IN THE SUPREME COURT OF FLORIDA

MARGARET ALLEN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC11-1206
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In this brief, the symbol "R" will designate page numbers of the pleadings in the record on appeal, and the symbol "T" will designate the pages of the transcripts (numbered separately from the pleadings), as renumbered (in certain instances) by the clerk's office. Volumes will be referenced according to the sequential numbers assigned by the clerk's office for the entire record on appeal, and not by the numbering of the court reporters.

STATEMENT OF THE CASE

The State charged the Appellant, Margaret Allen, and two co-defendants, Quinton Allen and James Terry (J.T.) Martin, by indictment with the first-degree felony murder (during a kidnapping) of Wenda Wright, a friend and neighbor of the defendant's, and with kidnapping her with the intent to terrorize or do bodily harm. (Vol. 3, R 332-333) The defendant was arraigned and entered a plea of not guilty to the charges. (Vol. 3, R 338)

Upon the defendant's motion, the cases of the co-defendants were severed, as they had confessed to some degree of culpability and had implicated the defendant. (Vol. 3, R 369-374) Co-defendant Quintin Allen was permitted to plead to the lesser offense of second degree murder and received a sentence of fifteen years imprisonment, followed by five years probation, and co-defendant Martin pled to being an accessory after the fact and received a five-year prison sentence, followed by five years probation (which probation he had already been charged with violating when the case against the defendant proceeded to trial). These pleas were conditional on the co-defendants testifying against the defendant. (Vol. 6, T 859; Vol. 7, T 1123-1124)

The trial court heard and denied a number of motions relating to the death penalty, including motions to declare the death penalty unconstitutional and to

provide for jury findings under *Ring v. Arizona*, 536 U.S. 584 (2002), and a motion to declare the death penalty unconstitutional because the statute and jury instructions require a heightened standard of persuasion on the defendant to obtain a life sentence. (Vol. 3, R 395-413, 414-417, 491-497; Vol. 4, R 592-609, 622, 623, 624)

Prior to trial, the defense moved to preclude the testimony of the new, substitute medical examiner, who did not perform the autopsy of the victim, but simply reviewed the report and photographs from the original medical examiner (who had resigned and moved to Alaska and was unavailable for trial), coming to a materially different conclusion as to the cause of death. (Vol. 5, R 725-726) The court denied the motion without prejudice, granting the defendant a continuance to depose the new doctor. (Vol. 2, R 200; Vol. 5, R 729) Later, during trial, the court refused to allow the defense to admit into evidence, on the grounds of possible confusion to the jury, the report of the original medical examiner who actually performed the autopsy and upon whose report and photographs the substitute medical examiner relied in forming his opinion, although the court permitted the defense to cross-examine the doctor extensively from that report.[1] (Vol. 19, T

[1] Defense counsel conceded that he had orally presented to the jury all of the contents of that report that he wished the jury to hear. (Vol. 19, T 1490-1491, 1497)

1490-1491) Defense counsel also stipulated to the State's Motion in Limine, to preclude the defense from introducing as substantive evidence the original medical examiner's deposition, which motion the court granted pursuant to the stipulation. (Vol. 5, R 752, 756)

A jury trial commenced before the Honorable George Maxwell, Judge of the Eighteenth Judicial Circuit of Florida, in and for Brevard County. In its opening statement, the State noted that they were proceeding only on a felony murder theory and that it did not matter that the defendant may not have intended for the death to occur:

> Remember, premeditation is not an issue in this case. For whatever reason, Wenda Wright died while a felony kidnapping was being committed on her, even if it wasn't intended.

(Vol. 14, T 789)

The trial court refused to allow the defense to question co-defendant Martin as to an inculpatory (and inconsistent) statement made to him by co-defendant Quintin Allen, while they were incarcerated in adjoining cells discussing their testimony in this case, in which the co-defendant allegedly admitted to fatally choking the victim (thus minimizing the defendant's role in the killing). (Vol. 17, T 1290) The trial court ruled that the inculpatory statement was hearsay and, although a statement against Quintin Allen's penal interests, it lacked sufficient

indicia of reliability since the testifying witness, Martin, was disputing what he meant to say in his deposition regarding Quintin's alleged admission to him. (Vol. 17, T 1258-1290)

The trial court denied the defendant's motions for judgment of acquittal as to the kidnapping charge. (Vol. 19, T 1495-1497) The jury found the defendant guilty of first degree felony murder and kidnapping, as charged. (Vol. 5, R 794-795) The court adjudicated the defendant guilty of the crimes. (Vol. 5, R 828-829)

Penalty phase of the trial commenced the day following the guilty verdicts. During cross-examination of one of the defense mental health experts, the prosecutor asked the expert twice whether the defendant's lack of impulse control from her brain damage (to which they testified) could cause her to kill a prison guard, should she simply receive a life sentence.[2] (Vol. 21, T 1855) Following the presentation of additional evidence and argument, the jury recommended a death sentence by a unanimous vote. (Vol. 5, R 858)

A *Spencer* hearing was held, with additional testimony presented by the defense in mitigation, including the testimony of the defendant, and with the state

[2] Defense counsel did not object the first time the question of future dangerousness was asked and answered by the expert (who answered he could not say), but did object the second time asked by the State a short time later on the basis of "speculation." (Vol. 21, T 1855-1856) The court sustained the objection and no motion for mistrial was made.

providing victim impact testimony from several witnesses, including the victim's common-law husband, who indicated that he forgave the defendant, a long-time friend. (Vol. 2, R 230-292) A pre-sentence investigation was ordered. (Filed under separate cover.)

At the sentencing hearing, the trial court sentenced the defendant to death for the first degree murder. (Vol. 2, R 299-301; Vol. 6, R 941-965) In its sentencing order, the court found that the state had proven two aggravating circumstances: that the killing was committed during the commission of a kidnapping [§921.141(5)(d)] (assigning it great weight); and that the killing was heinous, atrocious, or cruel [§921.141(5)(h)] (great weight). (Vol. 6, R 951-953)

With regard to statutory mitigation, the court rejected the factor that the defendant was under the influence of extreme mental or emotional disturbance, merely noting that there was no testimony that she had a drug problem or that her alcohol consumption was in any way connected with the crime. (Vol. 6, R 954) Likewise, the trial court rejected the mitigating factor of the defendant's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law. The court found that although she had suffered a brain injury/dysfunction, that injury/dysfunction did not prevent her awareness of the criminality of her conduct and that she knew what she had done was criminal.

(Vol. 6, R 956-958) Further, the court indicated, her actions after the crime, including telling the victim's common law husband that she did not know where the victim was, do not suggest "that she was unable to conform her conduct to the requirements of the law had she wanted to do so," despite the uncontradicted opinion by all of the medical experts to the contrary. (Vol. 6, R 956-957)

As to non-statutory mitigating circumstances, the trial court did find that the defendant had been the repeated victim of physical and sexual abuse in the past, causing unconsciousness and requiring hospitalization, giving it only "some" weight.[3] (Vol. 6, R 958-959) Further, the court found as mitigation that the defendant suffers from traumatic brain injury, established by the experts' testimony, also assigning it only "some" weight, indicating that the experts could not agree on the extent that any such damage would affect the defendant's planning capabilities of disposing of the deceased's body. (Vol. 6, R 960)

Additionally, the trial court found as mitigation that the defendant had a bleak childhood and grew up in a drug-filled neighborhood, "surrounded by drugs, thugs, and violence." (Vol. 6, R 960-961) The court allotted this factor "some" weight, noting that for some three years of her life (between ages 5 and 8), the

defendant lived instead with her loving grandmother. (Vol. 6, R 960-961) The court also held that the defense had established as a mitigating factor that the defendant was always willing to help others, taking people in and giving them shelter, food and money, but, without reasons, simply gave this factor only "little weight." (Vol. 6, R 961)

The court concluded that the two aggravating circumstances outweighed the mitigating circumstances where there was "no excuse or justification for the Defendant's conduct," sentencing her to death for the felony murder. (Vol. 6, R 962) The court further sentenced her to a concurrent term of life imprisonment for the kidnaping conviction. (Vol. 6, R 963)

Notice of appeal was filed. (Vol. , R 1669-1670) This appeal follows.

[3] In the middle of its analysis of this mitigating circumstance, the trial court, for some unidentified reason, discusses the totally unrelated fact that two of the defendant's three children are in prison. (Vol. 6, R 959)

STATEMENT OF THE FACTS

The victim, Wenda Wright, and the defendant, Margaret Allen, were close friends and neighbors; they had known each other all their lives and often socialized together. (Vol. 14, T 798-800, 816-817) Occasionally, Wright would clean fish for the defendant, do some household chores, or help with her hair in exchange for payment. On February 8, 2005, the victim went to the defendant's house to either take the weaves out of the defendant's hair, do some housecleaning, or clean some fish. (Vol. 14, T 800; Vol. 15, T 882)

Later that day, after Wright had returned home, the defendant again appeared at Wright's house and the two once more left together, with Wright telling her "common law husband," Johnny Dublin, that she would be back. (Vol. 14, T 801-802, 805) Margaret[4] did not seem upset at this point in time. (Vol. 14, T 820) An hour later, the defendant returned to Wright's house in an agitated state and with some scratches on her face and neck, telling Dublin that she thought that Wright had stolen her purse, and receiving his permission to search Wright's bedroom for the missing purse. (Vol. 14, T 804, 806-808, 820, 822) When asked, the defendant told Dublin that Wright was still at the defendant's house, searching

for the purse. (Vol. 14, T 806, 822) The defendant spent at least 45 minutes searching Wright's room, making a mess. (Vol. 14, T 807, 820) Margaret offered Dublin $200 to tell her where her purse was, but Dublin responded that he had not seen the purse. (Vol. 14, T 804) Before Margaret left, Dublin told her that it was time for Wright to return home. (Vol. 14, T 806) Dublin never saw Wright alive again. (Vol. 14, T 802, 821)

Testimony of the actions surrounding the death of the victim came only from a co-defendant, Quintin Allen, who was originally charged with the first-degree murder of Wright and facing the death penalty, along with the defendant and James T. Martin. (Vol. 15, T 858 - Vol. 16, T 1022, 1073) This co-defendant was permitted to plead to second degree murder and receive a 15-year prison sentence plus five years probation in exchange for his testimony against the defendant. (Vol. 15, T 859-860) Quintin Allen at first testified that he was not related to the defendant (and simply referred to her as "Auntie"), but later claimed she was his aunt (and that his family would never call someone "Aunt" who was not related). (Vol. 15, T 865; Vol. 16, T 1023-1024) He also claimed knowing the victim since

[4] Since the defendant and a co-defendant and star state's witness, Quintin Allen, share the same last name, in order to avoid confusion, they will often be referred to by their first names in this brief.

he was seven years old, but had told police he had known the victim since he was a twelve or thirteen. (Vol. 16, T 1020-1021)

Quintin testified that he had gone to Margaret's house to repay a debt, although James Martin testified that Quintin was instead attempting to borrow money from her. (Vol. 15, T 865-866; Vol. 16, T 1136) Martin testified that this is when they discovered Margaret's purse was missing. (Vol. 16, T 1136-1137)[5] Martin was outside the home and did not witness any activities with the victim inside that day.

