IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| ENOCH D. HALL, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. SC10-182 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| _____ | ) | |

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0492868
444 Seabreeze Blvd. - Suite 210
Daytona Beach, Florida 32118-3941
(386) 254-3758

ATTORNEY FOR APPELLANT

## TABLE OF CONTENTS


| | PAGE NO. |
|---|---|
| TABLE OF CONTENTS | i |
| TABLE OF CITATIONS | iv |
| PRELIMINARY STATEMENT | 1 |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF THE FACTS | 8 |
| SUMMARY OF ARGUMENT | 43, 44 |
| ARGUMENT | |
| POINT I | 45 |
| **THE TRIAL COURT FAILED TO APPLY THE PROPER LEGAL STANDARD IN DECIDING THE APPELLANT'S MOTION TO SUPPRESS DENYING HIS RIGHT TO DUE PROCESS**. | |
| POINT II | 50 |
| **THE TRIAL COURT ERRED BY ALLOWING, OVER DEFENSE OBJECTIONS, IMPROPER OPINION TESTIMONY OF THE MEDICAL EXAMINER REGARDING THE SEQUENCE OF THE WOUNDS AND THE POSITION OF THE VICTIM, WHEN SUCH MATTERS ARE OUTSIDE THE SCOPE OF HIS EXPERTISE AND CANNOT BE MADE, IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.** | |

**TABLE OF CONTENTS** (continued)

PAGE NO.

POINT III 55

**REVERSIBLE ERROR OCCURRED WHEN THE COURT PERMITTED DETAILED AND HIGHLY EMOTIONAL PRIOR CRIME EVIDENCE TO BE ADMITTED AND TO BECOME A FEATURE OF THE PENALTY PHASE SUCH THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND A RELIABLE JURY RECOMMENDATION, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.**

POINT IV 62

**THE TRIAL COURT ERRED BY ALLOWING, OVER DEFENSE OBJECTIONS, EVIDENCE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.**

POINT V 64

**THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.**

## **TABLE OF CONTENTS** (continued)


| | PAGE NO. |
|---|---|
| POINT VI | 77 |
| **FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.** | |
| CONCLUSION | 79 |
| CERTIFICATE OF SERVICE | 80 |
| CERTIFICATE OF FONT | 80 |

## TABLE OF CITATIONS

**PAGE NO.**

**CASES CITED**:


*Almeida v. State*
748 So. 2d 922 (Fla. 1999) 73

*Banda v. State*
536 So.2d 221 (Fla. 1988) 68

*Bertolotti v. State*
476 So.2d 130 (Fla.1985) 58

*Bertram v. State*
637 So.2d 258 (Fla. 2nd DCA 1994) 50

*Bevel v. State*
983 So.2d 505 (Fla.2008) 47

*Blanco v. State*
706 So.2d 7 (Fla. 1997) 65, 71

*Bottoson v. Moore*
833 So. 2d 693 (Fla. 2002) 77, 78

*Boyd v. State*
910 So.2d 167 (Fla. 2005) 52

*Brennan v. State*
754 So. 2d 1 (Fla. 1999) 74

*Brewer v. State*
386 So.2d 232 (Fla., 1980) 48, 49

*Brown v. State*
721 So.2d 274 (Fla. 1998) 52

*Butts v. State*
733 So.2d 1097 (Fla. 1st DCA 1999) 51, 52

*Campbell v. State*
571 So.2d 415 (Fla. 1990) 70, 71

*Cannady v. State*
427 So.2d 723 (Fla. 1983) 68

*Castro v. State*
644 So.2d 987 (Fla. 1994) 52

*Cave v. State*
727 So.2d 227 (Fla.1998) 71

*Cole v. State*
701 So.2d 845 (Fla. 1997) 64

*Cox v. State*
819 So.2d 705 (Fla. 2002) 55

*Douglas v. State*
878 So.2d 1246 (Fla. 2004) 52

*Duncan v. State*
619 So.2d 279 (Fla. 1993) 55-57, 61

*Eddings v. Oklahoma*
455 U.S. 104 (1982) 70

*Eddings v. Oklahoma*
455 U.S. 104 (1982) 72

*Ferguson v. State*
417 So.2d 631 (Fla. 1982) 72

*Finney v. State*
660 So.2d 674 (Fla. 1995) 56, 57

*Freeman v. State*
563 So.2d 73 (Fla. 1990) 57

*Goodyear Tire & Rubber Co., Inc. v. Ross*
660 So.2d 1109 (Fla. 4th DCA 1995) 50

*Hansbrough v. State*
509 So.2d 1081 (Fla.1987) 66

*Hartley v. State*
686 So.2d 1316 (Fla. 1996) 65

*Harvard v. State*
375 So.2d 833 (Fla. 1977) 65

*Hill v. State*
549 So.2d 179 (Fla. 1989) 63

*Johnson v. State*
465 So.2d 499 (Fla. 1985) 68

*Jones v. State*
569 So.2d 1234 (Fla.1990) 58

*Kearse v. State*,
662 So.2d 677 (Fla. 1995) 52

*King v. Moore*
831 So.2d 143 (Fla. 2002) 77, 78

*Knowles v. State*
632 So.2d 62 (Fla. 1993) 72

*Kramer v. State*
619 So. 2d 274 (Fla. 1993) 73, 74

*Larkins v. State*
739 So. 2d 90 (Fla. 1999) 74

*Lawrence v. State*
846 So.2d 440 (Fla. 2003) 65

*Leon v. Wainwright*
734 F.2d 770 (11th Cir. 1984) 47, 48

*Martin v. State*
420 So.2d 583 (Fla. 1982) 65

*Mason v. State*
438 So.2d 374 (Fla. 1983) 68

*Merck v. State*
975 So.2d 1054 (Fla. 2007) 64

*Miranda v. Arizona*
384 U.S. 436 (1966) 18

*Miranda v. State*
832 So.2d 937 (Fla. 3rd DCA 2002) 52

*Morgan v. State*
639 So.2d 6 (Fla. 1994) 72

*Morris v. State*
811 So.2d 661 (Fla. 2002) 52

*Nelson v. State*
850 So.2d 514 (Fla.2003) 45

*Nibert v. State*
574 So.2d 1059 (Fla.1990) 74

*Offord v. State*
959 So.2d 187 (Fla. 2007) 73-75

*Perez v. State*
919 So.2d 347 (Fla. 2005) 52

*Porter v. State*
564 So. 2d 1060 (Fla. 1990) 74

*Ramirez v. State,*
810 So.2d 836 (Fla. 2001) 50

*Ramirez v. State*
739 So.2d 568 (Fla. 1999) 47

*Rhodes v. State*
547 So.2d 1201 (Fla.1989) 55-57, 61

*Ring v. Arizona*
536 U.S. 584 (2002) 2, 77, 78

*Robertson v. State*
699 So.2d 1343 (Fla. 1997) 74

*Robinson v. State*
520 So.2d 1 (Fla. 1988) 52

*Rodriguez v. State*
753 So.2d 19 (Fla. 2000) 57

*Rogers v. State*
511 So.2d 526 (Fla. 1987) 70

*Sims. v. Georgia*
389 U.S. 404 (1967) 47

*Spencer v. State*
615 So.2d 688 (Fla. 1993) 5

*Spencer v. State*
645 So.2d 377 (Fla. 1994) 68, 69

*Stano v. State*
473 So.2d 1282 (Fla. 1985) 55, 56

*State v. Dixon*
283 So.2d 1 (Fla. 1973) 65, 73, 75

*State v. Steele*
921 So.2d 538 (Fla. 2005) 78

*Terry v. State*
668 So. 2d 954 (Fla. 1996) 73

*Thornton v. State*
497 So.2d 906 (Fla. 4th DCA 1986) 52

*Traylor v. State,*
596 So.2d 957 (Fla.1992) 47

*Trease v. State*
768 So.2d 1050 (Fla. 2000) 70

*Urbin v. State*
714 So. 2d 411 (Fla. 1998) 58, 74

*Vining v. State*
637 So.2d 921 (Fla.1994) 62

*Walls v. State*
641 So.2d 381 (Fla.1994) 67

*Winkles v. State*
894 So.2d 842 (Fla.2005) 62

**OTHER AUTHORITIES**:

Amendment IV, United States Constitution 3
Amendment V, United States Constitution 3, 30, 49, 56
Amendment VI, United States Constitution 3, 30, 56, 77, 78
Amendment VIII, United States Constitution 30, 56, 64, 78
Amendment XIV, United States Constitution 3, 30, 49, 56, 64, 78

Article I, Section 16, Florida Constitution 3, 30, 55, 78
Article I, Section 17, Florida Constitution 30, 55, 64, 78
Article I, Section 2, Florida Constitution 55
Article I, Section 22, Florida Statutes 3, 30, 56
Article I, Section 9, Florida Constitution 3, 30, 49, 55, 78

Section 782.04(1)(a)1, Florida Statutes (2008) 2
Section 90.702, Florida Statutes 50
Section 921.141, Florida Statutes 77
Section 921.141(5), Florida Statutes 62
Section 921.141(5)(a)Florida Statutes 6, 29, 62
Section 921.141(5)(b), Florida Statutes 6
Section 921.141(5)(g), Florida Statutes 6
Section 921.141(5)(I), Florida Statutes 6
Section 921.141(5)(j), Florida Statutes 6

Ehrhardt, *Florida Evidence* (West 2010 ed.) §702.1 50

DiMaio, *Forensic Pathology*
(CRC Press 2nd ed. 1992), pp. 13-14 53, 54

*Forensic Science Under Seige:The Challenges of*
*Forensic Laboratories and the Medico-Legal Investigation System*
(Academic Press 1st edition 2007), p. 13 53

Hanzlick & Graham, *Forensic Pathology in Criminal Cases*
(LexisNexis 3rd edition) §38.5, p. 345 53

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| ENOCH D. HALL, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. SC10-182 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| _____ | ) | |

## PRELIMINARY STATEMENT

The record on appeal is comprised of thirty-five consecutively numbered volumes. In this brief, the symbol "R" will designate page numbers of the pleadings in the record on appeal, and the symbol "T" will designate the pages of the transcripts (numbered separately from the pleadings). Counsel will refer to the record on appeal using either "R" or "T"; followed by an Arabic number referring to the appropriate pages; followed by "Vol." followed by the appropriate Arabic number to designate the volume number, as denoted by the court clerk, and not the transcript volume numbers given by the court reporter.

## STATEMENT OF THE CASE

The State charged the Appellant, Enoch D. Hall, by indictment with the first degree murder by stabbing of Donna Fitzgerald, in violation of Section 782.04(1)(a)1, Florida Statutes (2008). (R1017-1018;Vol.7). The State filed a Notice to Seek the Death Penalty (R1022;Vol.7), and the Appellant entered a plea of not guilty to the charges. (R1031;Vol.7). At the time of the offense, the Appellant was an inmate at the Tomoka Correctional Institution and Officer Fitzgerald worked as a corrections officer at the facility.

The Appellant unsuccessfully contested the legality of Florida's death penalty statute under *Ring v. Arizona,* 536 U.S. 584 (2002). (R1124-1172;Vol.8). The Appellant contended, *inter alia*, that the statute unconstitutionally requires that the death penalty be imposed by a judge rather than by jury, that the statute fails to require fact-finding by the jury, that it fails to require jury unanimity on the recommendation and on each aggravator, and that it fails to require that the State list the relevant statutory aggravators in the indictment. (R1124-1172;Vol.8). The court denied the motion (R 1399;Vol.9). The Appellant also moved to preclude the death penalty as a possible sentence, because the indictment fails to allege aggravating circumstances (R1055-57;Vol.7). The court denied the motion (R 1396;Vol.9). The court also denied defense counsel's request for interrogatory

verdicts for the penalty phase (R1429-1432;Vol.9, R1592;Vol.10).

The Appellant filed a motion to suppress the three statements given investigators from the Florida Department of Law Enforcement, (FDLE), on the night of the murder (R1411-1412;Vol.9). The Appellant argued that the statements were not freely and voluntarily made, but were rather the result of the Appellant being in fear for his life due to being physically abused and beaten by employees of the Florida Department of Corrections (R1411;Vol.9). The Appellant argued that the statements had been obtained in violation of Appellant's privilege against self incrimination and in violation of his rights to due process and counsel as guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 22 of the Florida Constitution (R1411;Vol.9). After conducting an evidentiary hearing, the court denied the motion to suppress (R1516-1521;Vol.10). In the order denying the motion, the court ruled that even if the Appellant had initially been beaten or threatened by corrections officers prior to his initial statement that "the effects of such abuse upon the voluntariness of his subsequent statement to the FDLE clearly had been dissipated" (R1520;Vol.10).

