IN THE SUPREME COURT OF FLORIDA

CARL DAUSCH,

Appellant,

vs.

CASE NO. SC12-1161

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR SUMTER COUNTY

APPELLANT'S INITIAL BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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DISCOVERY OF THE BODY, AND THE INDICTMENT

This was a cold case. On the morning of July 15, 1987, the Sumter County Sheriff's Office was alerted to the presence of a corpse by the side of the road some seven miles north of Bushnell. (XII 388) The body of Adrian Mobley was fully clothed and hog-tied with a sheet; it looked as though it had been dragged. (XII 390; XIII 408, 452, 457-58; XIV 628-29) Law enforcement determined the body had been placed there the night before. (XIV 622) It was not until 2006 that a grand jury charged Appellant with the premeditated first-degree murder of Mr. Mobley, and with one count of sexual battery on him with force likely to cause serious personal injury. (I 1)

THE MEDICAL EXAMINER'S TESTIMONY

Dr. Cheryl LaMay conducted an autopsy on Mr. Mobley's body on July 15, 1987. (XIII 426) She testified at trial that he died from blunt trauma to his face, neck, and chest. (XIII 435, 439, 442) Those injuries are visible in State's Exhibit 2. (Vol. X, Disc 1; Appendix to this brief)

Dr. LaMay described the victim's facial injuries as including bruises and lacerations, chiefly to the bridge of his nose and the area around his eyes. (XIII 435-36) The nasal bridge was fractured, as was the cribiform plate, which she

described as "a small plate above the nose area...where the nerves from the nasal portion of the internal nose actually go into the brain." (XIII 437) Neither eye orbit was fractured, and there was no trauma to the brain itself. (XIII 437, 441)

The doctor described a further injury to the victim's neck and collarbone area. (XIII 438-41) She described "little parallel bruises" that appeared to her to have been inflicted all at once. (XIII 439) She agreed with counsel for the State that that patterned injury was consistent with "a stomping." (XIII 443) The injury to the neck area caused no breakage of cartilage, or of the hyoid bone or any other bone. (XIII 440-41) It did result in bruising to the soft tissue between the ribs and to the surface of the lung tissue. (XIII 440)

In the doctor's opinion fatal swelling resulted to the victim's brain once both injuries impeded the flow of blood from the brain. (XIII 441, 460, 463) The doctor believed the head injury took place first. (XIII 459-60) She concluded the victim was unconscious or barely conscious when the neck injury was inflicted. (XIII 460) The injuries taken together would have resulted in unconsciousness and death within minutes. (XIII 442)

The body exhibited no defensive wounds and the doctor did not believe the victim struggled. (XIII 452-54) Dr. LaMay took and stained an anal swab during the autopsy, and observed the presence of semen on the swab. (XIII 430-31) A

single straight black hair was found on the victim's face, but it was lost before it could be tested. (XIII 451; XIV 629; XIII 529) There was no sign of injury to the victim's buttocks or anal area; his appearance was consistent with having had consensual sex. (XIII 454-55)

DISCOVERY OF THE VICTIM'S CAR AND WALLET

A reserve law enforcement officer, Douglas Lee, spotted the victim's car being abandoned near Interstate 65, north of Nashville, Tennessee, on the afternoon of July 15, 1987. (XIII 469-75) Lee watched the man who abandoned it scamper up the bank to the northbound lane of the Interstate. (XIII 474-75) The man was about 5'9" and 165-180 pounds, and had dirty-blond hair and facial hair. (XIII 475; see 486) He was wearing a T-shirt which the witness thought was sleeveless, and the witness saw no tattoos. (XIII 475, 484, 496) The reserve officer alerted authorities; they identified the car as a 1981 Honda Civic that had belonged to Adrian Mobley, and processed the car for evidence. (III 476, 505-07; see XII 380-82, XIII 512-14)

Palm prints, which were identified years later as the defendant's, were taken from the outside of the car, and his thumbprint was taken from the cellophane wrapper from a cigarette lighter; the wrapper was found inside the passenger side of the car. (XIII 538-46, 581-82, 584-85) No prints of the defendant's were found

on the driver's side of the car. (XIII 584-85) Cigarette butts found in the car contained saliva, which would later yield a strong DNA match to the defendant. (XIII 515-16, 528; XIV 759-60)

The victim's wallet was found on July 22 on the roadside on I-75 in Georgia, just north of the Florida line. It contained the victim's identification and no cash. (XIII 559-61, 564-65)

THE THEORY OF DEFENSE

The case was defended on the theory that Mr. Dausch hitched a northbound ride from Mr. Mobley's killer. (XII 358-60, 365; XVI 1065, 1074) The defense, in its case, showed that the defendant in 1987 was 6'1" or 6'2" and 225 pounds, blond, heavily muscled, and heavily tattooed. (XIV 791-92) The defense further showed that the defendant vacationed with his family in Flagler Beach the second week of July, 1987; that the family returned home by way of I-95, I-10, and I-75; that the defendant parted company with the family at I-10 and I-75 to hitchhike the rest of the way to his Indiana home for his birthday; and that his girlfriend picked him up just south of Indianapolis on the evening of his birthday. (XIV 788-95; XV 824-27) The State corroborated that Flagler Beach had been the family's destination, by showing the defendant had sent a Flagler Beach-themed postcard to his daughter, postmarked Jacksonville, on July 8, 1987. (XIV 663-65, 672-76)

THE DNA ANALYSTS' TESTIMONY

As noted above, the defense conceded Appellant rode in the victim's car, making no challenge to the strong DNA profile that was ultimately drawn from the cigarette butts found in the car. (XII 358-60, 365; XVI 1065, 1074) The defense vigorously disputed that further DNA, taken from the victim's anal swabs, similarly showed an inculpatory profile. (XII 362-64; XVI 1070-74, 1079-80)

The anal swabs were first tested, by Thomas Wahl of the Florida Department of Law Enforcement, in 1987; they showed the presence of blood group A, and then-current science allowed no further conclusions. (XIV 636, 647-52) In 2003 the swabs were sent to Fairfax Laboratories in Virginia for re-testing, and the analyst there extracted two partial DNA profiles, one from the sperm fraction of the samples and one from the non-sperm fraction. (XIII 522-26, 529-32) The sperm-fraction sample yielded a partial profile that could only be compared at four loci. (XIII 529, 532) Fairfax Labs in 2003 also extracted DNA from the saliva that had been found on the cigarette butts in the victim's car, and obtained a strong profile comparable at 13 of 13 loci. (XIII 530; XIV 759-60; XV 944) In 2004 the Sumter County Sheriff's Office submitted the profile from the cigarette butt into the CODIS database, received notice that a match had been found, and accordingly obtained samples of the defendant's DNA; at the time, he was serving a prison

term in Indiana. (XIII 548-53; see V 970; VI 1066; XIV 750-52)

