IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS **PAGE**

1

AUTHORITIES CITED

CASE **PAGE**

OTHER AUTHORITIES

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.

Appellee claims that Miranda warnings are not required during a custodial interrogation absent police coercion. This is not true. Miranda v. Arizona, 384 U.S. 436, 467-68, 86 S.Ct. 1602, 1624 (1966) (..."such a warning is an absolute prerequisite in overcoming the inherent pressures" of custodial questioning).

Appellee points to numerous prior meetings between Appellant and Detective Dougherty to claim there was no police coercion. Appellee misses the point. All the prior meetings were non- custodial. These meetings did not result in Appellant confessing unlike the inherently coercive custodial interrogation.

Appellee claims it is proper for police to use deception with regard to Miranda warnings. This is contrary to Miranda itself in which the Court stated that "...any evidence that the accused was threatened, tricked, or cajoled into a waiver..." will result in suppression. Miranda, 284 U.S. 436, 476 (1966).

Appellee claims Missouri v. Seibert, 542 U.S. 600 (2004) does not apply because it does not bar techniques that dilute or circumvent the effect of Miranda

warnings. However, Seibert prohibits this very evil. It does not matter if the technique in this case is not identical to the one in Seibert. Police cannot use any technique (whatever it may be) designed to thwart the Miranda warnings.

Merely giving Miranda warnings does not meet the requirement that they be effective. Where a technique is used to dilute or circumvent Miranda, even where warnings are given, Miranda is violated. See Seibert.

Appellee claims the police did not use an intentional strategy to circumvent Miranda so that Appellant would not invoke his rights. However, the police acknowledged use of a ruse so that Appellant would not 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 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, T485 (Emphasis added).

Appellee claims that Detective Dougherty merely preserved rapport when he had a different officer arrest Appellant on different charge at a different location, and then put him in a task force room where Dougherty showcased evidence (including false evidence) and later brought him into an interrogation room. This is not true. Dougherty admitted this was a contrived ruse T3233. If preserving rapport was the

goal, another officer could have brought Appellant to the interrogation room without this ruse.

There was no need to have Appellant arrested on a different offense at a different location, etc. Also, there was never an interrogation on the different offense for which Appellant was arrested. It was merely part of a ruse to thwart Miranda so Appellant would not invoke his rights on the crimes charged.

Contrary to Appellee's implied assertions, appellate courts have not endorsed the deception of separating Miranda warnings from the interrogation. Some deception has been tolerated during the interrogation, but it has never been tolerated during the Miranda warning process. Again, "any evidence that the accused was threatened, tricked, or cajoled into a waiver" requires suppression of his statement. Miranda 384 U.S. at 476 .

Even without a police strategy, a court may order suppression when the warnings are separated from the statements. Commonwealth v. Coplin, 612 N.E. 2d 1188 (Mass. 1993) (defendant is arrested and given Miranda warnings at home, then at police station 35 to 40 minutes later defendant is given incomplete warnings by a different officer-under totality of circumstances there was a break in the chain of events, and warnings at time of arrest did not carry over to the interrogation). The totality of the circumstances in determining the effect of prior warnings include: (1) whether warnings given at same location as interrogation; (2) whether warnings are

given by same officer who conducts interrogation; (3) whether warnings and arrest are for the crimes which one is interrogated on; (4) time lapse between the warnings and later interrogation; (5) the extent the later statement differs from any earlier statements; (6) the apparent emotional and intellectual state of the suspect. See State v. Deweese, 582 S.E. 2d 786, 798 (W.Va. 2003).

At bar, the totality of the circumstances show that Miranda warnings were not effective at the time of interrogation. The warnings were done by a different officer, on a different offense, at a different location, at a different time. The lapse of time between the warnings and interrogation was significant. Although the exact amount of hours that elapsed is not known -- we do know it was significant.[1] Appellant was placed in the task force room specifically to absorb evidence (including manufactured evidence) in order for him to feel he was in a hopeless situation T3238-40, 3063-64. This intervening event distracted him even more from prior warnings and created further disconnect and separation from the subsequent interrogation. Of course, the resulting statement differed from prior ones. Thus the totality of circumstances call for

[1] Appellee claims the lapse is either a "few minutes" or ½ hour. The record does not support for this claim. It would have taken considerable time to transport Appellant to the police station and process him. More importantly, Appellant was left in the task force with staged and false evidence for a considerable amount of time. The police acknowledged they wanted Appellant to be able to absorb the evidence and feel hopeless. The police even went to the extent of creating false lab reports showing Appellant's DNA at the crime scene and placed it on the wall for him to see. T3063-64. Appellant was not merely whisked in and out of the room.

suppression of the statements. **However, this case is worse -- the police created a ruse to dilute or circumvent the effectiveness of Miranda**.

Appellee mentions Colorado v. Spring, 479 U.S. 564 (1987) where Miranda was not violated when the police arrested the suspect on one charge and then interrogated him on a different charge. Spring does not apply at bar for several reasons. First, in Spring, the warnings were not given by a different officer at a different location with a lapse of time and other intervening events (i.e. the task room with false evidence). The police did not separate the warnings from the interrogation. More importantly, in Spring the police did not intentionally try to circumvent Miranda. Finally, even if Spring had involved an intentional circumvention of Miranda, the Court's later proclamations in Seibert make clear that Spring now would be decided differently.

Appellee notes that upon being arrested on the separate and distinct offense Appellant wanted to speak to Dougherty. There was absolutely no evidence Appellant wished to speak about the Bradley or Wiggins/Caughey cases. He never asked to see Dougherty about them. Only after the ruse to separate the warnings, and placement in a room with false evidence, was Appellant unexpectedly confronted with interrogation about the Bradley or Wiggins/Caughey cases. The request does not dispel the ruse to get around Miranda.

