IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-976
Lower Tribunal No.: 2006-CF-2999-A-W

RENALDO DEVON McGIRTH
Appellant,

v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the initial, direct appeal of a final judgment imposing a sentence of death pursuant to Art. V, § 3 (b) (1), Fla. Const.

References to the record on appeal are made with the letter "R," followed by the record volume number, followed by a "p," followed by the volume page number or numbers. For ease of reading, the Appellant is referred to variously as "Defendant" and "Appellant" and "McGirth." Appellant had two Codefendants.

They are referred to by their last names of "Houston" and "Roberts," respectively. There are three victims in this case: husband James Miller, his wife Diana Miller, and their daughter Sheila Miller. For brevity, they are referred to as "Mr. Miller," "Mrs. Miller, " and "Sheila." The words "State" and "prosecution" are used synonymously and interchangeably.

STATEMENT OF THE CASE AND FACTS

A. Police Investigation

Officer R. Stroup of the Marion County Sheriff's Office executed the "probable cause" affidavit that preceded Appellant Renaldo McGirth's arrest and indictment. It provides a good overview of the evidence that the State later presented at trial. Officer Stroup alleged that Renaldo McGirth was one of a trio of young, black men who entered the home shared by Mr. and Mrs. Miller and their daughter Sheila on July 21, 2006.

The Miller home was in the "Villages" community of Ocala. R34, p. 7. This is a secure, gated community. R34, p. 1610-1611. The three assailants had been acquainted with Sheila. R1, p. 7. After she invited them into the family home, they robbed and shot Mr. and Mrs. Miller. They departed in the family's red Ford van, taking Sheila and her parents' bank cards and credit cards with

them. R1, p. 7. A subsequent credit card purchase put police on the trail of the assailants.

A "be-on-the-lookout" dispatch went out over the police radio. A patrol officer heard the dispatch and spotted the Miller family van at a convenience store. He pulled the van over. The van driver initially obeyed and stopped. However, moments later, the driver returned to the roadway and sped away. A high-speed chase ensued. In the end, the van crashed and rolled over. The police apprehended McGirth, Roberts and Houston near the crash site. R1, p. 7. Sheila was injured. The police caught up with her later at Munroe Regional Medical Center. R1, p. 8.

Sheila confirmed to the police that she knew the assailants and had invited them into her family's home. R1, p. 8. She told police that the assailants taped her mouth shut shortly after they entered the home. She said that McGirth pointed a gun at Mrs. Miller. He demanded cash and credit cards and eventually shot Mrs. Miller in the chest. R1, p. 8. The assailants forced family members to move about inside the house. R1, p. 7-9. Sheila said that the assailants made her father lie down on the floor.

Mr. Miller also talked to the police. He told them that the assailants shot

him in the head while he was lying on the floor. R1, p. 7.

Sheila told police that the assailants forced her to make some purchases over the Internet, using her parents' credit cards on the family computer. She described how the assailants placed her in the family van and transported her to some retail stores where they attempted to make purchases with Mr. and Mrs. Miller's bank and credit cards. R1, p. 8-9. Sheila told police about the high-speed vehicular chase. She told police that while the assailants had her in the family van and were fleeing the police, McGirth gave Houston a gun and instructed Houston to kill her. R1, p. 9.

Following the police chase, the three assailants were quickly caught and held in police custody. The police attempted to interview all of them. Appellant McGirth and Co-Defendant Roberts declined to speak. Codefendant Houston did speak and gave the police his version of who did what in the subject crimes. R1, p. 9-10.

Sheila Miller later learned that her mother, Mrs. Miller, had been shot and killed in the incident.

On August 9, 2006, McGirth was indicted on one count of first degree murder with a firearm of Mrs. Miller, one count of attempted first degree murder

with a firearm of Mr. Miller, one count of robbery with a firearm of Mr. and Mrs. Miller, one count of kidnaping with a firearm of Sheila, and one count of felony fleeing or attempting to elude a law enforcement officer. R1, p. 1-4. The indictment contains similar allegations against Houston and Roberts. R1, p. 1-4.

At the time of the crimes, McGirth was just 3 months beyond his 18th birthday. Roberts was 20. Houston, the only minor of the trio, was 17. R1, p. 1-4. Sheila Miller was 40. R24, p. 1579.

B. High-Publicity Case

The jury trial was held at the Marion County Courthouse, the Honorable Judge Brian D. Lambert presiding. Judge Lambert would later say that this was the longest trial he ever presided over. R. 47. P. 3521-3522. It was a high-publicity case. Judge Lambert referred to it "The Villages murder trial." R. 24, p. 29. However, Judge Lambert went to great lengths to obtain a jury that was fair and unaffected by all of the news coverage, publicity and talk. Judge Lambert ordered three separate, 50-person panels of prospective jurors to assure that there would be sufficient jurors left over after all the media-exposed and biased jurors were eliminated and after all the peremptory challenges were exercised. R. 24, p. 23, 47-48. It is noteworthy that Jury selection consumes most

of Volumes 24 through 36 of the record on appeal. Some prospective jurors confirmed that they read or heard or viewed things about the case. However, careful review of the jury-selection transcripts has not revealed a single instance of a juror being seated who was not capable of setting aside all impressions or opinions and rendering a fair verdict based solely on the evidence presented in court. Irwin v. Dowd, 366 U.S. 717 (1961), Davis v. State, 461 So.2d 67 (Fla. 1984), Pietri v. State, 644 So.2d 1347.

At one point during jury selection, a prospective juror told his fellow prospective jurors that he knew of Appellant McGirth from his former employment at the Florida Department of Juvenile Justice. Upon learning of this, Judge Lambert struck the entire, 50-person panel. R28, p. 634; R 29, p. 811. Judge Lambert continued to go to great lengths to assure that subsequent prospective jurors were not adversely affected by information about the Department of Juvenile Justice or the dismissal of a 50-person jury panel, or anything else that might cause prejudice. R31, p. 1216, 1331; R32, p. 1492.

Judge Lambert continued questioning the jurors periodically throughout the trial to assure they had not been exposed to non-trial information about the crimes, the Defendants or the case. R35, p. 1696; R36, p. 1917; R39, p. 2409; R42, p.

2888; R46, p. 3185; R46, p. 3317-3336. It is not error to deny motions to change venue or strike a jury which are based on risk of exposure to improper information unless it is shown that the jurors ultimately seated received and became biased by improper information. Walding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983), Overton v. State, 757 So.2d 537 (Fla. 3d DCA 2000).

In its guilt-phase opening argument, the State admitted that the victims' daughter, Sheila Miller, was not kidnaped. R34, p. 1544. The State added that Sheila Miller was "ostensibly" taken against her will. R34, P. 1546. The State conceded that Houston and Roberts and Sheila Miller knew each other before the subject crimes. The State admitted that Houston pled guilty to second degree murder in exchange for a sentence in the range of 25-40 years. R34, p. 1544. The defense reserved its opening argument until after the presentation of the State's case in chief.

The State called forty separate guilt-phase witnesses. The trial transcripts are extremely voluminous. Fortunately, the issues in this appeal can be fully presented, understood, argued, and adjudicated with reference to less than all of the testimony.

C. Testimony of Neighbor Patricia Murawski

Patricia Murawski was a neighbor of James and Diana Miller. R34, p. 1556-1557. At approximately 1:30 p.m. in the afternoon of July 21, 2006 James Miller approached her excitedly. He asked her to call 911 because his wife had been shot. R34, p. 1562. Ms. Murawski observed a bloody wound in the back of Mr. Miller's head. She applied paper towels to stanch the bleeding. Mr. Miller exclaimed, " . . . they were robbing us. . . there are three black men . . ." R34, p. 1569-1570.

D. Testimony of Mr. Miller

Mr. Miller Testified. He said that he and Mrs. Miller only had one child: Sheila. Mr. Miller testified that Sheila was an alcoholic and a drug abuser. R34, p. 1578-1579. Sheila Miller, now 40 years of age, never finished college. She had always been completely dependent upon her parents. R34, p. 1578- 1579. Mr. and Mrs. Miller provided Sheila with money and a house. R34, p. 1579. They paid for her to go through drug rehabilitation, without success. R34, p. 1622. Sheila had stolen money from her parents in the past. R34, p. 2626. However, if Mr. and Mrs. Miller were to die, Sheila stood to inherit their entire estate. The estate was valued at three to four million dollars. R34, p. 1621.

According to Mr. Miller, Sheila's dependence upon Mr. and Mrs. Miller was a constant source of friction. Mrs. Miller wanted to give Sheila everything;

Mr. Miller wanted to give her nothing. R 34, p. 1579-1580. Sheila had recently been injured in a car accident which left her confined to a wheelchair. R34, p. 1582.

In the afternoon of July 21, 2006, some young men came to the Millers' house. R34, p. 1582. Sheila answered the door in her wheelchair. One of the men embraced her. R34, p. 1583. Mr. Miller excused himself to take a shower while Sheila visited with the men. Mr. Miller finished his shower and walked into the master bedroom. One of Sheila's house guests grabbed Mr. Miller and dragged him forcefully into Sheila Miller's bedroom. That man had a silver pistol. Mrs. Miller was on Sheila Miller's bed, covered in blood. R34, p. 1584-1586. Mrs. Miller told Mr. Miller not to worry because she "could handle it." R. 34, p. 1586. The man who grabbed Mr. Miller forced Mr. Miller do lie on the floor of Sheila's bedroom. R34, p. 1586-1587.

At the time he gave his courtroom testimony, Mr. Miller was 70 years old. R34, p. 1756. He had a hearing impairment and could not hear everything that occurred during the crimes. R34, p. 1587. He also admitted that he could not identify the assailants at trial. R34, p. 1584.

While Mr. Miller was lying on the floor of his daughter's bedroom, one of the assailants had their foot on his neck, pinning him to the floor. R34, p. 1588.

Nevertheless, Mr. Miller perceived other assailants moving his daughter into a different room. One of the family dogs entered Sheila's bedroom. Mr. Miller's captor threatened to shoot the dog it continued to bark. Mr. Miller hushed the dog. R34, p.1587-1590.

After five to ten minutes, Sheila was brought back into her bedroom. At this time, Mr. Miller felt his wife's body at his feet. He perceived the flash and sound of a gun. He felt something in his head. It is noteworthy that the State Medical Examiner testified at trial that the bullet was removed from Mr. Miller's head and preserved as evidence. R39, p. 2363, 2381 Obviously, Mr. Miller survived to testify at Appellant's trial. He did not lose consciousness. R34, p. 1588-1589. He then heard the assailants shoot Mrs. Miller a second time. Mr. Miller escaped out the bedroom window and went straight to neighbor Pat Murawski's house. R34, p. 1593. Mr. Miller did not see Sheila during any of the ordeal. R 34, p. 1621.

When the police and paramedics arrived, Mrs. Miller was still breathing but was otherwise unresponsive. R34, p. 1633, 1622. She had two puncture wounds. R34, p. 1668. She died en route to the hospital. R34, p. 1668-1669.

When Mr. Miller returned to the house, he discovered that his wallet was missing and five hundred dollars had been withdrawn from his bank account. Mr.

Miller described the Miller family van to the police. R34, p. 1604-1606. Sheila knew where Mr. Miller kept the van keys and his wallet. R34, p. 1624.

