IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1086

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR HOLMES COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Calhoun." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

> VI 1017: the jury's 9 to 3 recommendation found at page 1017 in Volume VI;
>
> SE 21-C: State's exhibit 21-C, which was found on the floor of Calhoun's trailer and which contained the victim's blood.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

OVERVIEW

What was left of Mia Brown's body was found in the trunk of her charred white Toyota. The car had been driven deep into the woods and intentionally set on fire. The fire was so hot that it melted glass and metal and burned off almost all of Mia Brown's arms and legs. Duct tape and co-ax type wire were found wrapped around her remains. Ms. Brown was alive when the fire was raging through her car. The fire killed her.

Ms. Brown disappeared when, at Calhoun's request, she drove her white Toyota to Defendant Calhoun's to give him a ride. After she left to pick him up, she was seen alive only one more time, when she knocked on the door of someone who lived one road away from Calhoun's trailer and she asked for "Johnny Mack," which referred to Calhoun.

Although undoubtedly the fire accomplished its intended purpose to destroy evidence, Calhoun's path and actions created other evidence. For example, shortly after Ms. Brown disappeared, Calhoun was seen driving a white vehicle with a Florida tag -- undoubtedly Ms. Brown's car. At the time he had scratches on his hands, he said he had been deer hunting, and he was in a big hurry. Later that same morning and not very far away, witnesses saw a fire coming from the area where the burned out car was eventually found and in the area where Calhoun was known to camp.

For days, Calhoun attempted to hide. He was found in a barn on the floor. When residents inquired, Calhoun denied knowing Ms. Brown and then said that "probably" she was the one who was supposed to pick him up. Within days of murdering Ms. Brown, the police found Calhoun hiding inside the frame of his bed and under a mattress.

A duct tape roll found in Calhoun's trailer was stained with the victim's blood, identified at a 1-in-38 quadrillion

probability. Calhoun's blood was identified at 1-in-420,000 odds. Several of the victim's hairs, pulled out of her body, were found at various locations in Calhoun's trailer. Additional DNA identification and other evidence within Calhoun's trailer marked Calhoun's murder of Ms. Brown.

The appellate issues pale in comparison with the overwhelming evidence of Calhoun's murder of Ms. Brown.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

CASE TIMELINE.

DATE	EVENT
12/16/2010	Last day Mia Chay Brown seen alive while looking for "Johnny Mack's" (Calhoun's) place. (See (XIII 608-611)
2/18/2011	Johnny Mack Sketo Calhoun, indicted for First Degree Murder and Kidnapping of Mia Chay Brown. (I 39-40)
12/8/2011	Defendant's Motion to Suppress, which attached a purported[1] transcript of the police interview of Calhoun. (I 51-106)

[1] The State has no reason to question the substantial accuracy of the transcript attached to the Motion to Suppress, but, as argued infra, apparently it was never proffered to the trial court to consider concerning the ISSUE I issue, and the trial court considered only the first seven minutes for purposes of the Motion to Suppress. The denial of the Motion to Suppress is not raised on appeal.

DATE	EVENT
12/21/2011	Evidentiary hearing on Defendant's Motion to Suppress. (VII 1162-1203)
1/10/2012	Trial court's Order Denying Motion to Suppress and indicating that, pursuant to the parties' agreement, the trial court listened to only the first seven minutes of the audio of the police interview of Calhoun. (I 109-110)
2/20/2012	Jury selection began.(X)
2/28/2012	Jury found Calhoun guilty as charged of First degree Murder and Kidnapping. (XVII 1246-47; VI 960)
2/29/2012	Jury recommended death sentence by 9-3 vote. (XVIII 1373; VI 1017)
4/4/2012	Spencer hearing. (VII 1251-1306)
5/18/2012	Judge Patterson sentenced Calhoun to death. (VII 1308-1312; VI 1075-1083)

FACTS SURROUNDING THE MURDER AND INVESTIGATION.

Timeline of Some Key Facts.[2]

The following is submitted as an overview of some of the key prosecution evidence. Additional details are narrated in the following two sections.

DATE	EVENT
12/16/2010, ~8-9PM	Mia Chay Brown left work in her 4-door white Toyota sedan (XIII 593; XIV 819-20; XV 910, 945) to give Defendant Calhoun a ride at his request (See XIII 593-94; see also XIII 594 regarding the time she gets off work);

[2] The detective summarized some of the key events at XV 949-51.

DATE	EVENT
12/16/2010, ~8:40PM	Ms. Brown arrives at the wrong trailer of Jerry Gammons and asks for "Johnny Mack" (XIII 605-613); Gammons' trailer is a road away from Calhoun's (XIII 611);
12/17/2010, 3:30am-4:00am	Photograph taken of Calhoun's ceiling (XV 937-39) with the victim's camera (Compare XV 911-13 with XV XV 916-22; see XIII 619; XV 920-22);
12/17/2010, 5:30am-6:00am	Calhoun, with scratched and bloodied hands ((XIII 650-51), at a convenience store in Alabama, driving a 4-door white vehicle with a Florida tag (XIII 651-52); Calhoun was in a big hurry (XIII 653);
12/17/2010, ~8am	Calhoun's father at the scrapyard where Calhoun's trailer located but Calhoun is not there (XIII 627-28); the father did not know where Calhoun was (XIII 638-39);
12/17/2010, ~11-11:30am	Fire observed in the woods in Alabama near where Calhoun was known to visit (Compare XIV 753-60 with XIV 709-713, 764-67);
12/17/2010, evening	Victim's friend finds victim's purse inside Calhoun's trailer, (Compare XIV 713-18 with XIV 768-69), with the victim's camera missing from the purse, where the victim usually keeps it (XV 911; see XIII 618-19);
12/18/2010	Serving a search warrant, officers find in Calhoun's trailer: disarray; co-ax wires pulled out of equipment; duct tape; and the memory card (XV 835 et seq.) from Ms. Brown's camera, on which they subsequently determine the photograph had been taken of Calhoun's ceiling 12/17/2010, 3:30am-4:00am (Compare XV 911-13 with XV 916-22; see also XIII 619); Later, scientific analysis showed, e.g., that the victim's blood and DNA consistent with Calhoun's were on the inside of the duct tape roll (XV 870-73);
12/18/2010, morning	Calhoun, with wet clothes, found on the floor in the Brooks' barn near Geneva Alabama (XIV 779-83, 793);
12/18/2010,	Calhoun tells the Brooks' that he does not know

DATE	EVENT
morning	Mia Brown, but also admits that she "probably" was the person who was supposed to pick him up (XIV 784-85, 798-99);
12/20/2010	Victim's burned-up remains found in the trunk of her car, which had also been consumed by fire (XIII 551-63, 579); the wooded location of the car was consistent with where fire was observed on 12/17/2010 (See, e.g., XVI 978-79), and it is 1488 feet from where Calhoun had gone camping (Compare XIV 709-713, 764-67 with XV 947-48); Co-ax type wire and duct tape were wrapped around various locations on the victim's remains (See XIV 584-85, 689, 693, 694-95; VIII 1358, 1360, 1362, 1364);
12/20/2010	Police find the evidence tape on Calhoun's door broken and find Calhoun hiding in the trailer inside a bed frame under some bedding (XV 927-28); police observe scratches on Calhoun's legs, arms, and neck and take photographs (XV 929-31; SE 10-AtoD at VIII 1378-84; SE 27-AtoD at IX 1520-26);
12/21/2010	Dr. Boudreau conducts autopsy on victim's remains (XIV 683 et seq.);
Subsequent DNA analysis	DNA analysis, for example, establish the victim's DNA at 1/38 quadrillion and Calhoun's DNA at 1/420,000 in blood on the duct tape recovered from Calhoun's trailer (XV 870-72); DNA in several strands of hair that had been pulled-out are identified as the victim's (XV 880-90).

Sequence of Events Proved at the Guilt-Phase.

On December 20, 2010, the charred remains of murder-victim Mia Chay Brown were found in the trunk of her burned-up car located about 400 feet into the woods in Geneva County, Alabama. (See XIII 556-70, 578-80; XIV 698-99; XV 945) It was a white

four-door 2000 Toyota Avalon (XIII 593; XIV 819-20; XV 910, 945).

Copies of photographs of the burned up car in the woods are at VIII 1340-46, and photographs of the car after it was stored as evidence at VIII 1426-32.

The victim's remains weighed 29 pounds. (XIV 687) "The hands and limbs were burned off" "The torso was basically all that was left." (XIV 687) Copies of photographs of the burned up car in the woods are at VIII The victim was alive at least during the first part of the fire that consumed her car. (XIV 699) She was identified through her dental records. (XIV 698-99)

Copies of photographs of the victim's remains are at, e.g., VIII 1358.

The following are some details of the events and evidence surrounding and pertaining to the discovery of Ms. Brown's remains.

Mia Chay Brown was an employee at Charley's Deli or Charlie's Grocery (XIII 544-45, 592, 616) in Esto, Florida (XIII 543, 592, 616). She lived in Bonifay, Florida. (XIII 546-47, 614-15)

Thursday, December 16, 2010.

At lunchtime, on December 16, 2010, Brandon Brown, Mia's husband, talked with Mia while she was at work. (XIII 616) Ms. Brown was scheduled to get off work at 9pm that day. (XIII 616)

Another witness testified that Ms. Brown usually got off work at around 8 or 9pm. (XIII 594)

Harvey Glen Bush was a regular customer in the store, knew Mia Brown, (XIII 591-92) and a few days earlier had met Defendant Calhoun (XIII 593). At about 1:00-1:30pm (XIII 595), on December 16, 2010, Mr. Bush observed Defendant Calhoun enter the store and asked Mia Brown for a ride to a "party house" that night, and Mia Brown agreed to give him a ride when she got off work that night. (XIII 593-94)

Brittany Mixon, Calhoun's on-and-off girlfriend (XIV 703-704, 720; see also XIV 749, 750), testified that she expected Calhoun to come to her place the night of December 16 and stay with her until Christmas. (XIV 704, 722, 734)

At "around 8:40pm," Ms. Brown went to a trailer belonging to Jerry Gammons and asked for "Johnny Mack." Mr. Gammons testified:

> Q. Okay. Now could you describe to us what exactly happened when she came to your residence?
>
> A. Well, she came knocking on the door, like I said around 8:40. My little dog got to barking so it woke me up and I went to the door and opened the door and she was like standing in the yard and she asked me was Johnny Mack there and I told her there was no Johnny Mack that lived there, she was at the wrong address, she said, well, he was supposed to live in a camper on the junk yard. I said, well, I am sorry, nobody live here by that name.
>
> Q. Could you tell what she was driving?
>
> A. She was driving a light colored car. She had left it running in the driveway but I didn't really pay much attention, I was focusing on her.

(XIII 607) Gammons did not know the name "Johnny Mack" at first because he knew of the Defendant as a "Sketo." (XIII 608-611) Calhoun's trailer is located a couple of blocks behind Gammons', and Gammon's trailer is reached, rather than Calhoun's, by turning a road sooner or later. (See XIII 611) "It's one road down." (XIII 611) He pointed to the locations in an aerial photograph. (XIII 609-611) On cross-examination, Gammons indicated that the young lady's car was a four-door, she left the engine running, she did not have her purse with her, and she had shut her car door. (XIII 612-13)

After Ms. Brown knocked on Gammons' door and realized this was the wrong residence, she left, and Gammons did not notice in which direction she headed. (XIII 613)

Friday, December 17, 2010.

At 2am, on December 17, 2010,[3] Ms. Brown's husband awoke and discovered that she had not returned from work, which was unusual for her. (XIII 617-18) He knew she had been scheduled to get off work at 9pm the previous night. (XIII 616) He called his wife's family, but he was unable to locate her. (See XIII 618)

At 3:47am, on December 17, 2019, Officer Grimley was dispatched pursuant to a missing person report regarding Mia

[3] Mr. Brown was nervous and could not recall the date, as such (XIII 615), but it was the night she failed to return home. (See XIII 616-18)

Brown and, that day, unsuccessfully attempted to find Ms. Brown. (XIII 621-24)

Between 5:30am and 6:00am, on December 17, 2010, Calhoun was observed at an Alabama convenience store where Sherry Bradley is the manager. Ms. Bradley had seen Defendant Calhoun in her store few times before (XIII 663), and Ms. Bradley knows Calhoun as "Mr. Calhoun or Sketo" (XIII 649). Ms. Bradley identified Calhoun in a photospread. (XIII 656-58) Another customer, Darren Batchelor, had seen Defendant Calhoun at that store sometime in December 2010. (XIII 677-78)

Ms. Bradley testified that, on December 17, Calhoun's hair looks oily, like it needed washing, and he is wearing an open flannel shirt, with a white T-shirt underneath, and "like denim jeans." (XIII 653-54)

Ms. Bradley testified that, at this time, Calhoun was driving a white four-door vehicle with a Florida tag and red clay on it. (XIII 651-52) She does not know how Calhoun got to her store in the past. (XIII 663-64, 665-66) This time, she saw Calhoun park in a handicapped space. (XIII 649, 664) Calhoun asked for some cheap cigarettes (XIII 650), and when he is paying for them, she noticed fresh scratches and what appear to be dried blood on his hands (XIII 650). She testified:

Q. Did these appear to be fresh scratches?

A. Yes, sir. I even asked him did he need me to get him anything for the scratches and all because they were, you know, there were a lot of them and all that.

Q. What were you thinking?

A. He said he had been deer hunting. I asked him what he had been doing to get them scratches. My exact words was, baby, what have you been doing to get these scratches? And he said he had been deer hunting.

