IN THE SUPREME COURT OF FLORIDA

LEO LOUIS KACZMAR III,

Appellant,

v. **CASE NO. SC10-2269**

STATE OF FLORIDA,

Appellee.

/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APELLANT

I. PRELIMINARY STATEMENT

LEO LOUIS KACZMAR, III, was the defendant in this capital case, and he will be referred to in this brief as either “appellant,” “defendant,” or by his proper name.

References to the Record on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses.

STATEMENT OF THE CASE

A three count Indictment filed in the Circuit Court for Clay County on March 2, 2009, charged Leo Louis Kaczmar, II, with first-degree murder, arson, and attempted sexual battery (1 R 9). The State also filed a notice that if the defendant were convicted of the murder allegation, it would seek to have the court impose a sentence of death for that offense (1 R 41). Kaczmar filed several pretrial motions, and the one most significant for this appeal was:

1. A Motion and Amended Motion to Dismiss Count 3 of the Indictment: Attempted Sexual Battery (3 R 519, 5 R 836). Filed pursuant to Rule 3.190(c)(4) Fla. R. Crim. P. Traversed (7 R 1148). Denied (8 R 1370).

Kaczmar was tried before Judge William Wilkes, and the jury found the defendant guilty as charged on the three counts (8 R 1494). He then proceeded to the penalty phase of his trial. The jury recommended, by a vote of 11-1, that the court impose a sentence of death (8 R 1499).

It followed that recommendation, and justifying a sentence of death, it found in aggravation:

1. Kaczmar had a prior conviction for robbery

2. The murder was committed during the course of an attempted sexual battery

3. The murder was especially heinous, atrocious, or cruel.

4. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (9 R 1583–85)

In mitigation the court found and gave slight weight to the following:

1. Kaczmar was raised by an alcoholic father who was physically and emotionally abusive.

2. He was emotionally traumatized as a child when he saw his grandfather drown and his mother shoot his father.

3. He had been taught to lie in court.

4. He and his mother lacked a normal mother-son bonding relationship.

5. He was kind to animals.

6. He was loyal to friends.

7. He was a good, reliable business partner.

8. He had a loving relationship with his aunt.

9. He had been protective of younger members of his family.

10. He suffered from the long term effects of illegal drug abuse.

11. On the night of the murder he was impaired by illegal drugs

12. He had never had any professional mental health counseling or treatment

13. He demonstrated respectful behavior in court.

(9 R 1591-95)[1]

As to the arson conviction, the court sentenced Kaczmar to 30 years in prison. It imposed a 15-year sentence for the attempted sexual battery (9 R 1596-97). All sentences are to run concurrently.

This appeal follows.

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[1]The court rejected as unproven the statutory mental mitigators of extreme emotional disturbance and capacity to appreciate the criminality of his conduct (9 R 1587-89). It also rejected the age mitigator (9 R 1590). It said Kaczmar had not proven the following nonstatutory mitigators: 1. The effects of being sentenced to an adult prison as a juvenile, 2. Lack of adult male mentors as a teenager and young adult. 3. Emotionally torn by periods of parental abuse and overindulgence, 4. Good prison inmate. 5. Disparate treatment of the co-defendant (9 R 1587-96).

STATEMENT OF THE FACTS

By December 12, 2008, Priscilla and Leo Kaczmar had been married five years, and they had two children (14 R 331). They lived in a house on Dothan Road in Green Cove Springs with his father; Maria Ruiz, his father's girlfriend; and his uncle Ed (15 R 464). Maria was quiet, and stayed mostly in her bedroom knitting or doing bead work (14 R 333-34; 15 R 465, 473). No one ever saw her argue with the defendant (15 R 465).

That day was a Friday, and, as was usual, Priscilla took the children to visit and stay with their grandmother for the night (14 R 335). The defendant's father was in the hospital and Maria was at home in her room (15 R 465). For Leo, it was his time to be with his friends, and that meant Ryan Modlin (14 R 334-5). About 1:00 p.m. the two men smoked some marijuana (15 R 468). Later, about 5 p.m., they drove to Jacksonville where Kaczmar bought some cocaine, which both men used and got high (15 R 469-71). They returned to the defendant's home, and Modlin left but returned about 9 p.m. (15 R 467). He went into Kaczmar's bedroom and saw marijuana and cocaine, some of which they used (15 R 474). By now the defendant had become "real paranoid" (15 R 475), and had poked holes in his bed, trying to find something. He also paced up and down the hall, and looked outside windows (15 R 475).

For the most part, though, the two men stayed in Kaczmar's bedroom using cocaine. The defendant said he wanted to get Maria back there to get her to use some of the drug and have sex with her (15 R 477). He was also watching a pornographic movie and had turned the volume up so loud that it could be heard throughout the house (15 R 475). He called her name out loud two or three times (15 R 478). At some point, he got on his hands and knees and was wiping the floor, thinking that Maria had overfilled the bathtub and water was now in his closet (15 R 478).

Modlin went home about 11 p.m., and after watching a movie, eventually went to sleep (15 R 479).

About 5 a.m. neighbors were awakened by loud, deep voices, cursing, screams, and sounds like someone was having an argument and kicking a hollow door, coming from the house where Kaczmar lived (14 R 317-20). They did not think it a "big deal," and went back to sleep (14 R 312, 319). They did so because what they heard sounded like the arguments they had heard for the past two months between Kaczmar and his uncle. As one neighbor said, "I just assumed it was Leo and his Uncle Ed into another fight. . . . I went back to sleep. . . . It was Saturday morning." (14 R 312)

About an hour later, or sometime after 6:00 a.m., another neighbor saw the house on fire (14 R 291-92). The fire and police departments were called and

eventually the blaze was extinguished. When the police went inside they found the partially burned body of Maria Ruiz in the kitchen (14 R 363, 15 R 427-28). It also had at least 90-100 knife inflicted wounds, several of which could have caused her death (14 R 219, 15 R 431).

A subsequent autopsy revealed that those injuries and not the fired had killed her. That is she was dead before the fire started (15 R 428, 451). She had several fatal "cuts and stabs" about her neck (15 R 430). There were also some knife wounds to her chest and back, five of which went into her lungs and others cut three major arteries (15 R 436-37). She had stab wounds to her head and face as well as some evidence of blunt force trauma (15 R 437-38). Several of the injuries would, by themselves, have been fatal, and Ms. Ruiz probably lost consciousness within seconds of receiving them (15 R 442-43).[2]

She had at least 10 defensive wounds on each of her hands (15 R 446-47), indicating she had "put up a significant fight." (15 R 448). There were, however, no injuries to her genitals, breasts, and anus, other than the burns (15 R 452). No unusual pubic hairs were found either (15 R 452).

Kaczmar was eventually arrested for the murder of Maria Ruiz. While in jail awaiting trial, he told another inmate, William Fillancia, much of what Modlin had said about their activities on December 12 and 13 (16 R 787). The defendant,

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[2] No blood was found in her lungs, indicating that she was probably dead or close to it when her throat was cut (15 R 443-44).

however, added more details regarding Ruiz. Specifically, he said that he wanted to have sex with her, and at that time, she shared a mattress with his father, which was in the living room (16 R 788). That evening, she was lying on the mattress, and he approached her and "started making passes at her" hoping "to get lucky." (16 R 788-89) They got into a shoving match, and she went to the bathroom (16 R 789). He pounded on the door and then went outside and knocked on the bathroom window. She left and went into the kitchen where they got into another shoving match. She grabbed a knife, and Kaczmar hit her in the head and grabbed the knife, cutting his thumb in the process (16 R 789).

Now he was "really angry," so he hit her again. Then, using a pocketknife he had in his pocket, he stabbed her (16 R 790).

Afterwards, he changed his clothes and buried them (16 R 791). He went to a gas station, bought $2 worth of gas, and drove to a road behind his house where he parked his truck (16 R 793). He walked home, poured gasoline in the kitchen and made a line with the fuel to the outside (16 R 793). He then lit the gas. He returned to his truck and drove to his mother's house in Jacksonville, where the police found him (16 R 795).

When questioned, he told them he had been fishing, and the blood they saw on one of his socks came from an injury he had gotten while doing that (16 R 795-96). Despite this explanation, the police took the sock, and upon a DNA

examination, it was discovered that Ruiz's blood was on it (16 R 675).