Prior to trial, the Appellant moved in limine to preclude the State from introducing evidence during the guilt/innocence phase of the charges for which the

Appellant was serving his prison sentences and the length of any of his sentences (R1468-1469;Vol.9). The Appellant also moved in limine to preclude the State from introducing into evidence during the penalty phase the length of the Appellant's prison sentences that he was serving at the time of the alleged murder (R1470-1471;Vol.9). The court granted the first motion and precluded the introduction of the evidence at the guilt phase, but denied the second motion as to the penalty phase (R1588,1589-1590;Vol.10).

A jury trial commenced before the Honorable J. David Walsh, Circuit Judge of the Seventh Judicial Circuit of Florida, in and for Volusia County, on October 12, 2009. (R1623;Vol.10).

At the close of the State's case, defense counsel moved for a directed verdict of second degree murder arguing that the State had failed to prove that the Appellant had acted with premeditation (T2654-2657;Vol.28). The court denied the motion for a directed verdict (T2660;Vol.28).

During the testimony of the medical examiner, Dr. Predrag Bulic, defense counsel objected to the doctor testifying about the order in which injuries were inflicted upon Officer Fitzgerald (T2639;Vol.28). Defense counsel argued that the doctor was not qualified to give an opinion as to the order of injuries (T2639;Vol.28). The court overruled the objection (T2639;Vol.28).

The jury returned a verdict of guilty as charged of first degree murder (R2893;Vol.30). The court adjudicated the Appellant guilty of the charge (R2899;Vol.30).

Penalty phase of the trial commenced on October 27, 2009 (R1666;Vol.10). The defense renewed their previously argued motion in limine to preclude the State from offering evidence of the length of the Appellant's sentence to the jury (T2933;Vol.31). The trial court denied the motion and the State offered evidence that the Appellant was serving two life sentences at the time he committed the offense (T3039;Vol.31). The State also offered evidence that Appellant had committed prior violent felonies, introducing testimony from two women that the Appellant had sexually battered (T2966:Vol.31). Defense counsel objected to the testimony as highly prejudicial and irrelevant (T2966-67;Vol.31). The trial court overruled the objection (T2967;Vol.31). The jury returned a recommendation of death, by a vote of 12 to 0. (R1725; Vol.11).

A *Spencer*[1] hearing was held on December 7, 2009 (R1729;Vol.11).

In the sentencing order, the court found that the state had proven five aggravating circumstances (R1790-1799;Vol.11). The court gave very great weight to two aggravators: heinous, atrocious, or cruel [§921.141(5)(h)] and cold,

---

[1] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

calculated, and premeditated [§921.141(5)(I)]. The court gave great weight to the remaining three: that the killing was committed by a person previously convicted of a felony and under sentence of imprisonment [§921.141(5)(a)];the defendant was previously convicted of a felony involving the use or threat of violence to the person [§921.141(5)(b)]; the killing was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws [§921.141(5)(g)] (R1790-1799;Vol.11). The court had also found the aggravator that the victim was a law enforcement officer engaged in the performance of her official duties [§921.141(5)(j)], but concluded that this aggravator merged with the hinder governmental function aggravator and subsequently gave it no weight (R1790-1799, 1810;Vol.11).

The court found that no statutory mitigators had been established (R1810;Vol.11).

As to non-statutory mitigation, the trial court considered twelve possible mitigators and found that only eight had been established (R1800-1810;Vol.11) The court found: the defendant was a good son and brother (some weight); the defendant's family loves him (little weight); the defendant was a good athlete who won awards and medals (little weight); the defendant was a victim of sexual abuse (some weight); the defendant was productively employed while in prison (some

weight); the defendant cooperated with law enforcement (some weight); the defendant showed remorse (little weight); and the defendant displayed appropriate courtroom behavior (little weight) (R1800-1806;Vol.11).

The court found that the following four non-statutory mitigators were not established and assigned them no weight: the defendant suffered from work related stress; the defendant was under the influence of drugs at the time of the homicide; the defendant was suffering from impaired judgment; the defendant was under the influence of extreme mental or emotional disturbance (R1803, 1803-1804,1804, 1806-1809;Vol.11).

The court concluded that the five aggravating circumstances "far outweigh" the established non-statutory mitigating factors and sentenced Appellant to death for the first-degree murder. (R1810;Vol.11)

Notice of appeal was timely filed on January 29, 2010. (R 1822;Vol.11) This appeal follows.

## STATEMENT OF THE FACTS

At trial, in defense counsel's opening statement, the Appellant conceded that he had killed Officer Fitzgerald and was guilty of second degree murder (T2000-2003;Vol.23;Vol.1).

The Appellant, Enoch Hall, grew up on a five acre farm outside of Milton, Florida with his parents and two younger brothers (T3161,3165;Vol.32). His mother was a housewife, his father worked at local textile plant, and the brothers had chores to do on the farm (T3161, 3162, 3165, 3170;Vol.32). He was an obedient child who never got into trouble at school (T3166-3167;Vol.32). When he got older, he played football and won awards for running track (T3167, 3172;Vol.32). The three brothers enjoyed riding dirt bikes and three wheelers together (T3167-3168;Vol.32).

When Enoch Hall was nineteen years old he was arrested, placed in jail, and raped (T3193;Vol.32). Mr. Hall had taken his girlfriend's car, her mother and her mother's boyfriend were both law enforcement officers (T3193;Vol.32). The mother's boyfriend told Mr. Hall's father that he was going to take Mr. Hall to jail and "get him raped" (T3194;Vol.32). After the rape, Mr. Hall withdrew from his family, he no longer liked to be around people, and he became afraid of law enforcement officers (T3195;Vol.32).

Years later, Mr. Hall was serving two consecutive life sentences at Tomoka Correctional Institution in Volusia County, Florida (T3039;Vol.31) While serving his time, Mr. Hall worked as a welder in the PRIDE compound at the prison (T2082; Vol.24).

PRIDE is not part of the Florida Department of Corrections, (DOC), rather it is a company that has a contract with DOC (T2142; Vol.24). Correction officers who are working in the PRIDE compound are employees of the PRIDE company, however only a state-certified correctional officer was permitted to supervise inmates in the PRIDE facility (T2143-2144;Vol.24).

The PRIDE compound consists of numerous outbuildings and one main bay area where inmates refurbish large vehicles, such as semi-trucks and buses (T2036;Vol.24). During PRIDE's normal operating hours, approximately 7:00 to 3:30, up to 70 inmates would work in the facility (T2142;Vol.24). Sometimes there would be an overtime shift, which began after 3:30 p.m. (T2143;vol.24).

In order to enter the PRIDE compound, an inmate must pass through a set of two gates (T2037;Vol.24). By the gates there is an officer station where the inmates clock in and out (T2065;Vol.24). The inmates have time cards, which they place in either the "In" bin or the "Out" bin (T2137-2138;Vol.24). There is a metal detector that inmates must pass through as they exit the compound

(T2037;Vol.24).

Inside the main PRIDE building is a bay area and a welding area (T2095;Vol.24). There are racks of sheet metal and bins of scrap metal (T2094-2095;Vol.24). Mr. Hall's work station was in the welding area (T2096;Vol.24). There are numerous other welders working at PRIDE besides Mr. Hall (T2143:Vol.24).

Mr. Hall was known for always being the last one to leave the PRIDE facility (T2574-2575;Vol.27). The inmates have to clean up their areas before they leave the facility (T2572;Vol.27). The inmates get paid by the hour, so one guard suspected he was hoping to earn a little bit more money by always leaving late (T2574-2575;Vol.27). When inmates leave PRIDE they must go through the check out procedure, which involves walking through the metal detector and getting a pat down by the corrections officer (T2574;Vol.27). After the inmates have left, a count is called into the control room and the supervising officer turns in the PRIDE keys (T2575-2576;Vol.27). Inmates were not permitted to "hang out" in the PRIDE facility (T2576;Vol.27). Officer Frederick Evins, who often worked the overtime shift at PRIDE, testified that in his opinion all inmates knew that the corrections officer would go and find them if they were not accounted for at the end of the shift (T2577;Vol.27).

Officer Fitzgerald was filling in for another officer when she worked the overtime shift on the night of June 25, 2008 (T2009, 2079;Vol.23). That night, Sergeant Suzanne Webster, a corrections officer at Tomoka C.I., was working as the control room supervisor (T2004-5;Vol.23). The control room monitors all alarms, passes out keys, and is responsible for getting a count from all areas of the prison as to the number of inmates in that area (T2006;Vol.23). When Sgt. Webster started her shift that day, as approximately 4:05 p.m., she requested that all areas report in a count of their inmates (T2005-2006;Vol.23). Officer Fitzgerald called Sgt. Webster and told her that 13 inmates were working in the PRIDE compound (T2006,2008;Vol.23).

Later that evening, at approximately 7:30 p.m., Sgt. Webster realized she had not heard from Officer Fitzgerald (T2008-2009;Vol.23). The officer that normally works that shift would call prior to releasing inmates from the PRIDE compound (T2008-2009;Vol.23). The key box in the control room was checked and it was determined that the PRIDE keys had not yet been turned in by Officer Fitzgerald (T2009;Vol.23). The PRIDE keys unlock all the buildings and individual locks within the PRIDE buildings (T2009,2082;Vol.23).

When Sgt. Webster was unable to contact Officer Fitzgerald by radio or by phone, she radioed Officer Chad Weber, an inside security officer, and told him to

check on Officer Fitzgerald (T2010-2011;Vol.23).

After Officer Weber went to the PRIDE facility there was a lot of confusion on the radio and Sgt. Webster heard yelling, so she called out the alpha response team for backup to the PRIDE building (T2012-2013;Vol.23). She later called out the bravo response team when she heard over the radio, that an officer was down (T2012-2013;Vol.23).

Officer Weber was in the office of Captain Shannon Wiggins when he received the call from Sgt. Webster (T2029-2030;Vol.24). Officer Weber immediately went with Sgt. Bruce MacNeil to the PRIDE compound (T2030,2057;Vol.24). When they arrived at the compound they saw that the gates at the entrance of the PRIDE compound were closed, but not properly locked (T2030-2031,2058;Vol.24). The two officers initially did a sweep around the outside of the PRIDE buildings, then they entered the main PRIDE building, after noticing that the North door of the building was cracked open (T2031,2058; Vol.24). The officers entered the building through the North door and proceeded to walk through it to the South end of the building (T2031-2032,2058 ;Vol.24). The building was dark, because the lights for the facility had been turned off (T2031;Vol.24). When Officer Weber reached the South end of the building, he turned around, looked at the North door, and saw Mr. Hall run out the door

(T2032,2039;Vol.24).

The officers chased Mr. Hall as he ran around the exterior of the PRIDE to the South door, through the interior of the building, and back out the North door (T2032-2033, 2069;Vol.24). Sgt. MacNeil called for backup and advised Captain Wiggins of the situation (T2058,2079;Vol.240. When Mr. Hall exited the North door a second time, Officer Weber was waiting for him (T2033;Vol.24). Officer Weber testified that Mr. Hall put his hands in the air and immediately confessed to killing Officer Fitzgerald by repeatedly stating, "I freaked out, I snapped, I killed her." (T2033;Vol.24).

Officer Weber ordered Mr. Hall to place his hands on the wall, so he could be handcuffed and noticed that Mr. Hall had the set of PRIDE keys looped around his thumb (T2033-2034;Vol.24). Officer Weber took the keys from Mr. Hall and placed him in handcuffs (T2034;Vol.24). Officer Weber estimated that Mr. Hall was apprehended approximately three to five minutes after the two officers entered the PRIDE compound (T2034;Vol.24).

Sgt. MacNeil came out of the PRIDE building and saw Mr. Hall being handcuffed (T2040,2070;Vol.24). Sgt. MacNeil also heard Mr. Hall repeatedly confess, "I snapped, I killed her." (T2071;Vol.24).

The officers asked Mr. Hall for the location of Officer Fitzgerald

(T2041;Vol.24). Mr. Hall did not respond to their question, but instead continued mumbling what he had stated before, "I freaked out, I snapped, I killed her." (T2042, 2046;Vol.24).

