IN THE SUPREME COURT OF FLORIDA

PAUL DUROUSSEAU,

Appellant,

v. **CASE NO. SC08-68**
L.T. CASE NO. 03-CF-10182

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

NADA M. CAREY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. **0648825**
301 S. MONROE STREET, SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE[1]

On September 4, 2003, the Duval County Grand Jury indicted Paul Durousseau for first-degree murder in the asphyxiation death of Tyresa Mack. 1:9-10.

On January 29, 2003, the state filed a notice of intent to rely on evidence of the murders of Nikia Kilpatrick and Shawanda McCallister.[2] 2:360-361. On October 14, 2005, the defense filed a motion to prohibit the alleged similar fact evidence. 5:798-800. The parties filed memoranda of law, 6:1017-1022, 6:1023-1044, and jointly filed a Stipulation of Facts for purposes of the motion. 5:919-925. After a hearing, XIV 2555-2649, the court denied the motion. XIV 2648-2649.

Durousseau was tried by jury May 21-June 8, 2007. His defense was that he did not kill Mack and the state failed to find the real killer by focusing solely on evidence of sexual

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[1] References to the forty-volume record on appeal are designated by the volume number and page number. References to the five-volume record of exhibits are designated by the letter "E" followed by the volume number and page number. Pretrial proceedings were held before Duval County Circuit Judge John Skinner. Trial proceedings were held before Duval County Circuit Judge Jack A. Schemer.

[2] Two months prior to his arrest in the present case, Durousseau had been indicted on five counts of first-degree murder in the deaths of five other women in the Jacksonville area, including Nikia Kilpatrick and Shawanda McCallister. 1:1-2. After Durousseau was convicted in the present case, the state nolle prossed all five counts. 18:4125.

activity, on the assumption that sexual activity was linked to Mack's death.

After deliberating nine and a half hours, the jury found Durousseau guilty as charged, finding the murder was committed during a robbery and sexual battery. 36:3125-3140, 8:1418.

A penalty phase proceeding was held June 26-28, 2007. The jury recommended that Durousseau be sentenced to death by a vote of 10 to 2. 8:1550.

The court held a Spencer hearing on August 2, 2007, at which the defense presented additional testimony and evidence. 16:3865-3935. The court also denied appellant's motion for new trial.

On December 19, 2007, the trial judge imposed the death sentence. 9:1577-1581. The judge found four aggravating factors: prior violent felony; heinous, atrocious, and cruel; committed during a sexual battery; and pecuniary gain. In mitigation, the judge found and gave weight to the following factors: (1) the defendant was raised in a broken home; (2) the defendant was raised without the benefit of his natural father and lost the love and support of his stepfather at an early age, (3) the defendant grew up in poverty and came from a deprived background, (4) the defendant was raised in a very violent neighborhood and was exposed to violence and the threat of violence to his person on a daily basis, (5) the defendant

personally witnessed his stepfather physically abuse his mother, (6) the defendant was disciplined by being beaten as a child, (7) the defendant has worked continuously through his adult life, (8) the defendant enlisted and served in the United States Army for approximately six years, (9) the defendant has supported his two children, Jasmine and Teresa, and was a loving and caring father, (10) the defendant has been a loving and respectful son to his mother, Debra Paige, and cared for her during several periods of illness and incapacitation, (11) the defendant has been a good brother to his siblings and to other family members, helping to care and watch over his cousins, Edward and Matthew, (12) the defendant saved his cousin's life and his brother's life, (13) the defendant has the support of family and friends who continue to love him, (14) the defendant has alcohol abuse issues on both his mother and father's side of his family, yet the defendant has never abused either alcohol or illegal drugs, (15) society can be protected by a life sentence without parole, (16) the defendant has exhibited good behavior during the trial of this cause, (17) the defendant has diffuse brain damage, including frontal lobe damage, and is in the borderline range of intellectual functioning, (18) the defendant has thyroid disease (hypothyroidism), which can be damaging to a developing brain, (19) defendant has anemia, which can sometimes

prevent sufficient oxygen from reaching the brain, causing brain damage. 9:1583-1610.[3]

Notice of appeal was timely filed on January 11, 2008. 9:1617.

STATEMENT OF FACTS

GUILT PHASE

Tyresa Mack Murder-Prosecution

Family members found Tyresa Mack, 24, dead in her apartment around 8 p.m. on July 26, 1999. Mack lived in one of two upstairs apartments located above businesses in a commercial area. At the time of her death, she lived with her three children, ages 7, 3, and 1-1/2. 23:750-760.

Mack's sister, Sherabia Mack, testified she arrived at her sister's building around 7 p.m. The door leading to the upstairs apartments was locked, and no one answered the doorbell, which was working. Sherabia went to her grandmother's house, three blocks away, and returned with her stepfather, Lamar Odom. The bottom door was now unlocked, and they went upstairs and knocked on Mack's door but got no response. Mack's neighbor, Amady Sare, came out and told them he hadn't seen Mack since that morning. They broke down the door and moved a sofa

[3] The sentencing order is attached as **Appendix A.**

that had been pushed up against the door. Sherabia said her sister had been putting the sofa up against the door because the lock was broken. Mack's body was on the bed in her bedroom. An "X and O" heart pendant necklace and matching bracelet, which Mack wore every day, were missing, as was the living room television set. 23:764-772. Sherabia testified that her sister (Tyresa Mack) had met a man who had a good job and drove a truck but she didn't know the man's name. She gave police the names of Johnny Parker, a neighbor who had been looking for Tyresa Mack that day, and Greg Williams, another neighbor. 23:777-790.

The evidence technician testified that numerous items were scattered throughout the master bedroom and drawers had been pulled out and ransacked. Mack's body was nude from the waist down. Her torn underwear lay underneath her, and a pair of pants, which matched the shirt she wore, was lying on the bed. A towel was under her head. A cord, which appeared cut or ripped, was draped around her neck. The cord appeared to match a white phone with a ripped or cut cord that was on the floor of the bedroom. Mack's purse was on the bed, empty, and it appeared someone had pilfered through the purse. 24:813,829-838.

Other than the bedroom, the apartment was orderly. A Victoria's Secret pink striped bag containing several money bills was on the bathroom floor. Neither the bag nor the bills

were collected by police. 24:838-852, 890. There was a green telephone on the floor in the living room, disconnected, and without a cord. The cord was never found. 24:816, 829-832.

Durousseau's prints were not found anywhere in the apartment. 24:856-860.

Nicole Jackson testified that she and Mack had looked for jobs earlier that day. Jackson arrived at Mack's apartment around 9:30 a.m., and was let in the downstairs door by Adam Moss, who was fixing the lock on Tyresa's private upstairs entry door. Mack was wearing an X and O necklace with matching bracelet. When they left at 10 a.m., Moss had already left. The lock was still broken, so they pushed the love seat in front of the door and went out through the kitchen door. 24:904-912, 920-925, 928. Jackson took Mack home around 1 p.m. 24:913-916.

Tezalyn McFadden testified she spoke to Mack on the phone in the morning and again around 1 p.m. and 1:25 p.m. During the 1:05 call, McFadden offered to drive Mack to the hospital for her son's 3 p.m. appointment that same day. During the 1:25 call, she asked Mack to give her a wake-up call in case she fell asleep. During that conversation, there was a pause of several seconds. McFadden never got the wake-up call, and when she called Mack at 2:50 p.m., there was no answer. 24:933-959. Phone records showed there were three calls that day between

McFadden and Mack, a 15-minute call at 9:11 a.m., and 1-minute calls at 1:05 and 1:25 p.m. 31:2195-2205.

Joy Williams testified she was standing by the bus stop near Mack's building about 1:00, 1:30, or 2:00 that afternoon when a tall, skinny, brown-skinned man came from upstairs carrying a television. He walked towards a red car and did not seem to be in a hurry. When the man got to the trunk of the car, she looked away. Williams identified Durousseau in court as the man she saw that day. Rufus Pinkney was also on the corner when this occurred. 24:973-980.

Rufus Pinkney testified he was on the corner waiting for the bus to take him to work that day. Pinkney arrived at the bus stop around noon and caught his bus shortly after 1 p.m. Williams was there when he arrived. While he was waiting, he saw a light-skinned black man, over six feet tall, real skinny, with a low haircut. The man, who was wearing a work uniform, came out of the downstairs door in Mack's building, walked to a red car, opened the trunk, and stood behind it for about ten minutes. Pinkney didn't see the man place anything in the trunk or remove anything from it. The man then went back upstairs into Mack's building. His hands were empty. He did not look nervous, hurried, or like he was trying to hide. Pinkney identified the man in court as Durousseau. 24:992-1000, 25:1006-1007, 1017-1020. Williams had already left to go to the

store when Pinkney saw the man come downstairs. Pinkney's bus came about ten minutes later. 25:1008-1010.

A representative of the Jacksonville Transportation Authority testified that on July 26, 1999, buses were scheduled to stop at the Florida and Union bus stop at 12:17, 12:38, 12:59, 1:20, and 1:41 p.m. 25:1029-1039.

Detective McKean testified that when he told Durousseau on August 25, 2003, that he was being charged with the murder of Tyresa Mack, Durousseau said, "I don't know no Teresa Mack." When told that Mack was the girl that was killed on Florida Avenue, Durousseau said, "I don't know that girl." 25:1042-1043.

The state presented evidence that Durousseau worked at Goodyear from July 1, 1999, to August 26, 1999. The employees wore navy pants and shirt. The shirt had logos with the employee's first name and Goodyear in prominent yellow lettering. Durousseau's hours were 7:30 to 5, with lunch from 12 to 1. 25:1056-1070.

Mack's three children attended Little Angels Daycare March-June of 1999, as did the two Durousseau children. On July 26, 1999, a van picked Mack's children up in the morning and returned them to their grandmother's house in the afternoon. The director and another employee testified they had never seen

Durousseau and Mack speak or interact. 25:1079-1084, 34:2764-2772.

Dr. Margaret Arruza conducted the autopsy on Mack. Mack was 5'4" and weighed 122 pounds. Her nose, cheek, tongue, and lips had abrasions, which could have been caused by her face being pressed into a towel. The abrasions were on both sides of her face, indicating she was moving her head back and forth. Arruza did not examine her back to see if there was bruising caused by someone being on top of her back and pressing her into the mattress. She had petichiae, small hemorrhages in the whites of the eyes, which is caused by increased pressure. Her lungs were not congested but this didn't mean she died from something other than asphyxia. There was a remote possibility that Mack died from a heart attack during the struggle while having her faced pressed into the mattress. The telephone cord around her neck was draped loosely, wrapped twice, like a necklace, with no knots. Arruza found no injuries to the neck consistent with having been caused by the cord and could not determine whether the cord contributed to Mack's death or was placed there before death. In Arruza's opinion, strangulation can occur without noticeable trauma to the neck. Arruza found marks on Mack's wrists and arms, which were consistent with restraints being placed on them. Mack's blouse was torn in the middle. She was wearing earrings and a watch, which was loose.

Arruza couldn't say whether the watch corresponded to the pattern marks on Mack's wrist. Sperm were in her vagina but there was no vaginal trauma. The cause of death was asphyxia, or lack of oxygen to the brain. 30:1973-1995, 2059-2076.

Dr. Coughlin, an FDLE serologist, analyzed oral, anal, and vaginal slides. Coughlin found no sperm on the oral and anal slides but found intact sperm (heads, mid-pieces, and tails) on the vaginal slides. Intact sperm meant it was collected very soon after deposition. Because police told him to focus on sexual activity, Coughlin tested only items possibly linked to sexual activity and did not test hairs, fibers, or a cigar butt that were submitted to him. 28:1579-1635.

Sukhan Warf, a DNA analyst, found no male DNA on the white telephone in Mack's bedroom or the white phone cord wrapped around her neck. Seven hairs found on the phone did not match Durousseau's DNA. Male DNA on the green phone did not match Durousseau. No DNA testing was done on Mack's blouse, bra, underwear, or pants. 29:1762-1782.

DNA analyst Sheree Enfinger obtained a single source full profile on Mack's vaginal swabs that matched Durousseau. 29:1810-1819. A wash rag, two towels, and pillowcases were all negative for semen. She did not test the bed linens or Mack's underwear, bra, or blouse, on the assumption that the person who had sexual activity with Mack was the killer. 29:1872-1883.

Tyresa Mack Murder-Defense Case

Rodney McKean, the lead detective, testified there were doorbells on either side of the door to the stairwell that led from the street up to the apartments. The door was self-locking and could be opened from the inside [without a key] or from the outside with a key. McKean said the Victoria's Secret bag was never collected by police. The papers that were scattered on the floor and bed were released to Mack's family two weeks after she was killed and were not processed for fingerprints. There were money bills in the pink-and-white striped bag. McKean saw Kenneth Mack, now dead, at the scene but did not interview him. He tried to interview Johnny Parker at the scene but Parker fled. He met Greg Williams and took photos of bite and scratch marks on Williams on July 28. 33:2694-2714, 34:2722-2728.

Detective McKean testified he interviewed Joy Williams on August 10, 1999. At that time, she said the black male exited Mack's apartment on July 26 around 12:30 p.m. The man walked to the rear of a vehicle and opened the trunk, and then returned to the apartment building and walked upstairs. Moments later, he came out of the building carrying a large TV. He placed the TV in the trunk and left the area. 34:2794-2795.

Officer Milton Bowles testified the neighborhood was a high crime area and drugs were sold at the gas station across the street from Mack's apartment. Bowles didn't speak to anyone

from the station or the two businesses, one of which was a café, on the bottom floor of Mack's building. Kenneth Mack, Tyresa Mack's brother, flagged him down at the scene and was inside the apartment when Bowles got there. 33:2610-2630.

Timothy Look, an FDLE crime lab analyst, testified the top of the mattress was negative for blood and semen. 31:2134-2135.

Adam Moss testified he arrived at Mack's apartment no earlier than 10:20 a.m. the day Mack was killed. He repaired the bottom lock and put a rag in the hole where the top lock had been. Mack and another woman were there when he arrived. Mack received a phone call and was on the phone arguing with the guy when Moss left. He pushed the love seat against the door and left through the kitchen shortly after 11 a.m. Kenneth Mack accused Moss of killing Mack, and the police interviewed him for six hours. 33:2642-2653.

Sherabia Mack said her sister had recently had her car repossessed, was out of work, and was having financial problems. Sherabia said Greg Williams was a friend of hers.

Latasha Bell, Mack's sister, testified that Greg Williams sometimes did odd jobs for Mack, like taking out the trash. Johnny Parker was a neighbor with whom they had grown up. Bell said all of Mack's TV sets were working at the time of her death. However, in her deposition, Bell said the missing TV was broken. 33:2662-2672.