Also, while in jail, the defendant told Fillancia that he wanted to plant some evidence that would shift the blame for the homicide onto Modlin (16 R 802). Fillancia told the police of this, and they had a Jacksonville Sheriff's deputy act in an undercover capacity contact Kaczmar about helping him (16 R 742). Over the course of four meetings, the defendant and the deputy agreed that the latter would get some clothes and boots that matched Modlin's sizes and plant them underneath an air conditioning unit presumably of Modlin's trailer (16 R 748). Priscilla Kaczmar, the defendant's wife, at his instruction (17 R 841), paid the law enforcement officer $300 in two payments spread over a week's time (17 R 843). The deputy also agreed to ask and intimidate, if necessary, someone named "Jacob" to give favorable testimony for the defendant (16 R 757-58).

SUMMARY OF THE ARGUMENT

ISSUE I: The State charged Kaczmar with committing an attempted sexual battery, and before trial, as well as at the end of the State's case in chief, he sought to dismiss that charge because there was insufficient evidence he had committed that crime. At best the prosecution proved only that he had harassed Maria Ruiz. With some persistence he bothered her to the point that she fled to the kitchen, got a knife, and threatened him with it. At no time did he make any overt acts to show he intended to sexually batter her. He never grabbed her, forced her to the ground, ripped or took off her clothes, or did anything else that showed he had progressed beyond calling her names and trying to "get lucky."

ISSUE II: Over defense objection, the court allowed the State to produce evidence of conversations between Kaczmar and his wife concerning plans to pay an undercover police officer $300 to plant some evidence implicating a friend in the murder of Maria Ruiz. The State said the spousal privilege, as codified by §90.504, Florida Statutes, did not protect conversations involving criminal activity. Yet, the three exceptions recognized by that section do just that. That is, none of them give the state the right to force a wife to testify against her husband regarding conversations they may have had about committing a crime or a conspiracy to commit a crime. Ordinary rules of statutory construction prevent the court from creating what the legislature has not seen fit to do.

ISSUE III: The court fundamentally erred when it failed to give the jury a complete instruction on the defense of "heat of passion." That is, a heat of passion defense can either be a complete defense to first-degree murder, or it can justify a finding of some lesser homicide. In this case, the court instructed the jury as to the defense to first-degree murder but omitted any guidance as to it also being a defense to a lesser type of homicide. That was particularly egregious here because Kaczmar's defense was that, although he had killed Maria Ruiz, he did not have a premeditated attempt to do so. As such, the court's failure to give the complete heat of passion instruction amounted to fundamental error.

ISSUE IV: During his closing argument, Kaczmar sought to raise a "heat of passion" defense, but the court prevented him from doing so because the defendant ostensibly was going to quote from opinions of appellate courts of this state. While the trial court is given some discretion in limiting the wide latitude given parties when making their closing arguments, the court in this case went too far. Kaczmar never planned to say something like "the courts of this state have said. . ." Instead, drawing from what those courts have written was and was not murder or heat of passion killings, he could use the facts in those cases as examples to support his argument. There is nothing wrong with doing that, but when then court limited what the defendant could say it effectively gutted his defense that he had killed

Maria Ruiz in the heat of passion.

ISSUE V: The court, at the prosecutor's request, excluded certain exculpatory statements Kaczmar made to an undercover police offer. That was error. Although, as a general rule of law, self-serving statements are inadmissible under §90.803(18) ,Fla. Stats. (2008), §90.108, Fla. Stats. (2008) requires the admission of such hearsay if in fairness it ought to be considered. In this case, the court's gave a curt "motion denied," when the defendant asked that the jury hear the complete conversation between the him and the police officer. It never, as it should have done, determined first if what the defendant said was self serving; and second, if it was, whether in fairness the jury should nonetheless have heard it.

ISSUE VI: The trial court, in justifying its sentence of death, found that Kaczmar committed the murder of Maria Ruiz in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. That was error. The evidence shows that there was only rage when he killed her. The evidence, similarly shows no careful plot to kill. The State proved, at most, that the defendant wanted to have sex with her and harassed her enough until she threatened him with a knife. After the killing, he may have devised a clumsy plan to destroy evidence of what he had done, but what he did then does not show he had some prearranged plan to kill her. Finally, the desire to have sex with the victim does not also translate into a heightened intent to kill her. At best, the

evidence shows that that unrealized intent turned into a rage killing only after she had confronted him with a knife, he had knocked it out of her hand, and had cut himself in the process. Whatever intent he had at that point was not the heightened premeditation this Court has required for a murder to become cold, calculated, and premeditated.

ISSUE VII: The State presented insufficient evidence that Kaczmar had a premeditated intent to kill Maria Ruiz. The events that occurred in the kitchen showed only that he killed her will malice or in the heat of passion. As such, he was guilty of second-degree murder.

ISSUE VIII: William Fillancia, the jailhouse informant, provided the crucial evidence that the defendant burned the house he lived in. Yet, Fillancia's testimony was so inherently unreliable that it could not provide sufficient, competent, substantial evidence to support the arson allegation.

ISSUE IX: This Court wrongly avoided the issues presented by Ring v. Arizona, 536 U.S. 584 (2002), in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Because Ring was an "intervening development of the law" this Court could determine its affects on Florida's death penalty scheme without incurring the wrath of the United States Supreme Court, as this Court was leery of doing in those state cases. When it conducts that

examination, this Court should conclude that Ring requires at least unanimous jury recommendations of death. This Court should also find that even though the defendant may have a single valid aggravator, Ring still has relevance to the constitutionality of his death sentence.

ARGUMENT

ISSUE I:

THE COURT ERRED IN DENYING KACZMAR'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR THE FIRST-DEGREE MURDER AND ATTEMPTED SEXUAL BATTERY ALLEGATIONS BECAUSE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT THE DEFENDANT HAD ATTEMPTED TO SEXUALLY BATTER MARIA RUIZ, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The indictment in this case charged Kaczmar with the first-degree murder of Maria Ruiz by premeditation or during the course of an attempted sexual battery. It also alleged he had committed an attempted sexual battery (1 R 9-11). Before trial the defendant filed a motion and an amended motion to pursuant to Rule 3.190(c)(4), Fla. R. Crim. P., to dismiss the attempted sexual battery (3 R 519, 5 R 836). The State traversed that motion (7 R 1148), and the court denied it (8 R 1370).

At the close of the State's case in chief, Kaczmar moved for a judgment of acquittal for the same reasons as it had filed the motion to dismiss: the State had failed to present sufficient evidence he had attempted to sexually batter the victim (17 R 845-46). The court again denied that request (8 R 1381, 17 R 848). That was error, and this Court should review this issue under a de novo standard of review. McDuffie v. State, 970 So. 2d 312, 332 (Fla. 2007)

A. The critical facts showing that Kaczmar attempted to sexually batter Maria Ruiz.

As presented at trial, on Friday, December 12, 2008, Kaczmar lived in a house on Dothan Road in Green Cove Springs with his father; Maria Ruiz, his father's girlfriend; and his uncle Ed (15 R 464). Maria was quiet, and stayed mostly in her bedroom knitting or doing bead work (14 R 333-34, 15 R 465, 473). No one ever saw her argue with the defendant (15 R 465).

That day, as was usual, Priscilla, the defendant's wife, took the children to visit and stay with their grandmother for the night (14 R 335). The defendant's father was in the hospital and Maria was at home in her room (15 R 465). For Leo, it was his time to be with his friends, and that meant Ryan Modlin (14 R 334-5). About 1 p.m. the two men smoked some marijuana (15 R 468). Later, about 5 p.m., the pair drove to Jacksonville where Kaczmar bought some cocaine, which both men used and got high (15 R 469-71). They drove back to the defendant's home, and Modlin left but returned about 9 p.m. (15 R 467). He went into Kaczmar's bedroom and saw some marijuana and cocaine, which they use (15 R 474). By now the defendant had become "real paranoid" (15 R 475), and had poked holes in his bed, trying to find something. He also paced up and down the hall, looking outside the windows (15 R 475).

For the most part, though, the two men stayed in Kaczmar's bedroom using cocaine. The defendant said he wanted to get Maria back there to get her to use

some of the drug and have sex with her (15 R 477). He was also watching a pornographic movie and had turned the volume up so loud that it could be heard throughout the house (15 R 475), and he called her name out loud two or three times (15 R 478). At some point, he got on his hands and knees and was wiping the floor, thinking that Maria had overfilled the bathtub because water was now in his closet (15 R 478).

Modlin went home about 11 p.m. and after watching a movie, eventually went to sleep (15 R 479).

