IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v. CASE NO.: SC12-1086

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES

PAGE(S)

STATUTES

CONSTITUTIONS

IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,

Appellant,

v. **CASE NO.: SC12-1086**

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The record on appeal consists of eighteen volumes. Volumes I through IX contains the clerk's records and trial exhibits. These volumes will be reference with the prefix "R" followed by the volume and page numbers. Transcripts of the trial proceedings are contained in volumes X through XVIII will be referenced with the prefix "T." A copy of the sentencing order is attached to this brief as an appendix, referenced "App."

STATEMENT OF THE CASE AND FACTS

Statement Of The Case

A Holmes County grand jury returned an indictment on February 18, 2011, charging Johnny Mack Sketo Calhoun with first degree murder of Mia Chay Brown and kidnaping. (R1:39-40) Calhoun entered a plea of not guilty. (R1:42-43) The State filed notice of intent to seek a death sentence on August 30, 2011. (R1:46) Calhoun proceeded to a jury trial commencing on February 20,2012, and the jury found Calhoun guilty as charged on February 28, 2012. (R5:892-R6:960) Although the indictment alleged premeditated or felony murder theories, the jury returned a general verdict for first degree murder. (R1:39-40; R6:960) After the penalty phase of the trial, the jury recommended a death sentence by a vote of 9 to 3. (R6:1017) The trial court received sentencing memoranda from the State and the defense, a pre-sentence investigation report, and held a Spencer hearing where additional witnesses testified. (R6:1035-1074;R7:1251-1307) On May 18, 2012, Circuit Judge Christopher Patterson sentenced Calhoun to death for the first degree murder and one hundred years in prison for the kidnaping. (R6:1075-1083; 1085-1094; R7:1308-1313)

The trial court filed a sentencing order in support of the death sentence. (R6:1075-1083)(A copy is attached to this brief as an appendix) The court found three aggravating circumstances: (1) the capital murder was committed in a cold, calculated and

premeditated manner (very great weight); (2) the murder was committed during the commission of a kidnaping (great weight); and (3) the murder was committed to avoid arrest(very great weight). (R6:1076-1079) In the order, the court considered the heinous, atrocious or cruel aggravator but rejected it as not proven beyond a reasonable doubt. (R6:1075-1076) In mitigation, the court found one statutory mitigator -- the defendant has no significant criminal history with his only conviction being for a misdemeanor for driving with a suspended license. (R6:1079) The trial court addressed eight non-statutory mitigating circumstances:

(1) the defendant exhibited good conduct while in jail and during trial (little weight);

(2) the defendant has been a positive role model for other jail inmates(some weight);

(3) the defendant has the capacity for hard work (not established);

(4) the defendant is capable of forming loving relationships(little weight);

(5) the defendant's childhood history (little weight);

(6) the defendant will be incarcerated for life (minimal weight);

(7) the defendant was born with Sudden Infant Death Syndrome (not mitigating);

(8) the defendant's personal statement to the court (no mitigators established).

(R6:1079-1081)

Calhoun filed his notice of appeal to this Court on May 22, 2012. (R6:1098)

Guilt Phase -- State's Case

In December 2010, Mia Brown worked as an employee at Charlie's Grocery and Deli in Esto, Florida. (T13:543-549) On Thursday, December 16, 2010, Harvey Bush, a daily customer, was in the store between 1:00 and 1:30 p.m. (T13:591-593) He saw Mia Brown in the store and her white Toyota automobile outside. (T13:592-593) Johnny Mack Sketo Calhoun entered the store while Bush was talking to Mia Brown. (T13:593) Bush had actually met Calhoun the previous day at Calhoun's father's scrap metal yard in Esto. (T13:593, 596-597) Calhoun asked Brown if she could give him a ride to a party later that evening. (T13:594) She agreed to pick Calhoun up after she got off work, and she noted to Bush that she was friends with Calhoun's girlfriend. (T13:594) Bush knew the store closed between 8:00 and 9:00 p.m. (T13:594, 596) Jerry Gammons lived in a camper trailer two blocks away from the American Precious Metals scrap yard. (T13:605-606) At 8:40 p.m. on December 16, 2010, a young woman driving a light-colored, four door car stopped at his trailer, and said she was looking for Johnny Mack who lived in a camper on the scrap metal yard. (T13:607) Gammons told her she had the wrong trailer, and no one named Johnny Mack lived there. (T13:607) The next night, Gammon was at a bar and a man passed out flyers with pictures of two missing persons, Mia Brown and Johnny Mack Sketo

Calhoun. (T13:607-609) Gammon later made the connection because the woman looked like the woman who stopped at his trailer, and although he did not know Calhoun, he recognized the Sketo name as he was familiar with the Sketo family. (T13:607-609)

Brandon Brown, Mia Brown's husband, had prepared dinner and waited for his wife to return home from work on December 16, 2010. (T13:614-616) The store usually closed around 9:00 p.m., but sometimes closing the store required a little more time. (T13:616) While waiting, Brandon fell asleep on the couch and he awoke around 2:00 a.m. (T13:617) Mia was not at home, and he began calling friends and family trying to locate her. (T13:618) Mia's mother, Nancy Williams, made a missing person report with Deputy Betty Grimbly at 3:47 a.m. (T13:620-625) Grimbly turned the report over to the investigation section and a BOLO for a missing person issued. (T13:625)

Deputy Chuck White responded to a call at 8:00 a.m. on December 17, 2010, about a possible theft at American Precious Metals scrap yard. (T13:626-627, 632) The owners, Mr. Ellenburg and Mr. Sketo found that a skid loader had been hot wired and moved to a position close to the loading dock. (T13:632) There were unknown tire tracks in the area. (T13:634) Additionally, the travel trailer residence of Johnny Mack Sketo Calhoun had pry marks on the door, the inside had clothes and trash scattered throughout. (T13:628-630) Calhoun was not present. (T13:628) Later that morning, Deputy

White went to Charlie's Grocery to take a statement where he learned that Mia Brown was missing. (T13:630-631)

Brittany Mixon, Calhoun's girlfriend, was staying with her father in Geneva, Alabama, on December 16, 2010. (T14:702-703) She expected Calhoun to come to the house that evening, but he never arrived. (T14:704) The morning of December 17th, Mixon borrowed her father's truck and drove to American Precious Metals to find Calhoun. (T14:704-705) Calhoun did not have a telephone. (T14:705) Mixon arrived about 9:30 a.m. (T14:705) She saw Calhoun's father when she arrived, and he told her Calhoun was not there. (T14:705, 707) She went to the camper trailer, where she used to live with Calhoun and where she still had personal belongings. (T14:705-706) The trailer door could no longer be locked from the outside, and she pulled the door open to look inside for Calhoun. (T14:707) She saw that the inside of the trailer had been ransacked. (T14:707) Mixon left the trailer and drove toward Charlie's Grocery and Deli where she saw a number of police cars. (T14:708) She thought there may have been a wreck. (T14:708-709) She drove back to her father's house, and later, she called the Charlie's grocery expecting her friend, Mia Brown, to answer to talk about the police activity. (T14:709-710) Investigator Michael Raley answered, and he later met Mixon at her grandmother's house to talk about Calhoun and Brown being missing. (T14:710, 763-764)