By this time, Captain Wiggins and members of the alpha response had responded to the PRIDE compound (T2041-2042,2081;Vol.24). As he ran up to the officers, Captain Wiggins heard Mr. Hall muttering and yelling that he had snapped and killed "her" (T2083;Vol.24). Mr. Hall said it over and over again (T2083;Vol.24). Only one time did Captain Wiggins heard Mr. Hall say, "I'm sorry." (T2141;Vol.24). Captain Wiggins sent the backup officers to search the facility, while he talked to Mr. Hall and asked him where Officer Fitzgerald was (T2072,2085;Vol.24). Mr. Hall cooperated with Captain Wiggins and tried to explain that Officer Fitzgerald was in a paint room / office of one of the PRIDE facilitators (T2083;Vol.24). Mr. Hall was about to lead Captain Wiggins into the PRIDE building to show him where her body was, when Officer Burch ran out and said there was an officer down (T2085;Vol.24).

Officer Chad Burch was one of the officers who responded (T2047;Vol.24). As he had entered the PRIDE compound, Officer Burch heard Sgt. MacNeil yelling at Mr. Hall (T2054;Vol.24). Officer Burch went around the north side of the PRIDE building and saw Mr. Hall in handcuffs with Sgt. MacNeil and Officer

Weber (T2048;Vol.24). Officer Burch heard Sgt. MacNeil and Officer Weber asked Mr. Hall what he had done with Officer Fitzgerald and Mr. Hall repeatedly say, "I'm sorry, I snapped, I killed her." (T2049-2055;Vol.24).

Officer Burch checked the PRIDE building and noticed a light on in a room down a hallway (T2049;Vol.24). Inside the room, Officer Burch found the body of Officer Fitzgerald (T2049;Vol.24). Officer Burch went back outside and screamed, "Officer down." (T2050, 2072-3;Vol.24).

Captain Wiggins immediately told Mr. Hall to get down and he put Mr. Hall on the ground (T2086;Vol.24). Sgt. MacNeil and Captain Wiggins ran to the paint room/ office, leaving Mr. Hall in the custody of Officer Schweit and Officer Dickerson (T2073, 2085-2086, 2090;Vol.24).

Officer Fitzgerald was found lying face down on top of a cart (T2073, 2122;Vol.24). The upper part of her body was wrapped tightly in gray wool blankets (T2073;Vol.24). The bottom half of her body came over the back of the cart (T2073;Vol.24). She was naked from the waist down; her pants and underwear had been pulled down to her knees (T2073-2074, 2122-2123;Vol.24). A bucket of water was on the floor right next to Officer Fitzgerald's legs (T2123;Vol.24). Inside the bucket was Mr. Hall's shirt (T2123;Vol.24).

Sgt. MacNeil and Captain Wiggins looked for a pulse, while Officer Weber

went to check that medical assistance was en route (T2043, 2074;Vol.24). Officer Fitzgerald was not breathing and they were unable to locate a pulse (T2074, 2123-2124;Vol.24).

Captain Wiggins ordered a master count of all inmates and a security check of all officers (T2125-2126;Vol.24). He then ordered that Mr. Hall be escorted to the MTC building and secured in the hallway (T2126;Vol.24).

The medical building is referred to as the MTC building (T2053;Vol.24). The building has two sections, one is a medical facility and the other part of it is the confinement section (T2054;Vol.24). There is hallway between the two sections and Mr. Hall was initially taken to that hallway and was seated on a bench; he was later placed in the confinement section (T2054;Vol.24).

Mr. Hall was escorted to the medical facility by Officer Dickerson and Officer Gary Schweit (T2053;Vol.24). Officer Scwheit testified that he heard Mr. Hall say that he had flipped out, or words to that effect (T2147;Vol.24). Officer Schweit said that Mr. Hall looked like he had done something that he shouldn't have (T2149; Vol.24). Officer Burch saw Mr. Hall being escorted to the MTC building and said Mr. Hall walked with his head hanging low and he was sobbing (T2053-2055;Vol.24).

Officer Hector Olavarria relieved Officer Schweit as he stood watch over

Mr. Hall in the hallway (T2284;Vol.25). Also present in the hallway were Sgt. Kelso and Inspector Joiner (T2284;Vol.25). Inspector Joiner told Officer Olavarria not to say anything to Mr. Hall, but to stay close to him and watch him (T2284-2285;Vol.25). The officer later escorted Mr. Hall to a conference room to talk to investigators and then afterwards to a cell in the confinement unit (T2286;Vol.25). Mr. Hall was shackled and restrained while in the cell (T2286;Vol.25). Officer Olavarria stood outside the cell and watched Mr. Hall throughout the second interview (T2287-2289;Vol.25).

**A. Statements to FDLE Agents**

Mr. Hall gave three statements to agents from the Florida Department of Law Enforcement (FDLE) (T2157;Vol.24). During the first two statements corrections officers from the prison were present and listening to his statements (T2278-2279;Vol.25). The third and most complete confession was provided in the presence of only the two agents and after they had told Mr. Hall that they would be transporting him to the county jail that night (T2280;Vol.25).

Stephen Miller and Tim Krafft, special agents with the FDLE arrived at the prison at approximately 9:00 p.m. (T2151-2152;Vol.24). The agents were initially taken to the paint room and observed the body (T2152-2153;Vol.24). Agent Miller saw what appeared to be multiple stab wounds on Officer Fitzgerald's back,

noticed the lack of blood in the surrounding area, and concluded there was another crime scene (T2153;Vol.24).

Agents Miller and Kraft then met with Mr. Hall in a small office in the medical facility (T2155;Vol.24). Mr. Hall was wearing a white T-shirt, blue prison pants, and a blue prison shirt with the name "Prince" on it (T2232;Vol.25). Agent Miller gave Mr. Hall the *Miranda*[2] warnings and Mr. Hall agreed to waive his rights and speak with the agents (T2156-2157;Vol.24). During this interview, Mr. Hall was handcuffed and shackled (T2277;Vol.25). In the room with Mr. Hall were Agent Miller, Agent Krafft, Inspector Joiner, and two corrections officers (T2278;Vol.25). Agent Miller testified that no one in the room threatened, forced, or coerced Mr. Hall into speaking with law enforcement (T2164;Vol.24).

Mr. Hall admitted to killing Officer Fitzgerald (T2160;Vol.24). He said that he did not know what triggered the event; that he had "just freaked out" (T2187;Vol.25). Mr. Hall explained that earlier that day he had taken some pills that Frank Prince had given to him (T 2181-2182;Vol.25). Mr. Prince is also an inmate and also works for PRIDE (T2181;Vol.25). Mr. Prince regularly gave Mr. Hall pills (T2203;Vol.25). Mr. Prince gave Mr. Hall four white pills, but did not tell him what type of drug they were (T2182;Vol.25). Mr. Hall just wanted to get

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

high, so he took all four pills at lunchtime (T2182;Vol.25). After he took the pills he went back to work in the PRIDE building (T2183; Vol.25).

Later that day, when his shift had ended, Mr. Hall went looking for more pills (T2204-2207;Vol.25)). Mr. Hall turned off the lights in the main building, because he was the last to leave, and looked in the office for some pills (T3305-2206;Vol.25). Mr. Hall was unable to find any pills and became angry (T2198;Vol.25). Mr. Hall was standing in a closet in the back of the room, when Officer Fitzgerald opened the door to the room (T2220-2221;Vol.25). Officer Fitzgerald laughed and called Mr. Hall by his nickname and said, " Possum, come on, get out of there." (T2222;Vol.25). Mr. Hall told her to get out (T2222;Vol.25). Officer Fitzgerald grabbed Mr. Hall's arm and he freaked out and began to stab her (T2223;Vol.25). Mr. Hall said he could not recall how many times he stabbed her (T2224;Vol.25). Mr. Hall said he stabbed Officer Fitzgerald with a sharp piece of metal that he found on the ground of the room (T2186;Vol.25). Afterwards, he left the piece of metal on the floor of the paint room/office (T2186;Vol.25).

Mr. Hall then took off his bloody shirt and put it in a bucket of water and put on one of Mr. Prince's shirts (T2225-2226;Vol.25). He picked up the PRIDE keys and continued to look for the pills (T2227-2228;Vol.25). Mr. Hall stated that he did not remember pulling Officer Fitzgerald's pants down (T2202;Vol.25).

Mr. Hall explained that he had known Officer Fitzgerald for a long time and that he did not want to hurt her or anybody (T2184;Vol.25). Mr. Hall said she was always a nice lady and he liked her and considered her a friend (T2187-2188,2215;Vol.25). Mr. Hall said that he did not want to have sex with Officer Fitzgerald (T2185;Vol.25). Mr. Hall repeatedly stated that he just wanted to get high (T2190,2195,2196;Vol.25).

After the interview ended, Agent Miller went to inspect the crime scene and verify the details of Mr. Hall's confession (T2232-2233;Vol.25). While at the crime scene, Agent Miller was told that Mr. Hall wanted to talk to him again (T2235;Vol.25). Mr. Hall had been moved to a cell (T2236;Vol.25).

In the second statement, Mr. Hall admitted that he killed Officer Fitzgerald somewhere other than the room where she was found (T2244-2245;Vol.25). During this interview, Mr. Hall was naked and wrapped in a sheet, because his clothes had been collected as evidence (T2278-2279;Vol.25). Present at this interview were Mr. Hall, Agent Miller, Inspector Joiner, a crime scene technician, and a corrections officer (T2279-2280;Vol.25).

Mr. Hall told Agent Miller that he was looking for pills and happened to find the weapon, a piece of sheet metal (T2246-2247;Vol.25). Officer Fitzgerald found Mr. Hall searching for pills in the office, he ran out past her to the welding shed,

she chased him to the welding shed, and he stabbed her there (T2252;Vol.25). Mr. Hall carried her to Mr. Prince's office and placed her on the cart (T2254;Vol.25). Mr. Hall admitted pulling Officer Fitzgerald's pants down, but denied sexually assaulting her (T2254-2255;Vol.25). Mr. Hall said he threw some dirt on the blood outside the welding shed (T2250;Vol.25). Mr. Hall told Agent Miller that he hid the knife in a cinderblock wall near the welding shed (T2255-2256;Vol.25). Mr. Hall told Agent Miller he did not think he was "going to make it to tomorrow." (T2255;Vol.25). Agent Miller told Mr. Hall that he would transport him to the branch jail in a little while (T2256;Vol.25).

Agent Miller left Mr. Hall and went to the welding area to verify the details of the second interview (T2256;Vol.25). He found three bloody shoe tracks around the welding shed, what appeared to be blood inside the welding shed, and bits of Speedy Dry (T2257;Vol.25). The officers were unable to locate the shank, so Mr. Hall volunteered to help them (T2257-2258; Vol.25). Mr. Hall was wheeled out to the welding area shackled and in a wheelchair (T2258;Vol.25). Mr. Hall successfully directed them to the hiding place of the shank he used to kill Officer Fitzgerald(T2258-2260;Vol.25). Agent Miller then asked if Mr. Hall would be willing to do a third interview and he agreed to talk to the agent a third time (T2260;Vol.25).

In this third and final statement to Agent Miller, Mr. Hall agreed that in his first statement he said he killed Officer Fitzgerald inside the PRIDE building, but in his second statement he admitted to killing her in the welding area outside the PRIDE building (T2264-2265;Vol.25). This statement was made with only Mr. Hall, Agent Miller, and Agent Krafft in the room (T2280;Vol.25).

Mr. Hall admitted that he stayed behind in the PRIDE compound to look for drugs (T2265;Vol.25). The drugs were supposedly hidden by Mr. Prince (T2265-2266;Vol.25). While looking for drugs, Mr. Hall found the shank by the sink in Mr. Prince's office and took it with him (T2271-2272;Vol.25). Officer Fitzgerald came looking for him, because he was the only inmate who had not checked out yet (T2266;Vol.25). When he realized she was looking for him, Mr. Hall hid inside the welding shed (T2266;Vol.25). Officer Fitzgerald opened the shed's door and came in and tried to grab him (T2267;Vol.25). He tried to run past her, but she would not let go, so he stabbed her (T2267;Vol.25). Mr. Hall did not recall how many times he stabbed her (T2267;Vol.25). Officer Fitzgerald fell to the ground inside the shed; he did not know whether or not she was alive (T2267;Vol.25). Mr. Hall wrapped her up in a towel and blankets and carried her back to the paint room/ office (T2268-2269;Vol.25). He spread some of the Speedy Dry on the ground in the welding area to soak up the blood (T2268;Vol.25). Mr. Hall placed

her on a cart; he did not know if she was alive at the time (T2269;Vol.25). He then continued to look for pills, but was not able to find any and became upset (T2270;Vol.25). Mr. Hall went back to the room where Officer Fitzgerald was, pulled down her pants (T2272;Vol.25). He did not sexually assault her (T2273;Vol.25). Mr. Hall then walked out of the room, corrections officers then entered the PRIDE facility and he attempted to run from them (T2273;Vol.25). Mr. Hall said he had put his shirt in a bucket of water, put on Prince's shirt, but kept on his own pants (T2273-2274;Vol.25).