Twenty minutes after Quintin's arrival, Margaret asked him to stay with her children and she would be right back, saying that her purse was missing. (Vol. 15, T 870-871) Within five minutes, the defendant returned with Wright. Quintin claimed to have heard the defendant at this time accusing Wright of taking her purse, with Wright denying having done so (Vol. 15, T 871-873), but later he testified that he did not hear any of these accusations until much later, having remained outside on the porch. (Vol. 15, T 923-924)

After joining the two women inside the house about fifteen minutes later at the defendant's request (again, at a later time in his testimony, Quintin testified

[5] Quintin identified Martin as one of two painters at Margaret's house, while Martin testified he was working on Margaret's car. (Vol. 15, T 868, 887; Vol. 16, T 1128-1130)

differently, that he remained on the porch until much later), Quintin testified that Wright was seated on a sofa in the defendant's bedroom, with Margaret accusing her of stealing the purse. (Vol. 15, T 874-883) Quintin and Margaret searched the house for the purse for 20 to 30 minutes, while Wright merely sat on the couch. (Vol. 15, T 886-887) The defendant kept accusing Wright of taking the purse in a direct and aggressive, but not particularly loud, voice. (Vol. 15, T 889-890) Margaret had Quintin plat her hair, threatening the victim that she had better tell her the location of her purse by the time Quintin was finished with her hair. (Vol. 15, T 895-896) During the hairstyling, Wright continued to deny any knowledge of Margaret's purse, and, for the first time, asked the defendant to allow her to return home. (Vol. 15, T 896-897) The defendant responded with continued accusations, saying she "did not want to hear that shit, bitch give me my purse." (Vol. 15, T 897) Quintin Allen testified that he did not see anything between any of the parties that would have prevented the victim from simply leaving at that point. (Vol. 15, T 898)

Immediately after Margaret's hair was finished, Wright jumped up and ran over to the defendant, dropping to her knees and hugging the defendant's waist, while crying and begging the defendant to let her go home to her kids. (Vol. 15, T 899) Although the defendant owned a gun that was kept on a shelf in her bedroom,

according to Quintin, the defendant had not pointed the gun at anyone, and Quintin did not know if the victim ever saw the gun that day. (Vol. 899-900) (Later, he testifies to the contrary, that the defendant did pull the gun out. [Vol. 15, T 903]) Quntin indicated that at this point the defendant told the victim to stop crying those "fake ass tears" and to tell her where the purse was. When the victim started walking to the front door, the defendant hit her in the back of the head, knocking the victim to the ground, who rolled up in a ball and continued to protest her innocence, while the defendant continued to punch her with her fist. (Vol. 15, T 901-902, 907) In his statement to police, Quintin told them that the defendant instead punched the victim in the face, not the back of the head. (Vol. 16, T 1035)

Now, Quintin Allen claims, the defendant did retrieve her gun, pointing it at them and threatening Quintin, demanding that he assist her in detaining Wright. (Vol. 15, T 903) Allen admitted at this point, being afraid of the defendant, he did hold the victim's arms and legs down, asking her to give Margaret her purse back. (Vol. 15, T 905) Quintin, though, had told police and later in his trial testimony that he never held the victim down. (Vol. 16, T 1036, 1054) He claimed, inconsistently, that he did hold her down, then that he did not and Wright instead had her legs tied together and he merely stood beside her. (Vol. 16, T 1036) In his deposition, Quintin recounted that the victim was not restrained in any way, by

rope or any other means, and that he did not hold her down at all, but merely stood by her side. (Vol. 16, T 1054-1055) He testified a second time at trial that he did hold her down, and later, on re-direct exam in response to a leading question, admitted that he held her down sometimes and other times he did not. (Vol. 16, T 1036, 1054, 1073) Quintin admitted that his trial testimony was inconsistent and not accurate, that his statement to the police was the truth. (Vol. 16, T 1055)

While Quintin either was or was not holding down the victim (and if he was, it was because he was afraid of the defendant), the defendant went to her bathroom, retrieving bleach, rubbing alcohol and beauty care products, all of which she then poured over the victim's face and in her mouth and eyes. (Vol. 15, T 903-906; Vol. 16, T 1036-1037, 1042-1044, 1077-1078) Quintin later indicated that he did not know for sure what the chemicals were but also admitted that the bleach and beauty products were clearly marked, and additionally that he did not recall if the entire contents of all the products were poured on the victim or only some of them one at a time. (Vol. 16, T 1038-1040, 1042-1044, 1073-1074, 1076-1078)

The defendant then went to her closet, pulling out three or four belts, beating the victim with them, and instructing Quintin to tie her legs with one of them. (Vol. 15, T 908-910) Quintin complied and tied the victim's feet together with one of the belts, the victim never struggling to prevent this. (Vol. 15, T 909-910) When

the defendant's oldest daughter came into the room, according the Quintin, the defendant had her rip off a piece of duct tape and attempted to place it over Wright's mouth. However, since her face was wet with the bleach and other beauty products, it would not stick and the defendant placed a belt around Wright's neck, pulling it tight by both ends. (Vol. 15, T 911-915) Quintin testified that Margaret held the belt tight for about three minutes, with Wright pleading for her to stop as she was "about to piss on [her]self." (Vol. 15, T 913-915) However, he told police that the defendant held the belt for only 30 seconds to one minute. (Vol. 16, T 1057) Quintin also testified that only one belt was used, a plastic belt, but also claimed that when that belt broke, a second, cloth belt was used to strangle the victim. (Vol. 16, T 1055-1057) During this time, the victim started shaking and, after the three minutes did not move anymore. (Vol. 15, T 914-915) The defendant checked Wright's pulse, at her daughter's instruction, and indicated that she was merely unconscious and not dead. (Vol. 15, T 915)

Although at first not admitting to participating in this, Quintin later acknowledged to also holding the belt around Wright's neck, then claimed that he did so only after the initial three minutes, holding one end loosely for an additional two minutes. (Vol. 15, T 913-917) He denied killing her. (Vol. 16, T 1068-1070) The defendant then grabbed a sheet and directed him to tie the victim's hands

together. (Vol. 15, T 916, 918) However, Quintin testified in his deposition that the defendant directed him to get the sheet, which he did. (Vol. 16, T 1059-1060)

During his initial narration at trial of the events, Quintin did not mention that the defendant left her house with Wenda Wright there, but later in his testimony he stated that, at some point prior to beating and restraining the victim, and while Quintin was still out on the porch, the defendant left to go search the victim's house for her purse, instructing Quintin to not allow Wright to leave. (Vol. 15, T 920)

During this time period, while the defendant was away searching the victim's house for her purse, Wright opened the door and started to leave, and Quintin told her that his "auntie" did not want Wright to go anywhere. (Vol. 15, T 922-923) He claims that he did not restrain the victim in any way to prevent her from leaving, other than to tell her that the defendant did not want her to leave. (Vol. 16, T 1060) Wright inquired how long it would be and voluntarily returned inside the house, closing the door behind her. (Vol. 15, T 923) Quintin Allen testified (contrary to earlier testimony recounted above), that at this time he still had not learned that the defendant was accusing Wright of stealing her purse. (Vol. 15, T 924) Contrary to Dublin's testimony, Quintin disputed that the defendant

was gone for any longer than 15 to 20 minutes to search the victim's house, and that it could not have been 30 minutes to an hour. (Vol. 16, T 1034)

After the strangling of the victim, at which time Quintin thought she was only unconscious, he left on the ruse of going to buy a cigar to smoke some marijuana. (Vol. 15, T 925) The defendant permitted him to leave after initially balking at the idea, claiming that he would not return. (Vol. 15, T 925-926) He went to the store, and had someone pick him up there, spending the night at his cousin's house, and refusing to answer calls to his cell phone from the defendant. (Vol. 15, T 927-928) Quintin claimed at trial that the defendant first drove him to the victim's house the day of Wright's disappearance immediately after the strangling, where Dublin inquired of Wright's whereabouts; however, Dublin testified that it was the following day that this occurred. (Vol. 14, T 810-812; Vol. 15, T 962)

James Martin, after finishing work on the defendant's car and smoking some crack cocaine, slept at the defendant's house, Quintin Allen (who Martin was afraid of, knowing of his prior violent behavior) having told him he could not leave. (Vol. 17, T 1250-1251) Martin knew nothing about Wright's death until the next morning when he woke up and saw her body in one of the rooms. (Vol. 16, T 1148-1170) Upon inquiry, the defendant informed Martin that "**He** must have hit

her too hard." (Vol. 16, T 1170) Wright's hands, Martin indicated, were tied together with a bandana. (Vol. 16, T 1170) Margaret told Martin that she needed his help. (Vol. 16, T 1170) "We got to do something, like help bury her," Margaret said. (Vol. 16, T 1171)

Later that next morning, Margaret and Martin found Quintin at the barbershop, had him get in the car that the defendant was driving, and, according to Quintin, Margaret told him that Wright was dead, that she had not told her fast enough where her purse was, "and then she died." (Vol. 15, T 930) Martin, however, testified that Quintin already knew what was going on. (Vol. 16, T 1177) The defendant instructed Quintin that he was going to assist her in disposing of the body before her children came home from school. (Vol. 15, T 930)

Details surrounding the disposal of Wright's body were provided only by Quintin Allen and Martin, who had been housed in adjoining cells in jail and had discussed the case between themselves. (Vol. 17, T 1257-1258)

The trio, with the defendant driving, went to a local Lowe's store and purchased a sheet of plywood, to be used in disposing of the body. (Vol. 15, T 930-935; Vol. 16, T 1184-1189) A Lowe's surveillance video and a store clerk verified that the trio did purchase a piece of plywood there which they had the store cut for them, and with the defendant initially arguing with the clerk about paying for the

entire piece when they only needed the cut piece. (Vol. 15, T 999-1003; Vol. 16, T 1083-1088)

Quintin testified at trial that, before returning to her house, the defendant drove to a car repair business, where they borrowed a dolly to move the victim's body, which testimony was confirmed by an employee of the business. (Vol. 15, T 937; Vol. 16, T 1096-1118) However, when confronted with his statement to the police, Quintin then testified, consistent with his statement to the police, that when they returned to the defendant's house after the trip to Lowe's, the dolly was already there with Wright's body already loaded on it. (Vol. 16, T 1065-1066) Quintin repeatedly swore that his prior statement to the police was the truth, rather than his trial testimony. (Vol. 16, T 1055, 1060, 1066) The car repair employee indicated that Quintin, seated in the front seat, did not appear at all distraught. (Vol. 16, T 1118)

Upon returning to the defendant's house, Quintin observed that the victim's body had been moved to another room (in which he had not assisted) and that it had been wrapped in a rug and tied with a yellow nylon rope. (Vol. 15, T 938-946) Martin's testimony, however, was that all three went to get the dolly first (with Quintin hiding his face from the auto repair employee), then returned home, where Martin and Quintin wrapped the victim's body in a rug and tied it with the yellow

rope, “Margaret didn’t want to participate in that, just me and him.” (Vol. 16, T 1180-1181) After they had difficulties loading the body, Martin said, is when they went to Lowe’s to purchase the plywood. (Vol. 16, T 1183-1189)

Quintin and Martin loaded and tied the body to the dolly (or was it already tied to the dolly as Quintin’s police “truthful” statement said?), and, using the plywood as a ramp, attempted to load the deceased into the truck. (Vol. 15, T 948) However, the body was not tied onto the dolly straight, so it rolled off, and the trio quickly pushed it back inside the house to avoid detection and re-tie it. (Vol. 15, T 948) This time, they were successful in using the plywood as a ramp and loading the body into the SUV. (Vol. 15, T 955; Vol. 16, T 1191)