During Investigator Raley's interview, Mixon said that Calhoun

might be at a campsite area in Geneva County, Alabama. (T14:710-711, 764-765) She had stayed at the camp area multiple nights with Calhoun. (T14:711) The property belonged to Charlie Skinnard, Calhoun's brother-in-law. (T14:712-713, 767) Mixon accompanied Raley to show him the location of the property, and they arrived around 2:00 p.m. (T14:767) Another officer then drove Mixon back to her grandmother's house. (T14:713, 765-767) Raley continued to walk to the campsite. (T14:767)

About 4:00 p.m. on December 17th, Brittany Mixon returned to Calhoun's trailer to look for him. (T14:713) Angie Curry, a friend, and Percilla Brown, Mia Brown's sister-in-law, accompanied Mixon. (T14:713-714) When they stopped at the trailer, Mixon went inside. (T14:715) She became suspicious when she found a purse that did not belong to her, a pack of 305 menthol cigarettes and a bottle of wine. (T14:715-716) The purse was on the floor between the bathroom and a refrigerator. (T14:716-717) Mixon brought the items outside, and they contacted law enforcement. (T14:718, 768) Investigator Raley obtained the purse that contained items that appeared to be Mia Brown's. (T14:768-769) Mia Brown's husband and mother identified the purse and the contents. (T14:769)

Dick Mowbry, a game warden in Alabama with experience in tracking, helped search the wooded area, primarily looking for the car. (T13:555-557) He found a campsite with a tent and eventually found a car back in the woods about 150 yards off an old roadway.

(T13:561-562) The car had been burned with a fire hot enough to melt the glass windows. (T13:564-565) There was no license plate, but a melted Toyota insignia was located. (T13:564) Mowbry saw the seats were burned out of the car, and he could see into the trunk through a hole in the backseat area. (T13:565-566) He saw what appeared to be human remains, a charred rib cage. (T13:566-567) The conservation officer assisting him confirmed what Mowbry saw, and they called the sheriff's office. (T13:567)

Mike Gillis, an agent with the Alabama Bureau of Investigation, examined the scene where the car was found. (T13:575-579) The car took a zig-zagged path into the woods, and Gillis found bark damage on trees and items from the car along the path. (T13:578-579) He recovered a plastic taillight lens and a white, outside mirror that had been knocked from the car. (T13:578) The burned human remains were inside the trunk of the car. (T13:580) Gillis was also present at the autopsy. (T13:580-583) There was some wiring found with the body -- some appeared to be automotive wiring and some was consistent with coaxial wires used for TV cables. (T13:582-583) Much of the insulation was burned off the wire. (T13:587 The coaxial wires were wrapped around the lower arms and hands. (T13:584) Some silver or gray duct tape was also present and appeared to have been wrapped around the body. (T13:585)

Dr. Stephen Boudreau, an Alabama medical examiner, performed

the autopsy. (T14:683-686) The badly burned female remains consisted of the torso, with some internal organs. (T14:687-689) Through dental records, the remains were identified as Mia Brown. (T14:697-699) Cause of death was smoke inhalation and thermal burns. (T14:691) When examining the lungs, Boudreau found soot embedded in the mucus layer of the airway. (T14:695) In his opinion, the soot was breathed into the lungs, indicating that Brown was alive at the beginning of the fire. (T14:695) Carbon monoxide was found in a blood sample. (T14:697) Boudreau could not determine if Brown was conscious at the time the fire started. (T14:701) Wire was wrapped around the remains of the arms. (T14:689-690) The wire was television coaxial cable. (T14:690) Some other type wires were also with the body. (T14:690-691) Residual pieces of tape, possibly duct tape, in the hair and on the back of the neck. (T14:694-695) Boudreau concluded the death was a homicide. (T14:691)

Jeffrey Lowery, a deputy fire marshal for the Alabama State Fire Marshal's Office, collected the car and debris samples from the area for forensic testing. (T14:799-806) Perry Koussiafes, a senior laboratory analyst with the Fire Marshal's Office, conducted a chemical analysis of the debris.(T14:808-814) Three debris samples from the right front quarter showed the presence of a light petroleum distillate, such as lighter fluid or canned camping fuel.(T14:814-815) Arson Investigator Jason Deese examined the

burned vehicle and the laboratory results. (T14:818-820) He opined that the fire started in the area of the front passenger seat and compartment and was intentionally set using a flammable liquid. (T14:820-825)

Sherry Bradley worked at a convenience store located between Enterprise and Hartford, Alabama. (T13:646-647) On Friday, December 17, 2010, she opened the store at 5:00 a.m. (T13:648) Between 5:30 and 6:00 a.m., a man that Bradley identified as Calhoun entered the store. She said she knew him as Mr. Calhoun or Sketo. (T13:648-649) He had been in the store a few times. (T13:663) Bradley noticed that he drove a white, four-door car with a Florida license plate. (T13:651-652) He arrived at the store coming from the south and heading north, and when he left, he turned back south. (T13:652) He came to the counter and asked for the a pack of the cheapest cigarettes, and he paid with $2 in change. (T13:650) As he counted the money, Bradley noticed that he had a lot of scratches on his hands, some with dried blood. (T13:650) She asked if he needed something for the scratches, he said he had been deer hunting. (T13:650-651) Bradley noted that his hands had black around he fingernails, like her mechanic husband had when he came home from work. (T13:654) The man was wearing a white T-shirt with an open flannel shirt over it. (T13:653-654) There were a couple of blood spots on the T-shirt. (T13:654) Bradley saw a missing persons flier on December 19th, she recognized Calhoun's photograph and called the

police. (T13:656-657)

Another regular customer, Darren Batchelor, arrived at the store while Calhoun was present. (T13:653; T14:675) Batchelor went to school with Calhoun, and he saw him just outside the convenience store about 6:00 a.m. in December 2010. (T14:676-677) Since Batchelor was in a hurry that morning, he quickly spoke to Calhoun and continued into the store for his coffee and cigarettes. (T14:677-678) This was the only time Batchelor had seen Calhoun at this store that was about fifteen miles from Esto. (T14:678, 681) Batchelor drove a silver, two-door Chevrolet Cobalt. (T14:681-682) He did not notice the type of car Calhoun drove. (T14:678)