**B. Guilt Phase**

At trial, Daniel Radcliffe, a crime scene investigator for FDLE, testified that he found two blister packets of pills in a file cabinet in the paint room where the body was discovered (T2397-2399;Vol.26). The file cabinet was unlocked at the time, but Mr. Radcliffe did not know whether it had recently been unlocked (T2449-2450;Vol.26) The pill packets had an inmate's name on them, Franklin Prince (T2399;Vol.26). The white pills were labeled Ibuprophen 800 milligrams and the pink pills were labeled Carbamazepine a generic for Tegretol 200 milligrams (T2399;Vol.26). Tegretol is an anti-seizure medication (T2400;Vol.26). The State agreed to stipulate that Tegretol is not a controlled substance (T2587-2588;Vol.28).

Appellant's white t-shirt was found in a bucket of water with other shirts in the paint room (T2401-2402;Vol.26). Appellant's prison pants were found in a pile of clothes, also in the paint room (T2362;Vol.26). Months later, the Appellant's blue prison shirt was found lodged on top of a sixteen foot tall paint booth (T2320;Vol.25). Granules of Speedy Dry, a material used to sop up oil spills, were found on the ground in front of the welding shed and in a coffee can next to the shed (T2426-2428;Vol.26). The granules tested positive for blood and DNA testing confirmed that it was Officer Fitzgerald's blood (T2534-2535;Vol.27). A broom found nearby had Officer Fitzgerald's blood on the broom head (T2534-2538;Vol.27).

The welding shed was used to store welding equipment and there was very little free space to stand inside it (T2420-2421;Vol.26). Blood was found on the walls of the welding shed (2405 -2410;Vol.26, T). Also found in the welding shed was an olive cap, which had Officer Fitzgerald's blood on it (T2410-2411;Vol.26, T2498-2499;Vol.27). Mr. Hall's clothes tested positive for Officer Fitgerald's blood, including his underwear (T2506-2532;Vol.27).

A sexual assault kit was performed on Officer Fitzgerald's body ( T 2441;Vol.26). Jillian White, a crime lab analyst with FDLE, testified that there was no evidence of semen on the body (T2486;Vol.27).

Captain Wiggins testified at trial that shanks made in a PRIDE facility differed from the usual ones made by inmates (T2132;Vol.24). A PRIDE made shank has a machined edge that was made by a grinder, which gives the weapon an edge like a knife (T2133;Vol.24). In contrast a common shank is made by sharpening an item on a rough surface, such as concrete, so the edges are jagged (T2133;Vol.24). Captain Wiggins testified that the shank recovered from the wall not only has a meticulous sharpened point, it has grind marks on it from a tool grinder (T2135;Vol.24). There are tool grinders in the PRIDE facility at Tomoka C.I. (T2136;Vol.24). Captain Wiggins testified that he was a commander of the rapid response team and as part of his job would search prisons for weapons (T2131;Vol.24). Captain Wiggins has received training and education on different weapons to look for and over his 18 years of experience has seen thousands of weapons, including thousands of machine sharpened shanks (T2132,2135;Vol.24).

At trial, Dr. Predrag Bulic, the medical examiner, testified that Officer Fitzgerald had suffered blunt force injuries to her face, a ligature mark across her face, and twenty-two stab wounds (T2614,2641,2622; Vol.28). Dr. Bulic testified that the ligature mark was caused when Officer Fitzgerald's necklace was pulled backwards so that it was tight across her face (T2641-2643;Vol.28). Dr. Bulic stated that this type of mark is consistent with someone being grabbed by the hair

or the collar and the necklace being grabbed along with hair (T2643;Vol.28). The blunt force injuries to Officer Fitzgerald's face consisted of contusions to and around her eyes, on her forehead, on the bridge of her nose, and on her chin (T2615-2616;Vol.28). There were also some abrasions to the upper lip (T2615;Vol.28).

Officer Fitzgerald was stabbed seven times on her arms and hands; Dr. Bulic characterized these wounds as defensive wounds (T2623;Vol.28). She was stabbed ten times in her back and five times in her abdomen (T2622,2630;Vol.28). The wounds to the abdomen were relatively shallow and nonlethal, only one was potentially life threatening (T2624,2640;Vol.28). That wound pierced her liver and would have required surgery and antibiotics to survive (T2625;Vol.28). The stab wounds to her back were more severe. There were four stab wounds on the right side of her body (T2635;Vol.28). These wounds penetrated her right lung and caused it to collapse (T2631,2632-2634;Vol.28). One of the stab wounds fractured a rib (T2631;Vol.28). The remaining six wounds were on the left side of her back (T2635;Vol.28). One of the wounds, denoted as wound "Q", fractured another rib and penetrated her heart (T2635-2637;Vol.28). Dr. Bulic testified that this type of wound was lethal, there was no hope to survive this wound, and the most someone could survive was three to five minutes (T2636, 2646;Vol.28).

Wound Q and several of the other stab wounds to the left side also penetrated her left lung and caused it to collapse as well (T 2638;Vol.28). With only one lung collapsed, a person can survive several hours, but once both lungs collapsed a person rapidly loses consciousness and dies (T2634,2646;Vol.28).

Dr. Bulic testified that one of the stab wounds to the right side of her back showed the implement used to stab Officer Fitzgerald traveled downward as it entered the body (T2630-2631;Vol.28). The State asked the doctor:

> Given your examination of that stab wound, is the manner in which it was inflicted and the organs in which it penetrated, is that consistent with the victim standing when she's being stabbed or hunched over slightly?

(T2632;Vol.28). Defense counsel object, that the doctor was not qualified to give that opinion (T2632;Vol.28). The trial court overruled the objection (T2632;Vol.28). The doctor testified that "the position of the body was quite likely that she was standing at that time." (T2632;Vol.28).

Later the doctor testified that all of the injuries had occurred while Officer Fitzgerald was still alive (T2639;Vol.28). The State asked the doctor:

> Now given your expertise and training in this area and the defining of different injuries, do you have an opinion regarding which of the incised - - strike that - - which of the sharp force injuries came first?

(T2639;Vol.28). Defense counsel again objected asserting that the witness was not qualified to give an opinion on the order of injuries (T2639;Vol.28). The trial court overruled saying that it was a matter for cross-examination (T2639;Vol.28). Dr. Bulic testified as follows:

> We know that she was alive when she received all these injuries, so we can eliminate that there was any postmortem injury. And since there were defensive wounds, I would say that they came first because a person is at the time fighting for -- with the attacker and the most likely sequence of acquiring these injuries is the defensive wounds came first. So all the wounds on the hand -- on the -- on both arms came first.
>
> * * *
>
> Second, most likely what the sequence of these injuries is that the abdominal injuries came second. And since they were not lethal injuries and the person was, at the time, still relatively vital. And then the last injuries were injuries on the back where some of them were immediately lethal, especially both lungs were collapsed and there was a stab into the heart. At that point the victim probably expired rather quickly.

(T2639-2640;Vol.28).

**C. Penalty Phase**

At the opening of the penalty phase, defense counsel renewed the motion in limine to preclude the State from introducing evidence during the penalty phase as to the length of any of Mr. Hall's prison sentences that he was serving at the time the murder took place (T2933;Vol.31). Defense counsel argued that the length of

the sentence was irrelevant and immaterial (T2933;Vol.2). Defense counsel stated that Mr. Hall was willing to stipulate that he was under a sentence of imprisonment at the time of the killing and that the length of sentence was irrelevant under Section 921.141(5)(a), Florida Statutes (T2933-2934;Vol.2). The trial court denied the motion (T2935;Vol.31).

In their opening statement, the State discussed the aggravating circumstance of prior violent felony convictions and told the jury that they would present evidence that Mr. Hall had been convicted of sexual battery, aggravated battery, and kidnaping in 1993 (T2943-2944;Vol.31). The State announced that they would introduce the trial testimony of G. S., the victim, which would be read into evidence, because G. S., who had been 66 year old at the time of the crime, had died (T2943-2944;Vol.31). The State also told the jury they would hear from D.D. who was also kidnaped and sexually battered by Mr. Hall (T2945;Vol.31). The State then told the jury the details of how G. S. was walking through her neighborhood when Mr. Hall forced her into a vehicle, drove her to a secluded spot, committed sexual battery on her, beat her, and she finally escaped and was found crawling toward the roadway (T2946;Vol.31). The State also told the jury that they intended to prove that the murder had been cold, calculated, and premeditated (CCP) based in part on the clean-up Mr. Hall did after the murder

(T2949-2950;Vol.31). Defense counsel objected that the actions after a homicide do not establish CCP (T2949-2950;Vol.31). The trial court overruled the objection (T2950;Vol.31).

The State introduced into evidence three orders of judgment and sentence (T2965;Vol.31). The first order of judgment was for the kidnaping of D.D. (T2962;Vol.31). The second was for the sexual battery, kidnaping, and aggravated battery of G.S. (T2963;Vol.31). The third was for the sexual battery of R.B. (T2963;Vol.31). Defense counsel objected to the admission of these documents. because they listed the length of sentence and argued the same grounds as in the motion in limine (T 2962, 2964, 3017;Vol.31).

Defense counsel objected to the State reading the trial testimony of G.S. (T2966-2967;Vol.31). Defense counsel argued that the testimony was irrelevant, immaterial, highly inflammatory, and that any relevance it may have is greatly outweighed by the prejudicial effect it would have on Mr. Hall having a fair trial (T2967;Vol.31). The court overruled the objection (T2967;Vol.31). Defense counsel stated that the admission of the testimony was error and this error violates Art. I, Sections 9, 16, 17 and 22 of the Florida Constitution and denies Mr. Hall of his right to due process, equal protection, and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (T 2967;Vol.31).

G. S.'s trial testimony in the case of *State v. Enoch Hall*, Case No. 93-16779, in the Circuit Court in and for Escambia County was read aloud from the witness stand (T 2969-3006;Vol.31). In April 1993, G. S. was 66 years old, she had previously had a heart attack and had been ordered by her doctor to walk three days a weeks and to always carry nitroglycerin with her (T2970-2971,2972; Vol.31). On April 8th, she was wearing khakis, an old shirt, sneakers and a pair of orange pierced earrings that she had bought when she had her ears pierced for the first time at 65 (T2973;Vol.31). The prosecutor showed G. S. the earrings which had been marked as an exhibit (T2974;Vol.31). G. S. said, "Those are them I don't want them anymore." (T2974;Vol.31). The prosecutor asked again if those were her earrings and she replied, "Yes. I don't want them. I don't want them." (T2974;Vol.31).

That day, at 2: 30 in the afternoon, G. S. returning to her apartment complex after taking a walk, when a car pulled next to her (T2975,2980;Vol.31). She assumed that he was either going to ask her where an apartment was or run into the complex's office (T2976-2977;Vol.31). Instead he grabbed her by her neck and shoulders and pulled her backwards towards his car (T2977;Vol.31). G. S. screamed the entire time as he threw her into his car (T2978;Vol.31). He got in the car and she started to kick him (T2978;Vol.31). He hit her with his fists, knocking

her face into the dashboard, and told her, “Be quiet, bitch.” (T2978;Vol.31).

The apartment complex’s maintenance man and a worker from the complex’s office had run to the car to try to help her, but he had locked the doors (T2979;Vol.31). She tried to keep the car in neutral, feeling that, “ as long as they are here, they were going to get help. He’s not going to get me.” (T2979;Vol.31).

Eventually he was able to get the car in gear and drive off (T2980;Vol.31). She sat next to him shaking while he drove (T2981-2982;Vol.31). G. S. had been carrying her nitroglycerin in a little coin purse and when he threw her into the car it fell in the back seat (T2982;Vol.31). She told him that she had had a heart attack and begged him to please let her have her nitroglycerin (T2982;Vol.31). He told her, “I don’t give a damn about your heart. And didn’t I tell you to shut up and be quiet, bitch. I’m going to kill you.” (T2982;Vol.31).