Robin Ragsdale, a serologist with the FDLE, testified for the State at trial that she was dissatisfied with the results received from Fairfax Labs, and that she re-extracted DNA from the remaining portion of the anal swabs and from portions of the envelope they were contained in. (XIV 724, 754-56) That re-extraction yielded a partial DNA profile foreign to the victim's DNA, which she testified was comparable at two loci. (XIV 756) Ragsdale testified that the partial profile she extracted is similar to the defendant's known profile at those two loci, and that her statistical analysis of those similarities shows that one in 290 Caucasians could have been the source of the DNA found on the anal swabs. (XIV 756-59) She admitted on cross-examination that the statistical analysis she employed has a margin of error of "tenfold," and agreed with defense counsel that "that means that if I got 29 Caucasians in the room, one of them might match." (XIV 763-64)

In 2006 the FDLE sent the DNA that had been extracted by Fairfax Labs, and the DNA that was re-extracted by FDLE, to ReliaGene Laboratories in New Orleans for comparison with the known DNA of the defendant. (XV 886-89, 892-93; XVI 1005-06) At trial the defense called two analysts from ReliaGene as witnesses. (XV 886, 977) Both testified that they compared a known sample of the defendant's DNA with the DNA that was extracted and re-extracted from the anal

swabs; both testified that they perceived only a single profile in the DNA that was extracted from the anal swabs, and that that profile matched the victim and not the defendant. (XV 889-93, 979-82; XVI 1006)

It was also shown at trial that sperm was found on the sheet that was used to bind the victim's hands and feet. (XIV 656-57) The State and defense witnesses agreed that a strong DNA profile, comparable at 13 of 13 loci, showed that neither the victim nor the defendant was the source of that sperm. (XIV 765; XV 945-46)

Nancy Peterson, a former FDLE serologist who has since been an adjunct professor in the University of Central Florida's forensic DNA program, testified for the defense that she had reviewed the various DNA analysts' reports and bench notes. (XV 915-17, 919, 938, 941-42) She concluded that the DNA drawn from the cigarette butts and the sheet was correctly extracted and analyzed. (XV 943-46) As to the DNA taken from the anal swabs, she testified that the partial foreign profile extracted by Fairfax was identical to the partial foreign profile re-extracted by FDLE. (XV 947) Her opinion was that that partial profile affirmatively excluded the defendant as a contributor. (XV 948) Her explanation was that the results are comparable at six loci, and that while the partial foreign profile created by those results resembles the defendant's known profile at three of those loci, the results are distinctively dissimilar at the other loci, leading her to the conclusion

that someone else contributed the semen. (XV 948)

Specifically, Nancy Peterson's analysis of Robin Ragsdale's notes indicated that Ms. Ragsdale assumed that the data contained a "stutter peak." (XV 950-51) According to Ms. Peterson, a stutter peak is an artifact of the DNA-extracting process which should be ignored for comparison purposes. (XV 951) She clarified that analysts should be cautious about diagnosing peaks as "stutter peaks" where, as here, a mixed profile is present. (XV 951) Ms. Peterson testified that the much simpler and likelier explanation of the questioned peak in this case is that the foreign part of the DNA extracted from the anal swabs contains, rather than a "stutter peak," a valid result at a distinct locus which affirmatively indicates a non-match with the defendant's DNA. (XV 948-51)

THE INDIANA OFFICER'S TESTIMONY (WILLIAMS RULE)

The defense moved, prior to trial, for an order precluding the State from referring to the defendant's prior criminal history in the jury's presence. (V 970) The court granted the motion. (VI 1066)

During the guilt phase of trial, Deputy Sheriff Alan Jones appeared for the State. He testified he had spent thirty-six years as first a beat cop, then a detective, with the Indiana State Police, followed by three years with the Indianapolis-area sheriff's office. (XIV 678-79) He then identified the defendant in the courtroom,

and testified that the defendant had been blond in 1987. (XIV 680-81) The defense objected to the testimony and moved for a mistrial. (XIV 682-84, 688-89, 694-95) The defense argument was that counsel could not challenge the deputy's testimony without revealing the defendant's criminal record, and that "the jury is going to come to one conclusion, and that being he knew him because of criminal activity." (XIV 683-84) The State took the position that it was equally likely the jury would infer that Deputy Jones had met the defendant in some other capacity. (XIV 684-85, 692, 696) The court took a recess to consider the matter, then sustained the objection but denied a mistrial. (XIV 685-86, 694, 696) The court noted that "some other court may tell me that I should have granted a mistrial," but concluded that "during your lifetime you know law enforcement officers even if you've never been in trouble." (XIV 698)

In its motion for new trial, filed after the guilt-phase verdicts were returned, the defense asked the court to reconsider the mistrial motion. (VI 1184) The court denied the motion for new trial. (IX 1772-73)

THE SUICIDE ATTEMPT, AND THE SUICIDE LETTER

On April 4, 2011, this case was set for trial. (IX 1635) On April 3 the defendant was rushed to the hospital, having been found unresponsive in his jail cell with a rope made from a sheet around his neck; he lapsed into a coma, from

which he later recovered. (IX 1635) On April 7 the State issued a subpoena for the hospital's records, and the defense moved to quash the subpoena. (V 995-96) A hearing was held on the motion to quash on April 19. (IX 1634-48) At the hearing the State argued, relying on Walker v. State, 483 So. 2d 791 (Fla. 1st DCA 1986), that the attempted suicide was "certainly" evidence of consciousness of guilt. (IX 1634-36) The court responded "I believe there's a compelling State interest in fairness, and in not creating what is happening over in the jail by attempted anarchy. Which is just prevalent in the jail now. It appears that many people over there believe they can avoid, by any method whatsoever - and I'm highly concerned in what I hear in here today. And not only is this relevant, under Walker v. State, to the charge filed. It may be necessary for a State investigation of what went on. What really went on. You know, right now, it appears very much...that there's potentially a fraud brought upon the court." (IX 1641-42) The court denied the motion to quash the State's subpoena. (IX 1642)

The parties and court revisited the matter on November 30. (IX 1676, 1693-1708) The defense asked the court to reconsider its ruling allowing the State to prove the suicide attempt, and argued that if the attempt were to be proven, the defense should be allowed to introduce the defendant's suicide letter, which was addressed to counsel and was found in the defendant's cell. (IX 1693-94) The

letter has been made part of the record. (VI 1067-68) In the letter the defendant says that the prosecution lied to obtain the indictment against him, and asks counsel to send the exculpatory DNA test reports to his daughter. In the letter the defendant further states "You said you would charge $50,000 to go to work on a case like this. You know things should have been done that weren't. I'm being led to a slaughter and you know it. Please do this last thing for me." (VI 1067) The State argued the letter was hearsay (IX 1704); the defense relied on Meggison v. State, 540 So. 2d 258 (Fla. 5th DCA 1989), to support the letter's admissibility. (IX 1695-96) The court ruled that the State could prove up the suicide attempt, and that "this letter, even in light of the Meggison case and the argument that's been presented by the defense, would not be admissible to rebut that." (IX 1705)