Two witnesses driving in the area of Hartford, Alabama, saw smoke from a wooded area about 10:30 a.m to 11:00 a.m. on December 17, 2010. (T14:752-762) Brett Bennett saw a lot of smoke as he drove down a dirt road. (T14:756) He did not think it was a woods fire because the smoke was more centralized with black and orange colors. (T14:756-758) Keith Brinley, who worked for Geneva City Alabama in school maintenance, headed home for lunch about 11:00 a.m. (T14:758-760) When he turned down the dirt road leading to his house, he saw a big, black, mushroom-type fire. (T14:760-761)

In December of 2010, Tiffany Brooks lived in Hartford, Alabama, with her parents on Kelly Road. (T14:779) She knew Johnny Mack Calhoun as someone who had been to the house previously. (T14:779-780) About 9:30 a.m. on a Saturday in December 2010, Tiffany Brooks

found Calhoun in a shed where the family had a refrigerator and a a freezer. (T14:780) He was wrapped in a sleeping bag that had been used to help insulate the freezer. (T14:780-781) His clothes, blue overalls and a white T-shirt, were wet and dirty. (T14:781) There was no blood on his clothes. (T14:788) Tiffany brought Calhoun inside where he showered and put on some clean clothes while his were being washed. (T14:782) He took a nap on the couch, and later, Tiffany and her mother, Glenda Brooks, obtained some food from a Hardy's Restaurant for them all to eat. (T14:783) Glenda Brooks, Tiffany's mother, received a phone call from Tiffany's boyfriend, Steven Bledsoe, who had seen a missing person flier with Calhoun's picture and a woman named Mia Brown. (T14:784, 793-794) When asked, Calhoun said he did not know a Mia Brown, but he said that the girl may have been the person who was to pick him up for his girlfriend, Brittany. (T14:787, 794-799) After the phone call, they drove Calhoun to a dirt road in the woods at his request. (T14:785-786)

Investigators Charles Richards and Micahel Raley testified about the two searches of Calhoun's trailer. (T15:835, 845; 934) Charles Richards, a lab analyst with FDLE at the time, assisted in the searches. (T15:832-862) He photographed the trailer and collected possible evidence. (T15:835-837) The whole interior of the trailer was in disaray with clothes, trash and other items scattered around. (T15: 851) A partial roll of duct tape with a reddish stain on the cardboard roller was collected after the stain had a positive

presumptive test result for blood. (T15:838-839) Richards also photographed and collected five other pieces of duct tape. (T15:840-8410 A multi-colored sheet was collected from a folding futon bed and submitted for testing. (T15:841) A white quilt was on the same futon, and Richards collected it because there were some light-colored hairs on it as well as a pinkish stain. (T15:842-843) Richards found an SD card, a memory storage card for a digital camera, on the floor near the roll of duct tape. (T15:844) In the second search of the trailer, Richards collected some items of clothing with suspected hairs: a pair of black socks on the couch; black sweatpants and a pink polo shirt behind the bedroom door; and a black, long-sleeved shirt. (T15:847-848)

Michael Raley viewed photographs recovered from the camera SD card found in the trailer. (T15:914-919; 934,937) There were photographs of Mia Brown, her husband and other family members. (T13:691; T15:910-912; 937) Additionally, there was a photograph of the inside of Calhoun's trailer with a camera created date stamp of December 17, 2010, between 3:30 and 4:00 a.m. (T15:921-922, 937-939) Raley observed a television, DVD player, a VCR and a television converter box set up. (T15:940) Various cables were present, but one cable necessary to make the whole system work appeared to be missing. (T15:940-945) However, Raley acknowledged that he assumed a cable was missing, and he had no knowledge such a cable was ever there. (T15:959-961)

Trevor Seifret, a laboratory analyst with FDLE, testified about DNA testing on various items of evidence. (T15:862-909) On a roll of duct tape, a red stain tested positive for blood, and Seifret developed a mixed DNA profile from the stain. (T15:869-873) The major DNA contributor was Mia Brown with a complete 13 marker profile, and the minor contributor included the DNA of Johnny Mack Sketo Calhoun. (T15:870-873) Red stains on a multi-colored sheet tested positive for blood, and the complete DNA profile developed matched Calhoun. (T15:873-874) Three stains on a white bed quilt were positive for blood. (T15:875-880) Two of the stains produced DNA profiles matching Calhoun and the third stain had a DNA profile matching Mia Brown. (T15:878-880) Two hairs recovered from the white quilt had sufficient root to develop a DNA profile. (T15:881-883) One hair matched the DNA profile of Mia Brown, and the second hair matched the DNA profile of Johnny Calhoun. (T15:881-883) Testing of a hair found on a dark sock produced a mixed, partial DNA that included Mia Brown as a major contributor. (T15:883-884) Two of three hairs from a pair of black sweat pants produced DNA profiles. (T15:884-886) One had a complete DNA profile matching Mia Brown. (T15:885) The second hair had a partial DNA profile including Mia Brown. (T15:886) Four out of five hairs found on a pink polo shirt had complete DNA profiles matching Mia Brown. (T15:886-888) A single hair found on a black shirt had a partial DNA profile including Mia Brown. (T15:889-890)

On December 20, 2010, Harry Hamilton, a criminal investigator with the Holmes County Sheriff, arrived at Calhoun's trailer with intent to seize the trailer. (T15:926-927) He noticed that the evidence tape sealing the door was broken. (T15:927) Hamilton and Officer Dale Nye entered the trailer to be sure no one was inside. (T15:928) Officer Nye found Calhoun in the bedroom of the trailer, hiding underneath the mattress inside the bed frame box. (T15:928) They transported Calhoun to the Sheriff's Office. (T15:929) Calhoun had scratches on his legs, neck, arms and hands.(T15:929-931) Hamilton photographed the scratches. (T15:929-933)

Investigator Michael Raley conducted an interview of Calhoun on December 20, 2010. (T15:934, 952) The interview lasted about one hour. (law enforcement transcript of the interview appears in the record as an attachment to a pretrial motion at R1:62-106) However, the State sought to introduce just five responses Calhoun made during the interview. (T15:952-956) Defense counsel objected to the piecemeal introduction of these statements because the jury would not be given the context of the statements. (T15:953-954) Counsel asked to introduce the entire statement for context under the rule of completeness. (T15:953-954) The State objected because much of the statement was self-serving and inadmissible as hearsay. (T15:953-954) The court denied the defense counsel's objection, and allowed the State to introduce the portions of the statement. (T15:954) The investigator's questions regarding the five areas the

prosecutor wanted to present and Calhoun's responses were introduced as follows:

1. Investigator 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 American Precious Metals, and Calhoun said she had never been there. (T15:955-956)

