IN THE SUPREME COURT OF FLORIDA

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| JOHN HAMPTON, | : | |
| Appellant, | : | |
| vs. | : | Case No. SC10-0812 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| | : | |

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

# INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
Assistant Public Defender
FLORIDA BAR NUMBER O278734

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

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## STATEMENT OF THE CASE

On June 21, 2007, the State Attorney for Pinellas County, Florida, Sixth Circuit, filed an Indictment charging the Appellant, JOHN LEE HAMPTON, with the first-degree murder of [redacted] occurring on June 10, 2007, in violation of § 782.04(1)(a), Fla. Stat. (2006). (V1/R5-6) Mr. Hampton had a jury trial in June 2009 and was found guilty as charged on June 25, 2009. (V2/R213) The jury then recommended a sentence of death 9-3. (V2/R214) The trial court rendered a sentence imposing death on February 19, 2010. (V2/R282-299)

A Motion for New Trial was filed on February 25, 2010, based on juror misconduct; and the motion was denied on March 26, 2010. Mr. Hampton's Notice of Appeal was timely filed on April 16, 2010. (V2/R304-307,312-318)

## STATEMENT OF THE FACTS

### A. The Trial

[redacted] [redacted] was found dead in her apartment on the morning of June 10, 2007. What happened the day before and part of that evening is not in dispute. [redacted] attended a baby shower for Tierra Jones during the day on June 9, 2007, along with friend Chimere Streater. When [redacted] went home, she took one of Ms. Jones' children with her. Ms. Streater and her children also went home with [redacted]. Bettina Robinson lived across the hall from [redacted] and they would watch each others children. On the evening of June 9, 2007, into June 10, 2007, Ms. Robinson had all the children over in her apartment—her 5, [redacted] 3, and 2 others. Ms. Streater stayed at [redacted] apartment until about midnight drinking. At about 8 p.m. Reginald Span, John Hampton and a young boy stopped by [redacted] apartment. They stayed about 30 minutes, but they returned later without the boy. The 4 played cards, watched TV, and drank shots of gin. Ms. Streater did not see any cocaine being used. Mr. Hampton tried to have a conversation with Ms. Streater, but she did not like him. At one point [redacted] and Mr. Span went out and got more alcohol; and Ms. Streater stayed at the apartment with Mr. Hampton. When [redacted] and Mr. Span returned, that is when Ms. Streater left. (V6/T225-261)

[redacted] did not have a phone, so she would borrow Ms.

Robinson's phone. Ms. Robinson retrieved her phone from [redacted] at 1 a.m. on June 10, 2007, to recharge it. She did see Mr. Spann and Mr. Hampton at [redacted] apartment the evening of June 9, 2007; and Mr. Hampton invited her to stay and play cards. Ms. Robinson did not stay, because she had all the children at her apartment. Ms. Robinson woke up at 10 a.m. when she heard Ms. Jones banging on her door. Ms. Jones had gone to [redacted] apartment to retrieve her child, because she had not been able to reach [redacted] by phone. Ms. Jones knocked on [redacted] door and then walked in through the unlocked door. She found [redacted] on the floor nude. [redacted] looked unconscious, but would not budge when Ms. Jones tried to wake her. [redacted] was on her back with her legs spread, blood in her hair, neck punctured, eyes swollen, face bruised. ([redacted] did not have a bruised face the day before.) Ms. Jones then ran to the neighbor, Ms. Robinson, to use the phone. Ms. Robinson went with Ms. Jones into [redacted] apartment and saw [redacted] on the floor dead. There was blood on the walls and smeared everywhere, the bed was tossed over, and stuff was thrown everywhere. [redacted] did not keep her bedroom this way. Ms. Robinson and Ms. Jones called 911, and the Clearwater Police responded. Ms. Jones covered [redacted] with a blanket before the police arrived. (V6/T242-270)

The Associate Medical Examiner performed an autopsy on [redacted] on June 11, 2007. The cause of death was blunt and sharp injuries—there was blunt trauma injury to the brain that was potentially a life-threatening injury and a stab wound to the neck

that punctured the jugular vein causing significant bleeding and was a life-threatening injury if left untreated. The manner of death is homicide. [redacted] also had hand injures from a sharp instrument that could be consistent with defensive wounds. In addition, [redacted] had bruising and blunt force trauma to her face caused by multiple strikes, abrasions on her back and shoulder and knees, and chemical burns on her thighs. There were two different chemicals found on [redacted]—a generalized petroleum product and a moderate amount of clear blue-tinged gel-like liquid in the vagina. It's possible [redacted] could have received these injuries and remained conscious during the beating. Defensive wounds to the hands would indicate consciousness, and the number of wounds would also indicate a struggle. Most people would feel some degree of pain with these types of injuries. There were no injuries to the genital region or the anal region—no tears or bruising to the vagina, but lack of injury to the vaginal area does not establish whether or not [redacted] was sexually battered. There was no evidence of cocaine in the system, but there was evidence of ethanol in the blood and eyes which could be from alcoholic beverages.

The Associate Medical Examiner could not determine the time of death or a window period during which death occurred. The Medical Examiner's investigator didn't arrive at the scene until 4 hours after the call came in, and the Associate Medical Examiner didn't see the body until the next day. When the investigator went to the scene at 3:15 p.m. on June 10, 2007, rigor mortis was

present. Rigor has three approximate 12-hour periods—the first 12 hours it increases, the second 12 hours it stays constant, and the third 12 hours it decreases. These 12-hour periods, however, are approximate and flexible. Temperatures can affect the timing with warmer temperatures causing rigor to develop more quickly. Physical exertion can also cause rigor to develop more quickly. It's possible the victim could have died between 4-8 a.m., and the victim's struggle could have caused rigor to set in more quickly. When the Medical Examiner's investigator arrived, it is most likely the body was in the second period. The Associate Medical Examiner also could not tell when the victim lost consciousness. It's possible the victim was unconscious relatively quickly into the traumatic sequence of events. (V7/T434-464;V8/T527-534)

The police collected 200-300 pieces of evidence from the victim, the victim's apartment, the dumpster outside the victim's apartment, Mr. Hampton, and the Span residence; however, only a few pieces of evidence could be tested due to testing costs—Mr. Hampton's clothes and socks and jewelry and known DNA via swab, Mr. Span's known DNA from swab, swabs from the victim's vaginal area, swab from Mr. Hampton's foot, and victim's known DNA from her blood. The officers also took photos of the victim and her bedroom in addition to collecting a pair of socks, a bottle of Mr. Clean, and a bottle of lighter fluid from the dumpster outside the victim's apartment. (V6/T333-366;V7/T695-710)

A DNA analyst from a private DNA lab (which was used to handle outsource cases from the FDLE via contract due to a high

volume of cases), Sarah Shields, conducted the DNA testing in this case. She found the following results: A swab from Mr. Hampton's foot had the victim's DNA. A sock from the dumpster had the victim's DNA. Vaginal swabs from the victim showed Mr. Hampton's sperm, and Mr. Span was excluded. A stain from Mr. Hampton's shorts and a swabbing from Mr. Hampton's cross pendant necklace had the victim's DNA. All of these findings were within a reasonable degree of scientific certainty. (V7/T395-425)

The latent print examiner found Mr. Hampton's print on a white shoebox in the victim's home. The examiner did say she couldn't tell how long ago or when the prints were made. Prints can last for years. Just because Mr. Hampton's print was on the shoebox doesn't mean he put it in the victim's bed where the police found it. (V7/T465-483)

A blood splatter analyst examined the scene after the victim's body was removed. It was explained that cast-off splatter is associated with a suspect and the weapon, whereas impact splatter is associated with the victim. Cast-off from the weapon is usually in an arcing pattern, and the analyst saw two different arcing patterns at the scene. Information from the cast-off splatter allowed the analyst to determine there was a minimum of four blows to the victim while she was down low on the ground. This splatter was between low and medium impact indicative of beatings and stabbings and not from a gunshot. Focusing on the floor, the analyst observed a few things. There was a significant amount of pooling of blood in one area showing that the victim had laid in

the area for an extended amount of time to allow for this significant amount of blood. The victim appeared to have been dragged from one part of the room to the other side of the room where she was found. At this point the victim was either unconscious or deceased. There were handprints in blood on the floor that were consistent with two different possibilities, because the analyst could not tell if the handprints were male or female. One possibility was that the attacker was in a missionary position over the top of the victim as she lay bloody on the floor. The other possibility was that the victim was getting up from the floor. There was some transfer of blood where someone is moving around the room depositing blood on various items. There was a lot of transfer blood at the dresser. (V7/T484-515)

Once word got out of [redacted] death, Reginald Span received a call from a friend telling him the news. Mr. Span, his wife Dorothy, and Mr. Hampton drove over to [redacted] apartment. All three were interviewed by the police, and all three testified at trial.

Dorothy Span said Mr. Hampton was married to her sister and was staying with them when [redacted] died. Mr. and Mrs. Span and Mr. Hampton went to a barbeque during the day on Saturday, June 9, 2007. Mrs. Span was tired when they all got home, so she went to bed. When she woke up between 1:30-2 a.m., she did not see her husband. Mr. Span got home at 3:45 a.m., and Mrs. Span was not happy with him. When Mrs. Span asked her husband where he'd been, he did not say anything. He just took his clothes off and got in

bed. He had been drinking and was drunk. She saw Mr. Hampton around 8 a.m. The door alarm rang when Mr. Hampton came in and then came upstairs with a newspaper and a bag of pork skins. Mrs. Span and Mr. Hampton were cleaning the house when the call came in about [redacted]. Mrs. Span always washes her walls and the whole house with bleach. When they got the call about [redacted], all three drove over to [redacted] apartment. At that point Mrs. Span didn't know that her husband and Mr. Hampton had been at [redacted] apartment the night before. It wasn't until she spoke with her family that she was told her husband and Mr. Hampton were the last to see [redacted] alive. While Mr. Hampton was staying at the Spans' home, he slept downstairs on the sofa or the chair. (V6/T302-319)

Reginald Spann lived in Clearwater, Florida, from March 2007 through June 10, 2007; and he now lives in Georgia with his wife and two step-daughters. He met [redacted] through his wife; and he knows Mr. Hampton as Mr. Hampton was married to his wife's sister. Mr. Hampton was staying at the Span home on June 9, 2007. After being at a barbeque all day on June 9, Mr. Span took his wife home at 6 p.m.; and then he took his nephew and Mr. Hampton to [redacted] apartment. Ms. Streater was also at [redacted] apartment. Mr. Span, his nephew, and Mr. Hampton left the apartment after 20 minutes; but Mr. Span and Mr. Hampton went back to [redacted] apartment. The four of them talked, played cards, and drank. Mr. Span and [redacted] went out twice to buy gin and beer ([redacted] broke the first bottle requiring a second trip

out for more). At one point Ms. Streater left, but Mr. Span and Mr. Hampton remained. In the early morning hours Mr. Span had sex with [redacted] for the first and only time. Mr. Span did not ejaculate; because while they were having sex, he looked up and saw Mr. Hampton watching. So Mr. Span stopped. He spoke with [redacted] for about 10 minutes, and then he and Mr. Hampton left about 3:30 a.m.. [redacted] was in bed, nude, with the covers over her when the men left. The bedroom was clean when Mr. Span left. [redacted] didn't get up to lock the door, and Mr. Span couldn't lock it. Mr. Span and Mr. Hampton got back to the Span home about 3:40 a.m., but Mr. Hampton did not come into the house as he was going to visit a girl who lived a block up the road. Mr. Span left the door unlocked for Mr. Hampton and then went up to bed. Mr. Span put his clothes in a pile to be cleaned. Mr. Span next saw Mr. Hampton at 8:40 a.m.; Mr. Hampton was sitting in a chair with a newspaper when Mr. Span came downstairs. The alarm did sound at 8-8:30 a.m. on June 10, 2007, when Mr. Hampton came through the door. Mr. Span took a shower. When Mr. Span got the call about [redacted] Sunday morning, Mr. and Mrs. Span and Mr. Hampton drove over to [redacted] apartment. Mr. Hampton was wearing the same shoes, pants, and necklace he had worn the night before. Mr. Hampton was wearing a different shirt. [redacted] apartment was about a 30-minues walk from the Span home. (V6/T271-301)

