IN THE SUPREME COURT OF FLORIDA

DAVID JAMES MARTIN,

Appellant,

v. **CASE NO. SC10-539**

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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IN THE SUPREME COURT OF FLORIDA

DAVID JAMES MARTIN,

Appellant,

v. **CASE NO. SC10-539**
L.T. CASE NO. 08-CF-658

STATE OF FLORIDA,

Appellee.
____________________________/

Statement of the Case[1]

On August 15, 2008, the Clay County Grand Jury indicted appellant, David James Martin, for the first-degree murder and armed robbery of Jacey McWilliams. R1:30-31.

On November 10, 2009,[2] the defense filed a motion to suppress Martin's statement to police on the grounds that the statement was obtained in violation of his privilege against self-incrimination and was involuntary. R3:520-522. After a hearing on November 13, 2009, the trial court denied the motion to suppress. SR1:175-176.

[1] References to the sixteen-volume record on appeal are designated by "R," the volume number and the page number. References to the two-volume supplemental record are designated by "SR," the volume number, and the page number.

[2] The defense previously had filed a motion to suppress on September 9, 2009, based on the transcript of his taped statement, arguing that the Miranda warnings were deficient. R2:259-260. That motion was withdrawn after defense counsel viewed the taped statement, which showed that the proper warnings were given. SR1:18-19.

Martin was tried by jury before Clay County Circuit Judge William A. Wilkes on November 17-19, 2009. The jury found Martin guilty as charged.

The defense filed an Amended Motion for New Trial on November 24, 2009, which was denied on December 2, 2009. R4:703-705, 723.

The penalty phase of the trial was held on December 3, 2009. The jury, by a vote of 9 to 3, recommended the death penalty. R4:708.

The trial court held a Spencer hearing on January 8, 2010, at which the parties presented additional evidence. SR2.

On March 3, 2010, the court sentenced Martin to death, finding three aggravating factors: committed during a robbery; committed while on felony probation; and cold, calculated, and premeditated. In mitigation, the court found (1) drug abuse; (2) lack of positive role models; (3) lack of violent history; (4) crime was a situational, aberrant, isolated incident; (5) family members who love and support him; (6) has performed kind deeds for others; (7) has attempted to have a positive influence on family members, despite his incarceration; (8) artistic skills; (9) cares about animals; (10) is amenable to rehabilitation and a productive life in prison.

Notice of appeal was timely filed March 19, 2010. R5:867.

STATEMENT OF FACTS

A. Motion to Suppress

At the suppression hearing, the parties presented argument, the videotaped interview, a transcript of the interview, and the testimony of Detective West. Martin challenged the admissibility of his statement on two grounds: (1) the police violated his Fifth Amendment right when they failed to stop questioning him after he told them, "I have nothing really to talk about," and (2) his statement was the product of improper police coercion.

The interrogation took place on March 20, 2008, at the Pinellas County Jail, where Martin had been incarcerated for shoplifting. Jacey McWilliams had been missing since March 11, and her car had been found in Pinellas County and tied to Martin. The interview room was ten-by-ten, with blank walls, a table, and three chairs. The interview began at 12:50 p.m., lasted three and a half hours, and was surreptitiously videotaped from start to finish. SR1:25-28.

What follows is a summary of the interrogation.[3] Detectives Ken West and Brian Wolcott introduced themselves as "Ken" and "Brian," and West told Martin he had to read him his rights because he was in jail. Martin said he could read and write and though he never

[3] This summary is from the written transcript, which was provided to the trial judge and utilized at the suppression hearing. R4:529-653. Portions of the interrogation were played and transcribed at the suppression hearing, SR1, and a redacted version was played and transcribed at trial. R11:530-758. The court-reported transcriptions contain many more inaudible parts than does the transcript used at the suppression hearing.

attended high school, he got his GED while in a juvenile facility, which he entered at age 15. West read the rights card, and Martin said he understood. West asked Martin to "sign this real quick," and Martin signed. R4:531-532.

Detective West told Martin they were looking for Jacey and were aware that he had taken her out on March 11. Martin said he had known Jacey since about February 20 and had taken her to Black Beach, in Middleburg, on March 11. Jacey had picked him up at his house in Jacksonville around 6:30, they ate at McDonald's, and they got to Black Creek around 8 or 8:30. They walked out on the dock, talked, and smoked cigarettes. Martin said he dropped Jacey off in her neighborhood in Jacksonville around 1:00 a.m. after giving her $50 to let him use her car to visit his fiancée, Erin, in St. Pete. R4:533-545. He arrived at Erin's house about 5 a.m. The next day, March 13, Martin drove back to Jacksonville, packed up his stuff -- clothes, a tool box, and toiletries -- and returned to St. Pete the next morning. R4:545-555. He hung out with Erin until he got arrested at Wal-Mart on Monday, March 17. He didn't understand why he stole the items from Wal-Mart, cologne and a watch, when he had a $100 gift card: "I just have impulses and I will just do something." R4:556-564. He said his relationship with Jacey was not sexual but Erin worried about it and was "freaked out" that night because Martin's roommate had told her that Martin was sleeping with Jacey. R4:556-571, 11:630.

After about an hour of questioning, on page 50 of the transcript, Detective Wolcott told Martin that "evidence can't lie." R4:576. Wolcott drew a picture and explained how the cell phone towers showed where Martin's and Jacey's phones were that night and showed that Jacey's phone never returned to Jacksonville. R4:577-579. Wolcott continued:

> You're not a bad person, okay? You had some minor shit and we've all had minor shit. I ain't in here to judge you brother. But you are tired. I can tell you're tired. It's been tough. Okay, I can see it in your eyes, man. You're not a monster, are you? Are you cold-blooded?

R4:579.

Wolcott then told Martin that Erin would not back him up:

> And getting up in front of that jury of 12 people, we are going to parade a pretty little blonde haired girl that ain't never been in no trouble up there and set down and tell the story. Okay and then they are going to parade us and everyone we have talked to about everything else and then they are going to parade you up there. And like I said, I am not here to judge you. Okay, but let's face it. Common sense tells you who are they probably going to believe? Erin?

R4:580.

Wolcott continued:

> The girl that hasn't ever been in trouble. Don't do this. She is not going to protect you. You have you, okay. There is an out. I mean there is a light at the end of this tunnel. Things happen for a reason. Okay, he and I go out and if he and I go out to a bar one night and a fight happens, okay, I'm going to defend myself man. I am not going to let someone hit me, but in the meantime while I'm hitting him back my intent may not be to hurt him back and my intent might not be to hurt him bad or potentially even kill him. That might not be my intent. Things might have just went wrong. People can understand that. People can relate to that. People have all been in that

situation. The situation people can't relate with is why something is done for no reason. Okay. You need to help yourself. We need to help her family. We need to get some answers, okay. It's that simple.

R4:580.

Wolcott told Martin:

> [T]he best thing David can do for David is to help us find her. . . . Because you look like a monster if you don't. You really do. And you know where monsters go. Monsters go to prison. Monsters go to death row. Monsters never see the day of light again.

R4:580-581.

Wolcott told Martin:

> Jacey's folks are hurting really bad right now. As we speak. They want nothing more than the answer of her.

R4:584-585. Martin said he didn't know what to tell them.

Wolcott then told Martin he had a future if he told them where Jacey was:

> I see it right there, man. I see it on you and the moment I walked in you know, brother, you are a good kid. You have a long life to go. You got some minor little shit to take care of but you know what? That's stuff can be taken care of. There can be a future for David. . . . All we want are some answers for her family. Out of respect for them. Out of respect for her mama. It's that simple. I mean it's not that hard man. Don't make your life be over because of something so simple as just us giving her mom some closure.

R4: 585. Martin again said he didn't know where she was.

Wolcott continued:

> Let's let David put this behind him so that he can move forward in life. . . . . Okay, the easiest way for David to let this go away and to start washing your hands and start looking forward to your future. Just by giving some answers, that's it.

R4: 586.

At then point, Martin admitted stealing Jacey's car but said he left her unharmed, standing on Horsetail Road in Middleburg. R4:586-587. He stole her car because his fiancée "was really hurting" because his roommate "was constantly telling her, yea he's out with this girl. . . And he was hurting her and I didn't want to see her hurt. So I wanted to come see her." R4:589.

Wolcott then told Martin:

> David is not a bad guy. David is not cold-hearted. David is not a monster, okay. She just didn't get out of the car.

R4:589.

When Martin continued to say he left Jacey by the road, Wolcott told him:

> Don't let the little element of what happened ruin the rest of your life. Okay. You didn't want your fiancée to hurt, you had to get down here, I understand that. People can understand that. People have been hurt inside over love, okay. People have been hurt on the side of love. She just didn't get out of the car, David. Please, for her mom, man, if anything for her mom, okay.

R4:589.

Martin again said he didn't hurt Jacey. After Black Creek, they went to Jennings State Forest, and that's where he told her to get out of the car. He was "freaking out," and "out of my mind." R4:589-591.

Wolcott told Martin he didn't want Martin to "piss away the rest of your life":

> <u>For me to go out there okay and talk to the people that are wanting to put you in prison, I need to be able to go out and say I mean he's got a heart</u>. That's not what he wanted to happen. <u>Call her mama up and say look, it's not how it had to be but it was. He is sorry and remorseful</u>.

R4:591.

Wolcott gave Martin his card, which said he was in "homicide," and asked him to read it. Martin read the card and said, "To tell you the truth I don't even know what homicide means." Wolcott explained that homicide is "dying at the hands of another," which can be justifiable, excusable, or cold-blooded. R4:592.

Wolcott asked Martin if he wanted to spend time with Erin again, "hold her hand, go to the movies," "go to parks," and then said:

> <u>David, don't be the monster that we described</u> and be the human now. <u>Tell me where we can go get her and take her home to her mama</u>.

R4:594-595.

Detective West said, "I don't think what happened, that you meant to happen. We don't think you are that type of person." R4:596. Wolcott pointed to the drawing and told Martin "those people" are the jury and they wouldn't believe what he was telling them right now:

> Let me go put my hands on her. Let me go do what's right. <u>Let me go tell those people that David did what was right</u>. That David got into a situation that he couldn't control. That David didn't mean to do what happened. David told me where she was at. David told me he was sorry for what happened. He didn't mean for this to happen. It wasn't planned. It just happened. Let me go get her and take her home. Do what is right David.

> You are not a monster, David.
>
> * * *
>
> What are these people going to believe now when I walk in and say this is what we have?
>
> * * *
>
> I mean we already know what happened, but he is not remorseful for it. He doesn't care because he won't tell us anything. What do you think they are going to look at you as? They are going to look at you as the monster that you are not.

R4:598-599. Martin repeated that he left her on the road.

Wolcott told Martin that Martin wanted a car to come down to St. Pete and "from there, everything else, it wasn't planned. It was an accident, son." R4:602. When Martin responded, "people don't give a fuck about that," Wolcott said:

> David, people do care. There is many a times that I have had cases where it was justified, excusable, there was not intent. Stuff like that, okay, and it just disappeared. But you know what happened in those cases. Everybody stepped up and told the truth. None of that can happen.

R4:602.

Then, on page 75 of the transcript, after Wolcott told Martin it would be a weight off knowing "that shit's behind me," the following colloquy took place:

> Martin: You know what? I already feel that relief. You know why? Because I told you what I already told you.
> Wolcott: David.
> Martin: I have nothing really to talk about.
> Wolcott: David you are not, okay, you may be saying that you are having it, okay, but your body is not saying that.

Martin: Because y’all are putting me under a lot of pressure right now.

Wolcott: Okay, well it’s a pressure situation.

Martin: I know it is.

Wolcott: I don’t know how many times you have sat across from a homicide detective being questioned.

Martin: I never have.

R4:603. Wolcott then told Martin,

> Okay, the two of us have been doing this job longer than you have been alive. Okay, <u>we have seen other young people make this same mistake. They think that there isn’t a way out that there is no light at the end of the tunnel and they can’t help themselves and they can</u>. I am telling you they can, but you, David, cannot help yourself by not being truthful.

R4:603-604.

West added:

> It’s black and white. We don’t care obviously what happened here. <u>All we want is to take her from where she's at and place her back with her family so they can do what's right</u>. We don't care about anything else. All we want is -- so we can take her where she's at and put her where she belongs. That's what we want because <u>that mother is the one that I and he had to sit next to while she balled and cried and cried and pleaded. What do I tell her</u>? . . . I want to take her home to her mother so they can do what's right by her. I don't care what happened on that corner. I don't care what happened in Jennings Forest. . . I care about taking her and putting her where she belongs. She deserves that.
>
> * * *
>
> <u>Help me get her back with her mama today so they can do what's right by her</u> and you can be honest. Tell me how to go get her right now and take her home <u>so her mother doesn't hurt any more and that we can do what's right by her</u> so she doesn't lay somewhere where she doesn't need to be. Let me put her with her mother. That's what I would want to do for you if that was your mother or your sister or your father. I don't care about the rest. I would not want your mother to hurt like that and I spoke to your

mother and she wept and she cried because she thought I was coming to tell her that something bad had happened to you and I wasn't at all. Would you want her sitting there crying?

* * *

Okay. <u>You want this mother to sit there and cry</u>?

* * *

No. Because <u>you are not that monster. You are not that monster</u>, you know how to love. That's why you have had the relationships you have. Let me take this girl home to her mother today. Not another day, not Friday. Today. . . . I don't care about the rest. I really don't. Because I'm the one that has to drive back 4 hours and sit next to that mother, not you. And it hurts me just as much as it hurts you. It does, it hurts me to sit there and see that family going through what they're going through.

R4:604.

Martin said if it was that simple, he would tell them where she was. R4:605.

Wolcott again said:

I mean, <u>is it worth pissing your life away for?</u>

R4:606. Then, at page 78 of the transcript, the following colloquy takes place:

Wolcott: <u>You are tired, okay. I can see it, man. You are tired, okay</u>. Stop sorting for an answer you think that we are going to accept. Okay and just tell us the truth.
Martin: I am not trying to give more answers, I already gave you my answer.
Wolcott: Okay, okay. You haven't all the way. Okay, please, is it that difficult for you and me to have a man to man conversation.
Martin: Apparently.

R4:607. Martin again denied knowing where Jacey was.

Wolcott continued:

> Her mom is torn. Can't eat, can't sleep. Cries, even vomits, even throws up.

R4:608.

> . . . And that's why we drove 4 hours to get here so we can take her home. She doesn't want to be one of those mom's going to these parades holding a sign up, help me find my child, 2 or 3 years down the road. Okay, families self destruct over this.

Wolcott told Martin it would be dark soon. Martin repeated that he told them where he left her and he didn't know what happened after that. R4:608.

Martin asked to use the bathroom, and when he was brought back, Wolcott told him:

> [W]hen you went out I called and talked to her mom. . . . Okay, and in between tears and her choking up she begged me that her concern was her daughter. Okay, she appreciated everything that we are doing and she appreciated the fact that you were talking to us. Okay. . . . We might portray ourselves as tough guys because we are police officers and stuff like that. I was crying.
>
> * * *
>
> We need to do something for her. Okay. This is destroying her, all right.
>
> * * *
>
> There is a safety net. There is a huge difference from the David facing premeditated planned first degree monster cold-blooded murder, okay, to the other end of, it wasn't planned. It wasn't supposed to go like that. That's not my intent. A lot was going on . I am busting loose at the seams. I know that in my heart I need to get to this area. I am sorry, please. People care. She cared. Okay. She didn't ask me what's going to happen to David because I want to see that he goes to prison. She was like: I want my daughter. I need my daughter. . . . My partner and I have not lied to you. Everything we told you is the truth. David is not a premeditated murderer. Okay. Those people deserve to go to the electric chair.

> Okay. But there's several things below it. Okay. You may be way down here, brother. I don't know, you may be up here. I don't know unless you tell me. I need to – you got to tell me. Okay. There is a reason why everything happens. Was it a moment of rage? What is it? I mean there is a reason.
>
> *　*　*
>
> Are you the guy that wrote notes and planned for this to happen?

R4:611-612. Martin said he was nowhere in the picture.[4] R4:612.