Guilt Phase -- Defense Case

At the beginning of the defense case, counsel again asked the court to allow the introduction of Calhoun's entire statement under the rule of completeness. (T16:982-983) The court again denied the

motion, noting that the State had been allowed to introduce certain statement as admissions against interest, but the remainder of the statement was inadmissible as self-serving hearsay. (T16:983-984) The court did rule that defense counsel could question Investigator Raley to bring out that Calhoun had been cooperative during the interview. (T16:984-985)

Jose Martinez owned a convenience store in Esto, Florida. (T16:988) Johnny Mack Sketo Calhoun had been a regular customer for over nine years. (T16:989) On December 16th, Calhoun purchased a pack of small cigars known as cigarillos, some Boone's Farm Wine and a bottle of non-alcoholic apple cider. (T16:990) Martinez said that Calhoun never bought cigarettes, and he always smoked the small cigars, Swisher Sweets cigars in a three-pack. (T16:990)

Three witnesses testified to hearing a loud noise from American Precious Metals scrap yard in the early morning hours of Friday, December 17th. (T16:991, 996, 998) Matt and Monica Crutchfield lived about sixty-five yards from the scrap yard. (T16:991-992, 996-997) Between 1:00 and 3:00 a.m., Matt Crutchfield heard a loud "bang." (T16:922-993) Monica Crutchfield said the loud noise was unusual and it awakened her. (T16:996-997) The noise could have been someone slamming a door or a trunk. (T16:995) Matt Crutchfield did not hear any equipment moving around, but his view of the scrap yard was obscured by a row of pine trees. (T16:993, 995) Darlen Madden, who lives about a one block from American Precious Metals, heard a

loud noise from the scrap yard about 2:30 or 2:00 a.m. on December 17th. (T16:998-999) She described the noise as metallic and sounded like a car wreck. (T16:999) Although she got up and looked out of the window toward the scrap yard, she did not see anything. (T16:1000) After returning to bed, she recalls hearing a second noise that was not as loud as the first. (T16:1000-1001)

John Sketo, Johnny Calhoun's father, was the co-owner of American Precious Metals, along with his nephew, Terry Ellengurg. (T16:1002-1004) Upon arriving at work on Friday, December 17th, they noticed the Bobcat, a small forklift, appeared to be missing. (T16:1005-1006, 1008, 1051) The Bobcat was out of place on a loading dock, but the ignition switch had been torn out of the Bobcat. (T16:1006, 1021, 1023, 1051) There was a large stack of aluminum that had not yet been weighed, and Sketo and Ellenburg had concerns someone had tried to steal the metal. (T16:1009-1010, 1052-1053) A set of truck tracks, that had not been there the day before, were located in the loading dock area where the Bobcat was found. (T16:101031-1037) A truck with dual wheels made the tracks, and Ellenburg said the tracks and damage to some concrete steps at the loading dock made it appear as if the vehicle drove right off the dock. (T16:1061-1063) Calhoun's trailer had been ransacked. (T16:1010-1016, 1053-1056, 1069-1070) Calhoun was not present.(T16:1015, 1053-1054) Sketo and Ellenburg called for law enforcement assitance. (T16:1008, 1053) Brittany Mixon arrived at

the trailer. (T16:1016, 1057) She asked if Johnny was home, and Sketo said that he was not there. (T16:1017-1018) Mixon walked to the trailer, and even though Sketo told her it had been burglarized, she entered the trailer. (T16:1018, 1057-1058) She stayed inside about a minute. (T16:1019, 1058) She did not have anything in her hand when she went inside or when she came back out of the trailer. (T16:1019) Without saying anthing, she left. (T16:1019-1020) Glen Bush also drove up before the police arrived. (T16:1021, 1059) He was also looking for Calhoun, and he said that the police were looking for him because he had been seen with a missing girl. (T16:1022-1022, 1059-1060) Deputy White responded to the call. (T16:1022, 1060) He took the complaint and looked inside Calhoun's trailer. (T16:1022-1030)

Glenda Terrilyn Brooks testified in the State's case about receiving a telephone call from her daughter's boyfriend while Calhoun was at her home. (T16:1075-1076) The information she received was that Calhoun's picture was on a missing person flier. (T16:1076) She became uncomfortable having Calhoun in her home, and she asked him to leave. (T16:1076) He asked for a ride to Bonifay, but she told him she did not have enough gas to drive him that far. (T16:1076) After driving him a short distance, he said to let him out so she would not run out of gas. (T16:1076-1077)

Investigator Michael Raley searched another property in Geneva County, Alabama, that belonged to Calhoun's father. (T16:1080, 1082-

1083, 1088) The property had a barn walled on three sides. (T16:1082) A car tag bracket like the one that had been on Mia Brown's car was located on the property. (T16:1083) There was no tag found on Brown's car. (T16:1091-1092) The chrome plastic bracket was from Gilland Mitsubishi, and Raley surmised that there were many such brackets from that dealer. (T16:1089-1090) Raley had nothing to link that bracket to Brown's car. (T16:1090) Investigators also found a piece of cardboard in the barn with tire impressions and an oil stain. (T16:1083) According to family members, Brown's car had a small oil leak. (T16:1083) Raley also went to the Brooks' residence where he retrieved Calhoun's blue overalls and a T-shirt that had been washed and dried, along with a pair of shoes. (T16:1085-1086) A pack of Swisher Sweets cigars was also found in the clothes dryer containing the overalls and T-shirt. (T16: 1085-1086)

Pricilla Strickland was Mia Brown's sister-in-law. (T16:1093) During the day of December 17th, Strickland, Angelia Curry and Brittany Mixon attempted to find Mia Brown. (T16:1093, 1101) Mixon had a relationship with Calhoun. (T16:1093-1094, 1101) They drove to Calhoun's trailer, Mixon suggested they stop, and she volunteered to go inside the trailer. (T16:1094-1095,1101-1102) Mixon went inside the trailer and returned within 20 seconds with a purse and some wine. (T16:1094-1096) Curry could see Mixon enter the door of the trailer, she looked to the left and right, but she was never out

of Curry's sight. (T16:1103) When Mixon turned around, she had the purse, wine and a pack of cigarettes. (T16:1103-1104) Mixon said something happened in the trailer because it was a mess. (T16:1096)

Penalty Phase And Sentencing

The State presented no additional evidence at the penalty phase of the trial. (T18:1281-1282) Calhoun presented several witnesses who testified to his legitimate religious life change in jail, and his behavior and work in the jail helping others. (T18:1281-1327) Additionally, Calhoun's mother and brother-in-law testified. (T18:1327, 1332)

Pastor A.J. Lombardin ministers in the Holmes County Jail. (T18:1282-1284) He met and ministered to Calhoun in the jail. (T18:1283-1284) During his work, Lombardin was convinced that Calhoun's renewed religious life was real and sincere. (T18:1285-1286) He saw Calhoun counseling and ministering to other inmates. (T18:1285-1286) Calhoun was touching other lives for the better. (T18:1286-1287)