Mr. Hampton testified to a different version of how the evening ended at [redacted] apartment. Mr. Hampton's version

agreed with Mr. Span's version up until the time when Ms. Streater left [redacted] apartment about midnight. At that point the stories differ. Mr. Hampton said Mr. Span left the apartment twice to make phone calls; and the second time he left, he was gone for about ½ hour. Mr. Hampton and [redacted] talked during these calls; and during the second call, they had sex. That is how Mr. Hampton's DNA got inside [redacted]. Afterwards, Mr. Hampton and [redacted] went back into the living room, Mr. Span came back, and the three played cards again. Then Mr. Span and [redacted] talked, and Mr. Hampton dozed off on the couch. Mr. Span woke Mr. Hampton up and said it was time to go home. Mr. Hampton said he had to go to the bathroom; and as he walked around the corner, he saw [redacted] on the floor. He ran up to her and gave her CPR, but [redacted] could not move. [redacted] asked Mr. Hampton to help her, but he could not call 911 because he did not have a phone. In addition, he didn't want to call the police; because he had a warrant on him. [redacted] was talking and had a light pulse, but she could not help herself and could not get up. Mr. Span grabbed Mr. Hampton; and when they got to the kitchen, Mr. Hampton saw his socks had blood on them. He took them off and threw them in a little white trash can. Then he saw Mr. Span using dish detergent, and Mr. Span told him (Hampton) to wipe it off. Mr. Hampton wiped, because he didn't want anyone to know he was there. Mr. Hampton saw a bottle of lighter fluid, but he never saw anyone use it. Things got put into the white trash can, including the bottle of Mr. Clean; and he threw the can into the dumpster.

Mr. Span told Mr. Hampton that if anyone asked, they had been at a little hole-in-the-wall club called Blue Chip; but they were not at the club that night.

After they left [redacted] apartment, Mr. Span and Mr. Hampton went straight back to the Span home; and once Mr. Hampton got there, he didn't go back out. They had a beer, and then Mr. Hampton listened to the radio and went to sleep. When Mr. Hampton woke up that morning, Mr. Span was wearing all new clothes and shoes. Mr. Hampton wore the same shoes and shorts, but he changed his shirt. Mr. Hampton helped Mrs. Span clean the house; and when the call came in about [redacted] being dead, Mr. and Mrs. Span and Mr. Hampton went to [redacted] apartment. Mr. Hampton didn't want to go; because he had a warrant on him. Mrs. Span, however, would not let Mr. Hampton stay at the house with her kids alone. So Mr. Hampton went to [redacted] apartment, but he tried to stay away from the police by walking to the front of the building. He was sitting and smoking a cigarette when he saw Mrs. Span and the police coming. Mr. Hampton was then taken to the police station.

At the police station Mr. Hampton gave the police many different stores, and he did this when the police refused to believe his initial version which was the truth. The police kept at him saying people saw him do things and the Spans said Mr. Hampton did things. Mr. Hampton said he did not rob anyone; he did not hurt anyone; he did not rape [redacted]; he did not steal any drugs or money from [redacted]. All he did was give [redacted]

[redacted] CPR. He did not kill [redacted]. Mr. Hampton and Mr. Span left [redacted] apartment together at about 3 a.m.. Mr. Hampton did not walk back to [redacted] apartment by himself, because he didn't know his way around. Mr. Hampton didn't steal a bike, never called a cab, and never used a payphone to call [redacted]. (V9/T714-733)

Mr. Hampton admitted to having four felony convictions, and he was on probation for one of those felonies at the time of [redacted] death. He was in violation status on that probation in June 2007. This was the outstanding warrant he had described. He was also convicted of a crime involving truth or dishonesty. He also admitted to possessing cocaine that night which might also violate him. Mr. Hampton did not go to one of [redacted] neighbors, because he was scared. He ran. He panicked. He didn't use the phone at the Spans' as the phone was in their room. He didn't go to a neighbor's at 3 a.m., because no one would open the door at that hour. He wasn't thinking right. He knew [redacted] would be alone when they left, and there was no phone. (V9/T740-749)

The following are the statements Mr. Hampton gave the police (on the left) and his in-court explanation/recantation of those statements (on the right):

| Mr. Hampton's Statements to Det. Ruhlin as Summarized By the Detective | Mr. Hampton's Trial Explanation/Recantation on Cross-Examination |
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| 1. At the scene Mr. Hampton said he was at a card game at [redacted] home with Mr. Span. Ms. Streater was also there, and they all played cards and drank. Mr. Hampton and Mr. Span left together, and Mr. Hampton spent the night at the Span's house. Mr. Hampton and Mr. Span left [redacted] at about 3 a.m., and Ms. Streater left at about midnight. | 1. What Mr. Hampton said about leaving [redacted] at about 3 a.m. with Mr. Span was correct, but he made no mention of [redacted] dying in his presence or believing Mr. Span committed murder. Mr. Hampton didn't want the police to know he was there, because he was in enough trouble with the warrant in Georgia. Mr. Hampton tried to help [redacted] by putting cold water on her wound and holding a sheet on it. He did clean [redacted] vagina out while she was saying 'help me, help me' and was still alive. |

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| 2. The remaining statements by Mr. Hampton were made at the police station after Mr. Hampton waived his Miranda rights. They all started the same: Mr. Span and Mr. Hampton go over to [redacted] home with Mr. Span's nephew. They stayed a little while then left. After taking the nephew home, Mr. Span and Mr. Hampton return to Ms. Kinnes' home about 7 p.m.. Ms. Streater was also present, and the 4 played cards and drank. Twice during the evening Mr. Span and [redacted] leave for short periods to get gin. Ms. Streater left about midnight. Mr. Span and Mr. Hampton left about 3 a.m.. (At this point the story becomes different at each retelling.) Mr. Span and Mr. Hampton went into the Span home, and Mr. Hampton went to sleep in the living room chair he usually sleeps in. Mr. Span woke Mr. Hampton up that morning and sent Mr. Hampton to the store. Mr. Hampton didn't change his clothes when the Spans started to clean the house, and he helped. | 2. Mr. Hampton never mentioned he left [redacted] in her bedroom begging for help, that he performed CPR, that while begging for her life he cleaned out [redacted] vagina with a rag, or that he left [redacted] to die when he left with Mr. Span. |
| 3. Mr. Hampton said he dozed off after midnight. Mr. Span woke him up, and [redacted] was getting up off the floor. [redacted] said her baby's father was coming over, so they had to leave. | 3. Mr. Hampton was not asked about this version on cross. |

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| 4. Mr. Hampton said Mr. Span woke him up, and he saw [redacted] on the floor. Mr. Hampton tried to give [redacted] CPR. Mr. Span and Mr. Hampton left, and [redacted] was still alive. The men went back to the Span's home, and Mr. Hampton slept in the chair. | 4. Mr. Hampton told the police Mr. Span hurt [redacted], and he (Mr. Hampton) did CPR. However, Mr. Hampton did not talk about cleaning out [redacted] vagina while she was alive and begging for help. |
| 5. Mr. Hampton says they were all smoking marijuana in the bedroom. Both Mr. Span and Mr. Hampton had sex with [redacted]. [redacted] gets upset with Mr. Hampton, but Mr. Hampton doesn't say why. [redacted] grabs a knife and comes at Mr. Hampton. Mr. Hampton pushes her, and she falls on the knife. The officer confronts Mr. Hampton and says [redacted] had more than just 1 wound. | 5. Although Mr. Hampton said he and Mr. Span had sex with [redacted], that did not happen. Mr. Hampton got tired of being asked questions, so he lied. At trial he's telling the truth. The part of the story to the police where Mr. Hampton said [redacted] became upset with him during this threesome and ran at him with a knife, was a lie. Mr. Hampton saying he pushed [redacted] and she fell on the knife never happened. |
| 6. Mr. Hampton says they (Mr. Span and Mr. Hampton) both had sex with [redacted], and then [redacted] wanted them to pay. [redacted] got upset when they didn't pay, and she came at Mr. Hampton with a knife. Mr. Hampton grabbed [redacted] and spun her around. During the spinning around, Mr. Hampton accidentally slit her throat. | 6. Mr. Hampton said he never snatched a knife out of [redacted] hands during a struggle. |

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| 7. The 3 of them were in the bedroom doing cocaine. [redacted] got mad at Mr. Hampton, picked up the knife that was on the dresser used for cutting the cocaine, came at Mr. Hampton with the knife, tussled with Mr. Hampton, accidentally cuts her own throat when Mr. Hampton spun her around. Mr. Hampton and Mr. Span go back to the Span home, and Mr. Hampton spends the night in the chair. | 7. The part about the 3 of them doing drugs (cocaine) before the stabbing never happened and the struggle never happened. |
| 8. Mr. Hampton and Mr. Span have sex with [redacted]. Mr. Span leaves the room, and Mr. Hampton spits on [redacted]. [redacted] gets upset, grabs a knife, and tussles with Mr. Hampton over the knife. Mr. Hampton pulled the knife down away from [redacted] and then thrusted it upwards so as to accidentally stab [redacted]. | 8. Mr. Hampton said it wasn't true when he said he argued with [redacted] because he spit on her. Also, it wasn't true when he said Mr. Span had left [redacted] apartment when he stabbed [redacted]. |
| 9. Mr. Hampton says he did not spit on [redacted]. They just started fighting; and when [redacted] started hitting Mr. Hampton, Mr. Hampton took the knife and accidentally stabbed [redacted]. When Mr. Hampton and Mr. Span leave the apartment, Mr. Hampton throws his socks away. Mr. Span saw this. Mr. Hampton and Mr. Span then went back to the Span home for the rest of the night. | 9. Mr. Hampton said [redacted] getting upset with him, his grabbing a knife, his tussling with [redacted], and his stabbing [redacted] never happened. Mr. Hampton did, however throw the little trash can in the dumpster. |