On the morning the trial began, the judge repeated his earlier ruling regarding the suicide letter, noting "I just don't know how the letter is going to get cross-examined." (XI 16) The State called a corrections officer during the guilt phase of trial; he testified that on April 3 he found the defendant unresponsive in his cell with a homemade rope around his neck. (XIV 708-18) The State, in its closing guilt phase argument, asked the jury to consider that evidence when it weighed its verdicts. (XVI 1062) In its motion for new trial, filed after the verdicts were returned, the defense argued that it was error to allow proof of the suicide attempt

and to also deny admission of the suicide letter. (VI 1185) The court denied the motion for new trial. (IX 1772-73)

MOTIONS FOR JUDGMENT OF ACQUITTAL, AND THE GUILT PHASE VERDICTS

At the close of the State's case, and again at the close of the evidence, the defense moved for judgment of acquittal as to both counts. (XIV 775-77; XVI 1047-49) The defense argued that there was no evidence of a sexual battery or a robbery, and therefore no evidence of felony-murder; that there was no evidence of premeditated murder; and that there was insufficient evidence that the defendant was in Sumter County at all. (XIV 775-77; XVI 1047-49) The motions were denied. (XIV 779; XVI 1050)

After the proof set out above was introduced, the jury was instructed in accordance with the standard jury instructions, and retired to consider its guilt phase verdicts. During those deliberations the jury sent out the question "What is the penalty for first-degree murder? Second-degree murder?" (XVI 1124) With the parties' agreement, the court instructed the jurors that they should not consider possible penalties at that time. (XVI 1127) The ensuing verdict on Count II was not guilty of sexual battery with great physical force, and guilty, instead, of the lesser included offense of aggravated battery. (XVI 1130; VI 1119) The verdict on Count I was a general verdict of guilty of first-degree murder. (XVI 1130; VI 1118)

THE JURY FOREMAN'S GOOGLE SEARCH

Immediately after the jury was polled, the jurors were returned to the jury room. (XVI 1131-32) A short discussion of when to begin the penalty phase ensued in open court. (XVI 1132-40) Afterward the court released the jury for the day. (XVI 1141) Court reconvened later that afternoon, with the court taking a statement from bailiff Terry Appel. (XVI 1144-45) She stated she told the jurors, after the verdict was announced, that they could use their cellphones to call home. (XVI 1145) She also stated that one juror asked if he could look something up; she reported that she responded "yes," but followed that answer with "No, you better wait, we have to ask the judge.... The next thing I saw, or heard, was where he was starting to read something off the internet." (XVI 1145-46) The court responded "And that would have been the foreperson, which is Robert Eck? And he had gone onto his cellphone internet, and was reading something to do with this case?" The bailiff responded "Yes, sir." (XVI 1146)

The court brought the jurors back individually and asked them what had happened in the jury room. (XVI 1148-89) They were not sworn as witnesses at that time; they had earlier been sworn to "well and truly try the issues between the State of Florida and the Defendant, and render a true verdict according to the law and the evidence." (XII 338) Five jurors (Bernat, Long, Cavanaugh, Orienti, and

Reedy) denied they had heard anything about research being done, and one (McKinney) denied she had heard anything more than the defendant's name. (XVI 1149, 1152-53, 1165, 1166-67, 1168-69, 1184) In questioning the remaining jurors (Thompson, Kyler, Adkinson, Cassidy, Eck, and Weatherford), the judge began each colloquy with the statement that he believed someone might have violated the court's earlier orders not to conduct any individual research. (XVI 1154, 1157, 1161, 1170, 1179, 1186) The judge went on to ask them, individually, whether they had been aware of any electronic communication that involved the case taking place in the jury room. (XVI 1154, 1157-58, 1161, 1170, 1179, 1186)

Juror Kyler responded that the foreman, Eck, had told him he tried, but failed, to look up information on the defendant. (XVI 1158-60) Jurors Thompson and Adkinson said that Eck had told them he read that the defendant had gone to Disney World with his family, and argued with them, during his Florida trip; Adkinson specified that Eck was reading off his cellphone at the time. (XVI 1154-55, 1161-62) Juror Cassidy said that Eck looked up the defendant, and that Cassidy read on Eck's phone that there had been an altercation at Disney. Cassidy further stated that a second juror, named Daniel, told him he had learned the defendant had been in prison for rape for 17 years. (XVI 1170-72) Cassidy did not know how Daniel knew about the rape, but thought "the same printout" might

have been the source of all the information. (XVI 1170-72) Juror Daniel Weatherford said he overheard that the defendant had been in Orlando, and overheard that he had been in jail, but that he had not discussed those facts with anyone. (XVI 1186-87; see XII 329) The foreman, Robert Eck, said he had "Googled up" the defendant's name, read one headline from the (Sumter County) Daily Commercial, learned no more than he had learned during the trial, and overheard no discussion of the research. (XVI 1179-83)

All of the jurors who said they had overheard or read something during the break assured the judge they would not be affected, going forward in the penalty phase, by what they had learned. (XVI 1149, 1155, 1158, 1163, 1172, 1181, 1187) All of the jurors who were asked said they had done no electronic or other independent research before reaching their guilt-phase verdicts. (XVI 1158, 1172, 1181, 1187) Defense counsel objected to the same jury remaining empaneled for the penalty phase. (XVI 1189-90) She noted that the court had carefully admonished the jury not to do any independent research throughout the trial. (XVI 1190) In fact, the court did so no fewer than 48 times.[1]

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[1] (XI 22-23, 75, 90, 106, 116, 134; XII 249, 257, 267, 284-85, 339, 341, 345; XIII 410, 421, 498, 499, 555, 556; XIV 607, 609, 661, 662, 681, 700, 775, 787, 799; XV 811-12, 835, 845, 855, 860, 882, 885, 908, 914, 958, 959, 966, 971; XVI 1008, 1018, 1026, 1040, 1047, 1051, 1083-84)

On the morning the penalty phase began, defense counsel renewed her objection to the jury panel's continued participation. (XVI 1195-1203; XVII 1206-08) She specified that it appeared the foreman had been untruthful with the court. (XVI 1197) She also expressed concern that the jury would conclude defense counsel had misled them, based on the incorrect information the media had relayed, i.e, that the defendant's family had visited Orlando. (XVI 1218) Defense counsel further argued that the jury could not be trusted to follow the penalty phase instructions (XVI 1201-02; XVII 1218), and expressed her fear that the Google-searching had gone on before the guilt-phase verdict was returned. (XVI 1197) The State noted that the jury would hear about the defendant's prior rape during the penalty phase (XVII 1210), and relied on the jurors' statements that they would be able to set aside anything they had heard from outside the court-room. (XVII 1209)