Cliff Jenkins is a minister who does his work in the Holmes County Jail two nights a week. (18:1288-1289) Jenkins met Calhoun in the jail. (T18:1289) He saw real change in Calhoun's life. (T18:1290) Calhoun studied the bible, and he had a made personal and religious changes. (T18:1290) Calhoun began ministering to other inmates. (T18:1290-1291) Jenkins believes that Calhoun could continue to minister to others while incarcerated. (T18:1291-1292)

Ryan George had been involved in ministery after he had been involved in criminal activity that placed him in several county jails and ultimately a rehabilitation center. (T18:1294-1295) He considered himself to be an example of how a life can change. (T18:1295-1296) George knew Calhoun before he was incarcerated in the jail. (T18:1296, 1299) When he ministered to Calhoun in the jail, he believed him to be truly transformed. (T18:11297) Calhoun was no longer a self-centered person, but one who reached out to help others. (T18:1297-1299)

Patrick O'Dell met Calhoun in the Holmes County Jail. (T18:1301-1302) Calhoun invited him to a bible study.(T18:1303) Initially, O'Dell declined. (T18:1303-1304) Calhoun continued to reach out to him, and O'Dell did become involved with the bible study. (T18:1304) Over time, Calhoun helped him when he had a death in the family, lead him spiritually and became a friend. (T18:1304-1305) Although in prison, O'Dell said he continues down a path using the bible to guide him. (T18:1305-1306)

Jerry Pappas met Calhoun seven years earlier when he was 12-years-old. (T18:1308-1309) Calhoun always tried to help guide Pappas in this life to stay out of trouble. (T18:1309) He considered Calhoun like a brother. (T18:1309-1310) Pappas was in jail with Calhoun in April 2011. (T18:1310-1311) At that time, Pappas saw a big change in Calhoun. (T18:1311) He encouraged Pappas to change his life and lead him to study the bible. (T18:1311-1312) Pappas said

Calhoun had always been available to help him, but after Calhoun's religious experience, he was even more supportive. (T18:1312) Pappasstated he is making an attempt to change his life while in prison. (T18:1313)

Darryl Williams was incarcerated in the Holmes County Jail on July 29, 2011. (T18:1315-1316) Calhoun reached out to him, invited him to talk and approached him about discussing the bible. (T18:1317) During the conversations, Calhoun helped him understand and explore the bible. (t18:1317-1318) Calhoun showed him a different way to live. (T18:1318) Williams said Calhoun has the ability to affect other people's lives. (T18:1319)

Deputy Pamela Roberts works in the Holmes County Jail, and she had the opportunity to observe Johnny Calhoun during his 14 months of incarceration. (T18:1320-1322) He was a quiet inmate, observed the rules, and he did not present any problems. (T18:1321) Roberts also watched how Calhoun interacted with other inmates. (T18:1321) She saw him counsel inmates and try to steer them in the right direction. (T18:1321)

Lieutenant Bill Pate worked in the Holmes County Jail, and he knew Calhoun based on Calhoun's 14 months in custody in the jail. (T18:1324-1325) Calhoun had no disciplinary problems in the jail. (T18:1325) Pate had Calhoun's criminal history records that showed one prior conviction for a second degree misdemeanor offense of driving with a suspended driver's license in 2006, and a violation

of probation on that same case for 2008. (T18:1325-1326) Through the trial in this case, Calhoun was always quiet and respectful. (T18:1327)

Charlie Skinner is Calhoun's brother-in-law. (T18:1327-1328) He and Calhoun had a close relationship, Skinner considered him more a brother than a brother-in-law. (T18:1328) They knew each other since Calhoun was a child. (T18:1328) Calhoun was always friendly, outgoing, and generous. (T18:1328-1329) Skinner had a farm and worked in construction. (T18:1329) He trained Calhoun to drive farm equipment, and Skinner trusted him to be responsible. (T18:1329-1330) Skinner visited Calhoun in the jail, and he found him to be the same friendly, generous person. (T18:1331) While in jail, Calhoun changed his life, had a religious experience. He has a strong relationship with God, and he counsels others. (T18:1331) Skinner believes that Calhoun will continue to counsel and help others in prison if given the opportunity. (T18:1331)

Sharon Calhoun, Calhoun's mother, testified that Johnny Calhoun was the youngest of her five children, and his father is John Sketo. (T18:1332-1333) She described her son as always loving and a fun boy to be around. (T18:1333) The two of them had a close relationship. (T18:1333) He also had a good relationship with his father with a very special bond. (T18:1333-1334) Johnny was born with SIDS, and his father had to help care for him. (T18:1334) Johnny has a close relationship with his own nine-year-old son, even though his son

lives with his mother. (T18:1335) He was actively engaged with his son. (T18:1335-1336) Generally, he interacted well with all children. (T18:1336-1337) As a child, Johnny was an honor roll student, and he did not cause trouble. (T18:1337) He played football and graduated from high school. (T18:1337-1338) He also was a Boy Scout and almost earned the Eagle Scout rank. (T18:1338) Johnny was always friendly and helpful toward others. (T18:1338-1339) Since his incarceration, he became closer and in a real relationship with his faith and God. (T18:1340) Sharon Calhoun asked the jury to spare her son's life. (T18:1341)

On April 4, 2012, the trial court conducted a Spencer hearing. (R7:1251-1307) The Defense presented three witnesses. (R7:1259, 1264, 1267) Betsy Spann, Calhoun's sister, described their growing up together and described their relationship as best friends. (R7:1259-1262) Spann knew Calhoun to be a good father to his nine-year-old son, even though his son lived with his mother. (R7:1262-1263) Calhoun's mother, Sharon Calhoun, spoke of her son's continued faith and his attitude that God intends what will happen to him. (R7:1262-1264) He accepted whatever was decided about his life. (T7:1262-1264) She plead for his life, and related the impact on her and the family. (T7:1265) John Searcy, a minister with Faithful Ministries, had known Calhoun since they were children. (R7:1267-1268) He spent more time visiting with Calhoun in jail. (R7:1270) Rather than counseling Calhoun, Searcy said Calhoun

counseled him, strengthened him in his faith, and he grew as minister through the relationship with Calhoun. (R7:1270-1272) Johnny Calhoun spoke in his own defense. (R7:1283) He related how he had become strengthened in his relationship with God since his incarceration. (R7:1283-1286) The State presented four victim impact witnesses, the victim's brother, aunt, sister and mother. (R7:1287,1291, 1295, 1300)

SUMMARY OF ARGUMENT

1. The State introduced as admissions against interest, five statements Calhoun made during a police interview lasting about an hour. Calhoun requested the entire statement be introduced under the rule of completeness. See, Sec. 90.108 Fla. Stat. The trial court abused its discretion in not permitting the defense to present the remainder of Calhoun's statement on the basis that it was exculpatory. Although exculpatory statements are typically excluded as inadmissible hearsay, an exception to this rule applies where the statements are part of the complete context of a defendant's partial statement as the State has introduced it at trial. See, e.g., Kaczmar v. State, __ So. 3d __, case no. SC10-2269 (Fla. Oct. 4, 2012); Larzelere v. State, 676 So. 2d 394, 401-402 (Fla. 1996). The only issue for the trial court was whether the remainder of statement, in fairness, could provide context to avoid the potential that the partial statements could give misleading impressions to the jury.