Margaret drove them around looking for a suitable place to bury the body, at last settling on a site on a dirt road off of Highway 46, after first stopping at the defendant’s mother’s house to get a shovel. (Vol. 15, T 956-959; Vol. 16, T 1192-1193; Vol. 17, T 1215) Martin, however, in his deposition, had indicated instead that it was Quintin Allen giving the directions for the burial of the body. (Vol. 17, T 1255) Martin also told one of the defendant’s relatives that it was Quintin Allen who had done this. (Vol. 17, T 1256)

With Quintin and Martin digging a hole, the defendant stood watch on the roadway. (Vol. 15, T 963; Vol. 16, T 1192-1193; Vol. 17, T 1214-1215) After

Martin unloaded the body off of the truck and dropped it into the hole, they proceeded to cover the body with the removed dirt and replaced the scattered debris on top, having first removed the rug from around the body and replacing it on the truck. (Vol. 15, T 964-968; Vol. 17, T 1219-1225) After finishing with the disposal, the defendant drove them off, thanking God that the task was done. (Vol. 15, T 973)

The defendant drove them to a convenience store or a truck stop (depending on whose testimony), where Martin threw the rug into a dumpster. (Vol. 15, T 974; Vol. 17, T 1227) According to Quintin, the three then went to pick up the defendant's two daughters from school, returned home and removed the plywood, and Martin washed the yellow nylon rope (Martin said nothing about picking up the daughters from school first). (Vol. 15, T 974-975; Vol. 17, T 1232-1233)

Quintin testified that, after showering and changing clothes and upon leaving the defendant's house, he met an old friend, Crystal Penson, to whom he confided about the previous days' activities. (Vol. 15, T 975-977)[6] Crystal's parents called police and arranged for Quintin to talk to them the next morning, but it was not until later the next night that he met with them (having other things to do that day).

[6] Crystal was deceased by the time of the trial. (Vol. 15, T 977)

(Vol. 16, T 1067-1070) There, he informed the police about Wright's death and led them to her body. (Vol. 15, T 980-981)

The defense attempted to question Martin at trial about statements Quintin Allen had made to him while they were both incarcerated together, that Martin had relayed in his deposition, that Quintin confessed to him that he used a special leg hold to choke the victim, the same type of leg hold he used to "nearly choke" a fellow inmate during their incarceration. (Vol. 17, T 1258, 1261-1265) During a proffer, and being confronted with his deposition statement to that effect, Martin denied making that statement during his deposition (despite the fact it was recorded by a court reporter). (Vol. 17, T 1262, 1264) The state objected to the third-party confession evidence being presented to the jury, claiming that because Martin now denied making the statement during his deposition (again, despite it being so recorded by the court reporter), that the testimony was unreliable and must be excluded pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973). (Vol. 17, T 1258, 1265-1268)

At the burial scene, police found the body where Quintin had indicated. (Vol. 18, T 1324, 1351-1356) Also recovered at the scene was a cigarette butt that contained James Martin's DNA, Martin having dumped the truck's ashtray at the site. (Vol. 16, T 1221; Vol. 18, T 1357, 1402) Police also recovered several sheets

of plywood from the defendant's house, as well as empty bleach and beauty product containers and a belt from the garbage can. (Vol. 18, T 1325, 1327, 1334, 1343-1344, 1350-1351) The containers were not tested for prints and no testimony was elicited at trial that the recovered plywood or belt were ever tested for any evidence of the crime. (Vol. 18, T 1382)

Doctor Whitmore, the original medical examiner, who actually performed the autopsy on the deceased, opined that cause of death was from homicidal violence (beating resulting in bruises all over her body) and cocaine intoxication, with morbid obesity, a weak heart, and cirrhosis of the liver, being contributing factors. (Vol. 18, T 1363; Vol. 19, T 1470-1471) Despite close examination, including examining the layers beneath the skin, Dr. Whitmore did not observe any indication of strangulation or ligation. (Vol. 19, T 1471) When Dr. Whitmore retired, moving to Alaska and not making himself available for the trial, the state had new medical examiner, Dr. Qaiser, review Dr. Whitmore's report and photographs from the autopsy; he never personally examined Wright's body. (Vol. 18, T 1361-1362)

Dr. Qaiser, the substitute medical examiner who did not perform the autopsy on the victim or exhume the body for further examination, testified to his opinion of the cause of death solely from reviewing Dr. Whitmore's autopsy report and

photographs. (Vol. 18, T 1407-1418, 1472) He disagreed with Dr. Whitmore's conclusions as to the cause of death. (Vol. 19, T 1470-1471) Dr. Whitmore found the victim's neck to be symmetrical and free of trauma. (Vol. 19, T 1471) However, Dr. Qaiser, having read the police reports, opined that he had found on the photographs, where Dr. Whitmore's autopsy did not, evidence of ligation, and opined that this was the cause of death, along with the contributing factors of morbid obesity (the victim weighed 311 pounds), cardiac issues, and cirrhosis. (Vol. 18, T 1434-1436, 1439, 1442, 1445-1446; Vol. 19, T 1470) Qaiser did not agree with Dr. Whitmore's opinion of cocaine intoxication, claiming that the amount of cocaine in Wright's system was minimal. (Vol. 18, T 1443-1445)

Dr. Qaiser also described multiple bruising to the victim's head, face, torso, hand, arm, thigh, chest, and abdomen. (Vol. 18, T 1426-1433, 1436) He also found a mark on the victim's wrist, not noted by Dr. Whitmore, that "could possibly" have been a ligation on the wrist, indicating some restraint. (Vol. 18, T 1433; Vol. 21, T 1731) Dr. Qaiser admitted that he could not date the bruises to opine whether they occurred during this incident which caused her death, but stated only that they were definitely within a few days of her death. (Vol. 21, T 1718) The autopsy found no evidence of any caustic substances poured into her mouth or

eyes. (Vol. 19, T 1487; see also Vol. 18, T 1426-1438 [no testimony of any damage to victim's mouth, throat or eyes from any caustic substance])

The victim would have lost consciousness from the blows to her head, and the doctor could not say that she ever regained consciousness. (Vol. 18, T 1447-1448; vol. 19, T 1474) If, though, the victim was conscious after the blows to her head (as Quintin had indicated, never having testified that she lost consciousness as the doctor opinied), the ligature strangulation would have caused unconsciousness within 10-20 seconds and death within four to six minutes, according to Dr. Qaiser. (Vol. 21, T 1734-1735) During the guilt phase of the trial, Dr. Qaiser testified that he could not say whether the victim suffered at all (due to her unconsciousness). (Vol. 19, T 1477-1486) However, during the penalty phase of the trial, Qaiser speculated that, based upon studies that he had read, unconscious victims may be able to register pain, but cannot outwardly manifest it. (Vol. 21, T 1705-1712)

In its case for mitigation during the penalty phase, Dr. Gebel, a neurologist who interviewed Margaret and reviewed her medical records, testified that the defendant had suffered numerous head traumas through the years due to extensive beatings she received. (Vol. 21, T 1742-1750, 1764) The defendant lost consciousness on at least four of these beatings, but it may have been as many as ten, and she was admitted to the hospital. (Vol. 21, T 1764) Noted

neuropsychiatrist and brain-imaging expert Dr. Joseph Wu also counted at least ten cases of traumatic injuries to the defendant's head, with at least some resulting in unconsciousness. (Vol. 21, T 1815-1816, 1824-1826)

The defendant's aunt, Myrtle Hudson, confirmed these beatings and injuries to the defendant from "deadly abusive relationships," causing unconsciousness of several occasions. (Vol. 22, T 1880-1886) She was beaten so severely on one occasion that she was unrecognizable, her eyes were swollen shut, her lips, face and head was swollen, and she had "scars and stripes" all over her body. (Vol. 22, T 1886) Margaret, according to Hudson, also had been the victim of sexual abuse. (Vol. 22, T 1883)

The two doctors testified that Margaret Allen showed evidence, either through the PET-Scan or psychological testing and history, of traumatic organic brain damage. (Vol. 21, T 1750-1751, 1816-1821) Dr. Gebel indicated that Margaret was borderline functional, having a lower intellectual capacity. (Vol. 21, T 1750) Both testified, without contradiction, that this type of injury to the right frontal lobe area would destroy the defendant's ability to have impulse control, to think things through clearly, and to control her actions and understand the consequences of them. (Vol. 21, T 1751, 1753-1755, 1763, 1822-1824) Her mental impairment caused her to have problems controlling her actions and to

conform her conduct to the requirements of the law; when she loses control of her mood, she lost the ability to control her actions and understand their consequences. (Vol. 21, T 1753-1755, 1822-1824. 1829-1830) Margaret Allen, because of her organic brain damage, was simply unable to regulate her response to provocation, overreacting instead in a disproportionate manner to that provocation without an awareness of what she is doing. (Vol. 21, T 1829-1830) A person with this type of injury, Dr. Wu stated, can still have the ability to plan and execute that plan, such as a shopping trip to a home improvement store to buy a piece of plywood, have it cut, and argue about the price it, but still have the impaired ability to regulate her emotional overreaction to a situation. (Vol. 21, T 1831)[7] While a disproportionate overreaction does not occur on every occasion, her brain injury causes the defendant to have a higher likelihood of this, and Margaret Allen cannot control when it happens; she has an impaired neurological control of her ability to regulate anger and hurt impulse control. (Vol. 21, T 1854) Within a reasonable degree of medical probability, the defendant has traumatic brain injury which inhibits her

[7] Dr. Gebel admitted that evidence of the defendant's shopping for the plywood and disposing of the body may have an effect on his opinion of the *extent* of her brain injuries and *their location*, but opined that these injuries would still have a substantial effect on her impulse control, judgment, and actions, although not on the executive function of an ability to plan (temporal lobe damage vs. the prefrontal cortex process). (Vol. 21, T 1760-1764)

conduct as far as reaction and awareness of what she is doing. (Vol. 21, T 1829-1830)

Margaret grew up in an very unstable home environment, with no consistent father figure, but rather a constant parade of "stepfathers." (Vol. 2, R 230; Vol. 22, T 1877-1878)[8] She was sexually abused as a child by her uncle and brother and was later in several "deadly abusive" relationships with a lot of different men she tried to associate herself with. (Vol. 2, R 221-222; Vol. 22, T 1880, 1883) She grew up in a bad neighborhood of "drugs, thugs, and violence," and, unable to escape that neighborhood because of her poverty, became a part of that culture during her teen years. (Vol. 2, R 238-231, 241-242, 247-248; Vol. 22, T 1879) She was not a neighborhood gang member or a violent child and before she was severely beaten as an adult and hospitalized, there was no indication that she had a violent streak in her. (Vol. 2, R 247, 259-260) While not using drugs, she "became addicted" to selling them to support her family of three children, to send them to school with lunch money and get necessities for them. (Vol. 2, R 223, 247; Vol. 22, T 1879, 1887)

[8] The defendant did manage to live with her loving grandmother for a while during her childhood, but that was only for three years, when she was seven or eight years old. (Vol. 2, R 258, 261)

All three of her children have learning disabilities and were in special education classes. (Vol. 22, T 1889) Her youngest daughter has severe psychological problems and was under the care of a psychiatrist – the girl had taken a vacuum cleaner and it had sucked on her face, causing the problems. (Vol. 2, R 226-227) In fact, the money that Margaret was missing in February 2005 was Social Security disability money for the daughter. (Vol. 2, R 226)

Although the defendant drank alcohol, when she got "tipsy," she became very friendly, real clingy, "baby-like." (Vol. 22, T 1887) She was a good woman, who would help anyone in need any time they needed it, doing a lot for her family and friends, including the victim's family, with whom she was close friends. (Vol. 2, R 236, 238) If someone needed her, she was there, taking people in, giving them food and money. (Vol. 2, R 238-240)

Family members reminded the court (during the *Spencer* hearing) that nobody truly knows what happened that day, what Margaret's true role was, knowing only what was claimed by the co-defendants, whose inconsistent statements did not seem truthful and who were spared the death penalty. (Vol. 2, R 236, 243, 246, 249)

Margaret Allen took the stand at the *Spencer* hearing, conveying her sincere sorrow to the family and friends of Wenda Wright, with whom she was close

friends. (Vol. 2, R 246, 249) Margaret denied the killing, expressing her wish that she would never have left the victim alone that day, that she feels that if she had not left her alone, Wenda would still be alive, and Margaret prays that God will show the truth someday. (Vol. 2, R 246, 249)

SUMMARY OF ARGUMENTS

Point I. The trial court erred in excluding testimony of former co-defendant state witness Martin, that while incarcerated with former co-defendant turned state witness Quintin Allen, Quintin made a admitted to choking the victim to death. The trial court excluded it based upon a lack of indicia of reliability, looking at Martin's recantation of the his deposition testimony, rather than the indicia of reliability of Quintin's actual admission against penal interest. Further, Quintin's statement to Martin is admissible as an admission of a party.

