IN THE SUPREME COURT OF FLORIDA

EUGENE W. McWATTERS,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-51
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS **PAGE**

AUTHORITIES CITED

CASE
PAGE

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. The parties will be referred to as they appear before this court.

"R" will denote the record on appeal which is contained in volumes 1 through 41 and contains 5523 pages - the pages are numbered consecutively 1-5523.

"T" will denote the transcript pages contained in volumes 42-71 and contains 4012 pages - the pages are numbered consecutively 1-4012.

"SR" will denote the supplemental record which has 3 volumes of transcript with 33 pages and 1 volume of record with 37 pages - the pages are numbered consecutively 1-70.

STATEMENT OF THE CASE

On July 6, 2004, Appellant was charged by indictment with murder in the first degree and sexual battery upon Jackie Bradley in case no. 04-959CF. R1466-68.

On July 6, 2004, Appellant was charged by indictment with murder in the first degree and sexual battery upon Christal Wiggins in case no. 04-957-CF. R10-12.

On July 6, 2004, Appellant was charged by indictment with murder in the first degree, sexual battery, and petit theft upon Carrieann Caughey in case no. 04-961-CF. R2904-06.

Cases 04-957-CF (Wiggins) and 04-961-CF (Caughey) were joined for trial. Case No. 05-959 CF (Bradley) was to be tried separately.

In case no. 04-959CF (Bradley) Appellant moved to exclude the introduction of collateral crime evidence from the Wiggins and Caughey cases. T309, 321-322, 328. Appellant's motion was denied R546-47. As a result the three cases were consolidated for trial. SR11-12, 15.

A jury trial commenced on September 11, 2006. At the close of the case, Appellant moved for judgments of acquittal T3242, 3250. Appellant's motions were denied T3250, 3251. The petit theft charge was nolle prossed.

Appellant was found guilty of three counts of first degree murder and three counts of sexual battery as charged R998-999,1406,2844,4448.

The jury's recommendation for the death penalty was: 9 to 3 in the Bradley case T3870; 10 to 2 in the Wiggins case T3870; and 10 to 2 in the Caughey case T3870. On

December 4, 2006, the trial court sentenced Appellant to death in all three cases R4402-4445, 1408, 2846, 4450. The trial court sentenced Appellant to consecutive life sentences on each of the sexual battery convictions R1409, 2847, 4451. A timely notice of appeal was filed R4462. This appeal follows.

STATEMENT OF THE FACTS

Appellant was on trial for the murders of Jackie Bradley, Christal Wiggins, and Carrie Caughey. The relevant facts of each case are presented below.

JACKIE BRADLEY

Thomas Field testified he lived at a campsite in the woods in the Golden Gate area of Stuart T1906. Field was Baker acted on March 30, 2004 T1910. Field last saw Jackie Bradley on March 28 T1910. Field was at the camp drinking beer with others 1911. There was a conversation about Bradley's desire to wash up with a shower or bath 1914. Appellant suggested Bradley could go to his sister's house on Garden Street 3 blocks away T1916.

Austin Cottle, Jr. testified he last saw Jackie Bradley at Tommy Field's camp T1945-46. Bradley stated she wanted to take a bath or shower T1946. Appellant said she could get a shower at his sister's house T1948. Appellant, Bradley and Glen Burbaugh walked down the street T1948. After Bradley's death, Glen Burbaugh would state, "Revenge is best served cold" T1968.[1]

Terry McElroy testified he lived in the woods in March of 2004 T1970. Jackie Bradley was McElroy's off and on girlfriend T1970. Bradley came back from Georgia with a head wound and said her boyfriend beat her up T1970. Bradley then came to live with McElroy T1971. McElroy was beat up at his camp in the woods T1971. Bradley

[1] Burbaugh had earlier made a threat to choke Bradley to death T1952, however the statement was never admitted into evidence (see Point IX).

took McElroy to Thomas Field's camp T1971. Appellant was at the camp and stated he was going to get Bradley cleaned up T1976. Bradley said she was going to get cleaned up and would be back in an hour T1975-76. McElroy never saw Bradley again T1977.

On March 31, 2004, Jackie Bradley's body was found in a canal T2003-07, 2356.

Sergeant Sanford Shirk of the Martin County Sheriff's Office testified he was called to the scene where Bradley's body was found T2014. Bradley was found in a ditch which connects two ponds T2015. The area was a residential area with houses and streets T2014. A person standing in the ditch would be visible T2025. The area was visible to houses facing opposite of the ditch T2016. The body was floating in the ditch T2026. The body had been submerged and there was some decomposition T2032. The body was partially clothed with a T-shirt bunched up around the armpit area T2016, 2024. There was a bra on beneath the T-shirt T2040. The bra was pulled up over the breasts T2041. Shirt and pants were found floating near the body T2039. Two sneakers were found nearby T2041. The ditch was later drained of water T2049. Rocks were found once the water level receded T2049. The rocks were collected T2050. There was a large pile of rocks at the end of Garden Street T2052. These rocks were similar to the rocks in the ditch T2053. Footwear impressions were found at the scene T2062.

Dr. Charles Diggs is an associate medical examiner T2310. Diggs testified that on March 31, 2004, he responded and observed Bradley's body T2324-25. Diggs

remembers the clothing was disheveled and did not remember clothing on the lower extremities T2325. Diggs conducted an autopsy the following day T2326. Bradley was 43 years old T2326. The toxicology report showed the presence of .237 of alcohol T2327-28. There was very advanced decomposition consistent with 4 or 5 days T2330. Diggs did not observe any lacerations, contusions, or hemorrhages T2331. There were no contusions or hemorrhages to the vaginal area T2332. In many cases vaginal trauma can be seen despite decomposition T2332. The neck area showed decomposition and maggots T2333. An internal examination showed a fracture of the thyroid cartilage and hyoid bone T2334. When a person is strangled these structures are very often broken. Diggs could not find anything else T2334. There was no evidence of a struggle with Bradley T2366.

Diggs testified the cause of death was strangulation T2347. A person can lose consciousness in 20-30 seconds by strangulation T2348. It takes 3 minutes or shorter, or longer, before strangulation causes death T2349.

Earl Ritzline is a criminalist with the Indian River Crime Lab T2905. Ritzline analyzed the forensic evidence regarding Bradley. The vaginal swabs provided no evidence of spermatozoa T2923. Ritzline examined numerous pieces of Appellant's clothes (2 T-shirts, a tank top, a pullover, blue shorts, black shorts, a green coat) but could not find anything of forensic significance relating to Bradley T 2920. A single hair found under Bradley's nail was not significant T2916. A cigarette butt was found by Bradley T2921. It belonged to a female T2921.

CHRISTAL WIGGINS

Joseph Herbert testified that on Memorial Day 2004 he was at Donna Nicholson's house on Driftwood Avenue T2387, 2389. Donna and Appellant were there T2389. Later that evening Christal Wiggins arrived T2390. They were all partying T2390. They were smoking rock cocaine T2398. Herbert, his girlfriend, and Donna left T2391. Appellant and Wiggins were walking down the street together T2391. Herbert did not see Wiggins after that T2392. Herbert returned 45 minutes later T2402. Appellant returned to the house 2 or 3 times T2392. They allowed Appellant inside the first time but wouldn't answer the door the other times T2392. Appellant seemed weirded out like he was high on something T2392. Herbert's partying sometimes interferes with his ability to recall things T2404.

Cyndi Kaman testified that on Memorial Day of 2004 she went to Donna Nicholson's house with Joe Herbert T2417. About 10 p.m. Kaman left with Nicholson and Herbert T2419. Appellant and Wiggins were standing by a car in the driveway T2419. Kaman returned a half hour later T2419. Appellant came to the door 5 or 6 times T2419. Each time Appellant returned he was more fidgety and had less clothes T2419. Appellant was not allowed in and was told to leave T2420. The last time Appellant came back was 12 or 1 a.m. T2420. Appellant had returned to the house a total of 7 times T2423. Kaman testified the others had been using crack cocaine T2424. Some people get hyped up and sweaty do to the use of crack cocaine T2425.

Jodie Janata testified that Christal Wiggins is her best friend and Janata lived 2

houses down from Donna Nicholsen T2407. Janata saw Appellant early Monday morning on May 31 T2408. Janata was sitting in a car with her boyfriend when Appellant approached T2409. Appellant said that Jenny set up Joe and Janata replied that it's over with T2409. Janata went inside the house T2409. Appellant followed but was not let inside T2409-10. Appellant then left T 411. Appellant was hyper and sweaty T410. Appellant looked like he was under the influence of crack cocaine T2411. The last time Janata saw Christal Wiggins was earlier that night T2414. Janata saw Wiggins going to the corner and Wiggins said she would right back T2414. Janata has never seen Wiggins since T2414. That was at 10:30 or 11:00 T2415.

Thomas Curry testified he was home the early morning hours of May 31, 2004, T2435. Curry saw Appellant between 2 and 4 a.m. T2435. Appellant was asked to leave T2435. Appellant knocked on the door at 6:00 a.m. T2436. Curry did not answer the door T2436.

Charlotte Hurley testified she was a friend of Wiggins T2875. In March of 2002 Wiggins and Appellant went into the woods north of Cane Road T2877. Other people may have been present T2879. This is an area where Hurley would smoke crack T2879.

On June 7, 2004, Sergeant Tommy Nield found the decaying body of Cristal Wiggins in an area near Cane Road T2560-2565. Nield first saw a sock then found the rest of the body T2565.

Detective Joey Obermeyer testified that Wiggins' body was found 300 feet from an area where sex and drugs were performed T2569-70. A sock was located on the foot of

the body T2575. Undergarments were found in a nearby tree T2576. A shirt and bra were pulled up around Wiggins neck T2580. Nearby cigarette butts and cans were submitted for DNA T2581. To the East of the area where the body was found some dirt was disturbed T2575.

Sergeant Shirk testified that a hair was found on one of Wiggins' fingers T2590. White sneakers were found in palmetto bushes T2591.

Medical examiner, Dr. Roger Mittleman, testified that on June 7, 2004, he went to the scene of Cristal Wiggins' body T2996. Wiggins was laying on her back and her blouse and bra were pulled up over her neck area T2997. Wiggins was naked from the waist down T2998. On June 8, 2004, Mittleman performed an autopsy on Wiggins T2997. There was a small amount of alcohol and cocaine in Wiggins' brain T2999. Mittleman examined the vaginal area but nothing was found T3001. Other than an internal examination of Wiggins' neck there were no signs of trauma to Wiggins T3001. Mittleman peeled the skin from the neck and found insect and maggot activity T3002-03. The hyoid bone was missing T3002-03. This could be missing due to insect activity T3012. There was a fracture to the back of the Adams apple T3010. This may have been a preexisting condition as the original structure of cartilage was forming bone T 3018. The cause of death was asphyxia consistent with some type of manual strangulation T3013. The evidence was consistent with both a consensual sex act followed by a homicide and a homicide during a sex act T3016.

The criminalist, Earl Ritzline, testified that the sex crime kit of Wiggins showed

nothing of forensic significance T2935. Ritzline did not test the hair on Wiggins' finger T2942. Ritzline did not find the hair on the finger to be significant T2932. Sixteen hairs were found on Wiggins' shirt T2936. Most had their natural root T2936. There was no DNA evidence that incriminated Appellant T2944. Appellant's clothes were tested but there was no significance T2939-44.

CARRIE CAUGHEY

Linda Caughey testified that she was Carrie Caughey's mother T2449. Carrie had a drug problem T2456. Mrs. Caughey last saw her on May 29, 2004 T2450. Caughey was wearing sandals, blue jeans, a white shirt, and a bathing suit top
T2450.

Errin Cassidy testified that on Memorial Day weekend of 2004 she saw Carrie Caughey at the Heritage Inn Hotel at Hope Sound at 11:00 p.m. T2454. Cassidy and Sugar man took Caughey to Port Salerno T2454. Cassidy took Caughey behind the Li'l Saints store so she could prostitute to get money for crack T2456. Cassidy waited a half hour but Caughey did not return T2454. Cassidy went back to the Heritage Inn Hotel at 12:30 T2454. Caughey was at the hotel with a skinny older man with curly hair T2455-56. Caughey was smoking crack T2455. She left with the older man at 11:30 a.m. T2455. This is the last time Cassidy saw Caughey
T2457. The older man returned around 3:00 a.m. T2455-56.

Jerry Prevatt testified he knew Caughey and she was known to have a drug problem and to engage in prostitution T2459, 2461-2. Prevatt was robbed between May

30 and May 31, 2004, at the Heritage Inn T2463. Prevatt saw Caughey this evening – she wore jean shorts, a light colored top and a bathing suit top underneath T2464. Prevatt did drugs with Caughey in his room T2464. Caughey went to get more dope but came running back saying that 3 guys on the other side of the hotel were fixing to rob Prevatt T2465. Prevatt and Caughey left the hotel at 11:30 T 2465. They went to the L'il Saints store up on Driftwood to get more dope T2466. At approximately 2:00 a.m. they talked to Appellant about getting some dope T2467. Appellant was riding a bicycle T2469. They waited for Appellant to return with drugs but he returned without drugs T2476. Caughey got out of Prevatt's truck because she had some friends around the corner T2476. Caughey walked up the street and turned left T2478. Appellant came around the corner on his bike T2478. Appellant yelled to Caughey and she turned around a couple of times T2478. Appellant rode up to Caughey T2478. Prevatt thought everything was fine and drove to his house T2478.

Caughey's body was found in a wooded area at the end of Lincoln Street T2500, 2504.

Sergeant Sanford Shirk testified there were some houses in the area T2504. Caughey was nude from the waist down T2504. Her shirt and bathing suit top were pulled up to expose her breasts T2521. The body appeared to be covered with some vegetation T2505. The body was in a bad state of decomposition and there was insect activity T2504. The body was 12 or 15 feet into a wooded area T2524. Jeans were found 12 feet from the body T2524. Underwear was not found T2535. Caughey's arms

were outstretched and her legs were crossed over one another T2525. There were no luminol results in the area T2535. There was a large retention pond near where the body was found T2554.

Criminalist Earl Ritzline testified there was nothing of forensic value taken from Caughey or her clothes T2926,2931. Medical examiner Charles Diggs testified he performed the autopsy on Carrie Caughey. There was no evidence of lacerations, bleedings or bruises T2962. Caughey had a lot of cocaine in her body T2964. An internal examination of the neck showed the styloid process broken T2965. Sometimes when a person is strangled needle like bones which protract from the area beneath the ear are broken T2965. Caughey's hyoid bone was broken at the joint T2965. Strangulation is different for the styoid process because it is higher in the neck T2070-71. In Diggs' opinion the cause of death is strangulation T2972.