The distance from Durousseau's workplace to Traffic Bureau on Haynes Street, was 14.3 miles, and the driving time between 11:30 and 12:30 was 15.5 minutes. The return trip was 18 minutes. 34:2773-2777.

Dr. Stanton Kessler, a forensic pathologist,[4] conducted an independent review of all three autopsies. He also reviewed the crime scene photos. 32:2428.

Dr. Kessler said nonconsensual sexual intercourse usually is a violent act, producing tears, bruising, swelling, blood, and trauma to the vaginal area, which is easy to traumatize because mucosa tears easily. 32:2427.

Dr. Kessler said if wrist ligature is suspected, the wrist should be cut into to see if there is hemorrhaging. This was not done in the Mack case. In Kessler's opinion, the marks on Mack's wrists did not look like ligature marks. A ligature is something tied tight enough to produce skin bulges. Here, the marks were extremely faint and were not typical ligature marks. One mark looked like a scab, like a bug bite that had been scratched. Some darker marks looked like skin fold marks, and another mark could be an irritation of the skin. You cannot

[4] Dr. Kessler spent most of his career as Chief Medical Examiner for the Commonwealth of Massachusetts, where he also trained forensic pathologists. He was on staff at Harvard Medical School, has lectured extensively, and has been published 55 times in peer-reviewed journals. He has testified over 200 times, 99% of the time for the state. 32:2415-2419.

tell what the marks are without cutting underneath. The marks could be defensive wounds. Also, the marks were not where a ligature would be. The marks could be from Mack's bracelet, which was on her left wrist, or her watch, which hung loosely on her right wrist. 32:2429-2435.

The cord around Mack's neck also was not a ligature. The cord was loose, like jewelry. Nothing was tied, and it was not compressing the neck. The cord had nothing to do with her death. He could not tell if the cord was placed there before or after death. Mack's lungs were not congested, suggesting that she developed and died from heart arrhythmia while being asphyxiated. It would still be an asphyxia death. She probably was suffocated with a towel by someone sitting or kneeling on top of her. The medical examiner could have looked under the skin on her back for hemorrhage to confirm this. 32:2438-2445.

Dr. Kessler said you would expect some trauma in suffocation caused by manual act. You could possibly strangle someone without leaving marks if the person was very old, weak, and unable to respond, but usually you see something. 32:2463-2464.

Durousseau testified he had been married for eleven years. 34:2796-2797. In July 1999, he lived with his wife and their two daughters in the Washington Heights Apartments. He worked at Goodyear Truck Tire Service. His uniform consisted of a dark

blue shirt and blue pants. The shirt had "Paul" on one side and "Goodyear Truck Tire Service" on the other side, in yellow writing an inch and a half high. 34:2798-2800, 2851.

He met Mack in April 1999 at University Hospital, when he was there with his daughter to get shots. She dropped a baby bottle, his daughter picked it up, and they began talking. He saw Mack about fifteen times after that and had sex with her at her apartment. 34:2800-2802.

On July 26, 1999, he went to see her around 12:15. He had gone to Haynes Street about a ticket and was in the area. He was in his uniform and parked his red Mazda in front of her building, like he always did. Her doorbell didn't work, so he hit his keys on her kitchen window, and she came down and let him in. She was wearing a black robe, panties and bra. He went in and out the kitchen door because the lock on the front door was broken, and a large couch was blocking the door. They had sex on top of the sheets. The TV was broken, the on/off button wouldn't work, and she asked him to put it in the dumpster. He asked if he could keep it, and she said yes. She walked him down to the front door and waited while he opened his trunk. They came back upstairs, he grabbed the TV, and they went back down. She asked to borrow some money, and he got change for a $50 bill at the restaurant downstairs and gave her $40 at the front door. He left around 1 o'clock and got back to work about

1:25. He took Mack's TV home and fixed it by sticking a pencil in it to turn it on. A week later, he heard she had been shot. When asked by police in July 2003 if he knew her, he said no because he already had been charged with two murders and was scared. 34:2808-2809, 2852-2852, 34:2858.

Nikia Kilpatrick Murder-Prosecution

Kilpatrick was found dead in her apartment by her cousin, Sara Anthony, just after midnight on January 1, 2003. At the time of her death, Kilpatrick lived at the Spanish Oaks Apartments, on Arlington Road, with her two children, the oldest aged 2 years and the youngest 11 months.

Anthony, who also lived at Spanish Oaks, testified that she walked by Kilpatrick's apartment on Monday, December 30, at 6 a.m. and saw the bedroom light on. When Anthony went by that night, no one answered the door and she also noticed a strange smell. The following night, December 31, there was still no answer, and the smell was worse. Just after midnight, Anthony beat on the window, and Kilpatrick's older son came to the window and opened the blinds. Anthony saw Kilpatrick and her younger son lying on the floor in the hallway and alerted police. 25:1112-1136.

John Fraschello, the evidence technician, arrived at 11:20 p.m. on January 1, 2003. The apartment was in disarray. Kilpatrick's nude, partially decomposed body was partly in the

bedroom, partly in the hallway outside the bathroom. She had a coaxial cable around her neck. A heater in one of the bedrooms had a cut or torn cord, which was never found. Clothing was scattered across the floor. The drawers in the bedroom were pulled out. There were no signs of forced entry. The sliding doors to the back patio, the only other exit, were closed, and the safety bar was in the locked position. No latent prints of value were found. 25:1166-1196.

Rhonda Sherrer, Kilpatrick's sister, testified she was at Kilpatrick's apartment on Sunday, the 29th, between 9 and 10 p.m. While she was there, Kilpatrick received a phone call and was whispering as if she didn't want to be heard. Sherrer called her sister when she got home, at 10:30 or 11:00, but the conversation was brief. Sherrer thought her sister had company or was expecting company. Sherrer called Kilpatrick the next morning but there was no answer. Kilpatrick's Victoria's Secret purse was missing after she was killed. 26:1208-1218.

Shantrell Green testified she and Kilpatrick were walking one day in the fall of 2002 when Durousseau pulled up and began talking to them. Kilpatrick gave Durousseau Green's phone number so he could take Green out. Durousseau called Green the same day and came over to take her out. As he arrived, Rashawn Kilpatrick, Green's then-boyfriend (and Nikia Kilpatrick's uncle) charged into the bathroom and hit Green. Green and

Rashawn had words and he left. Durousseau said he had lingerie and jewelry in the car, and Nikia Kilpatrick went downstairs with him to see it. Green and Durousseau then went out. They went to the movies and to Wendy's and then he brought her home. He was a perfect gentleman. At that time, Kilpatrick was dating a tall, white guy who made lots of money. 26:1238-1251.

Sara Anthony confirmed Green's account of Durousseau's visit, saying Nikia Kilpatrick was there when Durousseau came to her apartment in December 2002 to take Green out. Durousseau said he sold lingerie, jewelry, and lotion, and Kilpatrick went downstairs with him to look. Durousseau took Green out and brought her home that same night. 25:1112-1121.

Natoca Durousseau, Durousseau's wife, said she took her husband to an apartment complex off the Arlington Expressway on December 29, around 8:30 or 9:00, to watch a football game with friends. She saw him go upstairs, and then left. He later called to say he was on his way home and got home around 1 or 2 a.m. 26:1256-1272.

Dr. Arruza, who conducted the autopsy on Kilpatrick, testified Kilpatrick was 5'5", 145 pounds. Her body was decomposing. A black coaxial cable was tight around her neck, placed on top of a pajama top. The cord was tied with a slipknot. There was no bruising on the neck, indicating little force was applied to the ligature. Kilpatrick had blunt trauma,

or bruising, to her head in three different places. She was pregnant. Her lungs were congested, the result of suffocation. There was no evidence her feet or arms had been tied in any manner. She was wearing five earrings, and there was no indication any jewelry had been removed. Sperm was present in her vagina but there was no vaginal trauma. Arruza said you may or may not see trauma as the result of forcible sexual assault. The cause of death was strangulation by ligature. 30:1995-2014.

Larry Denton, a serologist, testified sperm cells were present on Kilpatrick's vaginal, genital, oral, and anal swabs. 28:1669-1672. Denton did not test fingernail clippings, a gown, a blue towel and rag, or a pair of socks because he had been told to look only for signs of sexual activity. 28:1708-1709. The vaginal swabs matched Durousseau at eight markers. 29:1834. The genital swabs matched Durousseau at seven markers. 29:1840. The cable found around Kilpatrick's neck contained a mixture of DNA, none of which matched Durousseau. 29:1823-1826.

Nikia Kilpatrick Homicide-Defense Case

(Warf) Neither the major DNA profile, which was male, nor the minor profile from the broken heater cord matched Durousseau. 31:2158-2166.

Phone records showed two calls were made from Durousseau's home phone to Kilpatrick's home phone, a sixteen-minute call on December 8, 2002, at 12:56 a.m., and a one-hundred-minute call

on December 27 at 8:19 p.m. 31:2209, 2214-2216. Kilpatrick's phone records reflected the calls came from phone number 310-0000, a trunk number that brought calls from Comcast customers to Bell South subscribers, and were not traceable to a specific phone. 31:2212. Calls from 310-0000 also were made to Kilpatrick's home phone in January. 31:2216.

Ivory Durham was at Kilpatrick's apartment from 3:45 to 4:45 on December 28. Kilpatrick was jittery, like something was bothering her. There were four or five kids in the apartment who wouldn't go in the back but were peeking around the corner like someone was there. Durham saw through a crack in the bedroom door that the room was ransacked and got the sense that someone was there. 33:2509-2517, 2525.

Derrick Lewis, the lead detective, never determined the source of the coaxial cable found around Kilpatrick's neck. The TV's in the apartment were not missing any cable connections. Lewis did not check to see if the phone on the counter was working and did not check the voice mail. He did not determine whether any 911 calls were made from Kilpatrick's apartment. He never determined where Frampton Brown or Cornelius Robinson were on December 29 and 30, 2002. Brown said he was the father of Kilpatrick's unborn baby but Lewis did not verify this. 33:2529-2541.

Sarah Anthony identified Defense Exhibit 114 as Frampton Brown, 6'5", and stocky; Defense Exhibit 115 as Eric Brown, 5'6" and fat; and Defense Exhibit 204 as Cornelius Robinson, 5'7" or 5'8", and slim. 33:2569-2573.

A palm print from the door frame in Kilpatrick's apartment did not match Durousseau or Frampton Brown. 33:2574-2592.

Dr. Kessler testified the Kilpatrick case was not well worked up. He could not tell how much head trauma Kilpatrick had without photographs. Also, because the head was not shaved, he couldn't tell whether an instrument was used or whether enough force was used to kill her. 32:2448. The coaxial cable found around her neck was not pulled tight and did not cause any trauma. The cable could have been used to restrain her but was not the cause of death. The autopsy indicated the neck muscles were dissected and revealed no hemorrhage. 32:2449-2450. There was no fracture of the hyoid bone, fracture of the thyroid cartilage, edema in the larynx, or swelling of the epiglottis, without which there could be no ligature strangulation. Nor were the faint marks on her legs indicative of ligature. The cause of death was asphyxiation, suffocation, or myocarditis (lungs showed incipient abscess formation). Kilpatrick did not die from ligature strangulation. 32:2451-2453.

Durousseau testified he worked for Paul Aspen, moving furniture, in December 2002. He met Nikia Kilpatrick and

Shantrell Green as they were walking down the service road by Arlington Highway. On December 7, he went to Sarah Anthony's apartment. As Kilpatrick let him in, Rashawn Kilpatrick ran inside, beat Green up, then left. Durousseau gave Kilpatrick two robes that a friend had given him. She was the only person he knew they would fit. That evening, he took Green to the movies. 34:2809-2814.

Durousseau called Kilpatrick the next day, and talked to her on the phone at various times after that, sometimes from his home, sometimes from a pay phone. He talked to her on the phone December 27, 28, and 29th. On the 29th, he talked to her all day. That night, his wife took him over there around 9:45. They had sex between the sheets, no condom. He expected to spend the night but a man showed up. Kilpatrick went to the door, assuming it was her brother. Durousseau heard her say, "Don't come over to my house unannounced and there is a thing called a phone." The man said they needed to talk, and she told him she had company. At that point, Durousseau got dressed and walked down the hallway, and he and the man looked at each other. The man was stocky, about 6'3." Shown several photographs, Durousseau identified the man as the person in Defense Exhibit 114 (Frampton Brown). The man was mad. When Durousseau asked Kilpatrick who he was, she said he was her baby's daddy. The man told her, "I'm the one that's helping you pay your bills,

and everybody and their momma got a key to this apartment but me. Tell your friend to leave." Durousseau decided to go. Before he left, the man grabbed Kilpatrick, and she said, "Stop grabbing me. I told you about grabbing me." Durousseau asked her if she'd be all right, and she said it was nothing. Durousseau walked to the gas station and called his wife to say he was on the way home. He took the bus home. 34:2814-2823.

He called Kilpatrick several times after that from a pay phone and from his home, 34:2860, and learned she was dead four or five days later. 34:2823.

Shawanda McAllister Murder-Prosecution

On January 9, 2003, Shawanda McCallister lived with her fiancé, Rasheed Topey, in an apartment on Arco Drive in the Arlington area of Jacksonville. 26:1280-1281. Shaquita Jones, who lived next door, was home that night with LaGloria Bonner and Lovely McKenzie (her sister). Jones said Topey came banging on her door, saying McCallister was dead. He was upset. Jones and McKenzie went with Topey to his apartment, where they found McCallister face down on the bedroom floor. 26:1280-1286.

Jones said Topey had come by earlier to use the phone, saying he couldn't find McCallister. 26:1287. Jones didn't have a phone so she and McKenzie took Topey to the back of the apartments to "George's" house. When they got there, Topey got a call on his cell phone and never went inside. Jones returned

home, leaving Topey talking on his cell phone. 26:1299-1301. Topey never said anything about a man in his apartment or his clothes being passed through the window. 26:1306.

Earlier that evening, Jones saw McCallister putting laundry in a cab. Jones and McKenzie also talked to McCallister at her apartment. Later on, as they left to do errands, they saw her standing in the door talking on the phone. They returned home a little after 9:30. 26:1293-1299.