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| 10. Mr. Span left Mr. Hampton at the apartment with [redacted], and they started having sex doggie style. When Mr. Hampton accidentally went in the wrong hole, [redacted] got upset and grabbed a knife. Mr. Hampton took the knife from [redacted], slashed at [redacted], and accidentally cut [redacted]. Mr. Hampton disposed of his socks and the bedding and left. | 10. The story Mr. Hampton told about Mr. Span leaving Mr. Hampton at the apartment alone with [redacted] wasn't true. The part about him putting his penis in the wrong hole and upsetting [redacted] also never happened. He didn't fight with [redacted] after she hit him, because that didn't happen. He never grabbed a knife from [redacted] dresser, did not slash at [redacted], and did not accidentally cut [redacted] when she fell on the knife. Ms. Hampton never grabbed a knife and never cut anyone. |
| 11. Mr. Hampton says Mr. Span left the apartment, and he and [redacted] had sex; however, they then fought over drugs. Mr. Hampton and [redacted] grappled over a knife. Mr. Hampton got the knife, slashed at [redacted], and cut her. Mr. Hampton then used cleaner to cover up the fact that he had sex with [redacted]. He used detergent to clean the blood and clean out her vagina. He disposed of these items in the dumpster and then went back to the Spans' home. The anal story was a lie; the fight was over drugs. | 11. This story was not addressed on cross. |

12. The final story is that Mr. Hampton, Mr. Span, [redacted] and Ms. Streater are at [redacted] apartment. Ms. Streater leaves at midnight, and the guys leave at 3 a.m..
He said he poured lighter fluid on [redacted], but that didn't happen. He did use the cleaner and rag to clean [redacted] vagina. He said he stole cocaine and $50 from [redacted], but he never stole anything from. [redacted]. He said he used the money to buy cocaine and gin and beer from a bootlegger after hours, but he doesn't know a bootlegger.
The guys go back to the Span home. Mr. Span goes inside, and Mr. Hampton tells Mr. Span that Mr. Hampton is going to meet a girl. Mr. Hampton walks to a payphone and calls [redacted]. [redacted] tells Mr. Hampton he can come over before she locks the door. Mr. Hampton got a cab and went to [redacted] where they had some gin, snorted some cocaine, and [redacted] fell asleep. Mr. Hampton went through [redacted] dresser to steal her drugs, but [redacted] woke up and came at Mr. Hampton with a knife. They fought, and Mr. Hampton slashed and stabbed [redacted]. Ms. Hampton cleaned [redacted] up and disposed of the cleaning and lighter fluids. Mr. Hampton never intended to burn the place, he just used the lighter fluid for cleaning. After he killed [redacted], he got $50 from [redacted] apartment that he used to buy gin and beer and cocaine. Mr. Hampton used the cocaine and

12. The final story Mr. Hampton stated was not true. When he went back to the Spans' with Mr. Span, he never left. He told the police he called [redacted] from a payphone and [redacted] invited him over, but that was a lie. [redacted] had no phone. He told the police he had returned to [redacted] home and they has consensual sex, but that was not quite true—he had consensual sex with [redacted], but he never left the Spans' home once he got there. Even though he told the police he had rifled through [redacted] drawers for cocaine and money, that never happened. [redacted] never reached for a knife, he never grabbed the knife, and he never stabbed [redacted] once in the neck. He said he poured lighter fluid on [redacted], but that didn't happen. He did use the cleaner and rag to clean [redacted] vagina. He said he stole cocaine and $50 from [redacted], but he never stole anything from [redacted]. He said he used the money to buy cocaine and gin and beer from a bootlegger after hours, but he doesn't know a bootlegger.

(V9/742-775)

drank the alcohol. He stole a bike to get back to the Span's but then disposed of the bike.

(V8/T535-565)

After Det. Ruhlin's summaries of Mr. Hampton's various versions were given to the jury, the videotape of Mr. Hampton's statements made at the station was then played for the jury (approximately 2 hours).

(V8/T566-684)

B. Penalty Phase June 25, 2009

The State presented 2 witnesses:

A probation officer from Georgia met with Mr. Hampton on February 26, 2007, and later learned that Mr. Hampton left Georgia without authorization on March 7, 2007. Mr. Hampton was still on probation when he absconded. The probation officer presented 3 documents: (1) Mr. Hampton's Indictment for violation of the state sex offender registry law with a certified copy seal from the Clerk's Office, (2) Mr. Hampton's sentence for probation for violating the state sex offender registry law, and (3) a copy of the Probation Warrant issued on Mr. Hampton by the Probation Officer.

A detective from the Clearwater Police Department spoke with all 3 of [redacted] children—Ashianna (3), Racquel (4), and Dashianna (5). The oldest said she knew her mother was gone and she needed a new momma.

Mr. Hampton presented 7 witnesses:

Mr. Hampton's mother had 7 children. She took Mr. Hampton to live with his grandmother in Georgia. After that 2 other children, Jimmy and Angie, were taken away from her. It's been a while since she's seen Mr. Hampton. Mr. Hampton's father had a total of 17 children, and Mr. Hampton is his oldest son. Mr. Hampton's father did not see Mr. Hampton over his son's life—welfare took care of his son. Mr. Hampton's father was asked if he loved Mr. Hampton,

and the response was “always.” (V10/T989-901,906,907)

Mr. Hampton’s brother Jimmy is 3 years younger than John. When Jimmy was 4 or 5, his momma asked them where they wanted to go. Jimmy stayed with his mother in Florida, but John went to live with his daddy’s people. Prior to that time, Jimmy and John were raised in the same household in Florida; however, their mother’s boyfriend abused them. Once the boyfriend took all the racks out of the oven, turned it on, started to beat the boys, and then tried to put them in the oven. Jimmy ran, but John was caught; and the oven burned John’s arm. The boys were also beaten. After the oven incident, John was taken to Georgia. Although Jimmy had stayed in Florida with his mother, he ran away and was put in foster care. His aunt adopted him, and she would “woop” him if he did something wrong. She raised him to know right from wrong. He had a little bit better life than his brother, John. John’s daddy’s people didn’t care about John, just like their momma; they gave John to the wolves and just cashed the welfare checks and food stamps. John would come to Jimmy’s aunt’s home off and on, but they were not close as brothers. When John got out of prison in 2003/2004, Jimmy showed John love. Jimmy loves his brother, John. Jimmy is self-employed with a mobile detailing business. (V10/T907-914)

Mr. Hampton’s baby sister Angela didn’t really know her brother John until 2003. John left home before she knew him. When Angela left their mother’s home, her father (not the same man as John’s father) came for her and raised her in Georgia. She was

raised to be a better person—her dad taught her right from wrong. Angela did not get that from their mom, nor did she get love from their mom. She didn't have much contact with John growing up, but he moved in with her and her family in 2003 when he had no place else to go. John stayed with them for about 2 years, and Angela's 3 boys love their Uncle John. Angela was like a mother to John, and she taught him right from wrong. Since John has been in Florida, Angela has corresponded with him; and John sends her pictures he's drawn of her and her family. Angela loves John. (V10/T914-92).

Mr. Hampton's brother-in-law and Angela's husband Anthony testified he had known John since 2003. John would stay with them, and his sons knew their Uncle John who took them to the park and store. John had a job and was getting married. John was getting his life together. Anthony cares for John a lot, and his wife loves her brother a lot. (V10/T920-922)

Mr. Hampton's 4th Grade teacher Patricia Ship could not make the trip from Georgia, so her testimony was read. Ms. Ship taught for 32 years in Ashburn, Georgia; and she taught Mr. Hampton in 1986-1987. John was picked on by the other kids because his ears would stick out and then turn inward like a little monkey. He would cry and then act out towards them when he'd had enough. John could draw very well, and he would show her some of his pictures. Ms. Ship never saw anyone come to school to meet the teachers for John like a parent, and no one would come for different functions. She never met anyone who was there for John. John kept to himself

and had a slight slur in his speech. He was not very happy, and he mostly stayed by her. The way John dressed and came to school with the same dirty and tattered clothes over and over, it looked like no one was taking care of him. Once when other children asked if Ms. Ship had children, she said no. John said she wasn't married, so she doesn't have children. One child said you don't have to be married to have kids; her mother had 5 kids and wasn't married. John replied, "Well, not Ms. Ship." The last time she saw John was in 1987. She lost contact after he left 4th grade. (V10/T901-905)

The Classification Supervisor for the Pinellas County Sheriff's Office stated she was in charge of the housing of all inmates in the jail. Part of her job is to keep track of disciplinary reports when the inmates break the rules. These DR's are given by the detention deputies. Mr. Hampton has no DR's in his file since he's been incarcerated. (V10/T923-925)

C. Spencer Hearing December 4, 2009

Mr. Hampton put on 2 witnesses in this hearing—an attorney from Georgia and a forensic psychologist.

Greg Wolinski represented Mr. Hampton, who is from a small rural county that is one of the poorest in the state with one of the lowest average incomes for any place—so low the attorney didn't see how people could survive there. Mr. Wolinski had also represented Mr. Hampton's father, the town drunk, for stealing alcohol. Mr. Wolinski got to know Mr. Hampton in 2006 when he was charged with theft, but the charges fell apart when the witnesses'

stories didn’t make sense. These charges were determined to be fabricated, so Mr. Hampton was released. In 2006 and 2007 Mr. Hampton was arrested. As a registered sex offender, Mr. Hampton was accused of not living where he had told the Sheriff’s Dept. This turned out to be a mistake; but Mr. Hampton was facing 10-30 years, and the State was offering probation. Mr. Hampton took the probation against his attorney’s advice. That was the last time the attorney dealt with Mr. Hampton. Except for Mr. Hampton’s sister and wife, Mr. Hampton had no family support or structure. No one else in the family or in the community would go to bat for Mr. Hampton. Mr. Wolinski had no problems with Mr. Hampton. Mr. Hampton went to prison at age 18 for child molestation, and that is why he had to register in Georgia as a sex offender. The probation he received on June 10, 2007, for failing to register was for 10 years, and this was his first offense for failure to register. (V4/T592-601)

Dr. Robert Berland, a forensic psychologist who has spent at least 95% of his time on death penalty cases since 1986, met with Mr. Hampton shortly after Mr. Hampton was accused. The doctor examined Mr. Hampton’s mental health by administering tests, interviewing Mr. Hampton and 3 family members, and reviewing records—prison records, prison medical records, and school records. The doctor gave Mr. Hampton the MMPI-2 which tells whether the person is being truthful about symptoms or is trying to make the symptoms look worse than they are or is trying to hide symptoms. The test also shows symptoms of mental illness, particu-

larly symptoms of psychosis. Psychosis is a biological form of mental illness commonly caused by brain injury or inheritance or some combination of the 2.

Mr. Hampton's profile from the test indicated an extreme profile that is not faked but genuine. It reflects a psychotic disturbance when the test was taken 6-10 days after the offense was committed on June 10, 2007. Once a person has a psychotic disturbance, the person has it for life. They don't go away. It's a brain dysfunction that shows up on PET scans. Mr. Hampton's most prominent symptom was the delusional paranoid thinking, including hallucinations. On Mr. Hampton's MMPI-2 test Mr. Hampton didn't try to hide or fake or exaggerate his mental illness. Mr. Hampton has a biologically caused mental illness.

Mr. Hampton qualifies for extreme mental or emotional disturbance. Mr. Hampton lived with his sister for a year when he was 28, and the evidence from the sister shows Mr. Hampton was psychotic when he lived with her. If Mr. Hampton was psychotic then, he's been psychotic ever since. Because Mr. Hampton is psychotic, he would qualify for the extreme mental or emotional disturbance mitigating circumstance. Mr. Hampton's sister gave credible testimony over the phone, and the Georgia Prison medical records had 1 statement that was consistent—Mr. Hampton heard his name called. Auditory hallucinations are the most common and usually one of the first hallucinations mentally ill people experience, so that was consistent.