APPELLANT'S STATEMENTS

Sergeant Brian Bergen spoke with Jessica Aleman after Jackie Bradley's body was found T2079. Aleman's house was approximately 100 feet from where the body was found T2082. Appellant, Aleman's brother, lives with Aleman and was also present T2080-82. Appellant seemed uninterested and unemotional T2083. Appellant rarely made eye contact T 2084.

Bergen took a taped statement from Appellant on April 2, 2004 T 2097. The tape was played to the jury T2103-2225. Appellant explained he was really high on the day Bergen was at his sister's house T2222-23. Appellant was shown a photo and initially did

not recognize the person T2160. However, after looking at the photo Appellant recognized Jackie 2161, 2215-16. The last time Appellant saw her was two weeks ago T2161. On Friday Appellant was at a camp when Hippie Ray hit Terry and told him to leave T2180. Paul Bowman would give Appellant money for drugs T 2186. Appellant got drugs for himself instead of Bowman T 2186, 2192. Bradley was not at the camp when Appellant was there T2192.

Sergeant Bergen testified he interviewed Appellant on June 7, 2004 T 2599. Appellant was on crutches and his right foot was in a bandage T 2599. Appellant had facial hair and an abrasion on the side of his face T 2600.

Appellant's June 7, 2004, statement was played to the jury. Appellant indicated a week earlier he was at Donna Nicholsen's house smoking crack cocaine T2684, 2688, 2730. Another girl arrived and they continued to smoke T 735. Donna and others left T2735. Appellant and a heavy set girl remained T2737. Appellant would later go to Jodie's to score some dope T2738. The heavyset girl walked off and got into a car with someone T2738. At Jodie's house, Appellant tried to go inside but was told to leave T 2739. Appellant went to Donna's house and when she returned he went inside and continued to smoke T2739. After smoking at Donna's, Appellant went to get some drugs to sell T2751. Appellant rode his bicycle around smoking dope and selling dope T 2756, 2766. Appellant foot was run over when he was selling drugs T2714, 2763. Appellant fell to the gravel T2771. It did not hurt because Appellant was high T2763. Appellant sold some dope after the accident and then proceeded to the hospital T2754. This

occurred around 5:00 a.m. T 2765. When Appellant earlier said he had an ATV accident he was trying to cover up the fact he had sold crack cocaine T2751. Appellant smoked $80 worth of crack that night T 2795.

On June 18, 2004, police got a written statement from Appellant T2868. A written questionnaire was given to Appellant T2871-72. Appellant denied any involvement in the murders of the three girls T2872-3.

THE JUNE 23, 2004, STATEMENT

On June 23, 2004, a plan was set in motion to arrest Appellant on an unrelated charge and to interview Appellant T3026. Lt. Cedric Humphrey was to arrest Appellant at a McDonalds on an unrelated charge T3026, 3030. Humphrey read Miranda rights at McDonalds but was instructed not to engage Appellant in interrogation T 3026, 3034. The plan included purposely placing Appellant in a task force room with photos, rocks, and reports all pertaining to the homicides T3027, 3035. The police went through with the plan.

Dougherty testified that it was planned that Humphrey Mirandize Appellant rather than Dougherty T3233. Appellant was not read his rights at the station nor did Dougherty mention that Appellant had previously been read his rights T 3233. The plan was to set up this psychological ruse so Appellant would not exercise his Miranda rights T3233. The walls of the room Appellant was left in had police reports, photos, and witness statements T3238-40. Appellant initially denied being involved in Jackie Bradley's death but interrogators told him there were witnesses who saw him with her and thought he killed

her:

> "Mr. Silvas: That's the problem we're having. We have all these witnesses who saw you leave with her.
>
> "Mr McWatters: See, I don't know these witnesses that you're talking about. You know what I'm saying?
>
> "Mr. Silvas: You know them all. The – the Austins, both Austins, Senior and Junior.
>
> "Mr. Silvas: So they – they – they – they think you killed Jackie.

T3047-48. The interrogators continued to tell Appellant what others had told them

T3050-53. Appellant told interrogators that he had seen the wall in the task force room

with the evidence:

> "Mr. McWatters: .....I seen what the fuck it says on the goddamned – on the wall in there. I read everything.
>
> "Mr. Silvas: What was in there?
>
> "Mr. McWatters: What was in there? All a bunch of bullshitting junk all concocted and collected together that you fucking got up in there.
>
> "Mr. Dougherty: Was he in the room?
>
> "Mr. McWatters: Oh, I was in the room, boy, and fucking read everything. There's no sense in playing with me. I know what you have on the fucking wall. I know where you're coming from. I know exactly what you are using – fucking saying – the people are fucking saying.
>
> "Mr. Dougherty: So you know it's over.
>
> "Mr. McWatters: I know what you're talking about. I know there ain't (inaudible). I know I ain't doing nothing.

T3053-54. The interrogators then emphasized that the evidence referred to on the wall

was 100% fact and they knew exactly what had occurred:

> "Mr. Dougherty: Because we have people that say it. You read the walls. You tell me. I can't believe you were in that damn room. You read the walls. You tell me. How do you explain having that girl on your bike?
>
> "Mr. McWatters: She wasn't on my bike.
>
> "Mr. Dougherty: She was. She was on your bike and it ain't worth arguing over. I told you I looked at evidence and I looked at what we can prove. I'm not here to judge you. I'm here to say what probably happened

and what didn't happen. And you know what, now we know what happen. It's over. You're here. We know what happened. We know it down to a tee. We would like to clear some things up with you, but you're just feeding us a bunch of lies. What else do you want me to say? You saw the damn room. You weren't supposed to, but you saw it. You know what we've got now. And you know that there is – everything on those walls is 100 percent fact.

T3063-64. Appellant then noted the DNA evidence on the walls and the interrogators explained how the DNA showed his guilt:

"Mr. Dougherty: Well I can tell you it's fact. It's all documented.
"Mr. McWatters: All the DNA fucking shit –
"Mr. Dougherty: Yeah.
"Mr. McWatters: – you got up there and all that other shit –.
"Mr. Dougherty: Yeah, evidently.
"Mr. McWatters: (Inaudible.) That's all saying that it was me?
"Mr. Dougherty: That's yours.
"Mr. McWatters: (Inaudible.)
"Mr. Dougherty: I can't tell you it's not yours. It's your. You tell me. How did it happen? How did the D – how did your DNA end up on those nail scrapings? How did it happen?

***

"Mr. Dougherty: Thank you. That's where that stuff came from. The DNA came back on that. The bra in there. There's DNA on the bra. There's a shirt in there. Any little thing. I know you know a lot. Okay? And I'm not here to bullshit you. We fucking talked.

T3064-65. The interrogators continued to tell the Appellant about the walls of proof and how his situation was hopeless.

"Mr. Dougherty: We talked. And I told you what I can prove, we'll follow through with and you're here. You saw those walls. I was hoping to find a good reason, but now you have everything that we know about. And it's enough for you to be sitting here. I don't think you're a killer in my mind, but I think something happened. Something made you fucking snap. Whatever it was tell me about it. Give me a reason. I don't think you're a

cold blooded killer.....

"Mr. McWatters: I ain't walking from here. I'm chained down like an animal. So I know I ain't going nowhere.

T3066-68. The interrogators then explained they could help Appellant if they were able to know exactly what happened:

"Mr. Dougherty: And what did – what did that do? Are you trying to make us take control of it and help you?

"Mr. Silvas: Because we can do that.

"Mr. McWatters: I know you can. (Laughter.)

"Mr. Silvas: We can do that.

"Mr. Dougherty: Do you want to deal with an asshole that makes you do something or me that works with you?

***

"Mr. Dougherty: Eugene? I told you I'd be here with you through it. Okay? And I'll – I'll be there to get you help, try and get you help, whatever I can do. I just need to be able to rationalize with what you're talking about, with what – what – what happened.

T3080-82. The interrogators asked if Appellant wanted help and Appellant indicated that he didn't want to die and the interrogators indicated that they could take control and he didn't have to die and could get a job :

"Mr. Dougherty: All you can do is ask for help. Are you asking for help?

"Mr. McWatters: Something like that.

"Mr. Dougherty: Well let's talk, buddy.

"Mr. McWatters: Talk as in am I going to spend the rest of my life in prison or are they going to put me to fucking death?

"Mr. Dougherty: What would you like.

Mr. McWatters: Doesn't matter, either way, really.

Mr. Dougherty: You said you wanted us to take control of your life. Right?

"Mr. McWatters: Yeah. So I asked what kind of control you're talking about, but (laughter).

"Mr. Dougherty: Hey, you tell me. What would you like.
"Mr. McWatters: I don't want to die obviously.
Mr. Dougherty: I heard you're a great trustee.
Mr. McWatters: I won't be able to be a trustee now.
"Mr. Dougherty: Well, you'll be able to get a job though.

T3085-86. Appellant eventually answered questions about Jackie Bradley:

"Mr. Silvas: So lets – let's start with what – with Jackie, Eugene. What – what exactly happened around 11:30?
"Mr. McWatters: I don't know. It's another person. It ain't – it ain't – it ain't me.

***

"Mr. Silvas: Right. How did – how did you get her back there to the canal? I know your house is right there, but we just like to (inaudible).
"Mr. McWatters: We were drinking.

***

"Mr. McWatters: Talked, talking shit, whatever (inaudible).
"Mr. Silvas: Right. So what happened? Did you choke her? Did you fight with her? What happened?
"Mr. McWatters: I tried to have sex with her.
"Mr. Silvas: You tried to have sex? And did she give it up? Did she give up sex?
"Mr. McWatters: She wasn't willing at first, but then she finally did.
"Mr. Silvas: Okay
"Mr. McWatters: Yeah.
"Mr. Silvas: She wasn't willing initially and then was she okay with it. What happened after that?
"Mr. McWatters: I don't know. I have (inaudible).
"Mr. Silvas: Uh-huh.
"Mr. McWatters: (Inaudible.)
"Mr. Dougherty: Did you come?
"Mr. McWatters: It's possible.
"Mr. Silvas: So what happened after sex?
"Mr. Dougherty: Or was it during the sex that you choked her?
"Mr. McWatters: (Inaudible) what I had seen after I done (inaudible).
"Mr. Silvas: So you killed her?

"Mr. McWatters: Well, I know I'm the one who did it.

"Mr. Silvas: Okay.

"Mr. McWatters: (Inaudible) exactlly how it happened – exactly what expired during the course or as far as (inaudible).

"Mr. Silvas: What did you do after that? I mean – this happened on land, right?

"Mr. McWatters: Uh-huh.

"Mr. Silvas: What happened after that?

"Mr. McWatters: I put her in the water.

"Mr. Silvas: You put her in the water?

"Mr. McWatters: After I notice what I had done.

"Mr. Silvas: Okay. What did you do with the clothing she was wearing?

"Mr. McWatters: Threw them in the water, threw her shoes down the canal.

T3099-3102. Appellant also eventually talked about Christal [Wiggins]:

"Mr. Dougherty: Tell us about Christal. What happened?

"Mr. McWatters: Probably about – I don't know, about I think between (inaudible) bullshit and came down to the last (inaudible) to smoke fucking dope and we went to have sex and I told her – you know what I'm saying – she pulled that shit out. I don't know (inaudible). I guess after I started to get off, I fucking lost it one more time.

"Me. Silvas: Mm.

"Mr. McWatters: (Inaudible) come back – you know what I'm saying and I realized what I done and it's fucking crazy.

***

"Mr. Silvas: Did you take her underwear off, her panties?

"Mr. McWatters: Yes I did.

"Mr. Silvas: Okay. Did you pull them off or – or just tear them off?

"Mr. McWatters: I think I tore them off.

"Mr. Silvas: Was – did she say anything just prior to – to this happening that got you upset?

"Mr. McWatters: No. We were laughing. I remember that we were having some good consensual sex and –

"Mr. Dougherty: She told you to stop?

"Mr. McWatters: No.

"Mr. Dougherty: What were you saying, she wanted you to pull it out?

"Mr. McWatters: Huh?

"Mr. Dougherty: What were you talking about?

"Mr. McWatters: She wanted me to pull out.

"Mr. Dougherty: Did she tell you to stop or did you finish?

"Mr. McWatters: No.

***

"Mr. Silvas: What – how did you get her in the woods?

"Mr. McWatters: We had sex for crack.

"Mr. Silvas: You had sex for crack? Did you meet her earlier that evening somewhere?

"Mr. McWatters: Yeah. I met her at Donna's house.

***

"Mr. Dougherty: Did you guys fight?

"Mr. McWatters: I don't believe so.

"Mr. Dougherty: Why would you rip her underwear off?

"Mr. McWatters: It's part of the game.

"Mr. Dougherty: Did she get mad at you for doing that?

"Mr. McWatters: No.

"Mr. Silvas: Or was she dead already?

"Mr. McWatters: No, she wasn't dead already.

***

"Mr. Silvas: Well, how did you tear off the underwear, I guess Mike's asking? What position was she in – I mean, or in?

"Mr. McWatters: Laying on her back.

Mr. Silvas: Okay.

"Mr. McWatters: Her legs were up and I pulled them off.

"Mr. Silvas: All right. So you guys were – it was before sex, she was laying on the ground and you pulled them off of her? What happened after that?

"Mr. McWatters: We had sex.

T3104-05, 3108, 3133, 3137, 3138. Appellant was also questioned about Carrie

[Caughey]: "Mr. Dougherty: Let's talk about Carrie.

"Mr. Silvas: You already told us she was looking for dope for Prevatt. I mean that's what you said outside. Is that correct?

"Mr. McWatters: Uh-huh.

"Mr. Silvas: So what happened after that?

"Mr. McWatters: Probably the same thing. I had some on me.

"Mr. Silvas: You had what on you?

"Mr. McWattwers: Some dope.

"Mr. Silvas: Was it dope, crack, pot – crack?

"Mr. McWatters: Yeah.

"Mr. Silvas: Was she trying to find some or how did you wind up with –

"Mr. McWatters: She was trying to find some, he dropped her off.

***

"Mr. Dougherty: Were you talking to her?

"Mr. McWatters: They had stopped me and asked me for cigarettes and shit like that and he had already asked me did I know where to get anything.

"Mr. Dougherty: Uh-huh.

"Mr. McWatters: And I told them yeah.

"Mr. Dougherty: And then what happened?

"Mr. McWatters: Wee, he dropped her off and we went to the school park and I told her I had some. You know what I'm saying? I didn't have enough to give her for the hundred, but I'd get her some (inaudible) negotiations –

"Mr. Dougherty: Uh-huh.

"Mr. McWatters: Started having sex with her.

***

Mr. Dougherty: So you dropped her off and you guys went around the corner? Along the same pond, the retention pond area? Did you have sex?

"Mr. McWatters: Uh-huh.

"Mr. Dougherty: And then what happened?

"Mr. McWatters: Same theory, man.