Using personal identification information provided by Mr. Miller and his bank, police soon received information that his credit cards and bank cards were being used in some nearby retail stores. R34, p. 1681,1682. Such card usage– and the police investigation related to such card usage– eventually yielded surveillance videos of the assailants driving and rolling the wheelchair-bound Sheila through a series of bank ATM machines and retail establishments. R35, p. 1703-1704.

An employee of a shopping mall remembered seeing a wheelchair-bound white female accompanied by black males heading toward a shopping mall ATM machine. R35, p. 1702. This employee testified that the female appeared drugged and possibly asleep. A jewelry store owner testified to seeing the same people in his jewelry store. R35, p. 1713-1717. Jewelry store video recordings containing images of the wheelchair-confined Sheila and the black males with her were turned over to police. R35, p. 1707-1712. A loss-prevention manager from a Lowes home-improvement store turned over similar surveillance video recordings. R35, p. 1719-1722. None of the surveillance video recordings showed Sheila attempting to escape or summon help.

E. Testimony of Sheila Miller

Sheila testified at Appellant's trial. She confirmed all of the things that her father had said about her substance-abuse problems and her dependence on her parents. R 35, p. 1732-1740. She admitted that she was a convicted felon. R35, p. 1792. Over the Objection of McGirth's attorney, the court allowed Sheila to testify that she and McGirth had a longstanding relationship based on drugs. McGirth supplied her with cocaine and marijuana. McGirth even furnished Sheila and a boyfriend of Sheila's with drugs to distribute to others. R35, p. 1813-1820.

Sheila admitted that she gave the assailants admission into the Villages and directions to the Miller family home. 2006. R 35, p. 1741-1742. She was familiar with two of the three. She knew Defendant McGirth by his nickname of "Pooney" and she knew Codefendant Houston by his nickname of "Bro." R 35, p. 1742-1744. Sheila was able to identify the third guest, Roberts, in Court, but could not remember his name. R35, p. 1744-1745.

Sheila and McGirth had been good friends in the past. R35, p. 1748. Mr. And Mrs. Miller would not allow Sheila to smoke anywhere but in her bedroom. Therefore, Sheila invited her three guests into her bedroom. Once there, McGirth told Houston to reach into a bag and give Sheila her gift. Houston pulled out a roll of duct tape. McGirth pointed a silver pistol at Sheila and admonished her to cooperate so that no one would get hurt. Sheila told him to stop joking. He

replied, " . . . this is for real." R35, p. 1749-1751.

After silencing and subduing Sheila by duct-taping her mouth and hands, one of the assailants called for Mrs. Miller. She entered Sheila's bedroom. McGirth pushed her on the bed. Sheila told Mrs. Miller to give McGirth all of her money and possessions. Mrs. Miller responded that she had only $70 in her possession because she had just purchased a new house for Sheila. R35, p. 1752-1753. McGirth replied that Mrs. Miller must have money because she lived in the Villages. Roberts then entered Sheila's bedroom with Mr. and Mrs. Millers' Wallets and car keys and handed them to McGirth. R35, p. 1754.

Sheila's statement about what happened next is very important. According to Sheila, Mrs Miller said that she would get the money. Mrs. Miller *raised her hands*, and rose to go to the bedroom door. McGirth, *who was standing at the bedroom door*, shot Mrs. Miller at point-blank range.

The bullet left a hole in Mrs. Miller's shirt. She coughed up blood and asked that 911 be called because she had been shot in the heart. R35, p. 1755. This is the only gunshot that Sheila was aware of. R35, p. 1800. She recalled seeing Houston picking up one spent shell casings. She did not know if there were any more. R35, p. 1800. Sheila saw McGirth shoot her mother. R35, p. 1849. She did not see Roberts shoot her mother. R35.

McGirth then wheeled Sheila into the bathroom and held the gun to her head. He warned her to "shut up" or he would "take care of" her. He did this because she was crying. She could not stop crying. Mrs. Miller told Sheila that she was all right and not to worry. R35, p. 1755-1756. While in the bathroom, Sheila could see and hear the assailants moving her mother. They moved Mrs. Miller into the computer room. McGirth commanded Mrs. Miller to order some telephones over the Internet. Mrs. Miller responded that she did not know how to. While this was occurring, Sheila could hear Houston ransacking the house. She also heard McGirth admonish Houston to wipe everything off so that there would be no fingerprints. Houston got Mrs. Miller a bottle of water. R35, p.1758-1759. Sheila chewed the duct tape off her hands and mouth and threw it into the bath tub. McGirth then wheeled Sheila from the bathroom to the computer room. Her mother was still conscious. R35, p.1760-1761

Sheila searched the Internet for the "Nextel" or "Boost" brand of phones that the assailants wanted. R35, p. 1763-1764. Next, with McGirth holding a gun to her head, Sheila called the 411 information operator and asked for the Nextel telephone number in an effort to order the desired Boost phones by telephone. When this proved unavailing, McGirth said that they would purchase the phones at the store instead. R35, p. 1764. The assailants told Sheila that they were going

to take her out of the house to get money using a bank card. Mrs. Miller begged the assailants to take her instead of Sheila. All of this occurred in the computer room of the Millers' house. R35, p. 1764.

Mr. Miller, who was in poor health and depended upon Mrs. Miller for help, had been in the shower during most of this. While Sheila was in the computer room, McGirth ordered Roberts to get Mr. Miller. Sheila recalled Roberts walking Mr. Miller into her bedroom and commanding him to lie on the floor. Mr. Miller indicated he needed to go to the bathroom. Sheila and Mrs. Miller begged the assailants to let Mr. Miller go because he had urinary problems. They allowed him to go to the bathroom. The assailants also had Mr. Miller move the family dog into his own bedroom because they were afraid of it. Mrs. Miller was laid down on the floor. She told Sheila to do what the assailants ordered and not worry. R35, p. 1765-1766.

The assailants took Mr. Miller back to Sheila's bedroom and ordered him back on the floor. R35, p. 1767. Houston wheeled Sheila from the computer room to the living room. 1768. McGirth told Houston to put Sheila in the Miller family van. R35, p. 1767-1768. When Houston had trouble pushing Sheila's wheelchair out the front door of the house, McGirth took over and wheeled Sheila to the van. Roberts lifted Sheila out of the wheelchair and placed her in the van.

Next, he put he put wheelchair in the back of the van and turned on the van radio. R35, p. 1768.

McGirth went back into the house for another 10 minutes or so. The van and a separate vehicle that the assailants had arrived in were both across the street from the Millers' residence. McGirth instructed Houston to move the van into the driveway of the Miller home. R35, p. 1769. Roberts and Sheila remained in the van while the other two assailants finished up inside the house. Houston exited the house and walked across the street to a silver automobile that the assailants had arrived in. McGirth took the driver's seat of the van. Both drivers drove away from the Millers' house. R35, p. 1769.

Thereafter, the assailants drove Sheila to a series of ATM machines and retail stores. They commanded Sheila to attempt to obtain cash and make purchases. R35, p. 1775-1785. McGirth warned Sheila that there was a fourth accomplice back at the Miller house who would "take care of" her parents if she did not cooperate. R35, p. 1769. Sheila did not attempt to summon help or escape out of fear of what this fictitious fourth accomplice might do to her parents. R35, p. 1769, 1777. Sheila testified that all three of the assailants took turns pushing Sheila through retail establishments in her wheelchair. R 35, p. 1779.

Houston abandoned the silver automobile at a K-mart parking lot and got

into the van with the other assailants. R35, p. 1777, 1802-1804. McGirth was the only assailant to drive the Miller family van. R35, p. 1785. He eventually drove the group to the convenience store where the van was spotted by a police officer in a patrol car. R35, p. 1786-1787. The police officer pulled the van over. Houston and Roberts urged McGirth to shoot the police officer. McGirth declined, put the van in gear, and sped away. R35, p. 1787-1789.

A high-speed police chase ensued. During the chase, McGirth handed the pistol to Houston and instructed him to shoot Sheila so that she could not identify them. Sheila begged for her life. Other police officers had been alerted to the van's approach. They threw out "stop sticks" that flattened the van's tires and caused it to crash. R35, p. 1790. Houston had been holding the gun when the van hit the stop sticks. R35, p. 1792, 1807.

F. Testimony of Codefendant Theodore Houston

Houston knows McGirth and Roberts. R38, p. 2238-2239. He heard McGirth and Roberts are cousins or somehow related. R38, p.2239. On the day of the subject crimes, Roberts & McGirth drove over to Houston's neighborhood in an automobile and picked Houston up. R38, p. 2240-2241.

Houston had been in the same automobile the day before the subject incident. R38, p. 2241. On the day of the subject crimes, McGirth was driving.

The trio headed to The Villages. R38, p. 2242. McGirth told Houston that he (McGirth) wanted to transfer some phone numbers from Houston's cell phone onto a cell phone of his own. McGirth wanted Houston to accompany him to a mall while he bought himself a phone. R38, p. 2242. However, instead of going to the mall, they went to The Villages. There were three people in the car driven by McGirth: McGirth, Houston, and Roberts R38, p. 2243. On the way, McGirth stopped at a Dollar Store and then Wal-Mart to shop for some tank-top shirts. R38, p. 2244. The trio stopped at Wal-Mart where Roberts purchased a pack of three tank-top shirts. R38, p. 2245

Houston observed a black book bag in back of car driven by McGirth. R38, p. 2245. Houston identified the black book in a photo exhibit at trial. The group returned to the Dollar store. Only Roberts and McGirth went in. They came out with a bag of merchandise. R38, p. 2246. McGirth instructed Houston to let him (Mcgirth) hold the book bag. It appeared that Houston and Roberts put their Dollar Store purchases in the book bag. R38, p. 2246.

Houston's cell phone number was 615-4178. That number appears on the little scrap of paper admitted into evidence. R38, p. 2247. Houston did not give his cell phone number to the owner of the car they were in. McGirth might have given the car owner Houston's cell phone number. R38, p. 2248.

While the group was at the Dollar Store, McGirth used Houston's cell phone to obtain directions to a house. R38, p. 2248. The group ended up at a house where an elderly lady (obviously, victim Mrs. Miller) was doing yard work. R38, p 2248-2249.

McGirth asked the elderly lady if Sheila was home. The elderly lady indicated that Sheila was at home. R38, p. 2250. McGirth directed Houston and Roberts to follow him inside the house. R38, p. 2250.

Once inside, Sheila hugged McGirth. This was the first time Houston had ever seen Sheila. R38, p. 2250. Sheila was in a wheelchair. R38, p. 2251. The three friends sat down in the living room. R38, p. 2251. Sheila conversed with McGirth, telling him how she became injured. R38, p. 2251. McGirth told Sheila he would like to talk to her alone. She agreed. They went into the back room together. R38, p. 2252.

That left Houston and Roberts in the living room. Houston walked to the back bedroom and asked Sheila if he could use the bathroom. R38, p. 2252. Sheila was smoking. She asked Houston to open a window and put a fan in it. R38, p. 2254-55. As Houston turned to exit the bedroom . McGirth asked him to get tape out of the book bag that McGirth had carried into Sheila's room. R38, p. 2255. McGirth pointed a gun at Sheila and Houston and instructed Houston to

tape Sheila. This was the first time Houston had seen the gun. R38, p. 2256.