The judge initially found that the jury had acted out of confusion, rather than committing wilful misconduct. (XVII 1215) As to the jury's possible perception of the defense team as deceptive, the judge noted that as a practical matter, the jury would be hearing a different approach from a different lawyer during the penalty phase, and ruled that the penalty phase would proceed with the same panel. (XVII 1219, 1221) The defense then called as a witness an investigator

from the Public Defender's Office, who testified that he had Google-searched the defendant's name himself and discovered that no headline from the Daily Commercial referred to a Disney World trip. (XVII 1222-26, 1233) The judge stated that that testimony gave him concern, since "it sounded a lot like, to me, that there wasn't enough time to do all this research that apparently took place." (XVII 1235) He called a recess to consider the matter, then ruled again, without making further findings, that the penalty phase would proceed with the same panel. (XVII 1236)

Six days after the penalty phase verdict, on December 22, the defense filed a motion for new trial, arguing in part that the validity of the guilt-phase and penalty-phase verdicts had been brought into question by the foreman's Google search. (VI 1184-85) In February 2012, before the motion for new trial was ruled on, the defense filed a motion to expand juror interviews (VII 1237-44), arguing that the investigation "gave rise to the reasonable concern that jurors may have been exposed to prejudicial non-record information prior to the incident that the bailiff reported." (VII 1243) The State argued that the motion to expand juror interviews was based on "nothing more than speculation." (VII 1340)

A hearing was held on the motion for new trial and motion to expand juror interviews on February 28. (IX 1757-75) Defense counsel argued at the hearing

that the information the jurors confessed to having received could not have been garnered during the brief time period after the verdict was announced and before the jury was dismissed for the day, and argued that the contradictions in the jurors' accounts of the incident gave rise to the need for further questioning. (IX 1759-61, 1767) Counsel also asserted that the report indicating the defendant's family had gone to Disney World had appeared only in the Orlando Sentinel, thus giving rise to further suspicion whether the jurors had been candid with the court. (IX 1759, 1767) Printouts of the Google searches the investigator conducted have been made part of the record. (VI 1123-51; VII 1302-37) Counsel also argued that it was difficult to believe the jury genuinely believed the trial was over after the guilt phase ended, in light of the court's careful explanations of the process. (IX 1764) As to the penalty phase, defense counsel again argued that the jury may have been less disposed to consider mitigation, if they believed that defense counsel had misled them about where the 1987 family vacation had taken place. (IX 1762-63)

The judge noted that he had to agree with defense counsel that the jurors, at the time of the incident, must have been aware the penalty phase was still ahead.[2] (IX 1768) The judge mused that in bygone days jurors would hear extraneous

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[2]The record shows he had so informed them on several occasions. (XI 30, 123; XII 290; XVI 1131-32)

matter through open courtroom windows, noting that the real question, now as then, is whether they could set aside what they heard and be impartial. (IX 1770-71) He denied relief based on his ruling that "the jurors came back in here and were questioned. And any further question[ing] would not - even if it potentially gained something, I don't think that based on their answers that it would vitiate the entire penalty phase to such extent that it should be set aside." (IX 1771)

The judge ultimately made the following written findings in his sentencing order:

> Upon the Court's recess after determining the Defendant's guilt, a juror, with the mistaken belief that he was permitted to, utilized his smart phone for a few minutes to research the Defendant. Such juror told several of his fellow jurors of what he discovered. The Court conducted a full inquiry of all the jurors similar to the one conducted in Marshall v. State, 976 So. 2d 1071 (Fla. 2008), and determined that each juror was able to set aside whatever he/she may have heard or saw regarding the Defendant and listen only to the evidence that was to be presented in the courtroom during the Defendant's penalty phase of the trial. The Court also determined that the jurors were not privy to any information regarding the Defendant that they would not be informed of at the penalty phase.

(VIII 1405-06) The judge also denied the motion for new trial, in light of his previous rulings. (IX 1772-73)

PENALTY PHASE - THE STATE'S CASE

In the penalty phase, by stipulation with the defense, the State introduced documents reflecting Appellant was convicted, in 1979, of robbery; in 1983 and 1985 respectively, of the Indiana felony of battery; and, in 1990, of rape, criminal confinement, and battery. (VI 1153-56; XVII 1241-43, 1267-68) The State also called an assistant state attorney to the stand to read a one-page victim-impact statement authored by the victim's family. (XVII 1270-72) The statement established that the victim had been an art student who was kind to everyone he met in his job at WalMart. (XVII 1271) It closed with an account of the last time the victim kissed his mother, and with the sentiment "No more kisses or hugs from Adrian. No more good-byes or I love you's. That right was taken from him and his family." (XVII 1271-72)

PENALTY PHASE - THE DEFENSE CASE

The defendant's daughter Lindsay testified at the penalty phase that she has maintained a close relationship with the defendant, despite his incarceration, since she met him at age sixteen. (XVII 1375, 1378-82, 1387) Lindsay testified that her father's support and encouragement have been important to her life decisions. (XVII 1374-75, 1378, 1385, 1395) She explained that she had a child at fifteen, then experienced major depression and anorexia, but that she has overcome those

difficulties, has completed tours of duty as a Marine in Iraq and Afghanistan, and is finishing her doctorate in pharmacy. (XVII 1372, 1374, 1376, 1379, 1383, 1385)

It was established at the hearing that the defendant obtained GED and associate degrees while in prison, and that at the time of the penalty phase he was thirty credit hours from obtaining a bachelor's degree in counseling from Ball State University. (XVII 1331-32) Lindsay testified that the Indiana prison where her father had been incarcerated since 1990 had had him create a mural for the visiting area. (XVII 1389-90) She also testified that the defendant had raised enough cash painting and selling Indianapolis Colts memorabilia while in prison to buy her a wedding dress. (XVII 1380)

The defense also called as penalty phase witnesses Mark Combs, a boyhood friend of the defendant's, and the defendant's uncle, Kenny Dausch. Both testified that the defendant had been a talented athlete in high school. (XVII 1292, 1304-05) Those witnesses also established that the defendant's family had been dysfunctional; his father drank to excess and verbally abused his chronically ill mother, and the family had no indoor bathing facilities. (XVII 1283, 1286, 1292-94, 1302) Mr. Combs also testified to the defendant's long-term heavy drug use. (XVII 1285-90) He specified that the defendant had abused alcohol since grade school; that later during his school days he had used LSD, PCP, cocaine, and

marijuana soaked in embalming fluid; and that he quit high school at sixteen to abuse drugs and run the streets. (XVII 1285, 1287-90; see 1305)

Dr. Chowallur Dev Chacko also testified for the defense at the penalty phase. (XVII 1312-47) Dr. Chacko is a psychiatrist who is nationally board certified in forensic psychiatry and addiction medicine. (XVII 1313) He diagnosed the defendant with polysubstance dependence and a personality disorder "not otherwise specified," based on review of records and on his interviews with the defendant and his childhood friends and family members. (XVII 1317-23)