Mr. Hampton's sister observed common psychotic symptoms in-

cluding delusions. Mr. Hampton had a hard time trusting people, and he was frequently concerned about whether people thought badly of him when it didn't look that way to her. She saw her brother staring at people as if looking through them and staring off in space for long periods of time, which is a typical paranoid response. She would go into a room when Mr. Hampton thought he was alone, and he would be talking out loud to himself. Sometimes this frightened the sister, and she would lock her bedroom door when she went to bed. Mr. Hampton frequently thinks he heard something outside the house at night, but there was nothing there. Mr. Hampton would hear people talking and would see a light which was a visual hallucination.

Dr. Berland was not saying Mr. Hampton was substantially impaired in his capacity to recognize the wrongfulness of his act, but he was substantially impaired by his psychotic disturbance from conforming his conduct to the requirements of law because of the extreme mental or emotional disturbance.

The doctor also found some nonstatutory mitigating circumstances from talking to Mr. Hampton's family and having read the Georgia prison records. The evidence is not real strong, but is consistent.

> 1. Head Injury: Prison records show Mr. Hampton had blunt trauma to the back of the head in November 1993. Those with injuries to the back of the head are more likely than average to suffer a brain injury that will interfere with behavior. This goes with the vague indications on the MMPI-2.
>
> 2. Mood disturbance: Prison records show Mr. Hampton was on mild anti-depressants in 1995, 1996, and 1997. In 1997 the prison treated Mr. Hampton with valproic

acid—an antiseizure medication that has mood stabilizing benefits. Mr. Hampton said he had episodes of manic disturbance and depressive disturbance that sounded biological in nature.

3. History of suicide attempts: There are vague references throughout the record. The Georgia prison psychiatric report said Mr. Hampton was hospitalized for 3 weeks at the beginning of an incarceration that they deemed a suicidal gesture. Mr. Hampton admitted to 5 suicide attempts starting at age 12 with drinking Drano.

4. Physical abuse as a child: Mr. Hampton was abused physically as a child by his stepfather. His mother abandoned him so she could stay with the stepfather. When Mr. Hampton was put into an oven, this led to his removal from the home and his mother. Physical abuse becomes meaningful in the presence of psychosis/mental illness. People who are psychotic or mentally ill appear to be more affected by a history of physical abuse, and this affects behavior in later life.

5. Drug abuse: Mr. Hampton told police and a Georgia Prison psychiatric report described Mr. Hampton's alcohol use at 13 and marijuana and cocaine use at 15. This shows a long history of drug abuse.

6. Intoxicated at the time of the crime: Mr. Hampton described to the police cocaine, marijuana, and alcohol use both immediately before and after the offense.

7. Extremely poor parents both behaviorally and genetically: Mr. Hampton's father was incarcerated for most of his childhood. Mr. Hampton's mother was with the stepfather from the time he was very young, and she allowed the stepfather to physically abuse her son. This mother gave up her son rather than give up the stepfather whom she's still with. This mother also denied any abuse to her son by the stepfather. When asked why Mr. Hampton left her home at age 7, she said she couldn't control him. All the evidence the doctor had was to the contrary.

Dr. Berland gave Mr. Hampton a shorter version of the MMPI-2—370 questions instead of the longer version with 567 questions. The doctor scored only the basic validity and clinical scales, because that is what all the research supports. The research

hasn’t been substantial on the other questions, and he’s concerned about the premise on which they are based. So he doesn’t use those other questions with the additional validity scales. The last time the sister saw her brother, Mr. Hampton, was when he was 28; and Mr. Hampton was 32 or 33 at the time of the offense. The doctor never spoke with Reginald or Dorothy Span. Mr. Hampton has a psychotic disturbance that includes hallucinations and delusions; there aren’t other mental health disturbances that include hallucinations and delusions. The last time the doctor saw Mr. Hampton was October 2008, and he did not repeat the MMPI-2 test with Mr. Hampton.

The trial court asked if the doctor did a CAT/PET scan on Mr. Hampton since an extreme emotional disturbance will show up on a scan, but the doctor said he didn’t do a scan. (V4/R602-628)

## SUMMARY OF THE ARGUMENT

Mr. Hampton was convicted by a panel that included a juror facing criminal charges to be prosecuted by the same State Attorney's Office. That juror concealed his arrest when specifically asked if he had ever been accused of a crime. Juror #10 compromised the very foundation of our criminal justice process. Mr. Hampton was denied his right to be tried by a fair and impartial jury in violation of his U.S. and Florida Constitutional rights. Mr. Hampton is entitled to a new trial without any showing of actual harm.

In the alternative, Mr. Hampton was denied due process when the trial court abused its discretion and denied the motion to interview Juror #10. All defense counsel had to show was good cause for not filing within 10 days of verdict, and Juror #10's concealment of his arrest during voir dire demonstrated good cause. Once defense counsel showed Juror #10 was accused of a crime prior to and during the time period he sat on Mr. Hampton's trial, this established a prima facie showing of juror misconduct. Mr. Hampton's case must be remanded for the interview of Juror #10, an evidentiary hearing, and a trial court's decision as to whether or not a new trial is warranted.

Mr. Hampton is entitled to a new trial and/or penalty phase when the State, trial court, and jury were allowed to heavily rely on felony murder based on sexual battery even though the State failed to prove Mr. Hampton sexually battered [redacted]. The State's circumstantial evidence in this case is not inconsistent

with Mr. Hampton's reasonable hypothesis of innocence—that he had consensual sex with [redacted] before she was injured. Because of the heavy emphasis of sexual battery in this case by the State and trial court, the taint of using an unproven underlying felony had to have impacted the guilt phase and the penalty phase. Mr. Hampton is entitled to a new trial and/or a new penalty phase.

Mr. Hampton's entitled to a new trial and penalty phase because of the State's introduction of a large number of duplicative and highly prejudicial photographs of the deceased.

Mr. Hampton's death sentence is constitutionally invalid pursuant to Ring v. Arizona, 536 U.S. 584 (2002). Because Mr. Hampton was not charged with and convicted of the underlying, contemporaneous felonies that supported the felony murder aspect; Ring is applicable in this case.

The trial court erred when it rejected Mr. Hampton's 2 statutory mitigators of the capital felony being committed while the defendant was under the influence of extreme mental or emotional disturbance and of the capacity of the defendant to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(b) & (f), Fla. Stat. (2006). Dr. Berland's opinion was supported by facts which proved these 2 mental statutory mitigators by a preponderance of the evidence.

## ARGUMENT

### ISSUE I

IS APPELLANT ENTITLED TO A NEW TRIAL OR AN OPPORTUNITY TO INTERVIEW JUROR #10 WITH A NEW TRIAL POSSIBLE AS A RESULT OF THAT INTERVIEW DUE TO JUROR MISCONDUCT?

Juror #10 [1] was arrested in Pinellas County on 6-6-09 (arrest affidavit filed on 6-7-09) for possession of drug paraphernalia and loitering and prowling. Juror #10 was selected to be on Mr. Hampton's jury trial with voir dire on 6-22-09, jury trial from 6-23-09 through 6-25-09, jury sentence of guilt of first-degree murder on 6-25-09, and jury recommendation of death 9-3 on 6-25-09. The State Attorney for the Sixth Judicial Circuit in and for Pinellas County (the same State Attorney's Office that charged and prosecuted Mr. Hampton) filed an information on Juror #10 on 7-23-09 charging only possession of drug paraphernalia (a first-degree misdemeanor). This charge was disposed of in a withhold of adjudication and imposition of costs in an order filed on 10-9-09 after Juror #10 entered a no contest plea. This information was not disputed as set forth in Mr. Hampton's Motion to Interview Juror #10 and Amended Motion to Interview Juror #10 (filed 11-19-09 and 12-4-09), the Order denying the motion (filed 12-4-09), the Second Amended Motion to Interview Juror #10 (filed 12-21-09), the Order denying this motion (filed 1-7-10), the Motion for New Trial

[1] Juror #10 is Steven Doetsch and became Juror #4 on the final panel. (V2R317;V5/T185) Although Mr. Doetsch was really Juror #4, the brief lists Mr. Doetsch as Juror #10 for consistency purposes in that the motions, responses and orders refer to this juror either by name and/or by #10.

(timely filed on 2-26-10 after Mr. Hampton was sentenced to death on 2-19-10 pursuant to Fla. R. Crim. P. 3.590(b)), the State's Response, and the Order denying the Motion for New Trial (filed 3-26-10). (V2/R250-258,266-270,304-317)

At voir dire on 6-22-09 Juror #10 filled out a very short Juror Questionnaire, and on that form Juror #10 checked "yes" to either him or any member of his immediate family or any close friend having "been accused of a crime." (V2/R317; Supp. V1/R4) There are no details on that sheet as to when, where, or how many times. During the voir dire the trial court asked the entire prospective jury panel in Row 1, where Juror #10 was seated, whether they or a family member have been accused of a crime and whether they could set this aside. Juror #10 responded that his sister had been accused, he had no problems with the way it was processed, and he could set it aside. (V5/T44-46) The trial court then asked the entire panel about their relationship with law enforcement such as are they employed or a family member in the field of law enforcement now or in the past. The trial court made this category very broad to include prosecutors, criminal defense lawyers, judges, workers in a crime lab or for a crime-related agency or a prison. Although Juror #10 checked "yes" on his questionnaire, he remained silent during the trial court's questioning—even when the trial court asked at the end of that line of questioning if he had hit everyone. (V5/T51-56) And at the beginning of the questioning, the trial court asked the entire panel, starting with Row One, if they or a family member had been the

victim of a crime or needed to summon the authorities to report something. Although Juror #10 had checked “yes” to that question on the questionnaire, he remained silent when the trial court asked. (V5/T32-44)

There were only 4 questions on the questionnaire, and Juror #10 checked “yes” to law enforcement work, victim of a crime, and accused of a crime. He left witness to a crime blank. (V2/R317; Supp. V1/R4)

According to defense counsel’s motions and affidavit, one of Mr. Hampton’s attorneys saw Juror #10 at the Criminal Justice Center in Clearwater (where Mr. Hampton’s trial was held) in August 2009 and mid October 2009. This was after the jury’s 6-25-09 verdict of guilt and recommendation 9-3 of death but before the 2-19-10 sentencing. When defense counsel met to work on the sentencing part of the case, they discussed Mr. Watts having seen Juror #10. After further investigation, defense counsel identified the juror and discovered his pending criminal legal matters at the time of the trial. Defense counsel filed their initial motion to interview Juror #10 on 11-19-09. (V2/R250-256,266-268) The trial court denied the Motion to Interview initially because it was not filed within 10 days of jury verdict and no good cause had been shown for filing beyond the 10-day period required by Fla. R. Crim. P. 3.575. When defense counsel filed an amended motion and affidavit dealing with the timing issue, the trial court still denied the motion because defense counsel failed to discover this information about Juror #10 “earlier.” The trial court faults

defense counsel for failing to investigate the jury panel during jury selection, during trial or immediately after trial. Further, one defense counsel saw Juror #10 at the Courthouse in August and October but didn't investigate til November. (V2/R257,258,269,270)

The issue of Juror #10 was later raised in Mr. Hampton's Motion for New Trial as the only issue. Mr. Hampton argued he had been denied a fair trial because Juror #10 was under prosecution for a crime when he sat on Mr. Hampton's jury. Under § 40.013(1), Juror #10 was not qualified to sit as a juror. (V2/R304-307) The State responded that Juror 10 was not "under prosecution" in June 2009, because the State Attorney's Office did not file an information on the criminal charges until July 23, 2009. The State also pointed to the Juror Questionnaire for Juror #10 which checked "yes" for whether he or anyone he knew having been accused of a crime. According to the State, this put defense counsel on notice of prior contact with the criminal justice system. (V2/R308-311) The trial court denied the motion finding Juror 10 was not "under prosecution" during voir dire or the rest of the trial since the State did not charge him until 7-23-09. The defense also failed to show any prejudice or actual bias on the fairness of the trial, and there was no inherent prejudice. (V2/R312-317)

The trial court erred in denying Mr. Hampton's Motion for New Trial and/or Motion to Interview Juror #10. Although similar, these motions have different requirements and different remedies; so they will be addressed separately.