"Mr. Dougherty: And did you guys hang out?

"Mr. McWatters: I don't know how to describe it, but it happened.

"Mr. Dougherty: Okay. Did you – did you – let's put it this way.

Are you responsible for her death?

"Mr. McWatters: Yeah.

"Mr. Dougherty: Okay. What happened then?

"Mr. McWatters: I put her up in the trees and tried to cover her up with more trees.

T3109-3113.

***

"Mr. McWatters: We walked down Lincoln Street (inaudible).

"Mr. Dougherty: Okay. Then what?

"Mr. McWatters: I told her I had some crack.

"Mr. Dougherty: Did you?

"Mr. McWatters: Yeah.

"Mr. Dougherty: Did you go smoke it?

"Mr. McWatters: Little bit.

"Mr. Dougherty: Did you have sex first?

"Mr. McWatters: No. Had sex after.

"Mr. Dougherty: Okay. Did you take her pants off?

"Mr. Mcwatters: Uh-huh.

"Mr. Dougherty; Did you take her shoes off?

"Mr. McWatters: Uh-huh. All willingly.

"Mr. Dougherty: All willingly? No did you give her a push on your pipe?

"Mr. McWatters: What?

"Mr. Dougherty: How did you – how – how – much crack did you have?

"Mr. McWatters: Maybe like 30 bucks worth.

"Mr. Dougherty: Okay. The sex was consensual?

"Mr. McWatters: Uh-huh.

"Mr. Dougherty: After having sex what happened?

"Mr. McWatters: I don't know.

"Mr. Dougherty: Did she say something to piss you off?

"Mr. McWatters: No.

"Mr. Dougherty: Huh?

"Mr. McWatters: No.

"Mr. Silvas: So what happened?

"Mr. McWatters: I don't know.

"Mr. Dougherty: Did that rage come out in you again?

"Mr. McWatters: I think so.

"Mr. Dougherty: Did you punch her?
"Mr. McWatters: (Inaudible.)
"Mr. Dougherty: Are you sure?
"Mr. McWatters: I know – I don't know (inaudible) --
"Mr. Dougherty: Huh?
"Mr. McWatters: – (inaudible).
"Mr. Silvas: Did she scream?
"Mr. McWatters: I don't have no clue.
"Mr. Silvas: I'm sorry?
"Mr. McWatters: I don't have no clue.
"Mr. Silvas: Why did you do it?
"Mr. McWatters: I don't know. I know I did – I did it.
"Mr. Silvas: Okay.
"Mr. Dougherty: Are you responsible for her death?
"Mr. McWatters: Uh-huh.
"Mr. Dougherty: Huh?
"Mr. McWatters: Yeah
"Mr. Silvas: Are you responsible for Wiggins?
"Mr. McWatters: All three.
"Mr. Silvas: All three? Is there any other bodies that we don't know of?
"Mr. McWatters: No.

T3144-3146.

OTHER STATEMENTS

A media DVD was played to the jury as follows:

"A voice: Are you sorry for what you did?"
"Mr. McWatters: Yes."

T3203.

The police recorded a conversation between Appellant and his sister Jessica Aleman on December 7, 2004 T3207. In the conversation Appellant admits to having sex with Cristal Wiggins T3208. Appellant was concerned that would make him look guilty T3209.

The police recorded a conversation on October 31, 2004, between Appellant and his mother T3211. Appellant indicated he may have had sex with them but he didn't kill anyone T3214.

PENALTY PHASE

Dr. Roger Mittlemen testified that after reviewing the autopsies of Bradley, Wiggins, and Caughey there was nothing to indicate unconsciousness when they were strangled T3606-07. They could lose consciousness in less than a minute T3608.

Sergeant Bergen testified that Jessica Aleman indicated Appellant was not allowed to bring anybody to her house T3613.

Aileen Flanagan was a teacher at the Challenger School. Appellant was a student in Flanagan's class for severally emotionally disturbed students T3627. Appellant suffered from severe depression and had a below average IQ T3628, 3630. Any mother who spent any amount of time with Appellant would recognize there was something wrong with Appellant – but Appellant's mother failed to do T3632. Appellant came to school filthy, dirty and smelled of feces and body odor T3633. Despite attempts to fit in, because of poor hygiene Appellant was an outcast at school T3634. Records dating back from kindergarten show issues of a lack of self-worth and loneliness T3634. Appellant was teased by other students T3637. Records indicate Appellant was abused as a child starting in the first grade T3636. Appellant would come to school with black eyes and bruising T3637.

Michael Riordan, a licensed psychologist, testified Appellant's mother lost custody

of Appellant when he was 4 years old T3653. There was some evidence that Appellant was a crack baby T3653. Appellant discovered that his aunt was not his biological mother when he was 5 years old T3654. Appellant felt like an outsider T3654. Appellant was abused by boyfriends of his aunt T3655. Appellant suffered from physical deficits T3655. When Appellant would fail he would be beaten T3656. Appellant was struck with belts, extension cords, palm fronds with spikes T3656. Appellant would be bruised with open wounds T3657. Records show that the abuse would stop when the boyfriends were incarcerated T3657.

Appellant moved out at 13 and lived on the streets T3660. Appellant would sleep in a box under a bridge T3661. Appellant initially did well at the Challenger School but when his peers found out he was a crack baby he got into fights T3662. Appellant began drinking at age 9 and was getting drunk at the age of 13 T3663. Appellant had a significant history of drug and alcohol abuse T3664. Appellant was addicted to crack cocaine T3664. Appellant was designated as having mental illness in the 4th grade T3665. At the age of 15 he admitted to New Horizons for suicide risk and depression T3666. The IQ test showed Appellant had a borerline IQ T3682.

Riordan testified he did not look into mental mitigation because Appellant claimed he was innocent T3711. Riordan did note that Appellant's statement that "I just lost it" was consistent with acting under the influence of extreme mental or emotional disturbance and impulsitivity T3713.

Jessica Aleman testified, via audiotape, that she was Appellant's cousin but he was

raised as her brother T3719. Appellant was taken from his mother due to neglect T3750. It is not known who is father is T3753. Appellant was verbally, mentally and physically abused by Aleman's mother and father T3752. Aleman's father beat and abused Appellant T3753. Appellant was hit with boards, belts, shoes, and branches T3754. Because of the abuse Appellant had no choice but to leave at age 13 T3755. Appellant lived under a bridge and Aleman would bring him food T3755. Appellant basically grew up on the streets T3756. Appellant was beat up on the streets T3756. Appellant was involved in drugs T3756.

Jenny Moore testified that she is presently incarcerated for possession of crack cocaine T3771-73. Appellant and Moore lived together and had a child together T3774. The child is now 6 T3775. Appellant was a good father when Moore was with him T3778. Moore's son was taken away and as a result Appellant started using drugs more often T3779.

SPENCER HEARING

Jessica Aleman testified Appellant did not have a key to her house T3912. Appellant would enter through sliding glass doors which Aleman would not lock T3912. Appellant was not allowed to bring friends in the house T3913.

Gregory Landrum, a clinical psychologist, testified that he reviewed the records in Appellant's case T3917-19. There was no evidence of hallucinations or delusions in Appellant's record T3921. Landrum does not believe Appellant was under the influence

of extreme emotional disturbance T3922. Landrum would look to see whether Appellant knew right from wrong to find such mitigation T3930-31. The mental disorder must occur throughout Appellant's life for this mitigation to apply T3933. Appellant did not suffer from a condition which would impair his ability to distinguish right from wrong T3923. If sentenced to life Appellant could conform his conduct to the law T3936.

MPA HEARING UNDER §794.023

Dr. Deborah Leporowski, a licensed psychologist, testified she met with Appellant for 3 hours and reviewed the reports and documents in this case T3984-86. Dr. Leporowski testified Appellant did not qualify for the MPA injections because she could not diagnose Appellant having a sexual paraphilia T3988.

SUMMARY OF THE ARGUMENT

1. The police intentionally used a strategy to undermine and circumvent the effectiveness of *Miranda* warnings. Under Missouri v. Seibert, 542 U.S. 600 (2004) police cannot utilize a strategy to undermine or circumvent the effectiveness of *Miranda* warnings. It was reversible error to deny Appellant's motion to suppress.

2. Appellant moved to suppress the use of collateral crime evidence. The collateral crimes had similarities that were general and found in other crimes. The collateral crimes had significant dissimiliarties to the Bradley crime. The trial court declined to consider the dissimilarities. The collateral crimes were not relevant other than

to show propensity. It was reversible error to deny Appellant's motion to suppress the collateral crime evidence.

3. Appellant objected to state witnesses evaluating the circumstantial evidence for the jury. In essence the witnesses were acting as a 13th juror. It was error to overrule Appellant's objections.

4. The evidence was insufficient to prove premeditation.

5. The evidence was insufficient to prove sexual battery and felony murder.

6. Appellant's attorney Robert Udell, represented a key state witness against Appellant - Jerry Prevatt. It was not disclosed, nor inquired into, that Udell represented Prevatt in connection with the present charges against Appellant. Prevatt was a possible suspect and also pointed the investigative finger toward Appellant. Also, Appellant's other attorney, Rusty Akins, had worked at the public defender's office which had been withdrawn because of a conflict of interest. The trial court erred in failing to conduct an adequate inquiry and/or not withdrawing counsel.

7. The trial court erred in admitting photographs showing the results of maggots eating away at the flesh of the victims. The photographs were gratuitous. The prosecutor's explanation that he needed to show the jury the photos to prevent the jurors from being mislead by the photos is illogical, specious and demonstrates a true intent to inflame the jury.

8. The trial court erred in overruling Appellant's confrontation clause and hearsay objections to accusations by witnesses who did not testify at trial.

9. Appellant was denied due process and a fair trial by excluding evidence that Glen Burbaugh threatened to strangle Jackie Bradley.

10. The trial court erred in admitting evidence that Jerry Prevatt was afraid of Appellant.

11. The trial court erred in denying Appellant's motion to disqualify the State Attorney's Office.

12. The trial court erred in instructing the jury on, and in finding, the CCP aggravating circumstance.

13. The court erred in overruling Appellant's objection to the jury instruction on the cold calculated and premeditated (CCP) circumstance on the ground that it failed to require that the state prove that Appellant intended to kill before the crime.

14. The trial court erred in instructing the jury on, and in finding, the EHAC aggravating circumstance.

15. Florida's Death Penalty which does require: a unanimous jury finding for death; a unanimous jury finding of aggravating circumstances; a finding beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the unites States Constitution.

16. Florida Statute 921.141 (d), the felony murder aggravator, is unconstitutional on its face and as applied in this case.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT OF JUNE 23, 2004, WHERE POLICE INTENTIONALLY USED A STRATEGY TO CIRCUMVENT THE REQUIREMENT THAT A SUSPECT BE "ADEQUATELY AND EFFECTIVELY" ADVISED OF HIS RIGHTS UNDER MIRANDA v. ARIZONA 384 U.S. 436, 86 S.Ct. 1602.

The police admitted they intentionally used a strategy in order to avoid Appellant exercising his *Miranda* rights when interrogating Appellant on June 23, 2004. Such a strategy undermined the effectiveness of the *Miranda* warnings and requires reversal.

PRESERVATION

Appellant moved to suppress the June 23, 2004, statement:

> MR. AKINS: Your Honor, I would suggest that the statement on June 23, 2004, should be suppressed for a couple of reasons…. Lastly, Your Honor, we have Detective Dougherty's admission here in this hearing that this was a surreptitious **effort to circumvent** his *Miranda* warnings because he feared that if he was properly Mirandized that he would invoke his rights. And for those reasons, Your Honor, we would ask that the Court order that the statements be suppressed.
>
> * * *
>
> I would suggest that there is a legal issue, also, in the fact that *Miranda* is supposed to be given in a fashion that a person can knowingly and intelligently waive those rights. When you factor in a surreptitious effort when the interrogating officer knows that when properly Mirandized it's likely that he would invoke his rights and he does so to **circumven**t that, that is then a legal issue as to whether or not the statement was knowingly, freely and voluntarily made.
>
> * * *
>
> … I would suggest that that in and of itself, the **disjointed nature** which

> they were allegedly given in and of itself is a means **to deceive in order to dilute *Miranda***. And if the -- if law enforcement does anything to **dilute the meaningfulness** of the *Miranda* warnings, then it's an ineffective waiver of *Miranda*.

T493-495,496,499-500.[2] The trial court denied the motion T505, specifically ruling that the "law enforcement technique" was not improper T505.

FACTS

Detective Dougherty testified that once it was discovered there was an arrest warrant on a charge unrelated to the 3 homicides, a "plan" was set in motion T464 . An officer unconnected to the homicide investigation (Sergeant Humphrey) arrested Appellant on the unrelated warrant T464-465. The unrelated arrest was to be away from the police station at a McDonalds T465,474. Humphrey then read Appellant his *Miranda* rights on the unrelated arrest but would not question Appellant nor did he ask Appellant if he wanted to talk T465,476. Appellant later was transported to the police station T465. Appellant was be placed in the task force room where all the evidence of the 3 homicides including police reports, witness statements, photographs, maps, and physical evidence was located T465. Humphrey executed this plan pursuant to the instructions of Detective Dougherty. Appellant was later taken from the task force room to the interrogation room where Detective Silvas began the interrogation into the Jackie Bradley killing T3043-44. Dougherty later joined in the interrogation. Appellant was not read his *Miranda* rights at

the police station T482. Dougherty testified he "did not want him to invoke his rights" T485. Throughout the case Dougherty continued to acknowledge that he set up the psychological ruse because of the fear Appellant would otherwise exercise his rights:

> Q Okay. And it was a conscious decision on your part to have Sergeant Humphrey Mirandize him as opposed to you?
> A That's correct.
> Q In fact, that's why you didn't walk in and say "Mr. McWatters, you've previously been read your rights"?
> A Correct.
> Q Because as you developed this plan, so to speak, you had set up this psychological ruse because you were afraid that if you read him his rights, he would exercise those rights?
> A Yes, sir.

T3233.

STANDARD OF REVIEW

A trial court's ruling on a defendant's confession is a mixed question of law and fact. The trial court's ruling on historical facts is presumptively correct and is only reversed if not supported by competent substantial evidence. Conner v. State, 803 So. 2d 598 (Fla. 2d DCA 2001). The trial court's legal ruling on the admissibility of a confession is reviewed *de novo.* Conner v. State, 803 So. 2d 598 (Fla. 2d DCA 2001); Albritton v. State, 769 So. 2d 438 (Fla. 2d DCA 2000) (ultimate issue regarding confession is a legal question requiring independent review); Porter v. State, 765 So. 2d 76 (Fla. 4th DCA 2000); Sims v. State, 743 So. 2d 97 (Fla. 1st DCA 1999). In the present case, Appellant is not disputing the trial court's finding of historical facts. Rather, Appellant challenges

[2] Appellant also moved to suppress on a separate ground which is not being raised

the legal ruling regarding the police strategy of circumventing *Miranda* warnings. Thus this issue is reviewed *de novo.* Under any of standard review, the June 23rd statement should have been suppressed.