McGirth ordered Houston to tape Sheila's hands and mouth. McGirth took the cellophane wrapper off the duct tape to do this. R38, p. 2257. Houston confirmed that the duct tape and cellophane wrapper (marked "Dollar General") that had been marked into evidence looked the same. R38, p. 2258. Houston took one piece of duct tape and put it around Sheila's mouth and then complained to McGirth that he could not tape her. He testified that he lied to McGirth about not being able to tape Sheila because he did not want to go along with the crimes. R38, p. 2259. McGirth taped Sheila's mouth and taped her hands together. Houston remained in the room. R38, p. 2259.

As McGirth and Houston began readied themselves to move forward toward the living room, Mrs. Miller had finished talking to Roberts in the living room and began walking back toward Sheila's room. She entered Sheila's room and turned around. Mcgirth pointed the gun at Mrs. Miller's head. R38, p. 2260 McGirth asked Mrs. Miller for money. She responded that he did not have much money around the house. R38, p. 2262.

McGirth said something else to Mrs. Miller –Houston could not remember what– after which Mrs. Miller responded, "Fine, just take it."R38, p. 2262. McGirth then shot Mrs. Miller in the chest. Mrs. Miller grabbed her chest and

McGirth pushed her on the bed. She was bleeding from her chest. R38, p. 2262-63. McGirth instructed Houston to find the spent shell casing. At the same time, McGirth realized a bullet was jammed in the gun. McGirth took a bullet and the clip out of the jammed gun and handed all of them to Houston. McGirth directed Houston to reassemble the gun. R38, p. 2263. Houston was inside the Miller's house when Mcgirth handed him the gun. Houston made no effort to leave or call for help. R38, p. 2304-2305.

McGirth rolled Sheila into the bathroom. Houston placed the gun and gun parts on the hallway floor. R38, p. 2264. McGirth took some fabric from the living room couch. He asked Houston where the gun was. Houston told him. McGirth picked up the gun in the hallway and McGirth loaded it. R38, p. 2264-2265. McGirth asked Houston why he had failed to load the gun. Houston responded that he did not want anything to do with it (the crimes). In response, McGirth pointed the gun at Houston and told Houston that he (Houston) already had something to do with it. McGirth instructed Houston to wipe fingerprints off portions of the interior of the Miller's home or he would be shot himself.

Houston went into the back bedroom where Mrs. Miller was laying on the bed. Houston began wiping off objects in the bedroom. McGirth directed Houston to get the spent shell casing off the floor. R38, p. 2265. Next, McGirth

told Roberts to get Mr. Miller out of the room. Roberts responded that Mr. Miller was in the shower. R38, p. 2265-2266.

McGirth told Roberts to wait until Mr. Miller was out of the shower and then tell Mr. Miller that his wife needed his assistance. Jarrord Roberts left the bedroom. R38, p. 2266-2267. Houston cannot recall who, if anyone, escorted Mr. Miller into the back bedroom. Mr. Miller eventually walked into the back bedroom and observed his wife, Mrs. Miller, lying bleeding on the bed. R38, p. 2267-2268.

McGirth held the gun to Mr Miller's head and ordered him to lie face down on the floor. McGirth told Roberts to search for a wallet. Roberts returned with a wallet and car keys. R38, p. 2268-2269.

Roberts gave the wallet and car keys to McGirth. McGirth pocketed the keys and looked through the wallet. R38, p. 2270. McGirth asked the Millers what credit card worked with an ATM machine. R38, p. 2270. After awhile, McGirth took Mrs. Miller into the computer room. Houston cannot remember anything about anyone ordering merchandise over the Internet. R38, p. 2271-2272.

Sheila was also taken into the computer room. At this time, she did not have any duct tape over her mouth. R38, p. 2272.

Houston wiped down the bedroom windowsill and fan. R38, p. 2273. Houston could not remember what he did with the duct tape.R38, p. 2273. McGirth ordered Sheila to get on the computer and order some Boost telephones. R38, p. 2273-2274. McGirth had a conversation with Roberts about an address to deliver the Boost phones to. R38, p. 2274

When Mr. Miller was in Sheila's room, the two Miller family dogs ran from his front bedroom to Sheila's rear bedroom. McGirth told Mr. Miller that he was going to shoot the big brown dog. Mr. Miller grabbed the dog and pulled it down next to himself. R38, p. 2275. McGirth then directed Mr. Miller to take the dog back into his own bedroom. Mr. Miller complied and then returned to Sheila's bedroom. R38, p. 2276.

McGirth directed Houston to take off Mr. Miller's necklace and wrist bracelet. Houston complied and handed the items to McGirth. R38, p. 2276. McGirth told Sheila to get off the computer because they were going to an ATM machine. Sheila informed McGirth that there was an ATM machine in the Villages that was not equipped with a surveillance camera. R38, p. 2277. McGirth had obtained the PIN numbers for the ATM cards from Mrs. Miller. He wrote them down. R38, p. 2277.

McGirth asked Sheila about the family van. Sheila told McGirth that her

family had a van across the street. McGirth directed Roberts move the van closer to the house. R38, p. 2278. Roberts left the house and complied. R38, p. 2278 McGirth told Houston to take a book bag and a massage kit out of the house. Houston authenticated police photographs of them. R38, p. 2278. While Houston was taking the book bag and massage kit out of the house, Houston looked back briefly and saw McGirth standing over somebody. Houston then heard another shot. McGirth called Houston back into the house and instructed him to pick up the shell casing that was on the hallway floor. McGirth told Houston that they would dispose of the shell casings later.

As Houston retrieved the spent shell casing, he could see into Sheila's bedroom. He saw Mr. And Mrs. Miller there. He pocketed the shell casing and headed out of the house with the book bag and massage kit. On the way out, he heard a second shot. R38, p. 2281. Sheila was not in the house when the last two gunshots were fired. C R38, p. 2280. 2286) As Houston headed out of the house, He turned up the volume on the television. He did not see Sheila Miller in the car. R38, p. 2282.

As Houston was leaving the house, Mrs. Miller asked for water. Houston gave it to her. She poured it on her face and then she complained that she was cold. Houston took a sheet that she was holding against her wounded chest and

wrapped it around her body. He told her he knew nothing about what was going on. R38, p. 2283.

McGirth told Mrs. Miller to go to Sheila's Room. She crawled into Sheila's bedroom as the group departed. R38, p. 2283. McGirth exited the house and handed Houston the keys to the silver automobile that the trio had arrived in. Houston was alone in the silver car when the group drove away from the Miller's house. R38, p. 2303. McGirth instructed Houston to follow the others. McGirth warned Houston not to "try" anything because McGirth knew where Houston lived. R38, p. 2283.

Houston followed McGirth to an ATM machine in the Villages. Houston has his cell phone with him. McGirth, Roberts and Sheila went to an ATM machine. Roberts took Sheila out of the van and placed her in her wheelchair. McGirth wheeled her up to the ATM machine. All three walked over to the ATM machine. They returned to the van. Roberts lifted Sheila from her wheelchair to the van. The group departed in the car and the van. R38, p. 2284.

After driving away, McGirth stopped, opened the van door and told Houston to call Roberts on his cell phone. Houston complied. McGirth previously programmed Roberts' cell phone number into Houston's cell phone. The group traveled to a K-mart store in Belleview, Florida. R38, p. 2285. Once the group

arrived at the K-mart store, McGirth exited the van and got into the automobile with Houston. R38, p. 2286. McGirth held Houston's cell phone and pretended to talk on it. He was actually instructing Houston to tell Sheila that he (McGirth) was calling an ambulance to assist Sheila's mother.

Houston asked McGirth to take him home. McGirth declined, saying that Houston might tell his father what had happened. R38, p. 2286. McGirth told Houston to get into the van. Houston complied. Houston remembered seeing Roberts standing outside the van beside the wheelchair-bound Sheila. R38, p. 2286-2287 Roberts got back in the van.R38, p. 2287. McGirth and Sheila went into K-Mart store together. R38, p. 2287. While Roberts and Houston waited in the van, Roberts handed Houston sixty to seventy dollars in cash. R38, p. 2287-2288.

Sheila and McGirth returned from the K-mart store. Roberts lifted Sheila into the van. The group then headed to The Oaks Mall in Gainesville. R38, p. 2288. While en route to the mall, Sheila asked Houston if McGirth had called the ambulance for her mother. R38, p. 2289. Houston responded that he did not have anything to do with what was happening. Houston, McGirth, Roberts and Sheila eventually arrived at The Oaks Mall in Gainesville. Roberts puts Sheila back into her wheelchair. R38, p. 2289.

The group walked thorough some retail shoe stores. Sheila Miller and McGirth went to an ATM machine. R38, p. 2290. Houston wandered off by himself for awhile. Roberts soon walked up to Houston, as though Roberts were following Houston. The two went to a store that sold gold necklaces. They browsed but did not buy anything. They then rejoined McGirth and Sheila. R38, p. 2291.

Houston recalled that when Roberts was in the van, he was using a cigarette lighter to ignite and melt some plastic credit cards. R38, p. 2291-2292.

The group eventually left the Oaks Mall in Gainesville. McGirth stopped at a Citizens Bank to use the ATM machine. McGirth had Sheila attempt to withdraw money with one of the Millers' ATM cards. It did not work. Sheila told McGirth that the authorities were tracking them through the use of the cards. R38, p. 2292.

The group departed in the van. R38, p. 2292. McGirth stopped the van at a small, convenience store just off SR 41. McGirth exited while the three others remained in the van. R38, p. 2293. A police patrol officer rolled up behind the van in his police car and then circled the block while looking at the van. R38, p. 2293 When McGirth got back to the van, he asked Roberts what the police officer was doing. Roberts said the police officer was watching. McGirth started the van and began circling the block himself. The police officer pulled the van over.

As the patrol officer approached the pulled-over van, McGirth threw the gun Houston's lap and accelerated the van away from the officer. Houston held the gun, R38, p. 2294-2295. A high-speed chase ensued. It ended when the van went out of control and rolled over. R38, p. 2294.

During the police pursuit, McGirth had instructed Houston to kill Sheila. Houston refused and put the gun on the van floor. Sheila was screaming and crying and begging for her life. Houston had just finished placing the gun on the van floor when the van went out of control and rolled over. R38, p. 2295. After the van rolled, the gun ended up in Houston's face. Houston pushed it away. R38, p. 2294.

Houston was thrown out of the van during the crash. The van ended up on top of Houston's body. Sheila never got up and walked around. Sheila never had the gun. R38, p. 2295-2296. Houston was pulled out from under the van. arrested and transported to a secure hospital. R38, p. 2286.

Throughout the events, Houston had his cell phone with him. He did not call 911 nor anyone else for help. His phone was working but the power was low. R38, p. 2304.

When Houston was first questioned by the police, He told them he was never in the Miller's house. He told this lie because his father was not present to

advise him. R38, p. 2296. Houston told the interviewing detective that he stayed outside the house. R38, p. 2297. Houston previously entered into a negotiated plea agreement to get 25-40 years for truthful testimony. However, in the middle of the subject trial, Houston changed his mind about the plea deal because he felt 25-40 years was too harsh a sentence for " . . . something I didn't know nothing about." R38, p. 2298. Consequently, during the subject trial Houston said that he was testifying against McGirth and Roberts knowing full well that he himself could still have a trial, but would also face the possibility of a life sentence. R38, p. 2299.

There was a time at The Oaks Mall when the group went to the food court. McGirth left the others to use the rest room. Houston made no effort to summon help. R38,p. 2305-2307.