Point II. The court erred in adjudicating the defendant of the kidnapping charge where the confinement was insufficient and inseparable from the killing. As a result, if the kidnapping charge fails, the court also erred in adjudicating the defendant guilty of the first degree felony murder predicated solely upon the kidnapping charge.

Point III. Reversible error occurred when the prosecutor repeatedly asked a defendant's mental health expert about the non-statutory and highly inflammatory aggravator of future dangerousness of the defendant. Although the defense objection on the ground of speculation was sustained and no curative instruction or motion for mistrial requested, fundamental error occurred from the state's references to a non-statutory aggravating circumstance.

Point IV. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found inappropriate aggravating circumstances, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY OF STATE WITNESS MARTIN THAT FORMER CO-DEFENDANT TURNED STATE WITNESS QUINTIN ALLEN ADMITTED TO CHOKING THE VICTIM TO DEATH.

The state's star witness, former co-defendant turned state witness Quintin Allen clearly placed the blame for Wenda Wright's death on the defendant, claiming that Margaret beat and choked her with a belt while Quintin either merely stood by, or participated to a lesser extent by holding Wright down and loosely holding onto one end of the belt after Wright had already been strangled by the defendant and was no longer moving. Margaret's defense was that Quintin Allen committed the killing while she was off at the victim and Johnny Dublin's house searching for her purse (with Dublin's consent).

The other former co-defendant turned state witness, James Martin (who pled to being simply an accessory after the fact, having admitted to helping dispose of the body), was not present during the death of the victim. However, he admitted on defense cross-examination that he and Quintin were housed in adjoining cells and discussed the case. Prior to the defendant attempting to question Martin about an admission that Quintin made to him in jail in which he admitted to using a

special leg hold to choke the victim, which statement Martin had recounted during his deposition, the state objected to its admissibility and the defense proffered the testimony:

> A [by James Martin]: I remember saying that there. I remember saying he got a special hold that he used to chock (sic) her with. In that -- yeah, he can choke her with. Because he nearly choked the boy out in jail with that same hold.
>
> Q [defense counsel]: I am going to continue in the deposition. I asked you then, "Quintin said that," question.
> And you said, "Yes."
> "So, did you hear him say he chocked (sic) her?"
> "Yeah."
>
> * * *
>
> A: But I didn't say that he told me.
>
> Q: Well, again, I asked you -- and your answer at the top of Page 12, Line 2, "He said he had a special hold with his leg that choked her."
> I said, "Quintin said that?"
> And you said, "Yes."
> "So, if you did hear him say he choked her?"
> Answer, "Yeah."

(Vol. 17, T 1263-1264) Martin then questioned the accuracy of the deposition, denying that he said that, and also indicating that he instead said, "yeah he probably did choke her. Because how can a 140 pound woman choked a 290 – " [whereupon the state cut off the witness's answer with an objection to the proffer].

(Vol. 17, T 1246-1247) The state argued that this statement against Quintin's penal interest was inadmissible because Martin was now disputing the accuracy of his deposition answer and thus the statement did not bear the requisite indicia of reliability, citing *Chambers v. Mississippi*, 410 U.S. 284 (U.S. 1973). The trial court agreed and excluded the evidence of Quintin's admission. Its exclusion is reversible error, denying the defendant of her federal and state rights to cross-examine a witness and present evidence in her own behalf.

An evidentiary ruling is normally reviewed under an abuse of discretion standard. *See Williams v. State*, 967 So.2d 735, 747-748 (Fla. 2007). However, when the trial court bases its evidentiary ruling on an "erroneous view of the law," review of the ruling is *de novo* and constitutes error as a matter of law. *Hudson v. State*, 992 So. 2d 96, 107 (Fla. 2008); *McDuffie v. State*, 970 So.2d 312, 326 (Fla. 2007); *Hernandez v. State*, 16 So.3d 336 (Fla. 4th DCA 2009); *Chavez v. State*, 25 So.3d 49, 51 (Fla. 1st DCA 2010). Here, the trial court based its decision on an erroneous view of the law and thus committed reversible error as a matter of law.

In *Chambers v. Mississippi*, *supra*, the United States Supreme Court invalidated a state's exclusion of a hearsay third-party confession, allowing the admission against penal interests, ruling that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be

applied mechanistically to defeat the ends of justice." *Id*. at 302. This is because, "Few rights are more fundamental than that of an accused to present witnesses in his own defense" and state's cannot impinge on that right by excluding relevant evidence relevant to his culpability. *Chambers*, *supra*.

The *Chambers* Court, then, held that the Due Process clause affords criminal defendants the right to introduce into evidence third parties' declarations against penal interest – their confessions – when the circumstances surrounding the statements "provide considerable assurance of their reliability." 410 U.S. at 300. To be considered reliable, the statement must have tended to subject the declarent either to civil or criminal liability so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. Ehrhardt, *Florida Evidence*, §804.4, p. 1030 (2011 ed.) The reliability of theses statements flows from the fact that they are against the interest of the declarant at the time they are made. A person does not make statements which will subject himor her to civil or criminal sanctions unless they are true. *Id*.; *Brooks v. State*, 787 So.2d 765 (Fla. 2001). As this Court noted early on:

> The rationale for the declaration against interest exception was early stated in Gibblehouse v. Stong, 3 Rawle 437 (Pa.1832):
>
> > The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in

> saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest.
>
> At 438. It is inconceivable that a man would be more cautious in conceding a five dollar debt than in confessing a murder.
>
> * * *
>
> In short, we reject for Florida any "materialistic limitation on the declaration-against-penal-interest hearsay exception." *Chambers v. Missippi*, *supra*, 410 U.S. at 299.

Baker v. State, 336 So.2d 364, 369 (Fla. 1976). Section 90.804(2)(c), Florida Statutes, requires that, for admissibility of statements against *penal* interests offered to exculpate the accused, there must be sufficient corroborating circumstances to show the trustworthiness of the statement. However, inexplicably it does not make that same requirement for admissions against pecuniary or proprietary interests. This flies in the face of the common-sense statement quoted above in *Baker* that "it is inconceivable that a man would be more cautious in conceding a five dollar debt than in confessing a murder."

Nonetheless, here, there is sufficient evidence of corroboration to consider the statement trustworthy. In *Masaka v. State*, 4 So.3d 1274, 1282 (Fla. 2nd DCA 2009), the court analyzed this requirement to have two requirements:

> First, the trial court must consider the circumstances surrounding the making of the statement itself, including the language used and the setting in which the statement was made, to determine whether

> those circumstances tend to show that the statements are trustworthy. *Machado v. State*, 787 So. 2d 112, 113 (Fla. 4th DCA 2001) (*citing Lilly v. Virginia*, 527 U.S. 116, 139, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)). . . . Second, the trial court must consider whether the self-inculpatory statements are consistent with both the defendant's general version of events and the other evidence presented at trial.

The context of the declaration against penal interest here shows it trustworthiness. Quintin Allen made this statement to his friend and co-defendant while incarcerated on the charges and while discussing the facts of the case. As such, it was made to a friendly confidant and clearly inculpated him in the actual killing of the victim, exposing him to criminal liability; he had no reason to fabricate this admission. It was not of the type found unreliable, for example, in *Peninsular Fire Ins. Co. v. Wells*, 438 So.2d 46 (Fla. 1st DCA 1983), wherein the court found that the statement was not admissible because, under the facts of the case, the declarant had a motive to fabricate the out-of-court story. Here, it is clear that a person in Quintin's position "would not have made the statement unless he . . . believed it to be true." §90.804(2)(c), Fla. Stat.

Additionally, the contents of the self-inculpatory statement of Quintin Allen are consistent with the defendant's defense and with the other evidence presented at trial. Even co-defendant Martin admitted so during the proffer (before the state tried to cut him off) when he elaborated that Quintin must have choked the victim

to death because it was inconceivable that a woman the stature of the defendant could have inflicted the strangling and injuries upon the 311 pound victim. (Vol. 17, T 1246-1247)

The state argued, and the trial court utilized, a completely wrong standard in analyzing the reliability of the admission, focusing on the credibility of Martin, the witness to whom the admission was made (that Martin was now disputing the accuracy of the court reporter's transcription), rather than the legally correct analysis of the credibility of the declaration itself. "The credibility of the in-court witness testifying to the out-of-court declaration against interest is *not* a matter that the trial judge should consider in determining whether to admit the testimony concerning the out-of-court declaration against penal interest." *Carpenter v. State*, 785 So.2d 1182, 1203 (Fla. 2001); *Maugeri v. State*, 460 So.2d 975, 979 (Fla. 3rd DCA 1984); Ehrhardt, *Florida Evidence* §804.4, pp. 1033-1034 (2011 ed.) As *Carpenter* explained, "Instead, it is the jury's duty to assess the credibility of the in-court witness who is testifying about the the out-of-court statement." *Carpenter*, *supra* at 1203. Thus, the case should be reversed for the court's failure to follow the proper standard in evaluating the evidence for admissibility. This admission by Quintin Allen was crucial to the defendant's case, bore an indicia of reliability, having been made spontaneously to a friendly fellow conspirator, were not

contrary to the other evidence presented, and were unquestionably against Quintin's interests. *Chambers*, *supra*.

The state may argue on appeal that Section 90.804's requirements for this hearsay exception necessitate that the declarant must be unavailable to testify in order for the statement against penal interest to be admitted. *See* §90.804(1), (2), Fla. Stat. However, that limitation should not, and must not, be applied "mechanistically to defeat the ends of justice" just like *Chambers* says. To do so would infringe unfairly on the defendant's constitutional right to present her defense. As Ehrhardt notes, this requirement of unavailability requirement was included here simply because of the historical treatment of these exceptions and by their definition by the Federal Rules in effect at the time. Ehrhardt, *Florida Evidence* §804.1, p. 1012 (2011 ed.)

As such, there is no legitimate reason to exclude such statements simply because the declarant may be available to testify or did testify for the state. The rule requiring unavailability is "arbitrary" in the sense that it does not rationally serve the end that the third-party admission rules were designed to further, and the state can point to no legitimate end that this exclusion serves. *See Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). It thus follows that such a rule, applied in this

case, would violate the criminal defendant's right to have "a meaningful opportunity to present a complete defense." *Id*.