Wolcott told Martin it was his last chance to cooperate:

> Like you said you are not at the top of the tree, you are at the bottom of the tree, okay. That's what people are going to view. You are not the monster. But you have got to help yourself now, because we are going to leave and it ain't like I can talk to you again tomorrow. And this is it. It's getting late. Now it's almost 3:30.
>
> *　*　*
>
> And it's going to be dark soon. And we still want to call this mother back. She's not dumb. She doesn't just miss work. Mom knows. She told us she knows. She just wants her back so she can do the right thing by her which makes you the better person because you allowed us to do that. You're not going to be viewed as the monster, but once I leave you're a monster and that's what everybody is going to look at and I'm not going to be able to say, yes, he helped me. I'm going to say, no, he didn't and you're going to be sitting there and you're going to hear me say it and I'm not going to lie and those other people are going to listen to it and you're going to be a monster, but I don't think that's really what happened. I mean I think she got hurt. I can understand. You didn't intend to do that. All you wanted was the car. You wanted a car to get to your fiancee and unfortunately in the process of getting that car it went bad, something at that point you couldn't control which doesn't put you at the top of the tree. Puts you at the bottom like he was explaining to you. So you need to make a decision. Are you going to be

[4] The detectives had drawn a diagram of a tree apparently showing premeditated murder at the top and unintentional, excusable, and justifiable homicide at the bottom.

> the monster or you going to tell me how I can take her home?

R4:615.

Wolcott told Martin "people screw up," that he himself took a Snickers bar from the grocery store when he was 6 years old. He said he was sorry, "[i]t was that simple." Martin said he had stolen a dog collar and leash when he was 7 or 8. Wolcott said he and Martin weren't that different and that mistakes happen, that Martin needed to tell Jacey's mama he was sorry:

> It is uncontrollable for her. I would bet if she didn't have her family surrounding her, she would want to drive herself off the bridge or do something crazy because her whole life, her whole life right now is in turmoil. Does she deserve that?

R4:616-617.

Wolcott told Martin:

> You deserve better than this. Your future with Erin deserves better than this. Okay.
>
> * * *
>
> Remember what we told you in the beginning? You weren't after Jacey. You were after the car.
>
> * * *
>
> And that's what I tried to explain to you earlier. Accident's happen. You weren't after Jacey, you were after the vehicle.
>
> * * *
>
> Accidents happen. People understand accidents. They don't understand monsters.

R4:618-619.

> You know when they get down to the court room . . . and you get the family members, they come up there on the

witness stand and cry and plead and at the same time say, Your Honor, please. The individual, what they did was wrong, but they had a heart and I forgive them. Okay. Especially religious folks. Okay. This is forgiveness, man. I don't know if you follow the Bible and I'm not going to sit here and give you a Bible lesson, okay, but one of the main things it preaches is forgiveness. No matter what the person did that was so bad. Okay. There is forgiveness.

* * *

Whether or not you want to trust me, that's fine. Okay. I am not the one that makes the decision about what happens with the rest of your life. The guy in the robe up there is the one that is going to make a decision about what happens to the rest of your life. Okay. The attorney isn't going to be the one. It's going to be these people right here. The people like David and me who had stole. They got the candy. They got the dog chain. Okay. They are just folks. They have hearts. They make mistakes. Okay. Forgiveness. Repenting. But what they are not going to accept is being lied to.

R4:619.

You've got everyday people that are going to decide what happens from here on out and my partner and I are to have to get up there and tell them. Okay. What are we going to have to tell them? We are going to have to say, you know what, David you did the right thing. You did the right thing, folks. It's a shame it happened. It was a mistake. But he did the right thing. And her mom is going to get up there and have an opportunity to speak to them and I know by spending our time with her, her crying on our shoulders in her living room. Her having sleepless nights and not eating. I know her being a woman of religion, she's going to have forgiveness. Because whether or not God is number one in your book, it is for people like that. Forgiveness is big. Forgiveness shows heart, caring, understanding, okay. Do you want these folks back here to hear out of us that David is cold-blooded and he meant this to happen? That this is how he wanted it to be. That he said, You know what, I know her mom is upset, but screw her. Give me what I get. You are definitely going to be in a bad position. There's no doubt about it.

R4:620. Detective West then said:

> avid, you know what I would rather say? I would rather say here is a guy that had a problem that was trying to take care of the problem by going to rehab. He has some issues. He has some problems that he needs to take care of. He wanted to be next to his fiancee, he wanted to get a better, a start in life. He wanted a car. He made a mistake, he tried to get the car and things went wrong. He's not a bad guy but he definitely needs some help. . . Don't you think you need some help?

R4:620. Martin responded, "I know I need some help." West continued:

> Okay that's what they are going to see. They are going to see that you are reaching out for help. . . . You need some help and that's going to be their forgiveness because people do care. That's why he's telling you that there is a light at the end of the tunnel. This is not the end for you.
>
> * * *
>
> And all I am asking is to tell me the truth so that we can put you down here where you belong and get you some help. I don't want to make you out to be a monster. I don't believe you are one.
>
> * * *
>
> We haven't lied to you
>
> * * *
>
> . . . I know you are scared. I can see it. But we're not lying to you. My biggest fear is that the time is ticking for me to leave and I won't have another opportunity to talk to you. And when you walk back you're going to think, Oh, man, I should have told him this. And my agency is not going to allow me to come back because there's so much more they are going to want me to do.
>
> Tell me where she's at so I can go get her. Get that weight off of you. Let me get you some help. But, if you don't, I can't get you help. I can't tell them you are sorry. I can't tell them you were remorseful for what you did. I can't tell them that you have had some problems in the past and that you need help.

R4:621. The following colloquy then ensued:

> West: Again, I know you are scared. <u>But it's not that bad</u>.
> Martin: <u>Not that bad?</u>
> West: <u>It's not that bad. Listen to me. Listen to what I am saying to you. You could be looking at Death Row, son. That's not what this is about</u>. This is about a car that you wanted so you could come see your fiancee.

R4:621-622.

The following colloquy then took place:

> Wolcott: <u>Tell us the truth and we will even stay here with you and get you some help</u>.
> Martin: <u>What do you mean by that? Stay here to get me help. What do you mean by that</u>?
> Wolcott: <u>Make sure this system gets you help here</u>. You are not going to stay here anyway. You know you got to come back by my county.
> Wolcott: <u>Where he's got all of the connections</u>.
> West: <u>Yeah. Where I have all the connections. . . Clay County has got more forgivers than this place</u>."

R4:622. Wolcott continued:

> You got a decent opportunity here. <u>You got a girl that loves and cares for you who can't wait to be with you again</u>. Okay. Of course you've got a little more. We can't do nothing really, per se, here until you get up there. And it's going to be a little bit of time. We won't be dishonest to you, okay. We are not going to say y'all have fun. See you in the sunset. Okay. We understand there are things you got to man-up to and take care of, okay?
>
> We're not going to sit here and tell you that's going to disappear. Okay. We are not going to lie to you and we haven't since we have been in here. . . . <u>It's not the world against you. It's mistakes and these six people</u>. Okay, that's it.

R4:623. Another colloquy ensued about Martin's future:

> Wolcott: Then <u>do you not think that for the girl that was sitting over there talking with other guys, that</u>

wants to hold your hand go to the movies again one day and have a life with you, and have kids with you, and have a decent relationship with you as opposed to behind the piece of glass talking on phones?

Martin: That's all she's going to have.

Wolcott: No. She's not. That's what you are not getting. That's what you are not understanding. She is going to have that if we keep up with the lies. If we've got to portray you as this person that has told everyone to fuck off. . .

Wolcott: Take care of your business. Look at a future. Do you honestly think that there is a future if we leave out of here without your help?

R4:624.

Martin again said he dropped her off at Horsetail. R4:626-629. The following colloquy then ensued:

Wolcott: What is your fear right now?

Martin: I ain't going to get what I need.

Wolcott: Which is what?

Martin: I want fucking help.

Wolcott: Why do you think someone is going to give you help, man? Look at me. Why do you think someone is going to give help if they walk in and say: He wouldn't help me at all. Do you think they are going to extend a hand to you? No. They aren't going to give you any help. The only way they are going to give you help I would walk in and say, hey, he told me the truth. This mother doesn't suffer any more. He's sorry for what he did. Give the boy some help.

Martin: Well I have been in jail quite a bit. People don't get help. You get out of fucking jail and you go, oh, no.

Wolcott: Well, then what do you need help with?

Martin: My mind.

Wolcott: Okay. So you need to see a psychiatrist?

Martin: I need to see a fucking shrink or something.

R4:631-632. Martin told the detectives that people who asked for mental health assistance were locked up in confinement and left there. The following dialogue followed:

Wolcott: I can guarantee you none of those people there had two high-ranking detectives such as ourselves walk in there and go to bat for them either like this man already told you he would. It's his county. I guarantee you that. I know that. The people that I have gone and requested assistance in the past coming out of my mouth says a lot. . . . when we step into the play and go look, we spent all this time with this kid, okay. This is what he is needing. Let's not do this. . . .

* * *

West: And what did you tell me in the beginning when you told her to get out of the car and all this went down, that you were, you touched your head and what did you say?

Martin: I said I was out of my mind.

* * *

West: Step number one, you recognize that. You recognize that on this night that you weren't thinking straight. You understand that this is a problem for David. And I give you my word, that I will personally go to the State Attorney's Office and that is what I will convey to them. I can't make a deal. I am not allowed to do that. . .

Martin: But you have a lot of influence.

West: I give you my word. You are right. I do have a lot of influence and so does he.

Wolcott: And that's why we are not lying.

West: And so do my partners.

Wolcott: We're not lying about, we are not promising you anything. You see what I am saying? Saying we're going to do this or that, because that would be lying to you. But what the man is saying, his word carries a lot of weight. He's worked a long time in that county. He is highly respected okay. Everyone from the top man on down, okay. Knows that Detective Ken West, what he says goes. He is true to his heart. And a family man, he understands okay. It says a lot man. That says a lot when you got a guy like that who is going to step up there for someone that we only met a couple hours ago to go, you know, what? We need to do this for him.

Wolcott: But you know what the biggest battle for me is?

Martin: No.

Wolcott: My partners. A lot of times I tell people, hey, it's not that bad and they go uh-huh. But in the end, they always believe me. But right now, I can't go

> back and say that. I need that little bit of help from you, David. I need that last bit of help so that I can help you. . . . .

R4:633-636, SR1:134.

At that point, Martin asked the detectives if they could arrange a phone call to Erin. The detectives said no, not a phone call, but they could arrange a visit but "we got this issue right now that we have to cover first," where could they go get Jacey. Martin then said they could find her off Johns Cemetery Road, lying on the ground in some bushes. R4:636-638.

Detective West left the room. R4:638.

Crying, Martin told Wolcott that she was dead, that he "freaked out" and could hardly remember what happened. Asked if he wanted the car and she didn't want to give it to him, Martin said, yes. He felt bad "because the woman that I loved with all my heart was hurt so bad. And I had to be here. I just had to be here." R4:638. He used a hammer that was in the car. The hammer was in the river now, along with her phone. He hit her in the back of the head. He didn't know how many times: "I couldn't even look." They were outside walking around. They had gone to all the places he told the detectives about. He was sorry. He didn't know why he did it. He didn't want to do it. "It was like I was sitting here. Like okay, I got to do, I got to go, I got to do this. I have to do this. Something is telling me that I have to do this." And, "I am like no, no, no, no, no. And then I just swung the hammer and it hit her

and she fell to the ground and that's when it hit me. It's like oh my god. What did I do?" R4:640.

Martin told Wolcott, "I do seriously need some serious mental help. I really do." Wolcott said, "[w]e are upstanding guys, okay. We don't lie, we stick to our word," and Martin responded, "Yea, I know that." Martin asked to see Erin, and Wolcott said he'd see to it. R4:640-641.

Wolcott left the room, leaving Martin alone, crying.

West returned, asked Martin for directions to where Jacey was, and left again. R4:643-646. West returned, saying they'd found her. West then asked Martin what happened. Martin said he was taking her to lots of places that night, and when he was out there, he got a call from Erin, who was freaking out. She was "real scared" because he wasn't home, was out with some girl. "And her hurt just overwhelmed me, I guess," and he just "blacked out" when he killed her. R4:647. They had walked all around the trails. She lit a cigarette, and he told her he was going to get a cigarette. He got the hammer out of the car, and when he came back, she was standing there, and he hit her on the back of the head. She fell down, unconscious. He remembered swinging the hammer and seeing her fall, "and then I just went out and the next thing, I mean it's like a blur." The next thing he remembered was dragging her to the bushes. They had walked up onto the mound and "she stopped and lit a cigarette and I thought well I will go get a cigarette too. And I

went and got a hammer." R4:649. He had no idea how many times he hit her after the first time. It was a blur. When he dragged her to the bushes, he heard noises and thought she wasn't dead yet. He ran. He said, "oh my god." R4:648-650.

Asked if he used the hammer that was in the car under the front seat, he said, no, that might be her hammer. He threw the hammer he used in the river, along with her phone, on the way back to Jacksonville that Thursday. R4:651-652.

Martin asked West if his life was over, and West said, "No it's not. I am a man of my word." Martin's then asked, "I will probably be 50 years old when I come back home, huh?" R4:653.

After the videotaped confession was played, Detective West testified he was aware that Martin had been on the road for three or four days. West talked to Erin the day Martin arrived in St. Pete, eight days before the interrogation. West knew this might be a murder case. SR1:144-145. When they told Martin to tell the truth and they would stay with him and get him some help, they meant they would tell the State Attorney's Office that he needed some help. West conveyed this to the State but he couldn't recall who he talked to. SR1:163-164.

Referring to Martin's statement, "I have nothing really to talk about," West agreed that Wolcott was saying, "well you may be saying that but your body language is telling me something different." Asked what about Martin's body language suggested he wanted to talk

to them, West said, "he was open in talking, he never requested to stop talking." Asked what body language suggested he didn't mean it, West responded, "He was very open. He wasn't in a closed position." It was another hour and a half before Martin told them where the body was. SR1:169-170.

In denying the motion to suppress, the trial judge stated:

> I find that the officer gave the Defendant all his Constitutional Rights. He indicated he understood them. They voluntarily talked throughout the entire transcript I have here before me. At no time did he invoke his right to remain silent which he had a right to do that after given his Constitutional Rights. The motion to suppress is denied.

SR1:176.

B. Trial

On March 11, 2008, Jacey McWilliams, 23, was living with her mother in Jacksonville and working at Regency Dodge. A co-worker, Rochelle Dotson, testified that Jacey left work at 4:30 p.m. and said David Martin was taking her to a special place that evening. R9:399, R10:418-424.

Christine McWilliams, Jacey's mother, phoned Jacey around 9:30 p.m. because it was starting to rain. Mrs. McWilliams knew Jacey had been spending time with a man named David, whom Jacey had said was a friend. Ms. McWilliams said Jacey told her not to worry, that David was a careful driver, and they were in Middleburg and heading home. R10:406-409.

Erin Urban, 22, testified that Martin arrived at her house in St. Pete early the next morning. She and Martin had been dating since March 2007 and had lived together in Jacksonville before Erin moved to St. Pete in November 2007. R10:460-465, 500. Martin had described Jacey as a good friend who let him use her car and helped him out when he needed money or food. He said the relationship with Jacey was not romantic, but Erin was suspicious. R10:466-467. Erin had tried to contact him the previous evening because she thought he might be involved in another relationship. Late that night, Martin had texted her, asking if she was working the next day. She told him, yes, but he wouldn't tell her why he asked, just that she'd know soon, it was a surprise. R4:457-471. He arrived at her mother's house the next morning around 3 or 4 a.m. He said he had borrowed the car from Jacey for $50, that Jacey knew how much Erin missed him and had no problem loaning him the car. When he arrived, he was very happy, giddy, smiling, glad to be there. R10:472-474. They went to St. Pete Beach for the day, and then to a highway rest stop so Martin could sleep. He then dropped her off at her job at Publix. Martin drove back to Jacksonville on March 13 after getting into an argument on the phone with his roommate. R10:475-477, 496. He returned the next day with all of his belongings in the car, including a black tool box. Erin had not seen the tool box when he came the first time. She and Martin spent time together over the

next few days until March 17, when he was arrested for shoplifting. R10:478-485, 503.

Erin further testified that she took a Greyhound bus to visit Martin about a week before this occurred. While she was there, Martin borrowed a car from a friend or neighbor so they could visit a friend. R10:500. Erin also testified that she and Martin were on the phone two or three days before he showed up at her house, just joking around with each other, and "he said, well, you know, I can just steal a car and I said, okay, well, how are you going to do that, and he said, well, that's easy. I'll just kill them." She didn't think anything of it because she thought they were just joking. She joked back about a good place to hide a body, a cemetery, and thought he responded that he knew a better one but she couldn't remember what he said. R10:489-491.