Dr. Chacko testified that he believes the defendant suffers from "chronic brain damage from use of powerful drugs for extended periods of time." (XVII 1323-24) He pointed to the defendant's long-term intravenous use of cocaine, combined with long-term alcohol abuse and with repeated head trauma, as factors which have contributed to that brain damage. (XVII 1324, 1328-30, 1336-37) He specified that abuse of the particular drugs Mark Combs testified about causes irreversible damage. (XVII 1324) He also testified that according to the family's accounts, the defendant suffered head trauma more than once, by way of beatings the defendant suffered at the hands of his father, as well as in bar fights and run-ins with the police. (XVII 1329) He specified that the defendant had been taken to an emergency room on one such occasion and had experienced loss of

consciousness on another such occasion. (XVII 1330) Dr. Chacko further testified that patients with brain damage lose impulse control, and "tend to explode with little or no provocation." (XVII 1330)

The doctor also reviewed the defendant's history in prison. He described him as "the perfect example of a person while in the correctional system bettering himself with self-education." (XVII 1333) To support that assessment, he pointed to the degrees the defendant had earned, to the A and B grades he obtained in his college coursework, and to the fact that he had undergone three phases of treatment for substance abuse in prison. (XVII 1332-33) Dr. Chacko noted the loving relationship the defendant maintains with his daughter, and concluded that Mr. Dausch is capable of normal emotions while sober. (XVII 1333-34)

PENALTY PHASE - LEGAL ARGUMENT AND RULINGS

Before trial the defense filed a motion objecting to use of Florida's standard jury instruction defining "especially heinous, atrocious and cruel." (I 159-86) The motion argued that the standard instruction does not narrow the class of persons eligible for the death penalty in that the language employed is both broad and subjective. (I 159-60) The State relied on this court's decisions upholding the language as constitutional, and the trial court denied relief. (IV 778, V 834-35) The defense renewed the objection at the penalty phase; the court again denied

relief and read the standard language. (XVII 1362; XVIII 1441)

The defense filed pretrial motions seeking relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). (II 332-34; III 551-56) The motions asked the court to require the jury to make unanimous findings of fact detailing which aggravating factors it found. (II 332-33; III 552-53) The State opposed the motions, relying on this court's decisions rejecting similar arguments. (IV 758-59, 766) The trial court denied relief. (V 821, 838-39)

The defense also filed written requested penalty phase instructions. (V 979) One would have told the jurors that death is reserved only for the most aggravated cases, and one would have expressly allowed the jury to exercise mercy. (V 989, 990) The court read the standard penalty phase instructions. (XVIII 1436-46) The defense renewed its objections on the record, and relief was denied. (XVII 1362; XVIII 1446; VI 1185; VII 1342)

During the penalty phase, the defense argued to the jurors that the law allowed them to be merciful, and argued that "the death penalty is reserved only for the worst of the worst murders." (XVII 1264; XVIII 1433) The State responded "[i]t was mentioned by defense counsel, I guess by way of mitigation earlier, that the death recommendation was for the worst of the worst in Florida. Well, I submit to you, yes, the defendant is not Ted Bundy, he's not Danny

Rolling, he's not Aileen Wuornos. I could care less about Charles Manson out in California. Those folks are just totally different, okay? But I submit to you the defendant may not be the worst murderer - he is not, he is not the worst first-degree murderer here in Florida. He's the worst first-degree murderer for Adrian Mobley." (XVIII 1414-15)

The State also argued to the jury that it had proved the merged aggravating factors that the murder was committed for pecuniary gain and in the course of a robbery. (XVII 1257-58; XVIII 1410-12) In the course of making that argument the State admitted that "we don't know how much money he had" (XVII 1257) and that "certainly there is no evidence that cold cash was taken in this case." (XVIII 1411) The jury recommended death eight to four. (XVIII 1453)

THE SENTENCING MEMORANDA, AND THE SENTENCING ORDER

In its sentencing memorandum, the defense argued that the State failed to prove the theft of the victim's car was anything more than an afterthought, and argued that mere speculation supported the merged aggravators of pecuniary gain and "committed in the course of a robbery." (VII 1347-48) The defense further argued that as to the "heinous, atrocious and cruel" aggravator, the State had not shown the victim was aware of his impending demise, and had not shown "additional acts" which were distinct from the blows that caused death and which

set this murder apart from others. (VII 1350)

In its sentencing memorandum, the State asserted the following:

- "Clearly the murder was committed during the course of [a robbery]." (VII 1364)
- "Although there were no eyewitnesses to the actual death of the victim it is clear that the death occurred as a result of injuries received during the robbery." (VII 1364)
- "The victim was murdered to facilitate the defendant's return to Indiana.... There is no other motive for the defendant to have killed the victim in this case and this is the only reasonable inference to be drawn from the facts of this case." (VII 1365)
- "Certainly, the victim in this case was aware of his impending death as he was beaten and bound." (VII 1366)
- "Based upon where the victim was located and the condition of the victim when he was discovered coupled with the Medical Examiner's testimony this circumstance [that the killing was heinous, atrocious and cruel] has been proven beyond a reasonable doubt." (VII 1366-67)
- "[N]owhere in Dr. Chacko's testimony did he opine that the defendant suffered from [polysubstance abuse] at the time of the commission of the murder. Thus, this mitigating circumstance has not been established. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986)." (VII 1368)

The court, in its sentencing order, found that the merged aggravators of pecuniary gain and "committed in the course of a robbery" had not been proved beyond a reasonable doubt, and gave them no weight. (VIII 1410) The court found

two aggravating factors, that the defendant had committed a prior violent felony and that the killing had been especially heinous, atrocious, and cruel; the court gave them both great weight. (VIII 1408-09)

As to the HAC aggravator, the court quoted the State's sentencing memorandum word for word:

> The evidence at trial proved beyond a reasonable doubt that Adrian Mobley was bound, beaten, and stomped in the chest and head and left to die by the side of C.R. 476 during the middle of the night.

(VIII 1408-09; VII 1365) Further as to the HAC aggravator, the judge found that "it would have taken several minutes for the victim to die" and that "[c]learly, the death of Adrian Mobley was deliberate and extraordinarily painful." (VIII 1409)

As to mitigation, the court gave some weight to the positive influence the defendant had on his daughter, some weight to his self-rehabilitation, some weight to his amenability to a productive life in prison, and some weight to the fact he had manifested appropriate courtroom behavior. (VIII 1414-16) The court gave minimal weight to the defendant's deprived and abusive upbringing, artistic skills and close childhood friendships. (VIII 1413-14)

The court also reviewed Dr. Chacko's testimony regarding organic brain damage, and concluded as follows:

> The Court notes there was not any testimony or evidence to indicate or opine the Defendant suffered from mental illness or organic brain damage at the time of the commission of the murder in this case. Nonetheless, our law does establish that *all* evidence of mental disturbance or impairment is relevant if it may have some bearing on the crime or the defendant's character.... Consequently, this mitigator is given minimal weight.