**A. Motion for New Trial**

The Motion for New Trial was timely under Fla. R. Crim. P. 3.590(b) (filed within 10 days of sentence filed in a death case), so timing is not an issue. And since the only issue raised in this motion is the error dealing with Juror #10, that issue of juror misconduct in not revealing his recent arrest has been properly preserved.

§ 40.013 prohibits certain people from qualifying as a juror, such as those under 18 or law enforcement officers; but should a person lie about their age and sit as a juror although legally not 18 or older, a defendant has to show actual prejudice to obtain a new trial. See State v. Rodgers, 347 So. 2d 610 (Fla. 1977) (defendant did not show actual prejudice when a 17-year-old lied about her age and sat on his jury, so no new trial). There is an exception to this need to show actual prejudice, and that exception is based on § 40.013(1) where a person under prosecution for any crime cannot be qualified to sit as a juror.

In Lowrey v. State, 705 So. 2d 1367, 1368 (Fla. 1998), this Court carved out an exception to Rodgers based on Lowrey's unique circumstances: "[W]here it is not revealed to a defendant that a juror is under prosecution by the same office that is prosecuting the defendant's case, inherent prejudice to the defendant is presumed and the defendant is entitled to a new trial." In Lowrey, the juror had been charged with 2 counts of battery on 1-4-95; and those charges were not disposed of when he sat on the defendant's jury on 5-8-95. About 9 days after the defendant's trial, the

juror entered into a pretrial intervention program; and it was only by coincidence that counsel for Lowery became aware for the first time that a juror was under prosecution at the time of his jury service. This Court found there was "a clear perception of unfairness, and the integrity and credibility of the justice system is patently affected" when a juror with a pending criminal prosecution is allowed to serve as a juror on a case being prosecuted by the same state attorney's office that is prosecuting the juror. Id. at 1369,1370. This Court agreed with a Texas Court of Criminal Appeals that "a juror with pending criminal charges should be 'absolutely disqualified,' and a defendant convicted by a panel that includes such a juror should be entitled to a new trial without any showing of actual harm. Thomas v. State, 796 S.W.2d 196,199 (Tex. Crim. App. 1990)." Lowrey, 705 So. 2d at 1370. This Court held "that the very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror." Id. This Court granted Lowrey a new trial.

In Mr. Hampton's case Juror #10 concealed his pending criminal case by not telling the trial court he had been "accused" of a crime when specifically asked. Instead, Juror #10 talked about his sister's criminal issue. When asked about being employed by law enforcement or being a victim of a crime (him or family), Juror #10 again remained silent, even though he had checked those boxes on the questionnaire. In any case, the questionnaire was vague

enough to include family members, and Juror #10 answered the question about being accused of a crime by talking about his sister. The form gives no other notice that Juror #10 was concealing his own June 2009 arrest; so the form, contrary to the State's claim, put defense counsel on no notice once Juror #10 responded to the trial court about his sister.

It's to be noted that being asked about being "accused" of a crime may be more broad than "under prosecution." In Tucker v. State, 987 So. 2d 717, 723 (Fla. 5th DCA 2008), the Court notes in footnote 3 that the Attorney General's brief in Lowrey revealed the venire was repeatedly asked if anyone had been "accused" of a crime (the District and Supreme Court opinions omit this fact). Although the challenged juror identified 2 crimes he had been accused of, he failed to disclose the one for which he was under active prosecution. The juror's claim that he thought the prosecution was over was considered disingenuous because he had been asked whether he had been accused of a crime, not whether he was under prosecution. Here Juror #10 was asked about being "accused" of a crime, and he concealed his 6-6-09 arrest when specifically asked on 6-22-09. The Tucker court found this concealment in Lowrey significant and a distinguishing fact from that in Tucker where the juror didn't conceal anything during voir dire, because her arrest happened after she was questioned during voir dire. In our case Juror #10 concealed his arrest on 6/6/09 when asked if he had been accused of a crime.

The next important fact this Court noted in Lowrey was that

Juror A got a favorable end to his charges 9 days after the defendant's conviction by entering into a potential intervention agreement. In our case Juror #10 received very favorable treatment after he convicted Mr. Hampton and participated in the jury 9-3 recommendation of death. The State Attorney for the Sixth Judicial Circuit chose not to pursue the loitering and prowling charges, and the trial court accepted a no contest plea, withheld adjudication, and only imposed costs on the possession of paraphernalia charge on 10-9-09. As quoted in Lowrey, 705 So. 2d at 1369 in the District court opinion in Lowrey v. State, 682 So. 2d 610, 611-612 (Fla. 1st DCA 1996):

> We must not sanction even the appearance of impropriety in the administration of justice. In the present case, the juror was able to obtain a favorable resolution of the charges pending against him within a few days of his jury service. And the juror even approached the prosecutor at the courthouse on the day he resolved his case and initiated a conversation about [Lowrey's] case and his own pending battery charge. Even if these events were completely coincidental and innocent, they nevertheless created an appearance of impropriety.

Juror #10's concealment of his arrest when the trial court specifically asked if he had been accused of a crime and the very favorable outcome Juror #10 received a few months after Mr. Hampton's conviction and 9-3 jury death recommendation creates the appearance of impropriety in the administration of justice, casts doubt upon the fairness of Mr. Hampton's trial, and compromises the very foundation of our criminal justice process. As in this

Court's Lowrey decision, Mr. Hampton is entitled to a new trial. No prejudice need be shown by Mr. Hampton.

The question of whether or not Juror #10 was "under prosecution" for purposes of § 40.013(1) so as to be a basis for disqualification when he sat as a juror in Mr. Hampton's trial as legally defined should not be narrowly defined. As pointed out above, Juror #10 was not asked during voir dire or in the questionnaire if he was "under prosecution." Instead he was asked if he had been "accused" of a crime. An arrest for 2 specific criminal charges constitutes an accusation by that of an arresting officer. As stated by this Court in Melton v. State, 75 So. 2d 291,294 (Fla. 1954), "an arrest, in the technical and restricted sense of the criminal law, is 'the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime.' Cornelius, Search and Seizures, 2nd ed., § 47." (Emphasis added.) An arrest has significant impact on a criminal case. For example, it starts the clock ticking in Florida's speedy trial rule in Fla. R. Crim. P. 3.191(a). See Bulgin v. State, 912 So. 2d 307,310 (Fla. 2005). Juror 10 had been accused of a crime and he concealed that fact when specifically asked.

Since this Court should be concerned with the central policy underlying the qualification statute—to prevent the seating of a prospective juror who might vote to convict in hopes of receiving favorable treatment from the State Attorney in his own case (see Companioni v. City of Tampa, 958 So. 2d 404, 415 ftnt. 9 (Fla. 2d

DCA 2007), the focus should be on what the prospective juror can reasonably believe when it comes to seeking to curry favor. Juror #10 knew he was facing criminal charges on 2 different crimes; and although the State Attorney did not file an information until 7-23-09 (almost a month after Juror #10's service), only one charge was filed. It would not be uncommon to start negotiations with a prosecutor before a charging document is filed in order to lessen one's exposure; and although this all may be coincidence, there is an appearance of impropriety that starts before the charging document is filed but after a person has been arrested. It would not be uncommon to have an accused try to perform cooperation (such as acting as a CI) in order to obtain reduced charges or to have the case entirely nolle prossed. The concern about a juror trying to curry favor with the State Attorney begins before the actual information is filed—it begins when the person has been arrested.

The State may decide whether to file charges and what those charges will be, but the State doesn't get to decide when a person gets in trouble and is facing the prospect of criminal charges. Juror #10 knew he was in trouble when he was arrested on 6-6-09 when he was accused of 2 crimes. It was at that point that Juror #10 had every reason to want to curry the favor of the State Attorney for the Sixth Judicial Circuit, and it was only a few weeks later he was given the opportunity to sit on Mr. Hampton's jury in a case being prosecuted by that same State Attorney's Office. Shortly after Mr. Hampton's conviction and the 9-3 jury

death recommendation, the State Attorney filed the information against Juror #10 with only 1 charge instead of 2; and shortly after that, Juror #10 pled no contest—his adjudication was withheld and only costs were imposed. Mr. Hampton was convicted by a panel that included a juror facing criminal charges to be prosecuted by the same State Attorney's Office. That juror concealed his arrest when specifically asked if he had ever been accused of a crime. Juror #10 compromised the very foundation of our criminal justice process. Mr. Hampton was denied his right to be tried by a fair and impartial jury in violation of his U.S. and Florida Constitutional rights. Fifth Amend., U.S. Const.; Art. 1, Sec. 16(a), Fla. Const.. Mr. Hampton is entitled to a new trial without any showing of actual harm.

**B. Motion to Interview Juror #10**

The trial court denied Mr. Hampton's motions to interview Juror #10 about Juror #10's charges because the motion wasn't filed within 10 days of the verdict as required under Fla. R. Crim. P. 3.575 and defense counsel could have discovered the information earlier with due diligence. This last part was based on the fact that co-counsel had seen Juror #10 in the Clearwater Criminal Courthouse in August and October of 2009 but did not investigate further until mid November 2009. The trial court also believed that defense counsel should have investigated the entire jury panel during jury selection, prior to the jury being sworn, during trial, or immediately after trial. (V2/R269-270)

The standard of review of a trial court's denial of a motion

to interview juror is abuse of discretion. Johnston v. State, Case Nos. SC09-780, SC10-75 (Fla. March 24, 2011). The remedy for the improper denial of a motion to interview a juror is to remand the case back to the trial court for the purpose of interviewing the juror or jurors and having an evidentiary hearing thereafter. If juror misconduct is proven, then the burden shifts to the State to rebut the resulting presumption of prejudice. If the State fails to prove the defendant was not prejudiced by the juror misconduct, then a new trial is required. Ramirez v. State, 922 So. 2d 386,390 (Fla. 1st DCA 2006). If the allegations in the motion to interview juror established a prima facie showing of juror misconduct, the trial court abused its discretion in denying the motion. Roland v. State, 584 So. 2d 68,69-70 (Fla. 1st DCA 1991). As was noted in Ramirez, 922 So. 2d at 390, "[d]eciding a case before hearing all the evidence is antithetical to a fair trial."