G. S.’s testimony detailed how her assailant drove her past houses of her friends and how she wished they were outside and could help her (T2983;Vol.31). He drove past her a cemetery, where she had purchased a plot, and she thought, “please don’t let me die right now.” (T2984-2985;Vol.31).

Finally he drove her to a secluded place and sexually battered her, while threatening to kill her (T2987;Vol.31). Afterwards he got out of the car and said, “You’re too tight, bitch. Get out of the car.” (T2988;Vol.31). G. S. got out of the car and was putting on her clothes, when he threw her coin purse towards her

(T2990-2991;Vol.31). She thought he was going to let her go and reached down to pick up her coin purse, when he tried to hit her with a tree limb (T2991;Vol.31). She ran and he chased her with the limb (T2933;Vol.31). The next thing she remembered was crawling towards a roadway (t2933;Vol.31). She was found and taken to the hospital (T2994;Vol.31).

G. S. was in the hospital for 18 days (T2995;Vol.31). She suffered brain damage, lost some hearing, she experiences bouts of dizziness, she has completely lost her sense of smell, and she has as sunken place on her head from where she was hit (T2995-2996;Vol.31).

The prosecutor asked G. S. to look and see if her assailant was present in the courtroom:

> Q Let me ask you this, [G. S.]. Take a look around the courtroom and see if you can recognize this person that did this to you in the courtroom.
> A Do I have to?
> Q Well, would you do it for us?
> A Where is he? Right over here?
> Q I'm not going to tell you where he is, if he's even here, and look around and see if you recognize the person that did these crimes against you.
> A Oh, my God, oh. Please don't. Please don't -- don't let -- I don't want to be -- please. Please let me go and let me get out of here.
> Q [G. S.], let me ask you to look at one photograph for me.
> A Oh, my God, that is him. I don't want to look at this ugly -- oh, my God, this man, how could he do that to a person?

Q [G. S.], I take it that you have recognized him.
A I know that is the guy that kidnaped me and raped me, and I'm sure he's the one that tried to kill me. By the mercy of the grace of God, he didn't do it.

(T2997-2998;Vol.31).

D. D. then took the stand and testified over same objection defense counsel raised to the reading of G. S.'s testimony (T3021-3022;Vol.31). D. D. testified that in February of 1992 she was 22 years old and working at a home health agency (T3023;Vol.31). One day she was sitting in her car eating lunch when a man got in her car (T3024-3025;Vol.31). He was armed with a knife and he told her to shut up and drive (T3025-3026;Vol.31). D. D. was afraid he would try to rape her, so she intentionally vomited on herself, but she did not have much food in her stomach (T3026;Vol.31). She told him she was pregnant hoping he would have some compassion (T3026-3027;Vol.31). He had her stop the car in the woods and he raped her while holding the knife to neck and head (T3027,3029; Vol.31). D. D. was actually having her period that day, so he took her tampon out and threw it in the back seat (T3028;Vol.31).

Afterwards, he told her to get dressed and he had her drive to an ATM where they got some money (T3029;Vol.31). Next they drove to a gas station (T3030; Vol.31). She paid inside, because she wanted to write "help me" or " call 911" on the receipt, but he stood close by and watched while she signed (T3030-

3031;Vol.31). He had her drive around and eventually he started to become angry and directed her to drive towards Alabama (T3033-3034;Vol.31). D. D. started to try to find an opportunity for a semi-truck to hit the car in order to end it, but she did not want to hurt the truck driver (T3033-3034;Vol.31). He instructed her to turn off the interstate onto a dark wooded road (T3035;Vol.31). He told her, "I can't believe I didn't do it sooner. I'm going to kill you now. So turn around and go back down that road." (T3035;Vol.31). D. D. noticed a car behind her and tried to swerve the car in order to cause an accident, but the car behind them stopped in time (T3035-3036;Vol.31). D. D. stopped the car, jumped out, ran to the other car, got in the backseat, and asked to be taken to a police department (T3036;Vol.31). D. D. identified Mr. Hall as the man who kidnaped and sexually battered her in 1992 (T3037;Vol.31).

Over defense counsel's objection, Captain Wiggins testified that Mr. Hall was serving two consecutive life sentences at the Tomoka State Prison (T3039;Vol.31).

James Hall, Mr. Hall's father testified that Mr. Hall had been raped at age 19, when his girlfriend's mother's boyfriend, a law enforcement officer, arranged to have him put in jail after a dispute over a car (T3193-3196;Vol.32). After the rape, Mr. Hall withdrew from his family and was afraid of law enforcement (T3193-3196;Vol.32).

Dr. Buffington, a pharmacologist, testified that both Ibuprophen and Tegretol have the capacity to alter someone's behavior (T3202;Vol.32). Tegretol works by slowing down the impulse from one nerve to another (T3202;Vol.32). Tegretol has the potential for side effects involving the central nervous system, it can also cause a sever skin reaction, or even a blood disorder known as aplastic anemia (T3203;Vol.32). In the central nervous system, Tegretol can cause the garden variety of side effects from dizziness, nausea, vomiting, and headaches, but it can also cause confusion, blurred vision, hallucinations, speech disorders, involuntary movements, etc. (T3203-3204;Vol.32). The usual starting dosage for Tegretol is 100 milligrams a day to be increased up to 1200 milligrams a day at the most (T3205-3206;Vol.32). Dr. Bluffington reviewed investigative reports where the Appellant referenced taking four pills on the day of the murder (T3206; Vol.32). In a letter from defense counsel, Dr. Buffington was told that Mr. Hall had actually taken from four to seven pills (T3206;Vol.32). Dr. Buffington met with Mr. Hall and he identified the pills he took that day as Tegretol (T3207;Vol.32). The State called Dr. Myer on rebuttal and he testified that Tegretol has an antiaggression component to it and is used to treat aggression in people unable to control their impulses (T3382;Vol.34;Vol.34). Dr. Myer admitted on cross-examination that according to the package insert prepared by the manufacturer, in some patients, Tegretol can increase the risk of suicidal thought

or behavior and has the potential to cause unusual changes in mood or behavior (T3386,3396;Vol.34).

Bruce Hall, the former plant manager for PRIDE enterprises at Tomoka C.I., testified that Mr. Hall started at PRIDE as an apprentice welder and eventually worked his way up to lead welder (T3311,3313;Vol.32). Rodney Callahan, an inmate who used to work with Mr. Hall described him as a very good worker, conscientious, and very responsible (T3327;Vol.33).

In their closing argument, the State cited to the testimony of G.S. and D.D. (T3557,3563;Vol.35). When arguing the HAC aggravator, the State argued that Mr. Hall was completely indifferent to the suffering of Officer Fitzgerald, just as he had been indifferent to the suffering of G. S., saying:

> He was completely indifferent to her suffering, exactly like he was indifferent to G. S., that 66 year old lady, begging him, begging him for her heart pills. And how did he show his indifference? I don't give a damn about your heart. Shut up, bitch. Heinous, atrocious and cruel.

(T3357;Vol.35).

Later, when discussing the possible mitigating circumstance that Mr. Hall had been sexually abused in jail, the State said:

> However, if you choose to believe he was sexually battered in jail, I ask you, does that outweigh the fact that this defendant kidnaped, sexually battered and beat a 66-year-old lady? Kidnaped her in broad daylight. Does that outweigh the fact that this defendant kidnaped, D. D. in

> the parking lot outside her office, reading a book? Does it outweigh - -his claim he was sexually battered, does it outweigh the fact that he shoved a knife to D.D.'s neck as he pushed his penis inside her vagina? Does it outweigh the fact that he threatened to kill her every time she turned around and actually told her to drive down this dirt road because he was going to kill her? No.

(T3563-3564;Vol.35).

Dr. Harry Krop, a clinical pychologist, testified at the *Spencer* hearing (T12;Vol.5). In order to evaluate, Mr. Hall's condition, the doctor considered several different sources of information. Dr. Krop testified that he had reviewed Mr. Hall's school records and medical records (T627-633;Vol.5). Dr. Krop requested that an MRI, EEG, and PET scan be performed on Mr. Hall (T633635;Vol.5). Dr. Krop reviewed Mr. Hall's jail and prison records, as well as the reports about the current case (T635-639;Vol.5). Dr. Krop met with Mr. Hall for five separate clinical interviews to get a history on him (T639;Vol.5). In addition to the interviews, Dr. Krop administered a battery of psychological tests (T640;Vol.5). He administered neuropsychological testing to assess possible cognitive deficits (T640;Vol.5). He also administered a psychosexual battery of tests (T640;Vol.5).

Dr. Krop stated that Mr. Hall is competent to stand trial and was legally sane at the time of the offense (T641;Vol.5). The neuropsychological tests showed that Mr. Hall has a cognitive disorder, NOS (T656;Vol.5). He has mild to moderate

impairment of his memory and executive functions, which include impulse control (T38;Vol.5). There was no evidence of malingering (T38;Vol.5) Dr. Krop also stated that he would diagnose Mr. Hall now with coercive paraphilia disorder (T43;Vol.5). Based on Mr. Hall's self report of drug and alcohol abuse, Dr. Krop also diagnosed him as having a history of polysubstance abuse (T656-657;Vol.5).

Dr. Krop also discussed Mr. Hall's rape in the county jail at 19 years of age. Based on his parent's description of Mr. Hall's behavior after the assault, Dr. Krop also diagnosed Mr. Hall as having a history of posttraumatic stress disorder (T30,51;Vol.5).

Shortly after the assault Mr. Hall was Baker acted for a suicide attempt (T33;Vol.5). Mr. Hall was very embarrassed about the assault and never sought out treatment (T33;Vol.5). Mr. Hall also had a history of head trauma (T33;Vol.5). Mr. Hall had been arrested for a violation of probation and while in the jail he was beaten in the head by corrections officers (T33;Vol.5). After he got out of jail, he was extremely depressed (T34;Vol.5). His family was driving him to the facility for a second Baker act commitment, he realized where they were headed, and jumped out of the van into a parked car and put his head through the windshield (T34;Vol.5). Mr. Hall suffered seizures as a result of the injury (T35;Vol.5).

Local jail records state that Mr. Hall was diagnosed with psychotic disorder, NOS, but Dr. Krop did not agree with the diagnosis (T35;Vol.5). Some of the

DOC records indicate that Mr. Hall has schizophrenia and had taken anti-psychotic medication (T35-36;Vol.5).

As to whether Mr. Hall was under the influence of a mental or emotional disturbance at the time of the offense, Dr. Krop testified that there was a serious emotional disorder given the cognitive disorder and the paraphilia, which has an impact on impulse control and judgment (T43;Vol.5).

Dr. Danziger a psychiatrist, testified for the State that it was his opinion that there is no evidence other than self report that Mr. Hall suffers from any psychotic disorder (T761;Vol.6). Dr. Danziger pointed out that Mr. Hall had not been prescribed psychiatric medication for a 13- year span (T762;Vol.6). When Dr. Danziger first met Mr. Hall he complained of auditory hallucinations (T762;Vol.6). Dr. Danziger administered two tests to determine whether he was mentally ill or was malingering (T762-763;Vol.6). A score of more than 14 is highly correlated with malingering and Mr. Hall's score was 29 (T764;Vol.6). Dr. Danziger argued that Dr. Krop's diagnosis of Mr. Hall lacking impulse control was contradicted by Mr. Hall's industrious work history and lack of getting into trouble at prison (T766-768;Vol.6). Based on Mr. Hall's report that he used drugs while in prison Dr. Danziger diagnosed him with polysubstance abuse (T772;Vol.6). Dr. Danziger testified that Mr. Hall had adult antisocial behavior and a paraphilia, NOS (T774-775;Vol.6).

On cross- examination, the State questioned Dr. Krop's results, since he had not administered any formal test for malingering (T679-683;Vol.5). Dr. Krop explained that malingering tests are for determining whether someone is exaggerating psychiatric symptoms; he did not see any signs of psychiatric illness in Mr. Hall, so the tests would have been useless (T681-682;Vol.5) Dr. Krop also said that Mr. Hall admitted that he had lied to Dr. Danziger (T670;Vol.5)

Dr. Buffington testified that Tegretol may unmask or worsen pre-existing psychiatric conditions (T834;Vol.6). Since Mr. Hall has a history of being diagnosed with schizophrenia, the Tegretol may have triggered a new episode (T841;Vol.6).