Erin's half-brother, Michael Christian, a St. Pete police officer, testified that his mother called him on March 12, concerned because Martin had showed up driving a car when he didn't have a car. Christian ran the tag on the car, which came back registered to Jacey McWilliams. There were no problems with the registration and no criminal activity reported. R10:426-430.

Officer Kerry Burns arrested Martin on March 17 for shoplifting at the Wal-Mart in Pinellas Park. At Martin's request, Burns placed Martin's car keys in a car parked in the parking lot and called his

girlfriend, Erin, to tell her where the car was and that Martin had been arrested. R10:520-526.

Meanwhile, in Jacksonville, Jacey's mother reported her missing on March 14, after learning that Jacey had not been to work in two days. R10:410. Jacksonville police ran her car tag, saw that Officer Christian had run it a few days earlier, and obtained Martin's name from Christian. R10:436.

The police also learned from Jacey's cell phone records that Jacey's phone had never returned to Duval County from Clay County on March 11. They learned from Martin's cell phone records and cell tower information that his phone was communicating with a tower near his residence in Jacksonville from 3:13 to 8:28 p.m. that day; with a tower in the area of Old Jennings State Forest, from 8:28 to 10:51; with a tower in Middleburg, from 11:02 to 11:10; and with the Middleburg tower and a tower in Lawtey from 11:17 to 11:50. After 11:50, Martin's cell phone tower communications continued southerly, ending in the St. Pete area. R10:444-450.

Police learned there were two attempts to use Jacey's ATM card on March 12, at 1:22 and 1:23 a.m., at a Circle K in Ocala, and obtained the surveillance tapes showing the person who used the ATM at that time. R10:544-546.

Detective West testified he and Detective Wolcott interviewed Martin on March 20. They knew Jacey's car had been located in Pinellas County and linked to Martin. The goal of the interview was

to find out what happened to Jacey and locate her. R11:573-577. The detectives did not tell Martin they were recording the interrogation. Martin signed a form saying he understood his rights but did not sign anything saying that he wished to waive his rights. West was schooled in interrogation techniques, which included downplaying how critical the situation was in terms of what the person was facing. West told Martin he was not facing the death penalty or life in prison. R11:760-763. After 3 to 4 hours of interrogation, Martin admitted killing Jacey and told them where to find her. As far as West knew, Martin had been sleeping in the car before he was incarcerated. R11:762-763.

The videotaped confession was played for the jury. R11:580-758.

Jacey's body was found off of Johns Cemetery Road in Middleburg, in some overgrown Palmetto bushes. Her shirt and sweatshirt were pulled up over the head, sleeves partially down, and pants pockets turned inside out, as if the body had been dragged to that location. A cigarette butt was found 106 feet from the body and a blood stain 95 feet from the body. Between the blood stain and body were a pair of glasses, a right sandal, loose change, a left sandal, and a white blanket, which was 2 feet from the body. R13:803-813.

DNA from the blood stain and blanket matched Jacey. No DNA was obtained from the cigarette butt. R13:900.

Associate medical examiner Aurelian Nicolaescu performed the autopsy. Dr. Nicolaescu testified that Jacey died from blunt force trauma. She had a laceration on the back of the head and numerous other injuries. She may have been unconscious after the first blow and probably died very quickly. Because the skull was too fragmented to determine the number of blows, he referred the case to a forensic anthropologist, Dr. Walsh-Haney. Dr. Nicolaescu said a body can make gurgling sounds while being moved after death, if blood in the upper airways goes into the mouth. R13:819-831.

Dr. Walsh-Haney testified that she took x-rays, read the x-rays for evidence of trauma, then cleaned and reconstructed the bones. Most of the right side of the cranium was missing. After reconstructing the skull out of thirty-three fragments, she concluded there were seven to nine impact sites. Two of the sites may have been the result of a combination of blows rather than actual blows. The blows were delivered with “great force,” and the likely implement, which had a curvilinear edge, was a hammer. She couldn’t say what caused the laceration to the skin in the back of the head. R13:856-883.

Martin testified on his own behalf. He said he did not kill Jacey but was there when she was killed. R13:901. He had lied to the police because he had been threatened by the person who killed her. R13:957. He may have talked to Jacey on the phone that day but mostly it was text messaging. He texted her saying that he

wanted to take her out. He had gotten paid for a job in the neighborhood and wanted to repay her for taking him out earlier in the week. She picked him up in the neighborhood, they got gas, went to McDonald's, and then went to the boat dock on Black Creek. They stayed there a while and then went to Jennings State Forest. They walked on the trails and were leaving when Jacey's mother called her. R13:912-920.

They then went to Mike Gregg's residence on Malloy Court, near the end of Johns Cemetery Road. Martin had met Gregg several weeks before when a friend took him there to buy weed. Martin later learned that Gregg housed sex offenders in RV's behind his trailer. Martin began going to Gregg's every day or so to buy weed. Gregg approached him sexually one day, and another time offered him weed for sex. Martin declined both offers but didn't think much of it because his roommate was gay and he didn't have a problem with Gregg's sexuality. Then, one day, Gregg went to get the pot and came back with a gun, put the barrel of the gun in Martin's mouth, and forced him to perform oral sex. Gregg then had sex with Martin and took pictures. He told Martin to come back the next day, and when Martin said he wasn't coming back, Gregg said he would show the pictures to Martin's mother and to Erin. Martin continued to go out there and do what Gregg wanted him to do. Gregg would call him several days in advance and tell him when to come. R13:921-930.

Gregg had called a few days before March 11, and Martin had been unable to borrow a car. That evening, he planned to take Jacey out, spend time with her, and then have her drop him off at Gregg's, or wait at McDonald's or the boat dock while he went to Gregg's. After they left Jennings State Forest, he told her he had something to do and she could drop him or wait. When they got there, Gregg was upset because he was late. Jacey said it was her fault and told him where they'd been. Gregg said he knew another place they'd enjoy, and she suggested they go there. They followed Gregg to the end of Johns Cemetery Road, an area Martin had been to many times. They walked down to the lake, and smoked and talked for 10 to 15 minutes. When they got back to the cars, Gregg asked Jacey if Martin was her new boyfriend. Martin and Jacey both told him, no, he had a girlfriend. Gregg told Jacey that Martin was lying to him because Martin was gay and they did things all the time and took pictures. She seemed to take it as a joke. Gregg went to his car and came back with a camera, gave it to Jacey, told her to take pictures, and started unbuckling Martin's belt. When she told him he was taking it too far, he got out his gun, told her to do what he said, and resumed unbuckling Martin's pants. She dropped the camera and ran to the car, and when Gregg started to move, Martin jumped on him and tried to grab the gun. Martin was wrestling with Gregg when he saw Jacey coming back. At that point, Gregg hit Martin in the head with the gun, knocking him down. Jacey was swinging, but Gregg

caught her arm and grabbed the hammer out of her hand, swung, and she dropped. Gregg stood for a couple of seconds, then started swinging. Martin got the gun off the ground and shot at Gregg but nothing happened. When Gregg stopped swinging, he looked confused and said it wasn't supposed to happen. R13:931-948.

Gregg told Martin he knew Martin's mom worked at Value Pawn, drove a blue car, and lived off Woodside, and that his girlfriend lived in St. Pete. He told Martin to keep his mouth shut if he didn't want anything to happen to him, his mother, or his girlfriend. R13:948—949. He told Martin to help him drag the body away, and then left, saying, finish this. Martin then dragged the body over to some bushes. He was very upset and could feel her staring at him. He felt guilty because he brought her there, so he went to the car, got a blanket, and put it over her face. Gregg told him to get the hammer, so he put it in the car and ran to St. Pete. He had not planned to go there that night. R13:948-953. He acted happy when he got there because he didn't want Erin to know what happened. R13:956. He still felt his, his mother's, and Erin's lives were in danger while he was being interrogated. R13:957. He admitted trying to get money with Jacey's ATM card after she was killed. R13:958. He had never been interrogated before, and when they talked about the case disappearing, he took that to mean that if he told them what they wanted, it would disappear. He thought it would be okay and he would get help once

he got back to Clay County where they had all the connections. He never saw Erin after he told them where the body was. R13:961-963.

Asked about the conversation Erin had testified about, Martin said that was an ongoing thing between them, and he didn't think the words, "I'll just kill them," were said. She would say she loved him and missed him, and he would say he couldn't steal a car because he'd get in trouble, and she'd say, you can just go bury them in the cemetery. It was a joke, an ongoing joke. R13:909.

When he told the detectives it felt good to get it off his chest, he meant it because he felt guilty because he had brought her there. R13:973-974.

Penalty Phase

A joint stipulation was read to the jury, stating that Martin was convicted of burglary to a structure or conveyance on August 14, 2007, and was on felony probation between March 11 and March 17, 2008. R15:1162.

Eight witnesses testified for the defense.

Tracy Ray, Martin's mother, testified she was involved with David's father, who was physically abusive, from age 14 to 24. She left him when David was six months old, after he knocked her down while she was holding David. R15:1171.

Tracy said David did not have a good relationship with his stepmother and felt there was a lot of physical, mental, and later,

sexual abuse. She took him to a psychiatrist at age 4 because he would grab her leg and beg her not to leave him with his step-mother when his father wasn't there. He was "red-alert" asthmatic but his stepmother would put his medications where he couldn't reach them, and he couldn't wake her to get them. R15:1164-1165. She took him to a psychiatrist again at age 6 because she thought he was being sexually abused. After signing the admission papers at Charter by the Sea, she was told they would call child protection if she tried to remove him. He was released on Prozac six weeks later--when his lifetime maximum mental health insurance ran out. Charter closed soon after because the children were being mistreated. Staying at Charter had a very negative effect on David, and did abnormal things after that, like stockpiling batteries, hundreds of batteries in his lego boxes, batteries from watches, clocks, every type of battery imaginable. R15:1165-1166.

At age 3, David was in intensive care for three weeks due to asthma and almost died. Until age 8, he was on a breathing machine every 4 hours and spent two weeks a month in the hospital. He couldn't go outside if the pollen was bad and had to watch the other kids play through the window. R15:1167.

Tracy raised her kids alone for five years and drank heavily while they were growing up. She still had a drinking problem when she met her current husband ten years ago, but he wouldn't marry her

unless she quit, so she quit, and they got married 6 years ago. R15:1167-1168.

When David turned 13, his father got upset over child support and quit seeing him. This had a major impact on David, and he went from an A student to a D/F student. David's father hadn't had much contact with him since then. R15:1164.

David started smoking pot as a teenager and used other drugs when he was older. R15:1169.

David was on probation when the murder occurred for stealing an air conditioner out of Tracy's camper, which he pawned for $5. Tracy called the police because she thought that if he went to prison, he'd learn not to do drugs and steal, and if he went while he was young, he'd never want to go back. Also, she knew he couldn't make it on probation because he had no place to live, no vehicle, and no job. R15:1169-1170.

Tracy said she and her family were still very close to David. David was extremely close to his brother, Matthew, who was eight years younger. David was more like a dad to Matthew because he had looked after him a lot, and Matthew still looked up to David. Matthew couldn't visit David in jail because of his age, but he wrote David every week, and David had called Matthew every other week for a year and 9 months. David was also close to his paternal grandparents. R15:1172-1173. As far as Tracy knew, David was doing odd jobs in March 2008. His last regular job was working with her

husband in 2007. She probably would not have loaned him her car because he didn't have a license. She never discussed the sexual abuse with him. R15:1175-1177.

M.J. Martin, David's paternal grandfather, had moved to Florida 15 years earlier after retiring from a trucking company in Ohio. When his wife was dying 5 years ago, David started riding his bicycle from 25 miles away to be at her side. When he was part of the way there, his father picked him up. David lived with his grandparents for a few years when he was 2-3 years old, while his mother was in Kansas. Mr. Martin's wife and David were very close. When David's mother returned, she also lived with them. Mr. Martin didn't think Tracy gave David enough supervision. Tracy and Mr. Martin's wife both drank Vodka and orange juice. After they moved out, David stayed with them every weekend, and Mr. Martin had maintained a relationship with him until the crime. Mr. Martin had never heard of David being violent to anyone. R15:1178-1182.

Kathleen Walsh, 23, David's ex-fiancee, had known David since she was 16, and had lived with him for a time. When she was raped, he was there for her. He told her it would get better and that she didn't have to pretend. She never saw him violent toward anyone. The romantic relationship ended when he stole from her father, but they remained friends. David was really depressed at the time, because of things in the past. He had memories of things that happened when he was little, the molestation and things with his

stepmother. Kathleen didn't ask about details but had met his stepmother and concluded that she was "not very nice." Kathleen has been writing David since he's been in jail. R15:1184-88.

Shantell Kanita, a stay-at-home mom, has known David for 10-12 years. She said he was a good guy and good friend, a shoulder to lean on. She never saw him violent to anyone and said the crime was completely out of character. R15:1191.

Gene Gottlieb, Access Manager at Clay Behavioral Health Center, was David's conditional release counselor when David was 13-14 years old. Mr. Gottlieb had worked with adolescents for 22 years. He has a BA in pastoral ministries, with a minor in counseling and is a licensed pastoral counselor. R15:1192-93. The conditional release program was a three-month program to help kids re-acclimate to society when they got out of juvenile. He saw David 4 times a week for 30-45 minutes per visit during the first month, 3 times a week the second month, and once a week the third month. Mr. Gottlieb also talked with family members and teachers. There was no father in the home, his mom was not home much, and David was responsible for taking care of his brother. Gottlieb was very concerned about the lack of supervision because David was a follower. But, David did well, completed everything, met his curfew, attended school, and passed random drug tests. R15:1193-1201.

David made an impact on Mr. Gottlieb, and he felt David had a lot of potential and could succeed if given proper guidance, adult

role models, and proper activities. David respected authority in the program and the authority of the school resource officers. Mr. Gottlieb was very surprised to learn about the murder because this was out of character for David. R15:1195-1196.

Terry Kate, a retired benefits advisor, had known David for 8 years. They were friends, then became involved romantically. Kate broke it off in the summer of 2006 because of the age gap (Kate was David' mother's age). Kate said David was "wonderful, very sweet and kind, very loving, never a harsh word, always respectful to women." He loved animals and took in strays. She didn't help him financially or with laundry but had him to dinner. She was "floored" when she heard about the crime and had visited him in jail. R15:1204-07.

Heather Ray, David's step-sister, had known David since she was 12 or 13. They became step-siblings when Heather's father married David's mother. Heather testified that David was "the epitome of a big brother," very sweet, very kind to her, and protective of her. She could go to him for anything. Heather was shocked when she heard about the crime. She knew he had stolen from people but couldn't imagine him doing anything like this. She knew he had a pot problem but was unaware of any other drug use. Heather said David's relationship with his mother was very up and down, that his mother drank a lot, and when she drank, was combative with David, and David would try very hard to maintain the peace. Heather never

lived with David but she visited him every other weekend. Tracey was a good person when sober, but Heather suffered verbal abuse from her when she was drinking. David did not have a relationship with his father during the time Heather knew him. Heather did not think David's parents were good to him. R15:1211-13.

Matthew Whittington, 15, David's brother, is an Honor Roll student in high school. He said he lives with his dad and step-mother because of his mother's drinking. His mother was really combative towards him and David and verbally abusive. He and David were very, very close. David was a brother, best friend, and "sort of like a father." Matthew hung out with David and his friends, followed him around, and did drawing contests with him. Now, he writes to David and talks to him on the phone. David told Matthew to learn from his (David's) mistakes, to not do drugs or steal, and to make good grades. Matthew said David always has been a positive influence, is a "good-hearted person," and has had a huge impact on his life. R15:1214-20.

Spencer Hearing and Sentencing

The state presented victim impact testimony by Jacey's mother, brother, and sister-in-law. SR2:186-195. The defense presented the testimony of Tracy Ray, Martin's mother, who read a statement written by Martin's brother, Matthew. SR2:196-201.

The defense also introduced Dr. Krop's telephone deposition testimony, taken on December 1, 2009, was admitted into evidence.[5] The deposition consists exclusively of responses to questions posed by the prosecutor.

Dr. Krop met with David Martin on five occasions: May 14, May 28, June 18, and September 9, of 2008, and November 29, 2009.

The first meeting, on May 14, 2008, was in Krop's office. Dr. Krop interviewed David and administered a battery of personality tests,[6] but did not discuss the specifics of the case. The interviews took three hours and the testing two-and-a-half hours. During the interview, David told Krop that he had been sexually abused by an older male adolescent but had never told his mother, step-mother, or father about the abuse because he was afraid they wouldn't believe him and he didn't want to get in trouble. R5:742.