ANALYSIS

The state has the burden of showing that *Miranda* rights were adequately and effectively given. Brown v. Illilnois, 95 S.Ct. 2259 (1975); Colorado v. Connelly, 107 S.Ct. 515 (1986). In *Miranda*, the Court held "the accused must be adequately and effectively apprised of his rights." Missouri v. Seibert, 542 U.S. 600, 609, 124 S.Ct. 2601, 2608, 2609 (2004). The Court explained that the giving of *Miranda* warnings by itself does not meet the requirement that they be **effectively** given. Id. The Court condemned a police strategy that dilutes or circumvents the effectiveness of *Miranda* warnings:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the **warnings could function "effectively"** as *Miranda* requires.
>
> * * *
>
> At the opposite extreme are the facts here, which by any objective measure reveal a **police strategy adapted to undermine** the *Miranda* warnings.
>
> * * *
>
> The impression that the further questioning was a mere continuation of the

---

on appeal.

> earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.
>
> * * *
>
> **Strategists** dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickinson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Siebert's postwarning statement are inadmissible.

124 S.Ct. at 2610, 2612, 2613 (emphasis added). Justice Kennedy (the 5th vote for the majority) specifically condemned police strategy which undermines *Miranda*:

> The interrogation technique used in this case is **designed to circumvent** *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). It undermines the *Miranda* warning and obscures its meaning. The plurality opinion is correct to conclude that **statements obtained through the use of this technique are inadmissible.**
>
> * * *
>
> This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As Justice Souter points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The **strategy** is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already bee obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers and does not serve

any legitimate objectives that might otherwise justify its use.

* * *

> The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. **The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect**. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Moran v. Burbine, 475 U.S. 412, 423-424, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps.

124 S.Ct. at 2164 and 2615 (emphasis added). The bottom line is the Court made it clear that police techniques to circumvent or dilute the effectiveness of *Miranda* warnings would not be permitted.

In Seibert, the police used a strategy to undermine *Miranda* by only Mirandizing Siebert after she had incriminated herself. Siebert was then advised of her rights. Siebert then gave another statement. As the Court explained this statement is inadmissible because *Miranda* warnings tend to mean less after incriminating statements have already been made. The police strategy was to overlap the two statements, using the same police personnel, and treating the two statements as continuous. 124 S.Ct. at 2612. The police made certain there was no break in the chain between the initial interrogation and the later warnings and interrogation.

In the present case, as in Siebert, the police used a strategy to undermine *Miranda.* Here, the police used a strategy of separating the *Miranda* warnings from the

interrogation by having Appellant arrested on an unrelated charge and given *Miranda* warnings on that charge at a different location and by a different officer. The police made certain there was a break in the chain between the *Miranda* warnings and the interrogation in this case. As Officer Dougherty admitted, it was a psychological ruse so that Appellant would not invoke his *Miranda* rights. The undermining and circumventing of *Miranda* violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. It also violates Article I, Sections 9, 16 and 17of the Florida Constitution. See Almeida v. State, 737 So. 2d 520, 526 (Fla. 1999) ("gamesmanship of any sort" by police officers with regard to *Miranda* warnings is forbidden). It was reversible error to deny the motion to suppress. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO COLLATERAL CRIME EVIDENCE.

PRESERVATION

Initially Appellant was to face trial for the murder of Jackie Bradley. The prosecution moved to introduce evidence regarding the murders of Crystal Wiggins and Cathy Caughey. A Williams rule hearing was held. The prosecution argued the collateral crime evidence was admissible to prove identity, premeditation, and lack of consent . Appellant objected and argued that the collateral crimes were not admissible for any of theses purposes T309, 321-322, 328.

The trial court overruled the objections and ruled the collateral crime evidence was admissible to prove identity and premeditation R546-47. The instant issue was preserved for appeal.

WAIVER

Prior to the Bradley trial, defense counsel agree to consolidate the Wiggins/Caughey case with the Bradley trial. Defense counsel specifically emphasized he was not waiving the Williams rule issue by agreeing to consolidate SR11-12, 15. There would be no consolidation but for the overruling of the Williams rule objections SR15, Lines 19-25. In Joseph v. State, 447 So. 2d 243 (Fla. 3d DCA 1983) the state posited that agreeing to consolidate the defendant waived the Williams rule issue. The appellate court rejected such a claim noting that it would be a waste of judicial time and labor (and of course tax payers money) to require two separate trials to formalistically preserve the issue:

> [State's argument that] introduction of the evidence of both crimes in the same trial, Joseph has waived any objection he might have had. We do not agree.
>
> It is clear from the record that the motion to consolidate was made only because the trial court had ruled that the collateral crime evidence would be admitted, and that the asserted error of the trial court's earlier ruling was preserved for review.
>
> To hold otherwise would be to force the defendant, the State and the court to go through two separate trials for no purpose other than to formalistically preserve an appellate point, which, in our view, would be a manifest waste of judicial time and labor.
>
> His contention is met at the outset by the State's argument that by moving to consolidate the two cases, thus insuring the present issue has not been waived.

447 So. 2d at 245.

STANDARD OF REVIEW

The standard of review depends on the nature of the issue under review. U.S. v. Knapp, 120 F. 3d 928, 930 (9th Cir. 1997). If the issue is based on the superior vantage point of the trial court, the appellate court will give deference to the personal judgment (discretion) of the trial court, If the issue involves the application of a rule of law, the rule of law and not the trial court's personal judgment is deferred to.

There are no disputes to the historical facts in this issue. This issue involves a legal dispute as to the conclusion of law. Legal rulings are reviewed *de novo*. State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001). Although some evidentiary rulings are reviewed for abuse of discretion, any discretion is controlled and limited by rules of evidence. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003). Under any standard of review it was error to admit collateral crime evidence.

The test for admission of Williams rule evidence is relevancy. The evidence must (1) be material to prove the crime charged and (2) the unfair prejudice of the evidence cannot substantially outweigh it probative value. Lamarca v. State, 785 So. 2d 1209. 1212 (Fla. 2001). The relevancy of the Williams rule evidence must be separate from the propensity of the defendant to do a bad act. Williams v, State, 110 So. 2d 654 (Fla. 1959).

The issue is whether the accused did the charged bad act. When the jury is shown that on another occasion the defendant did a similar bad act the jury would believe the

defendant has a propensity to do such bad acts and thus is probably guilty of the charged bad act. Thus, a stringent review is required to avoid the admission of evidence based on propensity.

Appellant submits that the collateral crime evidence in this case only was relevant based on propensity. Evidence of the Wiggins/Caughey murders prejudiced Appellant in the Bradley case. Evidence of the Bradley murder prejudiced Appellant in the Wiggins/Caughey case.

TOWNSEND

In this case the prosecutor relied on Townsend v. State, 420 So. 2d 615 (Fla. 4th DCA 1982) to argue for the admissibility of the collateral crime evidence T319. Like the instant case Jerry Frank Townsend was on the trial for murder and the state introduced two collateral murders of women as part of a pattern theory (young women, strangled or stabbed, "lower torsos were naked", "all prostitutes").

Townsend is the poster child for demonstrating that courts must strictly scrutinize the admissibility of Williams rule evidence. The later onset of DNA evidence would conclusively show the murders were not done by Townsend but by different individuals. 80 APRFLBJ6, Florida Bar Journal April 2006, Alan Bookman, JUSTICE SHOULD NEVER BE DENIED; Sydney P. Freeberg, He Didn't Do It, St. Petersburg Times, Jan, 7, 2001, at 1A also available at 2001 WL 6596127. The loose application of Williams rule had caused a miscarriage of justice.

In Townsend the court mentioned some of the requirements of admissibility of

collateral crime evidence, but did **not** apply those requirements, Giving lip service is not sufficient. The courts must apply strict scrutiny to the evidence to ensure it is relevant to proving the crime charged.

In Townsend the court gave lip service to, but did not strictly analyze, the rigid test for whether the collateral crime evidence was relevant. In Townsend the court noted similarities between the charged crime and the collateral crime. The problem is that the similarities were not uncommon, but were superficial and were not of a special character or so unusual to identify the defendant as the killer. Unfortunately, nowadays women being found nude from the waist down, dead from strangulation or stabbing, is not unique so as to point to one person as the perpetrator. These are general rather than unique similarities.

In Townsend there was a miscarriage of justice. When the collateral crime evidence was admitted the jury would naturally believe the defendant was the killer. His confession did not help. The problem is that Townsend is innocent. Twenty years after Townsend's conviction DNA would later show that the killing had not been done by a single person. Townsend should not have fallen through the cracks in part due to a flawed Williams rule analysis.

Fortunately, Townsend was saved by the later development of DNA analysis. Appellant has no such safety net in this case. The police were unable to find DNA samples at the crime scene. Even though numerous pieces of Appellant's clothing were examined for the victims' DNA (blood, hair, saliva, etc.) none was ever found. In other

words, like in Townsend, there was no objective physical evidence incriminating Appellant. In both cases there were so - called confessions. This did not prevent a miscarriage of convicting the innocent. A very vigilant analysis of the relevancy of the collateral crime evidence is required. In this case the analysis was flawed.

IDENTITY

In determining whether collateral crime evidence is relevant, - other than propensity- it must be articulated how the evidence is relevant. In this case the state claimed the evidence was relevant to show identity. The question is how does the collateral crime evidence prove identity.

Collateral crime evidence proves identity where the points of similarities have a special character so as to identify the defendant as the perpetrator. Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981) (similarities must pervade the factual situations); Thompson v. State, 494 So. 2d 203, 204 (Fla. 1986) (similarities that victims of same age and build, crimes near some parking lot, and defendant having domestic difficulties on both occasions not sufficient - especially where there where other dissimilarities.) This is independent of identification whether by eyewitness or confession. See Stephens v. State, 662 So. 2d 394 (Fla. 5th DCA 1995). In order to prove identity the collateral crime must not be merely similar but must be unique or a fingerprint. See Peek v. State, 488 So. 2d 52 (Fla. 1986) (did not have "sufficient unique pattern" of criminal activity to be admissible); State v. Savino, 567 So. 2d 892, 894 (Fla. 1990) (degree of uniqueness

required is “fingerprint” type of evidence).

The similarities of the Wiggins /Caughey crimes to the Bradley crime were not unique. Unfortunately, today there are many occurrences where a practically nude body is discovered in a location where it was hidden. Certainly, the evidence was not sufficiently unique to prove identity.

In this case, there were significant dissimilarities between the Bradley and Wiggins/Caughey crimes:

• Age Bradley was 43	Wiggins/Caughey in late teens or early twenties.
• There was no evidence that Bradley struggled.	Prosecutor claimed there was evidence that Wiggins struggled.
• Bradley styloid process not broken but thyroid bone crushed.	Styloid process broken but thyroid bone not crushed.
• Bradley was killed in March.	Wiggins/Caughey were killed two months later in on May 31.
•Bradley was found 3 miles from others.	Wiggins/Caughey were found over 3 miles away from Bradley.
• Bradley’s legs had been crossed.	Wiggins/Caughey legs not found crossed.
• Bradley was homeless living in a camp of homeless people.	Wiggins/Caughey were not homeless.

The list of dissimilarities includes other items which vary in importance. However, one worth mentioning is the manner of death-strangulation. While this appears to be a similarity in actuality it is a dissimilarity. The strangulation of Bradley was different than

the strangulation of Wiggins/Caughey. The prosecutor even conceded that the thyroid bone in Bradley was crushed but not even fractured in Caughey T304-305. Bradley was strangled in the lower neck region and thus the thyroid bone was found crushed T2334, 2970-71. The styloid process was not broken. T2970. Whereas neither Wiggins/Caughey showed evidence of a crushed thyroid bone. In fact, Caughey had a broken styloid process - showing that the strangled in the upper portion of the neck T2970. The different styles of strangulation show a different perpetrator rather than identifying the same perpetrator. The trial court declined to take into account the dissimilarities.[3] The trial court also considered the victims last being seen isolated with Appellant as a similarity. However, this is not true. In fact, it is a dissimilarity. Bradley was not seen alone with Appellant. She was last seen with Glen Burbaugh (who celebrated her death by stating "Revenge is best served cold") T1968. and Appellant. This is dissimilar to the collateral crimes where the prosecution alleged the collateral victims were last seen alone with Appellant. Even this allegation is questionable. Jodie Janata testified she saw Wiggins alone at approximately 10:30 or 11:00 T2414-15[4]. Errin Cassidy testified she last saw Caughey with Jerry Prevatt T2457. The bottom line is the charged crime and the collateral crimes had significant differences.

The trial court below relied on Conde v. State, 860 So. 2d 930 (Fla. 2003). The

[3] The trial court wrote " this order does not need to address instances where dissimilar evidence may be admissible" R546.

[4] Earlier, Cyndi Kaman saw Appellant and Wiggins at approximately 10 p.m. as she left Nicholson's house T3529.

trial court relied on the factual scenario in Conde being the same - the defendant picking up a prostitute engaging in sexual relatives, then strangling them, and then disposing of the body along the side of a road R544. These facts were not the reason for admitting evidence of the uncharged murders. These facts are general and by themselves would only show propensity. However, Conde involved a unique additional fact which tied all the murders together - a message on the body:

> the pattern of these crimes together with the message Conde wrote on the back of his third victim indicating that she was "third" and "[see] if you can catch me," was evidence of premeditated intent to kill.

860 So. 2d at 945-946. Thus, in Conde there was a clear relevancy other than propensity. Unlike in Conde, in this case there was no relevancy link between the collateral crimes and the charged crime other than propensity.

PREMEDITATION

In the lower court the prosecution claimed the collateral crimes were relevant to prove the killing of Jackie Bradley was premeditated. The way this is normally done is to have solid evidence that the collateral crime is premeditated and then (if the charged crime is sufficiently similar) claim the charged crime was also premeditated. The problem in this case is there is no evidence the collateral crime was premeditated.[5] The proof of the collateral crimes in June did not prove the earlier crime in March was premeditated.

In addition, as earlier explained the collateral and charged crimes were not unique

[5] The only evidence presented by the prosecution as to Appellant's state of mind was his statement which negated premeditation.

as to prove the same person did both crimes - let alone that the perpetrator had the same premeditated intent to kill. See also Robertson v. State, 829 So. 2d 901, 909 (Fla. 2002) ("absence of mistake" requires substantial similarity). The collateral crimes show propensity. It was error to admit the collateral crime evidence.