About 5 a.m. some neighbors were awoken by loud, deep voices, cursing, screams, and sounds like someone was having an argument and kicking a hollow door coming from the house where Kaczmar lived (14 R 317-20). They did not think it a "big deal," and went back to sleep (14 R 312, 319). They did so because what they heard sounded like the altercations they had heard for the past two months between Kaczmar and his uncle. As one neighbor said, "I just assumed it was Leo and his Uncle Ed into another fight. . . . I went back to sleep. . . . It was Saturday morning." (14 R 312)

About an hour later, or sometime after 6 a.m., another neighbor saw that house on fire (14 R 291-92). The fire and police departments were called and eventually the blaze was extinguished. When the police went inside they found the partially burned body of Maria Ruiz in the kitchen (14 R 363, 15 R 427-28). It

also had at least 90-100 knife inflicted wounds, several of which could have caused her death (14 R 219, 15 R 431).

A subsequent autopsy revealed that those injuries and not the fired killed her. That is she was dead before the fire started (15 R 428, 451). She had several fatal "cuts and stabs" about her neck (15 R 430). There were also some knife wounds to her chest and back, five of which went into her lungs and others cut three major arteries (15 R 436-37). She had stab wounds to her head and face as well as some evidence of blunt force trauma (15 R 437-38). Several of the injuries would, by themselves, have been fatal, and Ms. Ruiz probably lost consciousness within seconds of receiving them (15 R 442-43).[3]

She had at least 10 defensive wounds on each of her hands (15 R 446-47), indicating she had "put up a significant fight." (15 R 448). There were, however, no injuries to her genitals, breasts, and anus, other than the burns (15 R 452). No unusual pubic hairs were also found (15 R 452).

Kaczmar was eventually arrested for the murder of Maria Ruiz. While in jail awaiting trial, he told William Fillancia much of what Modlin had said about their activities on December 12 and 13 (16 R 787). The defendant, however, added more details regarding Ruiz. Specifically, he said that he wanted to have sex with her, and at that time, she shared a mattress with his father, which was in the living

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[3]No blood was found in her lungs, indicating that she was probably dead or close to it when her throat was cut (15 R 443-44).

room (16 R 788). That evening, she was laying on it when he approached her and "started making passes at her," hoping "to get lucky." (16 R 788-89) They got into a shoving match, and she went to the bathroom (16 R 789). He pounded on the door and then went outside and knocked on the bathroom window. She went to the kitchen where they got into another shoving match. She grabbed a knife, and Kaczmar hit her in the head and took it from her, cutting his thumb in the process (16 R 789).

Now he was "really angry," so he hit her again then, using a pocketknife he had in his pocket, stabbed her (16 R 790).

B. The law on attempts

§777.04, Fla. Stats. (2008), provides the statutory law on attempts:

> 1) A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt
>
> * * *
>
> (5) It is a defense to a charge of criminal attempt, criminal solicitation, or criminal conspiracy that, under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant:
>
> > (a) Abandoned his or her attempt to commit the offense or otherwise prevented its commission . . .

Courts, when confronted with issues dealing with the sufficiency of the evidence of an attempt have fleshed out what that law means. To be guilty of an attempt to commit some crime, the defendant must have 1. Had the specific intent to commit it, and 2. Have done some overt but ineffective act towards its commission. Gustine v. State, 97 So. 207 (Fla. 1923).

As to this latter requirement, the overt act must " reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. . . . There must be some appreciable fragment of the crime committed, and it must be in such progress that it would be consummated unless interrupted by circumstances independent of the will of the attempter." Groneau v. State, 201 So. 2d 599, 603 (Fla. 4th DCA 1967); State v. Wise, 464 So. 2d 1245, 1246-47 (Fla. 1st DCA 1985). Other courts have expressed the "overt act" requirement similarly. "[A]n 'overt act' denotes some outward manifest pursuance of a design or intent to commit a particular crime.... The overt act must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime." Morehead v. State, 556 So. 2d 523, 524-525 (Fla. 5th DCA 1990)(Emphasis supplied.) "[W]e think the legislature intended to limit attempts to physical acts carried beyond preparation toward proximate accomplishment of what would be a complete crime." Hutchinson v. State, 315 So. 2d 546, 47-48 (Fla. 2nd DCA 1975).

In Farmer v. State, 315 So. 2d 225, 226 (Fla. 2nd DCA 1975), Farmer and two other participants, Bell and Bowen, decided to rob a "Big 'V'" store in Ft. Myers. They got a shotgun and drove to the store. The gun was taken out of the car and leaned against a tree. Bowen and Bell went inside while Farmer waited in the car. Bell returned, got the gun, and started back in when some "guys" showed up and apparently got out of their car. They soon, however, got back in, and Bell ran down the street, at which point the police showed up and arrested him. Clearly Bell, Farmer, and Bowen had the intent to rob the store, and what they did amounted to enough of an overt act towards its completion to justify an attempted robbery conviction. Only the arrival of the other "guys"(the circumstances independent of their intention) prevented them from completing the robbery.

In Groneau, cited above, a police officer, investigating a suspicious sound, caught the defendant and another man in an alleyway far from their home. They were close to a building that had a pushed in screen and broken window. The building's owner said that he had checked the windows every day before going home, and when inspected that day, the window was not broken. Moreover, a screwdriver was found near that window, and a hammer and another screwdriver were seen lying near a door of a neighboring building. The police also discovered some socks in a trash can, which the co-defendant admitted he had used. When

first seen, Groneau was hidden under a truck, and he refused to come out until the police told him to do so.

This evidence provided sufficient proof that Groneau attempted to commit a burglary. He had the intent to commit that crime as seen by the broken window, burglary tools, and other items laying about the crime scene, and but for the timely arrival of the police, he and his partner would have successfully broken into the building, and hence have committed a burglary.

On the other hand, in Rogers v. State, 660 So. 2d 237 (Fla. 1995), this Court found insufficient evidence that Rogers had the specific intent to commit a sexual battery. In that case, he approached a man and a woman as they walked to the woman's car, and asked for a flashlight. They did not have one, and after Rogers returned to his car to try and start it, he asked the couple for a ride. They agreed, and they got in the front while Rogers climbed in back. As the man drove, Rogers pulled out a gun, pointed it at him, and reached over the seat, squeezed the woman's left breast, and ordered her to take off her clothes. She asked him to stop and he did. A short while later the man and the defendant got into a fight, she fled, and the defendant shot the man, killing him.

On appeal, this Court found insufficient evidence of an attempted sexual battery. "While Rogers may have touched Daniel's breast and ordered her to remove her clothes, these acts do not rise to the level of an overt act toward the

commission of a sexual battery." Id. at 241.

C. This case.

The facts here are less compelling and more ambivalent than those in Rogers. Even the jury had problems with finding him guilty of attempted sexual battery.[4] Specifically, "any act" means more than Kaczmar simply declaring he wanted to have sex with Ruiz and hoped he "got lucky." (16 R 788-89). It meant more than calling out her name, or even making passes at her. He had to take some serious, significant action to unequivocably show he intended to sexually batter her, that is have unconsented sex with her, and he never went that far.

Instead, after harassing her, he followed her into the kitchen where they got into a shoving match. She escalated the confrontation when she grabbed a knife. The defendant hit her in the head and grabbed the knife, cutting himself (16 R 789). Now he was "really angry," so he hit her again, and using a pocketknife he had in his pocket, he stabbed her.

At no time do we see any overt acts to complete a sexual battery. He never tried to take off her clothes or force her to the ground. Unlike Rogers, this defendant never made any sexually suggestive moves. At best, Kaczmar may have committed a battery or aggravated battery against Ruiz, but the evidence, or rather

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[4] During its deliberations, the jury asked for the court to reread the definition of sexual battery, which it did. (17 R 990-992).

the lack of it, shows that he took no overt action to sexually batter her. His menacing efforts to "get lucky" were insufficient to amount to an attempted sexual battery because they never showed an unambiguous intent to commit that crime. They never amounted to "some appreciable fragment" of a sexual battery. Groneau, cited above. Indeed, although there is insufficient evidence Kaczmar committed any overt acts there is also precious little evidence he intended to sexually batter her. "Getting lucky" certainly suggests he had no intention to forcefully have sex with Ruiz. Instead, it only leads to the conclusion that he might not "get lucky" in which case there is no evidence he intended to push his luck and sexually batter her. The shoving without any sexual overtones hardly shows the required acts that he intended to go farther than that and rape her. There simply was no appreciable fragment of the sexual battery committed to show he even intended to force himself on her. State v. Wise, cited above. He never commenced a consummation of that offense. Robinson v. State, 263 So. 2d 595 (Fla. 3rd DCA 1972).