> [D]ue process envisions a court that "hears before it condemns...and renders judgment only after proper consideration of issues advanced by adversarial parties. In this respect the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals." Scull v. State, 569 So. 2d 1251,1252 (Fla. 1990)(citation omitted)....

Jones v. State, 740 So. 2d 520,523 (Fla. 1999).

In Mr. Hampton's case the trial court focused mainly on timing and trial counsel's lack of "due diligence." As to the 10-day period after jury verdict, the trial court found that defense counsel should have been investigating the jury venire panel during voir dire and the jury panel during and immediately after

trial. In Roberts v. Tejada, M.D., 814 So. 2d 334,344-345 (Fla. 2002), this Court rejected such an onerous burden as a prerequisite to a later valid challenge to juror nondisclosure. Such "conditions should not be imposed that would require additional teams of investigative lawyers to become involved.... The trial lawyer cannot be expected to be both in the courtroom presenting a case and at the same time in a different location...." Roberts, 814 So. 2d at 345.

Because Juror #10 concealed his pending criminal accusations, the 10-day rule is not applicable. It was only through Mr. Hampton's counsel accidentally seeing Juror #10 at the Criminal Courthouse in August and October of 2009 that suspicions were aroused and further investigation took place. In International Union of Operating Engineers, Local 675 v. Kinder, 573 So. 2d 385,386 (Fla. 4th DCA 1991), the Court held the 10-day rule to interview jurors from rendition of verdict did not apply because information concerning juror misconduct was not revealed until 2 months later.

Once the 10-day rule is eliminated, rule 3.575 has no other time limitations. The trial court appears to have applied a 10-day rule to the time of discovery of possible juror misconduct when it found that seeing Juror #10 at the Criminal Courthouse in August and October 2009 was not diligently pursued by investigating the juror in November 2009 and filing the motion in November 2009. No such immediate timing is required by the rule, and filing the motion in November 2009 after seeing Juror #10 in August and

October of 2009 was within a reasonable time period. There was no urgency to the matter, as Mr. Hampton had not even been sentenced as of November 2009.

All defense counsel had to show was good cause for not filing within 10 days of verdict, and Juror #10's concealment demonstrated good cause. Once defense counsel showed Juror #10 was accused of a crime prior to and during the time period he sat on Mr. Hampton's trial, this established a prima facie showing of juror misconduct.

The trial court abused its discretion when it denied the motion to interview. As stated in Ramirez, due process requires hearing the evidence before deciding the merits; and that did not happen here. Mr. Hampton was denied due process under the U.S. and Florida Constitutions when the trial court denied his motion to interview Juror #10. Fifth Amend., U.S. Const.; Art. I, Sec.9, Fla. Const.

The remedy for erroneous denial of the motion to interview is to remand back for the interview, then conduct an evidentiary hearing, and then decide whether or not a new trial is required. Mr. Hampton does not believe these steps are warranted in light of his Motion for New Trial. Mr. Hampton is entitled to a new trial without any further need for investigation or evidentiary hearing. However, if this Court believes that further investigation is needed, then it must remand for the interview, a subsequent evidentiary hearing, and a ruling by the trial court deciding whether or not a new trial is required.

## ISSUE II

DID FUNDAMENTAL AND REVERSIBLE ERROR OCCUR WHEN THE STATE AND TRIAL COURT RELIED ON SEXUAL BATTERY AS THE UNDERLYING FELONY FOR FELONY MURDER IN BOTH THE GUILT AND PENALTY PHASE WHEN THE EVIDENCE FAILED TO PROVE A SEXUAL BATTERY OCCURRED?

Although Mr. Hampton gave many different versions on what happened the night [redacted] died, none of those versions ever included raping [redacted]. Mr. Hampton was always consistent in stating his sex with [redacted] was always consensual, and the injuries [redacted] received were after the consensual sex. Mr. Hampton admitted having sex, which accounted for his DNA being present in [redacted] vagina; and he admitted trying to clean out [redacted] vagina with whatever cleaners were handy after she had been injured to destroy evidence of his sexual encounter with [redacted]. However, he always maintained the sex was consensual, and the State presented no evidence to the contrary. Even the Associate Medical Examiner found no evidence of rape. He testified there was no injury to the vaginal area although the lack of injury did not establish whether or not the victim was sexually battered. Still, there were no injuries in the genital or anal regions—no tears and no bruising. The blood splatter expert could not say with any certainty what the bloody handprints on the floor actually meant—they were consistent with the attacker being in a missionary position over the victim, but the handprints were also consistent with the victim getting up from the floor. The expert could not tell if the bloody handprints belonged to a male

or female. Thus, the blood splatter expert's testimony was inconclusive. The burden to prove sexual battery as a basis for felony murder fell on the State, and the State did not meet this burden.

In closing arguments the State argued first-degree murder via both ways—premeditation and felony murder. (V10/T800-818,833-851) And when the State argued felony murder, it argued all 3 underlying felonies—burglary, robbery, and sexual battery. The State's main focus, however, was always on the sexual battery. The State spent very little time on arguing premeditation. The prosecutor used the intensity of the victim's wounds to argue an intent to kill as well as means to eliminate a witness. (V10/T801-805,840,841) The State moved on to felony murder as an either/or both theory; and although it argued all 3—burglary, robbery, or sexual battery, the focus was on the sexual battery. (V10/T803,806-812,835-839, 849,850,851) The prosecutor spent very little time arguing the burglary or robbery as underlying felonies. (V10/812-816;850,851) Clearly, the State's main theme throughout its entire closing argument—the main motive it attributed to Mr. Hampton, was the sexual battery. The evidence, however, failed to prove a sexual battery occurred.

Although the jury was given several options for finding first-degree murder (premeditated, felony murder based on burglary, felony murder based on robbery, or felony murder based on sexual battery), it is clear the State focused on and emphasized the sexual battery. The failure to prove that sexual battery as the underlying felony in felony murder cannot be deemed harmless

in light of this heavy emphasis. In light of the weakness in the other alternatives and the focus placed on the sexual battery, a new trial is required.

Defense counsel for Mr. Hampton failed to present this insufficiency argument to the trial court, but it is reviewable for the first time on appeal as fundamental error. As per F.B. v. State, 852 So. 2d 226,230 (Fla. 2003), this Court is required to review the sufficiency of evidence to support the conviction in a death penalty case. See Fla. R. App. P. 9.142(a)(6). "This Court always reviews such cases to determine whether competent, substantial evidence supports the verdict, regardless of whether the issue is preserved or even raised on appeal." F.B., 852 So. 2d at 230.

As set forth in the jury instructions, Element 2 of first-degree felony murder required the State to prove beyond a reasonable doubt that [redacted] "death occurred as a consequence of and while John Lee Hampton was engaged in the commission of sexual battery or robbery or burglary; Or, B, the death occurred as a consequence of and while John Lee Hampton was attempting to commit sexual battery or robbery or burglary; Or, C, the death occurred as a consequence of and while John Lee Hampton or an accomplice was escaping from the immediate scene of sexual battery or robbery or burglary." (V10/T855) Sexual battery was subsequently defined as the State having to prove beyond a reasonable doubt that "the act" (Mr. Hampton's sexual organ penetrating or having union with Mr. McKinnes' vagina) was without [redacted] consent. (V10/

T861,862)

The State has no direct evidence of lack of consent—just direct evidence of "the act" which Ms. Hampton always maintained was consensual. Thus, the State based its felony murder sexual battery case wholly upon circumstantial evidence; and when a conviction is based wholly upon circumstantial evidence, the law requires a special standard of review as set forth in State v. Law, 559 So. 2d 187,188-189 (Fla. 1989):

> The law as it has been applied by this Court in reviewing circumstantial evidence cases is clear. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. Jaramillo v. State, 417 So. 2d 257 (Fla. [1982]). Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So. 2d 972 (Fla. 1977); Mayo v. State, 71 So. 2d 899 (Fla. 1954). The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse. Heiney v. State, 447 So. 2d 210 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983), disapproved on other grounds, Williams v. State, 488 So. 2d 62 (1986).
>
> *****
>
> ... A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. See Wilson v. State, 493 So. 2d 1019, 1022 (Fla. 1986). Consistent with the standard set forth in Lynch, if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." 293 So. 2d [44] at 45 (Fla. 1974). The

> state's evidence would be as a matter of law "insufficient to warrant a conviction." Fla.R.Crim.P. 3.380.
>
> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent proof from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. Spinkellink v. State, 313 So. 2d 666,670 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 472 So. 2d 1174, 1176 (Fla. 1985). Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. [footnote omitted]

As noted in Luscomb v. State, 660 So. 2d 1099, 1103 (Fla. 5th DCA 1995), "Although appellee [the State] is not required to conclusively rebut every variation of events which may be inferred from the evidence, it is required to present competent, substantial evidence which is inconsistent with appellant's theory of events."

The State's circumstantial evidence in this case is not inconsistent with Mr. Hampton's reasonable hypothesis of innocence—that he had consensual sex with [redacted] before she was injured.

In Everett v. State, 893 So. 2d 1278,1287 (Fla. 2004), this Court found sufficient evidence of felony murder with a sexual battery because the defendant admitted to having nonconsensual, forceful intercourse with the victim. In Carpenter v. State, 785 So. 2d 1182,1195-1196 (Fla. 2001), this Court found sufficient evidence of felony murder with a sexual battery as opposed to the

defendant's claim that he and the victim and another person had consensual sex with the victim, and the victim was killed after the consensual sex by the other person because the victim had belittled that other person. The evidence showed the victim was a religious, church-going, sixty-two-year-old woman who had not had sexual relations with her close male friend and the victim had several injuries to her vagina consistent with forceful penetration. In Mr. Hampton's case Mr. Hampton never admitted to raping [redacted], [redacted] was not of a "chaste" background, and [redacted] had no injuries to her vaginal area indicative of forceful penetration.

In Tillman v. State, 842 So. 2d 922, 926 (Fla. 2d DCA 2003), the defendant and victim were best friends with no evidence of animosity between them. The defendant testified that he accidentally killed the victim while "messing with" a gun that the victim had handed to the defendant. The defendant didn't believe it was loaded, because his friend was always preaching gun safety. After the gun went off killing the victim, the defendant said he panicked and decided to leave town. Since he had no car and no money, he took the victim's truck and jewelry. There were still, however, valuables in the victim's home; and the home was not ransacked or disturbed. The State argued that the circumstantial evidence showed an intentional shooting with premeditation or felony murder robbery, but the Court held the State failed to present sufficient evidence of either theory. The circumstantial evidence was not inconsistent with the defendant's hypothesis of

innocence that the shooting was unintentional and the taking of the property was not by force but as an afterthought. The Court held "the State failed to present competent testimony or physical evidence to impeach or contradict Tillman's explanation of what happened; to believe the State's version would amount to pure speculation." Id.