Finally, as a defense to the police ruse, Appellee claims there was no

psychological coercion by police. Under Miranda, custodial interrogation is inherently coercive. Further, Appellant argued below that significant psychological coercion resulted in false incriminations T3338, 3453.[2]

The police placed Appellant in a task force room that included false DNA evidence they had created to convince Appellant his situation was hopeless. See State v. Cayward, 552 So. 2d 971, 973 (Fla. 2d DCA 1989) (suppression of confession where police fabricated false documents to induce confession). In Cayward the court distinguished false verbal accusations with the fabrication of documents or physical evidence. One might resist verbal deceptions. However, where police manufacture evidence hope is lost. Even if one is innocent he could lose hope if he knows the adversary is manufacturing false evidence. Thus, this psychological coercion is powerful. The police also offered numerous promises.[3] Police officer may not use direct or implied promises, however, slight, to obtain a confession. See e.g., E.C. v. State, 841 So. 2d 604, 606 (Fla. 4th DCA 2003).

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[2] It is undisputed that portions of Appellant's "confession" were false. For example, he said he put Caughey "up in the trees," T3113, But, Caughey was never put up in the trees. Appellant would receive this false impression from looking at crime scene photos (in the task force room) which showed an article of clothing up in the trees. Appellant communicated what he thought the photos showed, but he misinterrperted what the evidence was. There is doubt Appellant killed Caughey - if he had he would know her body was never placed up in the trees.

[3] Police told Appellant he was not a bad guy and they could take control and help him T3073, 3080. When the death penalty was mentioned, police impliedly promised he would not get death by stating he could get a job as a trustee T3086.

The record refutes that there was no psychological coercion. More importantly, the police used a strategy of separating the Miranda warnings from the interrogation by having Appellant arrested on an unrelated offense and given warnings by a different officer at a different location and then having him absorb false DNA reports in a evidence room before finally being interrogated. The police made certain there was a break in the chain between the Miranda warnings and the interrogation.

POINT II

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

Throughout its brief Appellee portrays this case having compelling evidence against Appellant. However, there was no objective evidence such as DNA, prints, etc.[4] There were no eyewitnesses as to what happened. There is Appellant's statement admitting responsibility, but it is contrary to premeditation or sexual battery. Collateral crime evidence was misused for propensity without a strict scrutiny. This is what happened to Jerry Townsend, an innocent man who went to prison for over 20 years. While Appellant may, or may not, be totally innocent[5] -- the collateral crime

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4 Police had some physical evidence but it was either destroyed or neglected. For example, there was a hair found on Wiggins' finger. It was not untestable, but, without explanation, police believed it would not be relevant so it was not tested T2942.

5 The defense argued the confession was false T3338, 3453. Appellant's answers were in response to leading questions and he could not give details describing

evidence may improperly led to convictions greater than those that otherwise would be found.

Appellee claims deference should be should be given to the trial court's discretion. However, the trial court intentionally refused to consider the dissimilarities between the Bradley case and the Caughey/Wiggins case R546. Thus, it did not properly exercise discretion and deference should not be given to the so-called exercise of discretion.

Appellee claims trial counsel personally waived this issue. However, trial counsel emphasized he was not waiving the Williams rule issue:

> Mr. Udell: I'm going to be telling you we're going to agree to consolidate all three cases. **I just don't want to waive any rights that Eugene has on appeal.**
>
> ****
>
> I -- **I just want the record to be clear so nobody on appeal says, well, counsel waived some rights**.
>
> ****
>
> **The defendant's position** is that none of the evidence of any other homicide should come into trial of another homicide, and **that but for your ruling on the Williams rule we'd be asking for three separate trials. Now that we've been told that the evidence is coming in any way we're agreeing to consolidate all three cases**. If it constitutes a waiver it does. But if it doesn't I want the record to say "well, they noted their objection.

SR 11, 12, 15 (Emphasis added). Contrary to Appellee's claims, counsel did not want to try the cases together. He agreed to consolidation only after all the collateral crime

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the killing. The answers described things that never occurred. Even if the so-called confession was to be believed , he would be guilty of only a lesser degree of murder.

evidence was ruled admissible, destroying the purpose of having separate trials.

Appellee claims that **Appellant personally** waived this issue in a colloquy with the court. Appellee is wrong. The court informed Appellant of the **chance or possibility** of a waiver if he agreed with counsel's decision SR18-22. The colloquy was to make him aware of the **possibility**. The court said that, in making the decision, he should assume a waiver -- "if it's not, that's fine" SR20. Appellant understood his choices - but did **not** say he personally waived the issue.

Appellee acknowledges that this issue was raised pretrial and that the court made a clear ruling. T309, 321-322, 328, R546-47. However, Appellee claims the issue must be renewed. This is not true. Rule 90.104 (1)(b) adopted 914 So. 2d 285 (Fla. 2007); Tillman v. State, 964 So. 2d 285 (Fla. 2007); Franklin v. State, 965 So. 2d 79 (Fla. 2007). The cases cited by Appellee all predate the rule and do not apply.

Appellee also claims Appellant waived the issue by cross-examining about the Williams rule evidence. However, the law is clear that one does not waive an objection to evidence by cross-examining on it. See e.g. Stripling v. State, 349 So. 2d 187, 193 (Fla. 3d DCA 1977); Dupree v. State, 639 So. 2d 125, 127 n. 3 (Fla. 1st DCA 1994).