Q. Was there actually blood on his hands?

A. Dried blood, yes, sir.

(XIII 650-51)[4]

Calhoun also has blood spots on his white T-shirt, and he had "black stuff" around his fingernails. (XIII 654)

Calhoun came into the Alabama convenience store in a big hurry and left in a big hurry. (XIII 653)

At about 8am on December 17, 2010, Officer Chuck White went to America's Precious Metals scrap yard. (XIII 627) Calhoun's trailer is located on the premises. (XIII 627-28) The officer stepped inside Defendant Calhoun's trailer, and Calhoun was not there. (XIII 628-29) Calhoun's father, Mr. Sketo (XIII 628), and Mr. Ellenburg, Calhoun's cousin (XIV 708), did not know where Calhoun was. (XIII 638-39) Clothes and trash were "scattered all through" the trailer. (XIII 629; see also XIII 638) When Calhoun's father mentioned that a gun was kept in Calhoun's

[4] Prior to contacting the police, Ms. Bradley had not watched TV or listened to any radio broadcast about this case. No one had told her that Calhoun's hands were all scratched up or that he had greasy hair that needed to be washed. (XIII 666)

trailer, Officer White directed the father to retrieve it, and had no trouble locating it inside. (XIII 641-42) Mr. Sketo said nothing about Brittany Mixon moving the gun. (XIII 642)

At 8:25am, Officer White went to Charlie's Grocery and found out that Ms. Brown was missing, then on the 18th returned to the scrapyard. (XIII 630-31, 636, 639-40) On cross and redirect examinations, the officer testified that he initially went to the scrapyard due to a report that a skid steer loaded and been hot-wired; someone had unsuccessfully attempted to take it. (XIII 632-34, 642) There were pry marks on the trailer, but the officer had no idea when they were placed there. (XIII 638-39, 641) There were some tire tracks in the area (XIII 635), but they could have been placed there by customers (XIII 640-41). No one reported anything that was actually missing from the scrapyard anywhere. (XIII 642-43)

Neither Mr. Sketo nor Mr. Ellenburg told the officer that anyone else had been at the trailer that morning. At the time, the officer was unaware that Brittany Mixon had been there. (XIII 639)

Brittany Mixon testified that she had lived with Calhoun in his trailer for a while, but she moved out in October. (XIV 705) She explained that, when they lost the key to Calhoun's trailer, they pried the door open, but they eventually discovered they could open the door by yanking it. (XIV 705-706)

At about 9:30am to 10:00am on December 17, 2010, after Calhoun did not show up the prior evening at her house, Brittany Mixon went to Calhoun's trailer to look for him. (XIV 704-705) At the time, Calhoun had no phone. (XIV 705) She opened the door to Calhoun's trailer and looks inside without going in. She described it as looking "ransacked," "it had been tore up." (XIV 707) She testified that it "[l]ooked like somebody got mad or something." The TV was not where it was usually located. (XIV 726)

At about 11am to 11:30am on December 17, 2010, Brett Bennett, while driving in the Geneva County Alabama area, saw a lot of concentrated smoke coming from "behind the pond, dam" in an area to south/southeast. (XIV 753-58) He pointed to each location in an aerial photograph. (XIV 753-57) About 11am, David Keith Brinley also saw smoke from the fire and pointed to locations on the aerial photograph (XIV 760-61). Mr. Brinley testified:

> Q. Tell us about that, where were you and what did you see?
>
> A. I was headed home for lunch, around 11:00, and when I made the turn off the main highway going to my house, on the dirt road, I seen a big fire, big black mushroom type fire behind Mr. Bennettt's house.
>
> Q. Mr. Bennett's house?
>
> A. Who lives off of, off the main highway also.

(XIV 760)

About 2pm on December 17, 2010, Ms. Mixon took law enforcement to the location where Calhoun and she had stayed in

a tent at a campsite in the Geneva Alabama area. (XIV 709-713, 764-67) It was near a pond, a man-made dam (XIV 765) and on Charlie Skinnard's property. (XIV 766-67) When they went to the campsite it was "drizzling off and on" and "continued between raining and drizzling." (XIV 767)

Later on December 17, 2010, Brittany Mixon, returned to Calhoun's trailer to look for him again. She goes inside Calhoun's trailer. She described the inside of the trailer: " There was stuff laying everywhere in the trailer, ... I mean, the trailer looked like a tornado went through it." The bathroom cabinet mirror was laying on the couch." (XIV 730) She found some cigarettes, which she inferred were for her because she said that Calhoun does not smoke cigarettes and these are the brand that she smokes. (XIV 740-41) She also finds a purse. (XIV 713-18) She testifies that she placed no duct tape and no blood there, and she denied pulling Mia Brown's hair out of her head and placing them in Calhoun's trailer. (XIV 719-20) The purse is identified as the victim's. (See XIV 768-69) It is missing the digital camera that Ms. Brown took everywhere and that she usually kept there. (XV 911; see XIII 618-19)

Saturday, December 18, 2010.

At about 9:30am on Saturday, December 18, 2010, (XIV 780) in the Hartford/Geneva County Alabama area (XIV 779, 793), Tiffany Brooks found Calhoun on the floor of their barn covered up in

sleeping bags, which had been used for insulation for a freezer in the barn. (XIV 780-81) Calhoun was wet and dirty and had on overalls and a white T-shirt. (XIV 781) She did not notice any blood. (See XIV 788) Calhoun had scratches on his arms. (XIV 789) The Brooks family knew Calhoun (XIV 779-80, 793) as "Sketo" (XIV 781, 794), and they invited him inside their house, allowed him to take a shower, washed his clothes, provided him fresh clothes, fed him, and allowed him to take a nap on their couch (XIV 781-83).

While Calhoun is still at the Brooks' home that day, Tiffany Brooks received a phone call from her boyfriend, Steve Bledsoe, who said he saw a flyer at the convenience store that looked like "Sketo" and that "Sketo" and a woman by the name of Mia Brown were missing. (XIV XIV 784) Tiffany relayed this information to Calhoun, who responded that he does not know Mia Brown. (XIV 784-85) The Brooks were cross-examined about statements they made to law enforcement. (XIV 786-87, 797) On redirect examination, Glenda Brooks testified:

> Q. All right, there were two times during your statement to Lieutenant Raley we talked about this, right?
>
> A. Yes, sir.
>
> Q. And the first time you said, you just read this yourself: That's probably the girl that came looking, that was supposed to pick me up, right?
>
> A. Yes, sir.
>
> Q. That's probably the girl. Did you understand that to mean that he knew Mia Brown?

A. No, sir.

Q. When he denied he knew Mia Brown, did you think he was lying?

A. He said he didn't know, so...

Q. All he could say that's probably the girl that was supposed to come pick me up?

A. Yes, sir.

(XIV 798-99)

When Calhoun found out about the posters concerning him and Mia brown, he was "ready to go." At Calhoun's request, Tiffany dropped him off "down on a dirt road" (XIV 785), where there was "just a bunch of woods" (XIV 786).

On December 18, 2010, after obtaining a search warrant (XV 835), law enforcement went inside the Defendant's residence. It is disheveled. Inside on the floor, they also find a duct tape roll (XV 837; SE 13-C at VIII 1394; SE 21-A&B at VIII 1448 & 1448), pieces of duct tape (XV 837; SE 13-C at VIII 1394; SE 21-A&B at VIII 1448 & 1448; SE 21-E at VIII 1454) and an SD card, which is the memory card for a digital camera. The SD card was next to the roll of duct tape. (XV 844)

The reddish stain on the inside cardboard of the duct tape roll (SE 21-C & D at VIII 1450 & 1452) tested positive for blood. (XV 837-39)

A multi-colored sheet (XV 841) and a white quilt (XV 842) were recovered from the bed in the trailer. Some light colored hair were taken from the quilt. (XV 843)

Subsequently, in Calhoun's trailer, law enforcement also recovered some black socks from the couch that appeared to have hair on it (XV 845-46), black sweatpants that appeared to have hair on it (XV 846-47), and a punk polo shirt behind a door in the bedroom area of the trailer (XV 846). The also collected a black long sleeve shirt. (XV 848)

Monday, December 20, 2010.

On December 20, 2010, (XIII 561, 577), the victim's car is discovered about 400 feet into the woods in Geneva County, Alabama, (XIII 557-63, 579) 1488 feet from where Calhoun liked to go with Brittany Mixon (Compare XIV 709-713, 764-67 with XV 947-48). It is on the property of Charlie Skinner, who is Calhoun's brother-in-law. (XV 947) The location of the car was consistent with the location where on December 17th, Brett Bennett and David Brinley had seen a fire. (See, e.g., XVI 978-79)

The car is located approximately one and one-half miles from the Brooks' residence (XV 948-49), where, on December 18, 2010, Calhoun was found dirty and scratched up in the barn and from which he wanted to leave in a hurry when he found out he and Mia Brown were listed as missing.

Investigators found a path of debris going into the woods, through the woods, and to the burned-up car. The trial zig-zagged and included a vehicle's plastic taillight lens or turn

signal lens, a vehicle's outside mirror. (XIII 578-79) The car's zig-zag path was 625.2 feet long into the woods to its resting place, although the car's straight-line distance was 399.9 feet into the woods to its resting place. (XIII 579) There was some water on the top of the car. It had rained that Friday afternoon. (XIII 579)

When discovered, the car had no tag on it (XIII 564) and was burned up (XIII 563-66) from a hot fire (XIII 590). The Toyota insignia "had melted or f[allen] down" and the glass had also melted. (XIII 564, 567) The "windshields were gone and all of the glass windows, the seats were gone." (XIII 565) The front and back seats were "pretty much" burned out. (XIII 565) The game warden who found the car testified that he had "never seen a fire hot enough to melt the glass like that." (XIII 565)

When the game warden pointed his flashlight towards the back of the car, he could see into the trunk. There, he saw a "charred" rib cage. (XIII 566; see also XIII 580) The rib cage was part of the remains of Mia Chay Brown. (See XIII 551-55; discussion of medical examiner's testimony infra).

About 1:30pm on December 20, 2010, officers returned to Calhoun's trailer and found that the evidence tape on the door is broken. Officers then find Calhoun inside the trailer hiding inside the frame of the bed under the mattress. (XV 927-28) The

police observed scratches on Calhoun's legs, arms, and neck and took photographs. (XV 929-31)

On December 20, 2010, Investigator Raley Mirandized Calhoun and interviewed him, and Calhoun provided a statement. (XV 951-52) The officer testified to certain, specific aspects of the statement (XIV 952-56, which is the subject of **ISSUE I**.

Guilt-Phase Scientific Evidence and Additional Guilt-Phase Physical Evidence.

The medical examiner testified to the condition of the 29-pounds of the victim's remains:

> Q. Did the X-ray in this case reveal any projectiles in the body?
>
> A. No.
>
> ...
>
> Q. Were you able to determine the gender of the body?
>
> A. Yes, sir, it was a female.
>
> Q. What was the condition of the body?
>
> A. Badly burned.
>
> Q. When you say badly burned, were parts of the body burned worse than others?
>
> A. Yes, sir. The torso was basically all that was left. The hands and lower limbs were burned off. The torso had been burned through to expose the internal organs and some of those were actually charred and burned, so it was very badly burned.
>
> ...
>
> ... Some of the tissues were charred to the point of being just carbonized tissue, hard. Other portions deep in the body cavities were relatively spared. The uterus, for example, the vagina, were relatively spared because they

were deep in the pelvis and weren't exposed to as much heat, which is how I determined it was a female.

(XIV 687-88) However, it was not possible to do any analysis of anything in the victim's sexual organs (XIV 689), but the medical examiner did swab her vaginal area, and no DNA foreign to her was identified. (XIV 700)

The medical examiner testified to the bindings found on the victim:

> There was wire wrapped around what was left of the four limbs, the arms. As I indicated, the hands had been burned off basically but where the upper arms would be, there was wire sheath around both limbs, upper limbs, and there was tape applied to the neck area, as well.

(XIV 689) Photographs of the victim's remains (at VIII 1358, 1360, 1362) also shows the wiring wrapped around her. (See also close-up photograph of wiring at VIII 1364)

Investigator Gillis testified that the wiring and the gray-colored duct tape had been wrapped around the body (XIV 584-85) and he thought that the wiring was "embedded with the tape," but he was not sure. (XIII 587-88) When found, there was no knot in the wiring. (XIII 587)

The wiring found around the location of the arms was the type "that the cable company gives you to hook up your TV set to the wall. It has little curly cue wires and a wire in the middle." (XIV 690; see also XIII 583-84, 585-86) The wire was wrapped around where the victim's hands would be, and her body was bound in that position. (XIV 690) Additional wiring was "associated

with the neck and lower limbs," but when the autopsy was done, "they were not wrapped around anything tightly." (XIV 691)

Referring to a photograph, the medical examiner testified about a wire "extending up through the central portion there." (XIV 693) The doctor described photographs of the wiring and how it was wrapped around what was left of the arm. (XIV 693) The wiring was too mangled and partially melted, so its total length could not be determined. (XIV 700; see also XIII 589, 690) The end pieces for the wiring was not located among the victim's remains. (XIV 701; XIII 586-87)

There was "burnt fabric" which is what is left of clothing, when someone is incinerated." (XIV 693)

The tape around the neck had the appearance "of the duct tape that everybody loves and uses for everything . . . ." (XIV 694; see also XIII 584) The tape shielded some hair and the back of the neck from the intensity of the fire. (XIV 694-95)

"Soot" in the victim's airway indicates that the victim was "breathing smoke." (XIV 695) The victim "was alive when the fire started" (XIV 695, 699).[5] It could not be determined whether she was also conscious when she was in the trunk and when the fire

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[5] DNA and blood were also collected from the victim's remains. (XIV 695-97)

was started. (XIV 701) But there was no doubt that the victim was burned to death. (XIV 702)

Samples were collected from the burned out car. (XIV 799-807) they contained ignitable liquids, which the expert described as "light petroleum distillate," such as Coleman fuel, camp fuel, Zippo lighter fluid (XIV 814-15), which excludes oil or gas that is usually found in a vehicle (XIV 815).

An arson expert examined the car (XIV 817-18) and testified that the fire did not start due to an electrical problem or rupture to a gas tank, but rather, it was an "incendiary fire" "originated in the area of the driver's seat and the passenger compartment of the vehicle" (XIV 820-22; see also XIV 824-25). Part of the car's engine was "melted and burned away." (XIV 824) part of the windshield had melted away. (XIV 824)

An arson investigator testified concerning his VIN-related findings and identified the burned up car as a 2000 Toyota Avalon. (XIV 819-20) The car belonged to Mia Brown. (XV 945)

Calhoun's TV was laying face down on the bed, and some coax wires from Calhoun's video system was damaged like it had been pulled out. (XV 940-44; see SE 21-O at VIII 1474; SE 28-B,C,D at IX 1534-38) Another coax cable was needed to hook up the VCR. (XV 944)

The SD card contained photographs taken from Mia's camera (Compare XV 911-13 with XV 916-22; see also XIII 619), and the

last photograph in it was of the ceiling of Calhoun's trailer (XV 937-39). The forensic expert calculated that the last photograph was taken between 3:30am and 4:00am on December 17, 2010 (XV 920-22), assuming that no one had manually changed the date in the camera (XV 922).

A duct-tape roll and loose duct tape (XV 837, 840; photographs at VIII 1446-54 were on the floor inside Calhoun's ransacked trailer. The duct tape roll (VIII 837; SE 21-C at vIII 1450) had blood identified as Mia Brown's as a major donor and a Calhoun as a minor donor (XV 870-72). The probabilities were one in 38 quadrillion for Ms. Brown's DNA (XV 872) and one in 420,000 for Calhoun (XV 873).