When error occurs, reversal is required unless the state, as beneficiary of the error, can prove beyond a reasonable doubt that there is no reasonable possibility the error affected the verdict. State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). The improper introduction of similar fact evidence is presumptively harmful. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Huering v. State, 513 So. 2d 122, 124 (Fla. 1987) (collateral crime evidence is "inherently prejudicial " it creates the risk of conviction based on propensity rather than proof of the commission of the charged offense).

In this case the collateral crime evidence was especially harmful. The evidence would have the prejudicial impact of propensity - if they believe Appellant committed one of the crimes it is likely he committed the other crimes.

Appellant anticipates Appellee will claim the evidence is overwhelming, however, the harmless error test is not a "sufficient" or "overwhelming" evidence test - rather the question is whether the beneficiary of the error can prove that the error did not contribute to the verdict. State v. Lee, 531 So. 2d 133, 136-37 (Fla. 1988).

Furthermore, the evidence in this case was far from overwhelming. There was no objective evidence against Appellant. There was no DNA, prints, or other physical evidence against Appellant. Despite a diligent search, no evidence from Appellant was

found on the victim or at the crime scene. Appellant's clothes were scrutinized, but no evidence from the victims or crime scene was found. The prosecution used Appellant's statement to police wherein he indicated he was responsible for the deaths. However, the so-called confession was highly disputed by the defense. Appellant argued the confession was false and explained that psychological techniques can result in false confessions.[6] Appellant only repeated facts he had been given by police. The police placed Appellant in the task force room with photos, witness statements, police statements, and physical evidence T465.

During the interrogation, police repeatedly emphasized that Appellant should consider the evidence in the task force room T3063-64, 3066. Appellant later responded by repeating the evidence in the task force room. However, when asked how the killings occurred Appellant could not give an answer. Appellant had no idea because he was never given this information by police. Police had used tactics during the interrogation that can lead an innocent person to confess.[7] Again, Jerry Townsend is an example of

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[6] Defense counsel specifically referred to the false confession in the JonBenet Ramsey case by John Mark Karr. T3338, 3453.

[7] The psychological technique to induce a concession is to first make the suspect believe his situation is hopeless by confronting him with evidence. In this case the police showed Appellant all the evidence in the task force room - including falsified DNA evidence. This in itself is impermissible and would be argued on appeal if trial counsel had raised the issue in the lower court. See State v. Cayward, 552 So. 2d 971, 973 (Fla. 2d DCA 1989) (suppression of confession where police fabricated false documents to induce confession). Once the suspect believes he is powerless due to the evidence, the interrogator promises benefits for confessing (help getting lesser punishment)and implies that a continuous denial will make the situation worse. Again, the police did this in

what can happen when collateral crime evidence is not properly evaluated even combined with a confession - an innocent person gets convicted of multiple murders. Appellant was denied due process and a fair. 5th, 6th, 14th Amend; U.S. Constit., Art. I§§9, 16, 17, Fla. Constit. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN PERMITTING WITNESSES TO EVALUATE CIRCUMSTANTIAL EVIDENCE OVER APPELLANT'S OBJECTION.

Over Appellant's objections state witnesses were permitted to evaluate circumstantial evidence in essence as a 13th juror. This was reversible error.

STANDARD OF REVIEW

The standard of review depends on the nature of the issue under review. U.S. v. Knapp, 120 F. 3d 928, 930 (9th Cir. 1997). If the issue is based on the superior vantage point of the trial court, the appellate court will give deference to the personal judgement (discretion) of the trial court, If the issue involves the application of a rule of law, the rule of law and not the trial court's personal judgement is deferred to.

There are no disputes to the historical facts in this issue. This issue involves a legal dispute as to the conclusion of law. Legal rulings are reviewed *de novo*. State v.

Appellant's case. The psychological technique makes the irrational (admitting to a crime which one is to be punished for) seem rational(making the best of a perceived hopeless situation - even if not true this technique can give rise to false confessions. See 82 N.C.L. Rev. 891, The problem of false confessions in the post - DNA world.

Glatzmayer, 789 So, 2d 297, 301 n.7 (Fla. 2001). Although some evidentiary rulings are reviewed for abuse of discretion, any discretion is controlled and limited by rules of evidence. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003). Under any standard of review it was error to admit the evaluation of the circumstantial evidence.

PRESERVATION

A legal issue in this case was whether the crimes were sexual batteries without the consent of the victims. Appellant objected to state witnesses analyzing the evidence to render an opinion that sexual batteries occurred T2300,2307. The objections were two-fold - speculation T2300, and the opinion did not assist the jury because they were equally as capable of analyzing the evidence T2307.

The prosecutor argued their witnesses would give an opinion based on an evaluation of all the circumstantial evidence including location of the body, use of drugs, state of dress, etc.:

> Dr. Diggs will testify he has been to rape homicides scenes in the past, there are certain telltale indicators. Number one, victim in an isolated area; number two, the presence of drugs or alcohol; number three, the predominant manner of death is strangulation, asphyxia; number four, you find women in various stages of undress, either totally nude, partially nude, clothing disrupted or disturbed. And that, again, isolated areas. Canals are very common based on the report by Dr. Mittleman and Wetli from Miami.

T2302. The trial court overruled Appellant's objections and ruled the testimony would be admissible T 2305,2307. Subsequently, witnesses Diggs, would evaluate the circumstantial evidence as to whether a rape occurred T2316-2319. Diggs specifically

explained he was analyzing all the evidence (i.e. "the whole picture") to determine whether a rape occurred T2362-2363.

Dr. Diggs at one point stated:

> ... from a strictly scientific standpoint you can't – can't conclude that [rape]. But from a circumstantial picture... can conclude that as rape homicide...

T2287 (emphasis added).

Later, Appellant would object to detective Shirk giving conclusions regarding similarities between all three homicides T2593. Appellant specifically objected that the analysis and comparison of evidence was for the jury and not the witness T2593. Appellant's objection was again overruled T 2593.

ANALYSIS

Appellant was on trial for sexual battery and felony murder with the underlying felony of sexual battery. Thus, the jury had the job of analyzing whether Appellant was guilty of the crime of sexual battery. While under section 90.70 a witness' testimony is not inadmissible merely because it involves the ultimate issue the witness is not permitted to invade the province of the jury by doing the jury's job. See e.g. County of Volusion v. Kemp, 764 So. 2d 770, 773 (Fla. 5th DCA 2000). It is not the witness' function to apply a legal standard to a set of facts. Id.; Town v. Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984). A number of cases prohibit the admission of witness' testimony which does what the jury is assigned to do.

In Farley v. State, 324 So. 2d 662 (Fla. 4th DCA 1975), the appellate court

reversed where the doctor was asked, based on his experience -- both practical and medical -- for his opinion and the doctor responded, that based on the history and the finding of sperm, his opinion was that she had been raped.

In Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984), it was error for a witness to give an opinion on an element of the litigation -- whether certain services were "real and substantial." This Court explained if the witness' conclusion tells the jury how to decide an element it is not assisting the jury in determining what occurred. 460 So. 2d at 882. Rather, it is invading the province of the jury. It was recognized that while the witness could testify whether certain benefits were received he could not testify whether those benefits were "real and substantial." 460 So. 2d at 882.

In Gifford v. Galaxie Homes, Inc., 223 So. 2d 108, 111 (Fla. 2d DCA 1969), the court held that the expert could testify whether construction met construction and engineering standards but not whether there was "negligent" construction. Doing so would have been tantamount to having the jury "directed to arrive at a conclusion which it should be free to determine independently from the facts presented."

In Ruth v. State, 610 So. 2d 9, 11 (Fla. 2d DCA 1992) Appellant here was charged with keeping or maintaining an aircraft used to keep or sell drugs. Cappabianca testified that he believed the aircraft was set up and used to sell drugs. This directed the trier of fact "to arrive at a conclusion which it should be free to determine independently from the facts presented".

An opinion as to the existence of an element is impermissible as an opinion as to guilt. See Connor v. State, 32 Fla. L. Weekly D983 (Fla. 2d DCA 2007) (reversible error for witness to give opinion as to causation which was element of crime).

The bottom line is that witnesses cannot perform evaluations for the jury as to whether elements have been proven by the evidence. That is the jury's job. In this case, it was error for the witnesses to evaluate the circumstantial evidence.

Detective Shirk compared similarities of the Bradley, Wiggins and Caughey cases T2593-94. The jury should have made the comparisons instead of Shirk. Also, some of the evidence Shirk was comparing was evidence that he was told about but of which he did not have personal knowledge. While a witness may testify to matters he observes, he may not testify to other matters. Nardone v. State, 798 So. 2d 870, 873 (Fla. 4th DCA 2001) (error to permit witness to testify object was used as a deadly weapon).

Doctor Diggs' evaluation of the circumstantial evidence not only invades the province of the jury but also improperly goes beyond his expertise. See Connor v. State, 32 Fla. L. Weekly D983 (Fla. 2d DCA 2007) (even if witness is qualified as expert he will not be permitted to testify beyond his expertise). The doctor's expertise was not as a 13th juror to evaluate the evidence. It would be contrary to the purpose of a jury trial to permit experts to evaluate the circumstantial evidence. Doing so would be the epitomy of a witness telling the jury how it should decide an issue.

The trial court ruled the witnesses could evaluate the circumstantial evidence for the jury based on State v. Ortiz, 766 So. 2d 1137 (Fla. 3d DCA 2000). However, Ortiz

is not a case involving an evidentiary issue. Rather, Ortiz is a state appeal of the granting of a C-4 motion. In Ortiz, the appellate court emphasized the lower court had improperly weighed the evidence and further emphasized the trial court's decision should not have been whether the evidence was sufficient to survive a JOA -- it only had to survive a Rule 3.190(c)(4) motion. Again, the appellate review of the C-4 motion never involved any issue as to admissibility of evidence. Such an issue was never even raised. The trial court made a legal error in relying on a case not involving an issue as to admissibility of evidence. The trial court has no discretion to make a legal error.

Finally, the error was not harmless. As the beneficiary of the error the state has the burden of proving beyond a reasonable doubt the error was harmless. In this case, there are convictions for sexual battery and 1° murder which was presented on a theory of felony murder with sexual battery as the underlying felony. The improper evidence was used to bolster the state's theory of sexual battery. There is a real danger the jury may forgo its own independent analysis of the facts and bow to the analysis of the influential witnesses. Mills v. Redwing Carriers, Inc., 127 So. 2d 453, 456 (Fla. 2d DCA 1961) In addition, the probative value of the evidence was substantially outweighed by its prejudice effect. See Glendening v. State, 536 So. 2d 212 (Fla. 1988). The error cannot be deemed harmless and denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amendments; United States Constitution and Article I Sections 9, 16, 17 of the Florida Constitution. This cause must be reversed and remanded for a new trial.

POINT IV

THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION.

Appellant moved for a judgment of acquittal on the basis that the evidence did not support premeditation T3242, 3250. The trial court denied Appellant's motions T3250, 3251. This was error. In capital cases this Court reviews the sufficiency of the evidence for the first degree murder conviction. See Philmore v. State, 820 So. 2d 919. 926 (Fla. 2002) (court has obligation to review sufficiency of the evidence). The standard review for sufficiency of the evidence is *de novo* review. Jones v. State, 790 So. 2d 1194, 1196 (Fla. 1st DCA 2001).

Premeditation is more than an intent to kill, it is a fully formed conscious purpose to kill done with reflection:

> More than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997) (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986)). When the evidence regarding premeditation is circumstantial it must be inconsistent with the reasonable hypothesis that the homicide occurred other than by a premeditation design. eg., Randall v. State, 760 So. 2d 892 (Fla. 2000); Coolen v. State, 696 So. 2d 738 (Fla. 1997). In the present case, the state simply sought to infer premeditation without real proof. The proof would essentially be guesswork.

In Holton v. State, 573 So. 2d 284, 289 (Fla. 1990), this Court noted some

evidence from which premeditation may be inferred:

> Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.

In this case there were no witnesses or events prior to the killing which showed premeditation. See Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996). Appellant never stated or indicated any plan to kill. There were no prior difficulties. A weapon was not procured. The killing was by manual strangulation. Strangulation tends to be an impulsive act.

The mere act of strangulation has not been sufficient to prove premeditation. See Hoefert v. State, 617 So. 2d 1046 (Fla. 1993) (premeditation not sufficient by evidence of strangled female found partially nude); Green v. State, 715 So. 2d 940 (Fla. 1998) (evidence that victim manually strangled and stabbed three times insufficient to prove premeditation).

In the present case the prosecution chose to introduce the statements of Appellant as to what occurred. Appellant admitted responsibility for the killing, but indicated he did not know how it occurred and he had "lost it" T3104. Evidence that Appellant "lost it" is contrary to a premeditated design to kill.[8]

In Randall v. State, 760 So. 2d 892 (Fla. 2000) this Court agreed with the

[8] It should also be noted that Appellant had been heavily drinking or taking crack cocaine during the alleged incidents T2392, 2411, 2424-25.

defendant's argument that the prosecution in choosing to present Williams rule evidence had created a reasonable hypothesis that two homicides were other than by a premeditated design and thus the evidence was insufficient to prove premeditation:

> .....**the prosecution, by presenting evidence of Randall's history of choking women** to heighten sexual arousal, **actually demonstrated a reasonable hypothesis that the homicides were other than by premeditated design.** See Coolen, 696 So. 2d at 741. Randall argues here that the State's circumstantial evidence is consistent with the reasonable hypothesis that Randall began forcefully choking the murder victims during consensual sex and then when they struggled more than his girlfriend or ex-wife would have struggled, Randall became enraged and continued to choke them. This is consistent with the episodes described by both Howard and Randall's former wife. In view of the fact that the other women that Randall choked during sexual activity did not die, it is reasonable to infer that Randall intended for his choking behavior to lead only to sexual gratification, not to the deaths of his sexual partners. Randall contended at trial that, at most, the evidence established second-degree murder under section 782.04(2), Florida Statutes (1995)(second-degree murder is perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life). We agree in the wholly circumstantial case that the evidence does not support premeditated murder to the exclusion of a reasonable doubt. The evidence does support second-degree murder.

760 So. 2d at 901-902 (emphasis added). Likewise, here the State's choosing to use Appellants statements that he "lost it" did not support a premeditated design to kill. In Hoefert v State, 617 So. 2d 1046 (Fla. 1993) this Court reversed due to lack of evidence of premeditation where there was only evidence that Hoefert strangled women while either raping or assaulting them and then planning to conceal the body:

> Even taking the evidence presented in the light most favorable to the State, as Cochran requires, the State merely established the following: Hunt accompanied Hoefert to his apartment and was found dead in that apartment several days later; **the cause of Hunt's death was**

> **asphyxiation; Hoefert had strangled several other women while either raping or assaulting them** and Hoefert attempted to **conceal his crime by** failing to report Hunt's death to the authorities, by **digging a large hole in his yard where he planned to bury** Hunt's body, and by fleeing to Texas. Although we find that the circumstantial evidence in this case is consistent with an unlawful killing, we do not find sufficient evidence to prove premeditation. Therefore, the conviction for first-degree murder is reversed and the death sentenced vacated.