Topey testified he got home from work that day around 4:30 or 5 p.m. McCallister was not home. Topey stayed home an hour, then went to the Laundromat across the street and helped McCallister with the laundry. He went to night school, by bus, from 7 to 8:45 or 9 p.m. While in class, he talked by telephone to McCallister briefly. He got home around 9 or 9:30 but was unable to get into the apartment because he had left his key in the car of his girlfriend, Victoria Baker. 27:1339-1348. He was got in earlier because McCallister had left her key in the mailbox but he had returned the key to her at the Laundromat. 27:1382. The light and TV were on in the apartment. He called McCallister from his cell phone and heard the phone ringing in their apartment but she didn't answer. 27:1347. He went across the street to McDonald's, where he talked to a friend on his cell phone for 20 minutes. He went to Winn-Dixie to look for McCallister, and then returned to the apartment. Now the light

was off. He shouted and knocked and heard the phone ringing, but again there was no answer. 27:1350-1351. He removed one of the jalousie windows and tried to open the door but couldn't reach it. A man inside the apartment said, "Shawanda don't want to see you no more." Topey said, "Shawanda, what are you talking about you don't want to see me no more when you are pregnant with my child?" The male voice said, "What, you're pregnant?" Topey talked to them for a minute, and then asked for his work clothes for the next day. They told him to walk to the stop sign, which he did, and they then pushed his clothes and shoes through the window. McCallister told him she would talk to him later, to come back at one o'clock. 27:1351-1356. She sounded angry, not frightened. He thought she was having sex with another man and that made him angry. 27:1385-1388.

Topey tried to call his cousin to come get him but his phone went dead. He walked with Shaquita Jones to the back of the apartments and used the neighbor's phone. He then went to the Winn-Dixie shopping center to use the pay phone to call someone to pick him up. He bought cigarettes at the Hess Gas Station, walked around for a while, and returned to the apartment. The light was off and no one answered the door. He took more slats out of the window, pushed his body through, and unlocked the door. He went in and found McCallister dead. 27:1360-1363.

On cross-examination, Topey said he started dating Victoria Baker in September 2002. When Baker learned McCallister was pregnant, she told Topey she was splitting up with him. 27:1379. McCallister paid all the bills. 27:1373-1374. Topey and McCallister had accounts at Wachovia Bank and knew each other's ATM passwords. The morning of January 9, she asked him for his key to the apartment. 27:1375-1376. Topey knew she would be picking up her paycheck that day. Topey denied going to the apartment before class and taking the money McCallister had just cashed from her job. He denied that McCallister called him while he was in class, upset about him stealing the money. 27:1381-1383. Phone records showed he called McCallister's cell phone three times and her home phone twice between 9:41 and 9:57. He also called 982-2778 at 10:02; 10:03, and 10:10; called Victoria Baker three times between 10:04 and 10:18; and called someone at 349-4942 at 10:05. When asked whether his cell phone was dead when McCallister called him at 10:30, he said probably not but he did not talk to her then. 27:1390-1392. He denied killing her to get rid of his problem with Victoria Baker or to get his money back because she had told him on the phone that she took money out of his account that night. 27:1395, 1398-99.

Christy Conn, the evidence technician, found McCallister on the floor at the foot of the bed, nude from the waist down. A

condom was on the floor on the opposite side of the bed. A strap with a metal buckle was fastened to her right wrist, and a cord, intertwined with an item of pink clothing, was around her neck. The cord on a television in the living room had been cut. Her feet were bound with a black and white electrical cord. A pair of panties was on the bathroom floor. Jewelry was in the jewelry box. McCallister's ATM card, keys, and a Wachovia receipt were on a living room table. Durousseau's fingerprints were found nowhere in the apartment. 27:1404-1428, 1439.

Larry Lake, a trainer for Gator Taxi Company in 2003, said he trained Durousseau either on January 8 or January 9, 2003. Durousseau was with him for 3-4 hours, starting first thing in the morning. Lake drove and Durousseau sat in the front passenger seat. Between 1 and 2 p.m., they picked up a young black woman at the Health Center on 6th and Broad and took her to Arco Drive in Arlington. The call would have been assigned to Lake. Durousseau's training concluded that day and he received his cab that day. 27:1465-71, 1479.

Lanita Hicks lived on Matanzas Way, near Arco Drive. Hicks said when she was dropped off at home that night around 9:30 or 10:00, a Gator cab was parked in front of her house. About 35-45 minutes later, Hicks was taking the trash out to the back alleyway when she crossed paths with a man walking fast from the alleyway to the cab. Hicks identified Durousseau in court as

the man she saw. After she returned back inside her house, she heard the cab take off in a hurry towards Arlington Expressway. About 20-25 minutes later, between 11 and 12, she heard Topey screaming that his girlfriend had been killed. 27:1494-1503. There were no back doors to any of the apartments. 27:1517.

Darryl Lemon was smoking marijuana in his car in his driveway on Matanzas Way that night. Around 10:30, a Gator City cab pulled up and parked on Matanzas a space away from the dumpster. A tall, skinny man, about 5'9" or 5'10" and wearing black clothes, got out and walked around to Arco Drive. Around 11:30, the man came out from the pathway, walking faster, got in his car, and backed out quickly. Lots of guys went to McCallister's apartment, including him. That night, he did not see a man walking back and forth to the stop sign carrying clothes or shoes, did not see a man walking in the parking lot with a cell phone, and did not see a man walk from McCallister's apartment to Arco Street. 28:1529-1546.

Larry Denton, the FDLE crime lab analyst, testified that McCallister's oral, rectal, and genital swabs were negative but the vaginal smear and swabs were positive for spermatozoa. 28:1675-1679. He found one epithelial cell on the condom and no sperm on either side. 28:1714. He also analyzed the black cord and the white cord to pick up skin cells left by the user. 28:1685-1686. He did not test any of the other 36 items

submitted because he had been directed to look only for signs of sexual activity. 28:1712.

The DNA from the black extension cord and white telephone cord matched the victim. 29:1847. The DNA on the vaginal swab matched the victim. 29:1848. The epithelial DNA on the condom matched Durousseau. 29:1892, 1859. The fetus McCallister was carrying was Topey's child. 29:1901.

Dr. Arruza testified that McCallister was 5'5", 161 pounds. Her lungs were extremely congested. She had a bloody nose, no other trauma. She had petichiae in her eyes. She was wearing a white shirt and a white bra, which was undone in the back and torn in the front. There was a white extension cord around her neck, which had lots of looping and was tied with multiple knots. The ligature was completely different from those found on Mack and Kilpatrick, as those had no knots. 30:2095. A pink T-shirt was underneath the cord. There were abrasions on her neck where pressure was applied and hemorrhages in the base of the tongue. Dr. Arruza noted that this was very different from Mack and Kilpatrick, and indicated she definitely was strangled. 30:2092. She had marks on her wrists, and hemorrhages within her arms and forearms, consistent with having been bound. 30:2015-2018. Her feet were bound with a cord with two distinctive knots. 30:2093. There was no hemorrhaging underneath, meaning she was tied after death or she was not

moving. 30:2026-2028. Sexual intercourse would have been difficult while her ankles were bound. 30:2093. Her jewelry was intact, including 11 rings. 30:2034-2035, 2097. Cause of death was strangulation. 30:2039.

Detective David Smith interviewed Durousseau about the deaths of Kilpatrick and McCallister on February 21, 2003. The videotaped interview was played for the jury. When shown McCallister's picture, Durousseau said he picked her up at the Health Center, took her to the bank, bus stop, and to a job, and never saw her again. When shown Kilpatrick's picture and told she was killed in Spanish Oaks, Durousseau said he had been to Spanish Oaks once and had never seen Kilpatrick. 28:1549-1559.

Mack's apartment was five miles from the Spanish Oak Apartments, where Kilpatrick lived. Kilpatrick's apartment was 1.9 miles from McCallister's home on Arco Drive, and McCallister lived 3.1 miles from Mack. 28:1560.

Kimberly Brown, a 911 operator, received a call on January 10, at 9:32 a.m., about a homicide on 912 Arco Drive. The caller, who was calling from a payphone and did not give his name, said the victim's feet had been bound and she had been strangled. The caller said the victim was three months pregnant and had been killed by her boyfriend, Rashad. Officer Smith testified he recognized the caller's voice as Durousseau's. 28:1558-1571.

Shawanda McCallister-Defense Case

The flat sheet was positive for semen from several sources. The major contributor was Topey. Durousseau was excluded as the minor contributor. 31:2168-2177.

Phone records showed the following calls were made on January 9, 2003: At 3:51 p.m. (3 minutes) and again at 4:16 p.m. (1 minute), McCallister's home phone called her cell phone; at 3:56 p.m., McCallister's home phone called Brenda Paige's (Victoria Baker's mother) home phone; at 7:44 p.m., Topey's cell phone called McCallister's home phone; at 7:45 p.m., McCallister's home phone called Topey's cell phone; at 9:42 p.m., Topey's cell phone called McCallister's home phone. 31:2223-2229.

A paycheck for $567.09 was distributed to McCallister on January 9, 2003. Checks usually were distributed between 3 and 3:30 p.m. The check had been cashed. 31:2249-50. There was no record of a deposit of $567.09 in either McAllister or Topey's Wachovia accounts on January 9, 2003. There was a withdrawal of $280 from Topey's account at 8:53 p.m., leaving a balance $17.93. 32:2336-44. The $280 was not found in the apartment. 32:2385.

The Wachovia Bank ATM video for the evening hours of January 9, 2003, was played for the jury. 31:2257. The video showed McCallister at the ATM machine. 31:2263-2264.

Shaquita Jones testified she heard McCallister ask Topey for a key on the morning of January 9. Jones heard the conversation through the wall. 32:2281-2282.

LaGloria Bonner testified she saw Topey and McCallister at the Laundromat across from their apartment around 5 p.m. that day. Bonner saw McCallister again at 8 p.m. when she went to McCallister's apartment. Bonner went out for a while and returned to Jones' apartment around 9:27. 31:2287-2291. Topey came over while Bonner was in the bathtub, then came over again 15-20 minutes later, around 9:45. He wanted to use the phone to call McCallister, saying his phone was dead. He came over a third time to use the phone, and they went to George's. As they were knocking on George's door, Topey got a call on his cell phone and walked off to answer it, saying it was McCallister. He was on the phone three to five minutes, and when he got off, he said he had talked to McCallister. He then walked off towards the front like he was mad. Mr. George came to the door, and Bonner asked to use his phone. She was on the phone for two hours, until around midnight. When she got off and walked to the front, she learned McCallister was dead. She went to McCallister's apartment. Topey was acting nonchalant. Topey never said anything about passing clothes out through the window. That morning, she had overheard Topey and McCallister

arguing and heard McCallister ask him to return her key. 31:2291-2302.

Deborah King lived in an upstairs apartment. She had seen men at McCallister's apartment. She left for work around 9:30 p.m. the night McCallister was killed. When she got home the next morning, police were there. Jones was upset and said Topey was very jealous because McCallister had a lot of male friends coming over. 31:2317.

David Smith, the lead detective, said the cut cord matched the binding on McCallister's feet. McCallister appeared to be talking on the phone in the Wachovia ATM video but Smith never identified the call or the phone she was using. 32:2372. Topey told Smith that McCallister was to pay the JEA bill that day. 32:2374-75. Video surveillance tapes from McDonald's and Hess did not show Topey in any tapes. Smith never interviewed Victoria Baker, Shaquita Jones, LaGloria Bonner, or Lovely McKenzie. 32:2375-2377. Robert Pate, the head of driver services at Gator Cab, said when training, the trainee is a passenger and calls are assigned to the trainer. All drivers have a keypunch pad, and when they press "Book," the computer books the vehicle into the zone they are in. When a person calls the cab company, the information is typed into the computer and the computer dispatches the call to the cab in position one. Drivers are encouraged to build clientele by

giving family, friends, and prior fares their cell phone numbers. Those fares are not dispatched over the computer. The GPS system does not work if the computer is not on. Some drivers never turn it on and work strictly off their personal clientele. 32:2390-2397. The call log for January 9, 2003, indicated that a call at 2:49 p.m. to pick up a caller named Shawanda at the Duval Health Center was assigned to Durousseau, cab 2688. The next and last call assigned to Durousseau was a call at 11:41 p.m. to pick up a fare in Zone 6 at 1744 West 17th Street. The log showed, "No show, no customer." The driver turned the meter off just after midnight. The last call-in from that cab was at 7:38 p.m. The meter was turned off at 7:57 pm. 32:2403-2411.

Mark Gillette said McCallister called him on January 9, between 9 and 10:30 p.m. Hearing something in the background, Gillette asked her what was going on. She said, "it's my boyfriend, don't pay him no mind." 33:2563-2567.

The defense introduced evidence showing that Durousseau's cell phone was established on January 10, 2003. 34:2910.

Dr. Kessler testified the McCallister case was an extremely different scene and body from the Mack and Kilpatrick cases because the ligatures were tied tight and the crime scene was neat. A ligature was tightly tied around McCallister's neck with knots. There was a T-shirt under the electrical cord,

which is put there to decrease the pain. She was wearing a restraint strap used to lift patients, a big, thick strap that the arms go into and that goes around the waist. There were ligature marks on the neck and hemorrhages in the neck and at the base of the tongue. McAllister involved a different modus operandi; Mack was suffocated with a rag and you could not tell how Kilpatrick died because the histology wasn't done. 32:2455-2459, 2473-2483.

In Kessler's opinion, there were three different crime scenes, three different manners of death, and possibly three different killers. 32:2491. Asked whether the killer, if interrupted just before the murder, would have tied the knots more quickly, Kessler said a killer wouldn't have tied the knots or padded the ligature if rushed. Based on interviews with killers, they flee if anything disturbs them. 32:2504-2505.

Durousseau testified that he met McCallister on January 9, 2003, when he picked her up at 6th and Broad. Larry Lake was not with him. He took her to Job Corps, to Wendy's, to St. Catherine's to pick up her paycheck at 3:30, to the bank downtown, to JEA, and then home. At St. Catherine's, he turned off the meter after she got her paycheck and said she wouldn't have enough money. He did her the favor because they had the same birthday, August 11. While in the cab, when she got a call, she looked at her caller ID and said, "my house," then

answered and said, “what are you doing at my house?” She said, “Don’t worry about where I’m at,” and, “When I get there, I’ll get there, just have your stuff.” He dropped her off around 4:15, and she gave him her phone number. 34:2824-2835.

Around 7:45, he called her from Eckerd’s, and then went to her house, arriving around 8:30. He parked on Matanzas because she told him not to park in front but to park by the dumpster. As she opened the door, she said, “You took my money,” but when she saw it was him, she said, “No, not you.” She asked him to take her to the ATM machine, which he did. He saw her on the phone there. After they left the ATM, he took her home, parking in the same space. They went inside and had sex on the bed on top of the covers. He wore a condom, at her request. They were interrupted by a knock at the door. She put on her white shirt and went into the living room. He heard her say, “Stop, don’t come in here.” He got dressed and looked into the living room. She was standing in front of the window, which was missing the bottom jalousie. She said, “Why you take my money?” and the person said, “Let me in, we can talk.” She said, “Don’t think that I haven’t found out that you’ve been messing around on me.” He kept saying, “Let me in. Let’s talk.” He asked for his work clothes for the next day, and she made him walk to the corner, while she got his clothes and pushed them through the window. He came back and asked for his shoes, and she pushed those out

the window. At one point, she told Durousseau to say something, and he said, "She just don't want to see you tonight." The man said, "Bitch, you trying me?" A girl (LaGloria Bonner) walked by outside and asked the man if he was okay. He said, "No, I need to use the phone," and left with her. 34:2835-2843.

