICER GRECCO.

When Officer Grecco encountered him, Destefano said he had been shot. After the EMTs arrived, Grecco asked Destefano what had happened. Appellant made hearsay and Confrontation Clause objections to Grecco's testimony that Destefano said in response that he had been robbed by a black man in a black stocking mask. The judge admitted the statement as an excited utterance or dying declaration, and ruled that it did not violate the Confrontation Clause. The judge's rulings were contrary to law, the evidence was not harmless beyond a reasonable doubt, and this Court should order a new trial.

A. The evidence below.

Destefano was robbed and shot in the chest and in the leg around 3:00 a.m. or later, and walked away from the scene of the shooting 10 or 15 minutes after being shot. R25, 1518-20, 1526. At 4 a.m., Williams saw him in the middle of the road. R24 1471. Destefano asked Williams to stop, saying he needed help and had been shot. Id. He seemed very serious. R24 1479. Williams had him sit down, and called 911 on a pay phone. R24 1472.

Officer Grecco arrived at 4:17 and spoke with Destefano for about 10-15 minutes. R24 1483. Destefano was a little bit pale, had very wide eyes, was kind of almost like panting, was bleeding, and had a look kind of towards fear, very excited, and looked pretty scared, was frightened, terrified. R24 1485, 1513.

He said in answer to Grecco's questioning that he was delivering newspapers and a black man with a black stocking cap over his face tried to rob him and shot him, and he tried to shoot back and he didn't believe he shot the suspect. R24 1513. He said he had a .357, and didn't know what happened to it. Id.

The medical examiner said there would be minimal external bleeding from the chest wound and someone with such wounds would start to become light-headed, start to become dizzy, and would start to pass out as time went by. R25 1653, 1655-56. He would be aware that death was impending but not imminent in that he would have some notice that something was radically wrong. Id.

B. The evidence was inadmissible hearsay.

This Court reviews evidentiary decisions for an abuse of discretion, but a judge's discretion "is limited by the rules of evidence and by the principles of stare decisis." McDuffie v. State, 970 So. 2d 312, 326 (Fla. 2007). This Court reviews de novo an evidentiary ruling involving a question of law. See Linn v. Fossum, 946 So. 2d 1032, 1036 (Fla. 2006) ("Because we must decide as a matter of law whether the rules of evidence allow an expert to testify on direct examination that he or she consulted with other experts, we apply a de novo standard of review."). At bar, the evidence was admitted contrary to well-established law, so that the judge abused his discretion and erred.

Hearsay is an out of court utterance admitted to prove the matter asserted. See §90.801(1)(c), Fla.Stat. The state did not dispute that the evidence was hearsay, and hence bore the burden to

show that the statement fell within an exception to the rule. See Pressley v. State, 968 So. 2d 1039, 1042-43 (Fla. 5th DCA 2007). At bar, it sought admission under the exceptions for excited utterances and dying declarations. R24 1489-90. It failed to meet its burden to prove these exceptions.

i. *The statement was not an excited utterance under section 90.803(2), Florida Statutes.*

Section 90.803(2), Florida Statutes, provides:

(2) Excited utterance. A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The judge erred in admitting the evidence under this exception.

a. The state had to show Destefano was in a state of continuous excitement such as to deprive him of the power of reflection.

The statement must be made while the declarant is "laboring under the influence of a startling event at the time that the statement is made." Hutchinson v. State, 882 So. 2d 943, 951 (Fla. 2004). It must arise from excitement without time for reflection. Evans v. State, 838 So. 2d 1090, 1093 (Fla. 2002) says (e.s.):

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

When the time "is sufficient to allow reflection, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." Hutchin-

son, 882 So. 2d at 951.

The declarant must have remained in the state of excitement from the time of the incident to the time of the declaration. If the declarant settles down and then "once again becomes excited" the statement cannot be admitted. See State v. Skolar, 692 So. 2d 309 (Fla. 5th DCA 1997) ("a hearsay statement made long after the occurrence of the startling event is not admissible, even though the declarant once again becomes excited in the course of telling the event."). The proponent must "prove that the declarant did not engage in reflective thought." Mariano v. State, 933 So. 2d 111, 116 (Fla. 4th DCA 2006).

Hence, as the time grows between the event and the declaration, the proponent must show continuous excitement such as to deprive the person of the power of reflection. If the proponent cannot prove the length of time between the event and the statement, it cannot disprove lack of reflection and fails to meet its burden. See Hutchinson, 882 So. 2d at 951 (error to admit statement when time between event and statement "not clearly ascertainable"); see also Mariano, 933 So. 2d at 116 (discussing Hutchinson).

Further, excited utterances do not include narrative statements or statements made in response to police questioning. See J.A.S. v. State, 920 So. 2d 759, 763 (Fla. 2nd DCA 2006) ("narrative of a past event is generally not considered a spontaneous statement, [cit], nor is a statement in reply to questions from law enforcement, [cit.]."). See also Strong v. State, 947 So. 2d 552, 556-57 (Fla. 3rd DCA 2006) (statements "in response to police ques-

tioning are, by definition, not excited utterances"; citing cases).

b. Case law does not support admission of the evidence at bar.

The state failed to meet its burden at bar. Destefano was shot twice sometime after 3:00 a.m. Another third shot occurred ten or fifteen minutes later, and after that he left the area. At 4:00 a.m. (as much as an hour after he was shot), he encountered Williams. The state did not show that Destefano was excited at that time: Williams only said Destefano was "very serious" when he said he had been shot. R24 1479. Destefano had plenty of time to reflect before Williams saw him, and he had plenty more time to reflect during the 17 minutes before Grecco arrived. The fact that he was excited when he spoke with Grecco does not prove he was still so affected by the original excitement that he had been unable to reflect for the entire time since the time of the shooting.

Hutchinson involved the murder of Renee Flaherty and her three children. Renee called a friend around 7:30 p.m. and said she had fought with Hutchinson that night and thought he had left for good. She was crying when she made the call. This Court noted that the state had failed to show the length of time between the fight and the phone call, except that apparently the fight had occurred **some-time during the half hour between** 7 and 7:30 p.m. Hutchinson, 882 So. 2d at 951 Hence, this Court wrote that it could "only speculate as to whether Renee engaged in reflective thought." Id. It concluded that the trial court erred in allowing the evidence.

In Merritt v. Crosby, 893 So. 2d 598 (Fla. 1st DCA 2005), a pa-

role revocation case, an officer arrived within 20 minutes of being dispatched. He met Jeanice Pauldon, who had a welt on her forehead, a bloody nose, and a swollen lip and said Merrit punched her. Pauldon did not testify at the revocation hearing. The hearing examiner found the evidence did not support revocation, but the Commission ordered revocation based on Pauldon's statement. The First DCA found a departure from the essential requirements of law as the statement could not qualify as an excited utterance or spontaneous statement. It wrote at pages 599-60 (e.s.):

... . The rationale for these two closely related exceptions is that statements of this sort bear some indicia of trustworthiness because they were made before the declarant had any opportunity to contrive a false statement. See State v. Jano, 524 So.2d 660 (Fla.1988)(to qualify as an excited utterance, the statement must be made before there is time to contrive or misrepresent); J.M. v. State, 665 So.2d 1135 (Fla. 5th DCA 1996)(to qualify as a spontaneous statement, the statement must be made without the declarant first engaging in reflective thought). As this court recently observed in Blandenburg v. State, 890 So.2d 267 (Fla. 1st DCA 2004), as the interval of time between the event and the statement increases, so too does the opportunity for the declarant to engage in reflective thought. Here, at least 20 minutes passed before Pauldon made her statement, which was ample time for her to engage in a reflective thought process, and the record is otherwise devoid of any indication that she remained under the stress of the alleged event and had not regained her composure by the time she spoke to the deputy. Compare Lopez v. State, [888 So.2d 693 (Fla. 1st DCA 2004)].⁴ We thus reject the Parole Commission's contention that Pauldon's statement constituted either an ex-

⁴ In Lopez, an officer spoke to the still-excited victim of an armed kidnapping and assault **within six to eight minutes** of the crime **while the assailant was still in the victim's presence**. The First District held that the statement was an excited utterance, but that its admission violated the Confrontation Clause even though the defense questioned the victim at a deposition. This Court affirmed the First DCA's ruling on the Confrontation Clause issue in State v. Lopez, 974 So. 2d 340 (Fla. 2008).

cited utterance or spontaneous statement.

In Rogers v. State, 660 So. 2d 237, 240 (Fla. 1995), this Court held that **eight to ten minutes** would have been sufficient time for reflection but for the fact that the state presented direct eyewitness testimony of the declarant's continuously hysterical condition in the eight to ten minutes between seeing the murder and making the statements.

Appellant notes that Blandenburg v. State, 890 So. 2d 267, 270 (Fla. 1st DCA 2004), makes the sweeping statement that "common thread running through those cases, however, is that at the time of the statement, the declarants were either 'hysterical,' severely injured, or subject to some other extreme emotional state sufficient to prevent reflective thought." It cited only National Union Fire Ins. Co. v. Blackmon, 754 So. 2d 840, 843 (Fla. 1st DCA 2000), as a case involving a severely injured declarant. There, the court held admissible an emergency room statement of the decedent in a car crash. It gave no details surrounding the statement except to say that it was made about an hour after the accident, and it cited Henyard v. State, 689 So. 2d 239, 251 (Fla. 1996). In Henyard, this Court held admissible a statement by an hysterical woman who had been raped and shot and said her children had been abducted. One must assume that the facts surrounding the statement ruled admissible in National Union were similarly compelling. Significantly, National Union also held **inadmissible** the statement that another person involved in the accident made to an emergency medical

technician, so the court could not have meant that all statements by persons receiving emergency medical treatment are excited utterances. Thus, Blandenburg apparently meant by "severely injured" declarants those that had an immediately disabling injury such that they were bereft of the power of reflection.

Likewise, the case at bar does not fit the exception for cases in which the record clearly shows that the declarant was in a continuously hysterical condition as a result of the event. Cf. Bell v. State, 847 So. 2d 558 (Fla. 3rd DCA 2003) (still hysterical victim of attempted armed kidnapping kept going to the window and looking outside to assure herself assailant not there, and was so upset she could not speak at all 50 minutes after attack); Rogers; Rivera v. State, 718 So. 2d 856, 858 (Fla. 4th DCA 1998) (officer arrived "almost immediately" after victim was hit and victim was crying hysterically, shaking uncontrollably, and telling officer to keep defendant away from her).

In this regard, we may compare the facts at bar with those in Williams v. State, 967 So. 2d 735, 748-49 (Fla. 2007) (admitting statement under Rogers' hysteria standard). Williams tried to rape a pregnant young woman, he bit her, and he stabbed her at least seven times. The hysterical victim called 911 and said the attack had happened about 20 minutes before, and she had been stabbed in the heart and was dying, she was in obvious pain, and feared for her life and the life of her unborn baby.

By contrast, the facts at bar show ample time for reflection

and the state did not show a state of **continuous** hysterical excitement such as to deprive Destefano of the power of reflection. Calvin Williams did not testify to a state of excitement corresponding to that of the victim in the Williams case. Destefano did not have the special circumstances of the victim in Williams, a pregnant young woman who was in a hysterical state after being bitten and stabbed in an attempted sexual assault, and who thought she was dying from a stab wound to the heart.

At bar, the state did not show that Destefano was without the power of reflection between the time he was shot and the time that Grecco questioned him. The court erred in allowing the statement into evidence as an excited utterance.

ii. *The statement was not a dying declaration under section 90.804(2)(b), Florida Statutes.*

Section 90.804(2)(b), Florida Statutes, provides:

(b) Statement under belief of impending death.--In a civil or criminal trial, a statement made by a declarant while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or the circumstances surrounding impending death.

The state failed to show that Destefano believed death was imminent and inevitable, and had no hope of recovery. Hence, the judge erred in admitting the statement as a dying declaration.