As such, the lower court erred in denying Kaczmar's motion for a judgment of acquittal. This Court should reverse the lower court's judgment and sentence and remand for a new trial. It should do so because the jury returned a general verdict of guilt for the first-degree murder. As a matter of law, this Court cannot say the jury found the defendant guilty of premeditated murder, and not felony

murder with the attempted sexual battery being the underlying felony. Yates v. United States, 354 US. 298 (1957); Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003).

<u>ISSUE II</u>:

THE COURT ERRED IN ALLOWING THE STATE TO CALL PRISCILLA KACZMAR, THE DEFENDANT'S WIFE, TO GIVE TESTIMONY AGAINST HER HUSBAND, A VIOLATION OF SECTION 90.504, FLORIDA STATUTES AND THE FOURTEENTH AMENDMENT.

As part of its case in chief, the State twice called Priscilla Kaczmar, the defendant's wife, to testify. The first time, she told the jury that the defendant called her on the morning of the fire and told her the house was on fire, and she should come home (14 R 339). The second time, her husband, who by then was in jail, asked her to get $300 for a friend named William who was going to help him (17 R 840). He also said the money was to pay someone to plant clothes and a knife (17 R 841). The defendant further asked her to wear a blue smock, and that she should meet this person at a McDonald's restaurant (17 R 841-42). Eventually, she twice met with a Carlos, who was a police officer working undercover, and gave him the $300 (17 R 842-43). She was arrested about a week after giving him the money (17 R 844).

Before Priscilla testified both times her husband objected to her doing so, claiming that much of what she told the jury were conversations between her and her husband, which the State could not elicit (14 R 337, 17 R 837). Pretrial, Kaczmar had also sought to prevent the State from having her testify, but the court, both before trial and during it, denied that request (17 R 837, 10 R 1816-17). The

court erred in allowing the State to elicit this testimony, and this Court should review this issue under an abuse of discretion standard of review.

§90.504, Fla. Stats. (2008) controls this issue, and it provides:

> 90.504. Husband-wife privilege
>
> (1) A spouse has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, communications which were intended to be made in confidence between the spouses while they were husband and wife.
>
> (2) The privilege may be claimed by either spouse or by the guardian or conservator of a spouse. The authority of a spouse, or guardian or conservator of a spouse, to claim the privilege is presumed in the absence of contrary evidence.
>
> (3) There is no privilege under this section:
>
> (a) In a proceeding brought by or on behalf of one spouse against the other spouse.
> (b) In a criminal proceeding in which one spouse is charged with a crime committed at any time against the person or property of the other spouse, or the person or property of a child of either.
> (C) In a criminal proceeding in which the communication is offered in evidence by a defendant-spouse who is one of the spouses between whom the communication was made.

Kaczmar claimed the privilege under §90.504, but the State said he could not because the pair were "acting as coconspirators to commit a new felony offense. That's not privileged." (17 R 837, 16 R 1816-17)

Clearly, Kaczmar had the right to claim that privilege because the State wanted to elicit conversations between him and his wife. The prosecution can defeat the provisions of §90.504 only if what it wanted to introduce fell within one

of the three statutorily provided exceptions. None of them applied: a. neither Kaczmar nor his spouse had sued the other, b. the State did not charge the defendant with committing a crime against his wife, and c. the State, not Kaczmar, sought to introduce the spousal communications.

Moreover, because §90.504 is a legislatively created privilege, the trial court could not create a fourth exception that the State claimed existed: Kaczmar and his wife were "acting as coconspirators to commit a new felony offense. That's not privileged." (17 R 837, 16 R 1816-17)

In Jackson v. State, 603 So. 2d 671 (Fla. 1st DCA 1990), the 1st DCA, after noting "the strong public policy supporting the marital privilege," specifically refused to create the exception the prosecution claimed existed in this case:

> While threatening a witness is a crime, and had appellant been charged with that crime his wife could have testified against him, section 90.504(3)(b), Florida Statutes (1989), the state did not charge him with that crime. As the statute specifically delineates those exceptions to the marital privilege, we are loathe to add additional exceptions.

In Smith v. State 344 So. 2d 915 (Fla. 1st DCA 1977) the same appellate court also said "We refuse to engraft . . . an exception upon the marital privilege , again because of the harm it would inflict upon the strong policy underlying the privilege."

Thus, the lower court clearly erred when it did exactly what the First District said courts should not do. It created a fourth exception to the spousal privilege

rule.

With that said, was the court's error, nonetheless, harmless? Or, said another way, did the court's ruling have, beyond a reasonable doubt, no effect on the jury's deliberations? State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Planting or fabricating evidence had obvious relevance to the defendant's consciousness of guilt, and was thus admissible at his trial. The only evidence, besides Priscilla's that the defendant wanted to do that, and hence be guilty of the crime of perhaps tampering with evidence, came from William Fillancia, a 46-year-old man with three felony convictions who shared a cell with the defendant at the Duval County jail (16 R 779). As a prior convicted felon, and the one who stood to gain favor in the eyes of the prosecution and sentencing court in his case (16 R 780, 17 R 815-16), his testimony was inherently suspect. Its value, however, rose substantially when Priscilla confirmed what he said about the $300 Kaczmar wanted her to give the person Fillancia said would do the planting and also the clothes she was to where at the initial meeting so he could recognize her (17 R 725-26, 756, 841). Hence, what she said her husband told her had to have had some impact on the jury's deliberations, and was therefore reversible error for the court to have let them hear it.

This Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III:

THE COURT FUNDAMENTALLY ERRED WHEN IT FAILED TO GIVE A COMPLETE INSTRUCTION TO THE JURY ON "HEAT OF PASSION" AS A DEFENSE TO SECOND DEGREE MURDER, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The court, without objection, gave the jury the standard instruction on "heat of passion" as it is mentioned in the standard instruction on excusable homicide:

> The killing of a human being is excusable and therefore lawful under any one of the following three circumstances: . . .two, when the killing occurs by accident and misfortune in the heat of passion upon any sudden and sufficient provocation .. . .

(17 R 972, Fla. Std. Jury Instr. (Crim) 7.2)

The court, however, never also instructed the jury that "heat of passion" could negate the intent for first degree murder. Of course, Kaczmar never requested such an instruction, but it is also clear that he argued, or tried to argue (See Issue IV), that heat of passion was a defense to first-degree premeditated murder (17 R 919-20). The failure of the court to give a complete or accurate instruction on the heat of passion as it related to the critical element of premeditation not only was error, it was fundamental error. Davis v. State, 804 So. 2d 400 (Fla. 4th DCA 2001)

A heat of passion defense, as it relates to homicides, arises in two contexts. As instructed in this case, it can excuse a homicide. Or, as was not instructed, it can become a partial defense to a first-degree premeditated murder. That is, a

killing done in the heat of passion can negate the premeditation element yet still justify a conviction for second-degree murder or manslaughter. Johnson v. State, 969 So. 2d 938 (Fla. 2007); Forehand v. State, 126 Fla. 464, 171 So. 241 (Fla. 1936). As this Court said in Whidden v. State, 64 Fla. 165, 59 So. 561 (1912):

> A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment, and dominates volition, so as to exclude premeditation and a previously formed design, may not excuse or justify a homicide, but it may be sufficient to reduce a homicide below murder in the first degree, although the passion does not entirely dethrone the actor's reason

That "sudden transport of passion" occurred in this case, or rather, there was evidence that such may have happened. William Fillancia, the jail inmate in whom the defendant confided, said that Kaczmar told him that he followed Ruiz into the kitchen, at which point they got into another shoving match.

> She had grabbed a knife. He hit her in the head and then he tried to get the knife. While he hit her and got the knife out of his[sic] hand he cut his thumb. . .. . He hit her in the side of the head first and he knocked the knife out of her hand. . . He was really angry at that point. He actually hit her again and then he took a knife out of his pocket and started stabbing her.