McCallister called the man and got his voice mail. He called back, and she told him she didn't want him there. Durousseau left. As he approached the area where his cab was parked, he saw a guy impeding the path to his cab and two other men nearby, so he kept on walking until he got to the Hess Station. He caught a cab back to his cab, and while the cabdriver waited, went to check on McCallister. The door was cracked, and he yelled her name, and then went in the bedroom and saw her on the floor face down. He checked her pulse, and then ran because he was scared. He got in his cab and left. The next day, he called police to report what he knew. 34:2845-2851.

He never turned off his GPS that night. He had no fares between 7:23 p.m. and 11:43 p.m. because he was with McCallister. When interviewed on February 21, 2003, about the Kilpatrick and McCallister murders, the police came in twirling a Bible and saying that Moses never made it to heaven and he wouldn't either because he killed two people. He lied because

they had already decided he was guilty. He had one prior felony conviction. 34:2855-2882.

Penalty Phase

The state introduced into evidence a judgment and sentence showing that Paul Durousseau was convicted of aggravated assault on May 21, 2003. 36:3190.

The defense presented two expert witnesses and numerous lay witnesses.

Paul Durousseau's mother and father are Debra Moten Paige and Joseph Durousseau, Sr. They were never married but had two children together, Joseph, III, born September 29, 1969, and Paul, born in August 11, 1970. Mr. Durousseau was controlling, jealous, and physically and verbally abusive, including when Debra was pregnant with Joseph and Paul. After he whipped her with a coat hanger he had stuck in the fire, he returned to Texas because the police were after him. Debra and her children moved in with Debra's sister. 36: 3218-3222, 3301-3305, 3266-3272, 37:3389-3391

When Paul was one, Debra met Willie Paige. Their child, Dennis Paige, was born in 1973. Willie Paige had PTSD from Viet Nam. He slept in the closet and bathtub and built barricades with the mattress. He went into rages and once pulled a gun on Debra. One time Debra had to beg him not to kill her. The police were called often, by the children, and they left the

house in the middle of the night "countless" times. They left instead of Willie leaving because he had threatened to burn down the house with her and the children in it if they stayed. When Debra broke up with Willie for good in 1982, he said he would kill the boys if he saw them. 37:3392-3401. Debra said she disciplined Paul by sitting on him and hitting him on his bare bottom. One time she did this and he couldn't breathe.

Paul was diagnosed as a slow learner in elementary school and was in special education classes throughout his schooling. Drugs and alcohol were prevalent in the neighborhood but Paul never got involved in drug or alcohol abuse. He ran track and participated in other school activities. He got summer jobs every year while in school. He graduated from high school in 1989. He was almost 19, due to being held back. He was bussed to Reseda High because he had been attacked in a gang initiation at the neighborhood school. 37:3405-3412, 3440.

Ms. Paige developed lupus, high blood pressure, and diabetes about the time Paul graduated from high school. About the same time, she also got custody of her sister's children, Matthew, a newborn, and Edward, age 4. Both boys have mental handicaps. Their mother, Barbara, and another sister, Lillian, are mentally retarded. Two other sisters, Bonita and Anna, have hypothyroidism. Ms. Paige said after Paul graduated, he stayed home, helping out with Matthew and Edward. He changed Matthew's

diaper, made his formula, and saved his life one time by giving him CPR when he stopped breathing. Paul also rescued his brother, Dennis, from a swimming pool.

In 1990, when Ms. Paige got chicken pox, which almost killed her, Paul took care of her. Paul met Lynette, and they had a baby, Brianna, in 1992. Paul saw Brianna every week and supported her financially. They remain close very close. 37:3412-3418.

Paul joined the Army in October 1992. He was sent to Germany, where he met his future wife, Natoca, who also was in the Army. 37:3422. They married in 1995. Jasmine was born a year later, and Theresa in September 1997. Both daughters are slow learners. Another daughter, Dominique, born in June 1997, also is slow. Dominique's mother is Charlotte. 37:3433.

Paul was born early and was jaundiced. 37:3488. He also fell backwards out of his stroller when he was eight months old. The back of his skull protruded out two inches. He was rushed to the hospital and was watched closely for several months. While stationed in Germany, he had two-thirds of his stomach removed due to an ulcerating condition. He had trouble keeping weight on as a teen and had trouble meeting the minimum military requirements for the same reason. His military career ended when he received a bad conduct discharge. 37:3446.

Ms. Paige said Paul has been a good son to her. They talk every week and he writes her every week. 37:3435-3437.

Joseph, III, Paul's brother, testified the family moved around a lot. His mother and Willie Paige separated often, and they would go to his great-grandmother's house. The family was often on assistance and food stamps. They lived in a drug-infested, gang-infested neighborhood in South Central Los Angeles, where you could be chased and shot at. They often heard gunfire. Their mother beat them with a belt. If she didn't know who was involved, she beat them all. After his mother and Willie got divorced, they had no father figure, which affected them all. 36:3227-3234. He and Paul did not meet their biological father until they were 14 and 13, when their mother sent them to Beaumont to visit him. 36:3217-3224. Paul was funny and was the "class clown." He was close to their mother and treated her very well. He took care of her when she had chicken pox when he was 17-18 years old. 36:3235-3238. Paul was a caring brother and helped Joseph when he could. He loves his kids and they love him. 36:3241-3249.

Dennis Paige, Paul's half-brother, testified the family moved a lot because of his mother's relationship with Willie Paige, who was physically violent. As a result, Dennis went to six different elementary schools. They slept on the floor, in the car, on concrete, in "every type of bad neighborhood to

worse." They lived on assistance, food stamps, and Medicaid. Their mother disciplined them with belts, extension cords, and switches. If one did something wrong, they all got beat. Their mother was "stern, strict, and smart." Dennis went to live with his father when he was 12 because he didn't want to get whippings he didn't deserve anymore. 36:3316-37:3342. Paul was "fun" and good with his hands. When Dennis was seven years old, he got a cramp while swimming and Paul saved his life. Paul also gave their cousin Matthew CPR after he had a seizure. He took care of Matthew and Edward, changed their diapers, fed them, and cooked for them. Dennis knew Paul as a good person with a caring heart. 37:3344-3352.

Jeralyn Moton, Debra's (Paul's mother) sister, testified that as children, she and her siblings were beat with extension cords or put in potato sacks and tied to a tree and whipped. Her mother hit her with a knife one time and cut her hand open. Ms. Moton had not seen Paul since he was sixteen because she began using drugs and was homeless. Other family members, Anna, Barbara, and Sandra, also abused drugs. Two sisters, Barbara and Lillian, are mentally retarded. 36:3309.

James Moton, Debra Paige's brother, said Paul cried a lot as a child, especially when his mother left. Mr. Moton never saw Paul disrespect anyone. 36:3266-3272.

Delores Sheen, founder of the Sheenway School, testified Paul and his brothers were students there for several years in 1985, attending 5-6 days a week. The school, which served underprivileged children, was in South Las Angeles, bordering Watts, a high crime area with gangs and drugs. It was so bad the children were afraid to come to classes. Paul was slight in build and got picked on. He had been chased and was afraid. He caused no problems at the school. 36:3256-3263.

Wanda Ligons grew up in Watts and knew Paul from age ten until he was in his twenties. Ms. Ligons said there were many killings, beatings, and stabbings in the neighborhood. Every three days, someone died. A person died in her driveway. Whenever a car came down the street with no lights, the children dropped down behind a wall. 36:3274-3275. Paul was quiet, polite, and did what was asked of him. He was a good, gentle kid, a mentor to other children. He was a loving father to his daughter, Brianna. He was close to his mother, and when she got very sick, he cared for her, bathed her, and took her to the toilet. 36:3275-3279.

Jane Garrett met Paul in 1990, when Paul got leave from the military to care for his mother. He stayed by her side, cooked, and ran the household. When he returned to Georgia, he took Mathew, who had special needs, and cared for him until January 1997. 36:3199-3200.

June Orr, Paul's neighbor in Los Angeles, said Paul was nice and funny and did things for her the other kids wouldn't do, like mowing the lawn. As a teen, he was funny, happy, and a nice kid. He was a good father and a good son. 36:3282-3288.

Kiana Medina, Debra and Willie Paige's goddaughter, said she and Paul grew up like siblings. Paul would do just about anything for his brothers and others in his life. He visited Medina's mother often when she was ill with breast cancer. Paul was eighteen when his cousins, Matthew and Edward, came to live with them. Mathew, the baby, was born drug addicted, had severe developmental problems, and as a baby, cried and shook a lot. Paul was very patient and would kiss and rock him and do whatever he could to soothe him. Edward, 4, had a hard time adjusting to the loss of his grandmother but had a special connection to Paul. Paul was a good son and took care of his mother physically, emotionally, and financially, if needed. Paul was laid back, easy going. 36:3288-3300.

John Sims, a schoolteacher, was Dennis Paige's best friend in high school and hung out with Paul several times a week in 1987-1988. Dennis was outgoing, athletic, 6'3", and a football player; Paul was 6'5" and 110 pounds soaking wet. Paul was meek and shy in public but more outgoing with people he knew. Paul avoided physical confrontations because he didn't want to get hurt. Paul always kept a job and was positive. 37:3355-3362.

Latanya Street, a teacher, dated Dennis Paige in high school and saw Paul daily until 1991. Paul was very respectful, courteous, and helpful. He is a great son and good big brother. He was very respectful towards girls he dated. 37:3366-3372.

Eric Moton, Paul's first cousin, lived in the same apartment building as Paul and his brothers and went to the same schools. The area was gang-infested, and they heard gunfire three or four times a day. His uncle, James Ray, was shot eight blocks from his grandmother's house, where they were staying at the time. Eric himself was shot when he was 16. The gangs were always trying to recruit kids. Paul was "probably the easiest one of all of us." When their Aunt Sandra got custody of Eric's sister, Erica, Paul lived with Sandra from 1989-1992 to help her care for Erica and Sandra's son. 37:3373-3381.

Detra Lane, Paul's cousin, said Paul was energetic, fun, and influenced her to go into the Navy. 37:3382-3387.

Silvia Francis, a neighbor in 2001-2002, said Paul was helpful to her. He was often with his children. They were happy children. 36:3211.

Kenyatta Martin, another Washington Heights neighbor in 2002, said Paul was a good father and his children were always excited to see him. The neighborhood was drug infested, and Paul was protective of his children. Paul was funny and very friendly. She had never seen him angry. They had an intimate

relationship until she learned he was married. They remained friends. 36:3200-3204.

Dr. Jonathan Pincus is Chief of Neurology at the VA Medical Center in Washington, DC, and Professor of Neurology at Georgetown University.[5] 37:3482. Dr. Pincus examined Durousseau at the jail on May 14, 2006. He did a physical examination, mini-mental status exam, and a neurological exam. 37:3498.

The physical exam revealed two congenital abnormalities. First, Durousseau's height was 78 inches and his arm span 81 inches, when they should be the same. His chest also tapers at too great of an angle towards the breast bone. These deformities indicate there was something congenitally wrong with the formation of his body. People with such deformities often have something congenitally wrong with the formation of their brains. Congenital abnormalities can be chromosomal or the result of something the mother was exposed to while the child was in utero. 37:3502.

The neurological exam indicated Durousseau suffers from brain damage to numerous parts of his brain. 38:3530. He has diffuse damage in the front and back of the brain. 38:3553.

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[5] Dr. Pincus was a Professor at Yale from 1974 to 1986. He has published 140 articles, a third of them on the relationship of violence to the brain. He has written several books, including a book for the general public titled, "Base Instincts, What Makes Killers Kill," published in 2001. 37:3482-3491.

Dr. Pincus found other abnormal results in Durousseau's reflexes, including paratonia (the inability to relax the arms), indicating damage to both sides of the back of the brain. 37:3508-3511, 3515.

The mini-mental examination showed a significant loss of function in the back two-thirds of Durousseau's brain, the parietal and temporal lobes. 38:3526.

Dr. Pincus also determined through testing that Durousseau reads at a sixth-grade level. 38:3527-3528.

Dr. Pincus examined Durousseau's legs, back, and chest for injuries. On his back, he found a three-inch vertical scar, a four-inch vertical scar, many smaller scars, and a big horizontal scar that looked as if it had been made by a belt. Durousseau could not say how he got the scars. Most scars on the back are from beating in childhood. 37:3517, 3521-3522.

The jail medical records indicated Durousseau was diagnosed at the jail with hypothyroidism, or low thyroid function. A symptom of hypothyroidism is that the brain doesn't work properly. Low thyroid can mimic mental illness. 38:3522-3523.

In sum, the neurological exam showed Durousseau's frontal lobes were not working properly and the mini-mental exam showed his whole brain is significantly impaired. 38:3526-3527. People with this type of brain damage have difficulty with judgment and an inability to keep behavior in social bounds and

sometimes within legal bounds. 38:3530. Dr. Pincus said Durousseau "is a little bit as if he were drunk all the time." 38:3532. Thyroid disease combined with brain damage or mental illness sometimes results in "some very, very florid psychotic behavior." Untreated hypothyroidism worsens the effect of the neurological deficits. 38:3533. Durousseau likely sustained the brain damage before birth, in view of the congenital physical abnormalities. 38:3534.

Dr. Pincus testified that child abuse does not make someone a killer, nor does mental illness, nor brain damage, but when all three converge, "you have a problem." 38:3546. Asked if it's unusual for victims and family members to deny that child abuse occurred, he said "[i]t happens all the time." 38:3551.

Dr. Dorothy Lewis, a psychiatrist,[6] examined Durousseau in February 2006 and again in March and April of 2007, for a total of 20 to 30 hours. 38:3562. Dr. Lewis reviewed school, Army, and medical records; information about the offenses; and interviews with family and friends. She conducted independent interviews with his mother and one of his brothers. 38:3570. Dr. Lewis brought with her Dr. Katherine Yeager, a

[6] Dr. Lewis graduated from Yale Medical School and trained in adult and child psychiatry at Yale. She held appointments at NYU Medical School from 1979 to 2003; was clinical professor at Yale from 1979 to the present; has received many awards; and has been listed as among the best doctors in the US and the NY metro area for many years. 38:3557-3561.

neuropsychologist. Neuropsychologists test perceptual motor functioning, frontal lobe functioning, reasoning, and impulsiveness. Dr. Lewis also referred Durousseau to a neurologist, after it became clear during the evaluation that he had suffered serious insults to his brain. 38:3569.