When McGirth had been inside the convenience store while the others waited in the van, Houston did nothing to alert the police officer or ask for help. R38, p. 2308.

Houston admitted that he lied to the police several times. R38, p. 2309-2310. Houston admitted that McGirth introduced him to Sheila as his "little bro." R38, p. 2311. Roberts was outside in the car when Mr. and Mrs. Miller were shot . R38, p. 2311. McGirth and Houston were in the bedroom when Mrs. Miller was

shot. R38, p. 2315. Houston never saw Roberts with the gun. R38, p. 2319.

Houston remembered McGirth telling Mrs. Miller, "We know you're rich, you have factories." R38, p. 2323. Houston remembered testifying in his deposition that McGirth was the person who came out of the Dollar Store with the bag. R38, p. 2326. Houston also remembered Mrs. Miller asking Sheila, "What have you been telling them? (the assailants). "R38, p. 2324.

Sheila suggested that the group go to the Villages ATM machine because it was not equipped with a video surveillance camera. R38, p. 2324. On the trip back from the Gainesville shopping mall, Sheila used the telephone to attempt to buy some drugs. R38, p. 2325.

G. Gunshot Residue Evidence

State Evidence Technician Lisa Berg did a gunshot residue test on Sheila Miller's hands. R36. P. 1920. It revealed trace metal on the tip of her left thumb and inner part of her right thumb. R36, p. 1918-1923. She also did a gunshot residue test on Houston which reveled trace metal across both of his palms, middle of his left ring finger, and the fingertips of his right hand. R36. P. 1920. However, Evidence Technician Lisa Berg admitted that the gunshot residue testing was not ideal in this case. For example, Sheila Miller's hands had not been bagged before the test. R36, p. 1932. State Evidence Technician Debra Wilcox did a

trace metal test and a gunshot residue test on McGirth's hands. She admitted that the former test can produce a positive result if a suspect innocently touches something metal. R36, p. 2022-2023. State gunshot residue expert Daniel Radcliffe testified that trace amounts of gunshot residue were found on McGirth, but the amounts found were too small to be forensically significant and, indeed, could be due to contamination rather than exposure to a discharged firearm. R39, p. 2469-70, 2482, 2484.

H. Other Guilt-Phase Testimony

State firearms and toolmark expert Maysaa Farhat testified that the spent shell casings recovered in the subject investigation could have been fired from the gun that was recovered in the crashed van. R. 39, p. 2492. She testified that the chamber marks on the gun corresponded strongly with those found on the recovered spent shell casings. R39, p. 2493. A comparison of the bullet recovered at the crime scene matched the bullet shot in a police test-firing of the recovered gun. R39, p. 1294-2495.

State latent fingerprint examiner Charlotte Adams testified that some of the fingerprints lifted off the contents of one of the victims' recovered wallet matched McGirth's fingerprints. R39, p. 2511, 2515-2516. The fingerprints lifted off the gun did not match any of the three Defendants or Sheila Miller. R46, p. 2517.

Mr. Miller gave further testimony related to the items that the police recovered from the crashed van. Mr. Miller confirmed that a great many of them were the things that the assailants had taken from him and his wife. R40, p. 2533-2543.

State Medical Examiner Julia Martin testified during both the guilt and penalty phases of McGirth's trial. Both her guilt-phase testimony and her penalty-phase testimony are summarized singly here for ease of reading. Dr. Martin testified that the first bullet to Mrs. Miller's chest pierced her lung. It did not enter her aorta or heart. R39, p. 2370. Dr. Martin explained that the first bullet wound to the chest was painful but not fatal. The head wound, however, rendered Mrs. Miller immediately unconscious and soon dead. R. 39, p. 2374. The first bullet was to Mrs. Miller's chest and it pierced her sternum. This was a painful injury. R46, p. 2325. Mrs. Miller would have remained conscious would have survived this one shot . R46, p. 3235. She would have remained conscious for 15 to 30 minutes between the time of this shot and the subsequent shot to her head. It is possible that she remained conscious longer. R46, p. 3235.

I. First, Second and Third Shots

As the above-summarized testimony indicates, three injury-causing bullets were shot during the subject crimes. The facts surrounding each individual shot

are important to this appeal. As noted above, the first shot was to Mrs. Miller's chest and was non-fatal. Sheila testified that McGirth fired this shot as Mrs. Miller raised her hands and moved toward the bedroom door that McGirth was standing near. R35, p. 1749-1755. Houston testified that McGirth shot Mrs. Miller in her chest shortly after Mrs. Miller responded to McGirth, "Fine, just take it (the money)." R38, p. 2260-2262. Houston also testified that this first shot was in Sheila's bedroom. R38, p. 2260-2262. Mr. Miller did not witness the first shot to his wife's chest. He first observed her covered with blood when he walked from the shower to the bedroom. R34, p. 1584-1586.

The second shot was also a non-fatal shot. It was the shot to the back of Mr. Miller's head. Mr. Miller remembered that his captors made him lie on the floor of Sheila's bedroom. He heard Sheila doing something in another room. Sheila was brought back into her bedroom, where Mr. Miller was laying, and Mr. Miller felt him self being shot in the head. R34, p. 1588-1589. Codefendant Houston testified that he (Houston) picked up the book bag that the assailants had used to carry the duct tape and gun into the house. He started leaving the house and heading toward the getaway vehicles. He looked back and saw McGirth "standing over someone." He turned to leave again and heard another shot (i.e. a second shot). R38, p. 2278-2281. Sheila did not give any testimony about this

second shot. It appears possible that she did not know about the second shot.

McGirth called Houston back into the house and instructed Houston to pick up the shell casing from the second shot. It was on the hallway floor. Houston complied. R38, p. 2278-2281. Houston turned around again to go to the getaway vehicles and heard the third shot. R38, p. 2281. Mr. Miller heard, but did not see, this shot. R34, p. 1588-1593. Sheila Miller did not give any testimony about the third shot. It appears that she did not know about the third shot. As noted above, the State Medical Examiner testified that the only fatal shot in this series of crimes was this third one, to Mrs. Miller's head.

J. Defense's Reserved, Guilt-Phase Opening Argument

Appellant's attorney argued that the evidence would leave jurors wondering whether Sheila Miller or Houston was the person who shot Mrs. Miller. R40, p. 2567.

K. Key Defense, Guilt-Phase Witnesses

Appellant's trial counsel called Ms. Jeanne Dembitsky as the first Defense witness. She testified that she saw three black males and one white female at a convenience store near the Villages community. They arrived in a van shortly after 1:00 p.m. on the day of the crimes. The three black males appeared "upbeat

and excited" whereas the white female seemed "reticent," and "unhappy." The white female was walking unassisted. She was not in a wheelchair. R40, p. 2569-2572.

Appellant's trial counsel also called fingerprint and evidence-collection expert named Janice Johnson. Ms. Johnson testified that there were many irregularities in the ways that the State did gunshot residue testing on McGirth. She explained that his hands had not been protected and were exposed to many potential sources of gunshot residue contamination. R40, p. 2589-2594. She pointed out how McGirth could have picked up gunshot residue from handcuffs, from the police patrol car and from the interview room floor. R40, p. 2593-2595. Finally, she pointed out that the gunshot residue that was detected on the right-handed McGirth was found on his *left* hand. R40, p. 2597.

L. Defense's Guilt-Phase Closing Argument

Appellant's trial counsel's guilt-phase closing argument to the jury appears intended to persuade the jurors that McGirth's involvement and offenses were comparatively minor whereas Sheila Miller and Houston conspired with one another to murder Mr. and Mrs. Miller. For example, McGirth's trial lawyer

argued: “We’re not saying our client (McGirth) is not accountable, but we’re saying that our client is not guilty of first-degree murder.” R43, p. 2944. She argued that Houston and Sheila Miller “ . . . came up with this scheme and Renaldo (McGirth) and Jarrord (Roberts) got dragged into it.” R43, p. 2945. She argued that Houston, not McGirth, was the shooter of all three bullets. R43, p. 2945.

M. State’s Guilt-Phase Closing Argument

The State’s closing argument portrayed the crimes as a collaborative effort of all three of the male assailants, with McGirth playing the dominant role. R43, 2896-2907.

N. Jury Question

During guilt-phase deliberations, the jury submitted a question to the judge: “Is cautious (conscious) intent the same as premeditation in that it can occur a few seconds before the crime was committed? R45, p. 3154. Away from the jury, Judge Lambert observed that, for the “Principals” standard jury instruction number 3.5(a) there is no definition for “conscious intent.” R45. P. 3154-3155. Judge Lambert concluded –Appellant believes correctly– that the jurors were asking whether the “conscious intent” element of the “Principals Jury instruction was the same as the “premeditation” element of first-degree murder standard jury instruction number 7.2. Defense attorneys for Defendants Roberts and McGirth

both strongly objected to Judge Lambert giving the jury any further explanation. R45, p. 3155-3157. Judge Lambert overruled the objection and answered the jury question as follows:

> Ladies and gentlemen, the question I have, jury question No. 4: Is conscious intent the same as premeditation in that it can occur a few seconds before the crime was committed? Specifically, is conscious intent the same as premeditation? The answer is no. The law does not fix the exact of time that must pass for the formation of conscious intent. R45, p. 3168.

Both defense attorneys moved for a mistrial. Both motions were denied. R45. P. 3169.

O. Guilt Phase Verdict Against Defendant McGirth

The jury found McGirth guilty of 1st-degree Murder, either premeditated first-degree murder or felony first degree murder, based on robbery killing of victim Diana Miller. R1, p. 1; R45, p. 3170. The jury also found McGirth guilty of attempted first degree murder with firearm of victim James Miller. R1, p1; R45, p. 3170. On this attempted first degree murder count, the jury also found that McGirth possessed a firearm, discharged a firearm, and did great bodily harm to victim James Miller.

The jury also found McGirth guilty of robbery with a firearm of victim Diana Miller and/or victim James Miller, R1., p1; R45, p. 3170. The jury also

found that McGirth possessed a firearm, discharged a firearm and did great bodily harm to James Miller or Diana Miller in connection with this Count.

The jury also found McGirth guilty of fleeing to elude a law enforcement officer R1, p. 2; R45, p. 3171.

The jury did not find McGirth guilty of kidnaping Sheila Miller R1, p.1; R45, p. 3170.

P. Guilt Phase Verdict Against Codefendant Roberts

With regard to the homicide of victim Diana Miller, the jury found Roberts guilty of the *lesser* included offense of manslaughter. R45, p. 3171; R1, p. 2 On the attempted homicide charge, the jury found Roberts guilty of the *lesser* included offense of attempted voluntary manslaughter. R45, p. 3171; R1, p. 2. On the robbery charge, the jury found Roberts guilty of robbery with a firearm as charged in the indictment. This was the same charge against McGirth, above. However, the jury found that Roberts did not possess a firearm. R45, p. 3171; R1, p. 3. The jury did not find Roberts guilty of kidnaping Sheila Miller. R45, p. 3171; R1, p. 3.

SUMMARY OF ARGUMENT

The Defendant suffered a great many types of judicial and constitutional errors in the trial court below. These errors denied the Defendant his constitutional

rights to due process of law and a fair jury trial and resulted in him being sentenced to death when he would have received a lighter sentence if the errors had not occurred.