2. The trial court improperly found the cold, calculated and premeditated and the avoiding arrest aggravating circumstances. The evidence failed to prove these circumstances beyond a reasonable doubt. As result, Calhoun's death sentence has been improperly imposed in violation of his rights to due process and to be free from cruel and unusual punishment. Amend. V, VI, VIII, XIV U.S. Const.

3. The trial court erroneously imposed a sentence of death in violation of the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Calhoun recognizes that this Court has ruled contrary to the position asserted in this issue in previous cases. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002); King v. Moore, 831 So. 2d 143 (Fla. 2002), cert. denied, 123 S.Ct. 657 (2002). However, Calhoun now asks this Court to reconsider these decisions.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO PRESENT CALHOUN'S STATEMENT TO THE POLICE UNDER THE RULE OF COMPLETENESS, AFTER THE STATE INTRODUCED SELECTED PARTS OF THE STATEMENT, ON THE GROUNDS THAT CALHOUN'S STATEMENT WAS EXCULPATORY.

The State introduced as admissions against interest five statements Calhoun made during a police interview lasting about an hour. Calhoun requested the entire statement be introduced under the rule of completeness. See, Sec.90.108 Fla. Stat. The trial court abused its discretion in not permitting the defense to present the remainder of Calhoun's statement on the basis that it was exculpatory. Although exculpatory statements are typically excluded as inadmissible hearsay, an exception to this rule applies where the statements are part of the complete context of a defendant's partial statement as the State has introduced it at trial. See, e.g., Kaczmar v. State, __So. 3d __, case no. SC10-2269 (Fla. Oct. 4, 2012); Larzelere v. State, 676 So. 2d 394, 401-402 (Fla. 1996). The only issue for the trial court was whether the remainder of statement, in fairness, could provide context to avoid the potential that the partial statements could give misleading impressions to the jury. Ibid.

Discussion

Investigator Michael Raley conducted an interview of Calhoun on December 20, 2010. (T15:934, 952) The interview lasted about one hour. (a law enforcement transcript of the interview appears in the

record as an attachment to a pretrial motion at R1:62-106) In the statement, Calhoun related a sequence of events that was exculpatory. (R1:62-106) In substance, Calhoun said he awoke Thursday morning feeling ill, and he needed a ride to the house of his girlfriend, Brittany Mixon. (R1:68) Brittany suggested he asked Mia Brown, who was a long-time friend of Brittany's. (R1:68, 76) Calhoun knew Mia and her husband, Brandon. (R1:76) Calhoun used to operate and live at a game room that had a pool table, and Brandon and Mia came there to shoot pool. (R1:76,91-92) Calhoun went to the store where Mia Brown worked, and she agreed to give him a ride after she left work as late as 9:00 p.m. (R1:68) Mia knew that Calhoun worked at his father's scrap metal yard and that he lived on the property. (R1:94) Calhoun assumed Brittany must have told her that he lived on the business property. (R1:94) Around 6:00 or 6:30 p.m., a large man with brick-red hair knocked on Calhoun's door and asked about metal prices. (R1:68, 80) He introduced himself as "Lance." (R1:68) Calhoun explained that he did not know metal prices, since he just worked at the business. (R1:68) Calhoun turned to walk back to his trailer, and the man grabbed him from behind around his head with something that had a strong, chemical smell. (R1:68, 81, 84-85) Calhoun lost consciousness, and he regained it momentarily to find himself bound with duct tape in the trunk of a car. (R1:68) Calhoun, still bound, was let out the trunk in the woods with the man who was threatening to kill him as pay back for

something. (R1:68, 85-87) When the man returned to the car for a moment, Calhoun managed to escape. (R1:68-69, 85-87) He wandered through the woods and a swampy area for a day, until he got to a highway and realized where he was. (R1:69-73) At that time, he made his way to a friend's house where he showered, changed clothes, slept and ate. (R1:69-73) While there, he learned about the missing persons flier with his and Mia's pictures and that the police were looking for him. (R1:79) Calhoun made his way back to his trailer. (R1:103-104) Calhoun told the investigators that he did not know if Mia made it to his trailer that Thursday night because she was not supposed to arrive until 7:30 to 9:00 p.m., and the man grabbed him earlier in the evening. (R1:75, 94-95) He acknowledged that he avoided law enforcement because he had bad experience seeking help from the police in the past. (R1:103-105)

The State sought to introduce just five responses Calhoun made during the interview as admissions against interest. (T15:952-956) Defense counsel objected to the piecemeal introduction of these statements because the jury would not be given the context of the statements. (T15:953-954) Counsel asked to introduce the entire statement for context under the rule of completeness. (T15:953-954) The State objected arguing that much of the statement was self-serving and inadmissible as hearsay. (T15:953-954) The court denied defense counsel's request to introduce the remainder of the statement and allowed the State to introduce the portions of the

statement:

> MS. DOWGUL[DEFENSE COUNSEL]: Your Honor, I am going to object to Lieutenant Raley testifying to bits and pieces of the statement. Under the rule of completeness the entire statement needs to be played so it can be played in context.
>
> MR. YOUNG[PROSECUTOR]: We would disagree. We plan on touching on five separate areas of the statement, we would be happy to proffer them for the Court, but the rule of completeness does not require the whole statement; what it requires is if there is context for a particular statement to come in then that context has to be provided. The State is not believing any of the areas we are going to touch on is going to require any further context being explained in any manner and anything other would then allowing statements for his interest or self-serving statements to be admitted before the jury and there's no such hearsay exception.
>
> MS. DOWGUL: Your Honor, to allow just bits and pieces of the statement to come in are some of them self-serving, yes, they are. Obviously in a statement that will happen, but with the context for this, what they are doing is taking out things that are injury to their case and only putting in the things that support their stance. Meanwhile, the jury is left with a hole in what the entire statement was and the context of the entire statement.
>
> MR. YOUNG: Your Honor, that's what the hearsay exception that's granted to the State is for, is for statements against interest.
>
> THE COURT: All right, well, I am going to deny the objection, I will overrule the objection. State will be permitted to proceed with this line of questioning.