In Mr. Hampton's case the State created a purely speculative theory of Mr. Hampton going back to [redacted] home strictly for the purpose of sex and to rape her if necessary. Although Mr. Hampton's statements were always consistent in claiming the sex with [redacted] was consensual, there was no physical evidence to support a sexual assault versus consensual sex as neither the blood splatter evidence nor the victim's vaginal evidence supported a sexual assault, and Mr. Hampton's claim that the victim's wounds occurred after consensual sex were not refuted by the evidence. Mr. Hampton may have made conflicting statements on how and why and whether they fought after the consensual sex, including conflicting statements on his taking money and/or drugs from [redacted] after the consensual sex; but he never waivered from the consensual sex. The reason Mr. Hampton gave for trying to remove his DNA from [redacted] after she was injured doesn't refute his claim of consensual sex before the injuries occurred. The State's heavy emphasis and speculation of Mr. Hampton raping [redacted] and then killing her to shut her up in closing argument was just speculation. The State failed to present competent testimony or physical evidence to impeach or contradict Mr.

Hampton's claim of consensual sex before [redacted] was injured.

Although the issues of premeditation, felony murder robbery or felony murder burglary were for the jury to decide, the State's overwhelming focus on felony murder sexual battery when there was insufficient circumstantial evidence of sexual battery had to have impacted on the jury's verdict. The State's arguing to the jury that Mr. Hampton's motive in going to [redacted] home was to have sex and rape her if necessary and to emphasize that he did rape her was error in light of the insufficient evidence of a sexual battery. That error was not harmless, because the State cannot prove beyond a reasonable doubt that the error "did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuillio, 491 So. 2d 1129, 1135 (Fla. 1986). A new trial is required.

Should this Court believe the error was harmless at the guilt phase, the same cannot be said for the penalty phase. The State's sentencing memo focuses on the sexual battery not only as the main felony committed during the murder but also in the HAC section. Of the 8 ½ pages in their memo, 5 pages stress the sexual battery/ rape as a reason to impose death. (V2/R220-228)

The same emphasis on the sexual battery is in the trial court's sentencing order imposing death. Of the 6 pages devoted to the aggravating factors, all 6 pages refer to the sexual battery/ rape. As with the State's memo, the sexual battery/rape is emphasized as the felony committed during the murder and under HAC, 2

of the 3 aggravators found by the trial court. (V2/R286-293; entire order at V2/R286-299)

In addition, the State and the trial court pointed to the jury's recommendation of 9-3 for death to support the imposition of a death sentence. (V2/R228,298) In obtaining that jury recommendation, the State relied again on emphasizing the sexual battery in its penalty phase opening and closing arguments. (V10/T884-886, 928-935) The prosecutor tells the jury to focus more on the sexual battery of the 3 felonies committing during the course of the murder "because of the violence of that aspect." (V10/T930) And then the prosecutor focuses on the sexual battery in asking for the death penalty. (V10/T931,933) Based on the emphasis the State put on the sexual battery, it cannot be said that the erroneous use of the sexual battery, that was not supported by the circumstantial evidence, had no impact on the jury's 9-3 recommendation of death beyond a reasonable doubt. Nor can it be said that such a tainted jury death recommendation along with the continued emphasis of the unproven sexual battery by the State in its sentencing memo and the trial court in its sentencing order had no impact on the death sentence imposed beyond a reasonable doubt.

The harmless error standard as set forth in DiGuillio requires this Court be persuaded beyond a reasonable doubt that without using that aggravator that the murder was committed during the course of a sexual battery, the remaining aggravating circumstances would have substantially outweighed the mitigating evi-

dence. See Geralds v. State, 674 So. 2d 96, 104 (Fla. 1996). The trial court found only 3 aggravators—prior felony conviction and on felony probation at the time of the murder (great weight); murder committed during commission of robbery or burglary or sexual battery with a heavy emphasis on the sexual battery (great weight); and HAC due to victim's multiple injuries and being raped, and victim begging for help while Mr. Hampton was using cleaners to remove his DNA with the victim being conscious during the beating and rape (great weight). The trial court also found the jury recommendation of death by 9-3 very persuasive. In 2 of the 3 aggravators plus the jury recommendation, the sexual battery/rape played an emphasized part. Although the trial court gave little weight to 5 non-statutory mitigators, the defense still showed evidence of Mr. Hampton's childhood neglect and abuse and abandonment by his parents, a reconnection with his siblings, and his being a model prisoner in the county jail for the 2 years while waiting for trial. Since the sexual battery played such an intregal part in 2 aggravators and the jury recommendation of death, it cannot be said beyond a reasonable doubt that without the sexual battery as a major factor the jury would have recommended death in light of the mitigation or that the trial court would have found that the aggravators and the jury recommendation of 9-3 for death (which may have substantially changed without such a highly inflammatory aggravating factor) would have substantially outweighed the mitigating evidence.

A new penalty phase is required.

## ISSUE III

DID THE TRIAL COURT ERR IN ALLOWING THE STATE TO INTRODUCE HIGHLY PREJUDICIAL AND CUMULATIVE PHOTOS WHICH INFLAMED THE JURY?

The State introduced 26 photos of [redacted] from both at the scene and the autopsy via the Medical Examiner. (Supp. V2/R5-30) Although Mr. Hampton did not object to photos 4A-I and 9A-F, he did object to several photos in group 24 and 25 as cumulative to what was in group 4 and 9 and so highly prejudicial as to outweigh any probative value. (Autopsy photos 32 & 33 were excluded since the Associate Medical Examiner said he didn't need them to testify.) Although the trial court and Associate Medical Examiner recognized some duplication—most noteably 24A being duplicative of 4C & 9A—the trial court allowed all 26 photos to come in at trial. As can been seen from the arguments and the photos themselves as well as the Associate Medical Examiner's testimony, the following photos should not have been introduced into evidence because they were cumulative and highly prejudicial with their prejudicial nature outweighing any probative value:

24A (close up of face) is duplicative of 4C and 9A.

24B (sideview of face) is duplicative of what is shown in 4D & 4E.

24C (inside of right eye) is duplicative and highly prejudicial of 24D.

24F (back) is duplicative of 4I.

24H (front of legs and knees) is duplicative of what can be seen in 4H.

25A & B (chemical of burns on the back and front of the thighs) are duplicative of each other and what can be seen in 4H & 4I.

The fact that some of the duplicative photos may have been closer views, doesn't change the fact that they still depicted the same injury. Showing multiple/cumulative depictions of such sensitive/prejudicial material not only enhanced their prejudicial nature but tainted their probative value to where their prejudicial nature substantially outweighed their probative value. Sec. 90.403, Fla. Stat. (2010) (V7/426-464)

In Pangburn v. State, 661 So. 2d 1182, 1187 (Fla. 1995), this Court set forth the standard of review when dealing with the admission of shocking photos that may outweigh any relevant value these photos might have had at trial. "Generally, the admission of photographic evidence is within the trial judge's discretion and a trial judge's ruling on this issue will not be disturbed on appeal unless there is a clear showing of abuse.... Nonetheless, we have previously determined that the admission of gruesome photographs may be improper when they are irrelevant or other photographs are adequate to support the State's contentions." Id. For example, in Thompson v. State, 619 So. 2d 261 (Fla. 1993), this Court held autopsy photos were improperly introduced when they weren't essential; because other photos introduced were more than sufficient to support the State's claim that the murder was heinous, atrocious, or cruel. In addition, this Court has cautioned trial judges to carefully scrutinize photos for prejudicial effect "when less graphic photographs are available to illustrate the same

point." Pangburn, 661 So. 2d 1187. In Young v. State, 234 So. 2d 341, 347-348 (Fla. 1970), this Court reversed for a new trial based on 22 of 45 photos introduced at trial that were gory and gruesome and in large numbers that were not necessary. This unnecessarily large number of inflammatory photos could have had the same information presented via "less offensive photographs whenever possible, and by careful selection and use of a limited number of the more gruesome ones relevant to the issues before the jury." Id. at 348, emphasis added. In finding reversible error, Young said it was applying its facts to the principle set forth in Leach v. State, 132 So. 2d 329, 331-332 (Fla. 1961):

> [W]here there is an element of relevancy to support admissibility then the trial judge in the first instant and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence.

(Emphasis added.) Lastly, this Court in Young stated it didn't intend to invade the state's discretion in deciding which photos to use at trial or the trial court's discretion in admitting such photos, "but we must insure that both state and trial court act within reasonable limits." Young, 234 So. 2d at 348.

In this case the trial court did not care that there was duplication among the victim's photos as long as the photos weren't identical:

> THE COURT: So I recognize that it's some duplicative; however, A, for instance, in 24A & 4C are somewhat duplicative, but yet A is a wider view and C, D, & E, of course, go to display the type of hemorrhaging in the eyes.

(V7/T431) Yet, having a ‘slightly wide view’ does not mean the images are depicting something different—they are depicting the same thing as the Associate Medical Examiner noted where 9A shows the same thing as in 24 A. (V7/T439,442) All 3 photos (24A, 4C and 9A) show the same close up of [redacted] face, and Mr. Hampton only objected to one (24A). The trial court did not exercise its discretion by limiting the number of gruesome photos, and there was certainly no relevancy for the Associate Medical Examiner in needing 3 photos that depict the same thing. When it comes to the bruising of the right eye, 24C shows the inside of the eyelid as well as the eye itself while 24D focuses more on the eye. The use of eyelid retractors is the only difference in 24D, but there does not seem to be a reason why 24C would not have sufficed for the Associate Medical Examiner’s testimony. (V7/443,444)

The Associate Medical Examiner is not asked about the group of photos in St. Ex. 4 taken at the scene and asked why those photos, already admitted into evidence, could not suffice; but defense counsel argued St. Ex. 4 showed the liquids and bruising and damage to the neck. The State tried to claim a difference between groups 4 and 24 in that the photos at the scene (4) showed the victim with blood while those taken at the Medical Examiner’s office were cleaned up to show traumatic injuries to the tissues. Defense counsel argued that the bruises clearly showed up in group 4 and were not masked with blood. (V7/T429-431) An examination and comparison of the group 4 & group 24 photos, however, clearly

shows the duplication.

As already noted, the trial court recognized the duplication between 4C and 24A. (V7/T431) The close-up on the side of the face in 24B doesn't reveal anything more than what was shown in 4D and 4E, and there is no blood on the side of the face in 4D& E to mask the bruising. The photos of the right eye in 24C & D are duplicative as has already been addressed. The photos of [redacted] back as shown in 24F reveals nothing more than what is depicted in 4I, and there is no blood in 4I to mask wounds. The depiction of [redacted] knees in 24H was supposed to depict some abrasions and scrapes, but even the Associate Medical Examiner could not really see these injuries. The knees depicted in 4H show a better photo of the knees; and again, there's no blood to obscure the bruising and scrapes. Finally, the Associate Medical Examiner uses 25A & B to show the dry dripping stains on the thighs after the liquids had been cleaned from the body (V7/T446); yet, 4H & 4I show these same stains several hours after the liquid had been placed on [redacted]. What 4H & I show is no different from 25A & B, yet the State was allowed to use multiple depictions of the same gruesome images. Seven duplicative images were used out of 26 which amounts to about 27% of the photos of the deceased. Seven photos could have been excluded as the State had other photos that adequately supported the State's contentions. The trial court had the obligation to carefully scrutinize photos and limit the number of the inflammatory photos. By allowing the State to introduce 7 duplicative images, the trial court failed to act within reasona-

ble limits.