Dr. Lewis did not do a complete physical exam but recalled seeing faint scars on his Durousseau's back. Scars occurring during childhood usually fade tremendously. 38:3556-3557.

Based on her examination, the neuropsychological tests, and Dr. Pincus' neurological exam, Dr. Lewis concluded Durousseau suffers from diffuse brain damage. The most significant impairment is frontal lobe dysfunction. The frontal lobes are used for logic, thinking, reasoning, and controlling the limbic system, or reptilian brain. The reptilian brain is related to survival and primitive urges, such as hunger, sex, and anger. When the frontal lobes are damaged, the ability to control impulses is impaired. Durousseau had many signs of frontal lobe damage, as well as a history of early injuries that could severely impair brain function, including his mother being beaten while he was in utero; severe jaundice at birth; and falling on his head as an infant. 38:3571-3577.

He is borderline retarded, with a verbal IQ of 77, performance IQ in the 80's, and an overall score of 82. 38:3574.

Asked whether someone with this sort of brain damage can engage in conversation, play card games, and appear normal, Dr. Lewis said it depends on the individual, and that psychiatrists, not to mention laypeople, can't tell by talking briefly with someone that their judgment is severely impaired. 38:3577-3576.

Durousseau also has symptoms of Bipolar Mood Disorder. 38:3582-3583. He has more manic symptoms than depressive, which were manifested in childhood "not only by kind of fooling around and being kind of difficult to manage, but also by a lot of risk taking and by talking out, talking out in class and just talking and talking and not being able to shut up." 38:3580. He also is "quite grandiose about his own persona," which is typical of mania. According to him, he is irresistible to women. He also has episodes of "hypersexuality," having sex three or four times a day. According to girlfriends, there were times he wanted to have sex constantly and times he wasn't interested. 38:3580.

He was unable to conceptualize the idea of mood, but said he had periods of time when he stayed in bed, didn't want to go out, didn't want to see anyone, which is typical of a depressive disorder. His mother also reported there were times when he cried a great deal as a child. 38:3580. She also reported he was just "going and going and going" and at times took risks and had several kinds of bicycle accidents and other injuries. People in manic or hypomanic states do risky things with no

concept of the consequences. Bipolar Disorder is treatable, and, even without medication, there can be periods of time when the person has a normal demeanor and function. 38:3581.

Durousseau also has a thinking disorder. His thinking is "extremely disjointed" and "circumstantially goes all around the place, he doesn't realize that he has missed the point of one thing and is going on to another and he is not making logical sense." He is extremely paranoid. Although he denied any problems, he said he hears people talking behind his back all the time and when he turns around and confronts the person, they deny saying anything. 38:3582.

Because Durousseau has a thinking disorder, with "incredibly illogical thought processes" and "pervasive paranoia," as well as a mood disorder, the diagnosis is Schizoaffective Disorder. Schizoaffective Disorder is more serious than Bipolar Disorder because it includes, in addition to Bipolar symptoms, some of the psychotic symptoms seen in Schizophrenia, the paranoia, rambling, illogical dissociations, and delusional thinking. 38:3624.

Dr. Lewis said there was evidence of psychotic behavior in the Army records. During an Army training exercise in sub-freezing weather, the men were ordered to get into their sleeping bags for the night. Durousseau decided not to do that,

slept out in the cold, became extremely ill, and almost died. He couldn't explain why he did this. 38:3583-3584.

Durousseau also has several medical conditions that affect brain function and thought processes. He was diagnosed as hypothyroid when he was put in jail in 2003 and first treated for it in 2003 or 2004. Lack of thyroid affects intelligence, is associated with the development of psychosis, and has been linked to Bipolar symptoms. Hyperthyroid can be genetically based, and two of Durousseau's aunts had it. 38:3584-3587. His thyroid condition "almost surely" caused his intellectual deficits and may have caused his mental illness. Given the discrepancy in his height and weight by age 16 (50^{th} percentile for height and 10^{th} percentile for weight) and that he was put in Special Ed at an early age, there is reason to believe this is a longstanding disorder. 38:3586, 3590-3591.

Durousseau also suffers from severe anemia (lack of hemoglobin or red cells), which showed up in a blood test when he was 16 but was never treated. He also had a high percentage of CO_2 in his blood, which is associated with psychosis. The combination of severe anemia and severe hypothyroid is "a disaster to the developing brain." 38:3591-3593.

Dr. Lewis found a genetic abnormality on his mother's side, Turner's Syndrome, a chromosomal disorder which is associated with cognitive disabilities similar to Durousseau's. Turner's

usually results in the inability to conceive because one of the X chromosomes is damaged but in Durousseau's mother's case, some of her cells have two X's. 38:3593-3595. Turner's has been associated with hypothyroidism and stomach ulcers. Durousseau had part of his stomach removed for ulcers, has hypothyroid, and has Bipolar symptoms, all associated with Turner's. 38:3596-3597. Women with Turner's Syndrome can transmit certain abnormalities to male children on the X chromosome. 38:3637.

Asked whether someone with this constellation of problems "could sit here and be interested and listen to what people are saying, and even take the stand and testify, and do they have the ability to rescue a brother from a swimming pool, the ability to give CPR to a cousin," Dr. Lewis responded that that you can't generalize and this was not an everyday phenomenon: "[I]ndividuals with this constellation have very serious mental illness and some cognitive limitations, but it doesn't yet have a name." 38:3597-3598.

Dr. Lewis further opined that, assuming Durousseau killed Mack, his ability to conform his conduct to the requirements of the law was substantially impaired at that time:

> [H]e has been suffering from brain damage, which is extremely important, particularly frontal lobe dysfunction, since early childhood. And he has a psychotic disturbance, particularly manifested by paranoia, in which he can misperceive reality, and

> because his frontal lobes are damaged, he cannot suppress a – an instinctual reaction to something.

38:3599-3600.

Asked whether, assuming that he killed Mack, he was at the time under extreme mental and emotional disturbance, Dr. Lewis said, yes, "I think that's an understatement, that he suffered severe psychiatric illness and brain damage that impaired his ability to control his behavior." 38:3600.

A two-page document that purported to be a record of Durousseau's grades from grade 7 to 12 showed that Durousseau graduated with a 2.0 average, his rank was 256 out of 310, and he was in the 4th percentile in math and the 32nd percentile in reading. The report did not indicate whether his grades were in comparison to Special Ed kids or all the kids. 38:3644.

Hypothyroidism can cause severe psychiatric problems. In the 1800's, they put people in the insane asylum for hypothyroidism. Undiagnosed, hypothyroidism can lead to psychosis and look like schizophrenia. 38:3650.

In rebuttal, the state presented the testimony of Officer Ellis. Ellis testified that when he took a photograph of Durousseau's back on February 21, 2003, the only scar he saw while taking the photo was a small scar on his shoulder. Asked to look at the marks in the photo on Durousseau's back, Ellis said, "That appears to be the reflection of the camera flash."

Ellis is not a doctor, knows nothing about the aging of scarring, did not use a magnifying glass to examine Durousseau, and was not examining his back for scars. He had merely been asked to take a photo, which he took from four feet away. 38:3657-3661.

Spencer Hearing

Dr. Imran Rajwani testified Durousseau first came to the jail clinic in March 2003. In January 2004, he was tested for hypothyroidism using a simple blood test. His thyroid was low, and he was placed on a thyroid replacement hormone, which the jail continues to monitor. 16:3867-3870.

The trial court took judicial notice of the court file pertaining to the aggravated assault charge the state relied on for the prior violent felony aggravator. 16:3871. The court initially withheld adjudication and placed Durousseau on two years probation. In October 2002, the withhold adjudication was maintained and he was continued on probation. The court also received into evidence a sworn affidavit by Chris Ballard in reference to the facts of the aggravated assault. Ballard gave Durousseau a polygraph in January 2003 so that a psychosexual treatment provider would know what treatment to give. The questions asked were whether he had sexual intercourse with the alleged victim, whether he removed any of her clothing, and whether he struck her head against a washing machine.

Durousseau answered no to all the questions, and Ballard determined he was not deceptive. The trial court found he answered truthfully. 16:3879-3891.

SUMMARY OF ARGUMENT

1. The trial court erred in admitting evidence of the Kilpatrick and McCallister murders to establish that Durousseau killed Tyresa Mack. The state did not prove Durousseau killed Kilpatrick or McAllister, only that he had sex with them. Furthermore, even if the state had proved his guilt of the collateral crimes, not only were there marked dissimilarities between the three crimes, the similarities were not unique or distinctive and thus were not relevant to prove the same person committed all three crimes.

2. The circumstantial evidence is insufficient to prove robbery as the predicate felony for felony-murder and that the murders were motivated by pecuniary gain. The victim was found nude from the waist down, her underwear beneath her. The only items missing were two pieces of jewelry the victim allegedly was wearing and a television set. It is at least as reasonable, if not probable, that the motive for the crime was sexual not pecuniary and the missing items taken as an afterthought.

3. The trial court erred in rejecting Dr. Lewis' testimony and opinion that appellant suffers from Bipolar Disorder and Schizoaffective Disorder and that the two mental mitigators

applied in this case. Dr. Lewis' testimony was unequivocal, not rebutted, and not contradicted by any other evidence in the case. The trial judge abused his discretion by substituting his personal lay opinions for those of the qualified expert.

4. The circumstantial evidence was insufficient to prove appellant killed Mack. The evidence showed only that he had sex with her, leaving open the reasonable possibility that someone else killed her.

5. Appellant's death sentence was unconstitutionally imposed in violation of Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

Issue 1

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF TWO COLLATERAL MURDERS WHERE THE STATE DID NOT PROVE APPELLANT COMMITTED THEM; THERE WAS NO UNIQUE MODUS OPERANDI FROM WHICH TO CONCLUDE THAT THE SAME PERSON COMMITTED ALL THREE CRIMES; AND THE DANGER OF UNFAIR PREJUDICE FAR OUTWEIGHED ANY PROBATIVE VALUE.

The trial court erred in allowing the state to present evidence of the McCallister and Kilpatrick homicides. First, the state proved only that appellant was intimate with the collateral crime victims, not that he killed them. Second, the similarities between the three murders were neither distinctive nor unique and thus were not relevant to show that the same person committed all three crimes. Finally, to the extent the

evidence was relevant at all, the danger of unfair prejudice far outweighed any probative value.

A trial court's decision to admit collateral crimes evidence is reviewed for abuse of discretion. Chandler v. State, 702 So.2d 186, 195 (Fla. 1997). However, that discretion is narrowly limited by the rules of evidence. Nardone v. State, 798 So.2d 870, 874 (Fla. 4th DCA 2001).

This issue was preserved by appellant's motion to prohibit the alleged similar fact evidence, memorandum in support of that motion,[7] argument at the hearing, and by repeated objections to its admission at trial. 5:798, 6:1017-1022, 25:1102-1110, 26:1275-1279, 27:1322-1323, 28:1649-1651, 30:1972.

At the hearing on the motion, the trial judge stated, "I think by a clear and convincing standard your client is put at or near the scene at the time of these two other girls' deaths." 14:2567. The judge ruled the evidence admissible, saying:

> What the state, can, I believe, prove at trial if this evidence is allowed in is that we have three young women in their early 20's, all black, all young mothers, all in similarly struggling situations, all found dead with home use wire wrapped around their necks, all with the DNA of Mr. Durousseau somewhere in or around their person and two of which or at least one of which without question he was seen with.

[7] The Memorandum in Support of Defendant's Motion to Exclude Similar Fact Evidence, State's Memorandum of Law in Opposition to Defendant's Motion to Prohibit Similar Fact Evidence, and Stipulation of Facts for "Similar Fact Evidence" Hearing are attached as **Appendices B, C, and D.**

. . . .

> I believe the state has shown the Williams Rule is sufficiently – not only relevant but that the similarities are sufficiently clear and convincing and that it should be admitted.

14:2648-2649.

Similar fact evidence of other crimes is admissible when relevant to prove a material fact in issue, such as opportunity, intent, identity, or absence of mistake or accident, but is inadmissible when relevant solely to prove propensity. Williams v. State, 110 So.2d 654, 659-660 (Fla. 1959); see also 90.404(2), Fla. Stat. (2007). Where, as here, similar fact evidence is submitted to establish the perpetrator's identity by showing his modus operandi, "[a] mere general similarity will not render the similar facts legally relevant to show identity." Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981). The points of similarity "must have some special character or be so unusual as to point to the defendant." Id. This is because "[t]he mode of operating theory of proving identity is based on both the similarity of *and the unusual nature of the factual situations being compared*." Id. (emphasis added).

As Ehrhardt, Florida Evidence, s. 404.10 (2007 ed.), explains:

> The probative value comes from the fact that the collateral crimes were committed with a unique modus

> operandi, which was the same as that used in the crime in question; therefore, it may be inferred that the same person committed both crimes. When that evidence is coupled with an identification of the defendant as the person who committed the prior crime, the evidence is relevant.

Thus, before Williams rule evidence may be admitted, first, the defendant must be positively identified as the person who committed the collateral crime, and, second, the similarities must comprise such a unique combination of characteristics that they "lead to a conclusion that only the accused would have committed both crimes." Lewis v. State, 654 So.2d 617 (Fla. 4th DCA 1995). Finally, as with any relevant evidence, the probative value of the evidence may not be substantially outweighed by undue prejudice. s. 90.403, Fla. Stat. (2007).

A. THE EVIDENCE WAS INSUFFICIENT TO PROVE DUROUSSEAU COMMITTED THE KILPATRICK AND MCALLISTER MURDERS.

The identification of Durousseau as the person who killed Kilpatrick and McCallister is based solely on evidence that he had sex with both victims and was seen with one victim (Kilpatrick) shortly before their deaths. This evidence falls far short of the quantum of proof required to admit collateral crimes under Williams.

In State v. Norris, 168 So.2d 541, 543 (Fla. 1964), this Court held that in order for evidence of a collateral crime to be admitted against an accused, "mere suspicion is insufficient; rather, the proof must be clear and convincing." Subsequently,

the court in Slomowitz v. Walker, 429 So.2d 797, 799-800 (Fla. 4th DCA 1983), compiled definitions of "clear and convincing" from other states, which included "highly probable," "highly probably true," leaving "no substantial doubt," and "an abiding conviction" of guilt. The court in Slomowitz concluded that

> [C]lear and convincing evidence requires that the evidence . . . be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. at 800; see also Acevedo v. State, 787 So.2d 127 (Fla. 3d DCA 2001)(same); Florida Jury Instruction 2.03 ("Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue").