ARGUMENT FOR EACH ISSUE

Issue 1: The trial court erred in permitting the prosecutor to argue to the jury that the Defendant was like the September 11, 2001 World Trade Center Terrorists

During its guilt-phase closing argument, the prosecutor made the following statement to the jurors:

> Even if you think Sheila Miller orchestrated the events that led to her mother's death on July the 21st, 2006, a scenario that is not supported by any evidence that you have heard, how can that possibly mitigate or lessen the culpability of the person that you know killed Diana Miller? That would be like giving the pilots of the two planes that crashed into the World Trade Center a pass –
>
> (R47, p. 3478)

Defense counsel made a specific, timely objection and motion for mistrial. The trial court overruled the objection and denied the mistrial motion and the prosecutor continued his comment as follows:

> MS. HAWTHORNE: Your Honor, objection.
>
> THE COURT: Overruled.

> MR. TATTI: -- a pass because it was Osama's idea.
>
> MS. HAWTHORNE: Your Honor, we would move for a mistrial. 9/11 is not an area that we go into. It is highly emotional, highly volatile. I would ask that this Court direct the State not to discuss 9/11 in their closing.
> THE COURT: The motion for mistrial is denied, but, again, obviously, I would say 9/11 is not in evidence here. I believe it is used as an analogy. But let's move on to something different.

(R47, p. 3478)

Preservation: As the foregoing indicates, the issue of the propriety of the prosecutor's remarks was preserved by a timely objection and motion for mistrial.

Standard of Review: In reviewing claims of improper prosecutorial appeals to juror emotions, the reviewing courts examine the record to determine whether the challenged prosecutor remarks have injected elements of emotion and fear into the jury's deliberations. The reviewing courts also apply a harmless error analysis. Urbin v. State, 714 So. 2d 411, 419.

Analysis: This reviewing court is directed to Brooks v. State, 762 So.2d 879 (Fla. 2000). Appeals to jurors emotions cumulatively deprived the Defendant of a fair penalty phase. Florida Courts have consistently forbidden comments which appeal to juror emotions and stir up juror anger. Urbin v. State, 714 So.2d 411

(Fla. 1998), Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989), Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). Federal Courts take the same view. *See, e.g.* Brooks v. Kemp, 762 F. 2d 383 (11th Cir. 1985).

Prosecutorial remarks which lead jurors to engage in a patriot-versus-traitor analysis are especially prejudicial and damaging to the calm analytic process needed for fair jury proceedings. In Ruiz v. State, 743 So.2d 1 (Fla. 1999) this court condemned a prosecutor request that jurors to do their patriotic duty, just as the prosecutor's own father had done by serving in Operation Desert Storm. The court explained that the remarks linked the noble sacrifices made by members of the United States armed forces with a corollary duty to sentence the Defendant to death.

Other courts have strongly condemned arguments which speak of Defendants as terrorists or which their crimes in terms of terrorism. Lung v. State, 179 S.W.3d 337 (Mo.App.S.D. 2005), State v. Thomas, 158 S.W.3d (Tenn 2005), Hernandez v. State, 114 S.W. 3d 58 (Tex. App. [2d Dist.] 2003), People v. Kipp, 26 Cal.4th 1100 (2001), Brewer v. State, 93-CT-00676-SCT (Miss. 1997), Corwin v. State, 870 S.W. 2d 23 (Tex. Cr. App. 1993).

Constitutional violations: The trial court's allowance of the improper prosecutorial remarks violated Defendant's right to due process of law, secured by

the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated the Defendant's right to a fair trial, secured by the 6th and 14th Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 2: The trial court erred by incorrectly answering a jury question about the "conscious intent" element of the "principals" jury instruction

At the end of the guilt phase, the trial judge read the jury the standard "Principals" jury instruction of Fla. Std. Jury Instr. (Crim) 3.5(a). R44, p. 3075-3076; R6, p. 893. Using the words of the standard jury instruction, the judge instructed the jurors that, in order for a defendant to be a principal (and therefore vicariously liable for the criminal acts of another) it is necessary that " . . . the defendant has a conscious intent that the criminal act be done." Id.

The trial court judge also read the standard, first degree murder "premeditation" jury instruction which informs the jury that, "Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the killing."

R44, p. 3045-3046.

Then, later on in the middle of guilt-phase jury deliberations, the jury submitted the following written question, which the trial court judge read to the attorneys: "Is cautious (conscious) intent the same as premeditation in that it can occur a few seconds before the crime was committed?" R45, p. 3154.

The trial court judge, spoke to the attorneys away from the jury. The trial judge referred to the "Principals" standard jury instruction, number 3.5 (a), and observed that "There is no specific definition for conscious intent in the principal instruction." The trial court judge further observed that the jurors were asking if the "conscious intent" element of the "Principals" jury instruction was the same as the "premeditation intent" in the first-degree murder standard jury instruction number 7.2. R. 45, p. 3154-3155.

Counsel for both defendants replied that the jurors must rely strictly on the existing, written jury instructions with no further explanation. The trial judge disagreed. R45, p. 3155-3156. Appellant's trial counsel repeated that it would be error to give jury any further explanation and she objected to the court giving the jury any information on this subject beyond what appears in the written jury instruction. R. 45, p. 3156-3157. The trial court judge overruled the objections and answered the jury's question as follows:

> Ladies and gentlemen, the question I have, jury question No. 4: Is conscious intent the same as premeditation in that it can occur a few seconds before the crime was committed? Specifically, is conscious intent the same as premeditation? The answer is no. The law does not fix the exact of time that must pass for the formation of conscious intent.
>
> (R45, p. 3168)

Both defense attorneys moved for mistrial, to no avail. R45, p. 3169.

Preservation: As indicated above, defendant's trial counsel objected to the erroneous jury instruction and moved for mistrial. The issue has been preserved for appeal.

Standard of Review: In order for an improper jury instruction to constitute reversible error, it must, under the circumstances of the case, be capable of misleading the jury in such a way as to prejudice the defendant's right to a fair trial. Lewis v. State, 693 So.2d 1055 (Fla. 4th DCA 1997). Trial judges have wide discretion in decisions regarding jury instructions, and the appellate courts will not reverse a decision regarding an instruction in the absence of a prejudicial error that would result in a miscarriage of justice. Shepard v. State, 659 So.2d 457, 459 (Fla. 5th DCA 1995).

Analysis: The "conscious intent" element of the Principal jury instruction focuses on the *results* intended by the Defendant: the successful completion of a crime by some other person. The Principal jury instruction has nothing to do with

time. For purpose s of criminal-law "principal" liability, "Conscious intent, " is the intent that a specific crime be committed by another. Carranza v. State, 985 So.2d 1199 (Fla. 4th DCA 2008). It is the intent that the crime be committed by someone else, coupled with some act to assist that other person in committing the crime, which creates vicarious "principal" liability. Terry v. State, 668 So.2d 954, 964-965 (Fla. 1996).

The jury instruction on "premeditation" for first-degree murder, quoted above, essentially informs the jurors that premeditation is *reflection*. That is, premeditation is reflecting for a moment, however briefly, on whether or to really go ahead and pull the trigger. Prosecutors tend to exploit the lack of a minimum time requirement for reflection by saying that premeditation can occur in a "split second" or be "instantaneous" or "automatic" or simply be a "conscious decision to kill." The prosecutor in the present case was no exception. He argued to the jury that " . . . about premeditation . . . it simply means if from the circumstances of the killing and the conduct of the accused convince you that it was consciously decided to kill them. . . . . To shoot a person as they're laying on the ground in the back of the head. It's premeditated." R43, p. 2910. This statement, combined with the trial judge's erroneous explanation of the "conscious intent" aspect of the "Principal" jury instruction led the jurors to believe that if the Defendant made a

quick decision to help a codefendant with *anything* –even something completely innocent– then the Defendant was criminally responsible himself for every unforeseen and unintended crime subsequently committed by Defendant's codefendants. Given the multiple suspects and multiple gunshots and multiple victims involved in the present case, this likely led the jurors to convict this Defendant of crimes that he himself did not intend or assist with. This denied the Defendant a fair jury trial.

Constitutional violations: The trial court's erroneous instruction to the jury violated Defendant's right to due process of law, secured by the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated the Defendant's right to a fair trial, secured by the 6th and 14th Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 3: The trial court erred in allowing excessive and inflammatory victim-impact evidence

The State presented victim-impact evidence at the end of its guilt-phase case in chief. Prior to this, however, on October 1, 2007, Defendant's trial counsel had filed a motions which pointed out the dangers of excessive victim-impact evidence and which sought court orders (a) requiring pre-trial proffers and court rulings on

the admissibility of victim-impact evidence, (b) limiting the presentation of victim-impact evidence to the judge alone, at the *Spencer* hearing. R1, p. 97-104, 105-109. Defendant's trial counsel also filed a similarly-based motion to limit victim-impact evidence to just one adult witness who could control their emotions in front of the jury and who would be limited to reading a written victim-impact statement that had been provided to the defense in advance. R2, p 198-202. These motions were denied, but with leave for the defense to subsequently file additional motions limiting any specific, troublesome victim-impact matters that came up in discovery. R2, p. 366-367.

At trial, the State presented some especially heart-wrenching victim-impact evidence. Mrs. Miller's aunt, Ann Taurianen, testified about all of the wonderful holidays and vacations she spent with Mr. and Mrs. Miller. R46, p. 3195-3196. When the Millers moved from Michigan to the Villages community in Florida, she too moved to the Villages in Florida. R46, p. 3197. She testified that Mrs. Miller used to assist her with her household chores. R46, p. 3201. She said that Mrs. Miller became Mr. Miller's caretaker after Mr. Miller had a stroke. She said that other family members have had to fill the gap and take care of Mr. Miller. R46, p. 3203.

Ms. Marie Franks was another resident of the Villages community who had

known Mrs. Miller since their Michigan days. She and Mrs. Miller golfed and skied together. She said that Mrs. Miller played and coached softball. R46, p. 3206-3211.

Ms. Lori Travis was a women's softball teammate of Mrs. Miller's. She explained how Mrs. Miller became the major organizer of women's softball games at the Villages. R46, p. 3213-3219. When someone lacked transportation, Mrs Miller would transport them to games. R46, p. 3215.

Mr. Lee Hancock organized recreational activities at the Villages. He worked with both Mr. And Mrs. Miller to organize softball games. R34, p. 3221. When Mr. Hancock could not be with his own family for Thanksgiving day, Mrs. Miller invited him over to have Thanksgiving dinner with the Miller family. R34, p. 3221. The Villages community was "devastated" by the death of Mrs. Miller. R34, p. 3226-3227. Twenty-five or thirty of Mrs. Miller's sports companions met in an impromptu memorial gathering in Mr. Hancock's home. R34, p. 3227. Residents of the Villages community pooled their resources and paid $500 to run a memorial ad in Mrs. Miller's honor in the local newspaper. The memorial ad was shown to the jury. R34, p. 3227-3228. Enough money was left over after paying for the ad to contribute another $100 to the Alzheimer's fund in Mrs. Miller's honor. R34, p. 3227.

Players in the Villages softball league dedicated their fall season to Mrs. Miller. At the baseball field, they retired her jersey and installed a shadow box which displayed Mrs. Miller's photograph and the medal she had won in the Senior Games. They were shown to the jury. The players had a silent prayer and released balloons in her memory. R34, p. 3228-3229.