## SUMMARY OF ARGUMENT

Point I. The trial court erred in denying the motion to suppress Mr. Hall's statements to FDLE agents. The trial court used the wrong legal standard in considering Mr. Hall's motion to suppress. The court considered that the initial confession may have been coerced by violence, but failed to examine the totality of the circumstances to determine whether the taint had disappated before the second confession.

POINT II. The trial court erred in permitting the medical examiner to testify beyond his area of expertise as to the sequence that the stab wounds were inflicted upon the victim. The medical examiner's testimony was without scientific basis and was admitted without requiring the State to establish a foundation.

POINT III. The trial court erred in allowing highly prejudicial testimony in the penalty phase to establish the prior violent felony aggravator. The testimony became a feature of the feature of the penalty phase denying Appellant his right to due process.

POINT IV. The trial court erred in permitting the State to argue at the penalty phase a non-statutory aggravator.

POINT V. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found an

inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

POINT VI. Florida's death penalty procedure violates the Sixth and Fourteenth Amendments under *Ring v. Arizona*.

## POINT I

**THE TRIAL COURT FAILED TO APPLY THE PROPER LEGAL STANDARD IN DECIDING THE APPELLANT'S MOTION TO SUPPRESS DENYING HIS RIGHT TO DUE PROCESS**.

In the order denying Appellant's motion to suppress the trial court held that "if" the Appellant had been physically abused by corrections officers, there was no effect on the voluntariness of the confessions to FDLE agents. The basis of the court's decision was the fact that after the first statement the Appellant asked to talk to the agents a second time and agreed to talk to them a third time. By only considering the fact that the Appellant asked to talk to the agents the trial court failed to properly the apply the totality of circumstances test to determine whether the confessions were voluntary.

On appeal, a trial court's factual findings are accepted provided there is evidence to support them, while the trial court's legal conclusions are review de novo. *Nelson v. State,* 850 So.2d 514, 522 (Fla.2003). A trial court's application of law to the facts is also subject to de novo review. *Id.* Here the trial court employed the incorrect legal standard in deciding the Appellant's motion to suppress.

Shortly after he was apprehended in the PRIDE facility and while still on the premises of the Tomoka Correctional Institution, the Appellant made three separate statements to agents from FDLE (R1411;Vol.9). The Appellant later moved to

suppress these statements as involuntary arguing that the statements were the result of the physical abuse he suffered at the hands of Tomoka corrections officers, while not in the presence of the FDLE agents (R1411-1412;Vol.9). The Appellant stated that he had been in fear for his life when he gave the statements (R1411;Vol.9). At a hearing on the motion, the State's twelve witnesses contradicted the Appellant's testimony that he had been abused, but several witnesses testified that the Appellant had suffered an injury to his eye on the day in question (1517-1518,1520;Vol.10). In the order denying the motion, the trial court did not determine whether this injury was the result of abuse from a corrections officer or a defensive blow struck by Officer Fitzgerald. The trial court, instead found that as a fact that "if" the Appellant had been subject to abuse prior to the first confession the effects had dissipated by the time the Appellant was with the FDLE agents (R1520;Vol.10). Further, the court found that had the Appellant suffered a beating by the first corrections officers who apprehended him, then effects of such abuse on the later statements to FDLE agents had dissipated (R1520;Vol.10).

Florida Courts have long recognized the necessity for guarding against coercion when a defendant makes a confession. In *Traylor v. State,* 596 So.2d 957, 964 (Fla.1992), this Court stated:

> The basic contours of Florida confession law were

> defined by this Court long ago under our common law. We recognized the important role that confessions play in the crime-solving process and the great benefit they provide; however, because of the tremendous weight accorded confessions by our courts and the significant potential for compulsion-both psychological and physical-in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing-coercion.

The burden is on the State to establish by a preponderance of the evidence that a defendant has waived his Miranda rights knowingly, intelligently, and voluntarily. *Ramirez v. State*, 739 So.2d 568 (Fla. 1999). A trial court must look to the totality of the circumstances in determining whether a defendant voluntarily waived their Miranda rights. *Bevel v. State*, 983 So.2d 505, 515 -516 (Fla.2008). A confession that is the product of violence or threats is involuntary and "cannot be constitutionally used against the person giving it" *Sims. v. Georgia*, 389 U.S. 404, 407(1967). If a defendant gives multiple confessions, the fact that the first confession was the coerced does not automatically mean that the others are similarly tainted. *See Leon v. Wainwright*, 734 F.2d 770, 772 -773 (11th Cir. 1984). In *Leon*, the Eleventh Circuit Court of Appeals explained that the test for determining whether a later confession is tainted by the first is whether, given the circumstances there is a "sufficiently isolating break in the stream of events" *Leon*, 734 F.2d at 722. The opinion provides:

> The United States Supreme Court has never held that an

> early inadmissible statement automatically precludes the admission into evidence of later voluntary statements. *United States v. Bayer,* 331 U.S. 532, 541, 67 S.Ct. 1394, 1398, 91 L.Ed. 1654 (1947). Instead it has established that in cases involving multiple confessions courts may hold some of the confessions involuntary and others not only if such a distinction is justified by a sufficiently isolating break in the stream of events. See, e.g., *United States v. Bayer*, 331 U.S. at 540, 67 S.Ct. at 1398, 91 L.Ed. 1654 (holding valid second confession made under notably different circumstances six months after first confession which violated McNabb rule); *Lyons v. Oklahoma*, 322 U.S. 596, 604, 64 S.Ct. 1208, 1213, 88 L.Ed. 1481 (1944) (holding valid second confession made in new, noncoercive environment to different questioners, a half day after first admittedly involuntary confession). We must therefore determine whether, under the circumstances present in this case, it can be found that the coercion surrounding the first statement had been sufficiently dissipated so as to make the second statement voluntary. See, e.g., *Darwin v. Connecticut*, 391 U.S. 346, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968); *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1953).

*Leon*, 734 F.2d at 772 -773. Florida has adopted the same standard, in *Brewer v. State*, 386 So.2d 232 (Fla., 1980), this Court reiterated that:

> Once it is established that there were coercive influences attendant upon an initial confession, the coercion is presumed to continue "unless clearly shown to have been removed prior to a subsequent confession." *State v. Outten*, 206 So.2d 392, 396 (Fla.1968). **The inquiry is whether, under the circumstances, the influence of the coercion that produced the first confession was dissipated so that the second confession was the voluntary act of a free will.** See, e. g., *Darwin v. Connecticut*, 391 U.S. 346, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968); *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716,

> 98 L.Ed. 948 (1953); *United States v. Bayer*, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947); *Lyons v. Oklahoma*, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1943).

*Brewer,* 386 So.2d at 236. (emphasis added).

In the trial court's order, in the analysis of whether the voluntariness of later confessions would be tainted by the alleged physical abuse, the trial court did not consider any of the surrounding circumstances. In *Brewer*, this Court explained that when employing the surrounding circumstances test to determine whether a subsequent confession is voluntary, the focus of the inquiry is whether the improper influences have been removed. *Brewer*, 386 So.2d 236-237. Here the trial judge, while admitting the possibility of an improper influence, i.e. abuse and threats, failed to consider whether the Appellant was still subject the same conditions when making his later statements to law enforcement. By failing to apply the proper test when deciding the Appellant's motion to suppress, the trial court denied the Appellant his right to due process. *Amends. V, XIV, U. S. Const.; Art. I, §9, Fla. Const*.

## POINT II

**THE TRIAL COURT ERRED BY ALLOWING, OVER DEFENSE OBJECTIONS, IMPROPER OPINION TESTIMONY OF THE MEDICAL EXAMINER REGARDING THE SEQUENCE OF THE WOUNDS AND THE POSITION OF THE VICTIM, WHEN SUCH MATTERS ARE OUTSIDE THE SCOPE OF HIS EXPERTISE AND CANNOT BE MADE, IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

An expert witness is normally permitted to testify relative to generally accepted scientific theory in the witness's area of expertise. §90.702, Fla. Stat.; *Ramirez v. State*, 810 So.2d 836, 842 (Fla. 2001). A witness may only testify as an expert in the areas of his or her expertise and it is not enough that the witness is qualified in some general way. The witness must possess special knowledge about the discrete subject about which an opinion is expressed. Ehrhardt, *Florida Evidence* (West 2010 ed.) §702.1; *Goodyear Tire & Rubber Co., Inc. v. Ross*, 660 So.2d 1109, 1110 (Fla. 4th DCA 1995).

Prior to its admission, the propounding party must lay a foundation concerning the qualifications to express his opinion on the question asked. *Id*., *Bertram v. State*, 637 So.2d 258, 260 (Fla. 2nd DCA 1994). As a threshold for admissibility, expert opinion testimony must be relevant, see section 90.401, Florida Statutes, and must meet the standard generally applied to scientific, technical, or other specialized knowledge under section 90.702, Florida Statutes. *Butts v. State*, 733 So.2d 1097,

1100 (Fla. 1st DCA 1999).

Here, the medical examiner was asked to ascertain the sequence of the wounds and the position of the deceased's body at the time of the injuries, to which defense counsel objected as being outside possible realm of a medical examiner's knowledge and thus unqualified to render such opinions. (T 2634, 2639) The court, without requiring the state to lay a foundation as to the possibility of such an opinion, allowed the opinion evidence to be presented to the jury. Despite the fact that the deceased had been moved from the murder location and despite the fact that the victim died shortly after all the wounds were inflicted, Dr. Predag Bulic contended that he was able to determine those matters and gave his opinions to the jury and the court, which evidence was relied upon by the court in its findings of fact. The admission of this speculative and unsubstantiated opinion testimony was error, rendering the first degree murder conviction and death sentence unconstitutional.

An examination of Florida cases wherein the medical examiner was asked to opine the sequence of the wounds reveals a unanimous consensus by medical examiners (with the exception of Dr. Bulic here) that such an opinion is medically and legally impossible:[3]

---

[3] With the exception under some circumstances as to only if the wounds were inflicted pre- or post-mortem.

The medical examiner could not conclude with a reasonable degree of certainty what was the sequence of the stab wounds. *Perez v. State*, 919 So.2d 347, 378 (Fla. 2005). The exact order of wounds could not be established. *Boyd v. State*, 910 So.2d 167, 191 (Fla. 2005). Dr. Areford could not determine the sequence of the injuries inflicted on Hobgood while she was alive. *Douglas v. State*, 878 So.2d 1246, 1251 (Fla. 2004). The medical examiner was not able to say in what order the stab wounds were inflicted. *Miranda v. State*, 832 So.2d 937, 939 (Fla. 3rd DCA 2002). Dr. Melamud could not determine the sequence of the injuries. *Morris v. State*, 811 So.2d 661, 663 (Fla. 2002). "Q. But of course you can't sequence any of these injuries, can you? A. No, I cannot sequence these injuries." *Butts v. State*, *supra*. The medical examiner testified that she did not know in what sequence the chest wounds were inflicted. *Brown v. State*, 721 So.2d 274, 279 (Fla. 1998). The medical examiner could not offer any information about the sequence of the wounds. *Kearse v. State*, 662 So.2d 677, 686 (Fla. 1995). The medical examiner testified that she did not know in what sequence the chest wounds were inflicted. *Castro v. State* 644 So.2d 987, 989 (Fla. 1994). The sequence of the wounds could not be determined. *Robinson v. State*, 520 So.2d 1, 2 (Fla. 1988). Dr. Wright could not tell in what order the wounds were inflicted. *Thornton v. State*, 497 So.2d 906, 907 (Fla. 4th DCA 1986).

And yet, our Dr. Bulic amazingly maintained here that he could do what no other

medical examiner in Florida could do: accurately determine the sequence of wounds.

Forensic treatises also indicate that, because, as here, the victim dies "too quickly for visible or other detectable changes to occur in the wounds" the expert is precluded in his "ability to accurately age the various wounds" and can only make such a determination where the injuries have been inflicted over a long period of time. Hanzlick & Graham, *Forensic Pathology in Criminal Cases* (LexisNexis 3rd edition) §38.5, p. 345; Pyrek, *Forensic Science Under Seige: The Challenges of Forensic Laboratories and the Medico-Legal Investigation System* (Academic Press 1st edition 2007), p. 13; DiMaio, *Forensic Pathology* (CRC Press 2nd ed. 1992), pp. 13-14. Similarly, medical examiners are routinely unable to accurately determine the position of the body when the injuries were inflicted. DiMaio, *supra*.