As held in *Curtis v. State*, 876 So.2d 13, 21-23 (Fla. 1st DCA 2004), in a murder prosecution, the exclusion of defense evidence of a confession of a third party to a crime because the declarant was not shown to be unavailable deprived the defendant of his due process right to a fair trial. "A trial judge may be required to admit a third-party confession under constitutional principles, even if it does not qualify as a declaration against penal interest" under the code. *Id*.; Ehrhardt, *Florida Evidence*, §804.4, pp. 1029-1030, n. 2 (2011 ed.).

Furthermore, *Chambers v. Mississippi* itself disputes the necessity of unavailability in the context of a statement against penal interests. For in *Chambers*, the declarant *was* available, *was* present in the courtroom, and *was* under oath. *Chambers*, 410 U.S. at 312. In fact, the United States Supreme Court indicated that the declarant's presence in court made the hearsay admission all the more reliable since he could have been called by the state (again) and examined by the state extensively as to his making of the statement, and his demeanor and responses weighed by the jury. *Id*., *citing California v. Green*, 399 U.S. 149 (1970). Thus, excluding the statement against interest because of the availability of the witness may indeed be counterproductive.

Even if this Court should require unavailability of a declarant for the statement against penal interest exception, the statement should still be admitted as either a statement of a party or of a co-conspirator [§90.803(18), Fla. Stat.] In any event, it is clear from the facts of this case, where the *sole* unsubstantiated evidence linking the defendant to the actually killing (as opposed to the defendant merely being involved in the disposal of the body) is suspect, having come from a co-defendant to the crime who was offered a deal for his testimony,[9] the defendant must constitutionally be permitted to present evidence that that co-defendant instead was the sole or primary cause of the victim's death. Justice would not be served otherwise. *Chambers*, *supra*; *Curtis v. State*, *supra*; *Baker v. State*, *supra*.

A new trial with the introduction of Quintin Allen admission to choking the victim, evidence crucial to the defense case and the interests of justice, must be ordered.

[9] *See Florida Bar News, "What to do about jailhouse snitches with reasons to lie?"*, March 15, 2012, p. 10. That article refers to the number of wrongfully convicted defendants, including 46% of the death row inmates released due to exoneration, who were wrongfully convicted due to jailhouse informant's perjured testimony, which evidence is currently being studied by the Florida Innocence Commission.

POINT II.

THE COURT ERRED IN ADJUDICATING THE DEFENDANT OF THE KIDNAPPING CHARGE WHERE THE CONFINEMENT WAS INSUFFICIENT AND INSEPARABLE FROM THE KILLING, AND ALSO ERRED IN ADJUDICATING THE DEFENDANT GUILTY OF THE FIRST DEGREE FELONY MURDER PREDICATED SOLELY UPON THE KIDNAPPING CHARGE.

This Court has a mandatory obligation to review the sufficiency of the evidence in every case in which a sentence of death has been imposed. *Jones v. State*, 963 So. 2d 180, 184 (Fla. 2007). Review of sufficiency of the evidence is a *de novo* review. *State v. Williams*, 742 So.2d 509 (Fla. 1st DCA 1999).

Here, the state charged the defendant with (and argued to the jury) only first degree felony murder during the course of a kidnapping, and kidnapping with the intent to inflict bodily harm or terrorize the victim, pursuant to Section 787.01(1)(a)(3), Florida Statute. (Vol. 3, R 333) Under the statute:

> (1)(a) The term "kidnapping" means forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
> . . . .
> 2. Commit or facilitate commission of any felony.
>
> 3. Inflict bodily harm upon or to terrorize the victim or another person.

§ 787.01, Fla. Stat.

In *Mobley v. State*, 409 So.2d 1031, 1034 (Fla. 1982), this Court observed that a literal construction of the kidnapping statute would potentially convert almost any forcible felony into kidnapping. The Court instead adopted the view that the kidnapping statute does not apply to unlawful confinement or movements that are "incidental to other felonies." *Id*. at 1034-37; *Tindall v. State*, 45 So.3d 799, 801 (Fla. 4th DCA 2010). Thus, under *Faison v. State*, 426 So. 2d 963 (Fla. 1983), the court must determine whether a defendant's conduct amounts to a confinement crime separate from other criminal charges.

In *Faison*, this Court announced a multi-part test for determining whether a particular confinement or movement during the commission of another crime constitutes kidnapping. In such situations, the confinement or movement:

> (a) Must not be slight, inconsequential and merely incidental to the other crime;
> (b) Must not be of the kind inherent in the nature of the other crime; and
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier to [commit] or substantially lessens the risk of detection.

Faison, 426 So. 2d at 965 (*citing State v. Buggs*, 547 P.2d 720, 731 (Kan. 1976)); *Tindall v. State*, *supra*.

Therefore, under this test, the actions of moving a victim from one room to another during the course of a robbery has been held to be insufficient to establish

a kidnapping separate and distinct from the robbery. *Lewis v. State*, 50 So.3d 86 (Fla. 4th DCA 2010). Likewise, in *Sanders v. State*, 905 So. 2d 271, 272 (Fla. 2nd DCA 2005), the victim was held in her apartment for three hours with the Defendant demanding sex. Eventually, the Defendant threatened the victim with a knife before the victim acquiesced to the demand. He later allowed the victim to use the bathroom, closed the door and left. The court found these facts did not support a "confinement" separate to support a charge of kidnapping. *Id*. at 274-75. The defendant "obviously could not have accomplished the sexual battery without the victim's presence. In other words, the victim's confinement was the sort that, though not necessary to the underlying felony, was likely to naturally accompany it." *Id*. at 274. *See also Tindall v. State, supra*.

While the *Faison* test has been held by this Court and others to not necessarily apply where the defendant is charged with subsection (1)(a)(3) with an intent to inflict bodily harm upon or to terrorize the victim,[10] courts still must consider whether the state may convert any murder, robbery, sexual battery, or other crime involving an assault on another person into two separate crimes by charging the defendant under subsection (1)(a)(3) instead of (1)(a)(2), even if the

[10] *See Biggs v. State*, 745 So.2d 1051, 1052 (Fla. 1991); *Carter v. State*, 762 So.2d 1024, 1027 (Fla. 3rd DCA 2000).

facts demonstrate that the alleged "confinement" was subsumed in the other criminal act. *Conner v. State*, 19 So.3d 1117, 1122-1125 (Fla. 2nd DCA 2009).

As the court reasoned in *Conner*,

> Surely a person who commits a sexual battery, for example, has the requisite intent under subsection (1)(a)(3) both to "inflict bodily harm" and to "terrorize the victim." But such an expansive reading of subsection 787.01(1)(a)(3) would lead to the very result that the Fifth District [in *Harkins v. State*, 380 So. 2d 524 (Fla. 5th DCA 1980)] noted could not possibly have been the intent of the legislature, and one which would perpetuate the problem the *Harkins* court sought to avoid – that any first-degree robbery or forcible sexual battery could be converted into two life felonies.

To explore this problem further, the Second District noted, the court must focus their attention on the overt acts which form the basis of a kidnapping offense (the *actus reus*) instead of the requisite intent underlying those acts (the *mens rea*). *Id.*

In considering whether conduct involving another crime also amounts to a kidnapping, this Court has noted that one must "closely examine the facts to determine whether the confinement or movement was incidental to the [other charged crime] or whether it took on an independent significance justifying a kidnapping conviction." *Mobley v. State*, 409 So.2d 1031, 1034-1035 (Fla. 1982). In *Conner*, the court held that pushing a victim down the stairs and strangling her in a public place was merely incidental to the attempted murder charge and therefore it was insufficient to support a conviction for the separate crime of

kidnapping. *Conner*, *supra*. Similarly, in *Mackerley v. State*, 754 So.2d 132, 137 (Fla. 4th DCA 2000), *quashed on other grounds*, 777 So.2d 969 (Fla. 2001), the Court ruled that holding a victim in a headlock in order to shoot the victim is not "confinement" sufficiently separate from the murder charge.

The *Conner* court ruled that this fundamental principal of whether the confinement was incidental to the other crime applies whether the state charges the defendant under subsection (1)(a)(2) or subsection (1)(a)(3). The act, the court concluded of holding his victim on the ground "had no significance independent of the attempted murder, was merely incidental to the choking, and amounted to a mere momentary restraint insufficient to support a conviction for kidnapping." *Conner v. State,* 19 So.3d at 1125. And although the victim was undoubtedly terrorized during the attack, the court concluded that his acts were insufficient to constitute the confinement, abduction, or imprisonment necessary to establish kidnapping. *Id*.; *see also Mackerley*, *supra* at 137.

Applying this rationale to the instant case, the facts indicate that the victim, up until the acts which killed her was not restrained or confined; testimony from the co-defendant Quintin Allen indicated that she was not restrained by any force and could have left at any time. Wright voluntarily accompanied the defendant to her house (Vol. 14, T 801-802, 805); Wright was left alone while Quintin and

Margaret searched other areas of the house for the purse (Vol. 15, T 886-887); the defendant left Wright in her house while she went to Wright's house to look for her missing purse (Vol. 15, T 922-923); when Wright got up to leave during this time, Quintin Allen merely informed her that the defendant did not wish for her to leave and Wright voluntarily closed the door and returned to her seat in the bedroom (Vol. 15, T 922-923; Vol. 16, T 1060); and even when, for the first time, Wright asked to return home and the defendant continued her accusations against Wright, Quintin Allen testified that he did not see anything between any of the parties that would have prevented the victim from simply leaving at that point. (Vol 15, T 897-898) It was only during the acts of the actual strangulation that the victim was in any way confined, and by this time, this confinement was merely incidental to the killing.

While at one point during the actual acts surrounding Wright's death, the victim was held down and her hands bound with a sheet, that confinement too was merely incidental to the killing. In *Berry v. State*, 668 So.2d 967, 969 (Fla. 1996), this Court held that "There can be no kidnapping where the only confinement involved is the sort that, though not necessary to the underlying felony, is likely to naturally accompany it." And in *Jenkins v. State*, 433 So.2d 603 (Fla. 1st DCA 1983), the court reversed the kidnapping conviction because she was murdered

shortly after her confinement and therefore the confinement was inconsequential in the commission of further acts.

In *Berry*, the Court did find that the binding of the victims there *was* a confinement with independent significance from the underlying felony, but only because the defendants left the victims tied up after the commission of the robbery which was for the purpose of making a clean getaway and thus "substantially reduced the risk of detection," a factor in determining that the confinement was a separate offense. That purpose was clearly not present in the instant case; the confinement was simply incidental to the act of strangling the victim here.

Under this analysis, the kidnapping charge cannot stand and must be vacated. Since the state chose to charge the defendant the way they did, with only the kidnapping and felony murder during the course of the kidnapping, when the kidnapping charge fails, so too must the "during the course of a kidnapping" of the felony murder charge. *See Mackerley v. State*, 754 So.2d 132, 137 (Fla. 4th DCA 2000) ("Because the State's theory of kidnaping was legally inadequate, a conviction for felony murder would be improper as a matter of law.") The two convictions must then be reversed and the case remanded for entry of judgment for a lesser included offense, both charged by the indictment and supported by the evidence, such as third-degree felony murder (during the course of a false

imprisonment), and false imprisonment, and for resentencing thereon. *See Hernandez v. State*, 56 So. 3d 752, 762-764 (Fla. 2010) (third degree felony murder as a permissive lesser of first degree felony murder); *Coicou v. State*, 39 So. 3d 237, 243-244 (Fla. 2010) ("The proper remedy is remand to the trial court for retrial on any lesser offenses contained in the charging instrument and instructed on at trial."); *Conner v. State*, *supra* (kidnapping charge failed because confinement was incidental to the underlying felony; remanded for entry of conviction for false imprisonment).