On Calhoun's bed in his trailer, blood at two locations on a white quilt was identified as Calhoun's at one in 27 quadrillion. (XV 876-79) on the quilt Ms. Brown's blood was found at a 1 in 38 quadrillion probability. (XV 878-80)

A hair on the white quilt/blanket recovered from Calhoun's bed was identified as the victim's through DNA analysis, and one hair was identified as Calhoun's. (XV 880-83) The biology expert testified that these are hairs with actively growing roots, consistent with being "forcibly removed" from the head. (XV 881-82)

The hair recovered from the black socks on Calhoun's couch was identified as Ms. Brown's. (XV 883-84)

A full DNA profile of hair found on the black sweatpants from Calhoun's trailer matched Ms. Brown's DNA, and a partial DNA profile from a second hair from those sweatpants matched Ms. Brown's DNA. (XV 884-86)

Four hairs recovered from the pink polo shirt behind the door in the bedroom are of the trailer were identified as Ms. Brown's. (XV 886-88)

A partial DNA profile from a hair found on the black long sleeve shirt from Calhoun's trailer was identified as Ms. Brown's. (XV 888-90)

Calhoun's blood was also identified on the multi-colored sheet recovered from the bed in Calhoun's trailer. (XV 873-74)

After Calhoun was caught hiding inside the bed frame in his trailer, photographs were taken of his hands, arms, and his neck showing multiple scratches (XV 929-31; SE 10-AtoD at VIII 1378-84; SE 27-AtoD at IX 1520-26) and a scratch on his stomach (XV 931 at 1528).

In addition to those mentioned above, numerous other photographs were introduced and referenced. (See, e.g., XIII 544, 558 et seq.; 578 et seq.; 609-611, 629-35; XIV 692 et seq., 801-802, 822-23; XV 836 et seq.; XV 946 et seq.) Copies of the photographs introduced into evidence can be found in VIII and IX of the record.

The Defense Case.

Defendant Calhoun declined to testify in the guilt phase. (See XVI 981-82)

Defense counsel moved to "enter the remainder of the defendant's statement" and referenced the rule of completeness. Counsel and the trial court discussed the matter further. (XVI 983-86) Additional details are discussed infra in ISSUE I.

The defense called the following witnesses.

JOSE MARTINEZ (XVI 988-91): Owner of a convenience store who knows Calhoun. On December 16, Calhoun purchased some cigars, wine cooler, and apple cider. He has never known Calhoun to smoke cigarettes.

MATT CRUTCHFIELD (XVI 991-96): A correctional officer. He lives close to America's Precious Metals. At about 1;00-3:00am on Decemeber 17, he was awakened by a loud bang coming from the direction of the scrapyard. This was not "too out of the norm," but it does not happen every night. It could have been someone slamming a door. He heard no heavy equipment.

MONICA CRUTCHFIELD (XVI 996-98): Matt's wife. She heard the same loud noise as her husband, which "sounded like it came ... [from] across the road from the Precious metals area." She does not recall this noise happening before.

DARLENE MADDEN (XVI 998-1002): On disability and lives about a block from America's Precious Metals. During the night of

December 16-17, she heard one or two loud noises, "like a car wreck." She turned on her flood lights and could not see anything. She saw nothing unusual, heard no equipment, and she does not recall hearing any vehicles come or go.

JOHN SKETO (XVI 1001-1049): Calhoun's father, with Terry Ellenburg, co-owner of America's precious Metals. He usually arrives at the scrapyard about 7:30am. On Friday, December 17th, he arrived at about 7:30-7:45am. (XVI 1005, 1044) Mr. Sketo discussed some tracks and indentation. (XVI 1031-37, 1045-46) He had Mr. Ellenburg call the police. (XVI 1008-1009) He went inside Calhoun's trailer and described the mess: "Just clothes, and silverware out of the drawers and stuff, and the drawers, you know, the cabinets was open and the drawers and they was throwed down in the floor." (XVI 1010-15) A charcoal grill, not a TV, had been thrown on the bed. (XVI 1012-13, 1040) He said he saw no purse on the floor. (XVI 1013) Calhoun was not there. (XVI 1013, 1015)

Mr. Sketo testified that Brittany Mixon drove up, asked if "Johnny" is here, and went inside Calhoun's trailer with nothing in her hands and came out about a minute later with nothing in her hands. (XVI 1016-21, 1042-45) Glen Bush came over and said that "the law" is looking for "Johnny." (XVI 1021-22)

Officer White arrived, and he told the officer that he "didn't see nothing missing." (XVI 1024-25) He said he told the

officer that he noticed that Calhoun's shotgun had been moved and that Ms. Mixon had been there. (XVI 1026-27) The shotgun did not smell like it had been fired. (XVI 1029)

On cross-examination, Mr. Sketo estimated the distance between the scrapyard and the campsite on Mr. Skinner's property at about 10-15 miles. (XVI 1046)

TERRY ELLENBURG (XVI 1049-75) identified himself as Calhoun's cousin and indicated that he works for himself with his uncle at America's Precious Metals. (XVI 1049-50) He usually arrives at work between 7;30 and 8:00am. (XVI 1050) On December 17, he arrived around 7:30am and noticed that the Bobcat had been moved. (XVI 1050-52) He testified that Calhoun's door had been pried open. (XVI 1054, 1067-68) He also testified about the mess inside the trailer, not seeing the shotgun inside, Ms. Mixon going inside the trailer with nothing in her hands and coming out "not long" afterward with nothing in her hands, and tire tracks. (XVI 1055-67, 1073) He said that on the prior Wednesday, the trailer was not in the ransacked-looking condition. (XVI 1069) He noticed nothing missing from the scrapyard. (XVI 1070) He called the police. (XVI 1053)

On cross-examination, he indicated that neither he nor Calhoun's father knew where Calhoun was that morning, and he expected Calhoun to be in his trailer. (XVI 1071) Mr. Ellenburg said that on Wednesday Calhoun grilled some porkchops and may

have used lighter fluid but probably used wood. (XVI 1072-73, 1074)

GLENDA TERRILYN BROOKS (XVI 1075-78), who had testified in the State's case-in-chief concerning Calhoun showing up at her home and denying he knew Ms. Brown, in the defense's case testified that, after Steve Bledsoe called, she did not want Calhoun there anymore and asked him to leave (XVI 1075-76). Calhoun asked for a ride to Bonifay, not Esto, but because she was low on gas, Calhoun got out of the car. (XVI 1076-77)

On cross-examination, when the prosecutor asked if Calhoun requested Ms. Brooks to call the police, defense counsel objected on the ground that it is opening the door to asking Ms. Brooks about Calhoun telling them that he had been kidnapped. The trial court sustained the objection and directed the prosecutor to "move away from this line of questioning." (XVI 1078-79)

LIEUTENANT MICHAEL RALEY (XVI 1080-92), the investigator for this case, was recalled by the defense. (XVI 1080) Defense counsel asked the officer nothing about Calhoun's statement to him. (See XVI 1080-92) The officer testified about the whereabouts of Brittany Mixon's father December 16 to 17 (XVI 1080-81), about a barn "Mr. Calhoun had" in Geneva County and in which he found a tag and an oil stain on the same side of the car as the victim's small oil leak. (XVI 1082-83) There also a

tag bracket from Gilland Mitsibishi, which he could not tie to the victim's car or its missing tag. (XVI 1083, 1089-92) He identified some "Swisher Sweet Cigars" found in the drier in which Calhoun's clothes had been washed at the Brooks. (XVI 1085)

PRISCILLA STRICKLAND (XVI 1093-1100), Mia Brown's sister-in-law (XVI 1093), testified concerning her assisting attempting to locate Ms. Brown. (XVI 1093-94, 1097-98) She said that Ms. Mixon went in Calhoun's trailer for about 20 seconds and came out with Ms. Brown's purse and some wine. (XVI 1095, 1098)

ANGELIA CURRY (XVI 1100-1106) testified she heard that Ms. Brown and Calhoun were missing (See XVI 1105) and she knew that Ms. Mixon was Calhoun's girlfriend,, so she went to Ms. Mixon's to obtain her assistance looking for Ms. Brown (XVI 11010). When Ms. Mixon went inside Calhoun's trailer, Ms. Curry had her body in sight the entire time, never bent down, and came out with a purse, a liquor bottle, and a pack of cigarettes. (XVI 1103-1105) She never got within 10 feet of the trailer door. (XVI 1105)

The defense rested (XVI 1106), and the State announced that it had no objection to "whatever" the defense "wants to include in the record" and it has no rebuttal (XVI 1106-1107).

Calhoun confirmed that it was his decision not to testify. (XVI 1115)

Defense counsel submitted exhibits for introduction into evidence without objection from the State. The exhibits did not include any part of Calhoun's statement to Lt. Raley. (See XVI 1116)

Guilty Verdict as Charged.

The J\jury found Calhoun guilty as charged of First degree Murder and Kidnapping. (XVII 1246-47; VI 960)

The Penalty & sentencing Phase.

For the penalty phase, the state requested that the guilt-phase evidence be considered (XVIII 1281-82), and the defense called several witnesses. (XVIII 1282-41)[6] The jury recommended a death sentence buy a vote of 9 to 3. (XVIII 1373; VI 1017)

At the Spencer hearing, the defense called additional witnesses. (VII 1259-73) Calhoun addressed the trial court. (VII 1283-86) The State tendered victim impact statements. (VII 1287-1306)

After the trial court ordered a pre-sentence investigation (VI 1037, 1064-70), the parties submitted sentence memoranda (VI

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[6] Since the Initial brief does not attack the trial court's findings concerning mitigation, the State relies on the trial court's sentencing order (VI 1075-1083, attached as Appendix) for a summary of the mitigation evidence in the jury penalty phase and at the Spencer hearing.

1038-43, 1044-61), the trial court sentenced Calhoun to death. (VII 1308-1312; VI 1075-1083).

The trial court's sentencing order is attached as the appendix to this Answer Brief. The trial court rejected heinous, atrocious, and cruel (HAC), reasoning that the State did not prove that the victim was conscious "at the time of her death" (VI 1075-76) and found the following aggravating circumstances:

> 1. Committed in a cold, calculated and premeditated manner, assigned very great weight (VI 1076-77);
>
> 2. During the commission of a kidnapping, assigned great weight (VI 1078); and
>
> 3. Committed to avoid arrest, assigned very great weight (VI 1078-79).

Concerning mitigation, the trial court found the statutory mitigator of no significant criminal history, assigned significant weight. (VI 1079) The trial court discussed eight non-statutory mitigating circumstances:

> 1. Defendant exhibited good conduct while in jail and during trial, little weight;
>
> 2. Defendant has been a positive role model for other jail inmates, some weight;
>
> 3. Capacity for hard work, not established;
>
> 4. Capable of forming loving relationships, little weight;
>
> 5. Childhood history, little weight;
>
> 6. Will be incarcerated for life, minimal weight;
>
> 7. Born with Sudden Infant Death Syndrome, not mitigating;
>
> 8. Calhoun's personal statement to the court, no mitigation established.

(VI 1079-81)

SUMMARY OF ARGUMENT

ISSUE I in unpreserved. Calhoun wants to present materials and arguments to this Court that he did not present to the trial court concerning the rule of completeness. Preservation is especially important in this situation because of the burden on the proponent of evidence to show why additional parts of a statement, which are otherwise unreliable hearsay, should be admitted out of fairness, such as to clarify a part of the introduced statement so it does not otherwise mislead the jury. Trial defense counsel tendered no specifics whatsoever to the trial court, perhaps because the excluded portions were so damaging to his defense.

If the merits of ISSUE I are reached, the trial court's ruling was reasonable, especially given the circumstances presented, and not presented, to the trial court. In any event, excluding the rest of Calhoun's statement actually benefitted Calhoun, rendering the exclusion harmless beyond a reasonable doubt. For example, in his statement, he bragged about having sex with about 30 married women the past four years, admitted to drug involvement, and weaved a story about an unknown man abducting him to an unknown location, for an unknown reason to kill him. In contrast, the defense attempted to suggest a different story at trial of Calhoun disappearing during someone's attempt to steal from the scrapyard. Indeed, Calhoun told the investigator that the unknown man grabbed him after he

(Calhoun) had come out of the trailer to speak with him, and the trial defense posed that someone forced open Calhoun's trailer door.

ISSUE II attacks CCP and Avoid Arrest aggravators. The evidence was sufficient to support each of them. Calhoun knew the victim, overcame the victim in a violent struggle that left the victim's blood and pulled-out hairs in Calhoun's trailer, tied up and gagged the victim, abducted the victim, drove her to a remote wooded location, and incinerated her. Along the way, while he was in a hurry, he calmly completed a purchase at a convenience store and concocted a story that attempted to explain the scratches on his hands.

None of the appellate issues merit any relief.

ARGUMENT

Because rulings of the trial court[7] are the subject of an appeal, the "Tipsy Coachmen" principle applies: A "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." "[T]he reviewing court may not preclude an appellee from raising an alternative basis to support the trial court's ruling solely because the argument was

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[7] Even in cases of fundamental error, the focus is on a trial court ruling, that is, one that, subject to fundamental-error's high appellate burden, should have been rendered.

not preserved." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). Accord Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").

Therefore, because the trial court's order or ruling is the subject of the appellate review, even an argument that an appellee does not make on appeal should be considered as a basis for affirmance if it supports the trial court's decision. See Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"). See also Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason").

ISSUE I (RULE-OF-COMPLETENESS CLAIM): DID THE TRIAL COURT REVERSIBLY ERR IN REFUSING TO ADMIT DEFENDANT'S ENTIRE STATTEMENT TO THE POLICE? (IB 29-38, RESTATED)

ISSUE I claims that the trial court erred in refusing to introduce the rest of Calhoun's hour-long statement to Lt. Raley

after the State had introduced parts of it. However, the defense failed to show the trial court anything about the rest of Calhoun's statement that required it to be admitted in the interest of fairness. Nothing specific whatsoever in the rest of the statement was tendered to the trial court in support of the defense request. Indeed, the issue arose in the trial court when the defense objected to the State introducing Calhoun's party-admissions on direct examination rather than the defense tendering the entire statement to the trial court for admission. Thus, the defense also failed to proffer the entire statement to the trial court for this issue, as well as failed to show how specific aspects of the rest of the statement promoted fairness.

However, arguendo, even if this Court reaches the merits and reviews a part of the record on appeal that was not presented to the trial court for this issue, the issue should be rejected. Given the balance of Calhoun's statement to Lt. Raley, the circumstances surrounding the ruling, and the totality of the trial evidence, none of the statements that the State introduced was misleading, and the remainder of Calhoun's statements to the police did not substantially clarify the statements that the State introduced. The trial court's ruling was reasonable.

Moreover, the balance of Calhoun's statements to the police was not consistent with the defense presented to the jury and actually would have been prejudicial to Calhoun's defense,

perhaps explaining why defense counsel did not fully pursue[8] the matter through questions of Lt. Raley on cross-examination or even belatedly on direct examination when the defense recalled Lt. Raley in the defense's guilt-phase case.