The testing indicated David had a moderate to high-level of depression, with suicidal ideation. On the MMPI-2, seven of ten clinical scales were elevated. The most elevated was the psychopathic deviance scale, due to antisocial behavior since David was a juvenile, including run-ins with the law, authority, and his parents. Dr. Krop diagnosed David as having antisocial personality disorder but noted that his antisocial behavior generally involved

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[5] Defense counsel had previously informed the trial court that Martin did not want Krop to testify during the penalty phase. 1221.

[6] He was given the Beck Anxiety Inventory, the Beck Depression Inventory, the MMPI-2, the Mooney Problem Checklist, a drug survey, the Michigan Alcohol Screening test, and the Wechsler Abbreviated Scale of Intelligence.

property and manipulative crimes rather than violent crimes. R5:748-753.

David endorsed the following as serious problems throughout his life:

> lacking self-confidence, drinking by a member of the family, not finding a suitable life partner, not doing anything well, having feelings of extreme loneliness, feeling rejected by my family, not being understood by my family, wanting love and affection, trying to forget an unpleasant experience, people finding fault with me, my mind constantly worrying, having a bad temper, feelings too easily hurt, having a guilty conscience, bothered by thoughts running through my head, sometimes afraid of going insane, bothered by thoughts of suicide, being underdeveloped sexually.

R5:754. He also said he was "in constant fear of losing myself or losing control," and was constantly tired but couldn't sleep due to nightmares and "other thoughts in my mind." R5:754-55.

Dr. Krop also diagnosed David with substance abuse. He primarily used marijuana but also used other drugs and alcohol. He had experienced blackouts after drinking, gotten into fights, and attended AA. R5:756.

At the second meeting on May 28, 2008, at the jail, they discussed the case. R5:757. David said he was arrested in Pinellas County for stealing a bottle of cologne and a watch. Dr. Krop noted that he had a gift card for $100 at the time but that stealing seemed to have been a compulsion for him throughout his life. R5:758.

David said he was living with someone he met through a drug transaction. He and Jacey went to Black Creek in Middleburg, a peaceful wooded area. He had known Jacey for about two weeks. It was not romantic. They had common interests and she had done him favors, like buy him lunch, and he wanted to repay her. At that time, his girlfriend of a year, Erin, was calling him a lot. She lived in St. Petersburg and had visited him for a week recently. She was worried about him and possibly jealous. Erin called him at 10:30 (Dr. Krop did not write down whether it was morning or evening)[7] and asked him what he was doing, whether he was still with that girl, and whether he was sure nothing was going on. David appeared sad as he told Dr. Krop this. He said he could feel Erin's pain and felt like he needed to get there to make her feel better. He kept thinking about how he needed to get there and "just snapped." He remembered walking at a fast pace to the car and a battle going on in his head: "No, you don't have to do this. Yes, I do, and so forth." There was a toolbox in the car, and he grabbed a hammer, went back to Jacey and, while turning his head away, struck her. It felt like a dream. "It was like watching myself go to the car. Watching myself return. It was like watching a movie from a third person's point of view." The next thing he recalled was driving down the road. There was no blood on him but he could

[7] Martin's phone records show that he received seven communications from Erin's cell phone between 8:27 and 9:15 that evening, and four more communications from her cell phone between 11:04 and 11:53 p.m.

pretty much figure out what he did. He didn't consider going back because he was scared out of his mind, and if he did it, he didn't want to see what he did. R5:759-761.

He drove to St. Petersburg, arriving at his girlfriend's house about 5 a.m. After he was arrested, he was questioned about Jacey. He eventually told them where she was but didn't recall specifically what he said. He said he was drugged up at the time, that he had taken 8 or 9 Zyprexa two nights before he was questioned (the drugs were snuck into the jail by other inmates), and that he recalled waking up a few days after the questioning. R5:761-762.

The experience of feeling like he was watching a movie had happened to him before, when he couldn't remember what he had done or what he was thinking or feeling. He described an episode in jail when another inmate "tried to push my buttons" and "knocked me in the side of my head." Another inmate later told him he fought the guy and had a crazy look in his eye but he didn't remember it. R5:762-763.

He had thoughts of suicide and said he was remorseful. He was in a constant battle with himself as to why he did it. He couldn't sleep despite being tired. He kept asking himself how he did it, why he did it: "It consumes my brain. I'm nervous all the time." R5:763.

After that session, Dr. Krop concluded David needed to be seen by a neurologist. David could not recall ever having any seizures

or head trauma but he had a history of blackout spells dating back to his childhood. These were generally stress-induced and occurred in response to events that were difficult to face emotionally. In Krop's opinion, these were dissociative episodes. R5:765.

At the third meeting, on June 18, 2008, Dr. Krop did a neuro-psych evaluation. He found no deficits in functioning, including in executive functioning, which includes impulse control and problem solving, and no evidence of malingering. His full-scale IQ was 109, well above average. Dr. Krop sent a report to Martin's lawyer on June 27, 2008, and planned to refer Martin to a neurologist. In September 2008, he requested Martin's taped statement, jail and juvenile records, and asked to interview Erin, but he got no response. R5:766-69.

The fourth meeting was a year later, on September 9, 2009. That meeting was precipitated when Dr. Krop received police reports and Martin's statement, and was asked by his new attorney to visit him at the jail. R5:769. Dr. Krop met with David for an hour and a half. David said he was charged with first-degree murder and was facing the death penalty. He said he had not been to a neurologist. He said his earlier statements to Krop and the police weren't true, that someone else killed Jacey and that he had lied before because this person had threatened to go after his family if he told. He said he had gotten three DR's in jail, possession of weed and

possession of two razors, which he used to sharpen pencils and cut hair and magazine articles. R5:775-77.

The final meeting was on November 25, 2009, at the jail for an hour and a half (this meeting took place one week before Dr. Krop was deposed). David had been found guilty, and Dr. Krop was aware he had testified that someone else did it, the same story he had told Krop in the last interview. R5:778. Krop told David he could provide a more honest appraisal of his mental state if David told him what really happened. David agreed to do so and said his initial account to Krop was accurate. He had met Jacey at a trailer park and they had gone to a concert. The relationship was never sexual. She let him use her car, gave him rides, and took him out to eat. They had similar interests. The day of the incident, he wanted to give her a good time to repay her. He was not drinking but had smoked a lot of weed and taken half a Zyprexa, which was his roommate's prescription. He said his roommate was mentally ill. Stealing the car was not in his mind but that's what ended up happening. He said he snapped after his girlfriend called. He felt in his head that he had to be there. He had bits and pieces of it in his memory. He felt like he knew what was going on but couldn't do anything about it. It was like watching a movie. What he told the police was an accurate representation of what happened. He lied before out of self-preservation; he had panicked and couldn't admit what he had done. R5:779-81.

He said he was surprised his stepmother talked to the defense investigator because "she hates me." When told his stepmother and mother each attributed his problems to the other, he said it was always that way, he felt caught between them. When asked why his father had not spoken to the investigator, come to the trial, or visited him in jail, he said his father worked a lot. In Krop's opinion, David was still protecting his father though he clearly felt rejected by him. R5:781-83.

Dr. Krop did not plan to testify to either of the statutory mitigating factors involving mental illness. R5:785. Krop intended to testify that David came from a very dysfunctional family, including a mother with a history of alcohol abuse, conflicts with his stepmother, an absent father, and a history of being sexually abused by an adolescent neighbor. In Krop's opinion, the childhood sexual abuse probably affected his sexual identity and relationships with women in that he was involved in a sexual relationship with his male roommate and he chose women he perceived as inadequate. R5:785-86.

Krop also planned to testify about David's drug and alcohol abuse, including harder drugs when he was younger and chronic marijuana use to self-medicate feelings of depression and rejection. R5:786.

David also used dissociation as a means of coping with stressful situations. In Krop's opinion, what David referred to as

a blackout was a defense mechanism used by children in situations they can't get out of and which is common to sexual abuse victims. Krop believed this may have occurred at the time of the offense. R5:786-87.

In Krop's view, David could probably function in a general prison population and that the violent act was out of character. When reminded of the DR's David received at the Pinellas County jail, Krop said he'd hold his opinion "in abeyance." R5:788.

Dr. Krop spoke to David's mother, father, stepmother, and grandfather. David remembered being locked up in a closet by his stepmother and urinating on himself as a consequence. The stepmother said there weren't any locks on the closets and she had to wake David up in the middle of the night to go to the bathroom because his mother was ineffective in potty training him. R5:789. David's mother blamed his father's side of the family, including his stepmother, for David's problems. She admitted she was a severe alcoholic and would blackout and fall asleep, leaving David unsupervised. Other family members' said his mother's alcohol abuse had a significant impact on David. It was a very dysfunctional family with each side using David as a pawn against the other. R5:790-791.

Asked if he had evidence of the sexual abuse apart from David's report, Krop said he'd been unable to get records from the mental health professionals that saw him but David said he never told them

anyway. David's attorney had spoken to David's roommate, who confirmed that he and David had a sexual relationship. R5:792. Dr. Krop believed David was truthful about his history for several reasons. One, the history was not self-serving in that he acknowledged his antisocial behavior and substance abuse. Second, the testing indicated he was not being manipulative or malingering. Third, most of what he said was verified by other family members. Fourth, although the stepmother denied some things that David remembered, that's not unusual in an "extremely dysfunctional" family. R5:796.

SUMMARY OF ARGUMENT

1. Martin's statement was inadmissible because the detectives failed to honor his right to cut off questioning when he told them he had nothing to talk about. Martin's confession also was inadmissible because it was the product of coercion.

2. The trial court's finding of CCP cannot be sustained because the evidence was consistent with a reasonable hypothesis of an unplanned, spur-of-the-moment act.

3. The trial court erred in finding unproved the mitigating factors of emotional abuse, sexual abuse, and remorse, where each of these mitigators was established by competent, uncontroverted evidence.

4. The trial court's failure to consider Dr. Krop's deposition testimony in its evaluation of the aggravating and mitigating factors denied Martin a fair sentencing proceeding.

5. The death sentence is disproportionate for this situational, aberrant, isolated act of violence by a 21-year-old with no prior violent history and substantial mitigation. Equally culpable defendants have received life sentences.

6. Florida's capital sentencing proceedings are unconstitutional under the sixth amendment pursuant to Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

Issue 1

THE TRIAL COURT ERRED IN DENYING MARTIN'S MOTION TO SUPPRESS BECAUSE HIS CONFESSION WAS (A) OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO SILENCE, AND (B) PROCURED BY THREATS, PROMISES, LIES, AND IMPROPER INDUCEMENTS AND THEREFORE INVOLUNTARY.

Preservation

This issue was preserved by appellant's motion to suppress, R3:520-522, and the arguments made at the suppression hearing. SR1:18-24, 172-175.

Standard of Review

On a motion to suppress, the court reviews de novo the trial court's application of the law to the facts, while the trial court's

findings of historical fact must be sustained if supported by competent substantial evidence. Parker v. State, 873 So.2d 270 (Fla. 2004). Here, credibility and demeanor were not issues, as the facts surrounding the interrogation were preserved on videotape and completely uncontroverted. Accordingly, this Court reviews de novo the trial court's decision. Cuervo v. State, 967 So.2d 155 (Fla. 2007); Almeida v. State, 737 So.2d 520 (Fla. 1999); Ramirez v. State, 15 So.2d 852, 855 (Fla. 1st DCA 2009).

A. Detective Wolcott's and West's Continued Questioning after Martin told them, "I Have Nothing Really to Talk About" Violated Martin's Right to Silence and Rendered his Subsequent Statement Inadmissible.[8]

In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court established procedural safeguards to protect the constitutional rights of persons subjected to custodial interrogation. Among those procedural safeguards is the "right to cut off questioning." Id. at 474. This right requires the police to immediately cease interrogating a suspect once the suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent." Id. at 473-74; Cuervo v. State, supra; Traylor v. State, 596 So.2d 957 (Fla. 1992). Moreover, the invocation of the right by the suspect must be "scrupulously honored." Mosley v. Michigan, 423 U.S. 96, 103-04 (1975). Simply put, the questioning (or interrogation) must end then and there, and may not resume absent

[8] Appellant raises this issue under the fifth amendment of the United States Constitution and article 1, section 9, of the Florida Constitution.

additional safeguards. See id. at 104-106 (holding suspect's right to silence was scrupulously honored where interrogation immediately ceased, and was reinitiated about a different crime over two hours later, after warnings re-administered).

A suspect is not required to use special or talismanic phrases to invoke the right to remain silent. See State v. Owen, 696 So.2d 715, 719 (Fla. 1997)("there are no magic words that a suspect must use in order to invoke his or her rights"). On the other hand, police officers do not have to guess whether a suspect wants the questioning to cease. If a suspect's comments are ambiguous or equivocal, the officers have no obligation to stop the interrogation and may proceed with the interview. Davis. v. United States, 512 U.S. 452, 459-62 (1994); Cuervo, 967 So.2d at 161; Owen, 696 So.2d at 719. Officers are bound to stop, however, when the suspect articulates his desire sufficiently clearly that a reasonable officer would have understood the statement to be a request to end the questioning. See Davis, 512 U.S. at 462; Owen, 696 So.2d at 718. Thus, to effectively invoke the right to cut off questioning, any clear and unequivocal declaration of a desire to terminate the inquiry is sufficient.

In determining whether a suspect has invoked his right to remain silent, the court looks at the words used as well as the context in which they are spoken. Cuervo; Owen. Relevant considerations include the questions that drew the statement, the

officer's response to the statement, and the point at which the suspect invoked the right to remain silent. See Cuervo; Owen; Pierre v. State, 22 So.3d 759 (Fla. 4th DCA 2009); Martin v. State, 987 So.2d 1240 (Fla. 2d DCA 2008); see also Smith v. Illinois, 469 U.S. 91 (1984).

Applying this standard, statements prefaced by words such as "I think," "maybe," or "I believe" generally have been found to be equivocal, under the circumstances. E.g. Commonwealth v. Almonte, 444 Mass. 511, 517, 829 N.E.2d 1094, 1099 (2005)("I believe I've said what I have to say," held not a clear invocation of right). Statements indicating the suspect's desire to avoid answering a particular question also have been held, under the circumstances, not to trigger the Miranda protections. See Owen, 696 So.2d at 719-720 & 717 n.4 ("I don't want to talk about it," and "I'd rather not talk about it," in response to questions about whether the crime was random or planned and where suspect had put his bicycle during the crime held equivocal). And, courts have found ambiguity where a statement conveying a desire to end questioning is followed immediately by another utterance that cast doubt on whether the suspect wished to do so. In Pierre, for example, when questioned about the other co-defendants, Pierre responded, "I don't know what you're talking about. So I'm just not going to talk anymore. I don't know what you're talking about. I was at home Friday night, waiting on my baby mama, me and my cousin, and I see those people."

The court concluded from the flow of the conversation and the context of the statement, "So I'm just not going to talk anymore," that Pierre was changing the subject to avoid admitting he knew the co-defendants. 22 So.3d at 764.

In contrast, numerous courts, in Florida and elsewhere, have concluded that remarks closely resembling Martin's in the present case constituted an exercise of the right to cut off questioning.

In United States v. Reid, 211 F.Supp.2d 366 (D. Mass. 2002), for instance, the court found Reid's statement, "I have nothing else to say," to be an unambiguous request to remain silent. The court noted that Reid did not use language suggesting hesitation, nor did he immediately draw the police back into the conversation. Instead,

> Reid used words that no reasonable police officer could understand to be anything other than an expression of a desire to stop answering police questioning. He used the word "nothing," which hardly can be considered ambiguous. He used the word, "else," which means "additional" or "more." American Heritage Dictionary 446 (2d college ed. 1985). He used these words in reference to what he had "to say." Viewed in combination, these words leave no doubt that Reid did not want to say anything more to Trooper Santiago in the State Police cruiser.

211 F.Supp.2d at 372.

Similarly, the court in Martin held the defendant's statement, "Really, I ain't got nothing to say. I really don't got nothing to say," to be unequivocal, and the defendant's statement that he had "nothing to say" was found by the court in Smith v. State, 915 So.2d 692 (Fla. 3d DCA 2005), to be "more than sufficient to invoke the defendant's right to remain silent." The court in Christopher v.