In Cole v. State, 701 So. 2d 845, 854 (Fla. 1997), this Court determined there was no abuse of discretion in admitting photos of the deceased as the trial court specifically found each photograph was relevant and not duplicative. In this case we have the opposite—the trial court noted at least one set of duplicate images and made no findings on any of the other 6 duplicative images. The same holding was made by this Court in Taylor v. State, 630 So. 2d 1038, 1042 (Fla. 1993), when the trial court determined whether each individual photo was cumulative, excluded one photo and ordered another trimmed to avoid repetitive and gruesome views of the victim. Such individual determinations of being duplicative or cumulative were not made by the trial court in this case.

Because of the nature of these photos and the large number of repetition, it cannot be said beyond a reasonable doubt that these 7 photos had no impact on the jury's verdict and recommendation and was harmless error. State v. DiGuilio, 491 So. 2d 1129,1138 (Fla. 1986). The State has the burden to show otherwise, but it cannot do so in this case. The large number of duplicative and cumulative photos of the deceased both at the scene and at the autopsy were so prejudicial and gruesome of a portrayal as to inflame the jury and create an undue prejudice in their minds. The jury had two important decisions to make—whether Mr. Hampton or Mr. Span killed [redacted] and whether they recommended Mr. Hampton receive the death penalty. The unnecessary use of a large number of gruesome photos had to have had an inflammatory influ-

ence on the jury’s decision-making process. A new trial and penalty phase are required.

## ISSUE IV

IS FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH EMPHASIZES THE ROLES OF THE CIRCUIT JUDGE OVER THE TRIAL JURY IN THE DECISION TO IMPOSE A SENTENCE OF DEATH, CONSTITUTIONALLY INVALID UNDER RING V. ARIZONA, 536 U.S. 584 (2002)?

Ring v. Arizona, 536 U.S. 584 (2002), declared unconstitutional the capital sentencing schemes then used in Arizona, Colorado, Idaho, Montana, and Nebraska, in which the judge, rather than a jury, was responsible for (1) the factfinding of an aggravating circumstance necessary for imposition of the death penalty, as well as (2) the ultimate decision whether to impose a death sentence. Four states - - Alabama, Delaware, Florida, and Indiana - - were considered to have "hybrid" capital sentencing schemes, the constitutionality of which were called into question, but not necessarily resolved, by Ring. Id. at 621 (O'Connor, J., dissenting).

Unlike Alabama, Delaware, and Indiana, Florida is a "judge sentencing" state within the meaning and constitutional analysis of Ring, and therefore its entire capital sentencing scheme violates the Sixth Amendment. As this Court recognized in State v. Steele, 921 So. 2d 538,548 (Fla. 2006), Florida is now the only state in the country that does not require a unanimous jury verdict in order to decide that aggravators exist and to recommend a sentence of death. Even more tellingly, this Court recently reaffirmed in Troy v. State, 948 So. 2d 635,648 (Fla. 2006), that Florida's procedure "emphasizes the role of the circuit judge over

the trial jury in the decision to impose a sentence of death". The Court also quoted and highlighted the following statement from Spencer v. State, 615 So.2d 688,690-91 (Fla. 1993): "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed." Troy, 948 So. 2d at 648.

The jury's advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with the minimum Sixth Amendment requirements of Ring. It is to be emphasized that 1 aggravator—on felony probation—involved a prior court order; and the other 2 aggravators involved no unanimous finding by the jury—HAC and committed during commission of burglary or robbery or sexual battery. Because the State did not charge Mr. Hampton with any of these felonies separately in an information, the jury made no unanimous factual findings on any of these felonies. In Troy, 948 So. 2d at 653,654, this Court rejected a Ring argument because of the jury's convictions for the underlying, contemporaneous felonies: "Troy was convicted of this crime simultaneously with two counts of armed burglary, two counts of armed robbery, and attempted sexual battery...." In Zack v. State, 911 So. 2d 1190,1202-1203 (Fla. 2005), this Court rejected a Ring argument because the jury found the defendant guilty of first-degree murder and 2 felonies which also supported the first-degree murder under felony murder. "We have explained that a defendant is not entitled to relief under Ring where the aggravating circums-

tance that the murder was committed during the course of a felony was found and the jury unanimously found the defendant guilty of that contemporaneous felony." Zack, 911 So. 2d at 1202. Ring remains an issue in Mr. Hampton's case since there were no contemporaneous felony convictions, and Mr. Hampton is entitled to relief under Ring.

The issue was preserved below (see V1/R92-107,131). Florida's capital sentencing scheme and Mr. Hampton's death sentence is constitutionally invalid.

## ISSUE V

DID THE TRIAL COURT ERR IN REJECTING APPELLANT'S STATUTORY MITIGATORS?

The trial court rejected Mr. Hampton's 2 statutory mitigators of the capital felony being committed while the defendant was under the influence of extreme mental or emotional disturbance and the capacity of the defendant to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(b) & (f), Fla. Stat. (2006). The trial court erred in rejecting these statutory mitigators, because Dr. Berland's opinion was supported by facts.

The trial court appears to have disputed Dr. Berland's practice of using only an abbreviated version of the MMPI-2 test, his failure to administer a PET scan, and his failure to "update" his information with more recent family interviews in rejecting Dr. Berland's opinion on extreme mental disturbance. Thus, the trial court's problem with Dr. Berland's ultimate opinion of Mr. Hampton having an extreme mental or emotional disturbance is not with the underlying facts, but with Dr. Berland's methods. Dr. Berland believed an abbreviated version of the MMPI-2 test gave a more reliable result, even though others in his field may have a different opinion. Having a dispute in the medical field as to which test to use or using a part of a test is a dispute in the medical community, not in the legal community. Giving a PET Scan or not giving a PET Scan when the doctor feels confident in his finding that Mr. Hampton's mental history as related to him by Mr.

Hampton's credible sister, Georgia Prison medical records and the MMPI-2 test which showed Mr. Hampton had a psychotic disturbance (a permanent condition once one has it) which is a brain dysfunction and a biologically caused mental illness, does not mean that Dr. Berland's conclusions must be rejected. It should not be required to give every test possible for a doctor to give his opinion. Dr. Berland found that Mr. Hampton qualified for extreme mental or emotional disturbance, and the facts as provided by prison records, test results, and Mr. Hampton's sister support that opinion.

In Nelson v. State, 850 So. 2d 514, 529-530 (Fla. 2003), this Court upheld the trial court's rejection of the extreme disturbance mitigator; because the record reflected the facts came from the defendant's self-reports to the doctor. The record also reflected that people who saw the defendant the evening before the murder did not see anything out of the ordinary about the defendant's behavior. In our case Mr. Hampton had only recently moved in with his in-laws, and the woman he met at [redacted] home had only met Mr. Hampton that night. No one knew Mr. Hampton well enough to know if he was acting normal or not. All Ms. Streater could say about Mr. Hampton was that she did not like him and told him to leave her alone. Ms. Span went to bed at 6 p.m., so she would not have been able to say how Mr. Hampton was acting at Ms. McKiness' apartment. Mr. Span was with Mr. Hampton all evening, but he never commented on Mr. Hampton's demeanor.

Dr. Berland, however, had spoken to Mr. Hampton's sister who

spent a year with Mr. Hampton a few years ago; and she told the doctor of instances showing Mr. Hampton was psychotic when he lived with her. Being psychotic is a permanent condition and would qualify Mr. Hampton for the extreme mental or emotional disturbance statutory mitigating circumstance in Dr. Berland's opinion. This opinion is supported by facts other than Mr. Hampton's self-serving statements.

As this Court noted in Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994), "[o]pinion testimony gains its greatest forces to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking." Uncontroverted, credible facts supported Dr. Berland's opinion; and the trial court should not have rejected the doctor's opinion. As this Court stated in Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995), and quoted from in Johnson v. State, 660 So. 2d 648, 663 (Fla. 1995), "Walls stands for the proposition that opinion testimony unsupported by factual evidence can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony cannot be ignored. Walls, 641 So. 2d at 390-91."

As stated in Walls, 641 So. 2d at 390, a defendant has to prove mitigators by a "preponderance of the evidence" which is the same as by the "greater weight of the evidence" and both mean "that which is more probable." Mr. Hampton has met this burden. The trial court should not have rejected his statutory mitigator of extreme mental or emotional disturbance.

The trial court also rejected the statutory mitigator that

Mr. Hampton's capacity to conform his conduct to the requirements of law was substantially impaired. The trial court based this rejection in part on the fact that no testimony was presented and no argument was made that Mr. Hampton was mentally retarded. There was also no evidence to support that Mr. Hampton was too drunk to remember the night's events.

Dr. Berland testified that Mr. Hampton was substantially impaired by his psychotic disturbance which prevented him from conforming his conduct to the requirements of law, and his was an extreme mental or emotional disturbance. The underlying facts supporting the doctor's opinion on extreme mental or emotional disturbance have already been established above.

The trial court's belief, however, that the defendant must establish he is mentally retarded to qualify for this offense—even if only in part—is in error. This Court has held that a trial court's rejection of impaired capacity under § 921.141(6)(f), Fla. Stat. (1985), because the evidence did not show that the defendant was "insane" at the time of the killing was erroneous. The fact that the defendant may be sane at the time of the killing did not eliminate consideration of the statutory mitigating factors concerning mental condition. Campbell v. State, 571 So. 2d 415, 418, 419 (Fla. 1990). Because the evidence of the defendant's impaired capacity was extensive and unrefuted, this Court found the trial court erred and ordered the trial court reweigh and evaluate the aggravators and mitigators in a resentencing (there were additional issues with the trial court's findings in his

sentencing order).

As with Campbell, Mr. Hampton should not have to prove his incapacity to conform his conduct to the requirements of law because his capacity is substantially impaired rises to the level of mental retardation. Dr. Berland had other evidence to show Mr. Hampton's impaired capacity—Mr. Hampton was psychotic—as established by his sister, the MMPI-2 showed a psychosis (a biological form of mental illness caused by brain injury or inheritance or both), and prison medical records showed Mr. Hampton had a psychotic disturbance. Other additional facts the doctor referred to for non-statutory mitigating circumstance would also support this statutory mitigator—blunt trauma to the back of the defendant's head likely to cause brain injury that interferes with behavior (prison records 1993), Mr. Hampton was on mood stabilizing medication from 1995-1997 (prison records), history of suicide attempts (from prison records and Mr. Hampton), physical abuse as a child which becomes more meaningful in the presence of psychosis (this was testified to by family members in court), drug and alcohol abuse starting at an early (statements made by Mr. Hampton to police and referred to in a Georgia Prison psychiatric report), and extremely poor parents both genitically and behaviorly (also established via testimony in court). These are the types of behaviors this Court considered in Campbell in finding the impaired capacity mitigator was established.

The trial court erred in rejecting both of these statutory mitigators. Resentencing is required.

## CONCLUSION

Based on the foregoing arguments and authorities, Mr. Hampton is entitled to a new trial, penalty phase, and/or resentencing.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Pamela Jo Bondi, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of May, 2011.

## CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

DEBORAH K. BRUECKHEIMER
Assistant Public Defender
Florida Bar Number O278734
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

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