(16 R 789-90)

Becoming "really angry" could amount to the heat of passion that would have justified giving the jury an instruction to that effect, and hence could also have sustained a conviction for second degree murder. Nelson v. State, 43 So. 3d 20 (Fla. 2010). In Hooper v. State, 476 So. 2d 1253, 1256 (Fla.1985) this court

held that a "Defendant is entitled to have the jury instructed on the rules of law applicable to this theory of the defense if there is any evidence to support such instructions." This means that the defendant gets the desired instruction if, when the evidence is looked at in the light most favorable to giving it, there is some to support the instruction.

Of course, as noted above and admitted here, Kaczmar never requested an instruction that specifically said that the jury could find him guilty of some lesser homicide than first degree murder if it found he killed Ruiz in the heat of passion. Yet that failure does not defeat his argument. As the Fourth District Court of Appeal said in Davis v. State, 804 So. 2d 400 (Fla. 4th DCA 2001): "[I]t is fundamental error to fail to give a complete or accurate instruction in a criminal case if it relates to an element of the charged offense." Moreover, that court also noted "It is also fundamental error to give an inaccurate and misleading instruction where the effect of that instruction is to negate a defendant's only defense."

In this case both situations exist. First, the court's instruction on excusable homicide, which included the "heat of passion" language was neither complete nor accurate as it related to the partial defense Kaczmar sought to argue (17 R 919-20). Second, what the court did instruct on heat of passion misled the juror into believing that if they found the defendant killed Ruiz in that sudden transport of passion, they had to excuse him from committing any type of homicide. Without

an additional instruction that the heat of passion defense could also provide only a partial defense, there was the great danger the jury convicted Kaczmar of first degree murder rather than letting him walk out of the courtroom a free man when it was obvious he had done something criminal. Beck v. Alabama, 447 U.S. 625 (1980); Anderson v. State, 697 So. 2d 878, 880 (Fla. 5th DCA 1997)("[F]ailure to give the jury the "third option"-of convicting on an appropriate lesser included offense, as opposed to either conviction or acquittal, impermissibly enhanced the risk of an unwarranted conviction.")

In Palmore v. State, 838 So. 2d 1222 (Fla. 1st DCA 2003), the State charged Albert Palmore with second-degree murder. In that case, Palmore and his girlfriend had an off and on relationship that ended when he found her in bed with another man. As she fled, he caught and stabbed her to death.

At trial Palmore argued that he had killed her in a heat of passion that would have reduced the charged second degree murder to manslaughter. He proffered specific instructions relevant to his theory of defense, but the court rejected them, holding the excusable homicide instruction, with its single mention of heat of passion, adequately instructed the jury on his defense.

On appeal, the First DCA noted that Palmore's defense was not excusable homicide, a complete defense to homicide, and the standard instruction on that defense did not inform the jury of the partial defense of heat of passion. The trial

court, therefore, erred when it gave that inadequate and misleading instruction.

Similarly, in this case, the court gave only an excusable homicide instruction with its single mention of heat of passion. As in Palmore, Kaczmar did not seek a complete exoneration by claiming he had some justifiable excuse-heat of passion-for killing Ruiz. Instead, he tried to argue only a partial heat of passion defense. The court's guidance, however, omitted the critical definition of what that term meant, and as equally troubling, it never told the jury that heat of passion could negate premeditation but nonetheless justify a conviction for a lesser homicide. That omission, even though not objected to, or an instruction proffered, was fundamental error.

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV:

THE COURT ERRED IN LIMITING KACZMAR'S CLOSING ARGUMENT AND DEFENSE WHEN IT REFUSED TO LET HIM RELY ON THE LANGUAGE IN COURT OPINIONS TO EXPLAIN OR GIVE EXAMPLES OF WHAT WAS OR WAS NOT PREMEDITATION, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

During Kaczmar's closing argument, the defendant sought to explain what the critical term "premeditation" meant. Before he could do much, however, the State objected:

> There's a whole series of cases that say what premeditation is, what premeditation is not, and I've kind of made an outline here of some of those issues that have come up as to defining premeditation.
>
> Premeditation is an operation of the mind. A killing is not premeditation when it is - -
>
> **MR. COLAW:** I'm going to object. I think we're going to need to have a discussion.
>
> **THE COURT:** Ask the jury to step out.
>
> (Jury out at 10:26 a.m.)
>
> **MR. COLAW:** Judge, my objection now that the jury is out of the room is it sounds like that Mr. Shea is going to read court opinions or case law opinions concerning premeditation, and my objection will be the Court is going to instruct this jury on the legal definitions in the jury instructions on how premeditation is defined. It's an operation of the mind and it's up to them to decide. Arguing to them other Court's opinions in other cases is improper.
>
> **MR. SHEA:** Your Honor, of course I don't intend to cite any opinions, but it is the law that as an example here - - that in the heat of passion or sudden provocation is not to be determined to be a pre - - determined a premeditated thought. It's happened out of passion or out of just a sudden or unprovoked circumstance. This case is perfect with the facts that are in this case.
>
> It's - - there was so many stab wounds, and again we don't

know which was the first or the last according to the Medical Examiner, but once she was disabled, of course, there isn't any premeditation at that point.

Premeditation had to be formed before that first stab or infliction of the knife on the victim. The - - and again I don't intend to get into a lot of detail on it. I just wanted to infer to them that a moment of heat of passion - - and I'll restrict it down to - - I won't be reciting cases and I assure you of that.

MR. COLAW: I think Mr. Shea - - so the state's position is clear Mr. Shea can make argument about what he thinks are reasonable conclusions from the evidence, but they've agreed to jury instructions on what law this Court is going to instruct this jury on premeditation. They asked for no special instructions from court cases, so to frame it in the context of the Courts have decided over time it means this, it means this, it means this is not appropriate.

THE COURT: I will agree with that, counsel. I mean that's what the jury instructions are about. I'm limited to that and the jury is limited to what's presented to them. Now you make arguments but I don't want you citing any more cases.

MR. SHEA: No, sir.

THE COURT: Okay?

MR. SHEA: Yes, sir.

(17 R 919-920)

Kaczmar talked about premeditation, but did so by only recounting the evidence. He presented no detailed challenge to the State's claim that he had committed a premeditated murder, and raised no defense that he had committed the murder in the heat of passion. He never did so because the court had specifically prevented him from developing his argument about what is and is not premeditation, which drew from various court opinions. The lower court, therefore, erred by limiting the defendant's closing argument. This Court should review this issue under an abuse of discretion standard. Moore v. State, 701 So. 2d 545 (Fla.

1997).

A.. The law on closing argument.

While the lower court has some discretion in controlling a party's closing argument, Bigham v. State, 995 So. 2d 207, 215 (Fla. 2008), the law also gives the parties wide latitude in what they argue. Ford v. State, 802 So. 2d 1121 (Fla. 2001). This expansive privilege allows counsel the freedom to develop, "sharpen and clarify," his arguments, particularly those that are central to his case. Goodrich v. State, 854 So. 2d 663, 664 (Fla. 3d DCA 2003) Counsel does this to help the jury understand the issues and how the law applies to the evidence. Murphy v. Int'l Robotic Systems, Inc, 766 So. 2d 1010, 1028 (Fla. 2000). A trial court, therefore, will have abused the discretion given it when it limits that broad scope. Goodrich.

B. Applying this law to the facts in this case

After the court limited Kaczmar's closing argument, defense counsel regrouped his thoughts, but obviously its ruling derailed his major argument concerning the defendant's mental state at the time of the murder. As to that issue, whether the defendant had the requisite premeditated intent, counsel said, "As I was discussing with you this premeditation, and what I'm going to have to do is go

back through and kind of recite the history of the case, what happened during this case and then see how that fits into the definition of premeditation as the Court is going to describe it to you." (17 R 921). Then, for the next 20 transcript pages, Kaczmar's lawyer simply recounted the evidence without making any real effort to explain how it showed a lack of intent on his client's part (17 R 921-936). Only near the end of his closing argument did he make any attempt to defeat the State's argument that the defendant had a premeditated intent to kill by arguing a partial defense that he had stabbed Ruiz in a rage or "heat of passion":

> In other words, was it a struggle or were these injuries to the hand in this rage, whatever took place in there, of stabbing her? And again that's such an irrational mind. A person who would stab a person that many times is not rationally thinking.
>
> You know, where does the rage begin? Where does the thought process stop before that first act happens? It's so irrational. The entire time is so irrational to the average person, myself. Anybody who's decent and good cannot believe that a person of any sound mind would premeditatedly think I am going to do all of these terrible things to this lady and cut her hands and so forth.

(17 R 940).