Florida, 824 F.2d 836 (11th Cir. 1987), concluded that the statement, "Okay then, I got nothing else to say," could not be viewed as anything other than an unequivocal invocation of his right to remain silent. See also Pierre, 22 So.3d at 769 ("I'm not saying anymore" made during questioning was unequivocal invocation of right to remain silent); Dubon v. State, 982 So.2d 746 (Fla. 1st DCA 2008)("I have nothing to say" made during questioning invoked right to remain silent); State v. Murphy, 342 N.C. 813, 467 S.E.2d 428, 433-34 (1996)("I got nothing to say" invoked right to remain silent); People v. Douglas, 8 A.D. 3d 980, 981 778 N.Y.2d 622 (2004)(statement, "I have nothing further to say," could not have been interpreted as "anything other than an expression of a desire to stop answering police questioning").

In the present case, after an hour of interrogation during which Martin repeatedly denied harming Jacey, Martin told detectives Wolcott and West, "I have nothing really to talk about." Martin's statement came in response to Wolcott's exhortation to get "it" off his chest and confess:

> Wolcott: ... Okay, it's a weight off man. It's a weight off okay. It's a relief for you to be able to lay down tonight in your bunk, okay. Knowing that you know what, that shit's behind me.
>
> Martin: You know what? I already feel that relief. You know why? Because I told you what I already told you.
>
> Wolcott: David.
>
> Martin: I have nothing really to talk about.
>
> Wolcott: David you are not, okay, you may be saying that you are having it, okay, but your body is not saying that.

Martin: Because y'all are putting me under a lot of pressure right now.
Wolcott: Okay, well it's a pressure situation.
Martin: I know it is.
Wolcott: I don't know how many times you have sat across from a homicide detective being questioned.
Martin: I never have.

R4:603.

A few minutes later, after further attempts by the detectives to persuade Martin to confess, Martin again tried to cut off questioning, and Wolcott again challenged his attempt:

Wolcott: You are tired, okay. I can see it, man. You are tired, okay. Stop sorting for an answer you think that we are going to accept. Okay and just tell us the truth.
Martin: I am not trying to give you more answers, I already gave you my answer.
Wolcott: Okay, okay. You haven't all the way. Okay, please, is it that difficult for you and me to have a man to man conversation.
Martin: Apparently.

R4:607.

Martin's statement, "I have nothing really to talk about," in the context of a custodial police interrogation, clearly, unambiguously, and unequivocally manifested a desire to cut off questioning. Nothing Martin said afterward marred the clarity of his statement, and, as transcribed above, additional statements by Martin—"I am not trying to give you more answers" and "apparently"--immediately following indicated a continuing desire to end the conversation. The detectives therefore were obligated to immediately cease the interrogation.

Like Reid's statement ("I have nothing else to say," quoted above), Martin's semantically identical words, "I have nothing really to talk about," leave no doubt that he didn't want to say anything more to Detectives Wolcott and West. Martin, like Reid, used the word "nothing," which he emphasized with the word "really," which means "in reality," "truly," "indeed." The American Heritage Dictionary 1086 (New College Ed. 1980). Similarly, in Martin, discussed above, a virtually identical word construction was held to invoke the right to silence: "Really, I ain't got nothing to say. I really don't got nothing to say." In the present case, Martin used nearly identical words and phrasing in reference to what the detectives wanted to "talk about." There was no equivocation and no ambiguity in his statement. Not only was Martin's statement certain, it clearly expressed his desire to stop talking. Additionally, Martin even complained immediately afterward that the police were putting him under a lot of pressure to answer their questions.

Nothing that preceded or followed the statement rendered it unclear or equivocal. Unlike the defendant's statements in Owen, Martin's statement was not in response to a question about a particular subject but came during an exchange in which Detective Wolcott exhorted him to confess where he left the body. And, unlike the defendant in Pierre, Martin did not continue talking or seek to reengage in conversation immediately after making the statement but

sat silently looking down at the table and didn't speak again until the officers challenged his assertion.

Not only should a reasonable officer in Wolcott's and West's position have understood Martin's initial statement to be an invocation of the right to remain silent, it is apparent that Detective Wolcott actually understood Martin's statement to be an effort at terminating the interrogation. In response to Martin's assertion that he had nothing really to talk about, Wolcott told Martin, "You may be saying that you are having it, okay, but your body is not saying that." Wolcott's attempt to convince Martin that he (Martin) didn't mean what he had just said explicitly acknowledged that he, Officer Wolcott, understood precisely that Martin had said he wanted and intended to stop talking. Indeed, Wolcott even queried Martin "is it that difficult for us to have a conversation?" and Martin responded affirmatively, that yes, "apparently" it is that difficult for us to have a conversation--because Martin didn't want one. Wolcott had again overtly acknowledged Martin's invocation to silence.

At the suppression hearing, Detective West[9] agreed that Wolcott's response was, "Well, you may be saying that, but your body language is telling me something different." SR1:169. Asked what body language suggested Martin didn't mean what he said, West said, "He was open in talking, he never requested to stop talking," and,

[9] Detective Wolcott did not testify at the suppression hearing.

“He wasn’t in a closed position.” SR1:169. However, appellant has found no case law recognizing “open” body language (whatever that is) as nullifying a defendant’s previously or concurrently invoked right to silence.

When asked again at trial why he didn’t think Martin was invoking his right not to talk to them anymore, West said, “He never asked for an attorney,” and, “We continued talking and he continued talking. He never asked for an attorney,” and, “He didn’t choose the right to remain silent. He continued talking.” Asked what Martin would have to do to invoke his right to remain silent, would he have to open the door and leave the room, West responded, “He can refuse to talk.” R12:773-74.

There are two critical problems with Detective West’s explanation. First, Martin did not have to ask for an attorney in order to invoke his right to silence. It is axiomatic that the right to remain silent and the right to an attorney are two separate rights, each of which individually obligates the interrogating officer to cease questioning. Although Martin did not request an attorney, he did tell the detectives that he had “nothing really to talk about” and “already gave [them] [his] answer.”

Second, contrary to Detective West’s training, Martin did not have to stop talking to the detectives once he asserted his desire to cut off questioning; on the contrary, the detectives were obligated to stop talking to him. When Martin said “I have nothing

really to talk about," the detectives were obligated to immediately cease questioning and "scrupulously honor" Martin's right to remain silent.

Furthermore, that Martin did not sit mute after Detective Wolcott repeatedly challenged his attempt to cut off questioning does not alter the clarity of his assertion. See Christopher, 824 F.2d at 836 ("that defendant answers questions after asserting his right does not validate the failure of police to scrupulously honor his request"). Martin was not required to further assert his right. See Davis, 512 U.S. at 472-73 (Justice Souter, concurring)("When a suspect understands his expressed wishes have been ignored . . . in contravention of the rights read to him by his interrogator, he may well see further objection as futile"). By ignoring Martin's clear request and continuing the interrogation anyway, the detectives brought into play the very coercion and compulsion that Miranda was meant to prevent.

In Michigan v. Mosley, the Court observed that the police would fail to honor a person's invocation of his right to remain silent "either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." Id. at 105-06. Here, the detectives violated both proscriptions and thereby failed to honor, let alone "scrupulously honor," Martin's right to halt the interrogation. Martin's rights under the federal and

state constitutions were violated, and therefore his statements after he asserted his right to remain silent were inadmissible.

B. Martin's Statement was Not Free and Voluntary But Was the Product of Coercion.

In order for a confession or incriminating statement to be admissible under the due process clause, it must be shown that the confession or statement was voluntarily made. Brown v. Mississippi, 297 U.S. 278 (1936); Brewer v. State, 386 So.2d 232 (Fla. 1980). For a confession to be voluntary, the totality of the circumstances must indicate the statement was the "the result of a free and rational choice." Johnson v. State, 696 So.2d 326, 329 (Fla. 1997), cert. denied, 522 U.S. 1095 (1998); see also Traylor v. State, 596 So.2d 957, 964 (Fla. 1992). That is, it "'must not be extracted by any sort of threats,'" nor obtained by "'any direct or implied promises, however slight, nor by the exertion of any improper influence.'" Brewer, 386 So.2d at 235 (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)).

The standard governing whether a statement is involuntary due to coercive police conduct was summarized in Walker v. State, 771 So.2d 573, 575 (Fla. 1st DCA 2000), as follows:

> The mind of the accused should, at the time, be free to act, uninfluenced by fear or hope. See Traylor v. State, 596 So.2d 957, 964 (Fla. 1992). To exclude a confession or inculpatory statement, it is not necessary that any direct promises or threats be made to the accused. See id. It is sufficient if the circumstances or declarations of those present are calculated to delude the suspect as to his true position and exert an improper influence over his mind. See id. A confession or inculpatory statement

> is not freely and voluntarily given if it has been elicited by direct or implied promises, however slight.

See also Brewer, 386 So.2d at 235-36.

Simply put, a confession obtained through police coercion is involuntary and a violation of due process. In order to find a confession involuntary, therefore, the court must find (1) there was coercive police conduct, and, (2) the coercive conduct, under the totality of the circumstances, produced the confession. See State v. LeCroy, 461 So.2d 88 (Fla. 1984), cert. denied, 473 U.S. 907 (1985); see also Blake v. State, 972 So.2d 839, 844 (Fla. 2007)(for confession to be involuntary, there must be a causal connection between the coercive police tactics and the confession).

In the present case, the record shows that Martin's confession was obtained by a combination of coercive techniques, including threats, promises, and exaggerations and deceptions calculated to delude Martin as to his true position. Facing Martin's insistence that he did not know where Jacey was, the detectives (1) threatened Martin that if he refused to cooperate he would get sent to death row, would not get a fair trial, and the detectives would testify, among other things, that he was "cold-blooded," his attitude was "fuck you," and he "meant it to happen;" (2) deluded Martin as to his true position by repeatedly telling him that he was not a premeditated murderer and could expect a "future" with his girlfriend and "forgiveness" from a jury, but only if he confessed; (3) deceived Martin into thinking that he had only that afternoon to

cooperate or any benefits of cooperating would be lost; (4) promised, if he cooperated, to give favorable testimony at his trial and use their considerable influence in arranging psychiatric care, (5) explicitly promised to arrange a visit from his girlfriend, after and only after he cooperated, and (6) exploited his religious beliefs by pressuring him throughout the interrogation with a version of the long-condemned Christian burial technique.

These tactics clearly established the integral element of coercion. Equally clearly, considering the totality of the circumstances, the coercive tactics produced the confession. When Martin questioned the detectives' assertions, they assured him that what they were saying was true and that they weren't lying and that they had the authority to do what they both promised and threatened.

In Brewer, this Court found the confession involuntary where police threatened the defendant with the electric chair, suggested they had the power to effect leniency and that his confession would lead to a lesser charge, and implied that he would not get a fair trial. The police told Brewer he would get the electric chair or life if he got convicted of first degree murder but that second degree murder would result in 20 years and eligibility for parole: "That's second degree. That's what you did. I know that's what you did." They told Brewer if the evidence went to the jury, they would find him guilty and send him away for life or put him in the electric chair. "Think of 12 people that don't know a damn thing

about the law sitting back and listening to this?" But, they told him, "[i]f you did it, and tell us right now, we'll help you out," "Admit it. Say you're sorry. Try and get off light. That's your only recourse." If he told them how he did it, "we'll help you out on this. We'll get, you'll get out of this thing on second degree murder." One officer said: "Cooperate with us. We'll help you out. You've known me your whole life. I ain't no liar and I don't put stuff on people they don't deserve." 366 So.2d at 234-235.

West and Wolcott employed virtually identical tactics here: they threatened him with death row, suggested his confession would lead to a lesser charge or punishment, and implied that he would not get a fair trial. First, on page 52, line 9, they raised the specter of death row:

> Wolcott: The best thing that David can do for David is to help us find her. Okay.
> Defendant: Uhhuh.
> Wolcott: Because you look like a monster if you don't. You really do. And you know where monsters go. Monsters go to prison, monsters go to death row. Monsters never see the light of day again.

Detective Wolcott was telling Martin that his not helping them "find her" would lead to death row. This was not merely informing Martin of possible penalties, but an explicit threat meant to incite fear. Cf. Martinez v. State, 545 So.2d 466, 467 (Fla. 4th DCA 1989)(confession involuntary where police told defendant he "could wind up" in electric chair if he was not truthful, noting this was not meant to be informative but to psychologically coerce Martinez

into confessing) and Walker v. State, 707 So.2d 300 (Fla. 1998) (confession not involuntary where police reminded defendant that he could face the death penalty for murders but never threatened him). The detectives here were not telling Martin what could happen; they were telling him what would happen if he didn't tell them where they could find Jacey, that is, if he didn't give them self-incriminating evidence forthwith.

This threat of the death penalty also was improper because it implied that Martin's exercise of his right to remain silent would result in harsher treatment. See U.S. v. Harrison, 34 F.3d 886 (9th Cir. 1994)("there are no circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor). The detectives reiterated this message throughout the interrogation. For example, at page 71, lines 35-42, Wolcott again told Martin that if he didn't cooperate, "they [the jurors] are going to look at you as the monster," and at page 87, line 18, told Martin, "once I leave you are the monster," and at page 87, line 26, "Are you going to be the monster or are you going to tell me how I can take her home?"

Wolcott and West also made statements implying that Martin would not get a fair trial unless he confessed. The statement discussed above -- that unless Martin helped them, he would look like a monster and monsters go to death row -- implied that the verdict

would be determined by perception of his degree of cooperation and not the facts of the case, that is, Martin would not get a fair trial. On page 69, line 39, Detective Wolcott again told Martin the jury would not believe him, again implying an unfair trial:

> Wolcott: Who do you think I [sic] going to believe? You know who those people are right?
> Martin: Right.
> Wolcott: That's the jury.
> Martin: Unhuh.
> Wolcott: You go in there and tell them what you are telling me right now and they aren't going to believe you.

Then, on page 71, line 35:

> Wolcott: What are these people going to believe now when I walk in and say this is what we have.
> Martin: Right.
> Wolcott: I mean we already know what happened, but he is not remorseful for it. He doesn't care because he won't tell us anything. What do you think they are going to look at you as? They are going to look at you as the monster that you are not.

And, on page 87, line 18:

> Wolcott: . . . once I leave you are that monster. And that's what everybody is going to look at and I am not going to be able to say, yes, you know he helped me. I am going to say, no he didn't. And you are going to be sitting there and you are going to hear me say it and I am not going to lie. And those other people are going to listen to it and you are going to be the monster.

The detectives also implied that Martin would not get a fair trial because of his past. On page 52, line 8:

> Wolcott: And getting up in front of that jury of 12 people, we are going to parade a pretty little blonde haired girl that ain't never been in no trouble up there and set down and tell the story. Okay, and then they are going to parade us and everyone we have talked to about everything else and then they are going to parade you up

> there. And like I said, I am not here to judge you. Okay, but let's face it. Common sense tells you who are they probably going to believe? Erin?
>
> Martin: Yea.
>
> Wolcott: The girl who hasn't ever been in trouble.

This statement is improper because it implied that Martin would be judged by his past record rather than the facts of the case, that is, Martin would not get a fair trial. It is also improper because Wolcott was telling Martin, falsely, that he would have to testify ("and then they are going to parade you up there").

The detectives also threatened Martin with their testimonial damnation if he didn't tell them what they wanted. While police may under some circumstances tell a suspect that cooperation will be passed on to the authorities, United State v. Tingle, 658 F.2d 1332, 1336 n.5 (9th Cir. 1981; Maqueira v. State, 588 So.2d 221, 223 (Fla. 1991), telling a suspect that refusal to cooperate will be used against him violates the fifth amendment right to silence. Tuttle v. State, 650 N.W. 20, 36 (S.D. 2002); see also Tingle. As the court explained in Tingle:

> Refusal to cooperate is every defendant's right under the Fifth Amendment. Under our adversary system of criminal justice, a defendant may not be made to suffer for his silence. Because there is no legitimate purpose for the statement that failure to cooperate will be reported and because its only apparent objective is to coerce, we disapprove the making of such representations.

Courts therefore have found statements suggesting that failure to cooperate will result in harsher treatment to be coercive threats. See Tingle, 658 F.2d at 1336 (finding coercive law

enforcement agent’s statement that if suspect refused to cooperate, they would inform the prosecutor that she was “stubborn” and “hard headed”); Tuttle (finding officer’s statement, “I’m going to have to write it up that you’re not cooperating” was a threat); People v. Brommel, 56 Cal.2d 629, 633-634, 364 P.2d 845, 15 Cal. Rptr. 909 (1961)(finding coercive officer’s statement to suspect that unless he changed his story, they would write “liar” on their report to the judge).