When the senior women's softball team traveled to compete with other teams, the took the shadow box with Mrs. Miller's ribbon and jersey and medal so that Mrs. Miller could be with the team in spirit. R34, p. 3230-3231.

Preservation: While it is true that objections do not appear among the above-quoted victim-impact testimony, it is also true that the trial court declined to grant the above-described, defense counsel motions to limit victim-impact testimony. Therefore, the issue of improper victim-impact statements have been preserved for review. Even if it is assumed, for purposes of argument only, that defense counsel failed to adequately object to improper victim-impact statements; where the jury is exposed to extremely improper statements with no contemporaneous objection, if the damage rises to the level of fundamental error, it is still reviewable on appeal. Foster v. State, 603 So.2d 1312 (Fla. 1st DCA 1992), Nelson v. State, 679 So.2d 1249 (Fla. 4th DCA 1996).

Standard of Review: In addressing the propriety of victim-impact evidence,

the reviewing court engages in a 2-step analysis. First, it examines the challenged evidence to determine whether it exceeds the allowable parameters of Payne v. Tennessee, 501 U.S. 808 (1991). If so, the reviewing court engages in a harmless error analysis. Windom v. State, 656 So.2d 432 (Fla. 1995). Under the Payne case, victim-impact evidence is allowed *provided* that it is presented to show the victim's uniqueness as an individual, and *provided* that such victim-impact evidence is no so unduly prejudicial as to render the trial fundamentally unfair and hence violate the Defendant's right to due process of law secured by the 14th Amendment to the U.S. Constitution. Payne v. Tennessee, 501 U.S. 808 (1991).

Analysis: The victim-impact evidence presented in the subject case exceeds the bounds of Payne in two respects. First, it focused on the grief and loss suffered by the community rather than Ms. Miller's uniqueness as an individual. The testimony about the memorial ad and the shadow box and the retiring of Ms. Miller's jersey were especially inflammatory. Such testimony was not necessary to show the jurors that Mrs. Miller was an especially giving and caring individual. Such character traits *were* abundantly clear, even without all of the testimony about the grief and sorrow suffered by her teammates and neighbors in the Villages.

This Defendant's jury recommended a sentence of death by a vote of eleven-to-one. This barely eighteen Defendant was found guilty of first-degree murder

and sentenced to death. The more mature, 20-year-old Codefendant, Jarrod Roberts was found guilty of the lesser included offense of manslaughter and does not face execution. One cannot help but wonder what tipped the scales of justice against this young Defendant who was barely past his eighteenth birthday. Very likely, it was the excessive victim-impact evidence.

Constitutional violations: The inflammatory and excessive victim-impact testimony and evidence violated the Defendant's rights to due process of law, as secured by the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. Allowance of such testimony also violated the Defendant's right to a fair jury trial, as secured by the 6th and 14th Amendments to the U.S. Constitution and by Article 1, Sections 16 and 22 of the Florida Constitutions.

Issue 4: The Trial Court erred in allowing irrelevant "*Williams*-Rule" evidence that had more prejudicial effect than probative value

The State filed a 90.404(2)(c) notice of its intent to offer evidence of other criminal offenses in the subject case against the subject defendant. That written notice apparently got lost and did not make it into the Court file. However, the Court conducted a lengthy hearing that dealt exclusively with the "other criminal offenses" on that notice and thus created a reviewable record. R23, p. 3. Such

Williams-Rule hearing transcript consumes almost all of Volume 23 of the present record on appeal. That transcript identifies all of evidence, arguments and rulings on *Williams*-Rule issues prior to the start of the subject jury trial.

Obviously, the expression "*Williams* Rule" refers to the seminal case of Williams v. State, 110 So.2d 654, 662 (Fla. 1959) . At any rate, During that *Williams*-Rule hearing, Defendant's trial counsel discussed evidence that the assailants used illegal drugs to pay for the automobile that they drover to the Millers' house. Defendant's lawyer argued that the prejudicial effect of such evidence would outweigh its probative value. R23, p. 32, 37.

During the same *Williams*-Rule hearing, the state indicated that a longstanding, illegal drug-selling and drug-buying relationship existed between Sheila Miller and McGirth. R 23, p. 47-48 The prosecutor made it clear that the State intended to present evidence that such illegal drug dealings to prove –among other things– the nature of the assailants' arrival at the Miller's house on the day the subject crimes. R23, p. 48. Over the objection of Appellant's attorney, the trial judge ruled that such evidence was "coming in." R23, p. 48. Appellant's trial counsel continued to vehemently object to any references to any references to illegal drug matters on grounds that the prejudicial effect would outweigh the probative value. R23, p. 51-54. The judge overruled the objections and again

held that the evidence was "coming in." R23, p. 51-54.

Appellants renewed and re-argued such objections during trial. R35, p. 1813-1817. Nevertheless, during trial, the judge allowed the prosecutor to elicit testimony from Sheila Miller that she had a longstanding relationship with McGirth based on drugs and that he had furnished her with cocaine and marijuana. R35, p. 1818-1819. Sheila testified that McGirth provided her and her boyfriend with drugs to distribute. R35, p. 1818. She testified that, for awhile, a "falling out" had existed between her and McGirth because McGirth had pulled a knife on her boyfriend. R35, p. 1821. Sheila that when the assailants arrived at the Miller house carrying a bag (that bag that contained the duct tape) she thought it contained marijuana that they were delivering to her. R35, p. 1831. *Note:* The trial court judge held that such "bag" statement was inadmissible speculation and the trial judge instructed the jury to disregard it. R35, p. 1831. However, the trial judge allowed all of the other drug-related testimony. Sheila Miller testified that after the assailants took her against her will and drove off with her in the Miller family van, they forced her to telephone and attempt to buy illegal drugs from one of her friends. R41, p. 2869. There were other instances of Sheila Miller testifying that she previously knew the assailants through illegal drug dealings. R35, p. 2679-2681.

Preservation: As the foregoing indicates, defense counsel vigorously objected to the use of such "other crimes" evidence, both during the pre-trial *Williams*-Rule hearing and again, later on, during trial. The issue of the propriety of the trial court's allowance of *Williams*-Rule evidence has been preserved for appeal.

Standard of Review: In reviewing the propriety of a lower court's allowance of *William's*-Rule evidence, the reviewing court engages in a 3-step analysis. First it reviews the record to assure that the evidence of collateral crimes or bad acts is relevant to the issues in the subject case. Next, the reviewing court engages in a Fla. Stat. Section 90.403 analysis to determine whether the probative value of the "other acts" evidence is outweighed by its prejudicial effect. Finally the Courts apply a harmless error analysis. Herbert V. State, 526 So.2d 709 (Fla.App. 4 Dist. 1988), rev. den. 531 So.2d 1355 (Fla. 1988).

Discussion: In Craig v. State, 585 So.2d 278, 280 (Fla. 1991) the Court held that it was error for the trial court to admit evidence about the use of drugs in a murder prosecution. The facts of the Craig case were such that the Florida Supreme Court held that the use of drugs was unrelated to the murder and hence evidence related to the use of drugs should have been excluded. *Accord*, Porter v. State, 715 So.2d 1018 (Fla. 2d DCA 1998).

In Chapter 4 of Charles W. Ehrhardt's Florida Evidence, (West's, 2004 Ed.) Entitled Character Evidence, Ehrhardt explained, "Since *Williams* evidence must have its probative value weighed against its undue prejudice under Section 90.403, similar fact evidence which is suspect in establishing the defendant's involvement should be excluded since the undue prejudice would substantially outweigh the probative value of such evidence." Id., Section 404.9, p. 209. *See also* LaMarch v. State, 785 So.2d 1209, 1212 (Fla. 2001) and Huddleston v. United States, 485 U.S. 681, 689 n. 6 (1988).

As noted in the Statement of the Case and Facts above, there was no need for evidence about drugs. The testimony of Sheila Miller and Houston showed that Sheila Miller had a longstanding friendship with at least one of the assailants and let them into the Miller residence on such basis. There also plenty of evidence that the assailants came to the Miller house to rob, not to buy or sell drugs. The duct tape and the gun that the assailants had with them in the book bag were clearly robbery paraphernalia, not drug paraphernalia. The State had plenty of strong evidence of guilt for violent crimes without having to inject the added dimension of the assailants being drug dealers and drug users. This was a case in which the jury had to decide between the death penalty and a sentence of life in prison without the possibility of parole.

This Defendant's jury recommended a sentence of death by a vote of eleven-to-one. This barely-eighteen-years-old Defendant was found guilty of first-degree murder and sentenced to death. The more mature, 20-year-old Codefendant, Mr. Jarrord Roberts, was found guilty of the lesser included offense of manslaughter. Codefendant Jarrord Roberts does not face execution. One cannot help but wonder what tipped the scales of justice against this significantly younger Defendant. There is good reason to believe that all of the additional and unnecessary and prejudicial evidence connecting this Defendant to illegal drug activity served as an improper, non-statutory aggravating circumstance. It likely motivated the jury to sentence this younger Defendant to death.

Constitutional violations: The trial court's improper allowance of *Williams*-Rule evidence violated Defendant's right to due process of law as secured by the 5th and 14th Amendments to the U.S. Constitution. It also violated the right to a fair trial that is secured by the 6th Amendment to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 5: The trial court erred in allowing the "avoid arrest / witness elimination" aggravating circumstance of Fla. Stat. 921.141(5)e)

Preservation: Defendant's trial counsel Filed a motion to declare this aggravating circumstance unconstitutional, both as written and as applied to the

facts of this case. R3, p. 523-538. The trial Court denied it. R3, p. 512-514. Though there does not appear to be any further objection to this aggravating circumstance. Even if it is assumed, for purposes of argument only, that defense counsel should have done more to preserve this issue for appeal, the mischief caused by instructing the jury on an unsupported aggravating circumstance is so great that it should be regarded fundamental error, reviewable even without an objection below. In Barrientos v. State, 1 So.3d 120 (Fla. 2d DCA 2009) the court stated:

> . . . fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict.'" Id. at 645 (quoting Stewart v. State, 420 So.2d 862, 863 (Fla. 1982)). It follows that a failure to instruct the jury on an element of a crime is fundamental only when that particular element is disputed at trial. Reed v. State, 837 So.2d 366, 369 (Fla. 2002). Where an element of the crime is not accurately defined but is undisputed at trial, "the error is not fundamental error." Id. Furthermore, for an error in jury instructions to reach the level of fundamental error, "`the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" Delva, 575 So.2d at 644-45 (quoting Brown v. State, 124 So.2d 481, 484 (Fla. 1960)).

Standard of Review : A trial court's ruling on whether an aggravating circumstances has been proven is a mixed question of law and fact. A trial court's finding of an aggravating circumstance will not be disturbed on appeal as long as (1) the correct law was applied by the trial court, and (2) the record contains

competent, substantial evidence to support the aggravating circumstance. Aggravating circumstances may be proved by circumstantial evidence, but such circumstantial evidence must be competent and substantial. Hunter v. State, 660 So.2d 244 (Fla. 1995).