(VIII 1412) The court ultimately concluded that the aggravating circumstances, particularly the heinous, atrocious, and cruel aspect of the killing, far outweighed the showing of mitigation, and sentenced Mr. Dausch to death. (VIII 1416) On Count II, the court adjudicated him guilty of aggravated battery and sentenced him to ten years in prison. (VI 1121; VIII 1417) Timely notice of appeal was filed from the judgment and the April 26, 2012 sentencing order in the Circuit Court on May 24, 2012. (VIII 1444; see VIII 1447)

SUMMARY OF ARGUMENTS

Point one. The State's proof failed as to both of its felony-murder theories and as to premeditation. The theory that a robbery took place was no likelier than the theory that the victim's car was taken as an afterthought. No proof tended to show premeditation, and the State did not argue that theory to the jury below. As to identity, the proof was circumstantial and was not inconsistent with the reasonable hypothesis that the defendant hitched a ride with the killer. Due process demands a more convincing showing of guilt of first-degree murder.

Point two. The State called a policeman to testify to what the defendant looked like in 1987, without concealing that officer's profession. Prejudice to the defense outweighed the minimal probative value. The error in denying a mistrial impacted Appellant's right to due process.

Point three. It was error to allow the State to prove the defendant attempted suicide on the eve of trial. The inference of consciousness of guilt was weak. The court's further order excluding proof that negated any such inference amounted to a denial of Appellant's right to present a complete defense.

Point four. The court effectively found that the jury committed misconduct but that no harm resulted. The State failed to show the misconduct did not affect the verdicts.

Point five. Dual convictions for first-degree murder and aggravated battery on the same victim, where as here those convictions are based on a single incident, violate the federal and Florida constitutional protections against double jeopardy.

Point six. The State failed to prove the victim in this case was conscious of his impending demise. The State further failed to show torturous acts in addition to the acts that caused death. This court should hold that competent, substantial evidence does not support the aggravating factor that the killing was especially heinous, atrocious, and cruel.

Point seven. The jury should not have been instructed on the merged aggravating factors that the killing was committed for pecuniary gain and in the course of a robbery; competent, substantial evidence did not support either factor.

Point eight. The court's reason for giving the nonstatutory mental-health mitigating evidence minimal weight is not supported by the record.

Point nine. This case is neither one of the most aggravated, nor one of the least mitigated, cases to come before this court.

Point ten. Florida's standard penalty-phase instructions were not adequate in this case, as was argued below.

Point eleven. Ring v. Arizona, 536 U.S. 584 (2002), warrants relief in this case, notwithstanding this court's decisions to the contrary.

ARGUMENT

POINT ONE

APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE FIRST-DEGREE MURDER CHARGE SHOULD HAVE BEEN GRANTED. THE ORDER DENYING ACQUITTAL RESULTED IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW, PROTECTED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

Standard of review. Orders denying judgment of acquittal are reviewed *de novo*. Jackson v. State, 18 So. 3rd 1016, 1025 (Fla. 2009). When the State has introduced direct evidence, this court affirms if the record contains competent, substantial evidence supporting each element of the charged offense. Id. When the evidence is circumstantial, no matter how strongly it may suggest guilt, this court will not affirm unless the evidence is inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So. 2d 187, 188 (Fla. 1989).

Argument. As the defense argued below, the State failed to establish that a first-degree murder was committed, on either a felony-murder theory or a premeditation theory. As the defense also argued below, the State failed to establish that the defendant was the perpetrator of the crime.

As to felony-murder, the proof failed altogether as to rape and was circumstantial as to robbery, and the proof that did tend to show a robbery was not

inconsistent with the reasonable hypothesis that the victim's car was taken as an afterthought. As to premeditation, the proof was circumstantial and not inconsistent with the reasonable hypothesis that the crime was committed on an impulse. As to identity, the proof was circumstantial, and was not inconsistent with the reasonable hypothesis that the defendant hitched a ride with the killer.

FELONY MURDER

The State tried the guilt phase on the theory that the victim's death occurred as a consequence of either a robbery or a rape. The jury found, by its verdict on Count II, that the State did not prove a rape beyond a reasonable doubt. The court found, in its sentencing order, that the State did not prove that the killing was done in the course of a robbery beyond a reasonable doubt. The record supports those conclusions: there was *no* evidence tending to show non-consensual sex took place, and the facts that the victim's car and wallet were ultimately taken do not establish that the victim was killed for his belongings.

In Mahn v. State, 714 So. 2d 391 (Fla. 1998), the defendant was convicted of stabbing two victims to death, and also convicted of having robbed them of cash and a car. The trial court at the penalty phase ruled that the murders had not been shown to be committed in the course of a robbery. 714 So. 2d at 396. On appeal to this court Mahn argued that the proof did not support the robbery

conviction. This court agreed, holding that the record supported the trial court's finding that the takings were an afterthought. Id. at 397. Here, also, the record supports the trial court's finding that no robbery was proved.

In Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), this court held that no evidence supported the trial court's finding that a killing had been committed in the course of a robbery, where there was no proof that the defendant needed money or even knew the victim had money. In this case, similarly, there was no such proof. Further, the State admitted it did not show any money was in the victim's wallet when it was taken. The unadorned facts that the perpetrator in this case took the victim's car and disposed of his wallet are consistent with the theory that he not unnaturally wished to flee, and disassociate himself from, the scene of the death. See Hill v. State, 549 So. 2d 179, 182-83 (Fla. 1989) (pecuniary gain aggravator not shown where money could have been taken as an afterthought); Scull v. State, 533 So. 2d 1137 (Fla. 1988) (similar, as to victim's car); and Peek v. State, 395 So. 2d 492, 499 (Fla.1980) (similar, as to victim's car and cash).

Perry v. State, 801 So. 2d 78 (Fla. 2001), where this court rejected the defendant's "afterthought" theory, is distinguishable. In Perry's case, the jury was instructed on the afterthought theory, and apparently rejected it. Beasley v. State, 774 So. 2d 649, 666 (Fla. 2000), where this court rejected the same theory, is also

distinguishable: the "afterthought" theory was raised for the first time in Beasley's appeal, and substantial stolen cash appeared to be the only motive for killing the victim, with whom Beasley had had a cordial relationship. 774 So. 2d at 661-63, 666-68. Here the defense made the "afterthought" argument in its sentencing memorandum. (VII 1347) Hill, Scull, and Peek are similar to this case, and they should control.

PREMEDITATION

The State did not argue to the jury that it had shown premeditation. (XVI 1052-62, 1084-96) The court did instruct on that theory, and the defense argued to the jury that it had not heard sufficient proof to find the defendant guilty on that theory. (XVI 1099, 1074-75) The record does not support the jury's general guilty verdict on a premeditation basis.