The "utmost care and caution should be exercised by the court in the admission of dying declarations." Gardner v. State, 55 Fla. 25, 45 So. 1028, 1031 (1908). The proponent must show that the declarant believed death was imminent and inevitable, and had no

hope of recovery: "This absence of all hope of recovery, and appreciation by the declarant of his speedy and inevitable death, are a preliminary foundation that must always be laid to make such declarations admissible." McRane v. State, 142 Fla. 240, 194 So. 632, 636 (Fla. 1940) (quoting Lester v. State, 37 Fla. 382, 20 So. 232, 233 (Fla. 1896)). See also Williams, 967 So. 2d at 749 (Fla. 2007) ("declarant must believe death is imminent and inevitable with no hope of recovery."); Dixon v. State, 13 Fla. 636 (1869) ("in order to lay the foundation for receiving a statement as a dying declaration, it should be shown to the satisfaction of the court that at the time it was made the deceased not merely considered himself in imminent danger, but that he evidently believed he was **without hope of recovery.**") (emphasis in original). Dixon cited to the formulation of the declarant's state of mind in Woodcock's Case, 2 Leach C. Law 563 (1789):⁵

"Dying declarations," as they are called, are admitted in evidence upon the general principle that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. Woodcock's Case, 1 Leach, 502.⁶

⁵ Sometimes also referred to as King v. Woodcock.

⁶ Thus, the two rules applied at bar require opposing psychological states. Excited utterances are made by persons in such a state of agitation as to have lost the power of reflection. But dying declarations are made by those who have contemplated that death is at hand and all motivation for falsehood has gone.

Although the proponent need not show that the declarant actually said he or she considered death inevitable without any hope of recovery, it must show that the declarant so believed. The state failed to meet its burden at bar.

McDowell saw the "Mexican" (Destefano) standing on one knee. The man then walked out of sight. McDowell did not hear anything such as "I'm dying," and did not testify to anything that would make one think that the man believed death was imminent and inevitable with no hope of recovery.

Williams encountered Destefano sometime in the next hour. Destefano said he needed help and had been shot and was bent over and very serious, but Williams did not testify to anything that could indicate that Destefano believed death was imminent and inevitable with no hope of recovery.

Officer Grecco said Destefano was a little bit pale, had very wide eyes, like in someone who was hurt, he was kind of almost like panting, shallow breathing, had a hole, and was bleeding, and had a look kind of towards fear, very excited, and looked pretty scared. Again, Grecco's testimony did not show that Destefano believed death was imminent and inevitable with no hope of recovery.

Further, the medical examiner testified for the state:

Q Tell me what type of process the victim goes through as he continues bleed out. What affect does it have on his mental state and how aware is the victim of the gravity of the situation?

A What basically starts to happen is that the individual starts to become light-headed, starts to become dizzy. Then as the time goes by this particular individual tends to start to actually just pass out.

Q And so would the individual be aware of the fact that death -- **is death isn't eminent, it certainly is impending?**

A Oh, yes. The individual would have some notice that something is radically wrong here, yes.

R25 1655-56 (e.s).

Thus, the medical examiner testified only that the individual (about whom the medical examiner knew nothing) would have known that death was **impending but not imminent** because he would notice something was radically wrong in that he would be light-headed, dizzy, and would eventually pass out. Such evidence does not establish that Destefano believed death was "imminent and inevitable with no hope of recovery" was required by Williams and Dixon.

Further, the state did not show that Destefano would tell from his wounds that he was facing "certain and immediate death." Cf. Henry v. State, 586 So. 2d 1033, 1036 (Fla. 1991) (victim knew she faced "certain and immediate death" when she was burned over 90% of her body). The medical examiner testified that Destefano would have had minimal external bleeding from the chest wound, and that he would mainly perceive that he was light-headed and dizzy. His leg wound affected his mobility but was not life-threatening. Such evidence did not show that he would have thought he was facing certain and immediate death with no hope of recovery. Little can be inferred from the fact that EMT's arrived and treated him: it would be absurd to say that everyone who receives emergency medical treatment believes he or she faces certain and immediate death.

From the foregoing, the evidence fit neither of the hearsay exceptions found by the judge below.

C. The evidence violated the Confrontation Clause.

The Confrontation Clauses of the state and federal constitutions generally forbid the use of out-of-court testimonial statements in a criminal trial unless the declarant testifies at trial. Amend. VI, XIV, U.S. Const.; Art. I, §16(a), Fla.Const.

i. *The statement was testimonial.*

In Davis v. Washington, 126 S.Ct. 2266 (2006), the Supreme Court considered two consolidated cases regarding the question of when a statement is "testimonial." The Court set out the following standard, which did not constitute "an exhaustive classification of ... all conceivable statements in response to police interrogation," but which did suffice "to decide the present cases":

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 2273-74. It later again stressed the ad hoc nature of the standard, repeating that it was not exhaustive and sufficed only "to decide the present cases." Id. at 2278, n. 5.

In the first of the two cases before the Court, Adrian Davis was prosecuted for violating a no-contact order regarding Michelle McCottry. The state put into evidence a 911 call McCottry made

while Davis was beating her and then as he fled the house. Id. 2270-72. The Court granted review to decide whether the initial part of the call was a testimonial statement. Id. at 2277-78 (limiting holding to initial part of call which addressed events as they happened and not extending holding to questioning by 911 operator after Davis left).

The Court noted that "interrogations by law enforcement officers fall squarely" into the class of testimonial hearsay, and that testimonial statements are those "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." Id. at 2276. It wrote that 911 calls, especially in their initial phases, are not designed mainly to report "some past fact, but to describe current circumstances requiring police assistance." Id. It emphasized that the 911 call in question "was speaking about events **as they were actually happening**, rather than 'describ[ing] past events'". Id. (emphasis and brackets in original).

The Court found that McCottry's initial statements about ongoing events were not testimonial, and noted the difference between statements about an ongoing attack and statements about an attack that had just occurred (id. at 2277; e.s.):

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. Id., at 200, 168 Eng. Rep., at 202. The case **would be helpful to Davis if the relevant statement had**

been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

The second case before the Court involved the prosecution of Hershel Hammon for domestic battery and violation of probation. Officers responded to a call of a domestic disturbance and found Hershel's wife Amy on the porch. She seemed frightened, but said nothing was wrong and let them in. Hershel said they had argued but everything was fine now. The officers separated the couple and questioned Amy, who said Hershel hit her and attacked her daughter. Id. at 2272.

These facts presented the Court a "much easier task" than those in Davis's prosecution. Id. at 2278. When the officers arrived, Amy was under no immediate threat, and there was no ongoing violence: "There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person." Id. (citations to lower court opinion deleted). The lead officer "was not seeking to determine (as in Davis) 'what is happening,' but rather 'what happened.'" Id. Hence, the Court concluded, Amy's statement was testimonial and its use violated the Confrontation Clause.

This Court followed Davis in State v. Lopez. An officer arrived 6-8 minutes after an attempted abduction, and encountered the upset and nervous victim, Ruiz, who "surreptitiously" indicated that

Lopez, who was standing nearby, had forced him from his home at gunpoint. This Court held that Ruiz's statement was testimonial since there was no "ongoing emergency" when the officer arrived:

Applying this analysis to the instant case, we conclude that Ruiz's statement to Officer Gaston was testimonial, and is therefore within the scope of Crawford. The circumstances here indicate that there was no ongoing emergency at the time Officer Gaston questioned Ruiz. Officer Gaston arrived at the scene of the crime six to eight minutes after the crime had been reported. Lopez, 888 So.2d at 697. At the time Officer Gaston approached him, Ruiz was standing in a parking lot about twenty-five yards away from Lopez, separated from his alleged abductor in much the same way the declarant in Hammon was separated from defendant Hammon when the police arrived. Id. at 695. A short time later, Ruiz revealed that the gun that was allegedly used in his abduction was under the front passenger seat of his car, presenting no immediate danger at the time Officer Gaston arrived. Id. Even though the questioning of Ruiz was not as formal as it may have been in Hammon, it seems clear that the "primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." Davis, 126 S.Ct. at 2274. Therefore, the statement in Lopez was testimonial.

State v. Lopez, 974 So. 2d at 347.

As in State v. Lopez and the Hammon case decided Davis, Destefano told Officer Grecco about past events rather than events that were ongoing. Grecco did not seek to help Destefano with his physical condition, was not asking questions aimed at a medical diagnosis, and did not relay information to the paramedics, who in fact shooed him away. He sought information about a crime that had occurred well before he arrived. The use of Destefano's testimonial statement violated the Confrontation Clause.

ii. *No dying declaration exception applies to the statement, and no rule of forfeiture applies to it.*

At bar, the judge mentioned, but declined to rule on, two other possible grounds for admission (R24 1508):

Well, just on practical grounds as well, there may not be a case that has actually said this as yet, but for someone to engage in conduct that results in the almost immediate loss of life of someone, to state that anything that that person said as a dying declaration cannot be used in a court of law against them because of a lack of an opportunity to assert his or her Sixth Amendment Right, I think that is just a ludicrous proposition.

Nevertheless, I'll wait for a court of higher authority than I to make that the law of the land. But perhaps it has, but I have not been shown any particular case that actually does indicate that dying declarations are an exception to the Sixth Amendment of the Constitution. But it certainly seems like a logical exception that as a practical matter must clearly exist.

In this regard, the judge was apparently referring to two items of dicta in Crawford v. Washington, 541 U.S. 36 (2004), concerning a possible exception for dying declarations and a possible exception under a rule of forfeiture.

a. No possible exception regarding dying declarations applies at bar.

The Crawford dissent said well-established hearsay exceptions existed when the Bill of Rights was adopted, and that these exceptions applied to the Confrontation Clause. The majority responded that it found scant evidence that well-established hearsay exceptions applied to testimonial statements in criminal trials as of 1791, but added in a footnote that there **might** be an exception for dying declarations (id. at 56):

FN6. The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., Mattox v. United States, 156 U.S. 237, 243-244

(1895); King v. Reason, 16 How. St. Tr. 1, 24-38 (K.B.1722); 1 D. Jardine, Criminal Trials 435 (1832); Cooley, Constitutional Limitations, at *318; 1 G. Gilbert, Evidence 211 (C. Lofft ed. 1791); see also F. Heller, The Sixth Amendment 105 (1951) (asserting that this was the only recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See Woodcock, supra, at 501-504, 168 Eng. Rep., at 353-354; Reason, supra, at 24-38; Peake, supra, at 64; cf. Radbourne, supra, at 460-462, 168 Eng. Rep., at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis.

It is understandable that the Court did not rule that dying declarations form an exception to the Confrontation Clause, given how little historical evidence supports such an exception. The only American precedent cited by Crawford in this regard was Mattox, which contains only dicta on the subject. Mattox had been convicted of murder based on the testimony of various witnesses. His conviction was reversed, and by the time of his retrial two of the witnesses had died. He contended that use of the witnesses' **prior trial testimony** violated the Confrontation Clause. The Court found no violation because he had been afforded his right to confront and cross-examine the witnesses at his prior trial. Mattox v. United States, 156 U.S. 237, 240-244 (1895). The Court wrote in dicta that dying declarations are admissible in criminal cases, citing the opinion in Mattox's earlier appeal (id. at 243-44):

For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination, nor is

the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the chief justice when this case was here upon the first writ of error (146 U. S. 140, 152, 13 Sup. Ct. 50), the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal, if not greater, reason for admitting testimony of his statements which were made under oath.

The discussion in the prior case was also dicta. At Mattox's earlier trial, the government introduced **without objection** the dying declaration of the victim, Mullen, who told a doctor that he did not know who shot him. Mattox v. U.S., 146 U.S. 140, 142 (1892). Mattox then sought to bring out on cross-examination that Mullen said at the same time that Mattox was not the killer. Id. The Court wrote in dicta that dying declarations are admissible, and then held that the judge erred in limiting Mattox's cross-examination of the doctor. Id. at 152-53. The Court did not discuss the Confrontation Clause, and the discussion of dying declarations was hardly necessary to its ruling that the defense cross-examination had been improperly limited.

Crawford also cited to King v. Reason, 16 How. St. Tr. 1, 24-38 (K.B.1722). Crawford did not say the Court had ever considered King v. Reason as proof of a firmly established hearsay rule that had been meant to be an exception to the Confrontation Clause at

the time of the Founding. It simply cited it as an early case allowing a dying declaration in England.