By limiting counsel's closing argument the court prevented Kaczmar from developing his claim that he had killed Ruiz, not with premeditation, but in the heat of passion, or with some other, lesser intent. Clearly that is where he intended to go when he wanted to argue, using the law and examples provided by appellate decisions of the court's of this state, to tell the jury that what he may have done was "in the heat of passion or sudden provocation" and not premeditation. As he

saw those reported decisions, they were "perfect with the facts that are in this case." (17 R 920) Within the limits of the court's ruling he could discuss the evidence, but there was never any real success in applying the law to it. All we have is an anemic two paragraph wish that Kaczmar never premeditatedly killed Ruiz.

By preventing Kaczmar from relying on or "citing any more cases," the trial court prevented him from using the law as articulated by the appellate courts of this state on the issue of premeditation and lesser forms of intent. Clearly the defendant never intended to cite any opinions in his argument (17 R 919). But he did want to use those opinions to bolster his argument about what is heat of passion or sudden provocation.

How would he have done that? Under the wide discretion given him, he could have legitimately said that "for example consider the situation where the defendant and victim got into an argument where the victim threatened to take his child away from him, and he kills her by shooting her several times(the last one being as she lay on the ground) with a gun he had to get from his car." Clowers v. State, 31 So. 3d 962 (Fla. 1st DCA 2010). Was that homicide done in the heat of passion? No. Under those circumstances the homicide would have been done in the with premeditation and not in the heat of passion Counsel would have given no case citation, or said, "As the appellate courts of this state have held." Instead, he

would have incorporated, by way of an example, drawn from the facts and legal holding of some case into his argument. Would that be incorrect? No. He was simply presenting his theory of the case to the jury. Jean v. State, 27So. 3d 784, 786 (Fla. 3rd DCA 2010). He was drawing an appropriate, legitimate inference from the evidence and law. See, Lukehart v. State, 776 So. 2d 906 (Fla. 2000)

Thus, the trial court improperly exercised the discretion the law gives it when it limited the wide latitude the law also gives a defendant in what he tells the jury in his only time before it. All the defendant in this case wanted to do was apply the law to the evidence in this case.

This Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V:

THE COURT ERRED IN EXCLUDING CERTAIN EXCULPATORY STATEMENTS KACZMAR MADE, WHICH, UNDER THE RULE OF COMPLETENESS, THE COURT SHOULD HAVE ADMITTED, A VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Before trial, the State filed a motion to prevent Kaczmar from questioning its witnesses about "exculpatory statements made by the Defendant." (6 R 996-97). He opposed the motion, distinguishing the cases cited by the State in its motion (14 R 222). Immediately before trial, the court heard argument on the motion, and eventually granted the State's request (14 R 227).

At trial, the prosecution presented the testimony of Charles Humphrey, who was employed by the Jacksonville Sheriff's Office, and who, in this case, worked in an undercover capacity (16 R 742). Specifically, he was the person the jail inmate William Fillancia said could help Kaczmar plant some evidence against Ryan Modlin (16 R 743). Humphrey had four meetings with the defendant in the Clay County jail, three of which were recorded.[5] The prosecution, pursuant to the lower court's ruling, removed those parts of the defendant's statements in which he "denied doing the crimes and denies guilt."(14 R 221, 16 R 744). Those statements, as summarized by the prosecutor, were that he had admitted having his

[5] Problems with the taping device prevented the third visit from being recorded (16 R 742).

,wife pay $300 to someone to plant evidence implicating another person, and to beat up other witnesses. Later in the conversation he also said "I'm only doing this because I'm innocent." (14 R 224)

The lower court erred in granting the State's motion because under the Rule of Completeness the jury should have heard the exculpatory statements. This Court should review this issue for an abuse of discretion. Whitfield v. State, 933 So. 2d 1245 (Fla. 1st DCA 2006).

As a general rule of law, self serving statements are inadmissible under §90.803(18) Fla. Stats. (2008), which allows statements a party may have made that are against his or her interest. Lott v. State, 695 So. 2d 1239, 1243 (Fla. 1997)("Self serving statements are not admissible under section 90.803(13)."). While true, as perhaps a general statement of the law, §90.108, Fla. Stats. (2008),[6] which codifies the Rule of Completeness, requires the admission of such hearsay if in fairness it ought to be considered. In Larzelere v. State, 676 So. 2d 394, 401 (Fla.1996), this Court said that the purpose of the rule of completeness is to avoid the potential for creating misleading impressions by taking statements out of context.

[6] 90.108. Introduction of related writings or recorded statements.
(1) When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously.

In Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989), the First District Court of Appeal held that the lower court had erred in excluding self-serving hearsay of the defendant:

> Because portions of the defendant's conversation with the officer were admitted on direct examination, the rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two. (citation omitted). Once the officer testified in the state's case-in-chief about one portion of Eberhardt's statements to him, the court erred in sustaining the state's hearsay objection for the reason that his statements he was "high" or intoxicated were self serving. (citation omitted).

There is, thus, a two-step analysis a court must make before it can exclude self-serving statements made by a defendant in a criminal case. First, it must determine if what he or she said was self-serving. If so, it must then consider whether the Rule of Completeness requires its admission.

At the hearing on the State's motion in this case, the prosecutor discussed two cases it had cited in its motion, Kelly v. State, 857 So. 2d (Fla. 4th DCA 2003) and Moore v. State, 943 So. 2d 296 (Fla. 1st DCA 2006) to support its contention (14 R 223-25). They did little, however, to aid the court, and worse, diverted its attention from the issue Kaczmar had raised.

In Kelly, the State presented evidence that the defendant had made some incriminating statements about a burglary. On cross-examination, Kelly had presented other statements made during the same interrogation. His purpose was to

show that in context the entire interrogation was exculpatory. The court then allowed the State to present evidence that Kelly had three prior convictions, and the correctness of that ruling was the issue on appeal. Thus, Kelly has no significant relevance to this case because the 4th DCA never discussed whether the Rule of Completeness dictated that in fairness the jury got to hear all of Kelly's statement.

Moore says essentially the same thing.

Those cases, however, have nothing to do with this case. Kaczmar's complaint was that "if the State puts on the evidence they need to put on the whole thing." (14 R 225) That is, he argued that the Rule of Completeness required the State to present the complete testimony between Kaczmar and Humphrey.

The State, however, never responded to the defendant's argument, and it merely relied on Kelly and Moore as answering his contention (14 R 227), and immediately after the court summarily ruled, "The motion is denied." (14 R 227)[7] This abrupt ruling provided little clarity into whether the trial court applied the two step approach to the statements Kaczmar made to Humphrey. But if we assume that what the State sought to have excluded was self-serving, the trial court never made any fairness determination as required by the Rule of Completeness.

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[7] The court specifically asked Kaczmar's counsel about Kelly and Moore, but he was unprepared to respond to that request (14 R 226).

In Whitfield v. State, 933 So. 2d 1245, 1248-49 (Fla.1st DCA 2006), the trial court excluded hearsay statements of the defendant solely because they were self-serving. It abused the discretion given it in that case because it never made the required fairness determination.

Similarly, here the trial court's summary "motion is denied" does not satisfy the demands of the Rule of Completeness. Simple fairness required the State to present all of the statement Kaczmar made to Humphrey.

In Whitfield, the First DCA, rather than returning the case to the trial court for it to make a fairness determination, did it. This Court should not do the same thing here. It should not because the only evidence of the excluded hearsay came from the prosecutor's summary, which was that he wanted to plant evidence implicating another person because "I'm only doing this because I'm innocent." (14 R 224) Rather than relying on that, this Court should reverse the trial court's judgment and sentence and remand for a new trial to give the lower court, the court that has the discretion, the opportunity to determine if in fairness the jury should hear all of what Kaczmar said to Humphrey.

ISSUE VI:

THE COURT ERRED IN FINDING THAT KACZMAR COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION, A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS.