Appellee does not dispute the only law on whether the issue was waived is Joseph v. State, 447 So. 2d 249 (Fla. 3d DCA 1983). Appellee claims Joseph does not apply because Appellant and his counsel both personally waived the issue. As

explained above this is not true. Appellee does not dispute that Joseph was correctly decided. Even if Joseph was incorrectly decided, since it is the only existing Florida decision on the issue, the overruling of the decision should not retroactively deprive Appellant of the issue he preserved under existing law. See State v. Green, 944 So. 2d 208, 219 (Fla. 2006) (when cases allowing a defendant more time to file 3.850 were now being overruled for the first time, in the interest of fairness those defendants would allowed to refile from the date of the opinion); Ey v. State, 33 Fla. L. Weekly 5144 (Fla. 2008). Again, Joseph is a correct statement of the law that avoids a manifest waste of judicial time and labor.

Appellee claims one does not need to show a "sufficient unique pattern" under Peek v. State, 488 So. 2d 52 (Fla. 1986) to prove identity or premeditation. This is not true. See Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981) (similarities must be of a special character so as to identify the defendant as the perpetrator); Robertson v. State, 829 So. 2d 901, 909 (Fla. 2002) ("absence of mistake" requires substantial similarity).

Appellee does not dispute that if the killings had significant dissimilarities they would be inadmissible. Appellant listed 7 significant dissimilarities in his Initial Brief at pages 44-45. Appellee does not dispute 6 of the 7 dissimilarities. In fact, Appellee acknowledges the "crime scenes of Wiggins and Caughey murders showed signs of struggle" Answer Brief at 93, which is totally opposite of state witness testimony that there was no evidence of a struggle with Bradley T2366. Nor does Appellee dispute

the crimes where significantly different where Bradley was not last seen alone with Appellant, but was last seen also walking away with Glen Burbaugh T1948, who would state "revenge is best served cold" T1968, when discussing Bradley's death. The dissimilarities alone negate the premise that the Bradley killing was admissible to prove the Caughey/Wiggins killing.

Appellee claims that the manner of strangulation was unique and not dissimilar. However, the physical evidence showed the manual strangulations were different.

The prosecutor even noted Bradley had a crushed thyroid cartilage and soft tissue damage while Caughey had no damage to the thyroid cartilage and no soft tissue damage T304-305. Bradley was strangled in the lower neck and thus the styloid process was not broken and the cartilage was damaged T2970. Caughey had a broken styloid process -- showing strangulation in the upper neck T2970. The different styles of strangulation show a different perpetrator rather than identifying the same perpetrator. See Thompson v. State, 494 So. 2d 203, 204 (Fla. 1986) (**similarities** that victims of some age and build, crimes near same parking lot, and defendant having domestic difficulties on both occasions **not sufficient -- especially where there were other dissimilarities**).

The trial court declined to consider the dissimilarities.[6] It is legal error to

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

ignore dissimilarities, and marked dissimilarities make the crimes inadmissible. See Miller v. State, 791 So. 2d 1165, 1170 (Fla. DCA 2001).

On page 28 of its brief Appellee points to certain alleged facts to claim similarities so pervasive so as to identify Appellant as the killer. However, Appellee never explains how the alleged similarities show this. For example, Appellee points to Appellant's eyewitness statements of sexual activity as a similarity. However, the collateral crime evidence analysis must be independent of an eyewitness. See Stephens v. State, 662 So. 2d 394 (Fla. 5th DCA 1995).

Other claimed similar evidence is in fact dissimilar. Bradley was homeless, lived in the woods, and thus lived on the fringe of society. However, Caughey and Wiggins lived with their parents and were not on the fringe of society. Bradley drank and Caughey/Wiggins took drugs, but these facts, if similar, are not unique facts identifying a single perpetrator. Bradley was not killed within a short distance of Caughey/Wiggins - it was 3 miles away. Appellee insists that all three women were last seen with Appellant. This is not true. In fact, it is a dissimilarity. Bradley was not seen alone with Appellant. She was last seen with Appellant **and Glen Burbaugh** (who celebrated her death by stating "Revenge is best served cold") T1968. This is dissimilar to the collateral crimes where the state alleged the collateral victims were last seen alone with Appellant. Even this allegation is questionable. Jodie Janata saw

Wiggins alone at approximately 11:00 T2414-15.[7] Erin Cassidy last saw Caughey with Jerry Prevatt T2457. The bottom line is the charged crime and the collateral crimes had significant differences.

The prosecution hypothesized the bodies were concealed. However, the evidence was unclear on whether there was actual concealment or whether there merely appeared to be concealment due to nature (weather and /or animals). More importantly, the fact a body is concealed simply is not evidence of a special character so as to identify the perpetrator. Finally, the nature of the way the bodies were found does not identify as the killer. Unfortunately, it is not uncommon to find bodies in this state. For example, see e.g., Gudinas v. State 693 So. 2d 953, 957 (Fla. 1997) ("naked except for bra which was pushed up above her breasts"); Douglas v. State, 878 So. 2d 1246, 1251 (Fla. 2004) (nude waist down, top and bra pushed up to shoulders exposing breasts); Townsend v. State, 420 So. 2d 615 (Fla. 4th DCA 1982); Davis v. State, 103 P.3d 70 (Okla. Crim. App. 2004) (naked waist down with shirt and bra pulled over breasts); State v. Parker, 89 P.3d 622 (Kan. 2004) (bra pushed up to neck and armpits and naked from waist down); State v. Piper, 672 N.W. 2d 333 (Iowa App. 2003) (bra pushed up exposing breasts and naked from waist down); State v. Jones, 72 P. 3d 1264 (Ariz. 2003) (dressed only in bra pushed up above her breasts).

In its brief at page 33, note 3, Appellee still relies on Townsend v. State, 420

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7 Earlier, Cyndi Kaman saw Appellant and Wiggins at 10 p.m. T3529.