POINT III.

REVERSIBLE ERROR OCCURRED WHEN THE PROSECUTOR REPEATEDLY ASKED A DEFENDANT'S MENTAL HEALTH EXPERT ABOUT THE NON-STATUTORY AND HIGHLY INFLAMMATORY AGGRAVATOR OF FUTURE DANGEROUSNESS OF THE DEFENDANT.

The prosecutor improperly interjected "future dangerousness" as an nonstatutory aggravating circumstance into the proceedings. As this factor is not one of the statutory aggravating circumstances in Florida, it is highly improper and prejudicial to allow the jury to hear about such a factor. Reversible error occurs when such questioning takes place, as here.

This Court has repeatedly explained that "the probability of recurring violent acts by the defendant" (or "future dangerousness") is not a proper aggravating circumstance in Florida. *Miller v. State*, 373 So. 2d 882, 886 (Fla. 1979); *White v. State*, 403 So. 2d 331, 337 (Fla. 1981). The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose. *Purdy v. State*, 343 So.2d 4 (Fla. 1977). As this Court stated in *Elledge v. State*, 346 So.2d 998, 1003 (Fla. 1977), "We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death."

> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. *Proffitt v. Florida*, 428 U.S. 242, 258 (1976).

Miller v. State, *supra* at 885-886.

In *Walker v. State*, 707 So.2d 300, 313-14 (Fla. 1997) error occurred (though ultimately deemed "harmless" under the facts) when the prosecutor asked a defense mental health expert whether the defendant would ever "kill again?" The Court noted that defense counsel's objection to the question was sustained and a motion for mistrial denied, and that though there had been no request for a "curative instruction" doing so may have only "accentuated the prosecutor's question inviting improper testimony." The Court went on to state that "the probability" of future acts of violence by the defendant was not a proper aggravating circumstance, and moreover that the state could not attach aggravating "labels" to factors such as mental impairment that were in fact mitigating.

Further, in *Kormondy v. State*, 703 So.2d 454, 462-63 (Fla. 1997), on cross-examination of a defense witness, and over objection, the state elicited testimony that while in jail awaiting trial the defendant had "threatened" to kill two witnesses. In vacating the death penalty the court held that this evidence was a

"non-statutory" aggravating factor before the jury and that to permit it would be to jeopardize the constitutionality of the death penalty statute. *See also Teffeteller v. State*, 439 So.2d 840, 844-845 (Fla. 1983)

AS this Court held in *Miller, supra*, use of the defendant's mental illness, and his resulting propensity to commit violent acts, as an aggravating factor favoring the imposition of the death penalty appears contrary to the legislative intent as set forth in the statute. The legislature has not authorized consideration of the probability of recurring violent acts by the defendant if he is released on parole in the distant future. To the contrary, a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse. *Miller v. State, supra* at 886.

Here, when questioning the defense mental health expert about his testimony that Margaret suffered from brain damage resulting in a lack of impulse control, the state inquired twice whether this same lack of impulse control could cause her to kill a prison guard should she be sentenced to life. Defense counsel objected (on the basis of speculation) to the comment, which objection was sustained. However, no curative instruction or motion for mistrial was sought at the time. This error, it

is submitted goes to the very core of the constitutionality of Florida's death penalty procedures and thus constitutes fundamental error mandating a new penalty phase trial.

The prosecutor's question was wholly improper and in no way related to probing Dr. Wu's opinion that Margaret's ability to conform her conduct to the requirements of the law was substantially impaired at the time of this offense. *Walker*, 707 So.2d at 314. "The State may not attach aggravating labels to factors that actually should militate in favor of a lesser penalty – like, as in this case, the defendant's mental impairment." *Walker v. State*, 707 So. 2d at 314; *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

Further, the failure to seek a curative instruction or mistrial should not effect the required reversal. In *Walker*, this Court held that that it was immaterial that the witness did not answer the question or seek a curative instruction. "In other words, the 'bell was rung' by the question itself; and was not 'unrung' by the fact that the question was not answered." *Walker v. State*, *supra* at 314. The error here goes to the very heart of the penalty phase case; the error is thus fundamental requiring reversal. *See Pait v. State*, 112 So.2d 380, 385-86 (Fla. 1959); *Brooks v. Kemp*, 762 F. 2d 1383, 1403 (11th Cir. 1985).

Here, Dr. Wu did answer the prosecutor's question the first time that he could not say, but that in a more controlled environment such as prison, the lack of impulse control should not be a problem because of the rigidity of the situation. However, the prosecutor did not leave it at that, but instead asked again,

> So, you are saying to a reasonable degree of medical probability she is a risk to any prison guard who is watching her in the future?

drawing an objection (Vol. 21, T 1855-1856)

As noted in *Teffeteller*, *supra*, this is an obvious example of inexcusable prosecutorial overkill, which must result in a new sentencing retrial before a jury. The remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty. "The intended message to the jury was clear: unless the jury recommended the death penalty, the defendant, in due course, . . . will kill again." *Tefeteller v. State*, 439 So.2d at 885. As the Court stated, "There is no place in our system of jurisprudence for this argument." *Id*.

This is not a situation where this was a matter of first impression, such that there might arguably be some justification for the state's indulging in such elocution, for this Court has repeatedly condemned this type of conduct, and this prosecutor, Gary Beatty, was an experienced death penalty prosecutor who should

clearly have known about the prohibition of this type of nonstatutory aggravator. "The failure to heed what the Court has said before in this area thus necessitates a sentencing retrial." *Teffeteller*, *supra*.

Further, this intentional conduct by the prosecutor cannot be dismissed as harmless error. As shown by the American Bar Association's *The Florida Death Penalty Assessment Report*, vi, reported in this Court's decision in *In re Standard Jury Instructions in Criminal Cases – Report No. 2005-2*, 22 So.3d 17, 19 (Fla. 2009), despite being told that the aggravating circumstances are strictly limited to those specified in the statute, "25.2 percent believed that if they found the defendant to be a future danger to society, they were required to sentence the him/her to death." *Id*.

Thus, a new penalty phase before a new jury is required because of the prosecutor's intentional acts here.

POINT IV.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

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

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

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

A. The Trial Court Considered Inappropriate Aggravating Circumstances

Aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. *Martin v. State*, 420 So.2d 583 (Fla. 1982); *State v. Dixon*, *supra* at 9. The state has failed in this burden with regard to two of the aggravating circumstances found by the trial court, that of during the course of a kidnapping and HAC. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, do not support these circumstances and cannot provide the bases for the death sentence.

With regard to the aggravating circumstance of during the course of a kidnapping, the appellant refers this Court to the argument contained in Point II of

this brief, arguing the insufficiency of the evidence for kidnapping and urges that this aggravator be stricken on the same basis as raised there, that the state did not prove that the confinement was not simply incidental to the killing and was insufficient to establish a kidnapping.

Secondly, the appellant recognizes that this Court has upheld the use of this "automatic" aggravating circumstance in a felony murder situation to support a death sentence. *See Dufour v. State*, 905 So.2d 42 (Fla. 2005); *Blanco v. State*, 706 So.2d 7, 11 (Fla. 1997). However, the appellant asks this Court to reconsider that position, especially in a situation such as occurred here, where the defendant was charged solely with the felony murder (and not premeditation) of the kidnapping. In other sentencing situations, Florida courts have repeatedly held that an element of the crime cannot be used to further increase the sentence. *State v. Mischler*, 488 So. 2d 523, 525 (Fla. 1986) (a court cannot use an inherent component of the crime in question to justify departure), *see also Steiner v. State*, 469 So.2d 179, 181 (Fla. 3rd DCA 1985); *Baker v. State*, 466 So.2d 1144 (Fla. 3rd DCA 1985) (same); and *State v. Robbins*, 936 So. 2d 22, 24 (Fla. 5th DCA 2006) (if the use of the firearm was an element of the crime, the crime may not be further reclassified for sentencing enhancement). Why should such law apply in sentencing guidelines and firearm enhancement cases, but not here, especially where it was solely the

allegation of "during the course of a kidnapping" that even made this case a first degree murder case in the first place? The alleged kidnapping made this a first degree felony murder (no allegation or proof of premeditation) and was used a second time to enhance the case to the death sentence.

In automatically finding the aggravating factor of heinous, atrocious, or cruel simply because it was a strangulation, the trial court noted, quoting *McWaters v. State*, 36 So.3d 613, 643 (Fla. 2010), that "it is permissible to infer that strangulation, *when perpetrated upon a conscious victim*, involves foreknowledge of death, extreme anxiety and fear, and this method of killing is one to which the factor of heinousness is applicable." (emphasis added.) While this Court has upheld this factor numerous times in cases involving strangulation, this Court has not and cannot apply a *per se* HAC to strangulation cases. Each case must be examined on its own facts. Those cases in which it has been held to be HAC involved facts specifically showing that the victims were acutely aware of their impending deaths and all involved suffering beyond the singular fact of the strangulation. *See, e.g.*, *Hildwin v. State*, 531 So.2d 124 (Fla. 1988); *Thompkins v. State*, 502 So.2d 415, 421 (Fla. 1986).

The State's evidence in this case made it no more likely than not that Wright lost consciousness upon the initial blows to her head, as testified to by the

substitute medical examiner, and surely within seconds of her ligature strangulation. *See DeAngelo v. State*, 616 So.2d 440, 442-43 (Fla.1993). The evidence indicated the victim did not offer any resistance and did not struggle, and that the onset of unconsciousness would have been relatively quick (thus there was no prolonged foreknowledge of death).

Where a victim experiences the torturous anxiety and fear of impending death, it has been held that HAC may focus on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death. *Barnhill v. State*, 834 So.2d 836, 849-50 (Fla. 2002). The level of anxiety or fear required for a finding of HAC has been termed "aggravated terror." *See Rimmer v. State*, 825 So.2d 304, 328, n. 22 (Fla. 2002). The evidence of anxiety and fear of impending death must be more than speculation: *e.g.*, *Ferrell v. State*, 686 So.2d 1324, 1330 (Fla. 1996), where the court declared that speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is not sufficient to support HAC. Similarly, HAC was not found where the two robbery victims' hands were bound, and they were told to lie on the floor. Both victims were shot in the head, before the defendant left the scene. The court concluded that while the victims no doubt experienced fear during this criminal episode, it was not the type of fear, pain, and prolonged

suffering that this Court has found to be sufficient to support this aggravating circumstance. *Rimmer v. State*, 825 So.2d 304, 328 (Fla. 2002).

Telling here to this lack of foreknowledge is the total absence of defensive wounds or of a prolonged struggle, factors normally found to show the suffering and knowledge of death. In *Tompkins v. State*, 502 So.2d 415, 421 (Fla.1986), affirming the HAC finding, the medical examiner testified that death by strangulation was not instantaneous and the evidence supported a finding that the victim was not only conscious but engaged in a desperate, lengthy struggle for life, fighting violently to get away. Contrasting the evidence in the instant case with that of *Tompkins* and *Conde v. State*, 860 So.2d 930, 955 (Fla. 2003), shows that this factor is not applicable here.