Regardless of which terminology is used —- highly probable, highly probably true, leaving no substantial doubt--the clear and convincing standard is a "heavy burden," Slomowitz, 429 So.2d at 800, which cannot be met merely by showing that the defendant is the person "most likely" to have committed the crime. See Bryant v. State, 787 So.2d 904 (Fla. 2d DCA 2001); see also Henrion v. State, 895 So.2d 1213 (Fla. 2d 2005).

Moreover, the proof necessary for the admission of Williams rule evidence cannot be met by building inference upon inference. In Norris, the court held the collateral crime evidence was

improperly admitted because the state failed to prove Norris committed the collateral crime. In Norris' trial for first-degree murder in the arsenic poisoning of Walter Merrill, allegedly committed on June 3, 1960, the state was allowed to introduce evidence that arsenic had been found in the exhumed bodies of Earl Norris, the defendant's late husband, who had died in 1952, and Vinton Pace, with whom Mrs. Norris became closely associated after her husband's death, and who died in 1953. The Court concluded this evidence was improperly admitted because Norris was not specifically connected with the similar prior occurrences, other than that she was in such position that she had an opportunity to administer the poison to them.

Nor can proof of the collateral crime be established by bootstrapping the collateral crime to the charged crime. In other words, the state must prove the defendant's guilt of the collateral crimes independent of any similarity to the charged crime. See Bell v. State, 650 So.2d 1032 (Fla. 5th DCA 1995); Acevedo. Otherwise, the collateral crimes cannot logically serve as evidence proving the charged crime.

In Bell, the defendant was tried for arson and burning to defraud. Her husband testified that she started the fire and that he bought insurance so they could get money for a new home. The state also was allowed to introduce evidence of another fire several years earlier in the same location. In that first fire,

Bell was renting a mobile home, was not married, and there was no evidence she benefited from the fire. A friend of Bell's testified that Bell told her two weeks before the first fire "how she was going to start it." The court concluded there was insufficient evidence Bell started the first fire and not enough unique characteristics to make the crimes similar: "The state was attempting to build an inference upon an inference and make the fact that there were two fires the central issue of the trial. It appears the state was trying to convict Bell based upon an accumulation of similar bad acts, but they were not similar enough to be relevant." Id. at 1035.

Similarly, in Acevedo, where Acevedo was charged with murder and arson in the death of his granddaughter in 1995, the state was allowed to present evidence of a 1971 apartment fire that killed Acevedo's daughter. The fire investigator had concluded the earlier fire was probably caused by children playing with matches based on Acevedo's statement at the time. He had said when he entered the apartment, the bedroom was on fire, his son was in the bathtub, and there were matches on the floor. After the 1995 fire, Acevedo told police a different version of the 1971 fire: He said his son was in the bedroom and pieces of the ceiling were burning and falling on him. When told of Acevedo's contradictory recollection, the fire investigator said his suspicions that the 1971 fire was

intentional were heightened. The court concluded the Williams Rule evidence should not have been admitted on the "suspicion or hunch" that Acevedo had set the 1971 fire. Moreover, "the state's attempt to bootstrap the similarities of the 1995 fire to those of the 1971 fire in order to prove the defendant started the 1971 fire was equally inappropriate." 787 So.2d at 130. Id.

Here, too, the state's evidence falls short of clear and convincing and was admitted based upon inferences and bootstrapping. The only evidence linking Durousseau to the Kilpatrick murder was his DNA on a vaginal swab and that he was in the vicinity of her apartment complex between the time she was last seen alive and the time her body was found, a period of several days. This evidence shows only that he had sex with Kilpatrick within a few days of her death; it does not prove he killed her. At most, appellant is a "likely" suspect, not the "clear and convincing" perpetrator.

The evidence linking appellant to McCallister's death is equally sparse. McCallister was killed just after midnight on January 10. Appellant picked her up as a taxi cab fare on January 9, 2003, and witnesses placed a cab in the vicinity of her apartment that evening. Sperm were found on a condom and on a vaginal slide and swab, including appellant's on the condom. The DNA on the vaginal swab and slide belonged to Rasheed Topey,

McCallister's fiancé and roommate, who also was present at the apartment at or near the time of McCallister's death. Topey was dating another woman at the time of McCallister's death, whom he subsequently married. Again, the state's evidence proved only that appellant was with the victim and had sex with her near the time of her death. This limited circumstantial evidence leaves open the reasonable theory that although appellant was intimate with the victim, someone else, possibly her fiancé, murdered her.

The court erred in finding that the collateral crimes were relevant, first, by inferring from appellant's proximity to the victims shortly before their deaths that he must have killed them. Proximity does not equal murder. "Could have" does not equal "did." Norris. Second, the court's finding suffered from logical circularity, or bootstrapping. That is, each crime was offered as proof of appellant's identity in the other crimes with no outside evidence proving he committed any of them.

B. THE SIMILARITIES BETWEEN THE THREE MURDERS ARE NOT UNIQUE OR SUFFICIENTLY UNUSUAL TO ESTABLISH THAT THE SAME INDIVIDUAL COMMITTED ALL THREE CRIMES.

Even if proof of appellant's guilt of the collateral murders had met the clear and convincing standard, there was no unique modus operandi in the two collateral crimes tying them to the charged crime sufficient to make them relevant and

admissible under Williams. The similarities between the three crimes were few and were general in nature: The victims were young black women of similar height and lower socio-economic status who were found nude from the waist down with a cord around their necks. This combination of characteristics is neither unique nor unusual.[8]

There also were marked dissimilarities in the manner and method in which the crimes were perpetrated. Kilpatrick and McCallister were killed three and a half years after Mack. Kilpatrick and Mack lived southeast of the St. John's River in Arlington; Mack lived five miles away and west of the river. Kilpatrick and Mack lived with their children, while McCallister had no children and lived with her fiancé. Mack was unemployed, Kilpatrick had just gotten a new job; McCallister was employed.

There also were marked dissimilarities in the crime scenes and cause of death. A telephone cord was draped loosely around Mack's neck, with no evidence the cord was used to kill her. A coaxial cable was placed over clothing and wrapped tightly around Kilpatrick's neck with a knot on the right side. An extension cord intertwined with clothing was wrapped around

[8] Home use cord strangulation is not an unusual method of killing women. See, e.g., Jones v. State, 949 So.2d 1021 (Fla. 2006); Murray v. State, 838 So.2d 1073 (Fla. 2002); Robertson v. State, 699 So.2d 1343 (Fla. 1997); Reese v. State, 694 So.2d 678 (Fla. 1997); Taylor v. State, 630 So.2d 1038 (Fla. 1993).

McCallister's neck with slipknots on the left side. Mack had abrasions to her face and no head trauma, while Kilpatrick and McCallister had head trauma but no abrasions. Mack had marks on her wrists and ankles indicating she may have been bound, while Kilpatrick had no evidence of wrist or ankle binding, and McCallister was found with a belt on her wrist, restraint marks on both wrists, and ankles bound with a television cord. Although miscellaneous items were missing in each case, there were no similarities in the missing articles.

The connection between appellant and each victim also was different. There was no evidence he knew Mack; he had met Kilpatrick and dated her cousin; McCallister was a cab fare.

In sum, not only were there "marked dissimilarities" between the crimes, they were not committed in a particularly unusual or unique manner.

For collateral crimes to be admissible, they must share with the charged crime some "special character" that "inevitably" leads to the conclusion that the person who committed the collateral crimes also certainly committed the charged crime. See Drake; see also Buenoano v. State, 527 So.2d 194 (Fla. 1988)("there must be something so unique or particularly unusual about the perpetrator or his modus operandi that introduction of the collateral crimes would tend to establish that he committed the crime charged"); State v.

Savino, 567 So.2d 892, 894 (Fla. 1990)(degree of uniqueness required to admit Williams rule evidence as proof of identity is "fingerprint" type evidence).

For example, in Sias v. State, 416 So.2d 1213 (Fla. 3d DCA 1982), where the defendant was convicted of sexually battering a fourteen-year-old, the court held evidence of a prior attack on an eleven-year-old was properly admitted where on both occasions the defendant was accompanied by the same individual, put a piece of clothing over the victim's head, committed the sexual act, then removed the clothing after completion of the act.

In State v. Smith, 586 So.2d 1237 (Fla. 2d DCA 1991), the court held the Williams rule evidence admissible where the principal and collateral crimes were committed in the same apartment complex only three weeks apart, occurred between 3 a.m. and 4 a.m. in second floor bedrooms, and the assailant first cut the crotch out of both victims' panties.

In Buenoano, where the charged and collateral crimes involved the poisoning of a husband or fiancé, the Court stated:

> [W]e find poisoning to be a particularly unusual modus operandi to warrant the introduction of the collateral crimes evidence. When compared, the details of each offense are strikingly similar. All three victims established a close relationship with Buenoano either as her husband, common-law husband or fiancé. While living with her, each victim became seriously ill, requiring hospitalization upon displaying similar symptoms. A poison was used in all three cases. Buenoano was the beneficiary under a number of life insurance policies issued on the lives of the three

> victims and was also entitled to other monetary benefits upon the victims' deaths. These details are not merely evidence of a general similarity between the charged offense and the collateral crimes. "These points of similarity 'pervade the compared factual situations' and when taken as a whole are 'so unusual as to point to the defendant.'"

527 So.2d at 197 (citations omitted).

Likewise, in Gore v. State, 599 So.2d 978 (Fla. 1992), the Court held evidence of the rape of Corolis was admissible to establish Gore's identity as Roark's murderer where the common features of the crimes included that the victim was small and had dark hair; Gore introduced himself as "Tony;" he had no automobile of his own and transported the victim to the site of the attack in the victim's car; he was with the victim for a long time before the attack began; he used or threatened to use binding; the attack had both a sexual and pecuniary motive; the victim suffered trauma to the neck; the victim was attacked at a trash pile on a dirt road, where the body was then left; Gore stole the victim's car and jewelry; he pawned the jewelry shortly after the theft; he fled in the victim's automobile, leaving the state where the victim was found and staying with a friend or relative for a period of time after the crime; and he represented the car to be a gift or loan from a girlfriend or relative. Id. at 983-984. The Court concluded these similarities established a unique modus operandi which pointed to Gore as the perpetrator of the Roark homicide.

In Chandler v. State, 702 So.2d 186 (Fla. 1997), the Court held Chandler's rape of Judy Blair was properly admitted in his trial for the murders of Joan Rogers and her daughters, Michelle and Christe:

> [W]e find the "identifiable points of similarity which pervaded the factual situations," included chance encounters in public places with young female tourists to whom Chandler offered assistance; almost immediate offers of cruises on his boat; the same blue and white boat used for both crimes; a warm, non-threatening demeanor that convinced the eventual victims to accompany Chandler on his boat within twenty-four hours of meeting him; sexual motive with all three victims stripped from the waist down; use or threatened use of duct tape; crimes occurring in large bodies of water under cover of darkness; murder committed or threatened; and commission of crimes within a brief time frame seventeen to eighteen days of each other.

Id. at 194.

In all the cases above, there were precise, unique indicators tying the collateral and charged crimes together -- the same blue and white boat, panty crotches cut out, lengthy series of similar acts comprising a unique modus operandi, etc. -- that left no doubt that the person who committed the collateral crime also committed the charged crime.

In contrast, Williams rule evidence has been found improperly admitted when the similarities between the collateral and charged crimes do not operate logically to set the collateral and charged crimes "well apart," Heuring, 513 So.2d at 124, from other crimes of the same general variety. See,

e.g., Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979)(that charged and collateral crime involved burglary and sexual battery in which window was used to enter homes of young women who lived alone, occurred three weeks apart, took place same time of night, and concluded with taking of money, did not establish the requisite uniqueness where method of sexual assaults, taking of money, and attitude of assailants towards victims were dissimilar); Chambers v. State, 692 So.2d 210 (Fla. 5th DCA 1997)(that both robberies occurred in hotels on the same street shortly after victims had checked into their rooms, that silver revolver was used in both cases, that victims were ordered into bathroom, and valuables were taken from both sets of victims, did not establish requisite uniqueness where offenses occurred five months apart, method of gaining entry to the hotel room differed, one family was verbally threatened but not the other, number of guns involved was different, and mask was worn in one robbery but not the other); Thompson v. State, 494 So.2d 203 (Fla. 1986)(where both victims were women of same age and build, both crimes occurred near St. Helen's church parking lot, and defendant was having domestic difficulties on both occasions, requisite uniqueness not established where victim of charged crime was beaten but not sexually abused, while collateral crime involved sexual battery without bodily harm and defendant established enough rapport with victim that

she considered not reporting the assault); Drake (in trial for murder of woman found with her hands bound behind her back, error to admit evidence that Drake had sexually assaulted two other women, and had, during those assaults, bound the victims' hands behind their backs, where Drake had left a bar with all three victims shortly before the crime, because "[b]inding of the hands occurs in many crimes involving many different criminal defendants," and "[t]his binding is not sufficiently unusual to point to the defendant in this case, and it is, therefore, irrelevant to prove identity").

In the present case, as in the latter group of cases discussed above (Davis, Chambers, Thompson, and Drake) the similarities do not establish a "unique modus operandi." The marks of similarity relied on by the state--young, poor, black women, with home use cords found around their necks--are shared by numerous other offenses of the same general type. The strangulation rape/murder of young women is, unfortunately, a fairly common event. And the numerous differences between the two collateral crimes and the charged crime, in wounds suffered, manner of death, city locations, times, etc., were significant enough to allow the conclusion that someone other than the perpetrator of the two collateral murders committed the 1999 murder. The collateral crime evidence was irrelevant because

the state failed to prove that the person who killed Kilpatrick and McCallister was the same person who killed Tyresa Mack.

C. EVIDENCE OF THE COLLATERAL HOMICIDES SHOULD NOT HAVE BEEN ADMITTED BECAUSE THE PROBATIVE VALUE OF THE EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

Even if collateral crime evidence is relevant, it is inadmissible when its probative value is substantially outweighed by the danger of unfair prejudice or confusion of issues. See s. 90.403, Fla. Stat. (2007). Furthermore, in order to reduce the risk that the jury will convict based on the defendant's bad character, the state cannot make the collateral acts a feature of the trial. Steverson v. State, 695 So.2d 687, 689 (Fla. 1997).

In undertaking 90.403 balancing, the court must weigh the logical strength of the proffered evidence to prove a material fact in issue against the strength of the reason for exclusion. See Fernandez v. State, 730 So.2d 277, 282 (Fla. 1999). Here, logical strength of the collateral crime evidence to prove identity depends on first, the strength of the proof of appellant's guilt of the collateral crimes, and, second, the degree of similarity of those crimes to the crime charged. The more questionable appellant's guilt of the collateral crime, and the less unique or distinctive the similarities between the

crimes, the more likely the probative value of the evidence will be substantially outweighed by the danger of unfair prejudice.