In the present case, Detective Wolcott’s threats go far beyond the considerably milder threats found to be coercive in other cases. At page 71, line 40, as noted above, Wolcott expressly told Martin that if he didn’t give them answers and say he was sorry, he would tell this to the jury:

> Wolcott: . . . What are these people going to believe now when I walk in and say this is what we have?
> Martin: Right.
> Wolcott: I mean we already know what happened, but he is not remorseful for it. He doesn’t care because he won’t tell anything. What do you think they are going to look at you as? They are going to look at you as the monster that you are not?

At page 87, line 13, Wolcott again told Martin that if he didn’t cooperate that day, he, Wolcott, would tell the jury this, and he would be viewed as a monster for not cooperating:

> Mama knows what the outcome is. . . . She has told us she knows. She just wants her back so that she can do the right thing by her, which makes you the better person because you allowed her to do that. You are not going to be viewed as the monster. But once I leave you are the monster. And that’s what everybody is going to look at and I am not going to be able to say, yes, you know he

> helped me. I am going to say, no he didn't. And you are going to be sitting there and you are going to hear me say it and I am not going to lie. And those other people are going to listen to it and you are going to be the monster.

Again, at page 92, line 4, Wolcott told Martin that unless he talked, Wolcott would tell the jury Martin is "cold-blooded" and "meant this to happen":

> Do you want these folks to hear out of us that David is cold-blooded and he meant this to happen? That this is how he wanted it to be. That he said, You know what, "I know her mom is upset, but screw her. Give me what I get." You are definitely going to be in a real bad position. There's no doubt about it.

Here, Wolcott is threatening something even more intimidating: not merely that they, Wolcott and West, would testify that Martin didn't have a heart, but that they, Wolcott and West, would testify that Martin "meant this to happen" and that this is "how he wanted it to be," that is, that he committed premeditated murder.

And, at page 96, line 13, the following colloquy took place:

> Wolcott: Then do you not think that for the girl that was sitting over there talking with other guys, that wants to hold your hand and go to the movies again one day and have a life with you and had [sic] kids with you and have a decent relationship with you as opposed to behind a piece of glass talking on the phones.
>
> Martin: That's all she's going to have.
>
> Wolcott: No she's not. That's what you're not getting. That's what you are not understanding. She is going to have that if we keep up with the lies. If we've got to portray you as this person that has told everyone to fuck off.

The detectives' statements that they would tell the judge and jury that Martin is "cold-blooded," "meant this to happen," "wanted

it to be," said, "'I know her mom is upset, but screw her,'" and is a "person that has told everyone to fuck off," clearly are coercive threats.

Second, the detectives deluded Martin as to his true position by alternating the threats enumerated above with the illusion that Martin's position wasn't so serious. While deception alone will not invalidate a confession, the use of deception, trickery, or misrepresentation are factors to be considered. Frazier v. Cupp, 394 U.S. 731 (1968); cf. Walker, 771 So.2d at 575 (confession involuntary where "[u]nder totality of the circumstances, the officers' statements that Appellant could avoid arrest if he cooperated were calculated to exert an improper influence over Appellant and delude him as to his true position") with Blake (confession not involuntary where officers told defendant interrogation was not being recorded when in fact it was). Here, the detectives repeatedly assured Martin that he did not commit premeditated murder and was not facing death row, or even life imprisonment, that his situation was "not that bad." They repeatedly made it seem that confessing, or, as they put it, taking care of "this little matter," dealing with "some minor little shit," and not letting "the little element of what happened" get in the way, would dramatically enhance his position in court.

This long, slow, but relentless seduction played out over several hours. On page 52, beginning at line 18, Detective Wolcott told Martin:

> There is an out. I mean there is a light at the end of this tunnel. . . Things might have just went wrong. . . People can understand that. People can all relate to that. People have been in that situation.

On page 57, line 19, Wolcott urged Martin to tell the truth, because he had a “long life” ahead of him:

> I see it on you and the moment I walked in you know brother you, you are a good kid. You have a long life to go. You got some minor little shit to take care of but you know what? That’s stuff that can be taken care of. There can be a future for David. There can, okay. . . . Don’t make your life be over because of something so simple as just us giving her mom some closure.

On page 58, line 9, Wolcott said:

> Stop giving yourself pain. Let it off your chest. Let is [sic] give some answers. Let’s let David put this behind him so that he can move forward in life . . . the easiest way for David to let this go away and to start washing your hands and start looking forward to your future. Just by giving some answers, that’s it. Okay.

At that point, Martin admitted he stole Jacey’s car but said he hadn’t harmed her and didn’t know where she was.

The detectives continued telling Martin that what he had done wouldn’t ruin his life but that his failure to cooperate would. At page 61, line 23:

> Don’t let everything we have talked about in this room get thrown out the window because of leaving out a part of it. Okay, I know it’s hard. I know it. David is not cold-hearted. David is not a monster, okay. She just didn’t get out of the car.

At page 61, line 31, Detective Wolcott yet again minimized the crime and its consequences:

> Don't let the little element of what happened ruin the rest of your life. Okay. You didn't want your fiancee hurt. You had to get down there. I understand that. People can understand that.

Continuing this theme, on page 74, line 6, the following exchange took place:

> Wolcott: Tell me where I can go get her. Do the right thing. It is very simple. I think what happened here was an accident, David. You wanted a car and you wanted to come down here. And I think that from there, everything else, it wasn't planned. It was an accident, son.
>
> Martin: Let me tell you what, even if I could tell you where she's at. The whole point about it's an accident, people don't give a fuck about that. . .
>
> Wolcott: David, people do care. There is many a times that I have had cases where it was justified, excusable, there was not intent. Stuff like that, okay, and it just disappeared. But you know what happened in all those cases. Everybody stepped up and told the truth. None of that can happen.

Then, at page 75, line 42, Wolcott told Martin not to make the same mistake other "young people" had made, of thinking "there isn't a way out that there is no light at the end of the tunnel and they can't help themselves." Wolcott asked Martin repeatedly, "Is it worth pissing your life away for?" implying that the penalty would be more severe if he didn't confess, for example, at page 63, line 18; page 78, line 28.

At page 84, line 3, Wolcott again told Martin he was not facing a premeditated murder charge:

My partner and I have not lied to you. Everything we told you is the truth. David is not a premeditated murderer. Okay. Those people deserve to go to the electric chair.

At page 87, line 3, Wolcott repeated this:

[Y]ou are not at the top of the tree,[10] you are at the bottom of the tree . . . You are not the monster.

At page 90, line 14, the detectives told Martin that if he apologized for his "mistake," he had a future, and implied that he was not facing life in prison because he wasn't after Jacey, he just wanted her car:

Wolcott: . . . Can we get past all that other stuff and just get to I'm sorry. Okay, I made a mistake. People make um. All right? Please, that's all we are asking. That's all she's asking. She deserves better than this. You deserve better than this. Your future with Erin deserves better than this, okay.
Martin: What future? You know whether I did anything or not I am still gonna fucking get life in prison you know? Whether I did anything or not.
Wolcott: Not at all.
Martin: Oh, yea.
Wolcott: Not at all.
West: Remember what we told you in the beginning? You weren't after Jacey. You were after the car.
Martin: You are right.
West: And that's what I tried to explain to you earlier. Accidents happen. You weren't after Jacey, you were after the vehicle.

And then, at page 91, line 1, West said:

Accidents happen. People understand accidents. They don't understand monsters.

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[10] During the interview Martin had been shown a tree diagram with the more severe, first degree murder at the top of the tree and the less severe justifiable homicide toward the bottom.

Then, on page 93, line 38, Detective West told Martin again that he was not facing death row:

> West: I know you are scared. But it's not that bad.
> Martin: Not that bad?
> West: It's not that bad. Listen to me. Listen to what I'm saying to you. You could be looking at Death Row, son. That's not what this is about. This is about a car that you wanted so you could come see your fiancee.

Under the totality of the circumstances, the detectives' repeated assurances that Martin could avoid a premeditated murder charge and death row, could avoid a life sentence, could maybe even have the whole thing "disappear," because it was an "accident," but only if he cooperated, were calculated to exert an improper influence over him and delude him as to his true position. This was not only blatantly coercive but patently false. This was worse than a promise of leniency: the detectives here were misrepresenting to Martin the degree of the crime he would be charged with. Even when Martin questioned what they were saying, the detectives' reassured him that what they were saying was true, when they no doubt knew that giving an incriminating statement was far more likely to lead to a murder charge, conviction, and death row than saying nothing, and further knew that a murder committed during a felony (here, a carjacking), would actually increase the chances of death row.

Third, the detectives deceived Martin by telling him that this was his last chance to cooperate and thereby reap the benefits of that cooperation, when Martin actually had ample time to decide his legal strategy. The detectives told Martin at page 87, line 5, that

he had to help himself "now" because "we are going to leave and it ain't like I can talk to you again tomorrow. And this is it," and on line 17, "once I leave you are the monster," and on page 93, line 25, "the time is ticking for me to leave and I [sic] won't have another opportunity to talk to me . . . And my agency is not going to allow me to come back." All of these statements were coercive. See United States v. Anderson, 929 F.2d 96 (2d Cir. 1991)(confession coerced where trickery was false assertion, in effect, that defendant "must confess at that moment or forfeit forever any future benefit that he might derive from cooperating with the police agents"); see also Ramirez v. State, 15 So.2d 852 (Fla. 1st DCA 2009) (confession involuntary where, amid promises to help, detective told defendant "this is your only chance").

Fourth, the detectives promised to help Martin in a number of very specific ways--if he cooperated. While not all police statements that arguably could be considered "promises" render a confession involuntary, e.g., Bush v. State, 461 So.2d 936, 939 (Fla. 1984)("confession not rendered inadmissible because police tell accused it would be easier on him if he told the truth"), promises of leniency will render a confession involuntary. See Brewer. Furthermore, while an express "quid pro quo" bargain for a confession will render the confession involuntary as a matter of law, the absence of such a bargain does not insulate police misconduct from claims of undue influence or coercion. Ramirez v.

State, 15 So.2d 852, 856 (Fla. 1st DCA 2009); Walker, 771 So.2d at 575. Thus, offers to help not tied to a specific benefit (other than to tell the prosecutor that the defendant cooperated) will render a confession involuntary if the offer is made repeatedly and clearly produces the confession. Day v. State, 29 So.2d 1178 (Fla. 4th DCA 2010); Ramirez.

In Day, the court found the confession involuntary where "there was a constant barrage of offers to help throughout the statement, often tied to requests for more information." 29 So.2d at 1181. For example, the investigator told the defendant, "if something happened and its accidental-then we can work something out. But if it's something that-cause I don't see you as a predator, okay," "If there's something that we can fix and we can work with, then that's what I want to know," "I'm trying to give you the opportunity to help yourself so that I can work something out for you," "it helps when I talk to the State Attorney and I tell them what type of person you were and how honest you were." When the defendant asked, "You gonna help me?," the investigator answered, "I can do my best and talk to the State Attorney." Finally, the investigator told the defendant, "I'm gonna present this case to the State, okay. They're gonna go based on what I tell them, alright." In finding the statement involuntary, the court said:

> It must be remembered that confessions, as such, are equally inadmissible when they are the fruits of hope as when they are the product of fear. In the present case, based on the totality of the circumstances, the many

> offers of help and the statements implying authority to influence the process rendered appellant's confession inadmissible as improper fruits of hope.

Id. at 1182 (internal quotations and citations omitted).

Nonspecific promises to help likewise rendered the confession involuntary in Ramirez. There, the offers of help included the statement, "[I]f you want us to help you, you need to help us also," "How am I going to help you if you're lying to me and you don't want to tell the truth." In addition, the detective implied that he had some specific benefit in mind but couldn't say what it was until after Ramirez talked. The detective also told Ramirez, "this is your only chance," and the only way he would "get out of this" was by telling the truth, and "your life is in my hands." In finding Ramirez's confession involuntary, the court specifically noted that the detective never explained the limits of his authority.

Here, too, there was a barrage of offers to help, tied to requests for information. In contrast to those in Day and Ramirez, however, and thus even more coercive, Detective West's and Wolcott's offers to help were specific. They told Martin if he cooperated, they would tell the prosecutor and the jury nice things about him, and thereby help him to obtain leniency. For example, at page 63, line 25, Wolcott told Martin that if he confessed and was remorseful, Wolcott could "go out there okay and talk to the people that are wanting to put you in prison," because "I need to be able to go out and say I mean he's got a heart." At page 71, line 2,

Wolcott told Martin that he would tell the jury "that David did what was right" by telling him where she was and that "David told me he was sorry for what happened." And, at page 92, line 19, West told Martin he would tell the prosecutor and the jury that Martin wasn't a "bad guy," that he "needed help":

> West: David, you know what I would rather say? I would rather say here is a guy that had a problem that was trying to take care of the problem by going to rehab. He has some issues. He has some problems that he needs to take care of. He wanted to be next to his fiancée, he wanted to get a better, a start in life. He wanted a car. He made a mistake, he tried to get the car and things went wrong. He's not a bad guy but he definitely needs some help. He definitely needs some rehab. He definitely needs some guidance. Don't you believe that? Don't you think you need some help?
>
> Martin: I know I need help.

Wolcott and West also promised Martin psychiatric help, implying that they had the power to do this. When, at page 92, line 27, Martin told the detectives, "I know I need help," West responded:

> Okay that's what they are going to see. . . . You need some help and that's going to be their forgiveness because people do care. That's why he's telling you that there is a light at the end of the tunnel. This is not the end for you.
>
> And all I am asking is to tell me the truth so that we can put you down here where you belong and get you some help. I don't want to make you out to be a monster. I don't believe you are one.

At page 93, line 12:

> . . . all I am asking is to tell me the truth so that we can put you down here where you belong and get you some help.

At page 93, line 29:

> Get that weight off of you. Let me get you some help. But, if you don't, I can't get you help.

At page 94, line 22, the following colloquy took place:

> Wolcott: Tell us the truth and we will even stay here with you and get you some help.
> Martin: What do you mean by that? Stay here to get me help. What do you mean by that?
> Wolcott: Make sure this system gets you help here. You are not going to stay here anyway. You know you got to come back by my county.
> Wolcott: Where he's got all of the connections.
> West: Yeah. Where I have all the connections. . .

Then, at page 98, line 8:

> Wolcott: All I am asking you for David is to tell me where she's at. That's all I want. You don't have to tell me anything else, and I can get up and go.
> Martin: And then what?
> Wolcott: Then when you come, when you come back to my county then I can start setting stage one and stage two and put everything in order for you.

Then, at page 103, line 7:

> Wolcott: The only way they are going to give you help I would walk in and say hey, he told me the truth.

Then, on page 106, line 36:

> Wolcott: I can guarantee you none of those people there had two high-ranking detectives such as ourselves walk in there and go to bat for them either. Like this man already told you he would. It's his county. I guarantee you that. I know that. The people that I have gone and requested for assistance in the past coming out of my mouth says a lot. . . when we step into the play and go look, we spent all this time with this kid, okay. This is what he is needing. . . .
> West: . . . You recognize that on this night that you weren't thinking straight. You understand that that is a problem for David. And I give you my word that I

will personally go to the State Attorney's Office and that is what I will convey to them. I can't make a deal. I am not allowed to do that. . .

Martin: But when [sic] have a lot of influence.

West: I give you my word. You are right. I do have a lot of influence and so does he.

Wolcott: And that's why we are not lying.

Then, on page 107-108, line 42:

> Wolcott: We're not lying about – we are not promising you anything. You see what I'm saying? Saying we're going to do this or that because that would be lying to you. But what the man is saying, his word carries a lot of weight. He's worked a long time in that county. He is highly respected. Okay. Everyone from the top man on down, okay, knows that Detective Ken West, what he says goes. . . . in the end, they always believe me. But right now, I can't go back and say that. I need that little bit of help from you, David.

As in Day and Ramirez, there was a constant barrage of promises to help. Some of these have been set forth above, but there are others throughout the transcript. Many times the detectives offered to help Martin if he would help them; these two officers repeated over and over various versions of the same threats, promises, exaggerations, and deceptions. Similar to the detective's statement pointed out by the court in Day, "I'm gonna present this to the state, okay. They're gonna go base on what I tell them," the detectives here told Martin on page 103, line 7, "the only way they are going to give you help is if I would walk in and say hey, he told me the truth." These statements were calculated to do one thing: assure a 21-year-old high school drop-out that they had the authority ("what he says goes") to exert formidable influence before a jury, in the State Attorney's Office, in arranging for Martin

psychiatric care, and generally to help him--but only if he confessed.