Discussion: As noted in the Statement of the Case and Facts above, the shot that killed Mrs. Miller was the third and final, human-hitting bullet fired that day. It was the one to Mrs. Miller's head. The earlier, non-fatal shot to Mrs. Miller was to her chest and it occurred as she was raising her hands and moving toward the putative shooter, Defendant McGirth. R35, p. 1749-1755. Hence, there is reason to believe that the first shot to Mrs. Miller's chest was the shooter's reaction to her perceived resistance, not an effort to eliminate her as a witness. In other words, the first shot to Mrs. Miller looks like a "robbery gone wrong" shot, not a witness-elimination shoot. The next step is to examine the second, killing shot to Mrs. Miller's head. As noted in the Statement of the Case and Facts above, all that is known about this second, fatal shot is that Mr. Miller *heard* it and no living person saw it. Therefore, there is no way of knowing *who* shot the fatal bullet, or why they shot. To say that the final, fatal shot to Mrs. Miller's head was for witness-elimination purposes is pure speculation.

Urbin v. State, 714 So.2d 411 (1998) is a pool-hall robbery/shooting case.

Defendant Urbin told accomplice Craig Flatbo that, after he (Urbin) marched the robbery victim out to the parking lot at gunpoint, the victim resisted ("bucked") and tried to kick his (Urbin's) legs out from under him. Urbin told Flatbo that he (Urbin) shot the victim because the victim resisted ("bucked") and also because the victim had seen his (Urbin's) face. The Florida Supreme Court held that such facts are insufficient for the "avoid arrest" aggravating circumstance as follows:

> . . . as Urbin argues, "Although Flatbo testified that Urbin said he shot the victim because he bucked and because he saw his face — the evidence suggests this latter fact was at most a corollary, or secondary motive, not the dominant one." Based upon the evidence presented at trial, we conclude this factual situation more closely resembles the fatal confrontation in Cook v. State, 542 So.2d 964, 970 (Fla. 1989), wherein we found that the facts indicated that the defendant "shot instinctively, not with a calculated plan to eliminate [the victim] as a witness."

(Id., p. 415)

Cook v. State, 542 So.2d 964 (Fla. 1989) involves the robbery of a Burger King restaurant. A Burger King restaurant employee was taking out the trash. His wife was also outside the restaurant at the time. The Defendant marched the employee into the restaurant at gunpoint to rob him. The employee resisted, striking the Defendant in the arm. The Defendant shot and killed the employee. As the Defendant was running our the door of the Burger King the employee's wife

–who had been outside yelling and screaming– grabbed the Defendant by the legs. The Defendant shot and killed her. The Cook Court explained that these facts do not establish the avoid-arrest aggravating circumstance as follows:

> Next, Cook attacks the finding Mrs. Betancourt was killed to avoid arrest, arguing that his statement that he shot her "to keep her quiet because she was yelling and screaming" was insufficient to support the trial court's findings. We agree. The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness.

Robertson v. State, 611 So.2d 1228 (1993) is a case in which the Defendant Robertson decided to rob at gunpoint two victims who were in a parked car near a fishing spot. Robertson drove past the parked car in which the couple was sitting. He then made a U-turn, pulled alongside of the couple's car and parked. He took his rifle and walked towards the couple's car. A witness named Anthony Williams saw Robertson go to the driver's side of the couple's car and heard him demand money from the driver. Anthony Williams then heard shots. The man sitting in the driver's seat slumped toward the passenger side of the car.

Anthony Williams then saw a woman emerging from the passenger side of the car. Robertson went towards the woman and demanded, "Give me the rings." Anthony Williams then heard the woman crying and screaming that she did not have any money. Anthony Williams then heard more shots and he then saw the

woman fall to the ground outside the car.

The Robertson court held these facts insufficient to establish the "witness elimination" aggravating circumstance as follows:

> The first issue on review is whether the trial court erred in finding the aggravating circumstance that Robertson murdered Paguada to avoid arrest. The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Williams v. State, 386 So.2d 538 (Fla. 1980). Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So.2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). In order to support a finding that a defendant committed a murder to avoid arrest, the State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. Menendez v. State, 368 So.2d 1278 (Fla. 1979). "Proof of the requisite intent to avoid arrest and detection must be very strong" to support this aggravating circumstance when the victim is not a law enforcement officer. Riley v. State, 366 So.2d 19, 22 (Fla. 1978).
>
> The State failed to establish beyond a reasonable doubt that Robertson's dominant motive in killing Paguada was to avoid arrest. Although Robertson testified at the penalty phase of the trial that Paguada saw him clearly after he shot Najarro, he denied killing Paguada to prevent her from identifying him. As this Court stated in Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1986), "[t]he mere fact that the victim might have been able to identify her assailant is not sufficient to support finding this factor." The facts indicate that Robertson shot Paguada instinctively and without a plan to eliminate her as a witness. The State failed to show any other facts that would establish that Robertson's dominant motive was to eliminate

> Paguada as a witness.
>
> * * *
>
> Thus, the court erred in finding the aggravating circumstance that Robertson killed Paguada to avoid arrest.
> (Id., p. 1232-1233)

Jackson v. State, 502 So.2d 409 (1986) concerns a hardware store robbery. Jackson pretended to buy a box of nails. When the hardware store owner/victim opened the cash register, Jackson's brother produced a pistol and pointed it at the victim's head. Jackson reached around the cash register and began removing the money when the victim grabbed appellant, apparently in an attempt to retrieve some of his money. At this point, the brother leaned over the counter and fired a single, fatal shot into the victim. Approximately ten minutes later two customers entered the store and found the victim lying face down behind the counter in a semi-conscious state clutching a five dollar bill in his hand. In explaining why these facts are insufficient for the witness-elimination aggravating circumstance, the court stated:

> Appellant argues that the trial court erroneously found that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. We agree that this aggravating factor was improperly found to exist by the trial court. The trial court's assumption was that the only reason the murder was committed was to avoid capture or

> detection. In Riley v. State, 366 So.2d 19 (Fla. 1978), we held:
>
> > [T]he mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.
>
> Id. at 22. The requisite strength of proof is lacking here. The trial court's assumption that the murder was committed solely to eliminate a witness is only one of several possible explanations for this murder. Evidence adduced at trial revealed that neither appellant nor his brother knew the victim and there is nothing about the facts of this murder which suggests that it was committed solely to eliminate a witness. The trial court's assumption is too speculative to support upholding this aggravating factor.
>
> (Id., p. 411)

Consalvo v. State, 697 So.2d 805 (Fla. 1996) is a case in which there was evidence that the Defendant and the murder victim knew each other, that the victim had been pressing criminal charges against the Defendant on another matter, that the Defendant killed the victim while she was on the phone trying to summon the police. The Consalvo court held, quite correctly, that all of these things considered together do support the "avoid arrest" aggravating circumstance. However, the Consalvo distinguished other cases where the avoid-arrest aggravating circumstances is supported nothing more than the fact that the dead

victim knew and could identify the defendant:

> . . . the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator. Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992); Davis v. State, 604 So.2d 794, 798 (Fla. 1992).

The facts of Rogers v. State, 511 So.2d 526 (Fla. 1987) seem similar in many respects to the facts in the subject case. Defendant Rogers and accomplice McDermit decided to rob a Winn-Dixie store. Rogers ordered the store clerk to open the cash register. When she had trouble opening it, Rogers told McDermit to "forget it." These two robbers walked out of the store, McDermit in front and Rogers trailing behind. During this interval, McDermid said he heard an unfamiliar voice behind him say, "No, please don't." These words were followed by the sound of one shot, a short pause, and two more shots. On their drive away, Rogers allegedly told McDermit that he had seen a man, the victim, slipping out the back of the store during the attempted robbery. At trial, McDermid testified that Rogers said the victim "was playing hero and I shot the son of a bitch." The victim had, in fact, had been fatally shot three times, once in the right shoulder and twice in the lower back. The Rogers court explained that these facts were insufficient to establish the "avoid arrest" aggravating circumstance as follows:

> Nor do we find that the killing was to avoid or prevent lawful arrest. This particular factor requires clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness. Id.; Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). Here, the trial court presumed this intent based solely on the circumstances of the murder and Rogers' alleged statement that he shot the victim for trying to be a hero. We find that this evidence falls short of the "clear proof" required by Menendez and Riley.

Griffin v. State, 474 So. 2d 777 (1985) = 6 pgs. is another store-robbery case. The Griffin court explained why it reached the same conclusion in its very similar facts:

> "We do not agree with the judge that because the victim offered no resistance, and because he was the sole eyewitness, he was killed to avoid arrest. While this is certainly a plausible inference, it is not the only one. There is no direct evidence of why Frank Griffin killed Raul Nieves. There is no evidence that Nieves knew or recognized Griffin. The only evidence of Griffin's state of mind is Stokes' testimony that immediately after the shooting and getting in the getaway car, Griffin said "I shot the cracker. The cracker is bleeding like a hog." Griffin did not answer when Stokes asked why he shot him. This does not support he inference that this was a witness-elimination murder.

Clearly, the witness-elimination aggravating circumstance was just as inappropriate in the subject case as it was in the above-referenced cases.

Constitutional violations: The trial court's allowance of an improper

aggravating circumstance violated the Defendant's rights to due process secured by the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. It also violated Defendant's right to a fair jury trial as secured by the 6th and 14th Amendments to the U.S. Constitution and by article 1, Sections 16 and 22 of the Florida Constitutions.

Issue 6: The trial court erred in allowing the "cold calculated and premeditated" ("CCP") aggravating circumstance

Preservation: Defendant's trial counsel filed two motions to have Florida Statutes Section 931.(5)(I) –the "CCP" aggravating circumstance– declared unconstitutional as written and as applied to the facts of this case. R3, p. 369-411, 416-458. The trial court denied those motions. R3, p. 512-514. Even if it is assumed, for purposes of argument only, that defense counsel should have done more to preserve this issue for appeal, the mischief caused by instructing the jury on an unsupported aggravating circumstance is so great that it should be regarded fundamental error, reviewable even without an objection below. *See* the discussion of Barrientos v. State, 1 So.3d 120 (Fla. 2d DCA 2009) in Issue 5, supra.

Standard of review: Appellant refers to the "Standard of review" information in Issue 5 above and incorporates it by reference here in support of this

issue.

Discussion: The CCP statutory aggravating circumstances applies to murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated, first-degree murder. Porter v State, 564 So.2d 1060, 1064 (Fla. 1999). When the evidence of this aggravator is circumstantial –as it is in the present case– the evidence must be inconsistent with any reasonable hypothesis which could negate the aggravating factor. *e.g.* Mahn v. State, 714 So.2d 391, 398 (Fla. 1998), citing Geralds v. State, 601 So.2d 1157 (Fla. 1992) and Eutzy v. State, 458 So.2d 755 (Fla. 1984). In order for the CCP aggravating circumstance to apply, there must be a careful plan or prearranged design to commit murder. Nelson v. State, 850 So.2d 514 (Fla. 2003). In other words, a spontaneous shooting of the type that occurs in a "robbery gone wrong" like the present case does not suffice. Appellant incorporates here by reference all of the discussion and law set forth in Issue 5 above in support of this issue.

Constitutional violations: The trial Court's allowance of the CCP aggravating circumstance violates the same constitutional provisions identified in Issue 5 above which are hereby incorporated by reference in support of this issue as well.