King v. Woodcock, 1 Leach 500, 168 Eng. Rep. 352 (1789) and King v. Radbourne, 1 Leach 457, 168 Eng. Rep. 330 (1787), were also cited in Crawford, but the Court can hardly have meant that these English decisions, made **more than a decade after the Declaration of Independence**, could have weighed on the minds of the framers. The Americans undertook the Revolution in part because they thought the English judges and courts were trampling on the people's rights in criminal cases. The Americans cannot have meant to incorporate into their Constitution any post-1776 English decision favoring the Crown.

As already noted, King v. Woodcock and Woodcock's Case are the same decision. It was often cited in the Nineteenth Century, but was not uniformly accepted as an authority. Most notably, it was strongly criticized in Marshall v. Chicago & G.E. Ry. Co., 48 Ill. 475 (1868), in which the Illinois Supreme Court wrote that it could not circumvent the constitutional right of confrontation.

From the foregoing, there is no evidence of an intent to make dying declarations an exception to the Confrontation Clause at the time of the Founding, and the Supreme Court's dicta in Crawford, which merely addressed an argument in the dissent, did not create such an exception.

Regardless, the statements at bar did not amount to a dying declaration. The state did not show that Destefano saw that he

faced immediate death without hope of recovery. He did not say he was dying, Grecco did not tell him he was dying and did not say that he even seemed to think he was dying. The EMTs did not testify, and the medical examiner testified only that someone in his condition would think death was impending, rather than imminent, in that he would notice something was radically wrong because he would have trouble breathing. The medical examiner could throw no light on whether **Destefano** had a settled belief that he faced immediate death without hope of recovery. Thus, even if there were an exception for dying declarations, it could not apply at bar.

b. No rule of forfeiture authorizes the use of Destefano's statement.

The second item of dicta in Crawford occurred in a discussion of Ohio v. Roberts, 448 U.S. 56 (1980), a decision that Crawford overruled. Under Ohio v. Roberts, the Confrontation Clause did not bar statements bearing indicia or reliability. While criticizing Ohio v. Roberts, Crawford mentioned in passing the "rule of forfeiture" (Crawford, 541 U.S. at 62):

The Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See Reynolds v. United States, 98 U.S. 145, 158-159 (1879).

Reynolds was prosecuted for bigamy. Amelia Jane Schofield had testified at an earlier trial for the same offense that she had been married to Reynolds. After Reynolds was re-indicted, Schofield did not appear at the new trial. The prosecution showed that Reynolds had prevented her appearance by thwarting attempts to subpoena her, and it introduced her testimony from the first trial. Reynolds argued that use of her testimony **from the prior trial** violated his right of confrontation. The Court rejected Reynolds' claim, citing the rule formulated in Regina v. Scaife, 17 Ad. & El. N. S. 242, that "if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and **in the presence of the prisoner**, might be read." Reynolds, 98 U.S. at 158 (e.s.).⁷

In view of this rule, Reynolds said: "if a witness is kept away by the adverse party, his testimony, **taken on a former trial between the same parties** upon the same issues, may be given in evidence." Id. at 158-59 (e.s.).

Manifestly, the Reynolds rule does not apply at bar. Destefano gave no testimony at a prior trial, and the state did not show that appellant procured his absence after a prosecution had commenced in which he had given prior testimony.

⁷ Reynolds also cited two American cases, Drayton v. Wells, 1 Nott & M. 409 (S.C. 1819) and Williams v. State, 19 Ga. 403 (1856), which have only dicta on this issue. Drayton involved a second trial about a contractual dispute. The court ruled inadmissible the prior testimony of a witness who could not remember the details of the contract at the second trial. In Williams, the court held that the prosecution had failed to show that Williams had procured the absence of the complaining witness **after the prosecution began**.

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

Having injected error into the trial, the state must show it was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The state used the evidence because it calculated that it would affect the outcome, and there is a reasonable likelihood that it did. The error at bar was not harmless beyond a reasonable doubt. Appellant's conviction and sentence were obtained in violation of the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amend. VI, VIII, XIV, U.S. Const; Art. I, §§ 9, 16(a), 17, Fla.Const. This Court should order a new trial or resentencing.

The final words of the victim would have an obvious and profound emotional effect on the jury. Jurors are human beings and they would pay the closest attention to such evidence. Further, the evidence provided important corroboration of Roosevelt McDowell. Even the prosecutor acknowledged problems with McDowell's testimony, R30 2245, said it was difficult to understand, R30 2246, and even said parts of it was inaccurate. R30 2263.

Further, Destefano provided the state's evidence that the robber was a black man in a mask. The state exploited this evidence by pointing to the blood on the hood on appellant's jacket and saying that he had masked his face with the hood. R30 2271-72. Appellant presented a complete defense to the murder charge, and there was a good contested issue for the jury. One cannot say that Destefano's final accusatory words did not tip the scales in favor of the state, and this Court should order a new trial.

II. WHETHER THE COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Appellant moved to suppress statements he made to the police, alleging violations of the Fourth, Fifth, and Sixth Amendments. R3 341. Appellant contended that he had been illegally detained and that the officers lacked probable cause. R21 76-77, 81. The judge denied the motion after an evidentiary hearing, ruling that appellant consented to go the station and that the officers had probable cause to arrest him. R21 91-96. The judge erred.

A. The evidence at the hearing on the motion to suppress.

Appellant was in the bathroom at his rooming house when at least five⁸ police officers arrived. R11 29-30, 53.⁹ He came out and found three of the officers at the door of his "tiny room," speaking to his girlfriend, Dorothy Smith, and two other officers were "in the back." R11 28-30, 53, 55. Appellant would have had to make his way past the officers, who "pretty much" occupied the entire hallway, taking up all the area, including an officer with a shotgun. R11 56.¹⁰

⁸ When questioning appellant at the station, Det. Flaherty noted that "there was 20 police cars there" and they had come "right to" appellant. R26 1818.

⁹ When the officers arrived, Det. Coleman was aware of Deste-fano's statements to Grecco and of a statement from McDowell, and was aware of the blood spatters in the area of the shooting. R11 12-20. Also, the police had a report from Linda Roberts that a man at the rooming house had a possible gunshot wound. R11 23.

¹⁰ Det. Flaherty said it was a "possibility" that one of the officers had a shotgun, R11 54, then said there was not a display of force because "there's a lot more that we could do than a shotgun," id., then said a shotgun cannot be put in a pocket. Id. He

In this situation, appellant was confronted by Det. Coleman and Officer Mace, who asked to look at his hand, which was bandaged. R11 30. Mace questioned him about the injury, and, according to Mace, appellant said Smith had cut his hand in an argument. R11 30-31. Mace asked to look at the injury, and appellant acquiesced by removing the bandage. R11 31. Mace considered the wound inconsistent with a cut. R11 31-32.

Det. Flaherty "told Officer Mace to take him away, to take him out because I wanted to talk to her, to Dorothy." R11 56. Mace testified that he then asked appellant to go outside while Flaherty questioned Smith, and appellant acquiesced. R11 32. Once Mace had taken appellant outside, he asked appellant to come to the detective bureau to discuss his having been cut by his girlfriend, and appellant agreed. R11 33. Mace continued (R11 34):

I advised him, I said, sir, you're not under arrest but for the purpose of and policy of my department I have to secure you. I'm not going to place your hands behind your back and if you were under arrest, I would advise you were under arrest before I put the handcuffs on you. However, you're not under arrest, I'm just going to secure you so you can be transported.

He -- his concern was, I'm not under arrest. I said, no, sir, you're not under arrest or I would tell you you were. And he agreed. I handcuffed him from the front and we went straight to the Detective Bureau.

After Mace handcuffed appellant, and just as he was placing him in the car, appellant said "he wasn't gonna lie, that he was robbed the other day and he believed he may have gotten shot." R11

said detectives' guns were not out, id., but that appellant would have to go past "the officer standing there with the gun" to get out. R11. 56.

39, 42-43. Mace then left appellant in handcuffs and went to tell Det. Flaherty about appellant's statement. R11 38.

Mace then took appellant to the station where he was chained to a "pretty heavy" fixed structure in an interview room. R11 37. This was a procedure routinely used to keep persons from "trying to escape from that room." Id.

About 45 minutes later, Det. Coleman entered the room and read to appellant from a Miranda card, and appellant agreed to talk, and made statements which the state used at trial. R11 66-67.

Meanwhile, the police had been doing the following:

After Det. Flaherty directed Mace to take appellant out of his rooming house, Smith again said she had stabbed appellant. R11 49. When Mace came in and said appellant had said he had been shot, Smith said appellant had been "knocking at her bedroom window on the, I guess it was February 1st, or the morning trying to get in." R11 49-50. She said he had been robbed and shot, she and wanted to take him to the hospital and he didn't want the police involved. R11 50. She didn't see a gun. Id. The officers searched for a gun, but could not find one. Id.

Smith was taken to the station and interviewed by Det. Coleman. R11 61-62. She said she was involved in a fight with appellant and stabbed him in the hand and he left. R11 62. He returned on the early morning of February 1 with a larger wound on his hand and said he had been shot and robbed. Id.

At the same time that appellant was removed from his rooming house, officers took another resident, Montavious Gatlin, into cus-

tody as a suspect in a home invasion or robbery or a car jacking. R11 62-63. Gatlin was interviewed by Det. Gagliano, who told Coleman that Gatlin was familiar with a street rumor that Dorothy's girlfriend Steve shot the newspaper guy, and that Gatlin said appellant had been acting unusual and sold a chrome revolver with a black handle to someone on or about February 1. R11 64-65.

B. The standard of review.

This Court set out the following standard of review in Cuervo v. State, 967 So. 2d 155, 160 (Fla. 2007):

An appellate court reviewing a ruling on a motion to suppress presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence. Connor v. State, 803 So.2d 598, 608 (Fla.2001). Appellate review of the trial court's application of the law to the historical facts is de novo. Id. Accordingly, "appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the ... Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution." Fitzpatrick v. State, 900 So.2d 495, 510 (Fla.2005) (quoting Nelson v. State, 850 So.2d 514, 521 (Fla.2003)).

At bar, the judge's ruling was legally erroneous under this standard as discussed below.

C. Appellant was detained when he submitted to the apparent authority of the officers.

Warrantless searches and seizures are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions, which are jealously and carefully drawn. See Norman v. State, 379 So. 2d 643, 646 (1980) (citing and quoting authorities). In relying on consent as an exception to the Fourth Amendment, the state must prove that the con-

sent was in fact freely and voluntarily given, and it must make this showing by clear and convincing evidence. Id. It does not meet its burden by showing "acquiescence to authority" rather than "free and voluntary consent." Id. at 648.

The issue of acquiescence to authority was recently addressed in Brendlin v. California, 127 S.Ct. 2400 (2007), which involved the stop of a car carrying Brendlin as a passenger. The Court set out the common sense rule that a person is detained when prevented from going about his or her business because of police activity (id. at 2405-06):

When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," id., at 554, 100 S.Ct. 1870 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, see, e.g., Hodari D., supra, at 627, 111 S.Ct. 1547; Michigan v. Chester-nut, 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," Bostick, supra, at 435-436, 111 S.Ct. 2382; see also United States v. Drayton, 536 U.S. 194, 202, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002).

The Court noted that persons involved in a traffic stop would reasonably expect that they were not free to leave: "It is also

reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety." Id. at 2407. The Court went on to write that the state court had failed to apply the "objective Mendenhall test of what a reasonable passenger would understand," id. 2408, and it concluded that Brendlin would not have felt free to leave, so that he was detained under the Fourth Amendment. Id. at 2410.

Although the case at bar did not involve a traffic stop, it is governed by Brendlin's principles about acquiescence to apparent police authority.¹¹ The Court wrote in Brendlin that "a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." Id. at 2409. Likewise, appellant submitted to authority by staying and answering questions and removing the bandage from his hand, and he submitted by complying when Fletcher ordered patrolman Mace to take appellant outside. He further submitted by being handcuffed and being taken to the station where he was chained down.