A. THE IMPORTANCE OF PRESERVATION.

Preservation is especially important in this case. Calhoun correctly indicates (IB 35) that "fairness" is pivotal in deciding this issue. See §90.108, Fla. Stat. ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce **any other part** or any other writing or recorded statement **that in fairness** ought to be considered contemporaneously"); Jordan v. State, 694 So.2d 708, 712 (Fla. 1997)("**Fairness** is clearly the focus of this rule"; "general unreliability of inadmissible evidence should be one of the court's considerations in determining whether **fairness** requires admission"); Larzelere v. State, 676 So.2d 394, 401-402 (Fla. 1996)("the correct standard is whether, in the interest of **fairness**, the remaining portions of the statements should have been contemporaneously provided to the jury); Christopher v. State, 583 So.2d 642, 645-46 (Fla.

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[8] If this Court affirms in this direct appeal, defense counsel's rationale may become a feature of postconviction proceedings.

1991)("the rule of completeness generally allows admission of the balance of the conversation as well as other related conversations that in **fairness** are necessary for the jury to accurately perceive the whole context of what has transpired between the two"; subject to limitations that "'**must either relate to credibility or be germane to the matters brought out on direct examination**'"; quoting Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982)); see also Siegel v. State, 68 So.3d 281, 287-89 (Fla. 4th DCA 2011)("state contends that Siegel opened the door to the questions about his defense of the case when he testified"; "State must demonstrate a legitimate need to resort to such evidence to correct a false impression").

Thus, Kaczmar v. State, 2012 WL 4665829, *6 (Fla. 2012), recently explained:

> The purpose of this statute, known as the rule of completeness, is to 'avoid the potential for creating misleading impressions by taking statements out of context.' *Larzelere v. State*, 676 So.2d 394, 401 (Fla. 1996). '[P]arties may seek the introduction of other statements **when** those statements "in **fairness** ought to be considered contemporaneously" with the introduction of the partial statement,' but '[s]uch a fairness determination falls within the discretion of the trial judge.' *Id.* at 402

After correctly indicating that fairness is a major aspect of the test, Calhoun (IB 36-37) then focuses on two parts of his statements he made to Lt. Raley in arguing that it was unfair or misleading to exclude other portions of his statement to Lt. Raley.

However, Calhoun did not provide his appellate arguments to the trial court, thereby rendering them unpreserved on appeal. See, e.g., Hoskins v. State, 965 So.2d 1, 14 (Fla. 2007)("'For an issue to be preserved for appeal, ... it "must be presented to the lower court and **the specific legal argument or ground** to be argued on appeal must be part of that presentation if it is to be considered preserved."'"; quoting Perez v. State, 919 So.2d 347, 359 (Fla. 2005), quoting Archer v. State, 613 So.2d 446, 448 (Fla. 1993)); Rodriguez v. State, 919 So.2d 1252, 1286 (Fla. 2005)(IAC appellate counsel; trial counsel objected to the admissibility of one photograph but failed to specify, for the trial court, others that he raised on appeal, thereby failing to preserve the issue for appeal).

Harrell v. State, 894 So.2d 935, 940 (Fla. 2005), explained the three components for "proper preservation" and its "purpose of ... to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings.' *Castor v. State*, 365 So.2d 701, 703 (Fla. 1978)."

In other words, for preservation, the non-prevailing party-below must have provided the trial court the arguable benefit of the same argument that constitutes the appellate argument.

Here, defense counsel failed to present the trial court with the same argument that ISSUE I presents. Indeed, defense counsel

presented the trial court with no specific other portions of Calhoun's statement to Lt. Raley, and, accordingly, defense counsel failed to argue how such other statements should be admitted out of "fairness." The state elaborates.

The defense objected to the State introducing "bits and pieces of the [Calhoun's] statement" to Lt. Raley. (See XV 953-54) The trial court overruled the defense objection and allowed the State to "proceed with this line of questioning." (XV 954) The trial court's ruling on the admissibility of portions of Calhoun's statements to the police was correct, as Calhoun's statements that the State introduced were admissible as party admissions. See §90.803(18), Fla. Stat. Defense counsel, on a proffer during direct examination or perhaps on cross-examination of the witness, should have attempted to ask the witness questions concerning other portions of Calhoun's statement that clarified the portions the State introduced to show that fairness requires their presentation to the jury. Defense counsel would have then obtained a trial court ruling after showing the trial court not only the specific portions needed for clarification but also why they were needed for fairness. Instead of showing anything in the balance of the statement necessary for fairness, the defense simply made a broad statement that all of the rest of the statement should be admitted.

Consistent with the failure to preserve this issue, defense counsel was allowed to cross-examine Lt. Raley unimpeded by any objection whatsoever. (See XV 957-64) Indeed, on cross-examination, defense counsel was given unfettered leeway in asking Raley questions about Calhoun's explanation why he avoided law enforcement, which was an aspect of Calhoun's statement admitted on direct examination. (See XVI 958-59) Subsequently, the trial court pointed to the defense's "opportunity" during its cross examination of Raley "last week." (XVI 983) At this untimely juncture, the defense still failed to specify anything within Calhoun's statement that should have been admitted to clarify what the State introduced.

Indeed, even when the defense called Lt. Raley as its witness in the guilt phase, there was not even an untimely attempt to ask about any other portions of Calhoun's statement. (See XVI 1080-87, 1091-92) This omission is especially noteworthy because shortly prior to the defense calling Lt. Raley as its witness, Defense counsel discussed the questions that she would be asking Lt. Raley in her case, noting that there were additional matters that Calhoun discussed and on which cooperatively answered questions. (XVI 983-85) At that point, the trial court reserved ruling (XVI 985-86), but the defense failed to pursue the matter further when Lt. Raley testified as its witness. (See XVI 1080-87, 1091-92)

During the prosecutor's cross-examination of Glenda Brooks, while testifying as a defense witness, defense counsel even affirmatively strove to avoid a topic in Calhoun's statement to Raley by objecting to a prosecutor cross-examination question. Defense counsel contended that the question would "open[] the door" to an aspect of Calhoun's story about being kidnapped, which Calhoun had also related to Lt. Raley. The trial court sustained the defense objection and directed the prosecutor to "move away from this line of questioning." (XVI 1078-79)

Thus, the defense rested (See XVI 1106) after affirmatively seeking to avoid an aspect of Calhoun's statement to Lt. Raley, and rested without attempting to ask any of its witnesses about any other portion of Calhoun's statement to Lt. Raley.[9]

Even after resting, when defense counsel was discussing formally introducing the defense's photographs, the prosecutor indicated that "whatever she [defense counsel] wants to include in ... record, without objection from the state." (XVI 1106-1107) Defense counsel submitted exhibits for introduction into evidence without objection from the State. Even then, the exhibits did not, in any way, include any part of Calhoun's

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[9] Although this would have failed Section 90.108's "contemporaneous[]" requirement and thereby failed to cure the unpreserved status of the claim, continuing to fail to properly pursue the matter, even belatedly, provides additional substantiation that this claim was unpreserved below.

statement to Lt. Raley. (See XVI 1116) This discussion suggests the next point: The defense failed to proffer.

The lack of preservation through failing to point to anything specific within balance of Calhoun's statement to Raley was compounded through the defense's failure to proffer the full statement to the trial court for the purpose of reviewing it for a "fairness" determination.[10] Defense counsel should have proffered the entire statement to the trial court and specified how fairness requires other aspects of it to be admitted. Calhoun may respond that the trial court had a transcript of the entire statement in front of it as an attachment to Calhoun's Motion to Suppress. (See I 51-106) However, such an argument would be misplaced for three reasons.

First, a party presenting a matter to a court for one purpose does not satisfy a requirement of tendering it for all other purposes. It is the non-prevailing-party-below's responsibility to show the trial court why s/he should prevail on the issue. It should not be the trial court's responsibility to infer or to

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[10] A rationale for a proffer is so the appellate court can review the matter, as discussed in Baker v. State, 71 So.3d 802, 816-17 (Fla. 2011). However, a proffer is also an essential component of preservation, as discussed above: The trial court should be presented with the specific argument and the specific evidence on which the non-prevailing party below relies for an appellate issue. Here, if anything, the trial court encouraged a proffer, which was not forthcoming.

assume or to comb the record on other topics to determine if there is anything pertinent to whatever ends up as an issue on appeal.

Second, even if, arguendo, the trial court should have considered, for the rule-of-completeness objection, matters presented for a Motion-to-Suppress Miranda argument, here the defense still failed to specify for the trial court which other parts of the statement were necessary to clarify anything otherwise misleading in the introduced portions. And,

Third, again arguendo ignoring the first reason, for the Motion to Suppress, the parties told the trial court that only the first seven minutes of Calhoun's statements, "about [the first] five pages worth" of 45 pages of the transcript, were pertinent (VII 1169),[11] a representation on which the trial court explicitly relied in its order denying the Motion to Suppress:

> At hearing, the Court had benefit of testimony from Lt. Michael Raley, Holmes County Sheriff's Office, as well as listened to approximately seven (7) minutes of an audio recorded statement of Defendant. Both parties agreed that the relevant portions for the Court's consideration would be found within the first seven minutes.

(I 109) Accordingly, during the Motion to Suppress, the audio recording was turned off at the point when the Lieutenant asked

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[11] Incidentally, undersigned has listened to much of the audio of Calhoun's statement and confirmed that the first seven minutes are contained within the first five pages of the transcript.

Calhoun a question about his "legal name" (VII 1177), which is found on page 5 of the transcript attached to the Motion to Suppress (I 66).

Therefore, not only has Calhoun failed to present a record that shows he proffered the entire statement to the trial court, but also his counsel had affirmatively told the trial court that it need not review the entire statement regarding the motion-to-suppress issue.

Moreover, as suggested above, even if the trial court had studied the entire transcript for the Motion to Suppress, the defense should have referred the trial court to it for its rule-of-completeness consideration and specified the parts of it that were pertinent to the rule-of-completeness' fairness determination.

Yet further, Calhoun conclusorily asserts (IB 37-38) due process without developing the argument on appeal, thereby failing to preserve it at the appellate level. And, due process was not presented to the trial court, thereby failing top preserve such a claim below. See, e.g., Kelley v. State, 974 So.2d 1047, 1051 (Fla. 2007)(appellate due process claim not preserved because " Kelley did not make a due process objection to the trial court").

In sum, the defense at trial wanted it both ways: It wanted to object and assert the rule of completeness but it also

patently avoided presenting other specific aspects of Calhoun's statement. Perhaps the defense avoidance of specific aspects of Calhoun's statement was because they were inconsistent with the defense theory actually presented at trial, which the State will discuss at some length under harmless error infra.

B. THE STANDARD OF APPELLATE REVIEW AND ITS MUTUAL CONSISTENCY WITH PRESERVATION IN THIS CASE.

If the merits of ISSUE I are reached, it has none.

ISSUE I asserts an admissibility-of-evidence question. Calhoun (IB 29) correctly identifies the standard of appellate review as abuse of discretion. See, e.g., Kaczmar v. State, 2012 WL 4665829, *6 (Fla. 2012)(review of rule-of-completeness issue " is for abuse of discretion"; citing Larzelere v. State, 676 So.2d 394, 401 (Fla. 1996)); Dessaure v. State, 891 So.2d 455, 466 (Fla. 2004)("trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion"; citing Blanco v. State, 452 So.2d 520 (Fla.1984)).

Accordingly, Valle v. State, 70 So.3d 530, 546 (Fla. 2011), recently explained:

> 'It is well settled that "[t]he admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion."' *Rimmer v. State*, 59 So.3d 763, 774 (Fla.2010) (*quoting Brooks v. State*, 918 So.2d 181, 188 (Fla. 2005)).

"'Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of

saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.'" See, e.g., Geralds v. State, 2010 WL 3582955, *16 (Fla. 2010)(quoting State v. Coney, 845 So.2d 120, 137 (Fla. 2003), quoting White v. State, 817 So.2d 799, 806 (Fla. 2002)).

As such, the determination of the merits of ISSUE I is based upon the reasonableness of the trial court's ruling when it was made. Here, Calhoun has failed to meet his appellate burden of demonstrating that the trial court's ruling was unreasonable.

In this case, the abuse-of-discretion appellate standard highlights the importance of the preservation argument supra. To ignore preservation in this case would necessarily mean the adoption of a per se rule that any time any party invokes the rule of completeness, the entire statement must be automatically admitted, regardless of its contents and regardless of any other circumstances surrounding or in the statement. The judicial wisdom of the "reasonableness" standard is that it provides for appellate consideration of all of the circumstances presented, and not presented, to the trial court in reaching its decision, thereby highlighting the significance of preservation. Reasonableness and preservation, in this situation, are mutually consistent and mutually reinforcing in their wisdom.

Accordingly, Kaczmar v. State, 2012 WL 4665829, *6 (Fla. 2012), held that there was no abuse of discretion where the defense withdrew its rule-of-completeness request.

Here, as discussed in the "Preservation" section supra, given all of the circumstances of the litigation in the trial court, it was reasonable for the trial court to deny the defense's conclusory, entirely non-specific request that Calhoun's entire statement be admitted. To summarize the points made in the preservation section supra:

- The defense failed to present Calhoun's entire statement to the trial court for this issue;
- The defense failed to specify how anything in the remainder of Calhoun's statement was necessary fairness; and,
- The defense was allowed to cross-examine Lt. Raley unimpeded by any objection whatsoever, including unfettered leeway in asking Raley questions about Calhoun's explanation to Raley why he avoided law enforcement.

Even belatedly--

- When the defense indicated that it intended to ask Lt. Raley questions about Calhoun's statement when it called Raley as a defense witness, the trial court indicated it is reserving ruling regarding Calhoun's cooperativeness, but the defense subsequently did not pursue the matter;

- Thus, when the defense called Lt. Raley as its witness in the guilt phase, there was not even an untimely attempt to ask about any other portions of Calhoun's statement;
- During the prosecutor's cross-examination of Glenda Brooks, while testifying as a defense witness, defense counsel affirmatively strove to avoid a topic in Calhoun's statement to Raley by objecting to a prosecutor cross-examination question;
- The defense rested without attempting to ask any of its witnesses about any other portion of Calhoun's statement to Lt. Raley; and,
- The prosecutor indicated that "whatever she [defense counsel] wants to include in ... record, without objection from the state."

In sum, given the foregoing circumstances, it was reasonable for the trial court to deny the defense's non-specific request to admit Calhoun's entire statement to Lt. Raley.

The State, next, tenders additional reasons supporting the trial court's ruling.