617 So. 2d at 1049 (emphasis added).

In Carpenter v. State, 785 So. 2d 1182 (Fla. 2001) this Court held the evidence was insufficient to prove premeditation where the victim died from neck compression which required two or three minutes to cause death:

> During the guilt phase, the State presented evidence that Carpenter had arranged for the "party" at which Powell was killed, and the State also presented evidence that Powell died as a result of blunt trauma and **neck compression**, with the neck compression requiring total occlusion of the blood vessels in Powell's neck for **two to three minutes to cause her death**. As discussed above, the State also presented the testimony of Stephen Dakowitz, who testified that Carpenter had implicated himself in the murder of Ann Powell. The State argues that this evidence supports a finding of premeditation, while Carpenter argues that such evidence does not exclude every reasonable hypothesis that Powell's death was effected without a premeditated design. After reviewing the evidence and relevant case law, we find that Carpenter's position on this issue must prevail.
>
> * * *
>
> **While Carpenter's version of the events may not be true, the evidence does not exclude the reasonable hypothesis that Powell was killed, without premeditation**, after she rebuffed sexual advances made by Carpenter and Pailing. Accordingly, we determine that the trial court should have granted Carpenter's JOA motion with regard to only the premeditation theory of first-degree murder.

785 So. 2d at 1196-1197 (emphasis added).

The evidence of a premeditated design to kill was even less compelling than that found insufficient in the cases discussed above.

POINT V

THE TRIAL COURT IN DENYING APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL TO THE CHARGE OF SEXUAL BATTERY WHERE THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT A SEXUAL BATTERY OCCURRED.

Appellant moved for a judgment of acquittal on the charge of sexual battery and felony murder based upon sexual battery T3242, 3250. The ground for the motion was that the evidence was insufficient to prove that a sexual battery occurred T3242. The trial court denied Appellant's motions T3250, 3251. This was error.

The standard of review for sufficiency of evidence is *de novo* review. Jones v. State, 790 So. 2d 1194, 1196 (Fla. 1st DCA 2001).

The circumstances in this case are not sufficient to negate all reasonable hypothesis of innocence nor prove beyond a reasonable doubt that the crime of sexual battery occurred as is required. See Golden v. State, 629 So. 2d 109, 111 (Fla. 1993); State v. Law, 559 So. 2d 187 (Fla. 1989); McArthur v. State, 351 So. 2d 972 (Fla. 1977).

The evidence in this case showed no trauma, contusions, hemorrhages, etc., to any of the victims T2332, 2962. The medical examiner explained that in many cases vaginal trauma can be seen despite decomposition T2332. In fact, the medical examiner testified that the evidence was **consistent with** a consensual sexual act followed by a homicide as

well as a homicide during the sex act T3016, 2367, 2962. This evidence is not sufficient to prove sexual battery occurred See In the Interest of B.J.S., 503 N.E.2d 1198, 1201 (Ill.App. 4 Dist. 1987) (evidence insufficient though Dr. Warnick found "some abnormalities in the victim which might be consistent with sexual abuse, she noted that these abnormalities could also be caused by other factors"); Golden v. State, 629 So. 2d 109, 110 (Fla. 1993) (evidence insufficient where investigators could not rule out other causes than crime such as an accident); Peters v. Whitley, 942 F. 2d 937, 941 (5th Cir. 1991) (evidence failed to establish rape where doctor did not find evidence of forced intercourse).

In addition, where the prosecution chooses to introduce evidence demonstrating a reasonable hypothesis of innocence the evidence will not be sufficient to support conviction. See Randall v. State, 760 So. 2d 892, 893-99 (Fla. 2000) (where prosecution introduced Williams rule evidence which negated premeditated evidence was insufficient as to premeditation element). In this case prosecution choose to introduce and rely on Appellant's statement to police wherein he indicated that the sex was consensual and not a sexual battery:

> "Mr. Silvas: You tried to have sex? And did she ive it up? Did she give up sex?
> "Mr. McWatters: She wasn't willing at first, but then she finally did.
> "Mr. Silvas: Okay
> "Mr. McWatters: Yeah.
> "Mr. Silvas: She wasn't willing initially and then was she okay with it. What happened after that?
> "Mr. McWatters: I don't know. I have (inaudible).

T3099.

***

"Mr. Dougherty: Tell us about Christal. What happened?

"Mr. McWatters: Probably about – I don't know, about I think between (inaudible) bullshit and came down to the last (inaudible) to **smoke fucking dope and we went to have sex** and I told her – you know what I'm saying – she pulled that shit out. I don't know (inaudible). I guess after I started to get off, I fucking lost it one more time.

"Mr. Silvas: Mm.

"Mr. McWatters: (Inaudible) come back – you know what I'm saying and I realized what I done and it's fucking crazy.

***

"Mr. Silvas: Did you take her underwear off, her panties?

"Mr. McWatters: Yes I did.

"Mr. Silvas: Okay. Did you pull them off or – or just tear them off?

"Mr. McWatters: I think I tore them off.

"Mr. Silvas: Was – did she say anything just prior to – to this happening that got you upset?

"Mr. McWatters: **No. We were laughing**. I remember that we were having some good consensual sex and –

***

"Mr. McWatters: **We had sex for crack**.

"Mr. Silvas: You had sex for crack? Did you meet her earlier that evening somewhere?

"Mr. McWatters: Yeah. I met her at Donna's house.

***

"Mr. Dougherty: Did you guys fight?

"Mr. McWatters: I don't believe so.

"Mr. Dougherty: Why would you rip her underwear off?

"Mr. McWatters: **It's part of the game**.

"Mr. Dougherty: Did she get mad at you for doing that?

"Mr. McWatters: **No.**

***

"Mr. Dougherty: Okay. **The sex was consensual**?
"Mr. McWatters: **Uh-huh**.
"Mr. Dougherty: After having sex what happened?
"Mr. McWatters: I don't know.
"Mr. Dougherty: Did she say something to piss you off?
"Mr. McWatters: No.
"Mr. Dougherty: Huh?
"Mr. McWatters: No.
"Mr. Silvas: So what happened?
"Mr. McWatters: I don't know.

T3104-05, 3108, 3133, 3137, 3144 (emphasis added). The evidence was insufficient for the crimes of sexual battery and felony murder. Appellant's convictions and sentences must be reversed.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY AND/OR NOT WITHDRAWING COUNSEL DUE TO A CONFLICT OF INTEREST.

Appellant's attorney, Robert Udell, brought to the trial court's attention that he had represented one of the prosecution's key witness – Jerry Prevatt.[9] Udell also informed the court that Prevatt contacts him every other day T159. Udell also mentioned the possibility of representing Prevatt in the future T159-160. No further inquiry into the conflict was made. The trial court did not inquire when Udell's representation of Prevatt occurred or about the future representation of Prevatt. Instead, the trial court

9 Prevatt was not only the key witness to the Caughey murder, but was or should have been, a suspect in that murder.

indicated there was no actual conflict. However, how could one discern whether there was an actual conflict without an adequate inquiry? A further inquiry was required and would at the very least have reflected that **Udell was representing Prevatt <u>after</u> Appellant was charged with the murders and the representation includes matters related to this case** (as represented by attorney Akin's investigative billing reports):

> 1.5 8/23/05 Consulted with **Attorney Robert Udell** regarding McWatters and Jerry Prevatt. (Note: Udell is counsel for Prevatt) Conflict noted. Obtained audio recordings of statements made by McWatters to MCSO.
>
> ***
>
> 0.5 8/26/05 Consulted with Attorney Rusty Akins RE: Robert Udell, Jerry Prevatt and information provided by Eugene McWatters.
>
> ***
>
> 1 9/02/05 Consulted with Attorney Robert Udell regarding case evidence and witness(s) statements at Udell office in Stuart.

R98, 99, 102 (emphasis added). Errin Cassidy testified Caughey was last seen with Prevatt T22452. Thus, Prevatt could have been a potential suspect. However, Prevatt would point the investigative finger toward Appellant by stating he was afraid of Appellant and that he last left Caughey with Appellant. Udell was appointed to represent Appellant on September 16, 2005 – less than two weeks after representing Prevatt with regard to the crimes for which Appellant was charged R82.

Udell did not disclose the extent of the conflict and it remained hidden due to a lack of inquiry. It was reversible error not to hold an adequate inquiry. <u>See</u> <u>Lee v. State</u>, 690 So. 2d 664 (Fla. 1st DCA 1997); <u>Thomas v. State</u>, 785 So. 2d 626 (Fla. 2d DCA 2001).

Without the disclosure, Appellant unknowingly purported to waived his rights. Without an adequate inquiry or disclosure of the extent of the conflict there can be no informed findings of lack of conflict and there can be no informed waiver. Appellant was denied his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

In addition, the public defender's office moved to withdraw from Appellant's case due to a conflict of interest because it represented several state witnesses in the past. Appellant moved to have Rusty Akins removed from his case because Akins had been with the Public Defender's Office (the office had been appointed to Appellant on 6/24/2004, T372,T339-340, 372, and Akins did not leave the office until 9/30/2004, T376). If the trial court removed the public defender due to conflict it should have also granted Appellant's motion to withdraw Akins. See Ward v. State, 753 So. 2d 205 (Fla. 1st DCA 2000); section 27.53(3) Florida Statutes (and court grants motion to withdraw it may appoint a member with the Florida bar who is "in no way affiliated with the public defender").

An issue of a conflict of interest is a mixed question of law and fact. Hence *de novo* review of the legal issue is appropriate. See Cuyler v. Sullivan, 446 U.S. 335, 341 (1980). Implicit in the Sixth Amendment right to counsel is the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).
A criminal defendant's Sixth Amendment right to the effective assistance of counsel encompasses the right to counsel free of ethical conflicts. Wood v. Georgia, 45 U.S. 261

(1981); Holloway v. Arkansas, 435 U.S. 475 (1978); Ortiz v. State, 844 So. 2d 824, 825-826 (Fla. 5th DCA 2003); Bellows v. State, 508 So. 2d 1330, 1331 (Fla. 2d DCA 1987).

An actual conflict of interest can impair the performance of a lawyer. Cuyler v. Sullivan, 446 U.S. 335, 345 (1980); See also Holloway v. Arkansas, 435 U.S. at 481. When defense counsel makes a pretrial disclosure of a possible conflict of interest with the defendant, the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the defendant' right to the effective assistance of counsel or appoint separate counsel. Holloway, 435 U.S. at 484; Thomas v. State, 785 So. 2d 626 (Fla. 2d DCA 2001); Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1997). See also §27.53(3), Fla. Stat.

"To deny a motion for separate representation, where a risk of conflicting interest exists, is reversible error." Bellows, supra at 1331: Ortiz, *supra* at 825-826 (emphasis added). In Lee Thomas, and Ortiz, the district courts found without question that "there can be no doubt that [defense counsel] and the defendant had an actual conflict of interest" where the public defender's office had previously represented a key prosecution witness. Ortiz, the public defender represented the confidential informant in an unrelated case. Appellant's convictions and sentences must be reversed.

In both Lee and Thomas, as in the instant case, the public defender had previously represented the witnesses in unrelated cases at the time the defendants allegedly made statements to those witnesses. In all three cases, the courts ruled unanimously that "it cannot be said that the apparent conflict created when defense counsel represented both

[the defendant] and the state's key witness is not prejudicial to [the defendant] so as to have denied him his right to effective assistance of counsel," even though the representation was in unrelated cases, Ortiz at 826; Lee at 667-669; Thomas.

An actual conflict of interests existed; "to deny a motion for separate representation, where a *risk* of conflicting interest exists, is reversible error." Ortiz, at 825-826. There existed at least a risk of conflicting interests in this case. The error deprived Appellant of his rights to counsel, due process, and a fair trial. 5th, 6th, 14th, Amend., U.S. Constit., Art, I, §§2, 9, 16, 17, Fla. Constit. Appellant's convictions and sentences must be reversed and this cause and remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND PREJUDICIAL PHOTOS INTO EVIDENCE OVER APPELLANT'S OBJECTION.

Over Appellant's objections (T2276, 2278, 2296, 2240-42, 2276, 2278, 2954-57), the prosecutor permitted to introduce exhibits 24-26, 92, T2276, 2278, 2954-55, 2967. The photographs depicted the results of maggots eating away at the flesh of the victims. The photos had no relevance to any material fact in issue. The photos were not relevant and if they had any relevance that relevance was substantially outweighed by unfair prejudice.

The reasons given by the prosecutor below demonstrate the admission of the inflammatory photos was gratuitous. The medical examiner explained exhibits 24-26 were not relevant to showing cause of death T2289. Obviously, the women did not die

by a maggot attack. Exhibit #25 showed a wound beneath the chin that was caused by maggots. The medical examiner testified that the photo was taken to show the insect activity T228. The prosecutor speciously gave the illogical circular argument that the jury needed to see the inflammatory photo to prevent the jury from being mislead by the photo into believing that the wound was a stab wound T2294. The logical answer is not to allow the photo to be introduced so as to mislead the jury. The introduction of the photo was gratuitous in this case.

The medical examiner testified that exhibit #26 corroborative another piece of irrelevant evidence (#25) T2284. What is left is gratuitous inflammatory evidence.

The prosecutor argued that he also wanted to introduce the photos to show the bones in the neck T2295. However, previously the medical examiner pointed out that the photos didn't show the bones T2292.

Exhibits #24 and #92 did show the bra pushed up. However, independent of the photo witnesses described the fact that the bra was pushed up T2041, 2580, 2521. The reasons given by the prosecutor below demonstrate the admission of the inflammatory photos was gratuitous.

It is true that photographic evidence, if relevant, is generally held admissible regardless of its character as gruesome or gory. Allen v. State, 340 So. 2d 536 (Fla. 3d DCA 1976). However, if such photographs' primary effect is to inflame the passions of the jury, their introduction will result in a reversal of the conviction. Jackson v. State, 359 So. 2d 1190 (Fla. 1978).

The photos in this case demonstrate the work of maggots eating away at the flesh of the victims rather than anything attributable to a suspect. The photos should not have been admitted into evidence.

Cases have recognized that photographs depicting wounds or injuries by someone other than the suspect should not be admitted into evidence Czubak v. State, 570 So. 2d 925 (Fla. 1990) (photo showed condition of body caused by factor (dogs) other than crime itself); Reddish v. State, 167 So. 2d 858, 863 (Fla. 1964) (photographs of bodies after removal from scene were irrelevant and unnecessary); Wright v. State, 250 So. 2d 333, 337 (Fla. 2d DCA 1976) (reversal warranted even though jury instructed to ignore evidence); Rosa v. State, 412 So. 2d 891, 892 (Fla. 3d DCA 1982) (photo which included the results of emergency procedures performed after the stabbing).

In Hoffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990) the court reversed when although the photo had some relevance it was minimal when compared to the dangers of unfair prejudice to the defendant:

> Finally, Appellant contends the trial court erred when it permitted the introduction of an autopsy photograph of the victim's head. The photograph depicted the internal portion of the victim's head after an incision had been made from behind the ears to the top of the head, with the scalp rolled away revealing the flesh behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair overlies the skull. The state argues that it introduced the photograph to show that in addition to the other injuries sustained by the victim, he had suffered a separate blow to the left side of his head, and that he received the worst of the fight. The record contains other evidence which showed that the victim had broken fingers, bruises above the nose and lacerations on the back of the head. The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis

> muscle **without reference to the photograph**. The danger of unfair prejudice to Appellant **far outweighed the probative value of the photograph** and the state has failed to show the necessity for its admission. On retrial, the photograph should be excluded. Accordingly, we reverse and remand this case for a new trial.

559 So. 2d at 1249 (emphasis added). In this case the photos should not have been admitted.

In Almeida v. State, 748 So. 2d 922 (Fla. 1999) this Court explained that the prosecution does not have carte blanche to admit inflammatory photos to prove facts which are not in dispute - such inflammatory photos are gratuitous:

> The State introduced the Exhibit No. 10 an autopsy photo of the victim that depicted the gutted body cavity. Almeida claims that this was error. We agree. Although this Court has stated that "[t]he test for admissibility of photographic evidence is relevancy rather than necessity," *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996), this standard by no means constitutes a carte blanch for the admission of gruesome photos. To be relevant, a photo of a deceased victim must be probative of an issue *that is in dispute*. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. **Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous**.

748 So. 2d at 929-930 (emphasis added). The inflammatory evidence should not have been admitted in this case. The evidence denied Appellant due process and a fair trial.

POINT VIII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S CONFRONTATION CLAUSE AND HEARSAY OBJECTIONS TO ACCUSATIONS BY WITNESSES.

Over Appellant's confrontation clause and hearsay objections the prosecution was permitted to introduce portions of Appellant's statement which contained accusations by

witnesses who did not testify during trial T2623, 2642-43, 2648, 2654, 2667, 2674. This was reversible error.

The evidentiary issues involved in this point are strictly legal issues and thus review is *de novo.* See State v. Glatzmayer, 789 So. 2d 297 301 n.7 (Fla. 2007).

Assuming arguendo that some discretion is involved that discretion is narrowly limited by the rules of evidence. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001).

Regardless, under any standard of review it was improper to allow the jury to hear the out-of-court accusations against Appellant.

CONFRONTATION CLAUSE

During the interrogation of Appellant on June 23, 2004, police indicated that witnesses saw Appellant leave with Jackie Bradley and that they thought he killed her T3047-48, 3050-53. This included accusations by Austin Cottle Sr. and a witness name Shep – neither testified at trial T3051, 3053-54. Information the police received from Austin Cottle Sr. and Shep during their investigation certainly would qualify as "testimonial" See Crawford v. Washington, 541 U.S. 36 (2004); Davis v. Washington, 126 S. Ct. 2266 (2006). Exposing the jury to the accusations of non-testifying witnesses violates the confrontation clause of the United States and Florida constitutions. Id. Thus, the trial court erred in denying Appellant's objection. This cause must be reversed and remanded for a new trial.

HEARSAY

The police statements as to what others told them was also hearsay – despite the fact the statements came in during Appellant's taped statement. See Sparkman v. State, 902 So. 2d 253 (Fla. 4th DCA 2005) (interrogating police officer's accusations during tape recorded interview with the defendant constituted inadmissible hearsay and did not constitute an adoptive admission by the defendant); Pausch v. State, 596 So. 2d 1216 (Fla. 2d DCA 1992) (officer's statement's regarding death during questioning of defendant was inadmissible); Newsome v. State, 735 So. 2d 546 (Fla. 4th DCA 1999).

It might be claimed the statement were not admitted for the truth of the matter asserted but merely to show Appellant's responses to accusations. However, Appellant did not give any relevant responses to the accusations. The prosecution below even conceded that the statements were never adopted by Appellant T2655. Thus, the accusations were not relevant other than to show witnesses believed Appellant to be guilty. When the only relevance of an out-of- court accusation is the truth of the matter asserted by the declarant the matter is hearsay despite the proponent clothing it under a nonhearsay label. See Schaffer v. State, 769 So. 2d 496 (Fla. 4th DCA 2000); State v. Baird 572 So. 2d 904 (Fla. 1990); Keen v. State, 775 So. 2d 263 (Fla. 2000) (error to admit testimony officer received information from others linking the defendant to the murder); Wilding v. State, 674 So. 2d 114 (Fla. 1996) (error to allow officer to testify he received a tip identifying the defendant); Postell v. State, 398 So. 2d 851, 854 (Fla. 3d DCA 1981) (where inference is that police received tip that defendant was guilty - the

testimony is hearsay - confrontation defeated - notwithstanding that actual out-of-court statements are not repeated).

It was error to overrule Appellant's hearsay objection. This cause must be reversed and remanded for a new trial. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Art. 1, §§ 2, 9, and 16 of the Florida Constitution.

POINT IX

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY EXCLUDING EVIDENCE THAT GLEN BURGBAUGH THREATENED TO STRANGLE JACKIE BRADLEY.

Austin Cottle Jr. Testified that Jackie Bradley was last seen with Glen Burbaugh and Appellant walking down the street T1948. In a conversation after finding about Bradley's death, Burbaugh stated, "revenge is best served cold" T1968. Appellant proffered Austin Cottle Jr.'s testimony that Burbaugh had threatened to choke Bradley to death if she went back with John Powell T1952. Cottle connected this statement with Burbaugh's statement regarding revenge T1952. Appellant acknowledged the statement might not be admissible under the Florida Evidence Code but still sought to have it admitted.

"Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission". Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990).

A defendant has a fundamental right of due process under the United States Constitutions to present evidence crucial to his defense even where the state procedural rules might normally bar such evidence. Chambers v. Mississippi, 93 S.Ct. 1038 (1973). Obviously, Burbaugh's threat to strangle Bradley combined with his statement after her death that revenge is best served cold creates reasonable doubt as to Appellant's guilt in the Bradley case. Moreover, the reliability of the threat to strangle Bradley was corroborated by Burbaugh's later revenge statement. The excluded statement was important. Appellant was denied due process and a fair trial by the exclusion of the Burbaugh threat. This cause must be remanded for a new trial.

POINT X

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT JERRY PREVATT WAS AFRAID OF APPELLANT.

Over Appellant's objection Jerry Prevatt was permitted to testify be had been afraid that Appellant was going to rob him T2467. It was error to allow this evidence.

By eliciting testimony that Prevatt was afraid of Appellant, the prosecutor impugned the character of Appellant. "It is fundamental that the prosecution may not impugn the character of an accused unless the accused first puts character into issue at trial". Bates v. State, 422 So. 2d 1033, 1034 (Fla. 3d DCA 1982). Prevatt's fear of Appellant was clearly prejudicial. See Dupont v. State, 556 So. 2d 457 (Fla. 4th DCA 1990). Likewise, the state of mind of a witness, or victim, is not relevant toward determining the identity of the perpetrator and there is a danger of the jury misusing such

evidence for an impermissible purpose. Fleming v. State, 457 So. 2d 499, 501-502 (Fla. 2d DCA 1984).

At bar, the testimony as to Prevatt's fear of Appellant was merely collateral to whether Appellant had committed the offenses charged. The issue was whether he had killed and not whether Prevatt was afraid of him. Consequently, the evidence that Prevatt was afraid of Appellant should have been excluded. The error denied Appellant due process and a fair trial.

POINT XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE STATE ATTORNEY'S OFFICE.

Appellant's phone calls from the Martin County Jail were recorded. Although Appellant's calls to his attorneys were not supposed to be recorded – those conversations were recorded T991, 533-586. The prosecutors indicated they knew which phone conversations were between Appellant and his attorney and those which were between Appellant and non-attorneys (friends, relatives, etc.) T551. Despite this fact, the prosecutor chose to listen to recorded phone calls between Appellant and his trial attorney T551, 561,564.

Appellant did not move to suppress any of the phone conversations. Appellant moved to disqualify the State Attorney Office R933-34, T586, 1005-1008 1010. The trial court denied the motion TR944, T1010. This was reversible error.

The prosecutor below argued the attorney - client communications were waived

because there was a warning the phone calls were being monitored. However, the fact the calls were monitored does not evaporate the attorney - client privilege.

The attorney - client privilege remains intact "if not intended to be disclosed to third persons." Section 90.502(1)(c), Florida Statutes (emphasis added).

The phone calls were not intended to be disclosed to third persons and Appellant could reasonably expect they would not be. Evidence showed jail phone calls between clients and attorneys were not intended to be recorded and were only recorded due to an accident T991, 1000. Thus, the recording of the calls were unintended and unanticipated. Appellant would have reasonable belief the calls to his attorney would not be examined by the prosecution. It was error to deny Appellant's motion.

In addition, even if Appellant knew his calls were to be recorded, Appellant could reasonably believe that his calls would be private. Phone calls to one's attorney, if monitored, would be monitored for security purposes and not to gather evidence or defense strategy. The same is true for letters between attorneys and clients. One can expect letters to be examined for security purposes. However, security concerns do not vitiate the attorney - client privilege and permits prosecutors to search for defense strategy.

Finally, knowing the law enforcement officers may be scrutinizing phone calls for security purposes does not translate into having prosecutors scrutinizing the calls for non-security reasons - for evidence and strategy. Disqualification is the appropriate remedy where the State's Attorney Office purposely listen to attorney - client phone calls in order

to adduce strategy and/or evidence. This cause must be reversed and remanded for a new trial with different prosecutors.

PENALTY PHASE

POINT XII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

The trial court found the aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner, hereinafter "CCP" R4422. The jury was also instructed on CCP. This was error.

This aggravator "ordinarily applies in those murders which are characterized as executions or contract murders." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). While such examples are not deemed to be all inclusive, they do represent the type of heightened premeditation and coldness required for the CCP aggravator. The instant case meets neither the spirit nor the literal requirements for this aggravator.

It was error for the trial to find CCP and to instruct and to present CCP to the jury over Appellant's objections T3560.

In order for this aggravating circumstance to apply, "heightened premeditation" is required. Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992). That is, the defendant must have had "a careful plan or prearranged design" to kill. Id. A suspicion of heightened

premeditation will not be sufficient. Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988). This aggravator must be proven beyond a reasonable doubt. Lloyd, supra, at 403 (although evidence might create "suspicion" of a contract killing, the fact was established beyond a reasonable doubt). The trial court's finding CCP was legally flawed.

COLD

Even if a killing is calculated to be CCP it must be cold. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) Although killing was clearly calculated it was not the result of "calm and cool reflection" and thus not cold). The trial court found the killings to be cold stating that Appellant "acted out of anger, he did not act of a fit of rage" R4418. However, a killing done in anger is not cold. See Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993) no CCP where after being beaten by victim defendant leaves, obtains gun, and returns in anger and shoots victim).

Also, the trial court indicated that the killings were cold because they were planned. However, the finding of cold cannot be based on the finding of planning. See Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) fact that murder was clearly calculated did not prove that murder was cold thus CCP did not apply).

The only evidence as to Appellant's mind set was the prosecutor's evidence in his confession that he lost it. There was evidence indicating that Appellant consumed a lot of crack cocaine.[10] See White v. State 616 So. 2d 21 (Fla. 1993) (CCP stricken even

[10] Witnesses other than Appellant indicated Appellant did a lot of partying and smoked crack cocaine on the night of the murders T2392, 2411, 2424-25.

though record clearly established premeditation - evidence also showed excessive drugs use and the defendant was high). State witness, Joseph Herbert testified Appellant was "weirded out like he was high or something T2392.

A defendant's nervousness is inconsistent with the cold prong of CCP. See Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). A number of state witnesses described Appellanas being hyper and sweaty. T2410, 2419, 2435.

Even ignoring Appellant's statement, the evidence must show Appellant acted in cold manner doing the killing, the state did not produce such evidence. There still exists a reasonable hypothesis that does not include "cold" See Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992) (Where evidence susceptible to ... divergent interpretations" aggravator should not have been found).

CALCULATED

The trial court found calculation and heightened premeditation because if Appellant "had not intended to kill" "he could have stopped" but he killed by strangulation" R4417. However, the calculation and heightened premeditation prongs of CCP involve much more than intent to kill. Also, by the trial court's reasoning all strangulations are CCP. This is not true.

The trial court also emphasized that each collateral killing added to the heightened premeditation relying on Conde v. State, 860 So. 2d 930 (Fla. 2003). However, Conde involved a unique additional fact which tied the murders together and emphasized heightened premeditation - a message on the body:

> the pattern of these crimes together with the message Conde wrote on the back of his third victim indicating that she was "third" and "[see] if you can catch me, " was evidence of premeditated intent to kill.

860 So. 2d at 945-946. Thus, in Conde the message was the proof of heightened premeditation. In addition, in Wuornos v. State, 676 So. 2d 966, 972 (Fla. 1995) this court held it to be improper to use collateral crime evidence to establish CCP to establish a criminal pattern on propensity.

The trial court indicated that Appellant had a calculated plan. At best if there was any plan, it was a plan to have sex. Obviously, the sex was not public but in a location away from the public. However, having a plan is not sufficient to prove CCP. Under the rule established in Rogers v. State, 511 So. 2d 526 (Fla. 1987) the state must prove beyond a reasonable doubt that the defendant had a careful plan or prearranged design **to kill before** the criminal episode began. See also Wyatt v. State, 641 So. 2d 1336 (Fla. 1994) (CCP struck during shooting spree of 3 people); Foster v. State, 778 So. 2d 906, 921 (Fla. 2000) (the defendant must have a careful plan to commit murder, "before the fatal incident"). This was not shown in this case.

POINT XIII

WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S

OBJECTION TO THE JURY INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED (CCP) CIRCUMSTANCE ON THE GROUND THAT IT FAILED TO REQUIRE THAT THE STATE PROVE THAT APPELLANT INTENDED TO KILL BEFORE THE CRIME

Appellant moved to have the cold, calculated and premeditated (CCP) circumstance declared unconstitutional facially and as applied. T135, R2964-73. He argued that the circumstance violated the fifth, sixth, eighth, and fourteenth amendments to the Federal Constitution and Article I, section 9, 16, 17, 21, and 22 of the state constitution. R2964. Among other things, the argued that the standard jury instruction failed to require that the state prove beyond a reasonable doubt an intent to kill before the crime began. R2967-68, 2972. The judge denied the motion. T136-137. This was error.