Fifth, the detectives made an explicit promise in exchange for Martin's cooperation, in other words, a "quid pro quo" bargain. On page 108, line 18, Martin asked the detectives if they could arrange a phone call to Erin. They told him they couldn't do that but they could make arrangements for a visit, if he helped them:

> Martin: Can yall arrange for me a phone call?
> Wolcott: Phone call to where?
> Martin: Erin. I need two minutes.
> Wolcott: I can't, well I tell you what I will do to be fair okay. With them, but I am not going to tell you I am going to give you a phone call so that you stand here and trust me. Okay, but I do, I will make sure that, I believe she is trying to also get a visit.
> Martin: Are they going to let her have one?
> Wolcott: Oh, yea.
> West: Yea, we can see it. We can make arrangements for visits okay, but we got this issue right now David that we have to cover first. Okay.
> Wolcott: Just tell me where I can go get her.

Martin's very next utterance indicated where Jacey could be found. And, after he confessed, the detectives reiterated their promise at page 113, line 11 ("We have been working really close with the state attorney here and we will see to it that she can get a visit, okay"). The detectives told Martin they could arrange a visit, but first he had to help them. In other words, a visit was contingent on providing a statement. See Malloy v. Hogan, 378 U.S. 1, 7 (1964)(noting that Supreme Court has "held inadmissible even a confession secured by so mild a whip as the refusal, under certain

circumstances, to allow a suspect to call his wife until he confessed)(citing Haynes v. Washington, 373 U.S. 501 (1963)).

While it's true that at one point, at page 107, line 42, the detectives told Martin they weren't promising him anything, this caveat came at the very end of the interrogation. Up to that point, the detectives repeatedly had implied that they could help him out, and, even afterwards, continued to imply that they could and would do the very things "not being promised." In fact, on page 107, line 35, immediately after West told Martin that he wasn't allowed to "make a deal," he told Martin, "I do have a lot of influence," and "I give you my word." Wolcott added that, "we are not promising anything," but, again, in the next breath, told Martin that West's "word carries a lot of weight," and "what he says goes." Wolcott then told Martin, "I need that last bit of help so that I can help you." The detectives then promised the visit from Erin.

This is similar to Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979), where the detective told the defendant he could make no promises but nonetheless continued to make repeated assurances that he could help in obtaining a bond.

Furthermore, after Martin revealed the location of Jacey's body and told the detectives what happened, the detectives twice made comments about his trusting them. At page 112, line 26, Martin told them he needed "some serious mental help," and Wolcott responded, "All I can tell you is my partner and I okay, that once you didn't

want to trust us, we are upstanding guys okay. We don't lie, we stick to our word." Martin responded, "Yea I know that." If the detectives hadn't promised anything, Martin would have had nothing to trust them about. Nor would they have to "stick to [their] word." These statements show the detectives intended their statements as promises and were well aware that Martin understood them as such.[11]

Furthermore, telling Martin one time that they couldn't promise him anything did nothing to counteract the 40-50 false promises and threats the detectives had made repeatedly throughout the interrogation. The detectives also told Martin, at one point, on page 91, line 27, that "[t]he guy in the robe up there" makes the decision about what happens with the rest of his life, along with "these people right here" (the jury). Again, this comment did not negate the dozens of emphatic assertions of both positive and negative influence before a jury and in the State Attorney's Office, repeated assertions that his situation was not so bad, and the repeated offers of psychiatric help and to allow his girlfriend a visit.

Sixth and finally, Wolcott and West attempted to elicit a confession by appealing to Martin's religious beliefs with a variation of the "Christian burial technique," which this Court

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[11] See Telefort v. State, 978 So.2d 225, 227 (Fla. 4th DCA 2008)(noting that "word," as in "I give you my word," means "promise, citing Merriam Webster's Unabridged Dictionary (CD-ROM edition).

previously has characterized as a "coercive and deceptive ploy." Roman v. State, 475 So.2d 1228, 1232 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986); Hudson v. State, 538 So.2d 829, 830 (Fla.), cert. denied, 498 U.S. 875 (1989). This tactic is used to persuade suspects to disclose the location of a victim's body so that the victim can receive a proper Christian burial. Nix v. Williams, 467 U.S. 431 (1984). In Hudson, for example, the officer told the defendant the only way the family would know the victim was dead was if they could see the body.

Here, Detectives Wolcott and West asked Martin dozens of times to tell them "where we can go get her and take her home to her mama," and repeatedly said all they wanted was "to take her from where she's at and place her back with her family so they can do what's right" and "put her where she belongs." They told Martin that the Bible teaches forgiveness and they knew by spending time with Jacey's mother that she was going to have forgiveness because "God is number one for people like that." R4:620. They told Martin there are more forgivers in Clay County but they won't accept being lied to. They told him they sat next to Jacey's mother while she cried and pleaded and vomited and that all she wanted was closure. They told him Jacey's mom was almost suicidal, that she was torn and couldn't sleep. They told him Jacey's mom appreciated that he was talking to them and when the time came, she would tell that to the

jury. All of this was improper and coercive under Nix v. Williams and Roman.

In sum, Martin was subjected to a relentless stream of threats, misleading promises of help, and other deceptions. The message was clear: if Martin refused to tell the detectives where they could find Jacey that afternoon, he would suffer more severely, even receive the death penalty. If he cooperated, on the other hand, he would receive the benefit of favorable testimony, psychiatric help, and an immediate visit with his girlfriend, whom, by this point, he was desperate to talk to. Viewed together, as Martin reasonably would have understood them, Wolcott and West's statements were patently coercive.

Moreover, Martin's demeanor and responses on the tape demonstrate that the coercive tactics found their mark. When he questioned their assertion that it made a difference that he didn't want Jacey, he only wanted the car, they said, "not at all," "not at all." When they told him what they would say in court, he said, "I know." And, when he asked the detectives what they meant by "help," they assured him they were not lying, they were men of their word, and that they had the authority to deliver. The record shows that Martin took them at their word: he believed both the promises and threats. The record further shows a causal nexus between the detectives' statements throughout the interview, including the final

promise to arrange a visit with his fiancee, and Martin's confession.

As early as 1897, the Supreme Court observed in Bram v. United States, 168 U.S. at 543:

> A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner.

Many years later, in Brady v. United States, 397 U.S. 742 (1970), the Court reiterated this point, pointing out that in Bram

> even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.

The Court recognized that it is virtually impossible to say a defendant, especially one facing a murder charge, was not affected by promises.

Here, Martin was subjected not to one mild promise but a litany of significant promises, threats, deceptions, and inducements, repeated over and over. The detectives' overall strategy was simple: wear Martin down, first one officer, then the other, hour after hour, with first one threat and then another, first one promise and then another, until finally he breaks. But the law is clear: "any direct or implied promise, however slight," and "any sort of threats" are improper, and when constantly repeated over several hours during a police interrogation it is simply impossible to say the threats and promises had no impact on the defendant.

The state had the burden of proving by a preponderance of the evidence that Martin's confession was given freely, without police coercion. The state failed to meet that burden. Considering the totality of the circumstances, Martin's confession was not a free and unconstrained choice, but was the product of fear, unrealistic hope, and delusion as to his true position, due to the detectives' conduct. Martin's confession was involuntary, and the trial court erred in denying his motion to suppress.[12] Because it cannot be said beyond a reasonable doubt that the admission of his confession did not affect the verdict, the error is not harmless, see State v. DeGuilio, 491 So.2d 1129, 1139 (Fla. 1986), and Martin is entitled to a new trial.

Issue 2

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED.

The cold, calculated, and premeditated aggravating circumstance (CCP) applies where the evidence shows beyond a reasonable doubt that the killing was the product of calm reflection and a prearranged design to commit murder before the crime began. Here, the evidence is consistent with a reasonable hypothesis that negates

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[12] Appellant has not addressed the trial court's order denying the motion to suppress because the trial court did not specifically address the voluntariness of Martin's statement in response to the detectives' threats or promises but merely ruled in conclusory fashion that "they voluntarily talked throughout the entire transcript." SR1:176.

these elements. In Martin's confessions, both to police and to Dr. Krop, he described the killing as an emotional reaction to Jacey's refusal to let him use her car to visit his girlfriend in St. Pete, who was in pain and "freaking out." No evidence was inconsistent with this version of what happened. The CCP aggravator therefore cannot be sustained.

A trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by legally sufficient evidence. Almeida v. State, 748 So.2d 922 (Fla. 1999). Id. Each element of an aggravating circumstance must be proved beyond a reasonable doubt. Banda v. State, 536 So.2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). Moreover, such proof cannot be supplied by inference from the circumstances unless the evidence is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So.2d 1157, 1163-1164 (Fla. 1992).

This issue was preserved. R15:1133-1135.

In finding CCP, the trial judge stated:

> Evidence presented at trial showed that in the days leading up to the murder, the Defendant had a phone conversation with Erin Urban, where she asked him how could he come visit her in St. Petersburg since he did not own a car. The Defendant responded by saying he could just steal a car and kill the person he stole it from. Days later, the Defendant spent the evening with Jayce [sic] McWilliams, telling her it would be a "special night." While together, he drove her to an isolated location in Middleburg where the murder could not be observed. The Defendant then retrieved a hammer from the vehicle, while Jayce [sic] McWilliams looked away and

> smoked a cigarette, the Defendant struck her with the hammer, using great force. The evidence established the Defendant himself brought the hammer that evening, and that the Defendant later told police the first blow was from behind. Erin Urban received a phone call from the Defendant moments after the murder in which she described his demeanor as giddy, and that he showed no signs of emotional distress or panic. These facts establish the Defendant committed the murder in a cold, calculated and premeditated manner, and without any moral or legal justification. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

R5:827.

This Court explained the requirements of CCP as follows:

> The jury must first 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); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification. Thus, unless all the elements are established, we will not uphold the finding of a CCP aggravator. Further, while CCP can be established by circumstantial evidence, it must be inconsistent with any reasonable hypothesis which might negate the aggravating factor.

Gordon v. State, 704 So.2d 1311 (Fla. 1990)(internal quotations and citations omitted)(emphasis in original).

In the present case, the state failed to meet its burden of establishing that the murder was cold or calculated because the evidence is consistent with a reasonable hypothesis that negates these elements, i.e., that this was a spur-of-the-moment murder committed in an emotional frenzy when Jacey refused to loan Martin her car. Martin's version of what occurred is reasonable and

entirely consistent with the evidence in the case. The trial court's reasons for finding CCP, on the other hand, are not supported by the evidence and/or do not negate Martin's version of what occurred.

Martin described what happened to three different individuals on four separate occasions over a one-and-a-half-year period. All Martin's accounts, from his first police interrogation to statements made a year and a half later to a psychiatrist, were detailed, virtually identical, and wholly consistent with the other evidence in the case.

Martin first described what happened to Detective Wolcott on March 20, 2008, at the end of a 3-1/2 hour interrogation (Detective West had left the room). Martin told Wolcott that he wanted the car and Jacey didn't want to give it to him. He felt bad "because the woman that I loved with all my heart was hurt so bad. And I had to be here. I just had to be here." He "just freaked out" and could hardly remember what happened. He used a hammer that was in the car and hit her in the back of the head, he didn't know how many times. They were outside walking around. He was sorry. He didn't know why he did it. He didn't want to do it. "It was like I was sitting there. Like okay, I got to do, I got to go, I got to do this. I have to do this. Something is telling me I have to do this." And, "I am like no, no, no, no. And then I just swung the hammer and it hit her and she fell to the ground and that's when it hit me. It's

like oh my god. What did I do?" After confessing, Martin told Wolcott he "seriously need[ed] some serious mental help." R4:638-640.

Next, about five minutes later, Martin told West what happened (Wolcott was not present). Martin told West he had taken Jacey to a lot of places that night, and while they were out, he got a call from Erin, freaking out and scared because he was with another girl. "And her hurt just overwhelmed me, I guess." And he just "blacked out" when he killed her. He and Jacey had walked around the lake and walked up on the mound and "she stopped and lit a cigarette and I thought I will go get a cigarette too. And I went and got a hammer." When he came back, she was standing there, and he hit her on the back of the head, and she fell down, unconscious. He remembered swinging the hammer and seeing her fall, "and then I just went out and the next thing, I mean it's like a blur." He had no idea how many times he hit her. R4:647-650.

About two months later, on May 28, 2008, Martin told Dr. Krop what happened. They had common interests and she had done him favors, like buy him lunch on occasion, and he wanted to repay her. He took her to Black Creek, a peaceful wooded area. At that time, his girlfriend of a year, Erin, was calling him a lot, worried about him and possibly jealous. Erin called him at 10:30 and asked him what he was doing, whether he was still with "that girl," and whether he was sure nothing was going on. Martin said he could feel

Erin’s pain and felt like he needed to see Erin to make her feel better. He kept thinking about how he needed to get there and “just snapped.” He remembered walking at a fast pace to the car and that there was a battle going on in his head: “No, you don’t have to do this. Yes, I do, and so forth.” He grabbed a hammer from the car and went back to Jacey and, while turning his head away, struck her. It felt like a dream. “It was like watching myself go to the car. Watching myself return. It was like watching a movie from a third person’s point of view. I’m not really sure what happened after that.” The next thing he recalled was driving down the road. He was scared out of his mind.

A year and a half later, on November 25, 2009, Martin talked to Dr. Krop again and described what happened. Jacey had let him use her car, given him rides, and taken him out to eat. The day of the incident, he wanted to show her a good time to repay her. He snapped after his girlfriend called. He felt in his head that he had to be there. He had bits and pieces of it in his memory. He felt like he knew what was going on but couldn’t do anything about it. It was like watching a movie. R5:779-780.

These four accounts--detailed, reasonable, each internally consistent and consistent with each other--suggest a cohesive reasonable hypothesis that Martin lacked the cold calculation and heightened premeditation required to establish the CCP aggravating circumstance.

The evidence establishes, at best, that Martin made a spur-of-the-moment decision to kill after he was denied the use of her car, that he snapped, that this was a panicked killing by someone in a state of emotional upheaval. He wanted the car to go see Erin, he felt an intense need to see her due to her pain which compelled him to act impulsively. Although Martin may have intended to ask Jacey to loan him the car (after all, she had let him use it before), the evidence did not demonstrate that he had a careful plan or prearranged design to commit murder.[13]

This hypothesis[14] of an unplanned murder is consistent with the other evidence in the case. Furthermore, the evidence relied on by the trial court in finding CCP is either not supported by competent, substantial evidence, or is consistent with Martin's version of events. In finding CCP, the trial judge gave four reasons: 1) Martin seemed giddy, and showed no signs of emotional distress or panic when he spoke to Erin on the phone moments after the murder; 2) he brought the hammer with him that evening; 3) the murder was

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[13] The state's theory that he preplanned the murder in order to steal her car, is not even reasonable, given that so many people knew that they were going to be and that they were together that night--her mother, her co-worker, his roommate, Erin--and the car could so easily be traced to him. Jacey even spoke on the phone with her mother in his presence while driving around that night.

[14] Appellant recognizes that his testimony does not have to be believed. His testimony, however, establishes a reasonable hypothesis of an unplanned killing prompted by emotional panic, and if that hypothesis is consistent with the evidence, then the CCP aggravator has not been proved beyond a reasonable doubt.

committed in an isolated place; 4) he previously had commented to Erin about stealing a car and killing the person.

The first reason, "that Erin Urban received a phone call from the Defendant moments after the murder in which she described his demeanor as giddy, and that he showed no signs of emotional distress or panic," is not supported by substantial, competent evidence.[15] Although Erin testified that she talked and texted with Martin in the late evening of March 11 (and the phone records confirm this), she did not describe his demeanor during those interactions.[16] Erin's testimony that Martin seemed giddy referred to his demeanor when he arrived in St. Pete the next morning, at 4 a.m., five hours after Jacey was killed. She said at that time he seemed happy to see her, i.e., he was smiling, or giddy, and didn't exhibit any behavior that "would make [her] think something was wrong with anybody." R10:474. The trial court's finding thus was based on a

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[15] In making this finding, the trial judge no doubt relied on the state's sentencing memorandum, which states, "Moments after having murdered Ms. McWilliams, the Defendant placed a phone call to Erin Urban in which she describes the Defendant as being giddy and showing no signs of emotional distress or panic." R5:819. The prosecutor made the same argument to the jury, "We know that within minutes, of . . . a brutal murder . . . he's calling Erin Urban. . . . Recall Erin Urban's statements about how this defendant appeared to be acting, how he was speaking at the time as he had just hours before or perhaps minutes before killed her. He was happy, calm, excited to see her, no apparent distress." R15:1241-42.