In justifying sentencing Kaczmar to death the court found that he had committed the murder in a cold, calculated, and premeditated manner without any pretense of legal or moral justification:

> **4. The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.**
>
> The Florida Supreme Court has set forth four factors to prove this aggravating circumstance: 1) the killing was the product of a cool and calm reflection rather than an act prompted by emotional frenzy, panic, or a fit of rage; 2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident; 3) the defendant exhibited heightened premeditation; and 4) the defendant had no pretense of moral or legal justification. Jackson v. State, 648 So. 2d 85 (Fla. 1994).
>
> Evidence presented at trial established that the Defendant expressed a desire to have sex with Maria Ruiz earlier in the evening in which the crime occurred. He also indicated a desire to get her under the influence of drugs so he could have sex with her. During that time the Defendant turned up the volume on a pornographic movie he was watching in his bedroom so that Maria Ruiz could hear it. He also tried to be Maria Ruiz to come into his bedroom under the pretense of telling her she caused a bathtub to leak water into his room. All of these efforts were ignored by the victim.
>
> The Defendant made statements to his cellmate, William Fillancia, that once Christopher Ryan Modlin, the Defendant's friend and only witness in the house, left for the night, the Defendant decided to make sexual advances toward Maria Ruiz. The Defendant had already armed himself with a fold-up knife that was in his pants pocket

> once he started making sexual advances. During this time, Maria Ruiz fled from the Defendant into the safety of the bathroom. The Defendant went outside and banged on the bathroom wall and window in order to get her to exit the bathroom. The neighbor, Julie Ferrell, and her grandson, Nathan Ferrell, heard loud banging and screaming from the Defendant's property. Julie Ferrell recognized the voice as that of the Defendant.
>
> The Defendant then went back inside and confronted Maria Ruiz in the kitchen where she had armed herself with a knife for protection. The Defendant disarmed Maria Ruiz by punching her in the face. He took his own knife from his pants pocket, opened it, and began stabbing her. Maria Ruiz was stabbed over one hundred times, with more than twenty defensive wounds. Blood evidence showed that the victim was stabbed in the hallway of the house, as well as the kitchen area. There was also evidence that the victim tried to flee from the Defendant because she was stabbed in the back several times. In the medical examiner's opinion, the wounds that were fatal in and of themselves were some of the last ones inflicted on Maria Ruiz.
>
> Once Maria Ruiz was dead, the Defendant calmly changed his clothes and cleaned up. He then drove to a nearby gas station to purchase two dollars worth of gasoline. When he returned the Defendant parked his car at a vacant lot on a separate street to avoid having himself or his vehicle seen by other. The Defendant then walked through a wooded area and through a hole in the back fence of his property. The Defendant proceeded to pour gasoline throughout the residence, including near the victim's body, and set it on fire. The Defendant then drove into Jacksonville, Florida, where he tried to establish an alibi of having been fishing all morning. The Defendant's actions before, during, and after the murder exhibit cool, and calm reflection, and heightened premeditation. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(9 R 1585-87)

The court erred in finding this aggravator, and this Court should review this issue under a competent substantial evidence standard of review. <u>Williams v. State</u>, 37 So. 3d 187 (Fla. 2010).

This Court has aided a trial judge faced with the daunting task of evaluating and applying the statutorily created cold, calculated and premeditated aggravator. In Jackson v. State, 645 So. 2d 84, 89 (Fla. 1994), and more recently in Lynch v. State, 841 So. 2d 362, 372 (Fla. 2003), this Court provided the analytical approach for the sentencing judge to use:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ...that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); accord, Lynch v. State, 841 So. 2d 362 (Fla. 2003)(Citations omitted, emphasis in opinion.)

While the court in this case recognized Jackson, (9 R 1585), it never engaged in the analysis suggested by that opinion, and its findings in support of this aggravator fail to satisfy the three elements of it as this court has defined them.

1. The emotional frenzy. Until the very end, Kaczmar had only harassed Ruiz to have sex with him. He had ingested some cocaine before and during the evening, and his obnoxious behavior supports the obvious conclusion that he was intoxicated or under its influence. His puerile behavior, however, changed when Ruiz produced a knife and threatened him with it. Then he became “really angry” and attacked her, cutting himself, and killing her (16 R 789-90). At that point there

was no cool deliberation, no calm reflection that he wanted to murder her. There was only rage. There may have been some evidence that he wanted to have sex with her, but considering his drug soaked brain and his childish behavior, even that is questionable.

2. The careful plan or prearranged design. Again, until the very end Kaczmar, at most, only wanted to have sex with Ruiz, and what he did exhibited at best only that intent. Until she brandished a knife in the kitchen, the defendant's careful planning and prearranged designs amounted to harassing Ruiz, asking for sex, making passes, and hoping to get lucky. Eventually they got into a shoving match, she fled to a bathroom, and he knocked on its door and tapped on its window. He followed her into the kitchen, and they again shoved each other. She got a kitchen knife, which he took away, cutting himself as he did so. At that point he became "really angry" and move against her with murderous intent.

There is absolutely no evidence that he killed her after making a careful plan or according to some prearranged design. What happened simply belies that. That he may have had some prearranged design or intent to have sex with her cannot and did not morph into a prearranged plan to kill. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992)(No CCP where the defendant planned a burglary but not a homicide, which was the result of a sudden anger.); Hardwick v. State, 461 So.

2d 79, 81 (Fla. 1984)("The premeditation of a felony cannot be transferred to a murder which occurs in the course of the felony for purposes of [finding CCP].")

Of course, what he did after the murder showed some clumsy planning, but what a defendant does after the murder does not reflect on his intent before the crime. C.f., Jones v. State, 569 So. 2d 1234 (Fla. 1990); Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975). It shows only that he realized he had killed Ruiz and needed to do something to hide that crime.

3. The heightened premeditation. To distinguish murders in which the defendant had only a premeditated intent to kill from those which are CCP, this Court has required the defendants to have a "heightened" premeditation. Jackson, cited above; Walls v. State, 641 So. 2d 381, 388 (Fla. 1994). For example, in Buckner v. State, 714 So. 2 d 388 (Fla. 1998), the defendant, apparently angry with the victim because he had been with his girlfriend, got into an argument with him. They got into a tussle, at which point Buckner shot him twice, left, but came back asked him if he had had enough, and shot him three more times. Although this Court found sufficient evidence of premeditation, "we do not find if sufficient to establish 'heightened' premeditation."[8] Id. at 389.

Similarly, in McWatters v. State, 36 So. 3d 613 (Fla. 2010), McWatters confessed to killing his victim but did not also admit he had any preformed

[8] This Court also found insufficient evidence of a prearranged plan.

planned to kill. He strangled the victim after she had threatened him with a knife. There was no evidence of any prearranged plan to kill. Accord, Crump v. State, 622 So. 2d 963, 972 (Fla. 1993).

Similarly, in this case, Kaczmar may have had an intent to kill Ruiz, as is evidenced by the many times he stabbed her. There is, however, no evidence that he had that heightened premeditation required for the CCP aggravator to apply, and multiple stab wounds, without more, cannot establish this aggravator. Campbell v. State, 571 So. 2d 415 (Fla. 1990).

Indeed, until he began stabbing her, at most, the evidence showed he wanted to have sex with her. He did not elevate that desire to murder until she produced the knife, and he cut himself when he took it from her.

Of course, he killed her with a knife he had in his pocket, but he only had it because he carried one when he went fishing and happened to have it on him(16 R 790). There is no evidence he specifically brought the weapon with him to use in killing Ruiz. Carter v. State, 980 So. 2d 473, 481-82 (Fla. 2008)(Defendant brought fully loaded rifle to house where victims were murdered supported CCP finding.)

Consequently, the trial court erred in finding Kaczmar committed the murder in a cold, calculated, and premeditated manner.

At this point, the State could concede error but claim the trial court harmlessly erred. McWatters, cited above. This Court should not follow that siren call. It should not because if the State presented insufficient evidence to support this aggravator, the court should not have instructed the jury on the CCP aggravator. But it did, and without any idea if it found it and what weight it may have given that factor, this Court cannot say beyond a reasonable doubt that it played no part in its death recommendation.

Therefore, this Court should reverse the trial court's sentence of death and remand for a new sentencing phase trial.

ISSUE VII:

THE COURT ERRED IN DENYING KACZMAR'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR THE FIRST-DEGREE MURDER BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT HE COMMITTED A PREMEDITATED FIRST-DEGREE MURDER.