In *Conde*, the medical examiner testified that the victim's *numerous* defensive wounds, which included bruised knees and elbows, a fractured tooth, torn fingernails, and a bruise around the sensitive ear area, indicated a violent struggle and that the victim was alive and conscious for some period of time while Conde was strangling her. The medical examiner also found brain swelling, indicating sustained pressure on the neck, and air hunger, which usually involves longer consciousness than those instances when the blood is completely cut off. Lastly, the examiner testified that the victim suffered a broken hyoid bone in her

neck, which may have led to neck swelling even after Conde released his grip, causing the victim to experience air hunger longer than the twenty to thirty seconds Conde stated it had taken him to strangle her. The totality of this evidence provided competent, substantial evidence that the victim was conscious for a period of time during which she struggled with Conde, sustained numerous bodily injuries, and likely knew her death was imminent. *Id*.

Without signs of a struggle or defensive wounds, HAC and the victim's prolonged suffering or foreknowledge of death is based entirely on speculation and, as a result, cannot be upheld. A finding of HAC will always depend on whether the victim was conscious and aware of what was occurring during and/or leading up to the homicide episode. When the victim becomes unconscious, the circumstances of further acts contributing to her death, even if those acts would have been painful had the victim been conscious, cannot support a finding of HAC. *Herzog v. State*, 439 So.2d 1372 (Fla. 1983). Hence, HAC was not found in a strangulation murder where evidence supported the defendant's "statement that the victim may have been semiconscious at the time of her death." *Rhodes v. State*, 547 So.2d 1201 (Fla. 1989).

Such factors are not present here, just as they were not in *Rhodes*, *supra*. As the substitute medical examiner testified, there would have been rapid loss of

consciousness of the victim, which could have occurred almost immediately upon the first blow being struck, and he could not say whether she ever regained consciousness. (Vol. 18, T 1447-1448) Even if she did regain consciousness, ligature strangulation, Dr. Qaiser testified, would have again caused her to lose consciousness rapidly (within 10 to 20 seconds). (Vol. 21, T 1734) *See Elam v. State*, 636 So.2d 1312 (Fla. 1996) (HAC not found where victim was repeatedly struck in the head with a brick, but the victim was rendered unconscious in a very short period of time.) Further, Dr. Qaiser testified that he could not say whether the victim felt any pain from the strangulation. (Vol. 19, T 1475)

And, finally, the strangulation has not been proven beyond a reasonable doubt. Dr. Whitmore, the original medical examiner who actually performed the autopsy found absolutely no evidence of strangulation. It was only through the suspect testimony of Quintin Allen (replete with inconsistency after inconsistency) and the substitute medical examiner's impeached opinion based solely on photographs of the deceased that offered any evidence that strangulation was involved. Surely, such speculation cannot support a death sentence. The state has not proven HAC beyond a reasonable doubt and this aggravating factor must be stricken.

B. Mitigating Factors Are Present Which Outweigh Any Appropriate Aggravating Factors; The Death Sentence Is Disproportionate.

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

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

factors, it is truly of a mitigating nature. The court *must* find as a mitigating circumstance each proposed factor that is mitigating in nature. This is a question of law. *Campbell v. State, supra*. This Court summarized the *Campbell* standards of review for mitigating circumstances:

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

Blanco v. State, 706 So.2d 7 (Fla. 1997); *Cave v. State*, 727 So.2d 227 (Fla.1998).

The trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court glossed over the mitigating factors, totally rejecting the statutory mental mitigating circumstances, by applying an incorrect standard, and improperly abused its discretion in giving the nonstatutory mitigation reduced weight, with no explanations why. Such an explanation appears to be crucial in upholding lesser weight given to clear mitigation. For example, in *Merck v. State* 975 So.2d 1054, 1065 (Fla. 2007), the Court found the trial judge's assignments of weight to the established mitigating factors did not appear unreasonable or arbitrary given the entirety of the evidence

presented and the trial court's detailed explanation of his reasons for finding that the mitigating circumstance merited only little weight.

The trial court totally rejected the statutory mitigating circumstance of "under the influence of extreme mental or emotional disturbance." In doing so, it clearly applied the wrong law. The court here rejected this factor simply finding that there was no testimony of alcohol or drugs being the cause of the crime, apparently believing that drugs and alcohol abuse was the only basis for finding this factor. (Vol. 5, R 954) However, this factor also applies where, as here, there is evidence of brain damage which damage is related to the commission of the crime. *Crook v. State*, 813 So.2d 68 (Fla. 2002) (error to reject mental or emotional disturbance mitigator where evidence of brain damage); *Crook v. State*, 908 So.2d 350 (Fla. 2005) (death sentence reduced to life on proportionality grounds due in part to evidence of brain damage).

In fact, *Crook v. State*, appears to be directly analogous to the instant case. There, this Court held that clearly, the existence of brain damage is a significant mitigating factor that trial courts should consider in deciding whether a death sentence is appropriate in a particular case. *Crook*, 813 So.2d at 74-75. *Cf. Robinson v. State*, 761 So. 2d 269, 277 (Fla. 1999). Yet, In *Crook*, all three medical experts testified to their objective testing that substantiated the existence

of brain damage, specifically to the frontal lobe, which significantly impaired Crook's ability to control his impulses. Not only was their testimony uncontroverted, but it was entirely consistent with the report of Dr. Kremper that predated this murder and found Crook to have "severely limited frustration tolerance" and concluded that due to Crook's "severe cognitive, emotional, and behavioral deficits," with "minor frustration [Crook] was likely to become physically aggressive."

We have the same type of factors present in the instant case. Both mental health experts testified, based upon psychological testing, reports, and a PET-scan that Margaret had been repeatedly and severely beaten on perhaps ten occasions (some causing loss of consciousness and with such damage as to make her face totally unrecognizable). These occurrences were confirmed by family members. These injuries to her brain caused the defendant to simply overreact in a disproportionate manner to the provocation of having her purse and a significant amount of money (for her disabled daughter) stolen, to lose control of her mood and become angry and thus physically aggressive under such circumstances. The experts presented this uncontroverted evidence of organic brain damage, and even explained the causes and origins of Margaret's frontal lobe brain damage and established that there was a causal link between the brain damage and the

homicide, just as in *Crook*. Thus, the trial court erred in rejecting this mitigating circumstance, which has been called "the mitigating factor of the most weighty order." *Rose v. State*, 675 So.2d 567, 573 (Fla. 1996) and has been found to justify a life sentence. *See Kramer v. State*, 619 So.2d 274 (Fla. 1993).

> Accordingly, we hold that the trial court erred in rejecting the uncontroverted evidence of Crook's brain damage. We conclude that based upon the expert testimony, there was "a reasonable quantum of competent, uncontroverted evidence" establishing its existence and its connection to the crime in question. *Spencer*, 645 So. 2d 377 at 385. Certainly, this is not a case where there was little or no evidence presented to support a finding of brain damage, *see Shellito v. State*, 701 So. 2d 837, 844 (Fla. 1997), or where the expert testimony pertaining to a mitigating circumstance was equivocal. *See Robinson*, 761 So. 2d at 276-77; *see also Franqui v. State*, 699 So. 2d 1312, 1326 (Fla. 1997). As in *Spencer*, 645 So. 2d at 385, where the Court held that the trial judge erred in not finding and weighing uncontroverted mental mitigating circumstances, the expert testimony in this case pertaining to Crook's brain damage was uncontroverted, and the experts reached this conclusion after performing a series of neuropsychological and personality tests, conducting clinical evaluations of Crook, interviewing his mother, reviewing Crook's school and medical records, and examining the evidence in the case. Thus, given the unrefuted expert testimony in this case, we conclude that the trial court erred in failing to find and weigh the evidence of Crook's brain damage in its assessment of statutory mental mitigation.

Crook v. State, 813 So.2d at 75-76. *See also Spencer v. State*, 645 So. 2d 377, 385 (Fla. 1994).

Just as in the above cited cases, the record clearly establishes that the defendant was indeed under the influence of extreme mental or emotion disturbance at the time of the crime that was a major contributing factor in the crime, and the court's total rejection of this factor was unjustified and requires a life sentence or at least a remand to the trial court.

Similarly, the trial court erred in rejecting the other statutory mental mitigating circumstance of substantial impairment to appreciate the criminality of her conduct or conform her conduct to the requirements of the law. First, the trial court does find that both Dr. Gebel and Dr. Wu established that, because of Margaret's "numerous head traumas, the defendant has brain damage." However, in the next paragraph, the court inexplicably finds that Dr. Gebel does not have any major brain injury. This contention by the trial court must stem from a total misreading of Dr. Gebel's testimony: While he did testify that she did not exhibit the type of "major brain damage" that would cause weakness in her extremities (Vol. 21, T 1745), he also indicated, and quite clearly, that she *did* have "significant intra cranial injuries" and organic brain damage which caused problems with her mental status and directly contributed to the crime here. (Vol. 21, T 1750-1751, 1753-1755, 1760-1764)

The court then rejects this statutory mitigator, noting simply that Margaret was *aware* of the criminality of her conduct[11] due to the amount of time the defendant confronted the victim and searched for her purse prior to the killing, the fact that she told the victim's "husband" the next day that she did not know where Wright was, and that she was able to orchestrate the disposal of the body. First, it should be noted that co-defendant Martin at one point recounted that it was Quintin who orchestrated the disposal of the body. (Vol. 17, T 1255) and further that Martin told a relative of the defendant that it was Quintin Allen who had done this. (Vol. 17, T 1256)

Secondly, as *both* experts testified, the act of executing the disposal of the body does not negate this factor. As Dr. Wu and Dr. Gegel noted, medically different areas of the brain are responsible for those executive functions and while still having the ability to plan a shopping trip for plywood for use in the disposal of the body, she was still impaired in her ability to regulate her emotional overreactions to certain situations such as she found herself in. (Vol. 21, T 1760-1764, 1854) And Dr. Gebel specifically opined that despite evidence of the

[11] An awareness of the criminality of conduct, i.e. knowing right from wrong, does not preclude a finding of this mental mitigating factor; knowing right from wrong does not negate a defendant's capacity to *appreciate* the criminality of his/her conduct and to conform it to the law, which may still be impaired, as the doctors both testified here. *Huckaby v. State*, 349 So.2d 29, 33 (Fla. 1977).

defendant's disposal of the victim's body, these injuries would still have a substantial effect on her impulse control, judgment, and actions because of the different locations in the brain for these functions (temporal lobe damage vs. the prefrontal cortex process). (Vol. 21, T 1760-1764)

Both doctors testified, as recounted in the statement of facts, that the type of brain injury Margaret suffered from destroyed her ability to have impulse control, to think things through clearly, and to control her actions and understand the consequences of them; she was unable to regulate her response to the situation she found herself in, the provocation of having had her money taken, without an awareness of what she was doing. (Vol. 21, T 1750-1755, 1763, 1816-1824, 1829-1830) Yet, despite all of this uncontroverted testimony from the doctors, specifically applying it to the facts of the crime here, the trial court astoundingly concludes that "there is no evidence indicating that any impairment affected the actions of the defendant." This is a most egregious abuse of discretion that cannot be countenanced!