Issue 7: The trial court erred in allowing the "especially heinous, atrocious

and cruel" ("EHAC") aggravating circumstance

Preservation: Defendant's trial counsel filed two motions to have Florida Statutes Section 931.(5)(H) –the "EHAC" aggravating circumstance– declared unconstitutional, both as written and as applied to the facts of this case. R3, p. 206-237, 238-252. The trial court denied those motions. R3, p. 363-368. Appellant's trial counsel also made vigorous oral, trial-court argument against allowing the EHAC aggravating circumstance. Such objections were overruled. R46, p. 3312-3316. Even if it is assumed, for purposes of argument only, that defense counsel should have done more to preserve this issue for appeal, the mischief caused by instructing the jury on an unsupported aggravating circumstance is so great that it should be regarded fundamental error, reviewable even without an objection below. *See* the discussion of Barrientos v. State, 1 So.3d 120 (Fla. 2d DCA 2009) in Issue 5, supra.

Standard of review: Appellant refers to the "Standard of review" information in Issue 5 above and incorporates it by reference here in support of this issue.

Discussion: The EHAC statutory aggravating circumstances applies to murders that are either (a) extremely wicked or shockingly evil, (b) outrageously wicked or vile, or (c) "cruel," as evidenced to inflict a high degree of pain with

indifference to or enjoyment of the pain of others. Fla. Std. Jury Instr. (Crim.) 7.11(7). When the evidence of an aggravator is as circumstantial –as it is in the present case– the evidence must be inconsistent with any reasonable hypothesis which could negate the aggravating factor. *e.g.* Mahn v. State, 714 So.2d 391, 398 (Fla. 1998), citing Geralds v. State, 601 So.2d 1157 (Fla. 1992) and Eutzy v. State, 458 So.2d 755 (Fla. 1984). The essence of the EHAC aggravating circumstance is torture. That is, the effect of causing extreme physical pain or mental anxiety. Simmons v. State, 934 So.2d 1100 (2006), Barnhill v. State, 834 Sol2d 836 (Fla. 2002), Williams v. State, 574 So.2d 136 (Fla. 1991). Even where multiple gunshot wounds are coupled with a victim begging for his or her life, there will be no EHAC aggravating circumstance unless the killing id done to cause unnecessary and prolonged suffering. Bonifay v. State, 626 So.2d 1310 (Fla. 1993), Clark v. State, 609 So.2d 513 (Fla. 1992).

Rimmer v. State, 825 So.2d 304 , 328 (Fla. 2002) involved a robbery in which two robbery victims were told to lie on the floor. The were both shot in the head before the defendant left the scene. This Florida Supreme Court found that this was not the kind of fear, pain an prolonged suffering that this EHAC aggravating circumstance applies to.

Constitutional violations: The trial Court's allowance of the EHAC

aggravating circumstance violates the same constitutional provisions identified in Issue 5 above which are hereby incorporated by reference in support of this issue as well.

Issue 8: The Defendant's conviction cannot stand because it appears that the State presented witness testimony that the State knew was false

In its guilt-phase opening argument, the State conceded that the evidence would show that Sheila Miller was *not* kidnaped. R34, p. 1544. Nevertheless, the State put the Appellant on trial for kidnaping, along with all the other charges that the State prosecuted against the Appellant. R1, p. 1-5. The State nevertheless prosecuted the kidnaping charge all the way through trial until such charge ended in the jury's "not guilty" verdict. R6, p. 916.

The State called purported kidnaping victim Sheila to testify at Appellant's trial. R35, p. 1726-1793, She testified –falsely, if one is to believe the State– that the Appellant and his cohorts took her against her will and drove her around in her family's stolen van.

Preservation: The issue of the State knowingly presenting the false testimony of purported kidnaping victim Sheila Miller was *not* objected to or otherwise formally preserved for appeal. The undersigned counsel for Appellant of necessity, therefore, incorporates by reference in support of this issue all of the

"fundamental error" authority and argument that appears in Issue 5 above.

Standard of Review and Analysis: A prosecutor's knowing presentation of false testimony violates the Defendant's due process rights and requires reversal in accordance with the usual harmless error analysis. United States v. Agurs, 427 U.S. 97 (1976), Giglio v. United States, 405 U.S. 150 (1972).

Shifting attention away from these cases and back to the case at hand and the prosecutor's comment that the evidence will show that purported kidnaping victim Sheila Miller was *not* kidnaped, it is natural to wonder what the prosecutor was thinking. We can speculate that the prosecutor recognized that Sheila Miller had serious credibility problems and wanted to be candid about this with the jurors. Unfortunately, all that the undersigned attorney has to work with at this time is the record on appeal. It does appearance that the prosecutor presented the testimony of a witness (Sheila Miller) that the prosecutor himself believed was false. Hence, the undersigned attorney must brief this issue , and ask for reversal because of it.

Constitutional violations: The State's knowing presentation of the false testimony of purported kidnaping victim Sheila Miller violated the Defendants right to due process of law as secured by the 5th and 14th Amendments to the U.S. Constitution and Article 1, Section 9 of the Florida Constitution. It also violated the Defendant's right to a fair jury trial as secured by the 6th and 14th Amendments

to the U.S. Constitution and Article 1, Sections 16 and 22 of the Florida Constitution.

Issue 9: The Defendant's sentence of death cannot stand because Florida's death-sentencing statute violates the rules of *Ring v. Arizona* and *State v. Steele*

Preservation: Defendant's trial counsel filed a motion to have Florida's death-sentencing scheme declared unconstitutional based on Ring v. Arizona, 536 U.S. 584 (2002) and related cases. R4, p. 539-579. That motion was denied. R5, p. 815-829. The issue has been preserved for appeal.

Standard of review and analysis: This Florida Supreme Court has issued its opinion in State v. Steele, 921 So.2d 538 (Fla. 2005), wherein it stated, "Finally, we express our considered view, as the court of last resort charged with implementing Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations."

Initially, the Petitioner acknowledges that in matters which should be addressed by the legislature, the Courts wisely defer to the legislature. Such judicial deference has been demonstrated by this Court in Steele. However, it is also true that "death is different" in its finality, and require more legislative and judicial vigilance than other cases. Furman v. Georgia, 408 U.S. 238 (1972).

In Florida's capital sentencing scheme, the jury renders an *advisory* sentence of death or life based on a two-step process. First, the jury considers "Whether *sufficient* aggravating *circumstances* exist." Second, the jury considers "Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." F.S. Section 921.141 (formerly Section 919.23).

Florida capital cases require a unanimous verdict by a jury of twelve. *See* Rule 3.270 and Rule 3.440, Fla. R. Crim. P. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held that "Because ... enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' . . . the Sixth Amendment requires that they be found by a jury. The Petitioner's death sentence fails in the wake of Ring for a number of reasons. First, the jury recommended death by a margin of 9 to 3. Second, Ring requires that the jury, not the judge, make the findings needed to impose the death penalty. Those findings have not been made in the Petitioner's case. Third, Ring and Rules 3.270 3.440 of the Florida Rules of Criminal Procedure require that the jury findings in a capital case be unanimous.

Florida law requires that capital crimes be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, Section 15 (a)(1980). This Court has

held that indictments need not state the aggravating circumstances upon which the State may rely to establish that a crime qualifies a defendant for the death penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

Early in the history of the its post-1972 death penalty law, the Florida Supreme Court, in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), explained what constitutes a capital crime, and where the definition of "capital crime" comes from:

> The aggravating circumstances of Fla. Stat. Section 921.141 (6) actually defines those crimes – when read in conjunction with Fla. Stat. Section 782.04(1) and 794.01(1), F.S.A.– to which the death penalty is applicable in the absence of mitigating circumstances.

The sentence for first-degree murder is specified in Section775.082, Florida Statutes as follows:

> A person who has been convicted of a capital felony *shall be punished by life imprisonment* and shall be required to serve no less than 25 years before becoming *eligible for parole unless the proceedings held to determine sentence* according to the procedure set forth in Section 921.141 *result in a finding by the court that such person shall be punished by death*, and in the latter event such person shall be punished by death.
>
> (F.S. Section 775.082 (1979); emphasis Petitioner's)

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the present Petitioner's jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

The Florida death-sentencing scheme violates the principles recognized as applicable to the States in Apprendi v. New Jersey, 530 U.S. 466 (2000). As a result, the Florida death penalty proceedings under which the petitioner was sentenced violate the Sixth and Fourteenth and Eighth Amendments of the United States Constitution. Florida's death penalty scheme also violates the Sixth Amendment of the United States Constitution because the maximum sentence allowed upon the jury's finding of guilt is life imprisonment. A death sentence is only authorized upon the finding of additional facts. Since, under Florida law, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

In Ring, the court commented:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. [Citations to Hildwin v. Florida, 490 U.S. 638 (1989) and Spaziano v. Florida, 468 U.S. 447 (1984), Proffitt v. Florida, 429 U.S. 242 (1976)] In Hildwin, for example, we stated that this case presents us once again with the

> question of whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida (citation) and we ultimately concluded that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." . . . . A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Unanimous, twelve-person verdicts are required to impose the death penalty under common law principles. *See, e.g.* Burch v. Louisiana, 441 U.S. 130, 138 (1979) and Andres v. United States, 333 U.S. 740, 749 (1948). The notion that a unanimous jury is needed to impose the death penalty is based on the long-established principle that the death penalty is different than other punishments and carries with it safeguards and fail-safe protections found nowhere else. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The non-specific death recommendation in Petitioner's case violated the petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments of the United State's Constitution.

A literal reading of Florida's death penalty sentencing scheme (F.S. Section 921.141, formerly F.S. Section 919.23) indicates that the jury must, *before considering mitigating circumstances*, determine whether the aggravating circumstances are of sufficient magnitude to warrant the imposition of the death

penalty. In view of Apprendi and Ring, supra, the Petitioner's death sentence cannot stand because his jury did not unanimously recommend death and because it is impossible to know whether the jurors would have unanimously found any specific aggravating circumstances. In the present Petitioner's case, the jury recommended death by a vote of nine to three, not unanimously. Accordingly, there is a high probability that the jury did not unanimously agree on the existence of any particular aggravating circumstance. Given that this Florida Supreme Court has already acknowledged in Steele that Florida's death sentencing statute *should* be revisited to require *some unanimity* in the jury's recommendation, and given that the Florida Supreme Court has deferred to the legislature as best it can, and given the lack of action in this matter by any other branches of Florida's government, the undersigned Court-appointed attorney for Petitioner respectfully petitions this the judiciary to grant habeas corpus relief based on a continuing lack of a unanimity requirement in Florida's death sentencing statute.

Constitutional violations: The trial court allowed the prosecution of the Defendant under Florida's death-sentencing scheme. Florida death-sentencing scheme does not comply with the requirements of State v. Steele, 921 So.2d 538 (Fla. 2005) or Ring v. Arizona, 536 U.S. 584 (2002). This violated the Defendant's due process rights secured by the 5th and 14th Amendments to the U.S.

Constitution and Article 1, Section 9 of the Florida Constitution. It also violated the Defendant's right to a fair jury trial as secured by the 6th and 14th Amendments to the U.S. Constitution and Article 1, Sections 16 and 22 of the Florida Constitution.

CONCLUSION

The trial Court erred in the ways described above. Such errors were not harmless error. They were substantial and deprived the Appellant of his rights as described above. The Florida Supreme Court is requested to enter its Opinion, Order and Mandate reversing Appellant's Judgment and Sentence and directing the lower Court to vacate Defendant's Judgment and Sentence of Death and set the matter for a new trial.

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The undersigned attorney hereby certifies that this brief is submitted in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Fla. R. App. P.

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