So. 2d 615 (Fla. 4th DCA 1982). A case where an innocent man is wrongfully convicted, in large part due to collateral crime evidence, should not be an example of how to analyze collateral crime evidence. Townsend should be a reminder that vigilant analysis of collateral crime evidence is needed. Finding similarities is not sufficient. In this case the dissimilarities, which the trial court refused to consider, refute the collateral crimes had a special character so as to make them admissible.

Appellee claims that the collateral evidence was admissible to show a common plan. However, a common plan is only admissible if it proves a material fact in issue - such as identify or premeditation etc. -- lest propensity itself be admissible. See Duncan v. State, 291 So. 2d 241, 243 (Fla. 2d DCA 1974). For the collateral crime evidence to prove a common scheme it would have to have special similarities and lack significant dissimilarities. Appellee claims the collateral crimes prove that the Bradley killing was premeditated because the killings of Caughey and Wiggings were premeditated. However, the collateral crime evidence doesn't show the Caughey/Wiggins murders were premeditated. Moreover, the proof of collateral crimes in June did not prove the earlier crime in March was premeditated.

Appellee relies on Conde v.State, 860 So. 2d 930 (Fla. 2003) to claim that picking up prostitutes engaging in sexual relations and then strangling them and disposing of the body were the type of similarities allowing admission of collateral crime evidence. These facts were not the reason for admitting evidence of the

uncharged murders. These facts were 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, there was no relevancy link at bar between the collateral crimes and the charged crime other than propensity. Appellee's reliance on Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) is also misplaced. In Wuornos, unlike at bar, the collateral evidence was unique and Wuornos testified she was the victim and acted in self - defense. The fact that she had killed 6 other men by shooting them multiple times in similar premeditated fashions rebutted her claimed self -- defense/lack of premeditation. At bar, the state did not say it had proof that the Wiggins/Caughey killings were premeditated and thus it could be inferred the earlier Bradley murder was premeditated (or visa versa). Instead it used the prejudicial impact of **propensity** - if the jury believed Appellant committed one of the crimes it is likely he committed the other crimes.

Appellee also claims the collateral crimes were admissible to rebut a defense of accident. The trial court did not admit the evidence for this purpose. Appellant never claimed accident. He did claim lack of premeditation -- he lost it -- but this is not the

same as claiming an accidental killing. Appellant losing it shows he did not reflect or deliberate on the killing. It did not signify an accident such as performing CPR and accidentally choking the victim. In addition, the state would still need to show the unique similarity. Robertson v. State, 829 So. 2d 901, 909 (Fla. 2002). As pointed out, they did not do so in this case.

Appellee claims the collateral crimes rebut consent under Williams v. State, 621 So. 2d 413 (Fla. 1993). However, Williams is inapposite for two reasons. First, the collateral crime victims there testified that they did not consent to sex. At bar, there was no such testimony and no physical evidence even showing there was sex let alone whether it was consensual. Second, in Williams a special similarity overcame the fact consent is unique as to an individual and not merely provable by a separate incident. Here as discussed earlier there were significant dissimilarities.

Finally, Appellee does not meet burden of showing harmless error. As explained in the Initial brief at pages 48-50 the error was not harmless. Appellee refers to its **hypothesis** of the case rather than the actual facts. For example, as explained above, Appellant was not the last person with all three women; he did not say he **"took"** the women to an **"isolated"** area; he did not indicate sex with Bradley was not consensual; some nature was disturbed -- but not in an area where sex occurred; there was no evidence that he was scratched **by the women.**

Appellee concludes that Appellant's "admissions" make the error harmless.

The problem with this is that while Appellant's statements indicate responsibility they rebut premeditation and sexual battery. See Henry v. State, 574 So. 2d 73, 75 (Fla. 1991) (collateral evidence not harmless despite confession -- there was evidence from which it could be concluded Henry was guilty of a lesser degree of homicide). In addition, defense counsel attacked the reliability of the statements. See Initial Brief at 49.

POINT III

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

Appellee claims the state witnesses merely aided the jury in their area of expertise. However, there is a difference between giving a scientific basis for evaluating evidence and actually evaluating the circumstantial evidence for the jury. For example, Dr. Diggs used his expertise to testify the evidence was consistent with either consensual sex or rape (T3016, 2367, 2963) and stated:

> "... from a strictly scientific standpoint you can't - can't conclude that [rape]...

but then sat in the position of a juror to give his own, non - scientific opinion:

> "But from a circumstantial picture ... can conclude that as rape homicide...

T2287.

State v. Ortiz, 766 So. 2d 1137 (Fla. 3d DCA 2000) runs afoul the well-settled

axioms that it is the jury's function to evaluate circumstantial evidence [see page 55 of Initial Brief] and every defendant has a right to be tried on the evidence against him and not based on criminal characteristics in other cases See e.g. Dean v. State, 690 So. 2d 720, 722-232 (Fla. 4th DCA 1997); Lowder v. State, 589 So. 2d. 933, 935 (Fla. 3d DCA 1991); Nowitzke v. State, 572 So. 2d 1346, 1355-56 (Fla. 1990) (improper for state witness to testify to criminal behavior patterns of drug addicts); Flanagan v. State, 625 So. 2d 827, 829 (Fla. 1993) (admission of profile evidence that defendant and his house had certain traits which expert said fit sexual offender profile violates rule that existence of certain traits cannot be used to prove conformity with those traits on specific occasion -- also sex profiling does not meet Frye standard). As explained on page 55 of the Initial Brief, Ortiz did **not** involve an evidentiary issue and thus has no precedential value as to an evidentiary issue.