If Kaczmar did not commit a cold, calculated, and premeditated murder as argued in Issue VI the question arises of whether he committed a premeditated murder either. While the CCP aggravator requires a "heightened" level of premeditation, which is certainly more than required to be guilty of first degree premeditated murder, the level of intent shown in this case fails to reach even that lesser level of premeditation. Thus, the court should have granted the defendant's motion for a judgment of acquittal made at the end of the State's case (17 R 846-48). This Court should review the correctness of the trial judge's ruling under a de novo standard of review. McDuffie v. State, 970 So. 2d 312, 332 (Fla. 2007)

Premeditation, as defined by the Standard Jury Instructions is:

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

(Fla. Std. Jury Inst.)(Crim.) 7.2

In this case, the evidence shows only that Kaczmar killed Maria Ruiz in the heat of the moment, and not from any deliberately formed intent to murder her. She and he lived in the same trailer, she being his father's current girlfriend (15 R 464). They apparently got along tolerably well, or at least there is no evidence that they had had difficulties or run-ins before December 12, 2008. Indeed, that held true until that evening when the defendant, after an afternoon and early night of using cocaine, decided he was going to try to "get lucky" and have sex with her (15 R 464, 477, 16 R 788-89). But she rebuffed him, and went to the bathroom and locked the door (16 R 789). She would not open it when he banged on it, and went to the kitchen after he had gone outside and rapped on the bathroom window (16 R 789). Up to this point, there is no evidence of any deadly intent, but that soon changed.

But it was Maria Ruiz who escalated Kaczmar's puerile "get lucky" antics to an aggravated assault. When she went to the kitchen she found a knife and pointed it at the defendant when he confronted her there (16 R 789). Obviously, by now he was not going to "get lucky," and when he knocked her in the head he was cut by the knife (16 R 789). Now, sex was not on his mind, and using another knife that he happened to have he stabbed her many times, with some of the wounds Ruiz suffered being defensive (15 R 446-47).

The State's case proved that the defendant killed Ruiz without a premeditated intent. First, the time he had to form a the required intent was simply too short. Of course, there is no minimum time needed to do so, Fennell v. State, 959 So. 2d 810 (Fla. 2007), but there must be, nonetheless, some time, some appreciable period in which the defendant can consciously decide he is going to kill someone. Instead, the events in this case moved so fast and he was so angry that he killed her with malice, or with some "heat of passion." What he did was second degree murder.

Second, the number of wounds, by themselves, does not necessarily establish premeditation. Campbell v. State, 571 So. 2d 415 (Fla. 1990). Here, Ruiz was stabbed all over her body, indicating a frenzied attack rather than one deliberately done to kill.

Third, while Kaczmar used a knife, it was one that he fortuitously had in a pocket of the pants he wore that evening, and which he had used when he went fishing. It was not a rifle he deliberately had brought with him to a confrontation with the victim. Carter v. State, 980 So. 2d 473, 481-82 (Fla. 2008)

Fourth, Ruiz was killed in the kitchen of the house they shared with the defendant's father and uncle. That it happened there shows a complete lack of foresight or planning because if Kaczmar wanted to avoid being blamed for her death he would have had to somehow dispose of the body and blood evidence. At

some point the defendant's father and uncle would come home and the father, at least, would want to know where Ruiz was. If this had been a better planned, premeditated, murder, the defendant would have killed her somewhere else, somewhere where it would have been easier to hide the body and other evidence.

Thus, while the State proved that Kaczmar may have killed Ruiz, it presented insufficient evidence he did so with a premeditated intent.

This Court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VIII:

THE STATE PRESENTED INSUFFICIENT EVIDENCE KACZMAR COMMITTED AN ARSON.

The State charged Kaczmar with committing an arson, which was part of the incident involving the homicide of Maria Ruiz. It failed, however, to present sufficient evidence that he had committed that crime, and the lower court erred when it denied his motion for a judgment of acquittal as to that offense. This Court should review this issue under a de novo standard of review. McDuffie v. State, 970 So. 2d 312, 332 (Fla. 2007)

Arson, as defined by §806.1(a), Fla. Stats. (2008), occurs when

> (1) Any person who willfully and unlawfully, or while in the commission of any felony, by fire or explosion, damages or causes to be damaged:
>
> (a) Any dwelling, whether occupied or not, or its contents

So, the State had to prove that this defendant started the fire that burned the trailer in which he and Maria Ruiz lived. It did that using the testimony of the jailhouse informant, William Fillancia. While sharing a cell at the Clay County jail with the defendant, the latter told him about the murder. He also told him what he did afterward. That is, he changed his clothes and buried them (16 R 791). He went to a gas station, bought $2 worth of gas, and drove to a road behind his house where he parked his truck (16 R 793). He walked home, poured gasoline in the kitchen and made a line with the fuel to the outside (16 R 793). He then lit the gas.

He returned to his truck and drove to his mother's house in Jacksonville, where the police found him (16 R 795).

The problem is that Fillancia's testimony was inherently unbelievable, and hence could not provide sufficient, or competent substantial evidence that the defendant had burned the house he had lived in. It was so because Fillancia, as a three-time convicted felon who was facing a life sentence (17 R 814-15), knew that he could possibly get a better deal in his case if he got or produced information that would help the State in Kaczmar's case (17 R 835). Moreover, Kaczmar kept the paperwork for his case in the same cell he had shared with Fillancia for about 8 months, and there may have been times when the defendant had gone to court and left documents relating to his case unguarded or unprotected in their cell (17 R 815). Hence, this jailhouse informant had the motive, opportunity, and character to create a story that would help him while condemning Kaczmar. As a result, what he had to say was so inherently unreliable that it cannot provide sufficient, competent, substantial evidence of the defendant's guilt of the arson charge. This Court should reverse the trial court's judgment and sentence.

ISSUE IX:

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO. 2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO. 2D 403 (FLA. 2002).

To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Because this argument involves only matters of law, this Court should review it de novo.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002), this Court rejected all Ring challenges by simply noting that the nation=s high court had upheld Florida's capital sentencing statute several times, and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriquez de Quijas, has a notable exception. If there is an "intervening development in the law" this Court can determine that impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
>
> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such

> changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the "intervening development of the law" exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.). The question, therefore, focuses on whether Ring is such an "intervening development in the law" that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision.

The answer obviously is that it is a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled "where the necessity and propriety of doing so has been established." Ring, cited above at p. 608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring's impact on Florida's death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring's fundamental holding. "Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring." Bottoson, cited above at p. 725. Justice Anstead viewed Ring "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest v. State, 855 So. 2d 33 (Fla. 2003)(Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states."[9] Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw concludes that Ring, "therefore, has a direct impact on Florida's capital sentencing statute." Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the

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[9] Justices Quince, Lewis and Pariente agree that "there are deficiencies in our current death penalty sentencing instructions." Id. at 702, 723, 731.

conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that Anew rules generally should not be applied retroactively to cases on collateral review.@ Teague v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by the nation=s high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for

Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v. Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendants to death, it may simply have not wanted to deal with a post conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring). While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions.")

There is, therefore, no reason to believe the United States Supreme Court will accept this Court's invitation to reconsider this State's death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State's death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death

When it does, this Court should consider the following issues:

A. Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction." Lawrence v. State, 846 So. 2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge=s decision to impose death under section 921.141, Florida Statutes (2002).. . . [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has "never suggested that jury sentencing is required".... I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring.) In this case, the trial court found three aggravating factors, none of which would have satisfied her criteria.

Justice Anstead rejected Justice Pariente's partial solution to the Ring problem, and Kaczmar adopts it as his response to her position.

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, "The question, however, under Ring is whether a trial court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence." (Emphasis in opinion.)

B. Unanimous jury recommendations and specific findings by it. Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only

recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama,[10] Florida allows a non-unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, Kaczmar's death sentence may be unconstitutional. Bottoson, cited above, at 714 (Shaw, concurring in result only); Butler v. State, 842 So. 2d 817 (Fla. 2003)(Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non-unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non-capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases.

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[10] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendations. SB449.

Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person=s life is at stake that voice should unanimously declare the defendant should die.

This approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations:

> The eleven -to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty.

See Anderson v. State, 841 So. 2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence); Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003)(Pariente, dissenting); Bottoson v. Moore, 833 So. 2d 693, 709 (Fla. 2002)(Anstead, dissenting).

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida' death penalty scheme. It should also reverse Kaczmar's sentence of death and remand for a new sentencing trial.

CONCLUSION

Based on the arguments presented here, the Appellant, Leo Louis Kaczmar, II, respectfully asks this honorable court to: 1. Reverse the trial court's judgment and sentence and remand for a new trial, or, 2. Reverse the trial court's sentence of death and remand for a new sentencing trial.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic transmission to **MEREDITH CHARBULA**, Assistant Attorney General, The Capital, Tallahassee, Fl 32399-1050; and by U.S. Mail to **LEO LOUIS KACZMAR, III**, #J20499, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of June 2011. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

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