Premeditation may be inferred from the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the killing was committed, and the nature and manner of the wounds inflicted. Norton v. State, 709 So. 2d 87, 92 (Fla. 1997). In a case involving a single gunshot wound, where no proof of any of the circumstances surrounding the shooting was introduced, this court found proof of premeditation absent. Norton. Similarly, in cases where manual strangulation followed a sexual

encounter, and where the proof showed nothing more, this court has found proof of prior reflection to be absent. Bigham v. State, 995 So. 2d 207, 213 (Fla. 2008); Green v. State, 715 So. 2d 940 (Fla. 1998). In a case where two men fought for no apparent reason and one died of his injuries, this court held that evidence of premeditation on the killer's part was absent. Coolen v. State, 696 So. 2d 738, 741-42 (Fla. 1997). This case is similar, in that there were no eyewitnesses to any interaction, at any time, between the defendant and the victim, and accordingly there was no evidence of previous difficulties or provocation.

The medical examiner's testimony does not tend to show premeditation either. That testimony, combined with State's Exhibit 14, indicates that as few as two blows caused the victim's death. The injury to the neck appeared to the medical examiner to have been inflicted with the perpetrator's foot. There was no testimony suggesting that the injury to his face was inflicted with any sort of instrument or by way of repeated blows. The nature of the wounds thus does not support a premeditation theory. Cf. Bradley v. State, 787 So. 2d 732, 739 (Fla. 2001) (premeditation shown where death was the "patent consequence" of a "brutal and methodical" beating that left victim with a fractured skull and ribs); Miller v. State, 770 So. 2d 1144, 1148-49 (Fla. 2000) (intent to kill established where repeated blows with a metal pipe exposed the victim's brain); Buford v.

State, 403 So. 2d 943, 945-49 (Fla. 1981) (killing premeditated where the victim recognized the defendant, and three blows to the victim's head, with a 32-pound cement block, followed); Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975) (death was premeditated where defendant continued beating victim after death with a 19" metal bar).

Notably, during deliberations in this case, the jurors asked the court what penalty would result if they returned a verdict of second-degree murder. The cited cases show that Appellant's motions for judgment of acquittal as to the first-degree murder charge should have been granted.

IDENTITY

The defense also correctly argued below that the proof was legally insufficient to show the defendant was the perpetrator of the charged offenses. The proof that he was the perpetrator was based on three circumstances. First, the defendant admittedly rode in the victim's car. Second, a blond man of average height and weight was seen abandoning the car in Tennessee, whereas the defendant in 1987 was a tall, heavily muscled, and heavily tattooed blond man. Third, the State's DNA analyst testified that the foreign DNA profile on the anal swabs was similar to the defendant's profile at two loci, which led her to the

conclusion that one in 29 Caucasian men[3] could have left the semen.

The courts treat DNA identification evidence as circumstantial evidence. Washington v. State, 653 So. 2d 362, 365-66 (Fla. 1994); Singleton v. State, 37 Fla. L. Weekly D1657 (Fla. 2d DCA July 11, 2012); Bedoya v. State, 779 So. 2d 574, 577 (5th DCA), *rev. den.* 797 So. 2d 584 (Fla. 2001); Atkinson v. State, 429 So. 2d 726, 728 (Fla. 1st DCA 1983). Here the DNA profile and the statistical conclusion drawn from it were weak, and the three circumstances that tie the defendant to Adrian Mobley's death are thus not inconsistent with the reasonable hypothesis that the defendant hitched a ride with the killer. This court should reverse the convictions appealed from on that basis.

If this court does not agree that the proof of the defendant's involvement is circumstantial, the proof still does not amount to the substantial, competent evidence needed to defeat a motion for judgment of acquittal in a direct-evidence case. Only Robin Ragsdale's testimony linked the defendant to the crimes through DNA analysis; the other three DNA analysts who testified believed that Ms. Ragsdale's conclusion was unwarranted. The defense expert who had read the bench notes, Nancy Peterson, specified that Ragsdale's testimony was based on the highly unlikely assumption that extraction of the DNA from the anal swabs

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[3] After applying the "tenfold" margin of error.

had left an artifact that distorted the apparent DNA sequence, leaving a phantom "peak" behind whose presence she discounted. Ms. Peterson, in contrast, concluded that the peak in question was not a phantom but an affirmative indication that someone beside the defendant must have been the source of the semen. Both ReliaGene analysts agreed with Ms. Peterson's conclusion. Reversal for discharge is warranted, since the record as a whole shows that Ms. Ragsdale's testimony, combined with the rest of the State's case, did not amount to competent, substantial evidence of guilt.

DUE PROCESS

The due process clause of the federal constitution requires the States to prove every element of the criminal offenses they charge beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358, 361 (1970). The constitutional question is whether a rational trier of fact could have found that every element of the charged offense was proved beyond a reasonable doubt. See Coley v. State, 616 So. 2d 1017, 1018 (Fla. 3rd DCA 1993). This court has held that the protection set out in Winship "ha[s] long been incorporated in Florida constitutional law," citing Article I, Section 9 of the Florida Constitution. State v. Cohen, 568 So. 2d 49, 51 (Fla. 1990). The requirement of proof beyond a reasonable doubt has been held to be "basic in our law and rightly one of the

boasts of a free society." Cohen at 51, *quoting* Winship, 397 U.S. at 362. Where the State's proof does not establish what led up to a charged first-degree murder, the proof of premeditation does not meet the strictures of In re Winship. Burttram v. State, 780 So. 2d 224 (Fla. 2d DCA 2001). In this case, the State's proof did not establish what led to the victim's death, and accordingly did not establish premeditation to a constitutional certainty. Since the proof failed as to both the State's felony-murder theories as well, Appellant's conviction for first-degree murder must be reversed.

POINT TWO

THE INDIANA OFFICER'S TESTIMONY THAT HE KNOWS THE DEFENDANT WAS HIGHLY PREJUDICIAL. THE MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED. DENYING THE MOTION RESULTED IN DEPRIVATION OF THE RIGHT TO DUE PROCESS OF LAW, PROTECTED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

Standard of review. A ruling on a motion for mistrial is reviewed for abuse of discretion. Dessaure v. State, 891 So. 2d 455, 464 (Fla. 2004). A mistrial must be granted where it is necessary to ensure that the defendant receives a fair trial. Id. at 464-65.

Argument. After the Indiana deputy testified below, and after the court sustained an objection to his testimony, the mistrial the defense sought was necessary to ensure the defendant would receive a fair trial. The deputy's testimony - that he has been a police officer in the defendant's home area for many years, that he has known the defendant since 1987, and that the defendant was blond then - was offered solely to corroborate the testimony of the Tennessee auxiliary officer who saw an average-sized blond man abandon the victim's car the day after the murder. That weak probative value was substantially outweighed by prejudice to the defense.

The courts presume that proof that shows a defendant has a criminal past is

prejudicial. Castro v. State, 547 So. 2d 111, 115 (Fla. 1989). This court holds that error in admitting improper testimony may be exacerbated when the testimony comes from a law enforcement officer. Martinez v. State, 761 So. 2d 1074, 1080 (Fla. 2000). Florida's District Courts of Appeal have reversed convictions where proof that even suggests a defendant has a criminal past is introduced through the testimony of a police officer.