Appellee does not dispute the cases on page 53-54 of the Initial Brief that prohibit witnesses from performing evaluations of circumstantial evidence for the jury.[8] That is the jury's job. Instead, Appellee says an expert "decides for himself"

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8 At first blush one other case looks similar to the present issue -- Dailey v. State, 594 So. 2d 254, 258 (Fla. 1991). However, the objection and issue in this case were never raised nor addressed in Dailey. In Dailey this Court found no error in overruling **Dailey's objection** that certain expert testimony was "within the common understanding of the jury." 594 So. 2d at 258. Here, it is **not** being claimed that the jury commonly understood circumstantial evidence. Jurors may not be experts on circumstantial evidence. Yet, it is their function to deliberate on the circumstantial evidence - it is not the function for witnesses to deliberate and then inform the jury as to what crime they found was committed. Dailey did not involve an objection to, and

whether to do the jury's job of evaluating circumstantial evidence. This claim is specious and creates a real danger experts will invade the juror's responsibility. The expert will override the jury's own independent analysis of the facts and the jury will bow to the expert's analysis. See Mills v. Redwing Carriers Inc., 127 So. 2d 453, 456 (Fla. 2d DCA 1961).

Appellee claims Detective Shirk's testimony was not objected to and thus the earlier error was rendered harmless. However, Appellant previously objected to this type of testimony T2300, 2307 and again before Shirk analyzed the circumstantial evidence T2593. Thus, the subsequent testimony of Diggs T2316-19 and Shirk 2593-94 was covered by the earlier objections. Objections were made and further futile objections are not required. Rodriguez v. State, 494 So. 2d 496 (Fla. 4th DCA 1986) (since prior objection to same type of evidence was overruled no further objection was required). Contrary to Appellee's implied assertion, none of this evidence was presented prior to the objections.[9]

POINT IV

THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION.

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did not address, the issue of state witness performing the jury's function of evaluating circumstantial evidence. Nor was a defendant's right not to be tried on the criminal characteristics in other cases addressed in Dailey.

9 On T2010-17, Shirk did not evaluate the specific circumstantial evidence -- rather Shirk made general observations.

As shown in the Initial Brief, Appellant offered a reasonable hypothesis that the homicide occurred other than by a premeditated design and the State must prove the circumstantial evidence is inconsistent with the hypothesis. E.g., Randall v. State, 760 So. 2d 892 (Fla. 2000); Coolen v. State, 696 So. 2d 738 (Fla. 1997).

Appellee's brief does not point to evidence inconsistent with the hypothesis. Instead, Appellee stacks inference upon inference. The stacking or pyramiding of inferences amounts to speculation and is not permissible. See Miller v. State, 770 So. 2d 1144, 1149 (Fla. 2000) ("the circumstantial evidence test guards against basing a conclusion on impermissibly stacked inferences");Gustine v. State, 86 Fla. 24, 28, 97 So. 207, 208 (Fla. 1923); Brown v. State 672 So. 2d 648, 650 (Fla. 4th DCA 1996); Collins v. State, 438 So. 2d 1036 (Fla. 2d DCA 1983) (pyramiding of inferences lacks the conclusive nature to support conviction); Chaudoin v. State, 362 So. 2d 398, 402 (Fla. 2d DCA 1978).

Appellee's hypothesis is that Appellant lured the women to an isolated area away from other people with the plan to rape and strangle them, there was a struggle and the strangulation occurred for several minutes, and thus the killing was premeditated. No direct evidence supports this hypothesis, which is based on the stacking or the pyramiding of inferences.

Appellee first infers that Appellant **lured** the women to an **isolated** area with a **plan** to rape and kill. There was no direct evidence he lured anyone. Appellant's

statement indicated he and the women were together for drugs and sex. Also, the inference that Appellant concocted the situation to lure the women is also contrary to the evidence. For example, Appellant did not initiate the idea that Bradley clean up T1914. In addition, Appellee infers that because Appellant and the women were not in public he must have been planning something sinister such as murder. This is pure speculation. People usually have sex -- even consensual sex -- outside the view of the public. It is not reasonable to infer that only exhibitionists are involved in consensual sex. Also, the area was not isolated - there were houses very close nearby from which screams and/or other commotion would be heard T2014, 2504.

After inferring that Appellant lured the victims, Appellee then infers that the crime scenes showed a struggle. State witnesses testified there was no evidence of a struggle in the Bradley case T2366. Appellee infers a struggle in the Wiggins case. To make this inference it also infers that disturbed dirt reflects a struggle rather than disturbance by some other cause. Since Wiggins was not found at this area T2575, Appellee must also infer that Wiggins was alive at that time rather than the body being moved. Appellee also claims the stretching or tearing of clothing infers a struggle. To reach this inference one must infer that the materials would be altered by violent force rather thank the vigorous tearing off of clothing during sex as described by

Appellant.[10] The point is that numerous inferences must be stacked to infer how the death occurred and even after doing so the evidence does not rebut the reasonable hypothesis of lack of premeditation in that Appellant "lost it" rather than reflecting and deliberating on the killing.

The primary inference Appellee relies on is strangulation. As the Initial Brief pointed out, strangulation does not per se rebut a hypothesis of lack of premeditation.[11] Appellee relies on DeAngelo v. State, 216 So. 2d 440, 441 (Fla. 1993), but it was mere strangulation that was inconsistent with lack of premeditation. DeAngelo used both "ligature" and "manual" strangulation, had a "pair of socks on his hands" and practiced the murder **a week before**, which was inconsistent with spontaneity that DeAngelo claimed.

Appellee claims one can infer premeditation from strangulation from the inference great force was used from the inference Appellant crushed the hyoid bones. There are a number of inferences here -- some of which don't hold up.