This court has acknowledge that CCP must have the narrowing and limiting explanation in the jury instruction.

> "[a] vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346 (1972). Maynard v. Cartwright 486 U.S. at 361-62 108 S. Ct. at 1857.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). In the same opinion this court further acknowledged that the CCP jury instruction was defective for failing to adequately define the content (established by case law) of CCP:

> "… call for more expansive instructions to give content to the CCP aggravating factor. (Footnote omitted.) Otherwise the jury is likely to apply

> CCP in an arbitrary manner, which is the defect cited by the United States Supreme Court in striking down HAC (the heinous, atrocious and cruel aggravator) instructions. (Citation omitted.)
>
> ***
>
> For all these reasons, Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey – the description of the CCP aggravator is 'so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor'. Espinosa, 505 U.S. at 1079, 1172 S. Ct. at 2918. (Emphasis added).

Jackson, supra at 90.

CCP when properly construed and constitutionally limited, requires that the defendant have intended to kill before the criminal episode began. See Rogers v. State, 511 So 2d 536 (Fla. 1987) (careful plan must be made before the criminal episode began for CCP); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994). The "jury must first determine - that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)." See e.g. Foster v. State, 778 So. 2d 906, 921 (Fla. 2000) (emphasis supplied). The standard jury instruction which was given at bar[11] did not

[11] The judge instructed the jury (R3878-49):

> Four, the crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner and without any pretense or moral or legal justification. Cold means the murder was the product of calm and cool reflection. Calculated means having a careful plan or prearranged design to commit murder.
>
> As I had previously defined for you, a killing is premeditated if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing, the law does not fix an exact period of time that must pass between the

require such proof and relieved the state of its burden. Hence, it was unconstitutional. This error tainted the resulting penalty verdict and appellant's sentence. Cf. Espinosa v. Florida., 505 U.S. 1079 (1992) (unconstitutional jury instruction on heinousness circumstance rendered sentence unconstitutional).

POINT XIV

WHETHER THE COURT ERRED IN INSTRUCTING THE JURY ON, AND IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

It was error for the court to find the murder especially heinous, atrocious, or cruel (EHAC). It was also error to allow EHAC to be argued to the jury over Appellant's objection T3559.

The trial court based EHAC on a number of speculations. The trial court assumed that there was conscious when the strangulation occurred. However, there was no evidence whether of consciousness or unconscious when strangled. The medical examiner testified that there was no indication of any struggle T2366. One would expect to see signs of a struggle. Then again, the toxicology report showed that the victims were full of intoxicants T2327-28, SR46, SR51. Thus, the victim may have been unconscious

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formation of the premeditated intent to kill and the killing. The period of the time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required. A pretense of moral or legal justification is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the other-wise cold, calculated and premeditated nature of the murder.

due to alcohol and cocaine. The bottom line is that it is simply speculation to say she was conscious during strangulation. The evidence was insufficient for EHAC due to uncertainty about what happened. See Bundy v. State, 471 So. 2d 9 (Fla. 1985) (HAC rejected because there was no clear evidence the victim struggled with her abductor or experienced extreme fear); DeAngelo v. State, 616 So. 2d 440. 442-43 (Fla. 1993) (trial court did not err in rejecting HAC in strangulation case where facts were unclear); King v. State, 514 So. 2d 354 (Fla. 1987) (aggravator might not be based on what might have occurred).

The trial court also speculated the victim knew she was going to die. Speculation cannot substitute for proof of this aggravating circumstance. See Knight v. State, 746 So. 2d 423, 435-36 (Fla. 1998). '[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden, Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

Not every strangulation is HAC. This Court wrote in Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989):

> The trial court found the murder was especially heinous, atrocious, or cruel because the evidence suggested the victim was manually strangled. We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim as "knocked out" or drunk. Other evidence supports Rhodes' Statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In Herzog v. State, 439 So. 2d 1372 (Fla. 1983), we declined to apply this aggravating factor in a situation in which the victim,

> who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So. 2d at 9. Due to the conflicting stories told by Rhodes we cannot find that the aggravating circumstance of heinous, atrocious, and cruel has been proven beyond a reasonable doubt.

Cf. DeAngelo v. State, 616 So. 2d 440, 442-443 (Fla. 1993) (trial court did not err in rejecting HAC in strangulation case where facts were unclear).

In Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1999), this Court struck the heinousness circumstance where the victim "may have been" rendered unconscious. The evidence was that "Zakrzewski approached Sylvia, who was sitting alone in the living room. He hit her at least twice over the head with a crowbar. The testimony established that Sylvia may have been rendered unconscious as a result of these blows, although not dead. Zakrzewski then dragged Sylvia into the bedroom, where he hit her again and strangled her with rope." 717 So. 2d at 490 (e.s.). This Court wrote (pages 492-93 e.s.):

> As for Sylvia's death, we find that the trial court's finding of HAC was erroneous. The State has the burden of proving beyond a reasonable doubt that an aggravator has been established. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989). Medical testimony was offered during the trial which established that Sylvia may have been rendered unconscious upon receiving the first blow from the crowbar, and as a result, she was unaware of her impending death. We have generally held awareness to be a component of the HAC aggravator. See e.g., Wyatt v. State, 641 So. 2d 1336, 1341 (Fla.1994)(holding that HAC is repeatedly upheld where the victims are "acutely aware of their impending deaths"); Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990)(holding that events occurring after the death of a victim cannot be considered in determining HAC); Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984)(holding that circumstances that contribute to a victim's death after the victim becomes unconscious cannot be considered in determining HAC). Based on the medical expert's testimony, we conclude that the State has failed to meet this burden. Therefore, we

> find that it was error for the trial court to apply the HAC aggravator to Sylvia's murder.

EHAC is "inapplicable under Florida law where the victim is unconscious or unaware of impending death at the time of the attack." Cherry v. State, 781 So. 2d 1040, 1055 (Fla. 2000).

In Richardson v. State. 604 2d 1107, 1109 (Fla. 1992) this Court wrote: "The United States Supreme Court recently has stated that this factor would be appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Sochor v. Florida, 112 S. Ct. 2214, 2121 (1992). Thus, the crime must be both conscienceless or pitiless and unnecessarily torturous." At bar, the state did not show these elements. The court erred in finding the circumstances. In State v. Hunt, 220 Neb 707, 371 N.W. 2d 708 (Neb. 1985), the defendant entered the victim's house and tied the victim's arms and legs. Items were stuffed down the victim's throat. The defendant then strangled the victim with a nylon stocking until she was unconscious. The defendant removed the victim's robe. The victim would be found dead and no semen was found in the victim. The defendant did confess that after the strangulation he masturbated and ejaculated onto the victim's stomach. The Nebraska Supreme Court rejected HAC because there was "no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time":

> The evidence established that the victim was rendered unconscious within a short time of defendant's intrusion into her home. It therefore cannot be said that the murder was of the nature described in aggravating circumstance (1)(d), as specified in § 29-2523: "The murder was especially

> heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence.
>
> To be sure, forcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.
>
> Although the method by which defendant achieved sexual gratification may be accurately described as exceptionally heinous and atrocious, and as manifesting exceptional depravity by ordinary standards of morality and intelligence, the murder itself, given the inherent nature of a killing, cannot.

Hunt, 371 N.W. 2d at 721. The facts in this case was far less EHAC.

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and it's ruling is supported by competent substantial evidence in the record." Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001).

The evidence at bar does not rise to the level of proof required for this circumstance. Its use renders the death sentence unconstitutional under the Due process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Its erroneous use was not harmless beyond a reasonable doubt. Additionally, the jury should not have been instructed on the EHAC aggravator. This Court must reverse.

POINT XV

FLORIDA'S DEATH PENALTY WHICH DOES NOT REQUIRE: A UNANIMOUS JURY FINDING FOR DEATH; A UNANIMOUS JURY FINDING OF AGGRAVATING CIRCUMSTANCES; A FINDING BEYOND A REASONABLE DOUBT THAT AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH

AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This court has indicated it has not ruled on whether Ring v.Arizona, 122 S. Ct. 2428 (2002) applies in Florida. State v. Steele, 921 So. 2d 538, 540 (Fla. 2005) ("...this court has not yet forged a majority view about whether *Ring* applies in Florida'); but see Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006) (stating in Steele this court determined Ring did not apply in Florida). In Steele this court made it clear that in order "to obtain a death sentence, the state must prove beyond a reasonable doubt at least one aggravating circumstances" 921 So. 2d at 543. In other words, the fact finder must find at least one aggravating circumstance - otherwise the maximum sentence that can be imposed is life in prison. In Cunningham v. California, 127 S. Ct. 856 (2007) the court emphasized the Federal Constitution right to a jury trial requires juries to find facts noting "the relevant 'statutory maximum' ... is not the maximum sentence a judge may impose after finding of additional facts, but the maximum he may impose without any additional facts". Thus, aggravating circumstances must be found by the jury otherwise the maximum punishment is life in prison. Ring clearly applies to Florida's death penalty scheme.

Also, the Eighth Amendment requires "heightened reliability... in the determination whether the death penalty is appropriate..." Sumner v. Shuman, 483 U.S. 66, 72 107 S. Ct. 2716, 97 L.Ed. 2d 56 (1987).

1. Due process and the right to a jury trial were violated without the jury finding "sufficient aggravating circumstances" exist.

The Florida Legislature has not proclaimed the finding of one aggravating

circumstance is sufficient to exceed a life sentence. Rather, the Legislature requires that "sufficient aggravating circumstances" exist. §921.141. A finding of one aggravating circumstance is not enough. There must be a finding of sufficient aggravating circumstances. Thus, the fact Appellant was found guilty of felony murder does not waive his rights to have the jury determine whether "sufficient" aggravators exist. The felony murder aggravator may not be "sufficient " to justify the death sentence. In fact, the death penalty has not been upheld in Florida when felony-murder is the only aggravator. See Jones v. State, 705 So. 2d 1364 (Fla. 1998); Williams v. State, 707 So. 2d 683 (Fla. 1998).

2. Due process and the right to a jury trial is violated where Florida allows a jury to decide aggravators exist and to recommend a death sentence by a mere majority vote.

As this court noted in Steele, Florida is the only state that allows a jury to decode aggravators exist and to recommend a sentence if death by a mere majority vote. 921 So. 2d at 548. This violates both Ring and the right to heightened reliability of the Eighth Amendment that other states require. In deciding cruel and unusual punishment claims, the practice of other states will be reviewed. See e.g., Solem v. Helm, 103 S. Ct. 3001 (1983); Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

This court explicitly recognized that the jury is free to mix and match aggravating circumstances without deciding unanimously, or even by a majority, the particular facts upon which it is choosing death:

Under the law, the jury may recommend a sentence of death so long as a

> majority concludes that at least one aggravating circumstance exists. Nothing in the statue, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see §921.141(5)(f), because seven jurors believe that at least one aggravator applies.

921 So. 2d at 545. Again, this violates both Ring and the Eighth Amendment right to heightened reliability.

3. Due process is violated where the jury does not have to find aggravators outweigh mitigators beyond a reasonable doubt.

In State v. Wood, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 980 (1982), the Utah Supreme Court held that the certitude required for deciding whether the aggravating factors outweighed the mitigating factors was beyond a reasonable doubt:

> The sentencing body, in making the judgment that aggravating factors "outweigh,: or are compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

648 P. 2d at 83-84.

In State v. Rizo, 833 A. 2d 363 (Conn. 2003), the Connecticut Supreme Court recognized that the reasonable doubt standard was appropriate for the weighing process:

> Imposing the reasonable doubt standard on the weighing process, moreover, fulfills all of the functions of burdens of persuasion. By instructing the jury that its level of certitude must meet the demanding standard of beyond a reasonable doubt, we minimize the risk of error, and we communicate both to the jury and to society at large the importance that we place on the awesome decision of whether a convicted capital felony shall live or die.

833 A. 2d at 407 (emphasis added). The court recognized that the greater certitude lessened the risk of error that is paretically unreviewable on appeal:

> … in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instruction, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some constitutional floor based on the need for reliability and certaininty in the ultimate decision-making process.

833. A.2d at 403 (emphasis added). Finally, the court reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable doubt:

> Consequently, the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in this case. In this regard, the meaning of the "beyond a reasonable doubt" standard, as describing a level of certitude, is no different from that usually given in connection with the questions of guilt or innocence and proof of the aggravating factor.
>
> The trial court's instructions in the present case did not conform to this demanding standard. We are constrained, therefore, to reverse the judgment of death and remand the case for a new penalty phase hearing.

833 A. 2d at 410-11. Likewise, the factfinder in this case must have been persuaded beyond a reasonable doubt that the aggravators outweighed the mitigators. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant's sentence must be

vacated.

POINT XVI

FLORIDA STATUTE 921.141(5)(d), THE FELONY MURDER AGGRAVATOR, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Appellant was found guilty of only felony murder and not premeditated murder. Florida Statute 921.141(5)(d) violates both the Florida and United States Constitutions. The use of this aggravator renders Appellant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant argued this aggravator was unconstitutional T134, R3009-3012. The trial court denied the motionT134. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator.

Aggravating circumstance (5) (d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual batter, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree statute. Fla. Stat. 784.04(1)(a)2.

The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two

requirements before it is constitutionals. (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2743, 77 L. Ed.2d 235, 249 (1983). (2) It "must reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant, supra, at 2742, 77 L.Ed.2d at 249-250.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation". See Fla. Stat. 921.141(5)(I). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intent to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. It is clear that this aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra.

Three different state supreme courts have held this aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E. 2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92

(Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992); Tennessee v. Middlebrooks, 113 S. Ct. 1840 (1993) (granting certiorari); Tennessee v. Middlebrooks, 114 S. Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted).

In State of North Carolina v. Cherry, 257 S.E.2d 551, the Supreme Court of North Carolina held that when a defendant is convicted of First Degree Murder under the felony rule, the trial judge is not to submit to the jury at the penalty phase of the trial, the aggravating circumstance concerning the underlying felony. The Court in Cherry held that:

> We are of the opinion, that nothing else, appearing the possibility that the defendant convicted of felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to an "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the Statute we hold that when a defendant is convicted of First Degree Murder under the felony murder rule, the trial judge shall not submit to the jury, at the sentencing phase of the trial, the aggravating circumstances concerning the underlying felony.

The North Carolina Supreme Court state in Cherry that once the underlying felony has been used to obtain a conviction of First Degree Murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution of Cherry. 257 S.E.2d at 567.

This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

CONCLUSION

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

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Initial Brief has been furnished to: LISA-MARIE LERNER, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of January, 2008.

_____
Counsel for Appellant

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Petitioner's Initial Brief has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P*. 9.210(a)(2), this _____ day of January, 2008.

_____

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