(T15:953-954)

The State asked Lieutenant Raley questions regarding the five areas of Calhoun's statement 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 American Precious Metals, and Calhoun said she had never been there. (T15:955-956)

At the beginning of the defense case, counsel again asked the court to allow the introduction of Calhoun's entire statement under the rule of completeness. (T16:982-983) The court again denied the motion, noting that the State had been allowed to introduce certain statement as admissions against interest, but the remainder of the statement was inadmissible as self-serving hearsay:

> MS. DOWGUL[DEFENSE COUNSEL]: Your Honor, the only other thing I would make, since my case will now be beginning, I would be moving to be allowed to enter the remainder of the defendant's statement. I know the Court ruled last

week during cross-examination regarding the rule of completeness that the form in which the State posed the questions did not allow for myself to bring in what is otherwise deemed as self-serving statements. Your Honor, I'm going to again make that motion and ask that I be allowed to do that, and depending on the Court's ruling, I will have yet another request.

THE COURT: All right. Well, the Court had, had denied the request for the complete statement at that time and had relied upon the exception to hearsay. I believe it's 90.803(18), I think, the admission of a party opponent. And so that's the basis of the Court's ruling that permitted those limited questions to be answered and then, or to be asked of Lieutenant Raley and then answered by Lieutenant Raley. Certainly, though, if you're moving, that you wish to then move the entire statement in during your case in chief, what says the State?

MR. YOUNG[PROSECUTOR]: We would certainly object to that, Your Honor, on the basis of hearsay.

THE COURT: All right. And I'm going to at this juncture continue to deny that request on the rule of completeness. Certainly if that statement has something that is important and you wish to ask limited inquiry about, I think you had that opportunity with Lieutenant Raley last week, at least at this juncture, but I'm gonna deny that request, believing that there are a number of areas in that statement that are solely self-serving and would not have any probative value. So I'm gonna deny that request.

(T16:983-984)

The trial court abused its discretion in not permitting the defense to present the remainder of Calhoun's statement under the rule of completeness. As this Court has previously stated, the purpose of the rule of completeness "...is to avoid the potential for creating misleading impressions by taking statements out of context." See, Larzelere v. State, 676 So.2d 394, 401 (Fla. 1996).

The rule provides:

> (1) When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

Sec. 90.108(1) Fla. Stat. This rule generally allows introduction of the entire statement once the opposing party opens the door by admitting part of the statement. See, Larzelere, 676 So.2d at 401-402. Although a trial court has the discretion to limit the amount of the remaining statement that is introduced under the rule, the issue remains one of fairness and of providing context to guard against the potential for misleading impressions. Ibid. In Calhoun's case the trial judge failed to properly exercise its discretion and labored under a misunderstanding of the legal principles of the rule of completeness. Contrary to the trial court's considerations, the fact that the entire statement contains exculpatory statements does not preclude admission under the rule of completeness. See, e.g., Kaczmar v. State, __ So. 3d __, case no. SC10-2269 (Fla. Oct. 4, 2012); Larzelere v. State, 676 So. 2d 394, 401-402 (Fla. 1996); Whitefield v. State, 933 So. 2d 1245, 1248 (Fla. 1st DCA 2006); Eberhardt v. State, 550 So. 2d 102, 105 (Fla. 1st DCA 1989). Consequently, the trial court's reliance on the principle of exclusion of exculpatory statements did not afford the defense a fair application of the rule of completeness. The court

merely overruled and denied the defense objections and requests without conducting the requires fairness evaluation and the need for context.

In not allowing the introduction of other parts of Calhoun's statement for context, the jury was left with misleading impressions on at least two of the five points the State presented. First, introducing that Calhoun admitted being at the Brooks' residence on Saturday, December 18, 2010, without his stated reasons for being there was misleading. (T15:954-955) The bare admission of being at that location in the general area where Mia Brown was found at that time would lead the jury to conclude that Calhoun was there because he was involved with Brown's disappearance and death. Calhoun was entitled to present that he was there for another reason -- he had been abducted and left in the woods and sought refuge at his friend's house. The jury, as fact-finder, should have had the context of the statement that lead to a different inference than the one the State asserted. Second, the bare statement that Mia Brown had never been to Calhoun's trailer located on the property of American Precious Metals was completely out of context. (T15:955-956) The State wanted the jury to conclude that Calhoun was not telling the truth and covering up something with this statement because other evidence linked Brown the trailer. However, in context, the State's position is wrong. Calhoun told the investigator that he used to live in and operate a game room where

there was a pool table, and Mia Brown and her husband would come over to shoot pool. (R1:76,91-92) Investigator Raley then asked if Mia Brown ever came to the camper trailer where Calhoun then lived, and that is when Calhoun said Mia never came to the trailer:

> Calhoun: She'd come over to the pool hall and played pool before when I had it. Her and her ...
>
> Raley: Oh, back when you lived down there?
>
> Calhoun: Yeah.
>
> Raley: What about since the camper. She ever 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: Yes, sir. All kinds of, all kind of extra friends.

(R1:91-92) The context of the statement shows that is was made to indicate Mia Brown had not been to the trailer in the past to socialize. However, Calhoun had already told the investigator that he did not know if Mia Brown made it to his trailer that Thursday night when she was to give him a ride, because he was grabbed from the trailer himself before she was due to arrive. (R1:75, 94-95) Again, the jury had none of this context to evaluate the bare admission the State introduced.

The trial judge's erroneous evaluation and ruling regarding the

application of the rule of completeness has denied Calhoun his rights to due process and a fair and impartial trial. See, Amends. V, VI, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. Calhoun now asks this Court to reverse his case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN FINDING AND WEIGHING TWO AGGRAVATTING CIRCUMSTANCES NOT PROVEN BEYOND A REASONALBLE DOUBT.

A. The Evidence Failed To Prove Beyond A Reasonable Doubt That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

The aggravating circumstance that the capital felony was committed in a cold, calculated and premeditated manner as provided for in Section 921.141(5)(i) Florida Statutes has been defined as requiring the four elements. See, Jackson v. State, 648 So. 2d 85 (Fla. 1994); Walls v. State, 641 So. 2d 381 (Fla. 1994). This Court, in Walls, discussed them as follows:

> Under Jackson, there are four elements that must exist to establish cold, calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage."
>
> * * * *
>
> Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident."
>
> * * * *
>
> Third, Jackson requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder.
>
> * * * *
>
> Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide...

Walls, at 387-388.

In finding the cold, calculated and premeditated aggravating

circumstance, the trial court in this case relied on speculation and assumptions that were inconsistent with some its own other findings. Initially, the court rejected the heinous, atrocious or cruel aggravating circumstance because there was no proof that the victim was conscious at the time of death. (R6:1075-1076)(App) Specifically, the court wrote:

> 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...