Appellee's first inference is that there was a "crushed" hyoid bone. However, Wiggins' hyoid was missing and she had what could be a pre-existing injury to her

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10 Appellee also infers a struggle from a scratch on Appellant's face. The scratch was never connected with any of the women by physical evidence or testimony.

11 Appellee criticizes cases cited in the Initial brief this point. Those cases were not cited as being on point. Those cases were cited to show that strangulation is not per se premeditation.

adams apple T3010, 3012, 3018. Caughey's hyoid was broken and not crushed T2965.

Even if one assumed a crushed hyoid bone, one has to infer it was caused by Appellant rather than animals or insects. At bar, testimony showed one bone was missing or altered apparently due to insect activity T3012.

After Appellee infers a crushed bone and infers it was caused by Appellant, Appellee next infers that the damage required "great force." However, these bones are commonly broken in strangulations and special force is not needed T2334.

After Appellee infers a crushed bone, infers it was caused by Appellant and infers it had to be done by great force, it then must infer it is only consistent with premeditation. This involves an impermissible stacking of inferences. Also, using great force does not indicate reflection and deliberation. In fact, great force is often the result of impulse or anger be inconsistent with premeditation.

Appellee also infers premeditation from an inference that the strangulation took 3 minutes. Several inferences must be made to reach this inference. First, one must infer the strangulations at bar took 3 minutes. There was no testimony as to how long they took at bar. Dr. Diggs said it took 3 minutes "or shorter" before strangulation causes death T2349. This tells one absolutely nothing. How much shorter was never defined. Diggs never said that death could not have been instantaneous in this case.

Death by strangulation can be instantaneous. If the strangulation inhibits the

vagus nerve death occurs instantaneously. For example, a defendant claimed to have choked his partner during sex without having any warning (such as a struggle or statement that the partner couldn't breath) that he was doing harm. The pathologist explained that strangulation with vagal inhibition can literally cause the person to drop dead without warning:

> Q. So it rather looks as if pressure to the neck is a pretty dangerous business?
> A. It -- certainly from my practice I know and from reports recorded in the forensic literature, there is no safe way to squeeze someone's neck. It always carries with it the risk of this stimulating these receptors and producing this vagal response.
>
> ****
>
> Q. What about the vagal inhibition method, how does that affect that scenario?
> A. If it kicks in at the level that we have mentioned, where there is a severe effect on the heart, causing it to slow right down or causing it to beat abnormally or causing it to stop, **there is no prior warning to that; that will occur out of the blue.**
> Q. And is the situation therefore that someone may literally drop dead?
> A. They may **literally drop dead** with the pressure being applied to their neck, and there are recorded cases of that occurring within the forensic literature."

R.V. Coutts, [2006] UKHL 39;[2006]A11ER 353 [House of Lords]1 WLR 2154 (emphasis added). Death could have occurred "within 1-2 seconds" by vagal inhibition. Id. See also McMurtrey v. State, 74 So. 2d 528, 530 (Ala. App. 1954) (when vagus nerve is stimulated, heart automatically stops).

At bar, Appellee stacks inferences to infer a reflected and deliberated killing-i.e. premeditation. This is not permissible. The evidence does not rebut the

reasonable hypothesis that this killing occurred without the reflection and deliberation required for premeditation [i.e. he "lost it" rather than reflecting and deliberating].[12]

Appellee also claims the sequence of deaths rebuts the hypothesis of lack of premeditation. Appellee believes because Appellant previously killed he must have premeditated any subsequent killing. However, it shows, at best, that he knew, or should have known, he was entering a risky situation in which he might lose it. However, this is not the same as premeditation - intending to kill after reflection and deliberation.[13]

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.

Appellee claims there was direct evidence of sexual battery through witnesses (including Appellant's statement). This is without merit. Not a single witness

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12 Appellee infers that Appellant's statement he "lost it" shows premeditation. However, it shows the opposite. Further, ambiguities in statements to police must be construed in the accused's favor. See Fiske v. State, 366 So. 2d 423, 424 (Fla. 1978).

13 Even if one knows the risk of death, knowingly taking the risk is **not** the same as intentionally seeking the result -- i.e. premeditation. A habitual drunk driver may kill someone while driving. Despite knowing that his drunk driving may risk another's death he may repeat the risky behavior and kill another person. While he is **responsible** for the deaths, especially while ignoring and embracing the known risks -- he did not **intend** to kill so as to say he premeditated the killing.

testified to a sexual battery, including Appellant. Appellant's statement denying a sexual battery is hardly direct evidence of a sexual battery.

Appellee points to Appellant's inconsistent statements originally denying he knew Bradley as consciousness of guilt. Appellant stated he was responsible for her death thus making him guilty of manslaughter or second-degree murder. His consciousness of guilt relates to the lesser homicide and is not inconsistent with there not being a sexual battery. See Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (although Wilson initially told police intruder killed family, killing of Hueghley was still reduced to second degree murder where Wilson later stated he killed Hueghley during struggle was not contradicted by the evidence).

Appellee argues the crime scenes were **consistent** with a sexual battery pursuant to the testimony Dr. Diggs, Mittlemen and Shirk. However, the evidence is **not** inconsistent with the hypothesis of consensual sex. Neither Diggs, Mittleman or Shirk testified the crime scenes were inconsistent with consensual sex. In fact, Diggs and Mittleman testified the evidence was **consistent with** a consensual sex act followed by a homicide (T 3016, 2367, 2962).

Appellee claims that so-called similarities refute consensual sex. This claim has two problems. First, as described above, there were significant dissimilarities. Second, even there were similarities and no dissimilarities, they still don't prove sexual battery. The way to prove sexual battery through similar fact evidence is to

prove one of the incidents was a sexual battery and then conclude that due to unique similarities, the other two incidents were also sexual batteries. At bar, there was proof that one of the incidents was a sexual battery to infer the others were also sexual batteries.