[16] Erin testified that Martin texted her initially, asking if she was working the next day, and she responded that she was. He would not say why he asked this question, only that she would know soon, or that it was a surprise. They continued to talk or text periodically throughout the night and early morning until she went to sleep. R10:469-471.

misapprehension of the facts. Furthermore, that Martin seemed happy to see Erin the morning after the murder does not refute the hypothesis of a spur-of-the moment emotional killing. There is no evidence that when people commit impulsive, frenzied killings, they remain frenzied or otherwise highly charged for a certain number of hours afterwards, let alone at least five full hours. Also, someone "giddy" can easily be misread; since it means flighty, lighthearted, dizzy, someone who appears giddy could actually just be sleepy, or on drugs, or excited about something that isn't obvious, or even just relieved after something highly stressful. One could just as easily hypothesize that Martin was giddy because of the relief he felt at seeing Erin after the stress of what had happened plus his not having slept much in 24 hours. In sum, it would be pure speculation to base the CCP aggravating factor on this evidence.

The second reason relied on by the trial judge, "the evidence established the Defendant himself brought the hammer that evening," does not support CCP because there is an innocent explanation for why Martin had his tool box with him that night, i.e., that he was working that day and had the tools with him when Jacey picked him up. The prosecutor even suggested this explanation during closing argument.[17] That as a matter of his employment he had his tool box when Jacey picked him up does not prove he planned the murder.

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[17] In closing argument to the jury, the prosecutor argued that Martin said he had been "working with his hands on a construction job" earlier that day, "working with tools," and "[w]hen Jacey McWilliams

The third reason relied on by the trial court, that the murder was committed in an isolated place, also does not establish that Martin preplanned this murder. According to Martin's consistent, repeated version of events, he took Jacey to a pretty place that would be new for her and that he was familiar with himself because he had at one time lived near there to repay her for things she had done for him. That they were in a sparsely populated scenic area—they shared an appreciation of nature--when Erin called him, upset that he might be with another girl, was pure happenstance. This fact is consistent with a spur-of-the-moment killing.

The final reason relied on by the trial court, Martin's conversation with Erin, does not establish the murder was preplanned, because it was a general statement, made in jest. See Hardy v. State, 716 So.2d 761 (Fla. 1998). In Hardy, the defendant stole a car and was involved in two shootings the day before the murder. On the day of the murder, Hardy and three friends were stopped by a police officer. Hardy was armed with a stolen hand gun, and when the officer began to pat down the men, Hardy shot the officer twice in the head. One of Hardy's companions described him as "paranoid" and "flinching" when they were stopped by the officer. Several weeks before, Hardy told a friend during a discussion of the Rodney King incident, "If it ever came down to me and a cop, it was

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picked him up that night he brought his tool box." R15:1147; see also R15:1239 ("he was working construction that day, the defendant brought the murder weapon to the table, he brought that weapon to the party").

the cop." In finding the murder calculated, the trial judge relied primarily on Hardy's prior statement, stating, "The Defendant had previously considered and planned what he would do if faced with the situation he found himself confronted with on February 25, 1993." The Court concluded that Hardy's prior statement was insufficient evidence of a cold, calculated plan because it "was a very general statement made several weeks before the murder in reference to what Hardy would do if he were involved in a situation similar to that of Rodney King, who was beaten by police officers." Id. at 766. As with Hardy, Martin's offhand joking comment about killing for a car is insufficient evidence of a prearranged design to kill Jacey.

In sum, Martin's version of what happened establishes a reasonable hypothesis of a non-CCP killing, and that version is wholly consistent with the other evidence in the case. Aggravating circumstances must be proved beyond any reasonable doubt. The evidence does not establish beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner.

Absent the CCP aggravator, there were only two aggravating factors, felony murder/robbery and felony probation. In light of the substantial mitigation presented, this Court cannot say the error in instructing the jury on the CCP aggravator did not affect the jury's recommendation of death. A new penalty proceeding is required.

Issue 3

THE TRIAL COURT ERRED IN REJECTING THE MITIGATING EVIDENCE OF EMOTIONAL ABUSE, SEXUAL ABUSE, AND REMORSE.

To insure the proper consideration of mitigating circumstances, the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence. Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), receded from in part in Trease v. State, 768 So.2d 1050 (Fla. 2000). A mitigator is supported by the evidence "if it is mitigating in nature and reasonably established by the greater weight of the evidence." Ferrell v. State, 653 So.2d 367 (Fla. 1995). The trial court must find a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So.2d 1059 (Fla. 1990). The trial court may reject a mitigating circumstance only if the record contains competent, substantial evidence to support that rejection. Mansfield v. State, 758 So.2d 636, 646 (Fla. 2000).

This Court summarized its standards of review of the trial court's findings as follows:

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

Blanco v. State, 706 So.2d 7, 10 (Fla. 1997)(footnotes omitted).

In the present case, the trial court rejected as unproved the mitigating circumstances of emotional abuse, sexual abuse, and remorse, despite ample evidence to support them.

In finding emotional abuse unproven, the trial court wrote:

> The Defendant presented anecdotal evidence that he was subject to childhood emotional abuse, but did not provide evidence showing how the alleged incidents impacted his ability to know right from wrong, or kept him from being a law-abiding member of society. The Court finds this mitigating circumstance was not proven and has been given no weight in determining the appropriate sentence to be imposed in this case.

R5:829.

The trial court appears to have found that Martin might have experienced emotional abuse but nonetheless found this mitigator not proved because there was no evidence showing how the abuse related to his inability to abide by the law.

This finding was erroneous because there is no requirement that mitigation have a nexus to the offense. See Cox v. State, 819 So.2d 705, 723 (Fla. 2002); see also Nibert, 574 So.2d at 1062 (holding trial court erred in rejecting evidence of abuse due to its remoteness in time). Although a trial judge may assign little weight to a mitigator if there's an "absolute dearth" of evidence supporting the relevance of the mitigator to the particular defendant, Cox 819 So.2d at 723, that's not the case here. Here, there was ample documentation of Martin's dysfunctional family life. The testimony of family, friends, and Dr. Krop established that he suffered emotional and mental abuse from a severely alcoholic mother

and step-mother. He spent six weeks in a psychiatric facility at age 6, an experience that had a devastating effect on him. His father abandoned him when he was 13, a rejection which, according to lay and expert testimony, had a significant impact on him. The trial court's rejection of emotional abuse as a mitigating factor was not supported by competent, substantial evidence.

In finding sexual abuse unproven, the trial court wrote:

> The Defendant provided testimony from his mother that she suspected he had been sexually abused at a young age. She also testified that she could not confirm it had actually happened, only that she suspected it had occurred. The Court finds that this mitigating circumstance was not proven and has been given no weight in determining the appropriate sentence to be imposed in this case.

R5:829.

In rejecting sexual abuse as unproven, the trial court considered only the mother's testimony and did not consider the other evidence of Martin's sexual abuse, including the testimony of Kathleen Walsh, Martin's ex-girlfriend, and Dr. Krop. Walsh testified that Martin was depressed because of his past, including the "molestation." Dr. Krop testified that Martin told him he had been sexually abused by an older adolescent male but never told anyone because he was afraid he wouldn't be believed and that he'd get in trouble. In Krop's opinion, the childhood sexual abuse affected Martin's sexual identity (his sexual relationship with his male roommate was confirmed by the roommate) and relationships with women. Dr. Krop said he believed Martin's history because it was

not self-serving, testing showed no manipulation or malingering, and most of it was verified by other family members. The trial court erred in failing to consider this evidence. See Nibert v. State, 574 So.2d 1059 (Fla. 1990)(trial judges must consider, find, and give weight to mitigation that is presented). The trial court also erred in finding sexual abuse unproved. This mitigator was established by competent, uncontroverted evidence.

Last, in finding remorse unproven, the trial court said:

> The Defendant testified at trial that the apparent remorse he showed at the conclusion of his interview with law enforcement was insincere and an act. The Court finds that this mitigating circumstance was not proven and has been given no weight in determining the appropriate sentence to be imposed in this case.

R5:831.

The trial judge erred in rejecting remorse based on Martin's trial testimony. We know from Dr. Krop's deposition that Martin admitted that his trial testimony was not truthful and that his taped statement was accurate (the jury didn't believe his trial testimony, anyway). Accordingly, there is no basis in the record for concluding the remorse Martin expressed at his interrogation was not genuine. In addition, Dr. Krop testified that Martin said he felt remorseful and kept asking himself how he did it, why he did it, and that it "consumes my brain all the time." A mitigator may be rejected only when competent, substantial evidence contradicts its existence. See Mahn v. State, 714 So.2d 391, 400-401 (Fla. 1998). Martin's untruthful trial testimony does not satisfy this

standard. Competent, uncontroverted evidence of remorse was presented, and the trial court erred in rejecting this mitigating circumstance.

Issue 4

THE TRIAL COURT'S FAILURE TO CONSIDER DR. KROP'S TESTIMONY IN EVALUATING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DEPRIVED MARTIN OF A FAIR SENTENCING PROCEEDING.

Although the defense expert, Dr. Krop, did not testify at the penalty phase, per Martin's wishes, Dr. Krop's deposition testimony, taken December 1, 2009, was admitted into evidence at the March 3, 2010, Spencer hearing. SR2:201. Dr. Krop testified at length about Martin's family history and mental health history. Dr. Krop also testified to the detailed accounts Martin gave of what happened the night of March 11. The sentencing order does not mention any of this evidence. The trial court's failure to consider this evidence deprived Martin of a fair sentencing proceeding.

It is well-settled that the sentencer in a capital case must consider, evaluate and weigh any relevant mitigating evidence in the record. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). Here, Dr. Krop provided considerable testimony that was relevant to the CCP aggravating circumstance and to the proposed mitigating factors, including several mitigators the trial judge found unproved, i.e., emotional abuse, sexual abuse, and remorse. The trial judge did not address any of this testimony in his sentencing order. For example, the trial judge referred only to the mother's testimony about sexual

abuse in finding that mitigator not proved. See Issue 3, supra. There also is no indication the court considered Dr. Krop's opinion that Martin committed the crime while in a dissociative state, a defense mechanism common to sexual abuse victims. Further, there is no indication the trial judge considered Krop's testimony in evaluating the weight to be assigned any of the other mitigating factors.

The trial judge violated the proscription of Eddings by failing to consider this relevant mitigating evidence. A new sentencing proceeding is required.

Issue 5

MARTIN'S DEATH SENTENCE IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988).

> Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.

State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

In the present case, the crime was a situational, aberrant, isolated incident, committed with little premeditation by a 21-year-old with no prior violent history. When compared to similar cases

involving the death penalty, the ultimate punishment is not warranted.

In deciding whether death is the appropriate punishment, the Court must consider the totality of the circumstances in comparison to other cases. The death penalty is not warranted unless the crime falls within the category of both the most aggravated and least mitigated of murders. Almeida v. State, 748 So.2d 922 (Fla. 1999), cert. denied, 528 U.S. 1181 (2000).

Analyzing the aggravating and mitigating factors in light of this Court's caselaw mandates a reduction to life imprisonment. Since the CCP aggravating circumstance was improperly found, the present case involves only two aggravating circumstances, the felony murder aggravator (with robbery as the underlying felony) and the felony probation aggravator. The felony murder aggravator is the weakest aggravating circumstance of all, as it is inherent in every felony murder prosecution. This Court implicitly recognized this in Rembert v. State, 445 So.2d 337, 340-41 (Fla. 1984), in which the Court reduced the death sentence to life where the underlying felony was the only aggravator, even though there were no mitigating circumstances. This Court also has consistently reduced to life cases where the underlying felony is the only aggravating circumstance. See, e.g., Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Menendez v. State, 419 So.2d 312 (Fla. 1982), and has never approved the

imposition of the death penalty based solely on the felony murder aggravating factor where, as here, substantial mitigation exists. See Clark v. State, 609 So.2d 513 (1992); McKinney v. State, 579 So.2d 80 (Fla. 1991); Nibert v. State, 574 So.2d 1059 (Fla. 1990).

In addition to the relatively weak felony murder aggravator, the trial court properly found the aggravating circumstance that Martin was on felony probation at the time of the murder. The trial court assigned this aggravator great weight with no explanation. The weight of this aggravator, however, logically should depend on the nature of the prior conviction. Here, the felony probation aggravator was based on a third-degree felony conviction for stealing an air conditioner from his mother's dilapidated camper, which he then pawned for $5. Martin's mother testified that she had Martin arrested for this only because she hoped the arrest would lead to prison, which she hoped would "cure" Martin of stealing and of his drug problem. Martin's mother further testified that she knew Martin couldn't complete probation because he was too unstable, had no car, no job, and no place to live. Her recommendation was not heeded, however, and Martin was placed on drug offender probation, which he walked away from a week later.

In short, this was a minor property crime committed against Martin's mother, who involved the authorities only to get help for her son's drug addiction. Assigning great weight to the aggravator

under these facts is tantamount to punishing Martin for his drug addiction.

Accordingly, this case involves two of the weaker aggravating circumstances balanced against substantial mitigation, including that Martin was 21 years old and had no violent history. In addition, Martin was the product of an extremely dysfunctional family; had an alcoholic mother; was abandoned by father; was mentally and emotionally abused by mother and stepmother; was sexually abused as a child; spent six weeks in psychiatric facility at age 7; and had a longstanding drug abuse problem.

Despite this background, Martin has positive attributes, which are relevant to the question of whether the death penalty is applicable for him. Martin was described by numerous friends and family as "good-hearted," a good friend, "very sweet and kind," "very loving," and respectful to women. He was the "epitome of a big brother" to his step-sister, Heather, and has had a huge impact on the life of his brother, Matthew, 15, and continues to be a positive influence on him despite his incarceration.

In addition, the trial court specifically found that the crime was a situational, aberrant, isolated incident and that Martin is amenable to rehabilitation and a productive life in prison, both of which militate strongly against the death penalty.

This Court has reversed the death sentence in other cases involving a similar balance of aggravation and mitigation. In

Larkins v. State, 739 So.2d 90 (Fla. 1999), there were two aggravators and no statutory mitigation but some nonstatutory mitigation. The aggravators were prior violent felony, based upon a prior manslaughter and assault with intent to kill and robbery/pecuniary gain. Similarly, in Johnson v. State, 720 So.2d 232 (Fla. 1998), two aggravators, prior violent felony and burglary/pecuniary gain were balanced against the defendant's age of twenty-two and nonstatutory mitigation that included a troubled childhood, previous employment, and that Johnson was respectful to his parents and neighbors. This Court's decision in Wilson v. State, 493 So.2d 1019 (Fla. 1986), also supports a life sentence. In Wilson, the Court struck one aggravator, which left the HAC aggravator and prior violent felony aggravator and no mitigating circumstances. The Court reduced the sentence to life relying on the fact "that the killing, although premeditated, was most likely upon reflection of a short duration." Id. at 1023. The Court took this action even though the offense involved a first-degree murder, a second-degree murder, and an attempted first-degree murder, and the defendant had a history of criminal behavior. The present case is less aggravated and more mitigated than each of these cases, which, unlike the present case, involved defendants with violent histories. See also Kramer v. State, 619 So.2d 274 (Fla. 1993) (reducing sentence to life where there were 2 aggravators and no statutory mitigators even though defendant had previously killed a

man for which he was convicted of attempted murder before the man died); Fead v. State, 512 So.2d 176 (Fla. 1987)(reducing sentence to life despite prior murder).

The present case is not one of the most aggravated and least mitigated of capital murders. Equally culpable defendants have received life sentences. The death penalty is not the appropriate punishment for David Martin, and this Court should vacate his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

Issue 6

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

This issue was preserved by Martin's Motion to Declare Florida's Death Penalty Unconstitutional under Ring v. Arizona. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2003), does not provide for such jury determinations.

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

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

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Martin's death sentence

should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate appellant's conviction and reverse for a new trial; Issue 2, reverse for a new penalty proceeding; Issues 3-4, reverse for resentencing by the trial judge; Issues 5-6, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **STEPHEN R. WHITE**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to **DAVID JAMES MARTIN**, #J30258, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, December 3, 2010.

CERTIFICATE OF FONT SIZE

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

NADA M. CAREY
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

DAVID JAMES MARTIN,

Appellant,

v. **CASE NO. SC10-539**

STATE OF FLORIDA,

Appellee.

_____________________________/

APPENDIX TO
INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
A	Trial judgment and sentencing order