In the present case, the probative value of the Williams rule evidence is minimal, while the danger of unfair prejudice is substantial. First, the probative value of the evidence to prove identity is weak because the evidence linking appellant to the Williams rule murders is weak. See Issue I(A), supra. The unfair prejudice is that the state was trying to convict Durousseau based on an accumulation of similar bad acts that were not similar enough to be relevant; bootstrapping the collateral crimes to the charged crime in order to prove he committed the collateral crimes; and applying circular logic by using the tenuous evidence of each separate crime to "prove" the other crimes. See Issue 1(A), supra.

The state also made the collateral crime evidence a feature of the trial. Collateral offenses become a feature instead of an incident of the trial on the charged offense where evidence of the collateral crimes "consume[s] more trial time and space than the evidence of the actual crime charged," Sutherland v. State, 849 So.2d 1107 (Fla. 4th DCA 2003), or "has so overwhelmed the evidence of the charged crime as to be considered an impermissible attack on the defendant's character or propensity to commit crimes." Bush v. State, 690 So.2d 670 (Fla. 1st DCA 1997). Here, more than 2/3 of the time spent focused on

evidence from the collateral crimes; they were not incidental, but were the central feature of the trial. Appellant had to mount a full defense against each collateral murder, as well as against the charged murder. The evidence of the collateral crimes dominated because there was very little other evidence.

The prejudice is that even if the jury concluded that appellant committed either collateral murder, the three cases were similar enough to warrant only a tenuous connection. The primary, if not sole relevance, was to show propensity.

Relevant evidence also is inadmissible under 90.403 when confusion produced in the minds of the jurors outweighs the probative value. See Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949). Here, the confusion comes from requiring guilt of the charged crime to be beyond a reasonable doubt, based largely on collateral crimes which did not have to be proved beyond a reasonable doubt. In fact, the jury wasn't even instructed that it had to find that Durousseau committed the collateral crimes, only that they could consider them on the issues of identity, motive, intent, etc. To that confusion must be added the equally illogical confusion of using the charged crime to "prove" the collateral crimes which were then in turn used to "prove" the charged crime, none proved independently.

The risk of confusion and undue prejudice substantially outweighed the probative value of the evidence.

Issue 2

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO PROVE (1) ROBBERY AS THE PREDICATE FELONY FOR FELONY-MURDER; AND (2) THAT THE KILLINGS WERE MOTIVATED BY PECUNIARY GAIN.

The trial court erred in instructing the jury on robbery as a predicate felony for felony murder and erred in finding the pecuniary gain aggravating factor. The evidence did not establish intent to commit robbery or theft at the time of the murder. Although it is conceivable that appellant[9] murdered Mack in order to take her television set, necklace, and bracelet, a more reasonable inference is that there was a sexual motive for the murder, and the jewelry and television set were taken as an "afterthought" following the killing.

The standard of review is de novo. State v. Williams, 742 So.2d 509 (Fla. 1st DCA 1999). Furthermore, a conviction based on circumstantial evidence cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis which would negate an essential element of the crime. State v. Law, 559 So.2d 187 (Fla. 1989). Similarly, an aggravating factor based on circumstantial evidence "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992).

[9] For purposes of this argument, undersigned counsel will assume without conceding Durousseau's identity as the person who committed the murder.

This issue was preserved by appellant's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence. 34:2912-35:2922. The trial court instructed the jury on robbery as a predicate felony for felony-murder during the guilt phase of the trial and instructed the jury on robbery and pecuniary gain as aggravating factors during the penalty phase. In his sentencing order, the trial judge found the pecuniary gain aggravating factor,[10] stating:

> Witnesses testified that a television set and jewelry described as an "X's and O's" necklace with heart pendant and matching bracelet were missing. Scattered around her body on the bed where she was found were the contents of her pocketbook. In the "Williams Rule" murders, a small amount of property was missing from Ms. Kilpatrick's apartment, and money was missing from Ms. McCallister.
>
> The court does not find that pecuniary gain was the primary motive for this murder, and, therefore, assigns this factor little to moderate weight.

9:1586.

Robbery is the taking of money or property with the use of force, violence, assault, or putting in fear. See s. 812.13(1), Fla. Stat. (2007). While the taking of property after the use of force can sometimes establish a robbery, this Court has held that when the taking occurs as an "afterthought," as opposed to being the motive for the force or violence, robbery is not

[10] The trial judge found the felony murder aggravator based upon the jury's finding that the murder was committed during the course of a robbery and a sexual battery.

established. See Mahn v. State, 714 So.2d 391 (Fla. 1998); Knowles v. State, 632 So.2d 62 (Fla. 1993); Clark v. State, 609 So.2d 513 (Fla. 1992); Parker v. State, 458 So.2d 750 (Fla. 1984). The same analysis applies to the determination of whether the pecuniary gain aggravating factor is applicable. See Beasley v. State, 774 So.2d 649, 662 (Fla. 2000).

In Beasley, the Court explained:

> Where an "afterthought" argument is raised, the defendant's theory is carefully analyzed in light of the entire circumstances of the incident. If there is competent, substantial evidence to uphold the robbery conviction, and no other motive for the murder appears from the record, the robbery conviction will be upheld. Conversely, in those cases where the record discloses that, in committing the murder, the defendant apparently was motivated by some reason other than a desire to obtain the stolen valuable, a conviction for robbery (or the robbery aggravator) will not be upheld.

774 So.2d at 662 (citations omitted).

In Hill v. State, 549 So.2d 179 (Fla. 1989), the Court struck the pecuniary gain aggravator where the evidence suggested a sexual crime. There, the victim's body was found in the office where she worked. She was lying on her back with her clothes, including undergarments, removed or pulled down. She had been beaten and strangled, and her billfold containing money was missing. A coworker testified Hill had said he would rape and beat the victim if he had the chance. There also was evidence that Hill knew the victim had money and that Hill had

none. The Court concluded the murder could have been motivated by the defendant's desire to commit sexual battery. 549 So.2d at 183.

As in Hill, the record in the present case disclosed another apparent motivation for the killing. Furthermore, here, there was no indication that appellant wanted or needed the items taken after the murder. The victim was found nude from the waist down, her torn underwear beneath her. Her purse was on the bed, empty, as if it had been rifled through. Another purse, containing money, was found undisturbed in the bathroom. The only items missing were a matching necklace and bracelet, which she had been seen wearing earlier that day, and one of the three television sets in the apartment. As in Hill, the evidence suggested the motive for the crime was sexual and the jewelry and television were taken as an afterthought.

Furthermore, contrary to the trial judge's speculation, a pecuniary motive for the present murder cannot be inferred from the Kilpatrick and McCallister murders, as those murders occurred three and a half years after the present murder. Even if the later murders were motivated, in part, by a desire to obtain money or property or some other financial gain, that fact does not logically provide a basis for inferring that the earlier murder was motivated by financial gain.

The evidence was insufficient to prove a pecuniary motive for the murder beyond a reasonable doubt. It is at least as reasonable that the motive for the crime was sexual. The pecuniary gain aggravator therefore was improperly found.

Issue 3

THE TRIAL COURT FAILED TO PROPERLY FIND AND EVALUATE APPELLANT'S MENTAL MITIGATING EVIDENCE, BASING FACTUAL CONCLUSIONS ON THE COURT'S PERSONAL OPINIONS AND SPECULATION, AND REJECTING MITIGATING CIRCUMSTANCES WITHOUT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT ITS DECISION.

A trial court may reject a mitigating circumstance only if the record contains competent substantial evidence to support that rejection. Here, the evidence of appellant's mental illnesses and of both statutory mental mitigating circumstances was uncontroverted. However, the trial judge rejected the expert's opinion and based his decision on improper and unfounded speculation and his own personal opinions about psychiatry and behavior. Accordingly, it was error for the trial court to find that these mitigating circumstances were not established.

Mitigating circumstances need not be proved beyond a reasonable doubt but must be found if established by the "greater weight" of the evidence." Ferrell v. State, 653 So.2d 367 (Fla. 1995); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). Accordingly, whenever a reasonable quantum of competent,

uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So.2d 1059 (Fla. 1990). A trial court may reject a defendant's claim that a mitigating circumstance has been proved only if the record contains competent, substantial evidence to support the court's rejection. Id.; see also Cook v. State, 542 So.2d 964, 971 (Fla. 1989)(trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance).

Thus, when expert testimony and opinion support a mitigating circumstance, a trial judge can reject the testimony and opinion only where the record contains substantial competent evidence to refute it. See Coday v. State, 946 So.2d 988 (Fla. 2007); Walls v. State, 641 So.2d 381 (Fla. 1994); Nibert. A sentencing judge therefore may reject expert testimony when it cannot be reconciled with other evidence in the case. Coday. However, a judge cannot reject expert opinion based on the judge's personal opinion or lay experience. See Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993); Jackson v. Dade County School Board, 454 So.2d 765 (Fla. 1st DCA 1984).

A. THE TRIAL COURT ERRED IN REJECTING THE UNREFUTED OPINION OF THE MENTAL HEALTH EXPERT THAT DUROUSSEAU SUFFERS FROM SYMPTOMS OF BIPOLAR DISORDER.

The trial court rejected the testimony and opinion of Dr. Lewis, claiming: (1) lay witnesses' descriptions of appellant "are not consistent with Dr. Lewis' information, nor indicative, from a layperson's viewpoint, of a person with a mood disorder." 9:1602, and (2) "the Court finds Dr. Lewis' conclusion that [appellant's grandiose opinion of his own persona] is indicative of a person in a manic state is highly improbable." 9:1602.

These reasons are not supported by competent substantial evidence in the record but are based rather on speculation and the trial judge's personal views of mental illness and behavior.

As for the first reason, the trial judge concluded that Dr. Lewis' information that as a child Durousseau was "kind of difficult to manage" was inconsistent with the testimony of Delores Sheen that Durousseau caused no problems at the Sheenway school and the testimony of various friends and family that as a child, Durousseau was nice and always willing to help; respectful, courteous, and polite; avoided fights because he was "shy and meek;" was the "easiest going of all of us" and never did "anything out of line;" and was "even-keeled." 9:1602.

Contrary to the trial court's conclusion, the lay testimony referenced by the trial court is not inconsistent with Dr. Lewis' information. Dr. Lewis testified the evidence of manic

symptoms during childhood included "fooling around, being kind of difficult to manage, a lot of risk taking, talking out in class and just talking and talking and talking and not being able to shut up." Dr. Lewis testified that Durousseau's mother also reported he was just "going and going and going," resulting in injuries and accidents, which is a sign of manic behavior. 38:3580-3581. Dr. Lewis did not testify nor did her testimony imply or suggest that she received information that Durousseau was impolite, not nice, or disrespectful. There is nothing in the record, nor does the trial judge refer to anything in the record, that suggests a child who sometimes exhibits manic symptoms cannot also be respectful, polite, and helpful to others. Regarding Ms. Sheen's testimony that she never had to discipline him, we don't even know when appellant attended Sheenway or for how long.[11] Furthermore, that Ms. Sheen didn't discipline Durousseau when he was at her school does not contradict his mother's report that *at times* he "talked and talked and talked and would not shut up." In addition, Durousseau's mother was not asked during the penalty phase about her son's risk-taking behavior, talking and talking, or other

[11] The trial judge noted in his sentencing order that Ms. Sheen's testimony that appellant attended the Sheenway Center from 1985 to 1987 conflicts with the school record admitted into evidence that shows appellant attended Gompers Junior High in 1985 and Gompers High School in 1986.

manic-type behavior. Nor were any other lay witnesses questioned about manic behavior. The trial judge acknowledged that he "may not have received the identical information regarding Defendant's history that was received by Dr. Lewis." The trial judge also stated later in his order that he considered Dr. Lewis' opinion that people with bipolar mood disorder sometimes appear normal, which could explain why the observations of Durousseau's family and friends differ from Dr. Lewis' description. 9:1606. The lay witness testimony is not contradictory evidence and the trial court erred in concluding that it was.

In concluding that the lay witnesses' descriptions of Durousseau are not "indicative, from a layperson's viewpoint, of a person with a mood disorder," the trial judge has merely substituted his own lay opinion for that of the mental health expert. A trial judge is not free to reject an expert's opinion based upon the judge's personal lay opinions. Alamo Rent-A-Car.

The trial court's second reason suffers from the same problem. In rejecting Dr. Lewis' opinion that Durousseau displayed grandiosity, as indicated by his statement that "he is irresistible to women," the trial judge found this conclusion "highly improbable" because "[r]egardless of his opinion about himself, the evidence established that there were women who are attracted to him, or at least willing to have sexual relations

with him, which might form a basis for his own conclusions." 9:1602. The trial judge later concluded, with no additional explanation, that he did not find "sufficient factual support in the record" to accept Dr. Lewis' opinion that Durousseau has Bipolar Disorder.[12] 9:1609.

In concluding that Durousseau's belief that he is irresistible to women is logical, rather then grandiose, and that his history of hypersexuality and indiscriminate sexual encounters represent merely an "active sex life" rather symptoms of a mental disorder, the trial judge was himself acting as an expert and has employed his own personal views about behavior which contradict established psychiatric principles upon which the experts base their opinions.[13]

A trial judge is not free to reject an expert's opinion for his own opinions, which in turn contradict the established principles of the expert's field. In Alamo Rent-A-Car, the First District Court of Appeal reversed a decision of a Judge of

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[12] Dr. Lewis did not diagnose Durousseau with Bipolar Disorder. She diagnosed him with Schizoaffective Disorder because he has symptoms of Bipolar Disorder and of a thought disorder.

[13] The diagnostic criteria for manic and hypomanic episodes include inflated self-esteem, or grandiosity, and excessive involvement in pleasurable activities that have a high potential for painful consequences, such as sexual indiscretions. See DSM-IV, pp. 357-362, 365-368. Increased sexual drive is common, and grandiosity may lead to imprudent involvement in sexual behaviors such as infidelity or indiscriminate sexual encounters with strangers. Id. at 358, 366.

Compensation Claims where the judge rejected the opinion of a medical doctor that the claimant's streptococcal pneumonia would not be aggravated by cold or wet conditions. The judge rejected the opinion stating, "I know better from personal experience." Id. at 57. Concluding that the claims judge impermissibly relied on personal opinion to reject the medical doctor's opinion, the appellate court reversed, stating:

> Moreover, there is another reason why the JCC's findings must be rejected. The JCC appears to have impermissibly relied on his personal experience to conclude that claimant's pneumonia was aggravated by his working conditions. The question whether claimant's pneumonia was caused by or aggravated his working condition is essentially a medical one which is most persuasively answered on the basis of the medical evidence provided, rather than a matter falling within the sensory experience of a lay person.