Langley v. State, 735 So. 2d 606 (Fla. 2nd DCA 1999) is instructive on this point. Six officers, with a police dog, accosted Langley as she sat on the steps of her mobile home. When she got

¹¹ Brendlin cited many cases not involving traffic stops, and it has been applied to non-traffic stop situations. See, e.g., City of Lafayette v. Desormeaux, 967 So. 2d 477, 481-82 (La. 2007) (applying Brendlin to incident at police station). As the Seventh Circuit has observed: "The Supreme Court does not sit to decide cases that will control only cases having identical facts." Rivera v. Director, Dept. of Corrections, 915 F.2d 280, 282 (7th Cir. 1990).

up to leave, the officers asked her to stay, and an officer asked for identification. Langley opened her bag, an officer saw a crack cocaine pipe, and Langley was arrested. The judge denied Langley's motion to suppress, but the Second District reversed. It found that a reasonable person would not have felt free to decline the officer's request or terminate the encounter (id. at 607):

In order to determine whether a particular encounter constitutes a seizure, a court must consider the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a "reasonable person" that the person was not free to decline the officer's request or otherwise terminate the encounter. See Popple v. State, 626 So.2d 185, 188 (Fla.1993); State v. Crumpton, 676 So.2d 987, 989 (Fla. 2d DCA 1996). Under these circumstances, it cannot be said that a reasonable person, facing six police officers and a police dog, would believe that she was free to leave.

Thus, Langley submitted to the officers' apparent authority by coming back at the request to stay. At bar, appellant submitted to their authority by submitting to questioning when the officers blocked the hallway and by acquiescing when the detective ordered his removal.

i. *Appellant was detained in the rooming house.*

Appellant came out of the bathroom and found three armed officers at the door of his tiny room. They blocked the hallway,¹² and there were other officers in the back.

In such a situation of a police presence in a small area, our society expects that the officers have "unquestioned command of the

¹² The hallway of the common area had the status of the interior of a private home for purposes of the Fourth Amendment. See State v. Titus, 707 So. 2d 706 (Fla. 1998).

situation." Cf. Brendlin, 127 S.Ct. at 2407; City of Lafayette, 967 So. 2d at 481-82. If, for instance, the officers had directed appellant to go back into the bathroom, or step away from the door, or leave the hallway, a reasonable person would acquiesce with the expectation that the officers had unquestioned command of the situation. To refuse would be to risk arrest for obstruction.

The police immediately began questioning appellant. They asked about his hand, and they asked to see it. Det. Flaherty told Mace to remove appellant. A reasonable person would accept that the police had unquestioned command of the situation and would not test their apparent authority.

It would impose too much on citizens in such a situation to require that they gauge the lawful authority of the police, and then challenge that authority--at the risk of being charged with obstruction of justice--in order to avoid waiving their rights. As the Court wrote in Kaupp v. Texas, 538 U.S. 626, 632 (2003), "failure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer."

ii. *Appellant was detained outside the rooming house.*

Once outside, Mace asked appellant to be handcuffed and taken to the station for questioning. He said he was not formally arresting appellant, but he did not tell him he was free to refuse. He did not tell appellant he would be chained up at the station to prevent his escape.

At this point, appellant was detained. Persons in shackles are not free. They are on the receiving end of a classic show of authority and they are **by definition** under restraint. They will understand that they are being treated like criminals, like persons so dangerous that shackling is necessary to prevent them from attacking an armed police officer.

The state would have to show the most compelling evidence that such persons would not consider themselves to be restrained, such as that some game was being played, or a demonstration was being made of how handcuffs work or the like. It made no such showing at bar.

It was while thus shackled that appellant said he had been robbed and shot.¹³ Mace left him in this shackled state in the police car to report to the detectives. At this point appellant was completely in the control of the police.

iii. Appellant was detained at the station.

Appellant remained in the control of the police as he was taken to the station and chained to a "pretty heavy" fixed structure **so that he would not escape.**

The act of being chained to a heavy structure to prevent one's escape would communicate "to a reasonable person that he was not at liberty to ignore the police presence and go about his business,"

¹³ Mace testified that appellant was handcuffed and **then** made the statement "when I opened the [car] door just before he was to have a seat." R11 42-43. The court thereafter stated (erroneously) that Mace had said that appellant made the statement "before he was handcuffed." R11 94.

so that appellant was seized under Kaupp, 538 U.S. at 629, and the cases cited therein. Such a seizure at a police station requires "probable cause or judicial authorization." Id. at 630 (citing prior cases). The record does not show that appellant agreed to be chained down at the police station to prevent his escape.

iv. The cases relied upon below do not authorize the police action at bar.

In the lower court, the state relied on the plurality opinion in Taylor v. State, 855 So. 2d 1 (Fla. 2003), which cited Langley with favor but distinguished it on the basis of the facts. Two officers, one in plain clothes, went to Taylor's mobile home, and Taylor's roommate let them in. The officers knew Taylor had been with the murder victim shortly before she was kidnapped, robbed and murdered, and said they wanted to speak with him at the station. An officer went outside to run a radio warrants check on Taylor. From his car, he saw Taylor hide something in the home. Afraid Taylor might have concealed a weapon, the officer went inside and found that he had hidden a large sum of cash. Officers then handcuffed and questioned him. Id. at 11-12 (plurality opinion).

This Court determined that Taylor's initial involvement with the officers at the trailer was consensual because, unlike in Langley, the officers made no display of force: they simply came to Taylor's home and said they wanted to question him because he had been the last person to see the victim. Taylor, 855 So. 2d at 15 (plurality opinion). There was no "overt demonstration of police authority until" Taylor triggered an investigative detention by

furtively concealing a possible weapon. Id. at 15-16 (plurality opinion).

The officers then took Taylor to the station in the back of a police car. Taylor was not handcuffed in the car, but was handcuffed while he was walked through the station, although he was told he was not under arrest. Officers removed the handcuffs before questioning Taylor.¹⁴ This Court determined that these circumstances did not amount to a de facto arrest so that Taylor's later statements were not subject to suppression. Id. at 17-18 (plurality opinion).

At bar, appellant was handcuffed for purposes of transportation to the police station, he was then left handcuffed in the back of the police car while Mace went to talk to the detectives, he was then taken to the station in handcuffs, and then was put in chains to prevent him from "trying to escape." Under these circumstances, he at most acquiesced in the apparent show of police authority.

¹⁴ Although the plurality opinion is unclear on this point, the initial and answer briefs both show that Taylor was unhandcuffed at the start of the questioning. The initial brief is at:

http://www.floridasupremecourt.org/clerk/briefs/pre_2000/96000/96959_ini.pdf

Page 6 says: "When Taylor arrived, Lester met with him alone in an interview room. He removed the handcuffs and read Taylor his rights."

The state's answer brief is at:

http://www.floridasupremecourt.org/clerk/briefs/pre_2000/96000/96959_ans.pdf

It says at page 16: "Taylor was left alone in the interview room to await Detective Lester and the door was not locked. (III 416). Detective Lester arrived shortly thereafter and Taylor was unhandcuffed at that point. (III 416)."

Hence, Taylor does not support the judge's ruling at bar.

The state also cited Simmons v. State, 934 So. 2d 110 (Fla. 2006), which also cannot support the ruling at bar. As in Taylor, officers had evidence directly linking Simmons to the victim: the victim was his girlfriend, her purse had a birthday list with the names of his relatives, and she had been kidnapped in a car matching his car. A large number of officers went to his parents' home, but only two plainclothes officers approached him and spoke with him. He agreed to go to the station to talk with them and they handcuffed him while taking him to the station, but **removed the handcuffs when he arrived at the office and was questioned.** Id. at 1106-07. The trial court denied Simmons' motion to suppress his resulting statement.

This Court upheld the trial court's decision. It noted that the two detectives were "not in uniform and not armed" when they met Simmons. Id. at 1113. As to the use of handcuffs when transporting Simmons, it cited Taylor and noted that the handcuffs were removed "as soon as Simmons reached the sheriff's office." Id. at 1114. It concluded that Simmons' statements were voluntary.

From the foregoing, Simmons cannot apply at bar. Two unarmed officers encountered Simmons in an open area, but three armed officers encountered appellant in the close confines of a rooming house. Regardless whether Simmons was at one time in custody when he was in handcuffs, he was relieved of custodial or other restraints before the interrogation. By contrast, appellant was

chained down in an interrogation room to prevent his escape.

Further, Simmons addressed the question of the **voluntariness of the interrogation**, rather than the distinct question of whether there was an illegal detention,¹⁵ although the discussion seemed to mingle the two concepts. This Court wrote that the trial judge ruled that "Simmons voluntarily submitted to the interrogation," and the heading of this Court's discussion was: "Voluntariness of the Interrogation." Id. at 1113. It then affirmed the judge's ruling that that "Simmons' December 7 interview with detectives was voluntary". Id. 1114. Thus, Simmons addressed an issue other than the **illegal detention** issue presented at bar.

The question of voluntariness of police statements turns on whether the police engaged in intimidation on the order of a "credible threat of physical violence" or in promises of protection from violence. See Arizona v. Fulminante, 499 U.S. 279, 287-88 (1991) (discussing cases). The question of Fifth Amendment voluntariness is ultimately a subjective one, cf. Yarborough v. Alvarado, 541 U.S. 652, 667-68 (2004), as opposed to the objective question of whether a suspect does not feel free to leave and is therefore detained under the Fourth Amendment. Cf. Brendlin; Kaupp, 538 U.S.

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at 632. Proof of an illegal detention does not necessarily make an interrogation involuntary and vice versa. Hence, a court will suppress even a voluntary statement produced by an illegal detention:

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken[,] Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint."

Brown v. Illinois, 422 U.S. 590, 601-02 (1975).

From the foregoing, Taylor and Simmons cannot support the denial of the motion to suppress at bar.

D. The officers did not have probable cause to detain appellant.

The judge ruled that the officers had probable cause to arrest appellant before he was handcuffed outside the rooming house. R11 91. The record does not support the judge's ruling. The officers only had vague circumstantial suspicions, but no evidence directly linking appellant to the crime, such as an eyewitness identification, physical evidence, or an admission of guilt.

i. *The state failed to show probable cause.*

When the police encountered appellant on February 3, they only knew that someone at the scene of the February 1 murder had been bleeding from the left hand, a trail of blood led roughly in the direction of the rooming house, and appellant had a wounded left hand. When he was removed from the residence and handcuffed outside, they had only the additional fact that he said his girlfriend

had stabbed him. When Mace took him to the station and chained him down, the police had only the additional fact that he said he had been shot during a robbery on the night of the murder.

Such sketchy circumstantial evidence did not amount to probable cause to arrest and bind someone over for trial on a capital offense. The officers had **no physical evidence linking appellant to the crime, no murder weapon, and nothing putting him at the scene of the crime.** No officer would base a probable cause affidavit on such evidence absent some additional credible evidence linking appellant to the crime.

Probable cause requires more than suspicious circumstances and suspicious or false statements. Cf. Florida v. Royer, 460 U.S. 491, 507 (1983) ("We cannot agree ... that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge"); Aderhold v. State, 593 So. 2d 1081 (Fla. 1st DCA 1992) (error to find probable cause when suspect bought plane tickets in cash, boarded plane late, acted nervous and suspicious at airport, and made false and contradictory statements about traveling companion); Edwards v. State, 532 So. 2d 1311 (Fla. 1st DCA 1988) (error to find probable cause to arrest one of five persons near baggy of cocaine on ground even though he possessed \$300-400 rolled in manner consistent with drug dealers).

The state must show that the police had "had reasonably trustworthy information" to provide reasonable grounds to believe that

the suspect committed a felony. See Chavez v. State, 832 So. 2d 730, 747-48 (Fla. 2002). If "the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge" its task of determining probable cause. Beck v Ohio, 379 US 89, 96 (1964). At bar, the police did not have reasonably trustworthy information sufficient to provide reasonable grounds to believe appellant had committed the robbery and murder when he was first questioned in the rooming house or when he was removed and then handcuffed by Mace. The state did not show probable cause at that time.