> In some instances [police and prosecutors] do not like the data provided by a good medical examiner. . . . They prefer the charlatan who tells them what they want to hear to the expert who tells them unpalatable truths or that *conclusions cannot be made*. One of the characteristics of the unqualified expert in forensic pathology is an ability to interpret a case in exquisite detail. *This "expert"* sets the time of death, plus or minus a few minutes, *accurately positions the deceased, and gives detailed analysis of the events surrounding the death and precise deductions about the assault.* If the police have expressed prior opinions, it is not uncommon for the opinions of the "expert" to agree in almost complete detail with the police hypotheses. The experienced forensic pathologist tends to hedge, knows there can be more than one interpretation of a set of facts, and is more "wishy-washy" than the charlatan.

DiMaio, *Forensic Pathology, supra* at pp. 13-14.

The "expert" here, Dr. Bulic, never provided any foundation as to how he, above all other medical examiners, was able to give an accurate opinion on such impossible matters. The jury was thus misled by the unfounded opinion testimony of the doctor. Such misleading testimony could have caused the jury to find the defendant guilty of first degree murder as opposed to the defense's position that the killing was only second degree murder. Also the improper opinion testimony was used by jury and the court in determining the sentence of death, which is also therefore constitutionally infirm.

Thus, the judgment of first degree murder and the death sentence must be reversed and the case remanded for a new guilt and penalty phase trials.

## POINT III

**REVERSIBLE ERROR OCCURRED WHEN THE COURT PERMITTED DETAILED AND HIGHLY EMOTIONAL PRIOR CRIME EVIDENCE TO BE ADMITTED AND TO BECOME A FEATURE OF THE PENALTY PHASE SUCH THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND A RELIABLE JURY RECOMMENDATION, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.**

Admission of evidence, including testimony in a capital penalty phase regarding prior violent felonies, is within the discretion of the trial court, but will be reversed where there has been an abuse of that discretion. *Duncan v. State*, 619 So.2d 279, 281 -282 (Fla. 1993); *Rhodes v. State*, 547 So.2d 1201, 1204-05 (Fla.1989); *Cox v. State*, 819 So.2d 705, 715 -717 (Fla. 2002).

In the abstract, testimony regarding some details of prior violent felonies to establish that aggravating circumstance does not necessarily violate the Fifth, Sixth, Eighth or Fourteenth Amendments. *See Rhodes*, *supra*; *Cox*, *supra*; *Stano v. State*, 473 So.2d 1282, 1288-1289 (Fla. 1985). However, where the evidence of the prior offenses becomes a feature of the penalty phase and irrelevant, highly-emotional evidence is introduced, its prejudicial value outweighs any probative value and it must be excluded. *Rhodes*, *supra* at 1205.

As argued below, the misuse of prior violent felony evidence here denied Due Process and a fair and reliable sentencing proceeding. Art. I, §§ 2, 9, 16, 17 and

21, Fla. Const.; U.S. Const., Amend. V, VI, VIII, XIV. The defense objected to and sought to have precluded the reading of the testimony from the defendant's 1993 offenses of the elderly victim and the live testimony of the victim from the 1992 offenses. The testimony read or presented live was totally unnecessary to support the aggravating circumstance of the prior felonies or the fact that they included violence. The lurid details of these crimes presented did not directly relate to the crime for which Hall was currently on trial, but instead described the physical and emotional trauma and suffering of victims of totally collateral crimes committed by the appellant some fifteen to sixteen years previously. *See Rhodes v. State*, *supra* at 1205; *Duncan v. State*, *supra* at 282.

While some details (solely to show the violent nature of the prior offenses) are admissible at the penalty phase trial, those details of the prior offenses may not be emphasized to the point that the prior offenses become a feature of the penalty phase or are highly emotional and therefore prejudicial. *Rhodes*, *Duncan*, *supra*; *Finney v. State*, 660 So.2d 674, 684 (Fla. 1995).

> In *Williams v. State*, 110 So.2d 654 (Fla. 1959), this Court held that similar fact evidence regarding collateral crimes can be admissible. *Such evidence of unrelated crimes, however, cannot be made a feature of the trial*. *Williams v. State*, 117 So.2d 473 (Fla. 1960).

*Stano v. State*, *supra* at 1289. "There *are* limits on the admissibility of such evidence. . . . The line must be drawn when evidence of the circumstances of the

prior offense is not relevant . . . or the prejudicial value outweighs the probative value." *Duncan v. State*, 619 So.2d at 282.

This Court has repeatedly cautioned the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings. *See Rodriguez v. State*, 753 So.2d 19, 44-45 (Fla. 2000); *Finney v. State*, *supra* at 683-684; *Duncan*, *supra*; *Rhodes*, *supra*. And the prior crime testimony must not be overly emotional or made a focal point of the proceedings. *Finney*, *supra*. Caution must be used "because of the potential that the jury will unduly focus on the prior conviction[s] if the underlying facts are presented by the victim of [those] offenses." *Id*.

The collateral crime offense must not be "retried" before the capital jury in order to prove the aggravating circumstance or show the circumstances of violence that resulted in the prior conviction. "Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is unnecessary, or where the evidence is likely to cause the jury to feel overly sympathetic towards the prior victim." *Finney v. State*, *supra* at 684; *Duncan*, *supra*; *Freeman v. State*, 563 So.2d 73, 75 (Fla. 1990).

The potential unfair prejudice that attends this evidence has been recognized

by the courts. In that regard, "unfair prejudice" is the type of evidence that would logically tend to inflame emotions and which would tend to distract jurors and the court from conducting an impartial and reasoned sentencing analysis:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. . . Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

*Jones v. State*, 569 So.2d 1234, 1239 (Fla.1990). *See Urbin v. State*, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty, noting, "Although this legal precept – and indeed the rule of objective, dispassionate law in general – may sometimes be hard to abide, the alternative – a court ruled by emotion – is far worse."). Particularly when presiding over a capital trial, judges are cautioned to be "vigilant [in the] exercise of their responsibility to insure a fair trial." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985).

The prior victims' graphic, emotional, and prolonged testimony here (the first a verbatim reading of the testimony from the prior violent felony trial) was irrelevant under the above-cited case law and highly prejudicial to Hall's case. The information presented to the jury did not directly relate to the crime for which Hall was on trial, but instead described the physical and emotional trauma and suffering of the victims of totally collateral crimes (and old) committed by the

appellant; it was totally unnecessary to support the aggravating circumstance. It was highly emotional, especially the reading of the testimony of G.S. from the prior trial, expressing her horror at having to see and identify the defendant in court, recounting in grisly detail her fear during the kidnapping and rape (including her reaction at driving past her grave plot) and the defendant's callous indifference to her need for her nitroglycerin medication, and even her dismay to see the earrings which she was wearing during the attack. (T 2973, 2982-2985, 2993-2998, 3004-3005) Similarly, D.D. gave highly emotional, ghastly and prejudicial details of the defendant's prior crimes against her, including D.D.'s vomiting on herself and the sexual assault while she was on her period with the defendant removing her tampon and disposing of it prior to the assault. (T 3025-3028, 3035-3037)

Then, to make matters worse, the assistant state attorney argued these lurid details of the defendant's indifference and callousness to the jury in closing argument, not just to support the prior violent felony aggravator, but primarily in support of HAC and to minimize any mitigation of a sexual battery on the defendant while jailed:

> The fear and anxiety and suffering that goes along with knowing you are about to die. Didn't make a difference to Enoch Hall. He was completely indifferent to her suffering, exactly like he was indifferent to [G.S.], that 66-year-old lady, begging him, begging him for her heart pills. And how did he show his indifference? "I don't give a damn about your heart. Shut up, bitch." Heinous, atrocious and cruel.

*  *  *

> However, if you choose to believe [the mitigation evidence] that [the defendant] was sexually battered in jail, I ask you, does that outweigh the fact that this defendant kidnapped, sexually battered and beat a 66-year-old lady? Kidnapped her in broad daylight. Does that outweigh the fact that this defendant kidnapped [D.D.] as she sat in her car at lunch in the parking lot outside her office, reading a book? Does it outweigh -- his claim that he was sexually battered, does it outweigh the fact that he shoved a knife to [D.D.]'s neck as he pushed his penis inside her vagina? Does it outweigh the fact that he threatened to kill her every time she turned around and actually told her to drive down this dirt road because he was going to kill her? No.

(T 3557, 3563-3564)

The evidence of the collateral crimes introduced here over objection was inadmissible under this Court's standards; they became a feature of the penalty phase in all their inglorious and emotional detail. The state compounded the error by repeated references in its closing argument, not only regarding the prior violent felony aggravator, but also throughout its argument on other aggravators and potential mitigating circumstances. They were permitted to relay to the jury effects of the crimes beyond the permissible, as decried in *Duncan*, *supra*, and in *Rhodes*, *supra*. The prosecutor's outrage and the overtly emotional testimony improperly aroused the passions of the jury, passions which have no place in the capital sentencing determination.

The presentation of this type of information can serve no other purpose than to inflame the jury, to focus their attention on the fear and suffering of the prior collateral crimes victims, and to divert the jurors from deciding the case on relevant evidence concerning *this* crime for which he was to be sentenced, and not on the emotions surrounding the prior offenses. The focus on the prior gruesome crimes was not relevant and the prejudicial value outweighs the probative value. *Duncan v. State*, *supra*. This death penalty must be reversed.

## POINT IV

**THE TRIAL COURT ERRED BY ALLOWING, OVER DEFENSE OBJECTIONS, EVIDENCE OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.**

The state, allegedly in support of the aggravating circumstance of the defendant's status of "under sentence of imprisonment," was permitted to introduce into evidence for the jury the length of the prison sentence. Defense counsel moved in limine and also objected prior to the introduction of the evidence that the jury should not be informed of the length of the prison sentences, an irrelevant matter for this "status" aggravator. (R 1468-1469, Vol.9; R 1588, 1589-1590; Vol.10; T2933, Vol.31) The trial court denied the motion and the State offered evidence that the Appellant was serving two life sentences at the time he committed the offense (T3039;Vol.31) It is submitted that this issue, being a purely legal one, should be reviewed *de novo*.

The only matters that may be presented in aggravation are specifically limited to those set out in the death penalty statute. §921.141(5), Fla. Stat. *See also Winkles v. State*, 894 So.2d 842, 846 (Fla.2005); *Vining v. State*, 637 So.2d 921, 927 (Fla.1994). This Court has ruled that the introduction of evidence of non-statutory aggravating circumstances before the jury is constitutionally improper

and will necessitate a new penalty phase. *Hill v. State*, 549 So.2d 179, 184 (Fla. 1989). While the status of being under a sentence of imprisonment is an aggravating circumstance, the length of such sentence is not. Therefore, evidence of the length of the sentences was an improper non-statutory aggravating circumstance presented to the jury and the court in violation of the defendant's federal and Florida constitutional rights. As a result, the death sentence is rendered cruel and unusual and must be reversed and the case remanded for a new penalty phase trial without the offending evidence.

## POINT V

**THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.**

Mr. Hall's sentence of death must be vacated. The trial court made factual error in its sentencing order, found two improper aggravating circumstance, and abused its discretion by failing to consider (or improperly minimizing the weight given to) highly relevant and appropriate mitigating circumstances and in finding that the aggravating circumstances outweighed the mitigating factors. These errors render the defendant's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, §17 of the Florida Constitution.

Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *Merck v. State,* 975 So.2d 1054, 1065-1066 (Fla. 2007); *Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). Factual errors in a sentencing order are subject to a harmless error analysis.

*See Merck v. State*, *supra* at 1066 n. 5; *Lawrence v. State*, 846 So.2d 440, 450 (Fla. 2003); *Hartley v. State*, 686 So.2d 1316, 1323 (Fla. 1996). It is submitted that this Court's proportionality review, being a question of law, must be *de novo*. *See Blanco v. State*, 706 So.2d 7 (Fla. 1997) (whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court); *Harvard v. State*, 375 So.2d 833 (Fla. 1977) ("When the sentence of death has been imposed, it is this Court's responsibility to *evaluate anew* the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." [*citing State v. Dixon*, 283 So.2d 1 (Fla. 1973)]).

**A. The Trial Court erred in finding the aggravators of HAC and CCP**

Aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. *Martin v. State*, 420 So.2d 583 (Fla. 1982); *State v. Dixon*, *supra* at 9. The state has failed in this burden with regard to two of the aggravating circumstances found by the trial court, HAC and CCP.