Instead, contrary to the experts and all the supporting evidence, the trial court came up with its own medical diagnosis and conclusions that Margaret was able to conform her conduct to the requirements of the law "had she wanted to do so" simply because, after the fact, she "knew she had committed a horrendous

crime." (Vol. 5, R 957-958) This bald conclusion is unsubstantiated by any evidence in the record. The traumatic brain injury, substantiated with testing, brain imaging, and the medical history of the defendant, and the doctors' uncontroverted testimony clearly establish that the type of injury to the right frontal lobe area of her brain would destroy her ability to have impulse control in the type of situation she found herself in; Margaret, because of her brain injury, lost the ability to think things through clearly, to control her actions and, during the course of her overreaction and the killing, to understand the consequences of her actions. (Vol. 21, T 1751-1755, 1763, 1822-1824, 1829-1830)

Because of her organic brain damage, Margaret Allen was, at the time of the provocation of having her money taken, simply unable to regulate her response to this provocation, overreacting instead in a disproportionate manner to that provocation without an awareness of what she was doing at the time. (Vol. 21, T 1829) Her mental state, then, the next day after the killing and the belated realization of what had happened and the need to dispose of the body, bears no relationship to her lack of impulse control and inability to conform her conduct to the requirements of the law at the time of the provocation. (Vol. 21, T 1831) *See Crook, supra* (organic brain damage to the frontal lobe, impairment to ability to impulse control, severely limited frustration tolerance causing physical

aggression); *Besaraba v. State*, 656 So.2d 441, 445 (Fla. 1995) (psychotic episode, emotional disturbances, situational stress); *Morgan v. State*, 639 So.2d 6 (Fla. 1994) (rage and mental infirmity, overruling trial court fact finding); *Knowles v. State*, 632 So.2d 62, 67 (Fla. 1993) (organic brain damage, psychotic state, neurological deficiency, overruling trial court and reducing to life imprisonment); *Rivera v. State*, 561 So.2d 536 (Fla. 1990) (impulsive, anger); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (organic brain damage, impulsive).

In light of the uncontroverted evidence here of organic brain damage which bore a direct relationship to her actions, these two statutory mental mitigating circumstances cannot be rejected here, especially when compared to the above-cited cases; to do so causes Florida's death penalty scheme to be unconstitutionally arbitrary and capricious. The death sentence must be vacated.

And yet there is still much more here that requires a life sentence or at least a remand. In considering the plethora of nonstatutory mitigation, the court, without providing any adequate analysis, assigns diminished weight to the substantial mitigation. Trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to expressly evaluate in their written orders each mitigating circumstance proposed by a defendant to determine whether it is supported by the evidence and to, in detail, provide an

analysis of the weight given to each. *Hudson v. State*, 708 So.2d 256 (Fla. 1998). The *Hudson* trial court cited the evidence offered in mitigation and concluded that the defendant's situation was "neither substantial nor extraordinary" and gave the evidence little weight. Despite the fact that the trial court addressed the evidence in some detail, this Court rejected the trial court's "summary analysis" of both statutory and non-statutory mitigation finding that the judge did not evaluate in writing the evidence presented or explain the reason for his weighing of the evidence, quoting *Walker v. State*, 707 So. 2d 300, 319 (Fla. 1997):

> This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. To satisfy *Campbell*:
>
> > This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

> *Ferrell*, 653 So. 2d at 371 (emphasis added). Clearly then, the "result of this weighing process" can only satisfy *Campbell* and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order. *Id*. Since that is precisely the case here, we must vacate the sentence of death and remand for a proper evaluation and weighing of all nonstatutory mitigating evidence . . . .

Walker v. State, *supra* at 319; *Hudson v. State*, *supra* at 259. *See also Jackson v. State*, 704 So. 2d 500 (Fla. 1997); *Reese v. State*, 694 So. 2d 678 (Fla. 1997).

Without this detailed analysis of the weighing process for each mitigator, this Court cannot perform its constitutionally mandated duty of proportionality review and this State's death penalty is thrown back to the days of unbridled discretion. *See Walker, supra*. For, on the identical evidence, a judge in Miami could assign a mitigator great weight, yet another judge in Tallahassee might assign it only slight weight.

In the instant case, the trial court glossed over substantial nonstatutory factors. These factors were uncontroverted and directly related to the crime for which she is being sentenced. As such, the court abused its discretion in giving

them much less weight, without analysis, than they deserved when compared to other cases.

The defendant has been the victim of extreme physical abuse and was sexually abused by an uncle and a brother, described by family members; the physical abuse causing permanent brain damage, affecting the defendant for the rest of her life. The multiple instances of physical abuse and hospitalization is the worst seen by counsel in any previous capital case in his previous 35 years of handling capital appeals and must be given the proper great weight that it deserves when compared to other cases. Yet, the trial court, again without providing details of its weighing, gives it only "some" weight. (Vol. 5, R 958-959)[12]

Again, the trial court, without adequate explanation supported by the record, diminishes, as a nonstatutory mitigator, the defendant's brain damage and lack of impulse control, giving it only "some" weight (Vol. 5, R 960) when, compared with other capital cases it must be given the proportionate amount of great weight. (*See* argument above regarding the statutory mental mitigators.)

Further, the defendant suffered from an impoverished background and a deprived childhood in a broken home, growing up in a neighborhood from which

she could not escape, of violence and drugs, to which culture she became a part of, selling drugs to support her children. Again, the trial court dismisses this weighty factor with only "some" weight.

And finally, evidence was abundant that normally the defendant was a good woman, helping anyone she knew in need, taking people in and providing them with food, shelter, and money. She was close friends with her neighbors, including the victim and her family, to whom she expressed deep sorrow at the loss of Wenda. The evidence against her in this case as to her involvement came solely from the incredibly inconsistent and hence, suspect, testimony of co-defendants who had been spared their lives and permitted to plead to lesser offenses, testimony that Quintin even admitted on the stand was false (when caught in a discrepency, he swore that his statement to the police was the truthful testimony and that his trial testimony was false.) Surely, these factors demand a life sentence, especially when compared with other cases:

Low mental abilities or mental disorders such as that from which Margaret Allen suffer have been afforded weight sufficient to reduce a death sentence to life. *Woods v. State*, 733 So.2d 980 (Fla. 1999); *Larkins v. State*, 739 So.2d 90 (Fla.

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[12] In discussing the defendant's history of physical abuse, the trial court details the facts about two of the defendant's children being in prison, which facts have absolutely no relevance

1999); *Morris v. State*, 557 So.2d 27 (Fla. 1990); *Down v. State*, 574 So.2d 1095 (Fla. 1991); *Neary v. State*, 384 So.2d 881 (Fla. 1980); *Meeks v. State*, 336 So.2d 1142 (Fla. 1976); *Campbell v. State*, 571 So.2d 415 (Fla. 1990) (poor reasoning skills, third grade reading ability). *See also Amazon v. State*, 487 So.2d 8 (Fla. 1986) (mental problems need not reach the level of statutory mitigating factors to be considered).

See also Crook v. State, 908 So.2d 350, 358 (Fla. 2005) (aggravating circumstances present here, though substantial, found not to outweigh the combination of unrefuted and overwhelming mitigation, that were determined in other cases requires a life sentence, including Crook's abusive childhood, diminished control over his actions, and a disadvantaged home life; the aggravating circumstances present here, though substantial, were found not to outweigh the combination of unrefuted and overwhelming mitigation, that were determined in other cases requires a life sentence); *Wright v. State*, 688 So.2d 298 (Fla.1996) (reversing sentence of death where two aggravating circumstances did not outweigh evidence in mitigation, including remorse and regular church attendance); *Proffitt v. State*, 510 So.2d 896 (Fla.1987) (vacating sentence of death on proportionality grounds despite trial court's finding of two aggravating

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to this mitigator. (Vol. 5, R 959)

circumstances where mitigating evidence included the fact that the defendant was described as normally nonviolent); *Offord v. State*, 959 So.2d 187 (Fla. 2007), where despite the trial court only giving "some weight" and "moderate weight" to the mental mitigation evidence presented (*see Initial Brief of Appellant, Offord v. State*, SC05-1611, p. 2), this Court vacated the death sentence finding Offord's mental issues underlying the impaired capacity and extreme mental disturbance factors to be quite compelling and thus entitled to much greater weight.

See also Besaraba v. State, 656 So.2d 441, 445-446 (Fla. 1995) (defendant experiencing a psychotic episode in which he was unaware of his actions, evidence of past emotional disturbances, and situational stress of confrontation with victim which triggered episode, all establish this mitigator and justify a life sentence); *Morgan v. State*, 639 So.2d 6 (Fla. 1994) (rage and mental infirmity; Court applied this circumstance to reduce to life, *despite finding by trial court that it did not play a major role in the crime*); *Knowles v. State*, 632 So.2d 62, 67 (Fla. 1993) (organic brain damage, psychotic state, neurological deficiencies, coupled with intoxication caused this Court to reverse trial court's rejection of this factor and to reduce to life); *Rivera v. State*, 561 So.2d 536 (Fla. 1990) (borderline personality disorder, impulsiveness, lack of control of anger, affective instability); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (organic brain damage, increased impulsiveness,

diminished ability to plan events, psychologist testified that defendant "probably" unable to appreciate criminality).

Robertson v. State, 699 So.2d 1343 (Fla.1997), the Court held that the death sentence was disproportionate where Robertson committed an unplanned murder by strangling a young woman he believed had befriended him. Although two weighty aggravators applied (that the murder was committed during the course of a burglary and HAC), the Court noted that substantial mitigation was presented in the case, including the fact that heand had an abused and deprived childhood. *Id.* at 1347.

Further, in *Livingston v. State*, 565 So.2d 1288 (Fla.1988), this Court held that a death sentence was disproportionate where the trial court found three aggravators (i.e., prior violent felony, committed during armed robbery, and committed to avoid or prevent arrest) and two mitigators (i.e., Livingston's age of seventeen and his "unfortunate home life and rearing"). *Id.* at 1292. This Court explained that Livingston suffered "severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him." *Id.*

In the court's final conclusion weighing the aggravating and mitigating circumstances, the court finds in favor of death, considering that "there is no excuse or justification for the defendant's conduct." (Vol. 5, R 962) Again, as

explained above in reference to the statutory mental mitigation, the trial court is applying the wrong standard in ruling for death – if there existed here an "excuse" or "justification" for the kiiling that fact would totally prevent a conviction for first degree murder; the powerful mitigators here do not "excuse" or "justify" the killing, instead they simply, as the law requires, mitigate the sentence from death to life.

The unrebutted evidence in mitigation (both statutory and nonstatutory) runs contrary to the judge's minimalization of these mitigators; thus, the trial court's findings and weight should be rejected. The above-cited cases cannot be reconciled with the evidence and sentencing order here. To fail to follow these precedents renders the defendant's death sentence constitutionally unsound. There exists strong, unrefuted evidence that the defendant's organic brain damage directly and significantly contributed to these crimes; substantial mitigation exists here entitled to great weight. The death sentence must be vacated and the defendant sentenced to life imprisonment.

CONCLUSION

BASED UPON the cases, authorities and policies herein, the Appellant requests that this Court vacate her judgments and death sentence, and, as to Point I, remand for a new trial; as to Point II, vacate the convictions and remand for entry of lesser offenses; as to Point III, vacate the death sentence and remand for a new penalty phase; and, as to Point IV, vacate the death sentence and remand for the imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Tamara Milosevic, Assistant Attorney General, 444 Brickell Avenue, Suite 650, Miami, FL 33131, and mailed to Margaret Allen, DC#699574; Lowell Correctional Institution, 11120 N. W. Gainesville Rd., Ocala, FL 34482-1479 this 26th day of April, 2011.

CERTIFICATE OF FONT

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

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JAMES R. WULCHAK