Further, the police did not develop probable cause while appellant was taken to the station in handcuffs and chained to a heavy structure. Smith was brought to the station and made a third statement saying she had stabbed appellant in the hand and he came to the room on the night of the murder and said he had been robbed and shot. This statement merely combined her two earlier statements, so that it added nothing.

As for Gatlin, he was taken into custody for one or more serious felonies and told Det. Gagliano about a street rumor that Dorothy's boyfriend Steve had shot the newspaper guy. R11 64-65. Gatlin said appellant had been acting unusual and had sold a chrome revolver with a black handle to another person on or about February 1. R11 65. The state provided no evidence as to Gatlin's source for this information, and no evidence as to whether he had any veracity or reliability at all to overcome his obvious interest in avoiding prosecution.

Identification "by a **reliable informant** may constitute probable cause for arrest where the information given is **sufficiently accurate.**" Wong Sun v. U.S., 371 U.S. 471, 480 (1963) (e.s.). An informant's veracity, reliability and basis of knowledge are "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause'". Illinois v. Gates, 462 U.S. 213, 230 (1983) (setting out standards of probable cause to support search warrant).

The officers had the names of Smith and Gatlin, but the state still had to show that the officers had sufficiently accurate information from reliable informants.

In Wong Sun, officers arrested Hom Way after having him under surveillance for six weeks. Way told them he had bought heroin from "Blackie Toy," proprietor of a laundry on Leavenworth Street, the night before. The officers then went to a laundry on Leavenworth Street run by James Wah Toy. An officer tried to enter but Toy slammed the door and began to run away, and the officers forced their way in and arrested him. Toy gave information leading to Johnny Yee, who provided information incriminating both Toy and "Sea Dog" (Wong Sun). Id., 371 U.S. at 473-75. Toy and Sun were tried together and the judge allowed into evidence the statements and physical evidence obtained by the officers.

The Supreme Court found that the trial court erred in admitting against Toy evidence obtained in exploitation of his arrest.¹⁶

¹⁶ The Court found no error in admitting against Sun physical

It wrote that the officers "had no basis in experience for confidence in the reliability of Hom Way's information; he had never before given information." Id. at 481. It further noted the vagueness of his information and concluded: "To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy [that arrest warrants issue on a showing of probable cause]." Id. at 482.

Time has not diminished these principles. See U.S. v. Koerth, 312 F.3d 862 (7th Cir. 2002) (probable cause not supplied by statements of named informant without showing informant was reliable and without adequate factual showing except by conclusions and unsupported assertions; search upheld because officers relied on warrant in good faith); U. S. v. Hammond, 351 F.3d 765 (6th Cir. 2003) (probable cause not supplied by named informant's information which lacked detail; police could not rely in good faith on warrant because of officer's falsehood as to other facts in affidavit). In Kaupp, officers took Kaupp to the station after another man, who had previously failed lie detector tests, confessed to a murder and implicated Kaupp. The Supreme Court held that Kaupp was unlawfully arrested without probable cause. Id., 538 U.S. at 632.

There was no evidence of Gatlin's veracity or reliability ex-

evidence obtained in violation of Toy's rights, but reversed Sun's conviction because it may have been based in part on the use of Toy's statements incriminating him.

cept in the negative sense that he was suspected of one or more serious felonies and had an obvious motive to extricate himself from difficulty. Further, the information he provided was hazy and not likely to be easily verified. He said there was a rumor that appellant was involved in the crime, but there was no evidence of the source of this rumor. He also said appellant had sold a gun to an unnamed third party at an unstated place either before or after the murder, and the evidence does not show any basis for his knowledge: he may have seen the sale (in which case he would surely have provided more detail), he may have heard about it from an unnamed third person of unknown credibility, or it may have just been part of the rumors that he had heard.

ii. *The cases cited by the state did not support a finding of probable cause.*

The state relied on Simmons, Chavez, State v. Flanneroy, 566 So. 2d 310 (Fla. 5th DCA 1990), Krawczuk v. State, 634 So. 2d 1070 (Fla. 1994), Collins v. State, 707 So.2d 821 (Fla. 3rd DCA 1998), and State v. Stephens, 574 So. 2d 197 (Fla. 1st DCA 1991) as to probable cause. R21 85-89. These cases do not support a finding of probable cause at bar.

In Simmons, the police had evidence that Simmons was the victim's boyfriend, he had beaten her earlier in the week, and he was seen kidnapping her shortly before the murder. Simmons, 934 So. 2d at 1114. Hence, they had ample evidence to support probable cause.

Chavez also presented compelling probable cause. A schoolboy had been kidnapped in the vicinity, and Chavez's landlady found the

boy's book bag and a stolen gun in Chavez's trailer. Chavez, 832 So. 2d at 748.

In State v. Flonory, 566 So. 2d 310 (Fla. 5th DCA 1990), an eyewitness saw someone in a maroon Cutlass shoot a man with a .38 pistol. Officers quickly found Cooper, who had been in the Cutlass, and he took them to the car, in which the officers found a .38 caliber shell casing. Cooper said Flonory was with him at the time of the shooting and showed them where he lived. Thus, the officers had an overwhelming case of probable cause to arrest Flonory.¹⁷ At bar, the police had no such evidence tying appellant to the crime.

In Krawczuk, the defendant entered a guilty plea waiving his right to appellate review of the suppression issue. Nevertheless, this Court wrote in dicta that the record showed that the police had probable cause because Krawczuk had been selling property taken in the murder. Krawczuk, 634 So. 2d at 1071-73.

Collins and State v. Stephens have little bearing on the case at bar. Both held that detentions without probable cause did not require suppression of statements because the police did not exploit the illegal detentions. In Collins, the court held that re-

¹⁷ State v. Flonory had such an awkward procedural posture that its precedential value is doubtful in any event. After a judge denied Flonory's motion to suppress, a successor judge conducted the trial at which Flonory was convicted. The successor judge then granted a new trial after concluding that the original judge should have granted the motion to suppress. Without explanation, the appellate court looked to the evidence at trial, rather than the evidence presented at the suppression hearing to determine the police had probable cause.

ardless whether the police had probable cause when they first picked Collins up, they developed probable cause when Collins's co-defendant made a confession implicating both himself and Collins. Likewise, in State v. Stephens the police independently developed evidence that "would have justified a trial court's concluding that the police had probable cause to arrest Stevens just prior to his confession," and they then confronted him with information obtained from his mother inculcating him in the murder. Id., 574 So. 2d at 204. At bar, the state did not develop such independent, reliable evidence directly inculcating appellant. As already noted, Smith simply gave a statement at the station combining her two prior statements, and Gatlin was not a reliable informant and he simply reported rumors and unsubstantiated allegations.

From the foregoing, the police did not have probable cause and appellant was illegally detained. His statements to the police inside the rooming house, outside the rooming house while in handcuffs, and at the station while chained to prevent his escape, were inadmissible. His statements formed a major part of the state's case, and their admission was not harmless beyond a reasonable doubt. This Court should order a new trial.

III. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO PORTIONS OF HIS RECORDED CONVERSATION WITH DOROTHY SMITH.

Appellant objected to the state's use of CDs of telephone conversations between himself and Dorothy ("Dot") Smith, apparently made on the day of his arrest. R25 1551-57, 1701-07; R26 1714-33. Appellant argued that the contents were irrelevant and that any

relevance was outweighed by the prejudicial effect of the conversations, especially in light of foul language in the calls. R25 1553, 1555, 1703; R26 1720. The court ruled the conversations admissible, and the state put the CDs in evidence, R27 1870, and played one or both of them for the jury.¹⁸ The court erred in overruling appellant's objection.

A. The court erred in allowing the discussion of the marijuana.

The following occurred in the second recorded conversation:

DEF: Go get that, get, get all that reefer I had you to hide, that I gave you -

... .

DEF: Get that reefer that, them three pounds of reefer. What there was, a pound a half, yeah, that pound and a half of reefer -

DOT: Yeah, shouldn't be talking like that on no phone like that. You setting me up now.

DEF: No, because you don't understand what I'm trying to tell you.

DOT: I do (indiscernible) understand somebody was the only one talking about no drugs out there and (indiscernible) -

DEF: Okay, then listen.

DOT: - I'm a suspect. You talking about doping my, like that there.

18 The jury was given transcripts of both conversations to read while listening to the CDs. R27 1871. The trial transcript shows the playing of only one of the tapes at R27 1871-98, but the testimony immediately afterward refers to the second tape, in which there was a discussion of marijuana, as also having been played in court. R27 1899 (witness questioned about "reference in that last conversation about two pounds or a pound and a half of marijuana"). The transcript of the second conversation is at R4 488-512. The evidence was available to the jury in its deliberations.

R4 497-98. And:

DEF: Huh? You hear me? You know I ain't, ain't got no mother-fucking reefer now. You know I ain't got no two pounds of reefer there. I mean a half, pound and half of reefer there. You know that. Don't you?

DOT: (Indiscernible).

DEF: Huh?

DOT: (Indiscernible).

DEF: Huh? Huh? And the police know there ain't no reefer in that mother-fucking room, because they searched that mother-fucking room. Do you hear me?

R4 500-01.

The state told the judge out of the jury's presence that "Marijuana is code for the murder weapon." R26 1716. In response to the judge's concern that the marijuana reference might involve an uncharged crime, the prosecutor said, "obviously, it's not about marijuana. I'm not going to argue that. I'm going to argue it based on what he clearly is saying." R26 1717. He said he was "not going to have a witness that says refer [sic] is code on the street for gun because it's not. It's just his little code. I'm not going to argue that. I am going to argue there wasn't no refer [sic] in that house, he's talking about the gun." R26 1729.

The state called Smith as a witness after the judge ruled the conversations admissible. R26 1850. It did not question her about the "reefer" discussion, and she did not testify in any way that "reefer" was a code term for a gun. The state presented no expert testimony as to "reefer" as a code for a gun. It questioned appellant on cross-examination, and appellant said he used "reefer" as a

code for cocaine when talking to Smith, saying he wanted her to sell cocaine so he would have money to buy things to eat at the jail. R29 2139-43. The state argue to the jury that, in referring to "reefer," appellant was "telling her to get that gun out of that house." R30 2276-77.

Thus, the state put before the jury irrelevant evidence of appellant's drug dealing based on a completely unsubstantiated claim that the evidence showed that he had the murder weapon after his arrest and was arranging for its disposal from the jail.

Evidence of irrelevant evidence of criminal activity is presumed harmful and is inherently prejudicial. See Acevedo v. State, 787 So. 2d 127, 130 (Fla. 3rd DCA 2001); Valley v. State, 919 So. 2d 697, 699-70 (Fla. 4th DCA 2006). The state must present "clear and convincing" evidence of the collateral crime. State v. Norris, 168 So. 2d 541, 543 (Fla. 1964); Acevedo. At bar, the state did not present "clear and convincing" evidence that appellant had the gun and was directing Smith to dispose of it.

The state claimed to show that, after his arrest for murder, appellant tried to have Smith dispose of evidence against him. It based its claim on complete speculation based on evidence that he had committed the collateral crime of urging Smith to traffic in reefer. Upon admission of the recording, appellant was compelled to present his defense to this claim, namely that he sought to have Smith commit the collateral crime of trafficking in cocaine. Under these circumstances, the state cannot show that admission of the evidence was harmless beyond a reasonable doubt.

In U.S. v. Peoples, 250 F.3d 630 (8th Cir. 2001), a prosecution for aiding a murder, the government presented an FBI agent's opinions as to the meaning of words used in recorded conversations and the intentions of the persons speaking. The judge allowed the testimony, but instructed the jury that the agent's opinion "constituted argument rather than evidence." Id. at 641-42. The Eighth Circuit ordered a new trial, ruling that the agent's unsubstantiated opinion required a new trial even though a co-defendant "testified extensively against the defendants." Id. at 642.

At bar, the state cannot show beyond a reasonable doubt that the jury was not affected by the improper evidence. It had a circumstantial case and appellant presented a complete defense to the state's theory of the case. This Court should order a new trial.

B. The court erred in allowing appellant's statement to Smith that he was going to "to fight the mother-fucking judge with a dumb-ass lawyer and a dumb-ass bitch on my side."