***Cold, Calculated, and Premeditated***

In considering the aggravator of CCP, the trial court made a factual error in finding that Mr. Hall had made the shank that he used to stab Officer Fitzgerald (R1798;Vol.11). The trial court found, " The defendant's careful advance fabrication of the weapon" was evidence of a prearranged plan to kill, a heightened level of premeditation. While there was testimony at the trial that the shank in

question, with its machined edge, was most likely made in the PRIDE facility (T2133;Vol.24), there was never any evidence introduced that Mr. Hall was the one who had in fact fashioned the shank. At least seventy men worked in the PRIDE facility and any one of them could have made the shank (T2142;Vol.24). Captain Wiggins testified that he had seen thousands of machined shanks over his career, so they obviously were not a rare item (T2132,2135;Vol.24).

Furthermore, the court erred in considering Mr. Hall's actions after the murder as evidence of planning beforehand. In *Hansbrough v. State*, 509 So.2d 1081, 1086 (Fla.1987), this Court held that CCP did not apply to a robbery gone wrong, "As stated above, this appears to be a robbery that got out of hand. Hansbrough's frenzied stabbing of the victim does not demonstrate the cold and calculated premeditation necessary to aggravate his sentence with this statutory factor." Here, Mr. Hall's reaction was one of frenzy and his actions afterwards do not disprove that theory. Furthermore, Mr. Hall's actions afterwards, which the court called a "carefully planned attempt to clean up the crime scene" were more pathetic than devious. The walls of the welding shed were covered in blood and there were bloody shoe tracks outside the door pointing the way to the shed. The granules used to soak up the blood were left out in the open in a coffee can. The bloody shirt was in a bucket next to the feet of the officer. Plus the body of his victim was propped up on a cart in the middle of a room. Clearly Mr. Hall did not

"plan" anything, but merely reacted in a frenzy to try to cover up what he had done.

There is no cold, calculated and heightened premeditation here under the competent facts. The court erred in finding the aggravating circumstance of Cold, Calculated, and Premeditated. Four elements must be satisfied to support a finding of CCP: The murder must have been the product of cool and calm reflection and *not an act prompted by emotional frenzy or panic*. Furthermore, the murder must have been the product of a *careful* plan or *prearranged* design to commit murder before the fatal incident. The murder must also have resulted from *heightened* premeditation – i.e., premeditation over and above what is required for unaggravated first-degree murder. And finally, there must not have been any pretense of legal or moral justification for the murder. *See Walls v. State*, 641 So.2d 381, 388-89 (Fla.1994).

Under the competent evidence of this case, the state cannot prove beyond a reasonable doubt the existence of these elements; there is nothing to disprove that the defendant reacted in panic or frenzy when found by the officer while trying to stay behind and look for pills, and nothing to show the cold, calm reflection and a pre-arranged plan.

Under CCP's elements, the test for this aggravator must evaluate the mental state of the perpetrator rather than looking merely at the manner of the killing.

*Banda v. State*, 536 So.2d 221, 225 (Fla. 1988); *Johnson v. State*, 465 So.2d 499, 507 (Fla. 1985); *Mason v. State*, 438 So.2d 374 (Fla. 1983); *Cannady v. State*, 427 So.2d 723 (Fla. 1983). Thus, the evidence offered in support of the mental mitigating circumstances negates the CCP aggravator.

In *Spencer v. State*, 645 So.2d 377 (Fla. 1994), this Court reversed a finding of CCP based upon the evidence of the defendant's mental mitigation, ruling that his mental impairments negated the necessary aspects of this aggravator, despite evidence of some pre-planning on Spencer's part:

> However, we find that the evidence does not support the trial court's finding of CCP. Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator. During the penalty phase, a clinical psychologist testified that Spencer thought that Karen was trying to steal the painting business, which was a recapitulation of a similar situation with his first wife. The psychologist also testified that Spencer's ability to handle his emotions is severely impaired when he is under such stress. A neuropharmocologist agreed that Spencer has "very limited coping capability," "manifests emotional instability when he is confronted with [sudden shocks and stresses]," and "is going to become paranoid when stressed." This expert opined that Spencer's personality structure and chronic alcoholism rendered him "impaired to an abnormal, intense degree." In light of this evidence, we find that the trial court erred in finding that the murder was CCP.

*Spencer v. State*, *supra* at 384 -385.

So here does the evidence of Mr. Hall's mental and emotional disabilities

negate the finding of CCP. Looking to the facts of the instant case, we discover that the trial court, in finding heightened premeditation, totally ignored the evidence presented that the defendant was suffering from a a cognitive disorder that impaired his impulse control. He also was under the influence of drugs when he murdered the officer. There was no careful pre-planning of the killing; all the activities were done during and under the influence of a heated argument and anger. The trial court's findings regarding this aggravator are incomplete and fatally flawed, and do not address these important negators of cold, calculated and premeditated. This aggravator must be stricken.

***Heinous, Atrocious, and Cruel***

Here the court erroneously relied upon the testimony of the medical examiner to find HAC. As argued above, the medical examiner exceed the scope of his expertise when he testified that he could determine the sequence of the stab wounds and the position of the body when stabbed. According to the medical examiner the wounds to her lungs and heart were delivered last, so Officer Fitzgerald would have been conscious during the attack. His testimony, however, was unsupported by any medical evidence. It is just as likely that the sequence of events were as follows: after the defensive wounds were inflicted, Officer Fitzgerald slumped forward, he stabbed her in the back rendering her unconscious, she starts to fall, he grabs her by her hair to pull her up, and then stabs her in the

abdomen.

***Mitigation***

In *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant, reminding courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Rogers v. State*, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court *must* find it as mitigating. In *Trease v. State*, 768 So.2d 1050 (Fla. 2000), though, this Court recognized that there are some circumstances where a mitigating circumstance may be found to be supported by the record but, for additional reasons or circumstances unique to that case, be entitled to no weight. However, it still must be considered by the sentencer and its findings detailed as to the reasons for the lack of weight.

For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence. The trial judge should expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court *must* find as a mitigating

circumstance each proposed factor that is mitigating in nature. This is a question of law. *Campbell v. State, supra*. This Court summarized the *Campbell* standards of review for mitigating circumstances:

> (1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court;
>
> (2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard;
>
> (3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

*Blanco v. State, supra*; *Cave v. State*, 727 So.2d 227 (Fla.1998).

The trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court rejected the evidence provided by Dr. Krop that Mr. Hall was suffering from a cognitive disorder, NOS, and Coercive Paraphelia Disorder (R1806-1809;Vol.11). The trial court held that there was no evidence that the murder was committed under extreme emotional disturbance rejecting Mr. Hall's own testimony that he had, "freaked out."

In its consideration of extreme mental or emotional disturbance and impaired capacity mitigation, the trial court made incomplete and erroneous findings of fact. First it must be noted that the trial court, in giving these factors "little weight" considered the fact that "the defendant knew right from wrong"

(Vol. 7, R 876, 878), a totally irrelevant consideration in this mitigating factor. *Ferguson v. State*, 417 So.2d 631 (Fla. 1982) (the consideration of this mitigating circumstances is entirely independent of a finding of sanity); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (error to consider as mitigating evidence only that which would tend to excuse criminal liability, i.e. insanity); *Knowles v. State*, 632 So.2d 62 (Fla. 1993) (rejection of insanity and voluntary intoxication defenses does not preclude finding this mitigator); *Morgan v. State*, 639 So.2d 6, 13-14 (Fla. 1994) (jury's rejection of insanity defense and voluntary intoxication and finding of premeditation does not preclude finding this factor). The court's attention to the defendant's sanity is inapposite to this finding and shows the court utilized the wrong standard in its consideration of these powerful mitigators.

### B. The Death Sentence Is Disproportionate When Compared with Similar Cases

When compared to similar cases involving the death penalty, the ultimate punishment is not warranted.

As this Court repeatedly has stated, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders. *See e.g., Offord v. State*, 959 So.2d 187 (Fla. 2007); *Almeida v. State*, 748 So. 2d 922 (Fla. 1999) (crime must fall "within the category of both the most aggravated and least mitigated of murders"); *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996)

("Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist"); *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993) ("Our law reserves the death penalty only for the most aggravated and least mitigated murders"); *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973) (death penalty is reserved for "the most aggravated and unmitigated of most serious crimes").

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review "requires a discrete analysis of the facts, entailing a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998) (quotations and citation omitted; emphasis in original); *Offord v. State*, *supra* at 191. Proportionality analysis requires the Court to "consider the totality of circumstances in a case," in comparison to other capital cases. *See Porter v. State*, 564 So. 2d 1060 (Fla. 1990). The Court must compare "similar defendants, facts, and sentences." *Brennan v. State*, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is *de novo*. *See Larkins v. State*, 739 So. 2d 90 (Fla. 1999); *Urbin*, *supra*.

The circumstances of this case are more akin to those presented in cases in which this Court has reversed death sentences on proportionality grounds despite

the presence of the HAC aggravator. *See Offord v. State*, *supra*; *Robertson v. State*, 699 So.2d 1343 (Fla. 1997); *Kramer v. State*, 619 So.2d 274 (Fla. 1993); *Nibert v. State*, 574 So.2d 1059 (Fla.1990). In *Offord*, the aggravating factor of HAC was quite present: after consensual sex and during an argument with his wife, the defendant retrieved duct tape and a knife from another room, returned to the bedroom and started beating his wife, first with his fists, then he stabbed her repeatedly with the knife, before spotting a hammer and beating her to death with the claw end. However, even with such a strong aggravator as HAC ("there is no question that Offord committed a brutal murder," *Offord*, 959 So.2d 193), and despite the trial court only giving "some weight" and "moderate weight" to the mental mitigation evidence presented (*see Initial Brief of Appellant, Offord v. State*, SC05-1611, p. 2), this Court vacated the death sentence finding Offord's mental issues underlying the impaired capacity and extreme mental distubance factors to be quite compelling. *Offord*, *supra*. This Court also took special note of the fact that, as here, the murder was unaccompanied by any motivation such as pecuniary gain or avoiding arrest, and without the aggravating circumstance of a prior violent felony. *Id*. at 193.

The death sentence in this case is thus disproportionate. Just as this Court ruled in *Offer*, *supra* at 193-194:

As this Court observed over 34 years ago in *Dixon*:

> It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty-each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

283 So.2d at 7. The final step is the mandatory review by this Court, which we found was one indication of "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes." *Id*. at 8. For all the reasons we have explained, we conclude that this is not among "the most aggravated and unmitigated of most serious crimes" for which the death penalty is reserved. *Id*. at 7. Imposition of the death penalty would thus be a disproportionate punishment. We therefore vacate the death sentence and remand for the imposition of a life sentence without the possibility of parole.

So here, too, for all the foregoing reasons, this is simply not among "the most aggravated and unmitigated of most serious crimes" for which the death penalty is reserved. *Id*. Imposition of the death penalty would thus be a disproportionate punishment.

## POINT VI

**FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.**

During the course of the proceedings, trial counsel challenged the constitutionality of Florida's Capital Sentencing Scheme arguing, inter alia, that it violated Appellant's Sixth Amendment rights as interpreted by *Ring v. Arizona*, 536 U.S. 584 (2002), (R1124-1172;Vol.8). The challenge was unsuccessful. (R1399;Vol.9). Appellant was ultimately sentenced to death (R1790-1811;Vol.11). The jury was instructed and clearly understood that the ultimate decision on the appropriate sentence was the sole responsibility of the trial judge (R1718-1723; Vol.11).

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though *Ring* presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), cert. denied, 537 U.S. 1070 (2002) and *King v. Moore,* 831 So.2d 143 (Fla. 2002) cert. denied, 537 U.S. 1069 (2002). Additionally, Appellant is aware that this Court has held that it is without

authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., *State v. Steele*, 921 So.2d 538 (Fla. 2005).

Since the jury did not make specific findings as to aggravating and mitigating factors, it cannot be determined at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in *Bottoson* and *King,* because *Ring* represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. *Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.*

## CONCLUSION

BASED UPON the cases, authorities and policies herein, the Appellant requests that this Court reverse his judgment and sentence and, as to Point I and Point II, remand for a new trial; as to Point III, IV, remand for a new penalty phase; and as to Point V and Point VI, vacate the death sentence and remand for the imposition of a life sentence.

Respectfully submitted,

MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0492868
444 Seabreeze Blvd. - Suite 210
Daytona Beach, Florida 32118-3941
(386) 254-3758

ATTORNEY FOR APPELLANT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his box mailed to Enoch Hall, DOC #214353, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1000, on this 4th day of April, 2011.

## CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

_____
MEGHAN ANN COLLINS
ASSISTANT PUBLIC DEFENDER