Appellee again argues that one can infer a struggle and thus can infer a sexual battery. As Appellant explained above, Appellee impermissibly stacks inferences to conclude there was a struggle and then infers there was a sexual battery. Appellee also misstates facts. For example, Appellant did not point out a spot indicating a struggle and the disturbed dirt was east of the area where he was with Wiggins (T2575).[14]

Appellee cites a number of cases to claim there was sufficient evidence. These cases are materially different.

In Boyd v. State, 910 So. 2d 167 (Fla. 2005) the defendant did not offer a hypothesis of consensual sex. Boyd's hypothesis was the police planted DNA evidence -- this was contradicted by the chain of custody testimony.

In Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005), the defendant's hypothesis

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14 Also, Appellee's claim that the witnesses said Appellant was the last person seen with the women is incorrect. See Point II. Further, even if a witness testifies she last saw Appellant with the victim does not mean Appellant was the last person seen with the victim - it merely means that particular witness saw this. It does not mean that other witnesses, and people not called as witnesses, did not last see the victim in the presence of another person. For example, Errin Cassidy said she last saw Caughey with Jerry Prevatt T2457.

of innocence was that he had consensual sex with the victim between 9 a.m. and noon on August 17 and he never saw her after that. However, the hypothesis was **contradicted** by eyewitness testimony - he was seen with the victim at midnight on August 17. The defendant also always carried a knife - the knife was missing after the stabbing. The defendant also tried to obtain **another** blood sample to substitute for his own when asked for blood by police. Unlike at bar, the testimonial and physical evidence refuted the hypothesis. In Carpenter v. State, 785 So. 2d 1182 (Fla. 2001), the defendant's hypothesis of innocence was he (32 years old) picked up the victim (62 years old) at a party and later had consensual sex with her and later Pailing (17 year old) killed her after she belittled him after sex. However, this scenario was contradicted by the defendant's statements to another that this is not the way the incident occurred. There are no such contradictions at bar.

In Zack v. State, 753 So. 2d 9 (Fla. 2000), the defendant's hypothesis of innocence was that he had consensual sex with the victim at her home and afterward she made a comment and he attacked her in a rage. However, physical evidence contradicted this hypothesis and showed Zack attacked the victim immediately entering the house. This case has no such contradictory evidence.

Appellee's reliance on State v. Ortiz, 766 So.2d 1137 (Fla. 3d DCA 2000) is misplaced as the court did not dispute the trial court's findings that the evidence would not survive a JOA - but noted it only had to survive a Rule 3.190 (4).

Finally, at pages 53-54 of its brief, Appellee claims Appellant's statements and actions (concealing the body) show consciousness of guilt. Appellant's hypothesis is that he was responsible for the deaths but did not sexually batter. The evidence of consciousness of guilt is not inconsistent with trying to coverup the killings but still not having committed the offense of sexual battery.

POINT VI

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

Appellee does not dispute, that it is reversible error not to hold an adequate inquiry into a conflict of interest. See Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997); Thomas v. State, 785 So.2d 626 (Fla. 2d DCA 2001).

Appellee does not dispute, as explained on pages 64-65 of the Initial Brief, that Udell was representing a key State witness, Jerry Prevatt, with regard to this very case. Udell changed sides after the game had begun.

Appellee does claim the court adequately inquired into the conflict. This claim is specious. The court did not inquire as to when Udell represented Prevatt and as to the nature of the representation. If those simple questions had been asked, it would have been revealed Udell had represented Prevatt as a State witness against Appellant.

Appellee claims this conflict is not an actual conflict. However, as explained on pages 67-68 of the Initial Brief, the conflict was actual.

Appellee claims Appellant was at fault for not moving to disqualify Udell. However, the inquiry did not discuss the significance of the conflict.

Appellee cites to Appellant's waiver. However, the waiver is flawed by the fact the inquiry failed to disclose the true nature and extent of the conflict.

Appellee claims the issue was not preserved by bringing it to the attention of the trial court. However, the conflict was brought to the attention of the trial court. The trial court did not inquire about the extent of the representation and conflict.

Finally, Appellee cites to post-conviction cases regarding conflicts. However, none of those cases involve the situation here where the attorney represents a key State witness with regard to the very case the defendant is on trial for. Also,the cases don't deal with a conflict issue raised in the trial court and on direct appeal. Instead, Appellee cites cases where the conflict is first asserted in post - conviction and thus involves a different analysis (compare Initial brief at 65).

POINT VII

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

Appellee claims the medical examiner used the photos to show wounds. This is not true. As fully explained at page 69 of the Initial Brief, the photos did not show wounds - they showed maggot and insect activity.

Appellee argues that it wanted the medical examiner to use the photos to show

the bones in the neck (T2295). However, the medical examiner pointed out the photos didn't show the bones that were relevant to this case (T2292).

Finally, Appellee claims the photos were necessary to show maggot and insect activity to explain why it was unable to produce forensic evidence. However, the use of the photos in such a way would be misleading to the jury as it implies there was forensic evidence being eaten by the maggots. The State witnesses never made such a claim. Appellant did not argue below that the state was to blame for not producing forensic evidence. Even if he had, a witness could explain the insect activity without producing inflammatory photos. There was no justification for use of the inflammatory photos. Also, any relevance was substantially outweighed by unfair inflammatory prejudice. Appellee has not disputed this. Inflammatory photos unduly influence jurors toward guilty verdicts. See Law and Human Behaior, Vol. 30, no. 2 (2006), David A. Bright and Jane Goodman -- Delahunty; Gruesome Evidence and Emotion; Anger, Blame, and Jury Decision -- Making (Mock jurors who saw gruesome photos experienced more intense emotional responses, including greater anger at defendant, and convicted at a significantly higher rate than those not exposed to the photos). Cases have recognized the same inflammatory prejudice. See Jackson v. State, 359 So. 2d 1190, 1191-92 (Fla. 1978) (non relevant, or marginally relevant photos, may inflame jurors); Clark v. State, 337 So. 2d 858, 859-60 (Fla. 1976) (too much to expect jurors to ignore prejudicial material even when cautioned).