C. ADDITIONAL REASONS SUPPORTING THE TRIAL COURT'S RULING.

1. Calhoun was not entitled to the relief he sought.

This argument overlaps the State's preservation and reasonableness arguments. When Lt. Raley was testifying in the State's case-in-chief, the defense wished to admit **all** of his

self-serving statements into evidence, regardless of any supposed logical relationship to the portions that the State introduced. Presented with this in appropriate remedy and given the general evidentiary rule that the Calhoun's statements were hearsay unless except to the degree that the State used them as party admissions, the trial court correctly denied Calhoun's request to admit the entire remaining balance of his statements. See, e.g., authorities cited supra establishing fairness as criterion; Jordan v. State, 694 So.2d 708, 712 (Fla. 1997)("general unreliability of inadmissible evidence should be one of the court's considerations in determining whether fairness requires admission").

2. Given the balance of Calhoun's statement to Lt. Raley, none of the statements that the State introduced was misleading, and other parts of his statement were not necessary for fairness.

ISSUE I (IB 32-33) lists five "responses Calhoun made" and that the State introduced and then ISSUE I (IB 36-37) attempts to show that two of them were misleading without other aspects of Calhoun's statement being introduced. The state disagrees.

The five responses Calhoun lists (at IB 32-33) are as follows:

> 1. Raley asked Calhoun if he went to Charlie's Grocery on December 16, 2010, and asked Mia Brown for a ride a ride later that day. Calhoun responded that he did go to Charlie's Grocery and ask Mia Brown for a ride. (T15:952-953)

2. Raley asked Calhoun if he was at the Brooks' residence on Saturday, December 18, 2010. Calhoun answered that he did go to the Brooks' residence at that time. (T15:954-955)

3. Raley asked Calhoun if he was actively avoiding law enforcement in the days leading up to his arrest on December 20, 2010. Calhoun said he was avoiding law enforcement. (T15:955) On cross-examination, Raley said that Calhoun said he avoided law enforcement because of previous problems he had encountered with the police not helping him. (T15:958)

4. Raley asked if Calhoun knew Mia Brown, and Calhoun responded that he did and they were friends. (T15:955)

5. Raley asked Calhoun if Mia Brown had ever been to his trailer located on the property of America['s] Precious Metals, and Calhoun said she had never been there. (T15:955-956)

The Initial Brief focuses on only two of these statements (numbered 2 and 5), and its use of "for example" to perhaps suggest, without arguing, that other statements were misleading is insufficient to raise any appellate claim concerning statements 1, 3, and 4. Therefore, any possible claims concerning the other portions of Calhoun's statements would be unpreserved at the appellate level. See, e.g., Jones v. State, 966 So.2d 319, 330 (Fla. 2007)("In his reply brief, Jones raises for the first time a claim that ... the trial court abused its discretion by ... "; "we need not address it"); Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments"); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument); Sweet v. State, 810 So.2d 854, 870 (Fla.

2002)("Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved).

Concerning #2, Calhoun's admission that he was at the Brooks' residence on Saturday, December 18, 2010,[12] the state introduced through Calhoun's statement nothing concerning why or how Calhoun was at that location. This testimony was limited to Calhoun simply "showed up at the Brooks residence." (XV 954-55) In other words, this was evidence confirming Calhoun's physical location at a certain time. The State used other aspects of its case-in-chief to explain why Calhoun was there. Indeed, other aspects of his statement indicated that the Brooks were his friends (I 69), yet they testified against him. And, he also incongruously stated to Lt. Raley that he happened to come across these friends' residence while he was "roaming" (I 72) and "sick" (I 68) as "come out on the highway" and noticing his location (I 69). Indeed, this happenstance of seeking help at the friend's residence was supposedly after being assaulted, unconscious, and running for most of the day. (See I 102, 68-69;

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[12] For purposes of this discussion and the ensuing discussions, because it is the only indication in the record of the entire Raley interview, the State uses the transcript of Calhoun's statement that was attached to the Motion to Suppress (I 62-106) but not presented, not proffered, to the trial court for purposes of this issue. The State persists in its preservation and reasonableness arguments supra. So, this use of the transcript is for the sake of argument ("arguendo") and not a concession that it should be used on appeal for this issue.

see also discussion of other aspects of Calhoun's statement under Harmless Error infra)

Concerning #5, Calhoun's statement to Raley that Mia Brown had not been "to" his trailer was not misleading. Nothing in Calhoun's statement contradicted or clarified that Ms. Brown had not been in the trailer, where evidence showed that Ms. Brown had been assaulted. See Facts section supra. Ms. Brown, with her husband, coming to a different location to shoot pool does not clarify or even qualify his statement that she had not been at Calhoun's trailer. Indeed, Calhoun stated:

> CALHOUN: She'd come over to the pool hall and played before when I had it. Her and her ...
>
> RALEY: Oh, back when you lived down there?
>
> CALHOUN: Yeah.
>
> RALEY: What about since the camper [trailer], she come down there?
>
> CALHOUN: No sir, no sir, no sir.
>
> RALEY: OK.
>
> CALHOUN: Ain't no pool table there.
>
> RALEY: Yeah, a fellow with a pool table, he, he gets friends, don't he?
>
> CALHOUN: Popular. Yes sir. All kind of extra friends.

(I 91-92) In other words, these additional statements show that the trailer and the pool hall were different and not the same thing; at one time, he lived at the pool hall, but, by the time of the murder, he was living in the trailer. As such, they were not necessary to clarify Raley's trial testimony. Instead, they

would have reinforced Calhoun's statement that Ms. Brown had not been in Calhoun's trailer, where the police found extensive evidence of Ms. Brown being assaulted there.

Accordingly, although Calhoun bragged to Raley about his sexual relations with up to 30 married women within the past four years (I 87), he denied having any kind of sexual relationship with Mia Brown (I 91, 96), who was devoted to her husband (I 96), even though he also stated that she was a "beautiful girl" (I 91) and a "straight laced sweetheart" (I 96).

In sum, admitting the balance of Calhoun's statement was not necessary to clarify anything misleading or otherwise promote fairness for Calhoun. If anything, they would have buttressed the State's case against Calhoun. See also discussion of harmless error infra.

3. Given other evidence introduced at trial, none of the statements the State introduced was misleading.

As in the previous section, the State focuses on statements #2 and #5 because they are the only ones raised on appeal through any developed argument.

Concerning #2, Calhoun's admission that he was at the Brooks' residence on Saturday, December 18, 2010, this same fact was clearly proved through other evidence. As indicated in the Facts section supra, Tiffany Brooks testified to details that included, at about 9:30am on Saturday, December 18, 2010, (XIV

780) in the Hartford/Geneva County Alabama area (XIV 779, 793), she found Calhoun on the floor of their barn covered up in sleeping bags, which had been used for insulation for a freezer in the barn. (XIV 780-81) Calhoun was wet and dirty and had on overalls and a white T-shirt. (XIV 781) Calhoun had scratches on his arms. (XIV 789) The Brooks family knew Calhoun (XIV 779-80, 793) as "Sketo" (XIV 781, 794), and they invited him inside their house, allowed him to take a shower, washed his clothes, provided him fresh clothes, fed him, and allowed him to take a nap on their couch (XIV 781-83). Glenda Brooks also testified that Calhoun was there at their residence. (XIV 792-93) While Calhoun is still at the Brooks' home that day, Tiffany Brooks testified she received a phone call from her boyfriend, Steve Bledsoe, who said he saw a flyer at the convenience store that looked like "Sketo" and that "Sketo" and a woman by the name of Mia Brown were missing. (XIV XIV 784) Tiffany relayed this information to Calhoun, who responded that he does not know Mia Brown (XIV 784-85).[13]

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[13] On cross-examination, Tiffany Brooks acknowledged a statement she had made to law enforcement that Calhoun also said that Mia Brown is probably the girl who was supposed to come pick me up. (See XIV 798-99) Glenda Brooks also acknowledged a similar statement. (See XIV 797-99) Any such statement remains damaging to Calhoun: He is not sure of Mia Brown's identity even though other evidence proved he knew her.

Concerning #5, Mia Brown went to the wrong trailer, thinking it belonged to Calhoun (XIII 605-613), indicating that she had not previously been there. Indeed, there was no evidence that she had previously been there.

D. ADDITIONAL APPLICABLE CASE LAW.

In addition to the authorities and discussion supra, the State submits the following cases as providing guidance concerning preservation and the reasonableness of the trial court's ruling.

In Israel v. State, 837 So.2d 381, 392 (Fla. 2002), like here, the defense failed to specify the predicates for his claim. There, "Israel failed to identify the areas of drug abuse, brain damage, and low intellectual functioning as specific nonstatutory mitigation for the trial court to consider." Here, the defense failed to specify to the trial court the factual predicates for its rule-of-completeness assertion.

Correll v. State, 523 So.2d 562, 566 (Fla. 1988), applied the rule of completeness and explained that "[o]rdinarily, a defendant's statement should be introduced into evidence in its entirety, absent totally extraneous matters." This necessarily means that the party advocating for the inclusion of additional portions of the statement must show that they are not "extraneous" to the statements that were admitted. As such,

here, the defense should have proffered those other portions to the trial court to demonstrate the fairness component of the rule. Moreover, in Correll, like here, the defense was afforded other opportunities to elicit information contained in other parts of Calhoun's statement. Instead of seizing this opportunity, the defense even attempted to exclude a matter. Correll counsel, like Calhoun's, "must not have believed that the redacted portion was of great significance because he did not seek to introduce it in his case-in-chief, even though he presented several witnesses in his defense."

Christopher v. State, 583 So.2d 642, 645-46 (Fla. 1991), concerned two conversations, and even though they both concerned the "generally to the same events, the later conversation did nothing to explain the earlier conversation. The jury could not have been misled as to the content of the earlier conversation by the exclusion of the later conversation. Therefore, the court properly excluded Norma's testimony with respect to what Christopher told her in Arkansas." Here, the jury would not be misled by the statements that were admitted. Indeed, here, the defense failed to show the trial court any nexus whatsoever between the excluded portions and the admitted portions, other

than they were in the same interview, which Raley testified was about 45 minutes to an hour long (XV 957-58).[14]

E. HARMLESS ERROR.

Assuming, arguendo, that this court holds that ISSUE I was preserved and that the trial court's ruling was unreasonable, the exclusion of the balance of Calhoun's hour-long statement to Lt. Raley was harmless. The trial court should still be affirmed. See Larzelere v. State, 676 So.2d 394, 401-402 (Fla. 1996)(error, under the totality of the facts of the case, harmless beyond a reasonable doubt). Here, as Larzelere, the "statements introduced by the State constituted only a finite portion of the extensive record in this case." Moreover, the excluded portions of Calhoun's statement contained extensive statements that would have prejudiced Calhoun.

As previously discussed, the Brooks testified that Calhoun was at their residence in the Geneva Alabama area on December 18. Moreover, as also discussed supra, Calhoun's statement not only admitted that Mia Brown had not previously been in his trailer, but also that he did not have any sex with her. Other

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[14] The actual audio of the interview indicates that the total length of the interview was slightly over an hour.

evidence, independent of Calhoun's statements, included the following:[15]

- After Calhoun requested the victim to give him a ride to his girlfriend's place the evening of December 16, 2012, the last person to see the victim alive, besides Calhoun, was Jerry Gammons, who saw her at about 8:40pm one road down from Calhoun's trailer as the victim was trying to find Calhoun's place;
- Bloody scratches all over Calhoun's arms, hands, and neck soon after the murder;
- The victim's blood identified on the inside of a duct tape roll found in Calhoun's trailer, and DNA consistent with Calhoun's found inside that same duct tape roll;
- Multiple hairs of the victim identified in Calhoun's trailer in such a condition that they were pulled out and did not simply fall out;
- Calhoun's trailer in disarray, consistent with a violent struggle;
- The victim's purse found in Calhoun's trailer, but the purse missing the victim's camera, which she usually kept there;

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[15] The State provided detailed citations to the record in the Facts section supra.

- Digital media from the victim's camera found in Calhoun's trailer with an image of the ceiling of that trailer taken after Jerry Gammons saw the victim alive and before Calhoun was seen driving what appeared to be the victim's white car;
- The victim's body was wrapped in co-ax type wire, and co-ax wiring appeared to have been yanked from locations within Calhoun's trailer;
- Duct tape found around the head area of the victim's remains, and, in addition to the bloody duct tape roll in Calhoun's trailer, loose duct tape on the floor of the trailer;
- Calhoun observed at a convenience store and Calhoun found in the Brooks barn on the floor at times and places consistent with his abduction and incineration of the victim;
- The victim's car was a white Toyota, and when Calhoun was observed in the Geneva Alabama area, he was driving a white vehicle even though his soliciting a ride indicated that he had no car;
- Calhoun denied knowing Ms. Brown, and at most, admitted that probably she was the person who was supposed to give him a ride;

- In addition to running from the murder scene, Calhoun hiding in the frame of his bed under a mattress when the police caught him.

Calhoun's story (See I 68-69) failed to explain --

- the evidence of a violent struggle in his trailer, the victim's blood on the duct tape there, and several of the victim's pulled-out hairs found there.

Moreover, it is quite understandable why defense counsel's objection was so generic because --

- the story that Calhoun told Lt. Raley was inconsistent with his defense.

Concerning the last bullet-point, **Calhoun told Raley** that he was sick in his trailer at about 6 to 6:30pm, when a large unknown male came to his door. The unknown male said he was "Lance," but Calhoun had never seen him previously. Lance supposedly asked about scrap prices, and, when Calhoun turned around to go back into his trailer, Lance grabbed him around the head and body. Calhoun said he smelled something in Lance's hand, and he woke up to find that he was "duct taped up." Calhoun said he passed out again and when he woke up he was in the woods at some unknown location. (I 68-70, 80-83)

Lance said he intended to kill Calhoun as pay-back for something (I 68, 85). Calhoun said he did not owe anyone any money (I 750),[16] and Lance said he was not interested in Calhoun's property: "I don't want your money, I want your life." (I 87) Calhoun volunteered that he had slept with a "married women and stuff," (I 75) around 30 of them within four years (I 87).

Calhoun told Raley that Lance said he forgot something and, when Lance walked back to his car, Calhoun freed himself and ran away. After roaming awhile, Calhoun came across the Brooks' residence. (I 69, 72-73, 85-86)

In contrast to Calhoun's story, the defense at trial put on evidence that Calhoun disappeared the night that someone attempted to steal some equipment at the scrapyard and that Calhoun's trailer door had been pried open.

Moreover, Calhoun told ms. Bradley, who saw him, that he had got his scratches from deer hunting, not from running from an abduction.

Indeed, looking at the story that Calhoun told Raley, by itself, would have prejudiced Calhoun:

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[16] Later, Calhoun volunteered that he is "bad to pay [his] debts." (I 87)

- Calhoun, in essence, incredulously said that he was abducted by an unknown male to an unknown location for an unknown reason.