The first CD contained the following exchange (R27 1896-97):

DOT: Well, I'm sorry, because they was telling me they was gonna threaten me and put me in prison.

DEF: I told you --

DOT: But I, they ain't got the gun though.

DEF: You stupid bitch. God-damn it. You fuck bitch. You fuck-ass whore. I'm gonna call my brother and have him come bust your pussy-ass for, when I told you don't say that fuck-ass shit. Okay. It ain't nothing but twenty minutes up. I've only been on about fifteen minutes. You (indiscernible). You understand what I'm telling you? Huh?

DOT: Yeah.

DEF: And you, so you the stupid mother-fucker. You know what, I'm going, I'm going, understand me, to fight the mother-fucking judge with a dumb-ass lawyer and a dumb-ass bitch on my side.

DOT: Oh, I'm a dumb bitch?

DEF: Yeah, because of the shit you just did, Dot. You know what you just did? Huh?

DOT: Well, I'm telling like that, they said that, they told, they been in my room all day while I was up there and they got them officers and shit -

The prosecutor argued for admission of the statement about the judge, the lawyer and the person on appellant's side, saying it showed that appellant was "trying to coach this woman." R26 1721. He said they had talked about the gun and he did not "see what could be more relevant to speak directly to [appellant's] state of mind." Id. He continued (R26 1722):

... . I mean, in the context he's expressing his frustration with the system. He's not talking about anybody in general, he's just basically saying, I'm in deep trouble here and you're all I got on my side. Had he been a little more eloquent that's how he would have said it. I'm going to have to fight the judge, I'm going to have to deal with my lawyer and then I got you on my side. But he doesn't speak like that. This is how he speaks and I can't help that. So, I mean, I just think it's the context of it.

He did not explain how the expression of "frustration with the system" in any way tended to prove guilt.

The judge ruled the statement admissible, saying "in the scheme of things, if there is relevance, I would find that under 90.403 that the relevance is not outweighed by any prejudicial affect." R26 1723. The judge erred.

"[I]n order to be admissible, evidence must be relevant. See

§ 90.402, Fla. Stat. (1995). Relevant evidence is defined as evidence 'tending to prove or disprove a material fact.' Id. § 90.401." Gore v. State, 719 So. 2d 1197, 1199 (Fla. 1998).

At bar, no material fact was proved by appellant's statement about the judge, the lawyer and the person at his side. As the prosecutor said, the statement showed his frustration with the system. Frustration does not prove innocence or guilt.

C. The CDs contained considerable other evidence prejudicial to appellant.

The state presented, as part of the recordings, appellant cursing at Smith when she said she was pregnant with his baby (R4 508-09):

DOT: I'm pregnant with your baby. No, I ain't -

DEF: What? What? Man, I'm giving up. I don't care shit, man. You ain't been to no fuck-ass doctor.

DOT: No, I ain't seen my period in two months.

DEF: Okay, well, fuck that because I'm telling you this here from the bottom of my mother-fucking heart, what you say to me now, that what you said, okay, that's fin and dandy, but you can say what you want, in the morning when I go to bond hearing, they ain't going to give me all the (indiscernible). Them people talked about six different people.

The state's evidence also showed appellant's complete indifference to Smith's expressions of love:

DOT: I heard you, too, I was crying, I say Steve, I love you. You didn't hear me?

DEF: No, fuck, mother-fuck, he going, he gonna try to tell me so -

R27 1874. Similarly:

DOT: I love you.

DEF: Listen, this man fixing to get on the phone. I can't be yelling, calling your stupid-ass back.

DOT: I love you.

(The CD is turned off.)

R27 1898.

The judge asked the State to point to "any portion of these tapes that don't have to be played because they no longer contain anything relevant to the case? Because to me there are things that are discussed in here that I can't tell they're relevant or not."

R26 1717. The state said in response that "it really isn't so much the contents specifically of the transcripts. I mean, obviously it is in large part the contents, but the whole context in which these conversations are occurring, the tone and tenor of his voice are extremely relevant." R26 1718. It called on the defense to show what parts were irrelevant, and defense counsel replied that there was no relevance to any of it. R26 1719-20.

Thus, the state sought to make up for any deficiencies in its showing of relevance of the recordings as a whole by saying that it was not "so much the contents" as "the tone and tenor of his voice [that was] extremely relevant." But appellant's tone and tenor expressed frustration with the system and his situation. They showed nothing as to guilt or innocence. His cursing and cold indifference to Smith's feelings threw a very bad light on his character but shed no light at all on whether he committed the crimes charged.

We can see the irrelevance of such evidence from the following

example: Suppose the state had called Smith and asked her only how appellant reacted when told she was pregnant with her child and how he reacted when told she loved him. Such evidence would do nothing to establish appellant's guilt. Cf. Dennis v. State, 817 So. 2d 741, 762-63 (Fla. 2002) (error to overrule relevancy objection to testimony of Dennis's ex-girlfriend concerning his character); Wyatt v. State, 641 So. 2d 355, 358 (Fla. 1994) (error to admit testimony that Wyatt feigned a conversion to Christianity).

D. Appellant cannot show that the error was harmless beyond a reasonable doubt.

The defense rested on whether the jury could accept appellant's account of the murder. By the time appellant took the stand, the jury had been exposed to extremely harmful irrelevant evidence regarding his character. Such evidence was devastating as to his attempt to present persuasive testimony to the jury. The state cannot show that the evidence was harmless beyond a reasonable doubt.

The error was independently prejudicial as to penalty. An error harmless as to guilt may be harmful as to penalty. Gonzalez v. State, 700 So. 2d 1217 (Fla. 1997) (codefendant's confession harmless as to guilt, but prejudicial as to penalty); Burns v. State, 609 So. 2d 600, 607 (Fla. 1992) (background information about deceased harmless as to guilt, but prejudicial as to penalty). At penalty, the state compared appellant's character with the character of Destefano, as discussed below in Point VII. The improper evidence of the CD conversations put appellant's character in an

extremely bad light. It is reasonably likely that jurors would take his character, as shown on the CDs, into account when comparing appellant's character to the victim's.

Appellant's conviction and sentence were obtained in violation of the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amend. VI, VIII, XIV, U.S. Const; Art. I, §§ 9, 16(a), 17, Fla. Const. This Court should order a new trial or resentencing.

IV. WHETHER THE EVIDENCE SUPPORTED A CONVICTION FOR MURDER BY PREMEDITATED DESIGN.

The state had no eyewitness evidence of the shooting. Mr. McDowell testified he heard someone hollering "I don't have no more, I don't have no more," and then he heard two quick shots. R24 1518-19. The state contended that these were the two shots that struck Destefano. Ten or fifteen minutes later, McDowell heard a third, louder shot, R24 1519-20, which the state contended was not one of the two shots that struck Destefano.

These facts did not establish a premeditated design to kill so that the murder conviction violated the Due Process Clauses of the state and federal constitutions. The judge should have entered a judgment of acquittal for premeditated murder and the jury should not have been instructed on that theory of guilt.

In Kirkland v. State, 684 So. 2d 732, 734-35 (Fla. 1996), this Court found that the evidence did not establish premeditation despite the fact that the defendant repeatedly slashed the victim with a knife and beat him with a cane:

... . The State asserted that the following evidence suggested premeditation. The victim suffered a severe neck wound that caused her to bleed to death, or sanguinate, or suffocate. The wound was caused by many slashes. In addition to the major neck wound, the victim suffered other injuries that appeared to be the result of blunt trauma. There was evidence indicating that both a knife and a walking cane were used in the attack. Further, the State pointed to evidence indicating that friction existed between Kirkland and the victim insofar as Kirkland was sexually tempted by the victim.

We find, however, that the State's evidence was insufficient in light of the strong evidence militating against a finding of premeditation. First and foremost, there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Second, there were no witnesses to the events immediately preceding the homicide. Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide. Indeed, the victim's mother testified that Kirkland owned a knife the entire time she was associated with him. Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan. Finally, while not controlling, we note that it is unrefuted that Kirkland had an IQ that measured in the sixties.

In Hoefert, we were unable to find evidence sufficient to support premeditation in a situation in which Hoefert had established a pattern of strangling women while raping or assaulting them. Evidence was presented in that case indicating that the homicide victim, found dead in Hoefert's dwelling, was likewise asphyxiated. Despite the pattern of strangulation, the discovery of the victim in Hoefert's dwelling, and efforts by Hoefert to conceal the crime, this Court found that premeditation was not established. Hoefert, 617 So. 2d at 1049. In this case, there is no evidence that Kirkland had established a pattern of extreme violence as had Hoefert. A comparison of the facts in Hoefert and the instant case requires us to find, if the law of circumstantial evidence is to be consistently and equally applied, that the record in this case is insufficient to support a finding of premeditation.

In Mungin v. State, 689 So. 2d 1026 (Fla. 1995), Anthony Mungin shot a store clerk in the head during a robbery. There was

evidence that he had shot store clerks in two previous robberies.

Finding that the evidence did not establish the premeditation, this

Court wrote at page 1029:

We first address Issue 2, where Mungin argues that the evidence was not sufficient to support first-degree murder. The trial judge instructed the jury on both premeditated and felony murder, and the jury returned a general verdict of first-degree murder. We agree with Mungin only that the judge erred in denying his motion for judgment of acquittal as to premeditation.

Premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So. 2d 610, 612 (Fla.), cert. denied, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

In a case such as this one involving circumstantial evidence, a conviction cannot be sustained - no matter how strongly the evidence suggests guilt - unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So. 2d 972, 976 (Fla.1977). A defendant's motion for judgment of acquittal should be granted in a circumstantial-evidence case "if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." State v. Law, 559 So. 2d 187, 188 (Fla.1989).

The State presented evidence that supports premeditation: The victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. But the evidence is also consistent with a killing that occurred on the spur of the moment. There are no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation. Although the jury heard evidence of collateral crimes, the jury was instructed that this evidence was admitted for the limited purpose of establishing the shooter's identity.

Similarly, in Terry v. State, 668 So. 2d 954 (Fla. 1996), this Court found the evidence did not show premeditation where Terry

shot a woman in a robbery after his co-defendant threatened to shoot her husband if he moved, writing at page 964:

A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. Spinkellink v. State, 313 So. 2d 666, 671 (Fla.1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). In other words, for this Court to find that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Tibbs v. State, 397 So. 2d 1120, 1123 (Fla.1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). In contrast, sufficient evidence is "such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded." Id. (quoting Black's Law Dictionary 1285 (5th ed. 1979)).

We find there is sufficient evidence to support appellant's convictions for first-degree murder, armed robbery, and principal to aggravated assault. However, with respect to the first-degree murder charge, we find there is only sufficient evidence to support a felony murder theory, not a premeditated murder theory. While there is an abundance of evidence to support the conclusion that Terry shot and killed the victim during the commission of a robbery, there is simply an absence of evidence of premeditation. In fact, there is an absence of evidence of how the shooting occurred.

At trial, the state presented the following evidence against appellant: (1) Floyd's testimony describing Terry's role in the murder/robbery; (2) the guns used in the murder and assault were found in Terry's apartment; (3) a ballistic match between the bullet that killed the victim and the gun that Terry purportedly used in the murder; (4) a DNA match of the victim's blood on Terry's shoes, which Terry was wearing at the time of the murder; (5) Terry's fingerprints on a bag found at the murder scene; and (6) the testimony of Robin Morgan (a.k.a. Joe Garcia), who was placed in the same jail cell as appellant in Volusia County, which revealed that Terry told Morgan that he shot the victim. Additionally, Floyd stated that he and Terry were riding around looking for a place to rob and took \$160.00 from the station. The victim's husband confirmed that money was missing from the station. [FN12] All of this evidence supports the conviction for first-degree felony murder.

FN12. The fact that Terry had two handguns, an inoperable .25 caliber and an operable .38 caliber and gave the .25 caliber to Floyd to hold Mr. Franco in the service bay and then took the functional .38 caliber weapon to where Mrs. Franco and the money were located is not sufficient by itself to prove premeditation. See Sireci v. State, 399 So. 2d 964, 967 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

The dissent accurately described the majority holding: "The majority [has] decided that a jury's finding of premeditation was unsupported by sufficient evidence where a man went into a service station with a loaded gun and shot a kneeling woman in the head." Id. 966 (Wells, J., concurring in part and dissenting in part).