POINT VIII

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

Even though portions of the statement contained accusations by witnesses, Appellee claims there were no hearsay, or confrontation, problems because the prosecutor was merely seeking to place Appellant's answers to the accusations in context. This claim doesn't hold water. First, no relevant answers came from confronting Appellant with the out-of-court accusations. Appellee has never explained to this Court the trial court how Appellant's irrelevant responses to the accusations went to any elements of the crimes charged Yet, the state still fought to have this portion of the tape presented to the jury. Unlike in Appellee's cases, this portion really only put before the jury, the accusations and thus is a form of hearsay. See Sparkman vs. State, 902 So. 2d 253 (Fla. 4th DCA 2005); Shimko v. State, 883 So. 2d 341, 343 (Fla. 4th DCA 2004) (recognizing harm from insinuations in questions). As explained in the Initial Brief, the State can't try to introduce the hearsay accusations through police interrogation under the guise of a non-hearsay label.

Unable to describe what was being proved by this portion of the tape, Appellee falls back on the often used "context" claim to circumvent the hearsay rule. However, because Appellant's answers to the accusations were not relevant to any material issue in this case, one cannot introduce the accusations to circumvent the hearsay rules by

showing the context of an irrelevant fact. State v. Baird, 572 So. 2d 904 (Fla. 1990).

Finally, Appellee argues the hearsay and confrontation errors were harmless because the witness, (i.e., the declarants who made the accusations) testified at trial and could be confronted. This is not true. Accusations were by Austin Cottle Sr. and a witness named Shep (T 3051, 3053-54). These men never testified at trial.

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

Appellee does not dispute Appellant's analysis on pages 80-81 of the Initial Brief that the killing was, at best, done in anger. This is not substantial, competent evidence the killing was cold.[15] Thus CCP does not apply. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (where murder was not cold -- CCP did not apply even though it was clearly calculated).

Appellee claims that one can infer the killing was calculated based on the killing occurring in an isolated area. Such a claim is without merit. First, the activity did not occur in an isolated, remote area so that screams could not be heard by other people. In fact, the area was near residences where if attacks were made screams

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15 Specifically Appellee does not dispute the trial court's finding the killing was done in "anger"(although not rage) R4418, which is not cold. See Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993) (no CCP where defendant returns in anger and shoots).

would be heard. However, it is true that the areas were not in the direct line of sight of the residences. Thus, if a couple were quiet they would go undetected if they were drinking, doing drugs, or doing sex. Contrary to Appellee's hypothesis, most people are not exhibitionists who want to have sex in public or where they can be observed by others. The locations are more consistent with one wanting to have consensual sex for drugs with some privacy rather than one wanting to rape and attack where others would hear screams and commotion.

Finally, Appellee claims that Appellant's statements show a careful prearranged plan. However, nothing in the statement shows such a plan. Appellant said he "lost it" which does not show a prearranged plan.[16] The state presented no other evidence as to Appellant's state of mind. Even without the statement there is no evidence of a prearranged plan to kill. His statement indicates no such plan. Guesswork is not sufficient. See Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992) (where evidence "susceptible to ... divergent interpretation" aggravator does not apply).

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

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16 For CCP to apply there must be a calculated plan to kill before the criminal act began. See Roger v. State, 511 So. 2d 526 (Fla. 1987).

On pages 88-89 of the Answer Brief, Appellee hides its response to this issue. Appellee does not dispute that CCP requires that the defendant intend to kill before the criminal episode began. Nor does Appellee dispute that the instruction did not inform the jury of this requirement. Instead, it seems to take the position that jury instructions need not inform the jury what is required to constitute CCP. Appellee cites no authority for such a claim and the claim is without merit. CCP must be correctly instructed on -- including giving the limitations of the circumstance. Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994).

POINT XIV

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

Appellee claims one may infer EHAC from a number of other inferences. However, the stacking of inferences does not constitute sufficient evidence.

Appellee infers fear and emotional strain of the victims. This inference is based on the assumption of a struggle. This inference is based on inference that disturbance of some dirt signifies a struggle. However, this disturbance was east of the area of the body T2575. Furthermore, the medical examiner testified there was no evidence of a struggle T2366. The stacking of the inference is not sufficient.

Appellee says it can be inferred the women were conscious when strangled. There is no evidence of this. The women were full of intoxicants. The killing was not in an isolated area, but was close to residences. Despite this location, there was no indication that anyone heard screams as if the women were attacked. Appellee's hypothesis as to what might have occurred is not sufficient. Bundy v. State, 471 So. 2d 9 (Fla. 1985); King v. State, 514 So. 2d 354 (Fla. 1987).

Finally, Appellee claims strangulation is **almost** always EHAC. Almost is almost. For strangulation to be EHAC there cannot be uncertainty as to what happened. Id. In this case nothing is known about the strangulation. As explained in Point IV death could have been virtually instantaneous. The bottom line is that the evidence did not rise to the level of proof required this circumstance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Reply 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 July, 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 July, 2008.

_____
JEFFREY L. ANDERSON
Assistant Public Defender
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