Numerous other aspects of Calhoun's statement would have prejudiced him:

- He bragged about sleeping with about 30 women in four years (I 87);
- He admitted to being involved with drugs (I 101, 102; see also I 87);
- He admitted to having the materials to build a fire (I 73);
- Admitted to having "ash from a fire" on his hands (I 79);
- Admitted that the police considered him dangerous, as he stated that that they drew guns on him and told him that if he "wiggle[d]" they would shoot him (I 98);
- Admitted that when he hid in his trailer that the police "had launched a big man hunt" for him (I 104); and,
- When the officer told Calhoun that he killed Mia and burned her car, Calhoun requested an attorney (I 106).

If there was any error, it was harmless far in excess of beyond a reasonable doubt. ISSUE I should still be rejected.

For each and all of the forgoing reasons, Calhoun's conviction should be affirmed.

ISSUE II (CCP AND AVOID ARREST CLAIMS): DID THE TRIAL COURT REVERSIBLY ERR BY FINDING CCP AND AVOID ARREST? (IB 39-43, RESTATED)

The evidence showed that, after an extensive struggle with Ms. Brown in his trailer, Defendant Calhoun tied up and gagged Mia Brown, stuffed in the trunk of her own car, drove her to a remote, wooded location in Alabama, and where he, in fact, killed her by setting her car on fire.

STANDARD OF REVIEW.

"When evaluating claims alleging error in the application of aggravating factors, this Court does not reweigh the evidence to determine whether the State proved each factor beyond a reasonable doubt." "Rather," this Court "must 'determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Diaz v. State, 860 So.2d 960, 965 (Fla. 2003)(citing Alston v. State, 723 So.2d 148, 160 (Fla. 1998), quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). See also, e.g., Douglas v. State, 878 So.2d 1246, 1260-61 (Fla. 2004)(quoting Willacy).

"When there is a legal basis to support finding an aggravating factor, we will not substitute our judgment for that of the trial court...." Carter v. State, 980 So.2d 473, 481 (Fla. 2008)(quoting Occhicone v. State, 570 So.2d 902, 905 (Fla1990)).

Conflicting evidence does not render a trial court's ruling unreasonable. Bates v. State, 750 So.2d 6, 13 (Fla. 1999)("conflicting expert testimony").

Here, concerning the two challenged aggravators, the trial court merits affirmance because it applied the right rule of law and competent substantial evidence supports its findings.

A. CCP: SUFFICIENCY OF EVIDENCE FOR FINDING.

> In order for CCP to apply, the State must satisfy a four part test: 1) the killing was a product of cool and calm reflection rather than an act prompted by emotional frenzy, panic or fit of rage; 2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident; 3) the defendant exhibited heightened premeditation; 4) the defendant had no pretense of moral or legal justification.
>
> The Defendant well-knew the victim, Mia Chay Brown, through her employment at the local Esto, Florida convenience store. On Thursday, December 16, 2010, in the early afternoon, defendant entreated the victim to come by his house that evening and give him a ride. Defendant placed a call to his girlfriend, Brittany Mixon. He left a message telling her he would see her that evening in Geneva, Alabama and bring her son a chicken. The victim arrived at defendant's residence sometime after 8:40p.m., driving her white four-door 2000 Toyota Avalon. A struggle ensued while they were together in the trailer, as evinced by the disarray of the trailer and victim's recently pulled hair follicles and blood found therein. DNA matching the profile of both victim and defendant was found on a role of partially used duct tape and a white quilt nearby. Rather than using a hunting rifle in the trailer, so as to not awaken light-sleeping neighbors, the defendant procured tape and coaxial cable from his trailer to bind and gag the victim. He secreted her out of the trailer and departed the area by driving her vehicle in the darkness of the early December morning. The victim's digital camera and cell phone were later found missing from her purse found inside the trailer. Evidence indicated that the digital SD card from the victim's camera was found on the floor of the defendant's trailer displaying an image of the inside roof

of the trailer. Agent Jennifer Roeder of the Florida Department of Law Enforcement- Digital Evidence Section estimated the image to have been taken between 3:30 and 4:00 a.m., December 17, 2010.

The defendant placed the victim in the trunk of her car, and drove without incident across the state line into Alabama. The defendant was recognized driving alone in the victim's car about 5:30 a.m., by a Gladstone's convenience store clerk in Alabama, north of Hartford. He calmly purchased cigarettes, and when asked about the dried blood and scratches on him, without emotion he replied he had been deer hunting. The defendant drove south in the car bearing a Florida license plate, but not before lingering on the front porch long enough to be recognized by another patron. The defendant had driven at least fourteen (14) miles from Esto, Florida to the Gladstone convenience store, and chose not to abandon his plan.

The defendant drove to a secluded wooded area on his brother-in-law's property, between Geneva and Hartford, Alabama. The defendant was well acquainted with this area, having recently used the private campsite near a pond. The defendant did not abandon his plan.

Less than 1500 feet from his family's campsite, the defendant drove the vehicle into a thicket of underbrush and pines, careful to conceal it in excess of 400 feet in a straight line from the nearest clearing. Testimony established a winding debris field through the thicket to where the vehicle came to its final resting place to be 625.2 feet from the clearing. With the victim inside the trunk, and still breathing, the defendant ignited the car with a light petroleum distillate, such as Coleman fuel and lighter fluid. The defendant used a substance other than oil or gasoline. This establishes the 'heightened premeditation' element of CCP. Mia Chay Brown burned to death in a fiery tomb, only to be found by chance three days later. Witnesses reported seeing black smoke in the area between 11:00 and 11:30 a.m., Friday December 17, 2010. The defendant would later boast to law enforcement at about 2:00 p.m., that same rainy afternoon, he remained concealed near the campsite and was close enough to reach out and touch a deputy.

For in excess of fourteen hours the defendant was able to implement his plan of murder, undetected and undeterred by no one. He had ample opportunity to release the victim, but instead after substantial reflection acted out his plan.

> The defendant was deliberately ruthless, given the manner in which he killed the victim, and took no steps to stop the fire once he started it. There is no evidence in the record that defendant had any pretense of moral or legal justification to carry out his murder of Mia Chay Brown, a person from whom he knew he could ask a favor. The record clearly demonstrates the defendant acted without provocation. At no time did the defendant abandon his plan. The Court determines the four part test has been demonstrated by the totality of the circumstances, and proven beyond every reasonable doubt. The aggravating circumstance of CCP is established by competent and substantial evidence. The Court assigns very great weight to this aggravating circumstance.

(VI 1076-77)

The evidence and the law support the trial court's findings:

> Calhoun overcame the victim in a struggle in his trailer as shown by the extensive disarray, the victim's and Calhoun's blood, the victim's pulled-out hairs in Calhoun's trailer and scratches on Calhoun;
>
> With co-ax cable and duct tape, Calhoun tied up the victim and hushed her up for the ride in the trunk of her car to where he disposed of her;
>
> With the victim in the trunk, Calhoun stopped at a convenience store and told the clerk he obtained the scratches deer hunting; and,
>
> Calhoun drove the victim deep into the woods where he finished the job of killing her by setting the car ablaze with her still alive and bound and gagged in the trunk.

In contrast to the trial court's law-and-record-grounded findings, Calhoun (IB 39-40) argues that the trial court's rejection of HAC conflicts with it. He overlooks that a finding that the State did not prove that the victim was conscious when Calhoun set her afire does not negate the other evidence of CCP, including the extensive struggle in his trailer, binding and

gagging the victim, and carrying her miles to a remote location, lying along the way, and then setting her ablaze while she was still bound and gagged, then hiding from the police. **There is no need to bind and gag a cadaver**. Instead, the binding and gagging was pursuant to an intent to do what he did. This evidence is, in essence, unrebutted because Calhoun did not testify, and his defense was that someone else must have done it.

Accordingly, while Nixon v. State, 572 So.2d 1336, 1338 (Fla. 1990), did not discuss CCP, it was an aggravator supporting the death penalty and there, "At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G. According to the medical examiner, Ms. Bickner was alive at the time she was set on fire and the fire was the cause of death." Here, Calhoun bound, gagged, and abducted Ms. Brown in the trunk of her car. After driving Ms. Brown into the woods in the trunk, "[a]t some point" Calhoun, like Nixon, set her on fire, killing her. See also Nixon v. State, 932 So.2d 1009, 1024 (Fla. 2006)("we affirm the trial court's denial of postconviction relief, and we deny habeas relief").

Thus, as, for example, Hernandez v. State, 4 So.3d 642, 669-70 (Fla. 2009), explained, HAC is determined from the victim's perspective. In contrast, CCP focuses on the assailant. See Duest v. State, 855 So.2d 33, 47 (Fla. 2003)("unlike CCP, 'the

HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death'").

Lockhart v. State, 655 So. 2d 69, 73 (Fla. 1995), provides guidance. Lockhart upheld CCP. In Lockhart, "[t]here was no evidence of forced entry" and analogously, here the evidence showed that the victim voluntarily went to Calhoun's trailer to give him a ride, as Calhoun solicited. While in Lockhart, the victim was tortured, raped, and bound, here Calhoun overcame the victim's resistance in a violent struggle, then drove the victim miles to a remote location in the woods and then set her afire. In Lockhart, the victim was "bound at one time," and here the Calhoun bound and gagged the victim and put her in her trunk where he transported her to the remote woods to set her and her car on fire. As in Lockhart, here CCP should be upheld.

In Wright v. State, 19 So.3d 277, 300-301 (Fla. 2009), significant facts supporting CCP included, like here, "abduct[ing] and forc[ing] the victims to drive to a remote area where there would be no witnesses" and where he killed them. While Wright "obtained a firearm in advance," here Calhoun's persistence included overcoming the victim's resistance, binding and gagging her, keeping her hidden in the trunk of her car, even while stopping at a convenience store, and driving miles

and then hundreds of feet into the woods to set her and her car on fire.

Here, there is more than ample evidence to support CCP.

B. AVOID ARREST: SUFFICIENCY OF EVIDENCE FOR FINDING.

Calhoun's argument attacking Avoid arrest overlaps his attack on CCP. Perhaps the penultimate fact that he continues to overlook is the evidence showing that the victim was bound and gagged when he set her car on fire with her in it. There is no need to bind and gagged someone who is already dead.

The trial court's finding should be affirmed, as supported by competent substantial evidence:

> The defendant and victim knew one another from Esto, Florida. Rather than permitting the victim to return home, defendant transported her to a secluded area on private property in Alabama. The defendant had regularly gone to this campsite area for more than five years. By binding her with cable and tape, and placing her in the trunk of a car, Mia Chay Brown posed no immediate threat to defendant. She was incapable of thwarting his purpose or escaping. She could not summon help. The victim was the only person who could identify the defendant. The defendant doused the front passenger seat area of the car with an ignitable substance, and remained in the area to ensure a thorough bum and destruction of the vehicle, and its contents therein. The dominate motive for this murder was the elimination of Mia Chay Brown and all evidence linking him to this crime.
>
> The defendant avoided further detection throughout the day of December 17, 2010. By Saturday, December 18, 2010, he had managed to make his way through approximately 1.5 miles of woods and marsh to a house belonging to friends, the Brooks'. Choosing to remain undetected, he hid in their shed in a pile of sleeping bags. Tiffany Brooks found him at about 9:30 a.m., wet and dirty. Ms. Brooks permitted defendant to take a shower and washed his clothes as he

slept on their couch. Later that same day, Tiffany Brooks brought him fast food to eat.

In the meantime, flyers had been placed in nearby stores and restaurants with pictures of two missing persons, Mia Chay Brown and defendant. The defendant was confronted by the Brooks' about this flyer. At first he denied knowing the victim, but later said she was supposed to come and give him a ride but never showed up. Hastily, the defendant requested that the

Brooks' drive him beyond Esto to Bonifay, Florida. While on the way, the defendant asked to be let out on an isolated dirt road near the state line.

The defendant evaded law enforcement until December 20, 2010, when he was located inside his own trailer at American Precious Metals, in Esto, Florida. According to Captain Harry Hamilton, HCSO, it appeared as if the evidence tape had been broken and defendant was found hiding inside the frame of his bed, with items stacked on the mattress above him.

This Court finds the defendant's primary purpose of the killing of Mia Chay Brown was to avoid his own arrest. The Court finds beyond all reasonable doubt that the supporting evidence establishes this aggravating circumstance and gives it very great weight.

(VI 1078-79)

Some key aspects of the facts are the Defendant's knowledge that the victim knew him and thereby could identify him and his persistence at attempting to avoid detection, as he

- immobilized her in the trunk,
- drove her miles away,
- concocted a cover story for his scratches about going deer hunting,
- drove her into the woods, and then

- set her car, where she remained in the trunk, afire, resulting in an extremely intense fire that destroyed her and other evidence;

as he continued to attempt to evade detection by

- hiding in a barn,
- at least initially denied even knowing the victim,
- clandestinely worked his way back to his trailer and
- hid from law enforcement inside his bed frame.

The facts of this case far exceed simply the victim knowing the defendant.

Preston v. State, 607 So.2d 404, 409 (Fla. 1992), summarized the law and collected case law:

> We have long held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness. *Perry v. State*, 522 So.2d 817, 820 (Fla. 1988); *Bates v. State*, 465 So.2d 490, 492 (Fla.1985). However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes. *Swafford v. State*, 533 So.2d 270, 276 n. 6 (Fla. 1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989).
>
> We have upheld the application of this aggravating circumstance in cases similar to this one, where a robbery victim was **abducted** from the scene of the crime and **transported** to a different location **where he or she was then killed**. *See, e.g., Swafford*, 533 So.2d 270 (defendant robbed gas station then took attendant to remote area where he raped and shot her); *Cave v. State*, 476 So.2d 180, 188 (Fla. 1985) (victim was kidnapped from store and taken thirteen miles to a rural area and killed after robbery), cert. denied, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986); *Martin v. State*, 420 So.2d 583 (Fla.1982)

> (defendant robbed convenience store, abducted store employee, sexually battered and then stabbed her), cert. denied, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983). The only reasonable inference to be drawn from the facts of this case is that Preston kidnapped Walker from the store and transported her to a more remote location in order to eliminate the sole witness to the crime.

Here Calhoun did much more than abducting Ms. Brown, transporting her, and killing her at the new location.

Thus, while the ability of a victim to identify the defendant "may not alone be sufficient to support a finding that the dominant motive was to avoid arrest, the factor is significant," Hoskins v. State, 965 So.2d 1, 19 (Fla. 2007)(burglary, sexual battery, movement of victim). Here, there is much more than this "significant" fact.

In Wike v. State, 698 So. 2d 817, 822 (Fla. 1997), the victims knew the defendant and so they could identify him. Ms. Broen knew Calhoun. In Wiki, as Calhoun did to Ms. Brown here, the defendant transported the victims to a remote area and killed them. Here and in Wike, "The only logical inference from these facts is that Wike killed the victim to eliminate her as a witness."