The state had no stronger a case for premeditation at bar than it did in the foregoing cases. It showed at most that Destefano was shot twice in quick succession. As in Kirkland, it did not show that appellant exhibited, mentioned, or even possessed an intent to kill him at any time before the crime. It did not show that he shot him according to a preconceived plan. As in Mungin, "the evidence is also consistent with a [shooting] that occurred on the spur of the moment. There are no statements indicating that [he] intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation".

A conviction not supported by the evidence violates the Due Process Clause. Jackson v. Virginia, 433 U.S. 307 (1979); Amend. XIV, U.S. Const.; Art. I, § 9, Fla.Const. The Cruel and Unusual Punishment Clauses of the state and federal constitutions impose a

heightened standard of due process in death penalty cases. Amends. VIII, XIV, U.S. Const.; Art. I, § 17, Fla.Const. Because the state failed to prove a premeditated design to kill, this Court should reverse the conviction for first degree murder.

Appellant recognizes that Mungin upheld Mungin's conviction despite the lack of evidence of premeditation. It relied on Griffin v. United States, 502 U.S. 46 (1991), and wrote that jurors are well-equipped to analyze the evidence and so would not base a verdict on a ground not supported by adequate evidence when an alternative ground would support the verdict. Mungin, 689 So. 2d at 1029-30. By contrast, jurors cannot tell if a legal theory is inadequate as a matter of law, so that a verdict must be reversed if it could rest on a legally inadequate theory. See Griffin, 502 U.S. at 53-56.

Appellant points out that Mungin did not consider a crucial point in this regard. Mungin was based on the following well-established standard for proof for premeditated murder:

Premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla.), cert. denied, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

The jurors at bar used a different definition of premeditated murder. The judge instructed them pursuant to the standard jury instructions (R30 2298; R7 1153):

"Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix

the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

Thus, Mungin relied on a more precise definition of the required mental state than the jury instruction set out at bar. Mungin requires that the accused be conscious both of the "nature of the act he is about to commit" and of "the probable result of that act" and that the premeditation must be "fully formed." The standard jury instruction only required that the defendant kill "after consciously deciding to do so," and that the intent be "formed." The rest of the jury instruction focused on telling the jury that little time is needed for that mental state to develop.

In most cases, the distinction between these two definitions could make little difference. But at bar, the distinction could affect the verdict. One cannot tell whether an adequately instructed jury might have rendered the same verdict.

Appellant concedes that, as the state argued below, R2 281, Spencer v. State, 645 So. 2d 377, 382 (Fla. 1994), upheld the standard jury instruction. In Spencer, however, the evidence of premeditation was indisputable: Spencer choked his wife and threatened to kill her, he called her from the jail the next day and again threatened to kill her, several weeks later he told a friend about

a plan to kill his wife, several days later he brutally attacked her with an iron but she was able to flee, and two weeks later he attacked her and beat her with a brick, smashed her head against a concrete wall, and stabbed her to death. Given these facts, the jury could not have been affected by a variation in the definition of premeditation. Spencer did not decide the effect that the instruction might have in a case in which the evidence of premeditation was legally insufficient.

In view of the foregoing, the evidence did not support the state's theory of premeditated murder, and this Court should order a new trial.

V. WHETHER THE EVIDENCE SHOWED BEYOND A REASONABLE DOUBT THAT APPELLANT WAS THE MURDERER.

"Circumstantial evidence must lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged.'" Cox v. State, 555 So. 2d 352, 353 (Fla. 1989) (quoting Hall v. State, 90 Fla. 719, 107 So. 246, 247 (1925)). "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction." Cox, at 353.

The state presented evidence that: Destefano was shot twice in rapid succession in a public area sometime around 3 or 4:30 a.m. Appellant was shot in his hand at the scene about 10 or 15 minutes later, and he left blood all over the area, including on items in Destefano's car. Appellant told Dorothy Smith that he had been shot and robbed and he did not want her to call the police. He

told the police that Smith had stabbed him, that he had been shot in a robbery, and that he had witnessed the robbery and shooting of Destefano and had tried to pick up a gun, which had discharged when it slipped from his hand. Smith said appellant later sold a gun that she thought was silver to "Prophet" (Gatlin). Five months later, after appellant's rooming house had been sold, the murder weapon was found in the common laundry room. The state did not refute the hypothesis that appellant was present at the time of the robbery and was shot when he tried to pick up a gun lying on the ground, but he was not the person who shot and killed Destefano.

The Due Process Clauses of the state and federal constitutions forbid conviction where the evidence is insufficient, and the Cruel and Unusual Punishment Clauses of the state and federal constitutions impose a heightened standard of due process in death penalty cases. Amend. VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla.Const.

A court should grant a motion for judgment of acquittal when the state's circumstantial evidence fails to rebut the defendant's reasonable hypothesis of innocence, or where the state fails to present substantial, competent evidence of guilt. See Darling v. State, 808 So. 2d 145, 155-57 (Fla. 2002). See also Francis v. State, 808 So. 2d 110, 131-34 (Fla. 2001).

The standard of review is de novo. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). The trial and appellate courts are equally able to determine if it is proper to grant a judgment of acquittal. See State v. Smyly, 646 So. 2d 238 (Fla. 4th DCA 1994). The appellate court will "determine sufficiency as a matter of law". Tibbs

v. State, 397 So. 2d 1120, 1123, n. 10 (Fla. 1981).

"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." McArthur v. State, 351 So. 2d 972, 976 n.12 (Fla. 1977); Darling, at 155; Jaramillo v. State, 417 So. 2d 257 (Fla. 1982). If the state does not present evidence inconsistent with the defense hypothesis, no view that the jury may lawfully take of the evidence favorable to the state can be sustained under the law, and the state's evidence is insufficient to warrant conviction. Darling, at 156.

Every prosecution involves some direct evidence. For example, murder cases usually have direct evidence that the victim is dead. Such evidence does not bar application of the rule to a disputed element as to which there is only circumstantial evidence. Thus, this Court applied the circumstantial evidence rule in McArthur, in which the police arrived at McArthur's home after she shot her husband, and she said the gun had fired accidentally. See also Crump v. State, 622 So. 2d 963, 971 (Fla. 1993) (applying rule even though a witness saw victim get into Crump's truck on night of murder; state presented sufficient evidence refuting defense hypothesis); Terry (co-defendant and robbery victim's husband testified that defendant emerged from gas station store immediately after shooting victim; premeditation not proven).

At bar, the state's circumstantial case did not overcome the defense hypothesis, and this Court should reverse his conviction

and sentence.

VI. WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTION ON PREMEDITATED MURDER.

Appellant objected in writing to the standard jury instruction on "premeditated murder." R2 244. The judge overruled the objection, with leave to renew the objection if there were any change in the law before the time that the instruction was given at trial. SR 54. Defense counsel renewed all his objections to the jury instructions before the jury began to deliberate, and the judge said: "Your arguments have not been waived." R30 2293-94. The court erred in denying the objection to the standard instruction.

A. The statutory offense of murder "from a premeditated design."

Section 782.04(1)(a)1, Florida Statutes, sets out two forms of first degree murder: murder "from a premeditated design," and felony murder. It defines murder from premeditated design as follows:

The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being.

McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957), defined the "premeditated design" element (emphasis supplied):

A premeditated design to effect the death of a human being is a **fully formed** and conscious purpose to take human life, formed upon reflection **and deliberation**, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a

few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection **and deliberation** on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

See also Littles v. State, 384 So. 2d 744 (Fla. 1st DCA 1980) (quoting McCutchen).

In Owen v. State, 441 So. 2d 1111, 1113 n.4 (Fla. 3rd DCA 1983) , the court wrote (emphasis supplied):

"'Premeditation' and 'deliberation' are synonymous terms, which, as elements of first-degree murder, mean simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did, and that death would be the result of the act." [Cit.] Deliberation is the element which distinguishes first and second degree murder. [Cit.] **It is defined as a prolonged premeditation and so is even stronger than premeditation.** [Cit.]

Similarly, the revised fourth edition of Black's Law Dictionary defines "deliberation" as follows at page 514:

DELIBERATION. The act or process of deliberating. The act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means. See Deliberate.

B. The requirement of correct jury instructions.

Due process requires instructions as to what the state must prove to obtain a conviction. See Screws v. United States, 325 U.S. 91, 107 (1945); Amend. XIV, U.S. Const.; Art. I, § 9, Fla.Const.. The federal and state constitutional rights to trial by jury carry the right to accurate instructions on the elements of

the crime. Amend. VI, XIV, U.S. Const.; Art. I, § 16(a), Fla.Const. This Court wrote in Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945):

There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution... . We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading.

Rule 3.390(a), Florida Rules of Criminal Procedure, provides that the judge shall charge the jury on the law of the case.

Standard jury instructions are not necessarily correct statements of the law. See Yohn v. State, 476 So. 2d 123 (Fla. 1985) (standard instruction on insanity incorrectly stated Florida law). Promulgation of standard instructions does not relieve the court of its duty to instruct the jury on the law. Id. at 127. Judge Cobb wrote in Harvey v. State, 448 So. 2d 578 (Fla. 5th DCA 1984):

Unfortunately, trial attorneys and trial judges often fail to recognize that instructions promulgated by a Supreme Court Committee on Standard Jury Instructions, whether criminal or civil, are merely the work product of a conscientious committee and not immutable postulates from Olympus. Committees, after all, sometimes construct camels rather than race horses.

The Due Process Clauses of the state and federal constitutions forbid instructions relieving the state's burden of proof and persuasion as to an element of the offense. See Mullaney v. Wilbur, 421 U.S. 684 (1975) (murder instruction unconstitutionally relieved the state of the burden of proving the malice element required by state law); Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (dis-

cussing Mullaney); Francis v. Franklin, 471 U.S. 307 (1985); Motley. If a jury instruction authorizes a conviction on an improper theory of guilt, the resulting conviction is illegal. See Mills v. Maryland, 486 U.S. 367, 376 (1988) (citing cases).

C. The standard instruction on "premeditated murder."

The standard jury instruction on first degree murder does not explicitly state that "a premeditated design" is an element of first degree murder. The judge instructed the jury pursuant to the standard instruction (R30 2298):

"Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

This instruction misstated Florida law and unconstitutionally relieved the state of its burdens of proof and persuasion as to the statutory element of premeditated design. It did not attempt to define the premeditation element except by saying: "'Killing with premeditation' is killing after consciously deciding to do so." It did not mention McCutchen's requirement that the accused had "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and "was fully conscious of a settled

and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution."

Further the instruction relieved the state of the burdens of proof and persuasion that the premeditated design be fully formed before the killing. While it stated that "killing with premeditation" is killing after consciously deciding to do so, it relieved the state of its burden by creating a presumption: "It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing." Thus it told the jury that it needed only to find premeditation at the time of the killing. Finally, it did not tell the jury that the premeditated design element, carrying with it the element of deliberation, requires more than simple premeditation.

Appellant concedes that, as the state argued below, R2 281, Spencer upheld the standard jury instruction against a virtually identical challenge. As noted elsewhere in this brief, Spencer involved indisputable evidence of premeditation, and the jury could not have been affected by a variation in the definition of premeditation. Spencer did not decide the effect that the instruction might have in a case such as the one at bar in which jurors could have determined that the state did not establish beyond a reasonable doubt that appellant did not have a "fully formed and conscious purpose" and was not "fully conscious of a settled and fixed purpose" to kill formed after "deliberation" under McCutchen.

VII. WHETHER THE COURT ERRED IN ALLOWING THE STATE TO

PRESENT VICTIM IMPACT EVIDENCE BEFORE THE JURY FOR THE
PURPOSE OF COMPARING APPELLANT TO DESTEFANO.