(R6:1076)(App) This lack of evidence that the victim was conscious at the time of death also extends there being no evidence the victim was conscious at the time she was placed in the trunk of the car. Consequently, the victim may have been unconscious and may have appeared dead at that time. Therefore, at the time the victim was placed in the car, the defendant may have thought he was disposing of a body, rather in the process of killing the victim. As a result, the events subsequent to placing the body in the car would not be reflective of a cold, calculated plan on the part of the defendant to kill, since he may have thought the victim was already dead. The trial court's significant reliance on those events in the sentencing order are unfounded. (R6:1077)(App)

There is little evidence about what may or may not have happened in the trailer prior to the placing of the victim in the car. The trial judge's order relying on speculation as to what may have occurred is not proof – the court may not substitute "logical inferences" for missing proof. See, e.g., Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1992); Williams v. State, 386 So. 2d 538 (Fla. 1980). Initially, there is no evidence that Calhoun's asking for a ride from the victim was a ruse to commence a plan to commit any crime. Even if the request could be construed as a ruse to commit a crime, there is no evidence the crime was murder. A plan to kill cannot be inferred from a plan to commit other crimes. See, Barwick v. State, 660 So. 2d 685, 696 (Fla. 1992); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). There was evidence of a struggle. A struggle seems to contradict a thought-out plan to subdue and kill the victim. Additionally, there was evidence the victim was bound. However, she was bound using readily available items -- duct tape and a coaxial cable pulled from a televison entertainment system. The use of items of opportunity do not reflect the degree of prior planning the trial court suggests in the sentencing order.

There are factual circumstances present that would negate a finding of the cold, calculated and premeditated factor. Under the circumstantial evidence rule, Calhoun is entitled to a view of those circumstances in the light most favorable to him. See, Mahn v.

State, 714 So. 2d 391, 398 (Fla. 1998); Geralds v. State, 601 So.2d 1157 (Fla. 1992). The trial court erred in finding the CCP aggravator, and the use of that factor in sentencing violates Calhoun's constitutional rights to due process and protection from cruel or unusual punishment. Amends. V, VI, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. He now asks this Court to reverse his death sentence.

B. The Evidence Failed To Prove Beyond A Reasonable Doubt That The Homicide Was Committed To Avoid Arrest.

The aggravating circumstance that the victim was killed to avoid arrest as provided for in Section 921.141(5)(e), Florida Statutes can be applicable where the victim is not a law enforcement officer. However, such an application requires proof beyond a reasonable doubt that the defendant's sole or dominant motive for the murder was to avoid arrest. See, e.g., Green v. State, 975 So. 2d 1081, 1086-1088 (Fla. 2008); Zack v. State, 753 So. 2d 9, 20 (Fla. 2000); Consalvo v. State, 697 So. 2d 805, 818-819 (Fla. 1996); Geralds v. State, 601 So. 2d 601 So.2d 1157, 1164 (Fla. 1992); Riley v. State, 366 So. 2d 19, 20 (Fla. 1978). In this case, the proof failed. The aggravator was improperly found, and Calhoun's death sentence has been improperly imposed.

The aggravating circumstance depends on an assessment of the defendant's state of mind. See, e.g., Green v. State, 975 So. 2d at 1086-1088. In the sentencing order, the trial court relied

exclusively on the sequence of events after the victim was placed in the trunk of the car as reflective of the defendant's motive to kill. (R6:1078-1079) As discussed in part A of this Issue, *supra.*, the victim may have been unconscious and appeared dead at the time she was placed in the car. The defendant may have believed he was disposing of a body, rather than in the process of killing someone. An avoiding arrest motive for concealing a homicide is not the same as the motive for committing the homicide itself. Since the defendant's actions may well have been those of someone who believed he was concealing a body, not committing a homicide, the aggravator has not been proven. Calhoun is entitled to a view of the circumstances favorable to his position under the circumstantial evidence rule. See, Geralds v. State, 601 So. 2d 1157. The court should not have found and considered the aggravator in sentencing. Calhoun's death sentence violates his rights to due process and to be free from cruel or unusual punishment. Amend. V, VI, VIII, XIV U.S. Const.; Art. I Secs. 9, 16, 17, Fla. Const.

ISSUE III

THE DEATH PENALTY IS UNCONSTITUTIONALLY IMPOSED BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously imposed a sentence of death in violation of the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Calhoun's various motions to dismiss the death penalty as an option in his case should have been granted. (R1:119, 122, 125, 155, 156, 158, 159, 161) Ring extended the requirements of Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of the facts relied upon to increase maximum sentences to the capital sentencing context. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are co-decision-makers on the question of penalty and the jury's advisory recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to be unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstances in the indictment.

Calhoun acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme

Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert. denied, 123 S.Ct. 657 (2002). Calhoun also acknowledges the recent decision in the United States Court of Appeals For The Eleventh Circuit holding it was without authority to overturn prior United States Supreme Court authority upholding Florida's statute on Sixth Amendment grounds even though seeming in conflict with Ring. Evans v. Department of Corrections, __ F.3d __ case no. 11-144498 (11th Cir. October 23, 2012). Additionally, Calhoun is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of Ring. See, e.g., Miller v. State, 42 So. 3d 204 (Fla. 2010); Marshall v. Crosby, 911 So. 2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So. 2d 538. At this time, Calhoun asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in the constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare Section 921.141 Florida Statutes unconstitutional. Calhoun's death sentence would then fail to be constitutionally imposed. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. Calhoun's death sentence must be reversed for imposition of a life sentence.

CONCLUSION

For the reasons presented in Issue I of this brief, Calhoun aks this Court to reverse his convictions and order a new trial. Alternatively, for the reasons in Issues II and III, Calhoun asks that his death sentence be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Carlolyn Snurkowski, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapp@myfloridalegal.com as agreed by the parties, and to appellant, Johnny Calhoun, DC #Q26629, F. S. P., 7819 N.W. 228th St., Raiford, FL 32026, on this 5th day of November, 2012.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
Bill.McLain@flpd2.com
(850) 606-1000

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

APPENDIX

JOHNNY MACK SKETO CALHOUN,

Appellant,

v. CASE NO.: SC12-1086

STATE OF FLORIDA,

Appellee.

_____/

APPENDIX

TO

INITIAL BRIEF OF APPELLANT

Trial Court's order imposing the death sentence.

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 bums. 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 vJState. 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 ratal 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 Eslo, 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 Held 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 It :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 waa 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[1] 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 Bsto, Florida. According to Captain Harry Hamilton, IICSO, 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 Sheriffs 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. Ifess v. State. 794 So. 2d 1249 (Fla. 2001).

TON -STATVTQRY MITOATIWQ CffiCVMSTANff gg

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 U> 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 bard 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 ftith 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