613 So.2d at 58 (citations omitted).

In the present case, the question whether appellant exhibits grandiosity and other manic symptoms is a psychiatric one. Dr. Lewis' opinion was unequivocal and not refuted. The state did not offer any expert witnesses to refute her testimony. The state did not even challenge Dr. Lewis' opinion during cross-examination or in closing argument to the jury. There is no evidence that contradicts Dr. Lewis' opinion that Durousseau suffers from the symptoms of Bipolar Disorder. The

trial court's decision rejecting the testimony and opinion of Dr. Lewis is not supported by substantial, competent evidence.

B. THE TRIAL COURT ERRED IN REJECTING THE TESTIMONY AND OPINION OF DR. LEWIS THAT DUROUSSEAU HAS A PSYCHOTIC DISORDER AND PERVASIVE PARANOIA SUPPORTING THE DIAGNOSIS OF SCHIZOAFFECTIVE DISORDER.

In rejecting Dr. Lewis's opinion, the trial judge stated:

> Dr. Lewis gave two examples of the Defendant exhibiting signs of what she described as psychotic behavior. The first occurred around 1992 in Oklahoma, where during basic training in the Army, the Defendant was involved in a outdoor exercise in freezing temperatures. There, he refused to sleep inside of his sleeping bag, choosing instead to sleep outside of the bag, despite the bitter cold. The Defendant failed to give an explanation for this behavior, and Dr. Lewis determined it to be psychotic behavior.
>
> The Court agrees that [Defendant's choosing to sleep outside in the bitter cold] is certainly bizarre behavior. However, the Defendant was then in basic training at the beginning of his military career. He remained in the Army about five more years. He received a bad conduct discharge. He did not receive a medical or mental health discharge. There were no other psychotic episodes mentioned by Dr. Lewis in her testimony from this period until her interview with the Defendant in 2006, which covers a span of approximately fourteen years.
>
> After 20 to 30 hours of interviewing the Defendant, Dr. Lewis concluded that the Defendant has "pervasive paranoia." She referred to the Defendant's claim that he hears people talking behind his back all the time, when he turns around and confronts these people, they deny it. This is the second example she identified as being psychotic behavior. The Court accepts that hearing voices, when there are no voices,

> to be a sign of paranoia. However, this defendant has been in Duval County Jail since the early part of 2003. During most of his incarceration he was charged by indictment with the murder of several different women. His case has received extensive publicity. He has a distinctive appearance. He is six feet six inches tall, thin, and angular, with a protruding Adam's apple, making him easily identifiable. In short, it is certainly possible that people are talking about this defendant behind his back; and that they might deny it if confronted by him. His belief that people are possibly talking about him does not seem to this court to be illogical or based upon an irrational thought process. Of course, if he hears voices, when there are none, this would be evidence of paranoia. However, as he readily admitted during the guilt phase, he is not always truthful.

9:1603-1604.

In concluding that Durousseau's belief that people are talking behind his back all the time is logical rather than a symptom of a psychiatric illness, the trial judge has again substituted his own lay opinion for that of the expert. The trial judge has pointed to no evidence in the record that controverts Dr. Lewis's opinion. Notably, the state did not impeach the credibility of Dr. Lewis--the state did not even challenge her diagnosis of Schizoaffective Disorder—-nor offer a mental health expert of its own in rebuttal.

Later in the order, the trial judge stated:

> The Court has also carefully reviewed the Defendant's entire testimony at the trial. Despite Dr. Lewis' description that his thought process is

> extremely disjointed and illogical, his answers to questions were always responsive, notwithstanding that they also often lacked credibility. There were no exchanges in which it appeared that the Defendant was irrational, confused, illogical, or disjointed in his thinking.

9:1607.

The judge concluded, with no further explanation:

> The Court does not find sufficient factual support in the record to accept Dr. Lewis' other opinions that the Defendant has other mental illnesses, such as . . . schizoaffective disorder manifested by psychotic behaviors like paranoia.

9:1609.

Again, the trial judge has substituted his own lay opinion for that of Dr. Lewis. When asked whether someone with Durousseau's constellation of problems "could sit here and be interested and listen to what people are saying, and even take the stand and testify," Dr. Lewis responded, "It depends. I don't think you can generalize." 38:3597-3598. The evidence at trial therefore does not support the trial judge's conclusion that symptoms of the thought disorder that Dr. Lewis identified in Durousseau--disorganized thinking, etc.--would be apparent from observing his trial testimony. Trial testimony, like police interrogations, involve specific fact-based questions regarding what the individual did at a specific time and place and does not typically require the person to demonstrate higher

order thinking or even give a narrative, which might reveal disjointed or illogical thought processes. Persons with mental illnesses may appear more or less mentally healthy when answering simple, direct questions, as opposed to when they are questioned and tested at length by skilled experts.

The record contains no competent substantial evidence to support the trial judge's rejection of Dr. Lewis' testimony and opinion that he suffers from Schizoaffective Disorder. Accordingly, it was error for the trial court to find that this mitigating circumstance was not established. See Nibert; Coday.

C. THE TRIAL COURT ERRED IN REJECTING THE MENTAL MITIGATING CIRCUMSTANCES THAT APPELLANT COMMITTED THE CRIMES WHILE UNDER EXTREME EMOTIONAL OR MENTAL DISTRESS AND WHILE HIS CAPACITY TO CONFORM HIS CONDUCT TO THE LAW OR CONTROL HIS BEHAVIOR WAS SUBSTANTIALLY IMPAIRED.

In rejecting the two mental mitigating circumstances, the trial judge gave a number of reasons: (1) other than the evidence of this murder (and the Williams Rule murders), the sleeping bag incident, and his "recent claim" that he hears voices of people talking behind his back, appellant's remission covers all of his life, 9:1605; (2) Durousseau was not diagnosed with mental illness until Dr. Lewis and Dr. Pincus examined him, and no medical, school, or military records (aside from the sleeping bag incident) indicated concern about his mental health, 9:1605-1606; (3) appellant is not mentally ill; he is manipulative, devious, and crafty, and his numerous sexual

relationships--20 different women between 1999 and 2002--indicate "a certain degree of charm not often associated with individuals who have severe brain damage," 9:1606; (4) appellant was not nervous when he spoke to police, which "should have been an extraordinarily stressful situation," 9:1607; and (5) appellant used words like "clientele," "anonymous," "silhouette," "petite;" he said he read all of the depositions and most of the reports in the case; and his testimony indicated an "ability to think quickly," an ability not often associated with people who have severe brain damage. 9:1608.

As to reason one, that other than a few incidents, appellant has been in remission his whole life, the trial judge has misapprehended Dr. Lewis' testimony. Dr. Lewis diagnosed appellant with Schizoaffective Disorder, which includes symptoms of a thought (psychotic) disorder plus symptoms of an affective, or mood, disorder. The affective part includes symptoms of Bipolar Disorder, which are sometimes in remission. The thought disorder, on the other hand, including paranoia and disjointed and illogical thought processes is present all the time. The severe brain damage, also there all the time, impairs his ability to control urges and impulses. 38:3599-3600.

As for reason two--because Durousseau was only recently diagnosed means he must not be mentally ill--where is the evidence to support such an inference? How many mentally ill,

brain damaged individuals are not diagnosed until they commit a violent act, especially individuals who, like appellant, come from extremely impoverished backgrounds?[14]

As for reason three, that appellant is merely crafty and "charming," the trial judge's conclusion is based on the judge's lay opinion about mental illness, brain damage, and behavior. What the trial judge views as "devious" and "crafty" may in fact be symptomatic of mental illness. Dr. Lewis testified that Durousseau's hypersexuality and grandiosity about his personal persona are symptoms of his mental illness. Dr. Lewis' diagnosis was unrebutted and is consistent with established principles of psychiatry, as discussed above. The trial judge's contrary conclusion is not supported by any evidence in the record.

As for reason four, that appellant did not appear nervous when talking to the police, the court does not explain the relevance of Durousseau's demeanor with police to his mental condition at the time of the murders. Nor is there any record evidence establishing any connection between the two. There is no evidence in the record to support the trial judge's

[14] There is no evidence appellant saw a medical doctor before age 16, and even then, although tests indicated he was severely anemic, he was never treated for that disorder. Nor was he diagnosed with hypothyroidism until he went to jail, despite obvious signs that something was wrong.

conclusion that talking to police should have been a stressful situation *to* Durousseau. Is the trial judge saying it should have been stressful for a mentally healthy individual? Or, is he saying it should have been stressful for someone who is brain-damaged, mentally ill, and borderline retarded, like appellant? The trial judge once again has based a conclusion on his own personal opinion.

As for reason five, that appellant's vocabulary and ability to lie on the stand (assuming arguendo that he lied) are inconsistent with severe brain damage, the trial judge again has substituted his own opinion about brain damage for that of the expert. The only evidence on this point was Dr. Lewis's testimony that someone with brain damage may or may not be able to play cards, take the stand and testify, etc, that it depends on the person. Furthermore, the aspect of Durousseau's brain damage that Dr. Lewis related to the murder was the damage to his frontal lobes, which impairs his ability to control his behavior, i.e., suppress or rein in instinctual reactions.

The trial judge then stated that he accepted Dr. Lewis' conclusions about the existence of Durousseau's brain damage and low intellectual functioning but rejected Dr. Lewis' diagnosis of any other mental illnesses and rejected her opinion that both statutory mental mitigators existed. 9:1608-1609.

The trial court's rejection of the mental mitigating circumstances is not supported by competent substantial evidence. Asked whether Durousseau's ability to conform his conduct to the requirements of law was substantially impaired at the time of the murder, Dr. Lewis's response was an unequivocal "yes." When asked why, she stated:

> Because, to the best of our ability to trace back his history, um, he has been suffering from brain damage, which is extremely important, particularly frontal lobe dysfunction, [] since early childhood. And he has psychotic disturbances, particularly manifested by paranoia, in which he can misperceive reality, and because his frontal lobes are damaged, he cannot suppress a – an instinctual reaction to something. Ah, and, therefore, he was impaired then, and he has been impaired, I believe, for many years.

38:3599-3600. Asked whether he was under extreme mental or emotional disturbance at the time he killed Mack, Dr. Lewis responded,

> Yes, he suffered -- I think that's an understatement, he suffered from severe psychiatric illness and brain damage that impaired his ability to control his behavior.

38:3600. Although Dr. Lewis did not offer details from the murder to support her conclusions, *she was not asked to do so*. The state did not challenge her opinion, impeach her credibility, or offer a mental health expert of its own in response. While an expert's uncontroverted opinion may be

rejected, this Court has always required that rejection to have a rational basis, such as conflict with other evidence, credibility, or impeachment of the witness. Coday, 946 So.2d at 988. None of those reasons are present here. The judge's rejection of the expert testimony and opinion that both mental mitigators existed at the time of the murder has no basis in the record but was based rather on personal opinion and speculation. The trial judge abused his discretion in rejecting the statutory mental mitigators.

Issue 4

THE EVIDENCE WAS INSUFFICIENT TO PROVE DUROUSSEAU KILLED TYRESA MACK.

The state's evidence was insufficient to establish beyond a reasonable doubt that Durousseau was the person who killed Mack. The state proved only that Durousseau had sex with Mack. Accordingly, Durousseau's conviction must be vacated.

This issue was preserved by appellant's motion for judgment of acquittal at the close of the state's evidence and at the close of all the evidence. 30:2117, 35:2922.

The standard of review is de novo. State v. Williams, 742 So.2d 509 (Fla. 1st DCA 1999). Furthermore, a conviction based on circumstantial evidence cannot be sustained, no matter how strongly the evidence suggests guilt, unless the evidence is inconsistent with any reasonable hypothesis of innocence.

McArthur v. State, 351 So.2d 972, 976 (Fla. 1977). It is not enough if the facts suggest merely "a strong probability of guilt." Owen v. State, 432 So.2d 579, 581 (Fla. 2d DCA 1983).

As argued in Issue I, supra, the Williams rule murders should not have been admitted because the connection to Durousseau was too tenuous and the similarities too general for those murders to be relevant to prove Durousseau was the perpetrator in the Mack case. Absent the Williams rule evidence, the only evidence of Durousseau's guilt of the murder is the evidence that he had sex with her the day she was killed. This clearly is insufficient to establish that he killed her. Someone else could have killed her after he had sex with her. And even if the Williams rule evidence was properly admitted, it doesn't tend to show he killed Mack because the similarities are too general and there are no unique identifiers to prove that the person who killed Kilpatrick and McCallister also killed Mack.

Durousseau testified he had sex with Mack between 12:30 and 1:30 on the day she was killed, during his lunch break. He testified he had sex with Kilpatrick two days before her body was found and left when another man, who said he was the father of her children, showed up. He testified he was with McCallister the night she was killed, and while he was there, McCallister's boyfriend tried to enter the apartment through a

window. McCallister told him to leave and come back later. Durousseau left, returned shortly afterwards to check on McCallister, and found her dead.

The state presented no evidence contradicting Durousseau's testimony. Others, too, were present at about the time of the deaths of both collateral crime victims. Accordingly, the state has not established beyond a reasonable doubt that Durousseau killed Tyresa Mack. Durousseau's conviction cannot stand.

Issue 5

THE TRIAL COURT ERRED IN SENTENCING DUROUSSEAU TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Durousseau's pretrial Motion to Declare Florida's Capital Sentencing Statute Unconstitutional under Ring v. Arizona. 4:714. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context.

Section 921.141, Florida Statutes (2003), does not provide for such jury determinations.

Durousseau acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla.); cert. denied, 123 S.Ct. 662 (2002); King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002).

Additionally, Durousseau is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005) (including footnotes 4 & 4, and cases cited therein); Steele. At this time, Durousseau asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Durousseau's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1, reverse appellant's murder conviction for a new trial; Issue 2, vacate appellant's death sentence and reverse for a new penalty phase proceeding; Issue 3, reverse for resentencing by the trial judge; Issue 4, vacate appellant's murder conviction; Issue 5, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

NADA M. CAREY
Assistant Public Defender
Florida Bar No. **0648825**
Leon County Courthouse
301 South Monroe Street, Suite 401
Tallahassee, FL 32301
(850) 606-8500
nadaC@leoncountyfl.gov
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **STEPHEN R. WHITE,** Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to **PAUL DUROUSSEAU**, #J189087, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, March 09, 2009.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

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NADA M. CAREY
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

PAUL DUROUSSEAU,

Petitioner,

v. **CASE NO. SC08-68**
L.T. CASE NO. 03-CF-10182

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX TO INITIAL BRIEF OF APELLANT

APPENDIX	DOCUMENT
A	Sentencing Order
B	Memorandum in Support of Defendant's Motion to Exclude Similar Fact Evidence
C	State's Memorandum of Law in Opposition To Defendant's Amended Motion in Limine To Prohibit Alleged Similar Fact Evidence
D	Stipulation of Facts for "Similar Fact Evidence" Hearing