Appellant moved to prevent the presentation of victim impact evidence before the jury, R2 130, and to limit victim impact evidence and argument. R2 197. Among other things, he objected to use of evidence which "may invite jurors to gauge the relative worth of particular victims' lives," R2 132 (quoting Windom v. State, 656 So. 2d 432, 440 (Fla. 1995) (Kogan, J., concurring in part and dissenting in part)), and said the state should not be allowed to use the evidence to make argument as to characterizations and opinions about the defendant. R2 198 (citing to Chapter 92-81, Laws of Florida (amending section 921.141 (7), Fla. Stat.)).

Appellee responded, R3 301, 309, saying among other things that such evidence cannot be used to support "comparative judgments" between different victims under Payne v. Tennessee, 501 U.S. 808, 823-24 (1991), R3 302-03, and that the statute excludes "characterizations and opinions about ... the defendant". R3 304.

The judge denied the motions, subject only to their being renewed if there was a change in the law. SR2 60 ("if at the time the law is unchanged I will be permitting victim impact evidence during the penalty phase"); SR2 64 (denying motion without prejudice to reraise "if indeed there has been a change in the law").

The state presented to the jury at sentencing the testimony of Destefano's mother that Destefano had worked hard so he could buy a Harley Davidson motorcycle. R31 2435-36. The state then used this

evidence (in an embellished form)¹⁹ to invite the jury's consideration of the relative worth of appellant and Destefano and to comment on the character of appellant (R33 2553-54):

But I want to start out with this. Who is Danny Destefano? Danny was a loved son, brother, grandson, lover and good friend. Danny's death results in a loss to the community that was his family and his friends. He was unique as all human beings are unique.

One thing we learned about Danny was that Danny set his sights on something and then worked towards that are [sic] goal. I think the analogy or the story of the moped is classic. Here's a guy that likes motorcycles and his end dream is to own a Harllee Davidson. Well, some people might go out, leverage themselves to the hilt and buy a Harllee and have their dream. Quick satisfaction. But what Danny did is buy a moped. Right, I guess if you look on the spectrum of motorcycle type things, you've got a Harllee on one end and moped on the other. And he bought that moped, sold that moped, got a motorcycle sold the motorcycle. Worked his way up. Because he had a goal in mind. And he recognized that choices, you see, choices that he made in his life will take him to his goal. Because in the end, ladies and gentlemen, it all comes down to choices we make. As human beings we have free will. We have the ability to control our destiny. When you make a choice, you may make a choice that is well intension and bad things happen. And we recognize it that unfortunately you may have to pay the consequences for that. Sometimes you make decisions, good things happen, they turn out the way you want.

Sometimes you make decisions in your life for the wrong reasons but knowing why. Steven Hayward did just that. Steven Hayward sits at this table today not as a result of anything anybody did to him, any of the conditions in his life, but because of very simply he made some choices. He exercised his free will and his free will brings him here today and this places him in this condition of life.

Thus, the state improperly used victim impact evidence to com-

19 Contrary to the prosecutor's argument, there was no testimony that Destefano bought and sold a moped and "[w]orked his way up" to a motorcycle.

ment on appellant's character and to draw a comparison between his worth and character and Destefano's. The use of such evidence violated the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions, under Payne and under section 924.141(7). See State v. Muhammad, 678 A.2d 164, 179 (N.J.1996) ("Victim impact testimony may not be used ... as a means of weighing the worth of the defendant against the worth of the victim."); State v. Koskovich, 776 A.2d 144, 181-82 (N.J. 2001) (error to instruct jury that victim impact evidence allowed it to "balance" victim's background against Koskovich's).

Appellee cannot show beyond a reasonable doubt that such a strong emotional appeal did not affect the jury. The jury voted 8-4 for death, and the change of only two votes would have resulted in a life recommendation. Cf. Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998) (noting 8-4 recommendation in holding erroneous use of CCP circumstance was not harmless); Omelus v. State, 584 So. 2d 563 (Fla. 1991) (same, HAC); Preston v. State, 564 So. 2d 120, 123 (Fla. 1990) (noting 7-5 recommendation in reversing after striking prior violent felony circumstance). Appellant's sentence was obtained in violation of the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amend. VI, VIII, XIV, U.S. Const; Art. I, §§ 9, 16(a), 17, Fla.Const. This Court should order resentencing.

VIII. WHETHER APPELLANT'S SENTENCE BASED ON AN 8-4 PENALTY VERDICT IS UNCONSTITUTIONAL.

Under section 775.082(1), Florida Statutes, a person may be

sentenced to death only if:

the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Under section 921.141 (1) and (2), the court must conduct jury proceedings in which the jury is to make an "advisory sentence" based on whether there are sufficient aggravating circumstances and whether sufficient mitigating circumstances outweigh those aggravating circumstances. If the jury returns an advisory sentence of death, the court must give it "great weight," and a life recommendation is to be followed unless "no reasonable person could differ" that only death is the appropriate sentence. Grossman v. State, 525 So. 2d 833 (Fla. 1988); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Thus:

Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa v. Florida, 505 U.S. 1079, 1082 (1992).

The statute does not authorize a bare-majority advisory sentence, but this Court has ruled that a jury vote of 7-5 favoring death is sufficient to support a death sentence. Rose v. State, 425 So. 2d 521 (Fla. 1983). As to determinations of guilt of a non-capital criminal charge, the Supreme Court has declared unconstitutionally unreliable a guilty verdict by less than a "substantial majority" of twelve jurors, Johnson v. Louisiana, 406 U.S. 356

(1972). Johnson mainly concerned the Sixth Amendment claim, but it incorporated due process and equal protection analysis.

When a defendant is exposed to death as a possible punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). But instead of heightened reliability, section 921.141 invites error by using the constitutionally inadequate fact-finding procedure of a bare majority verdict.

At bar, the jury returned an 8-4 advisory recommendation. R7 1189. Such an 8-4 verdict is unreliable under Johnson and violates the Due Process, Jury and Cruel and Unusual Punishment Clauses.

Appellant recognizes that this Court has rejected an argument concerning this issue in James v. State, 453 So. 2d 786 (Fla. 1984). Also, this Court wrote in Stewart v. State, 872 So. 2d 226, 228, n.2 (Fla. 2003):

... . Finally, Stewart argues that Florida's death penalty statute is unconstitutional because it permits a jury recommendation of death by a bare majority vote. When the defendant has been convicted of a prior violent felony, as Stewart has, we have rejected the argument that a jury's recommendation of death must be unanimous. See, e.g., Doorbal v. State, 837 So.2d 940, 963 (Fla.) cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003).

Appellant notes that Stewart is based on the premise that Florida law require only that the state find a prior violent felony or other aggravating circumstance in order to obtain a death sentence. This ruling is plainly contrary to the face of the statute, which requires an advisory sentence based on "sufficient aggravat-

ing circumstances" (plural) and insufficient mitigation to outweigh the aggravators. Further, the statute does not authorize bare majority advisory sentences. Florida is alone among death penalty states to allow an advisory capital sentence by a bare majority vote.

For the foregoing reasons, appellant's sentence was obtained in violation of the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amend. VI, VIII, XIV, U.S. Const; Art. I, §§ 9, 16(a), 17, Fla.Const. This Court should vacate his sentence.

IX. WHETHER FLORIDA'S DEATH PENALTY PROCEDURE, IN ITS PRESENT FORM, OPERATES IN AN UNCONSTITUTIONAL MANNER.

Appellant concedes that this Court has rejected arguments essentially similar to those here presented in, e.g., Johnson v. State, 969 So. 2d 938 (Fla. 2007).

A. Under Ring v. Arizona, 536 U.S. 584 (2002), death eligibility must be determined beyond a reasonable doubt by a jury pursuant to the Jury and Due Process Clauses. The jury proceeding under section 921.141 does not comport with the requirements of the Jury and Due Process Clauses of the state and federal constitutions because the jury renders an advisory non-unanimous verdict at which it is not required to make the eligibility determination by proof beyond a reasonable doubt and the normal rules of evidence do not apply. Hence, Florida's death penalty sentencing scheme is unconstitutional, and this Court should vacate appellant's death sentence.

So far as Bottoson v. Moore, 833 So. 2d 693 (2002) stands for the proposition that a conviction for first degree murder without more makes the defendant death eligible, it renders Florida's death sentencing scheme unconstitutional under the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Under Furman v. Georgia, 408 U.S. 238, 313 (1972), there must be a narrowing of the category of death eligible persons. Cf. Jurek v. Texas, 428 U.S. 262, 276 (1976).

B. As just noted, Bottoson indicated that one becomes death-eligible by a mere finding of guilt of first degree murder. If this is true, Florida's death penalty statute is unconstitutional because it does not narrow the category of death eligible defendants as required by Furman v. Georgia, 408 U.S. 238 (1972).

C. Section 921.141 sets no standard for the proof of mitigating evidence. But the standard jury instructions limit jurors to consideration of mitigation after being "reasonably convinced" of its existence. The instruction improperly invades the province of the Legislature, incorrectly states the law, and limits the consideration of constitutional mitigating evidence. Appellant was denied his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

D. The Cruel and Unusual Punishment, Jury, and Due Process Clauses of the state and federal constitutions forbid imposition of a death penalty where the jury has been misled as to its role in the sentencing process. See Caldwell v. Mississippi, 472 U.S. 320 (1985). Under Ring, the state may not obtain a death sentence un-

less the jury makes a finding of the predicate facts that make a defendant eligible for a death sentence. Under section 921.141, Florida Statutes, one is not eligible for a death sentence unless there is a finding of "sufficient aggravating circumstances" and the mitigation does not outweigh these aggravators. Hence, under Ring, a defendant may not be sentenced to death unless the jury makes these findings. At bar, the judge erred in instructing the jury that its penalty verdict was advisory, since, under Ring, the verdict is not merely advisory, but is a necessary predicate for a death sentence. This Court should order resentencing.

E. The Cruel and Unusual Punishment, Jury, and Due Process Clauses of the state and federal constitutions forbid imposition of a death penalty where the jury has failed to properly consider mitigation and is not properly guided by the jury instructions in its penalty deliberations. Section 921.141 requires that the jury find sufficient aggravating circumstances, and that it determine whether sufficient mitigating circumstances exist to outweigh them, but sets out no method by which the jury is to do this.

The statute is also silent as to whether the mitigating circumstances are to be determined unanimously, or by a substantial majority, a bare majority, a plurality, or only by individual jurors. The Constitution requires strict guidance to the jury in capital sentencing. The Cruel and Unusual Punishment Clause requires a higher standard of definiteness than does the Due Process Clause with respect to jury instructions in capital cases, and jury instructions which preclude the full consideration of mitigating

evidence are improper. Cf. Hitchcock v. Dugger, 481 U.S. 393 (1987). Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990) disapproved instructions that did not adequately guide the jury as to how many votes were necessary to determine the existence of mitigating circumstances. Under section 921.141, the jury has no guidance as to whether there is a threshold number of votes required before mitigating evidence can be determined. Given the standard instructions, the jury could conclude that there is such a threshold and could in consequence be misled into failing to consider mitigating evidence. Accordingly, section 921.141 is unconstitutional.

The statute is silent as to how the jury is to go about determining the existence of aggravating circumstances. It is unconstitutional because it does not provide for how many votes are necessary to find any particular aggravating circumstances.

Since the jury is usually instructed as to several aggravators, it is possible for a jury to return a death verdict without even a majority of the jurors finding any one aggravating circumstance. This situation is contrary to the constitutional requirement of definiteness in sentencing determinations and the general due process requirement that verdicts in criminal cases be rendered by at least a substantial majority of the jury.

Since jurors could reasonably construe the law as authorizing a death verdict where not even a majority of them agree as to any one aggravating circumstance, Florida's death penalty statute is unconstitutional for failure to channel the sentencer's discretion

as required by the state and federal constitutions.

F. In view of the foregoing, appellant's sentence was obtained in violation of the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amend. VI, VIII, XIV, U.S. Const; Art. I, §§ 9, 16(a), 17, Fla.Const. This Court should vacate the sentence.

CONCLUSION

Appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to by U.S. Mail on Leslie Campbell, Counsel for Appellee, Assistant Attorney General, Counsel for Appellee, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, on 2 May 2008.

Attorney for Steven Douglas Hayward

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

Attorney for Steven Douglas Hayward