In Card v. State, 803 So.2d 613, 625 (Fla. 2001), like here, the evidence supporting avoid arrest included the defendant and the victim knowing each other and the defendant kidnapping the victim and taking her to a secluded area miles away. Card did not wear gloves or a mask, and there no evidence that remotely

suggests that Calhoun used those measures to conceal his identity from Ms. Brown. As in Card, this Court should "affirm the trial court's findings with regard to this aggravating circumstance."

See also Wright v. State, 19 So.3d 277, 302 (Fla. 2009)(" victim was taken from the initial location of the carjacking and driven to an isolated, remote place to be executed").

In any event, the record-based and reasonable "very great weight" attributed to CCP (VI 1076-77) would render harmless any error finding avoid arrest.

ISSUE III (RING CLAIM): DOES FLORIDA'S SENTENCING PROCESS VIOLATE RING V. ARIZONA, 536 U.S. 584 (2002)? (IB 44-46, RESTATED)

The Initial Brief (IB 44-45) correctly concedes that this Court has rejected this claim.

This Court has "repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." Ault v. State, 53 So.3d 175, 205-206 (Fla. 2010)(citing Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002)). It should reject Calhoun's challenge.

Moreover, the jury's guilt-phase finding of guilty as charged of Kidnapping (XVII 1246-47; VI 960) satisfies Ring. See, e.g., Salazar v. State, 991 So. 2d 364, 378 (Fla. 2008); Johnson v. State, 969 So.2d 938, 961 (Fla. 2007); Parker v. State, 873 So.2d 270, 294 (Fla. 2004)("in addition to a conviction for

first-degree murder, Parker was convicted by a unanimous jury of kidnapping and robbery"; aggravator of " committed the murder in the course of a kidnapping"; "Parker is likewise not entitled to relief").

Yet further, this is not an override case. Calhoun's jury in his penalty phase recommended death by a 9 to 3 vote (XVIII 1373; VI 1017). As this Court explained in State v. Steele, 921 So.2d 538, 544-46 (Fla. 2005), a jury recommendation of death is a jury finding at least one aggravator, thereby satisfying any Ring requirement. See also Ault v. State, 53 So.3d 175, 205 (Fla. 2010)(rejecting a Ring challenge and noting "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating circumstance listed in the capital sentencing statute"; citing Steele).

Moreover, there is no constitutional requirement of jury-unanimity. See Ault, 53 So.3d at 206 (citing Coday v. State, 946 So.2d 988, 1006 (Fla. 2006)). Cf. Johnson v. Louisiana, 406 U.S. 356 (1972)(upholding a conviction based on a 9-to-3 jury vote); Apodaca v. Oregon, 406 U.S. 404 (1972)(upholding convictions by less than unanimous jury, 11-1 and 10-2).

For each and all of these reasons, ISSUE III should be rejected.

IV. SUPPLEMENTAL ISSUES: SUFFCIENCY OF EVIDENCE FOR THE CONVICTION AND PROPORTIONALITY OF THE DEATH SENTENCE.

While not raised as issues, as such, the State tenders the following to assist the Court in evaluating the sufficiency of evidence and proportionality.

A. SUFFICIENCY.

"A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. ... The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases).

"If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

The state submits the trial court's able summary of much of the evidence, in denying the defense's motion for judgment of acquittal, as more than sufficient evidence to support the conviction:

Briefly, ... the victim and the defendant knew one another, the defendant asked the victim for a ride in the morning hours of December 16, 2010, the victim was in the vicinity of the defendant's trailer in the evening hours of December , 2010 looking for the defendant's trailer in the area of American Precious Metals. ... [A]t the same time, the evening hour of December 16, 2010, the defendant was expected by Brittany Mixon to be in Geneva, Alabama but never showed up.

The Court does note that a fire was observed the morning hours, approximately 11 to 11:30 AM, on December 17 of 2010 near the area of the campsite owned by the defendant's brother-in-law.

The victim, the evidence established, had been bound by a coaxial cable or wire of some sort, and tape, possibly duct tape. The victim's vehicle had been driven to the isolated area outside the state of Florida and into an isolated wooded area in the state of Alabama. The victim's vehicle was nearby and in close proximity to the camp ground frequented by the defendant. The vehicle had been ignited by an accelerant, and that accelerant was a light petroleum distillate, not gasoline or oil.

The victim was inhaling during the fire, and the victim was locked in the trunk of her own car, and the victim is now deceased. The defendant was seen driving a light colored four door vehicle in the early morning hours of December 17, 2010 with clay and dirt on the sides of the car, as if he had been on country roads.

The defendant was observed with scratches and dried blood on his hands, along with a blood spot on his white t-shirt, at that time in the early morning hours of December 17, 2010. At that same time he was observed with black stuff around his fingernails, and he was driving a light colored vehicle with a Florida tag, heading back south from the convenience store north of the Geneva area.

The Court further notes that the victim's blood and DNA were found on a role of used duct tape in the defendant's trailer. The victim's purse was found in the defendant's trailer. The victim's hair, sufficient for testing, was found in the defendant's trailer.

The defendant gave, subsequent to those findings, conflicting statements about the missing girl that was supposed to give him a ride.

> And then there was evidence that there was certain evasive techniques taken by the defendant.
>
> As I look at all of that information, I find that the State has presented evidence from which the jury could exclude every reasonable hypothesis except that of guilt.
>
> And I further note that as to the issue of premeditation in count one, that is specifically the province of a jury question, relying upon Walker v State at 957 So.2d 560, a Florida Supreme Court case, 2007. The Court has also relied upon Celeste, C-E-L-E-S-T-E, versus State at 2012 W.L. 511.303, a Florida Fifth DCA case, that being decided on February 17, 2012 for my consideration of the standard for the circumstantial evidence issue.
>
> And finally, the Court finds instructive and of great assistance and relies upon the Supreme Court case of Abdool, A-B-D-0-0-L, versus State, cited at 53 So.2d 2008, again a Florida Supreme Court case from 2010, which is factually similar to this case in many aspects.
>
> And based upon those cases and based upon the facts that I've heard, again in the light most favorable to the State, the motion for judg[]ment of acquittal is denied .

(XVI 978-81, text broken into additional paragraphs) See also discussion of CCP in ISSUE II.

Although Jones v. State, 648 So.2d 669, 678-79 (Fla. 1994), also involved the defendant's confession to another inmate, its other facts are instructive. There, like here, the defendant was driving the victim's vehicle. There, the defendant wrecked the vehicle in an accident, whereas here Calhoun intentionally drove the car into the woods and set it on fire. There, the wreck was not far from where the victim was killed, whereas here Calhoun set the fire to kill the bound and gagged victim in the trunk. There, the evidence was so strong that it rendered the erroneous admission of evidence harmless. Here, as summarized in the

foregoing pages and in the Facts supra, the evidence of guilt is at least as strong as in Jones and supports the conviction.

B. PROPORTIONALITY.

Phillips v. State, 39 So.3d 296, 305 (Fla. 2010)(internal citations omitted), explained the standard of review:

> In death penalty cases, this Court performs a proportionality analysis in order to prevent the imposition of unusual punishments under the Florida Constitution. ... In deciding whether death is a proportionate penalty, this Court considers 'the totality of the circumstances in a case' and compares the case with other capital cases. ... 'Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances.' ... And '[t]his Court's function is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge.' ...

The death sentence in this case is proportional to others, as the trial court found:

> The most logical interpretation is that the defendant with calculated plan and heightened premeditation murdered Mia Chay Brown by placing her against her will in a car trunk, driving her to a secluded wooded area, and ruthlessly setting fire to the vehicle. The defendant's purpose in committing this murder was to eliminate any witness and to avoid his detection and arrest. Nothing about defendant's lack of criminal history, family ties or new-found faith suggests that the ultimate sentence for such conduct is disproportionate. The death penalty is reserved for the most aggravated and least mitigated capital felonies. A review of other reported capital decisions leads the Court to the conclusion that the death penalty in this matter is not disproportionate.

(VI 1082)

The CCP aggravator is one of the most serious aggravators provided by the statutory sentencing scheme. See Larkins v.

State, 739 So.2d 90, 95 (Fla. 1999). Furthermore, a comparison of other cases supports the death penalty here.

In Robinson v. State, 761 So.2d 269, 272-73 (Fla. 1999), the trial court found three aggravating factors of pecuniary gain, avoid arrest, and CCP, and the two statutory mental mitigating factors and eighteen nonstatutory mitigating factors, including brain damage. Here, the trial court found three aggravating facts of kidnapping, avoid arrest, and CCP, only one statutory mitigator and much less non-statutory mitigation than in Robinson. Robinson conducted a proportionality review and "affirm[ed] Robinson's sentence of death," Id. at 276-79. Calhoun's death sentence should be affirmed.

In Fennie v. State, 648 So.2d 95 (Fla. 1994), a comparison of key aspects of the case provide guidance. There, as here, the victim was abducted to a remote wooded area where the victim was killed. While Finnie included HAC, there the aggravation, like here, included CCP and the mitigation included that the defendant coming from a broken home, whereas here Calhoun had the advantage of a loving family. (See VI 1080-81)

Aspects of Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983), are instructive. Routly, like here involved an abduction in which the victim was bound and gagged and placed in the trunk of the victim's own car, then driven to an isolated area, where the victim was killed. Here, while the trial court found the

evidence did not demonstrate HAC, unlike Routly's HAC, the kidnapping-relevancy of these facts should be considered. In Routly, "Whether or not the victim in the instant case died instantaneously is unclear from the record," and here the medical examiner could not opine whether the victim was conscious when Calhoun burned her alive. Here and in Routly, CCP was also found. While in Routly, there was no mitigation, here it is not weighty and Routly affirmed a jury override, whereas here the jury recommended death by a vote of 9 to 3.

Finally, Moore v. State, 701 So.2d 545, 551-552 (Fla. 1997), involved a 9 to 3 jury vote like here and the aggravators of avoid arrest, pecuniary gain, and prior violent felony. Here, avoid arrest and kidnapping were found, as well as the weighty CCP. Moore included a non-mental statutory mitigator and no nonstatutory mitigating factors, and here there was a non-mental statutory mitigator and non-weighty nonstatutory mitigating factors.

In sum, compared with other cases, the death penalty imposed here is proportionate.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

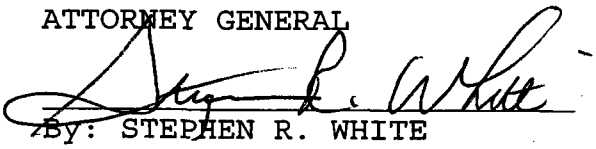
CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-MAIL on January 22d, 2013: W.C McLain at bill.mclain@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL



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IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1086

APPENDIX

Sentencing Order. (VI 1075-83)

AG#: L12-2-1191

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HOLMES COUNTY

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 11-011CF

JOHNNY MACK SKETO CALHOUN,

Defendant.

SENTENCING ORDER

The Defendant was tried before this Court on February 20, 2012 through February 29, 2012. The jury found the Defendant guilty of Murder in the First Degree, and Kidnapping. On February 29, 2012 the jury recommend by majority vote (9-3) that the death sentence be imposed on the Defendant for the murder of Mia Chay Brown. This Court gives great weight to the jury's recommendation. On April 4, 2012, the State and Defendant presented additional evidence and argument during the *Spencer* hearing before the Court. The Defendant presented additional evidence and argument he contends demonstrates mitigating evidence. The State argued the aggravating circumstances previously presented at trial. The Court did not permit the State to present any evidence or argument of an aggravating circumstance not previously argued to the jury. Additional arguments were made to the Court. The Defendant was given an opportunity to be heard, and he addressed the Court.

This Court is now required to consider and give individual consideration to each and every aggravating and mitigating circumstance as set forth by Section 921.141, Florida Statutes, including any and all non-statutory mitigating circumstances. Having heard all of the evidence introduced at trial and the *Spencer* hearing, as well as considering the sentencing memoranda of the State and Defendant, this Court now addresses each of the aggravating and mitigating circumstances:

AGGRAVATING CIRCUMSTANCES

1. The capital felony was especially heinous, atrocious and cruel (HAC).

HAC can be found in torturous murders evincing extreme and outrageous depravity as exemplified by a desire to inflict a high degree of pain or an utter indifference to human life. The victim was bound and gagged with tape, driven around for hours in the trunk of her own vehicle, taken across state lines to a secluded wooded area and set ablaze in an inferno that consumed everything inside the car with such ferocity that it melted windshield glass. All that

remained of the victim was her skull and upper torso, weighing twenty nine pounds. According to Alabama medical examiner, Dr. Steven Boudreau, at autopsy he identified what appeared to be coaxial cable around her arms, binding the body. Tape was found around her mouth and lower jaw. There were no projectiles or DNA foreign to the victim found within the human remains. Dr. Boudreau opined that the female victim (identified by dental records to be Mia Chay Brown) was breathing at the time of the fire, as smoke was imbedded in the mucous lining of her airway. His expert opinion was that Mia Chay Brown died of smoke inhalation and thermal burns. Can there be no more horrific death than this? The Court can only imagine the terror and excruciating ordeal Mia Chay Brown must have suffered. However, that is the difficulty with this aggravating circumstance. There is no reasonable doubt by this Court that the victim died in a fiery holocaust perpetrated by the defendant. However, the State did not present any evidence that the victim was conscious at the time of her death. Williams v. State, 37 So. 3d 187 (Fla. 2010). The medical examiner was unable to offer an opinion as to the pain and suffering the victim may have experienced. The State argues the fire possibly consumed any other evidence which could lead to a conclusion of consciousness. The Court cannot rely upon that supposition. Douglas v. State, 878 So. 2d 1246 (Fla. 2004). Without competent evidence as to the victim's consciousness or awareness of pending death, the Court may not find HAC. As such the Court determines that the HAC aggravating circumstance has not been established beyond a reasonable doubt.

2. The capital felony was cold, calculated and premeditated (CCP).

In order for CCP to apply, the State must satisfy a four part test: 1) the killing was a product of cool and calm reflection rather than an act prompted by emotional frenzy, panic or fit of rage; 2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident; 3) the defendant exhibited heightened premeditation; 4) the defendant had no pretense of moral or legal justification.

The Defendant well-knew the victim, Mia Chay Brown, through her employment at the local Esto, Florida convenience store. On Thursday, December 16, 2010, in the early afternoon, defendant entreated the victim to come by his house that evening and give him a ride. Defendant placed a call to his girlfriend, Brittany Mixon. He left a message telling her he would see her that evening in Geneva, Alabama and bring her son a chicken. The victim arrived at defendant's residence sometime after 8:40 p.m., driving her white four-door 2000 Toyota Avalon. A struggle ensued while they were together in the trailer, as evinced by the disarray of the trailer and victim's recently pulled hair follicles and blood found therein. DNA matching the profile of both victim and defendant was found on a role of partially used duct tape and a white quilt nearby. Rather than using a hunting rifle in the trailer, so as to not awaken light-sleeping neighbors, the defendant procured tape and coaxial cable from his trailer to bind and gag the victim. He secreted her out of the trailer and departed the area by driving her vehicle in the darkness of the early December morning. The victim's digital camera and cell phone were later found missing from her purse found inside the trailer. Evidence indicated that the digital SD card from the

victim's camera was found on the floor of the defendant's trailer displaying an image of the inside roof of the trailer. Agent Jennifer Roeder of the Florida Department of Law Enforcement-Digital Evidence Section estimated the image to have been taken between 3:30 and 4:00 a.m., December 17, 2010.

The defendant placed the victim in the trunk of her car, and drove without incident across the state line into Alabama. The defendant was recognized driving alone in the victim's car about 5:30 a.m., by a Gladstone's convenience store clerk in Alabama, north of Hartford. He calmly purchased cigarettes, and when asked about the dried blood and scratches on him, without emotion he replied he had been deer hunting. The defendant drove south in the car bearing a Florida license plate, but not before lingering on the front porch long enough to be recognized by another patron. The defendant had driven at least fourteen (14) miles from Esto, Florida to the Gladstone convenience store, and chose not to abandon his plan.

The defendant drove to a secluded wooded area on his brother-in-law's property, between Geneva and Hartford, Alabama. The defendant was well acquainted with this area, having recently used the private campsite near a pond. The defendant did not abandon his plan.

Less than 1500 feet from his family's campsite, the defendant drove the vehicle into a thicket of underbrush and pines, careful to conceal it in excess of 400 feet in a straight line from the nearest clearing. Testimony established a winding debris field through the thicket to where the vehicle came to its final resting place to be 625.2 feet from the clearing. With the victim inside the trunk, and still breathing, the defendant ignited the car with a light petroleum distillate, such as Coleman fuel and lighter fluid. The defendant used a substance other than oil or gasoline. This establishes the "heightened premeditation" element of CCP. Mia Chay Brown burned to death in a fiery tomb, only to be found by chance three days later. Witnesses reported seeing black smoke in the area between 11:00 and 11:30 a.m., Friday December 17, 2010. The defendant would later boast to law enforcement at about 2:00 p.m., that same rainy afternoon, he remained concealed near the campsite and was close enough to reach out and touch a deputy.

For in excess of fourteen hours the defendant was able to implement his plan of murder, undetected and undeterred by no one. He had ample opportunity to release the victim, but instead after substantial reflection acted out his plan. The defendant was deliberately ruthless, given the manner in which he killed the victim, and took no steps to stop the fire once he started it. There is no evidence in the record that defendant had any pretense of moral or legal justification to carry out his murder of Mia Chay Brown, a person from whom he knew he could ask a favor. The record clearly demonstrates the defendant acted without provocation. At no time did the defendant abandon his plan. The Court determines the four part test has been demonstrated by the totality of the circumstances, and proven beyond every reasonable doubt. The aggravating circumstance of CCP is established by competent and substantial evidence. The Court assigns very great weight to this aggravating circumstance.

3. The capital felony was committed while Defendant was in commission of kidnapping.

The facts of this case suggest the victim, Mia Chay Brown, voluntarily came to defendant's residence on the premises of American Precious Metals, in Esto, Florida. The defendant had asked her earlier in the day while at her place of employment whether she could give him a ride to a place called the Party Shack. At some point early in the morning of December 17, 2010, the defendant bound her arms with coaxial cable and gagged her mouth using duct tape. He further wrapped the victim with tape pinning her arms to her torso. Against her will, the defendant forcibly removed the victim from his trailer, placed her in the trunk of the car, and drove north over the nearby state line, into Alabama. He had no lawful authority to do so. Once in a secluded area, the defendant committed arson thereby killing Mia Chay Brown by thermal burns and smoke inhalation, as determined by the Alabama medical examiner.

The State has proven beyond every reasonable doubt the defendant was engaged in the kidnapping of Mia Chay Brown at the time she was murdered. The Court finds the existence of this aggravating circumstance and gives it great weight.

4. The capital felony was committed for the purpose of avoiding arrest.

The defendant and victim knew one another from Esto, Florida. Rather than permitting the victim to return home, defendant transported her to a secluded area on private property in Alabama. The defendant had regularly gone to this campsite area for more than five years. By binding her with cable and tape, and placing her in the trunk of a car, Mia Chay Brown posed no immediate threat to defendant. She was incapable of thwarting his purpose or escaping. She could not summon help. The victim was the only person who could identify the defendant. The defendant doused the front passenger seat area of the car with an ignitable substance, and remained in the area to ensure a thorough burn and destruction of the vehicle, and its contents therein. The dominate motive for this murder was the elimination of Mia Chay Brown and all evidence linking him to this crime.

The defendant avoided further detection throughout the day of December 17, 2010. By Saturday, December 18, 2010, he had managed to make his way through approximately 1.5 miles of woods and marsh to a house belonging to friends, the Brooks'. Choosing to remain undetected, he hid in their shed in a pile of sleeping bags. Tiffany Brooks found him at about 9:30 a.m., wet and dirty. Ms. Brooks permitted defendant to take a shower and washed his clothes as he slept on their couch. Later that same day, Tiffany Brooks brought him fast food to eat.

In the meantime, flyers had been placed in nearby stores and restaurants with pictures of two missing persons, Mia Chay Brown and defendant. The defendant was confronted by the Brooks' about this flyer. At first he denied knowing the victim, but later said she was supposed to come and give him a ride but never showed up. Hastily, the defendant requested that the

Brooks' drive him beyond Esto to Bonifay, Florida. While on the way, the defendant asked to be let out on an isolated dirt road near the state line.

The defendant evaded law enforcement until December 20, 2010, when he was located inside his own trailer at American Precious Metals, in Esto, Florida. According to Captain Harry Hamilton, HCSO, it appeared as if the evidence tape had been broken and defendant was found hiding inside the frame of his bed, with items stacked on the mattress above him.

This Court finds the defendant's primary purpose of the killing of Mia Chay Brown was to avoid his own arrest. The Court finds beyond all reasonable doubt that the supporting evidence establishes this aggravating circumstance and gives it very great weight.

STATUTORY MITIGATING CIRCUMSTANCES

The Court will address each statutory mitigating circumstance provided by Section 921.141, Florida Statutes, and every non-statutory mitigating as argued by Defendant.

1. The Defendant has no significant history of criminal activity.

The Defendant established that he had a prior criminal record consisting of only a misdemeanor conviction for Driving While License Suspended, and a violation of probation therein. Lt. Bill Pate, Holmes County Sheriff's Office (HCSO) testified the Defendant has no prior felony convictions. The State did not dispute this. The Court finds that this mitigating circumstance has been established by the greater weight of the evidence, and it is entitled to significant weight. Hess v. State, 794 So. 2d 1249 (Fla. 2001).

NON-STATUTORY MITIGATING CIRCUMSTANCES

The Defendant suggests the Court consider the existence of several non-statutory mitigating circumstances. The Court will address each one.

1. The Defendant had good jail conduct pending and during trial.

According to Deputy Pam Roberts, HCSO, the Defendant was quiet, respectful and presented no disciplinary problems while incarcerated. Lt. Bill Pate, HCSO, echoed that Defendant did not pose a disciplinary problem either at the courthouse during trial or during transport to and from his daily court appearances. The Defendant suggests that his good conduct and respect for authority demonstrates his ability to successfully adapt to a prison sentence of Life without possibility of parole. The Court finds this mitigating circumstance has been established by the greater weight of the evidence; however, it is afforded little weight.

2. The Defendant has been a positive role model to other inmates.

The Defendant presented numerous witnesses who spoke of his new-found faith and religious devotion while incarcerated. Pastor A. J. Lombardin testified as to the Defendant's

conversion and subsequent bible study and ministry with other inmates. Pastor Lombardin certified the Defendant to be an Elder Minister in the Utmost Miracle Church, Marianna, Florida. It was Pastor Lombardin's opinion that Defendant's faith and participation was a legitimate change not due to his incarceration and pending trial. The Court heard similar testimony from Cliff Jenkins, Ryan George and John Searcy.

The Court heard additional testimony from Patrick O'Dell, Darryl Williams and Johnny Pappas, all of whom recounted the positive and encouraging influence the Defendant had on their lives while sharing the Holmes County Jail. The Defendant offers these testimonies to demonstrate how the Defendant through his faith and devotion can assist those around him to promote positive and meaningful change. The Court is reasonably convinced of the existence of this mitigating circumstance. In light of all circumstances in this case, the Court gives some weight to this mitigating circumstance.

3. The Defendant has the capacity for hard work.

Charlie Skinner, brother-in-law to Defendant, testified that the Defendant had worked for his construction business and farm. Mr. Skinner noted the Defendant was always willing to take on tough jobs, and that he was reliable and trustworthy with equipment. The Court did not hear any other evidence as to Defendant's employment history, but for his occasional help at the scrap yard where he lived. Having the capacity for hard work is not a mitigating factor. A good employment history is. The totality of the record before this Court does not establish that the Defendant has a good employment history. This mitigating circumstance has not been established.

4. The Defendant is capable of forming loving relationships.

According to Charlie Skinner the Defendant is outgoing, friendly and generous "to a fault". The Defendant maintains a loving relationship with his brother-in-law, as well as with his sister, Betsy Spann. Ms. Spann, who lived with the Defendant as a child, described a loving and caring relationship with him. Ms. Spann also testified to a loving relationship between the Defendant and his eight year old son. While the minor child resides primarily with the natural mother, the Defendant visits the child on a frequent basis and is a good and attentive father.

The Court heard from Defendant's mother, Mrs. Sharon Calhoun. She testified about the Defendant's caring relationship with her and the strong bonds which are present within the family. Mrs. Calhoun described a close relationship between the Defendant and his own father. The Court also heard how the defendant treated his girlfriend's child as if his own. The totality of the evidence presented convinces the Court of the existence of this mitigating factor, and it is given little weight.

5. Defendant's childhood history.

By all accounts, the Defendant had a happy childhood filled with family and friends. Defendant was a good student and never a behavioral problem in school. Defendant played sports through his middle and high school years. Defendant was a Cub Scout, Boy Scout and lacked one credit to become an Eagle Scout. Defendant was the youngest of five children. From testimony of family and friends, it appears that the Defendant's upbringing was exemplary. There is no suggestion he was deprived or lacked the attention and affection of loving parents. Defendant offers this evidence to demonstrate his ability to work in group settings, achieve goals, and to have a positive influence. The Defendant is thirty four (34) years old and in good health. Based upon the totality of circumstances in this case the Court determines that this mitigating circumstance has been established, and is afforded little weight.

6. The Defendant will be incarcerated for the remainder of his life with no danger to others.

The Court listened to argument during the Penalty Phase that the length of the Defendant's potential mandatory life sentence could be considered. The Defendant underscores his potential for positive behavior upon others in prison and his potential for reducing others' recidivism. This Court has considered the ramifications of a sentence of life imprisonment without possibility of parole as impacting other inmates and the community at large. The Court determines this to be a mitigating circumstance and assigns it minimal weight.

7. Defendant was born with Sudden Infant Death Syndrome (SIDS).

Defendant's mother, Mrs. Calhoun, testified the Defendant was born with SIDS. No medical evidence was presented to suggest the basis of diagnosis, length of time of presenting symptoms, or any long term detrimental impact upon Defendant. The Court is not convinced that the circumstances of the Defendant's birth or SIDS diagnosis caused any long term physical or emotional problems. The Court does not find this to be a mitigating circumstance.

8. Defendant's statement to the Court.

The Court heard from the Defendant at the *Spencer* hearing. Defendant expressed his love for his family, and sincerity for his new-found faith. Defendant expressed remorse for things that he may have done during his life, and acknowledged responsibility for his mistakes. However, the Defendant stopped short of addressing anything in regards to this case or acceptance of responsibility therein. The fact the Defendant makes no comment about his actions in this case is neither an aggravating nor mitigating circumstance.

Defendant spoke, albeit briefly, about his voluntary drug and alcohol use, as well as promiscuity during his life. Nothing further was presented as to these general statements, and the Court does not find by the greater weight of the evidence that any mitigating circumstance exists.

PROPORTIONALITY REVIEW

The most logical interpretation is that the defendant with calculated plan and heightened premeditation murdered Mia Chay Brown by placing her against her will in a car trunk, driving her to a secluded wooded area, and ruthlessly setting fire to the vehicle. The defendant's purpose in committing this murder was to eliminate any witness and to avoid his detection and arrest. Nothing about defendant's lack of criminal history, family ties or new-found faith suggests that the ultimate sentence for such conduct is disproportionate. The death penalty is reserved for the most aggravated and least mitigated capital felonies. A review of other reported capital decisions leads the Court to the conclusion that the death penalty in this matter is not disproportionate.

CONCLUSION

The Court finds the State has established beyond all reasonable doubt the existence of three statutory aggravating circumstances. The Court finds the State has not established the aggravating circumstance of HAC. A total of three aggravating circumstances exist.

The Court is reasonably convinced of the existence of one statutory mitigating circumstance.

The Court is reasonably convinced of the existence of five non-statutory mitigating circumstances.

In weighing aggravating and mitigating factors this Court employs a qualitative analysis as to the nature of each circumstance which has been established. I find the aggravating circumstances in this case far outweigh the mitigating circumstances.

SENTENCE

As to Count I of the Indictment, for the murder of Mia Chay Brown, the Court sentences you to be put to death in the manner prescribed by law.

As to Count II of the Indictment, for Kidnapping, the Court sentences you to serve a term of 100 years imprisonment to be served in the Florida Department of Corrections.

These sentences shall run concurrent to each other.

The Clerk is directed to access the costs and enter judgment for those costs.

The Defendant is entitled to 493 days credit for time served.

You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court, and the Public Defender is appointed to represent you on appeal.

The Defendant shall be remanded to the Florida Department of Corrections for execution of this sentence.

MAY GOD HAVE MERCY ON YOUR SOUL.

DONE AND ORDERED, in open Court at Bonifay, Holmes County, Florida this 18th day of May, 2012.

CHRISTOPHER N. PATTERSON
Circuit Judge

Copies to:

Glenn Hess, Esq., State Attorney, Fourteenth Judicial Circuit

Brandon Young, Esq., Assistant State Attorney

Kimberly D. Jewell Dowgul, Esq., Attorney for Defendant

Kevin Carlisle, Esq., Attorney for Defendant