In State v. Price, 701 So. 2d 1204 (Fla. 3rd DCA 1997), an officer testified he had been a beat cop in the defendant's neighborhood and had known the defendant for years. The trial court granted a mistrial after the verdict, and the State appealed; the District Court affirmed, holding that the trial court had been "clearly correct as a matter of law" to grant the mistrial. 701 So. 2d at 1207. Identity of the perpetrator had been "hotly contested" at Price's trial. Id. Similar testimony was put on in Johnson v. State, 68 So. 3rd 366 (Fla. 1st DCA 2011) and in Alcantar v. State, 987 So. 2d 822 (Fla. 2d DCA 2008): in both cases, police officers of many years' standing identified the respective defendants, after testifying that they had known the person they were identifying throughout their respective careers. In both cases, the District Courts reversed the defendant's convictions. Numerous cases hold that a law-enforcement witness should only testify that he is familiar with a criminal defendant's personal appearance where

the jury is kept unaware of the witness's occupation. State v. Price; Edwards v. State, 583 So. 2d 740 (Fla. 1st DCA 1991); Hardie v. State, 513 So. 2d 791 (Fla. 4th DCA 1987); United States v. Allen, 787 F. 2d 933 (4th Cir. 1986), *rev'd on other grounds*, 479 U.S. 1077 (1987); United States v. Farnsworth, 729 F. 2d 1158 (8th Cir. 1984).

Here the requested mistrial was necessary to ensure a fair trial. The court granted a motion in limine prior to trial, keeping out any evidence of the defendant's prior convictions. At trial, the case was vigorously defended on the theory that the defendant was not the killer but instead a hitchhiker who entered the car north of I-10 after the murder. The quantum of proof admitted to show the defendant was the perpetrator of the charged offenses was small, and the deputy's testimony may have tipped the balance: that the jurors were intrigued by the suggestion of prior criminal activity is shown by the jury foreman's Google search. (See Point IV *infra*.)

Given the general weakness of the State's case, it amounted to an abuse of discretion for the trial court to deny the requested mistrial. See Mathis v. State, 760 So. 2d 1121 (Fla. 4th DCA 2000) (mistrial should have been granted where lay witness referred to defendant's prior prison stay); Ward v. State, 559 So. 2d 450 (Fla. 1st DCA 1990) (similar to Mathis). Further, admitting collateral crime

evidence violates the right to due process of law protected by Article I, Section 9 of the Florida Constitution, where, as here, the evidence is so prejudicial that the defendant is denied a fair proceeding. McLean v. State, 934 So. 2d 1248, 1261 (Fla. 2006).

The United States Supreme Court has expressly reserved the question whether proving prior bad acts in violation of the State's evidence code can amount to a deprivation of the federally-protected right to due process. Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991). Under existing federal caselaw, a state-court evidentiary ruling does not amount to the level of a federal due process violation unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Montana v. Egelhoff, 518 U.S. 37, 43 (1996). The Supreme Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." Id. The common-law tradition disallowed evidence of prior bad acts in order to show the person acted in conformity therewith. See Old Chief v. United States, 519 U.S. 172, 181-82 (1997). That ban dates back to English cases of the 17th century. United States v. Castillo, 140 F. 3rd 874, 881 (10th Cir. 1998). The court in Castillo assumed, without deciding, that the ban on prior bad act evidence to prove propensity has a constitutional, as well as common-law, dimension, since due

process incorporates "those fundamental conceptions of justice which...define the community's sense of fair play and decency." 140 F. 3rd at 881.

The Eleventh Circuit holds that an erroneous evidentiary ruling creates fundamental unfairness that implicates due process concerns where the evidence admitted is "crucial, critical, [and] highly significant." Thigpen v. Thigpen, 926 F. 2d 1003, 1012 (11th Cir. 1991) (denying habeas corpus relief where collateral evidence was properly admissible to show motive). On the facts of this case, the Indiana deputy's testimony meets the test set out in Thigpen. Reversal of the conviction appealed from, and remand for a new trial, is thus warranted on federal and state constitutional grounds, as well as on the ground the trial court abused its discretion by denying the requested mistrial.

POINT THREE

IT WAS ERROR TO ALLOW PROOF OF APPELLANT'S SUICIDE ATTEMPT. ONCE THE ATTEMPT WAS PROVED, IT WAS ERROR TO EXCLUDE HIS SUICIDE LETTER TO REBUT THE INFERENCE OF CONSCIOUSNESS OF GUILT. APPELLANT WAS DENIED THE MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE GUARANTEED BY THE FEDERAL CONSTITUTION.

Standard of review. In evidentiary matters the trial courts' discretion is limited by the rules of evidence and the applicable case law. Twilegar v. State, 42 So. 3rd 177, 194 (Fla. 2010). A court's erroneous interpretation of those authorities is subject to de novo review. Pantoja v. State, 59 So. 3rd 1092, 1095-96 (Fla. 2011).

Argument. The defense sought to exclude evidence of the defendant's eve-of-trial suicide attempt below, but the State successfully argued it was relevant to consciousness of guilt. The defense then sought to introduce the defendant's suicide letter, addressed to counsel, to rebut any inference of consciousness of guilt; the court excluded the letter. Those rulings, taken together, were erroneous as a matter of law, and thus fell outside the range of the court's discretion.

The State relied below on Walker v. State, 483 So. 2d 791 (Fla. 1st DCA 1986), and the defense relied on Meggison v. State, 540 So. 2d 258 (Fla. 5th DCA

1989).[4] In Walker the First District Court approved a jury instruction that read

> The attempted suicide of a person, after he is suspected of a crime, if proven beyond a reasonable doubt, may be considered by the jury as an indication of a desire to evade prosecution and one of a series of circumstances from which guilt may be inferred. You may find that the attempted suicide considered with other facts and circumstances is consistent with innocence. Evidence of attempted suicide and the significance to be attached to such evidence are matters exclusively within the province of the jury.

483 So. 2d at 796. In Meggison the defendant attempted suicide after entering a plea and while awaiting sentencing. Later he withdrew the plea; at trial, the State was permitted to prove the suicide attempt and argue it was relevant to consciousness of guilt. Meggison objected, and unsuccessfully sought to introduce his contemporaneous suicide note. The Fifth District Court reversed his conviction, holding that the suicide attempt was not presumptive evidence of consciousness of guilt since it followed a plea, and further holding that "if the evidence of the attempted suicide had been admissible, then clearly the contemporary, exculpatory suicide note was also admissible to provide a reason other than guilt for the attempted suicide." 540 So. 2d at 259, *citing* People v. Carter, 48 Cal. 2d 737, 312

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[4] Shepard's citation service reports that both Walker and Meggison were disapproved in Fenelon v. State, 594 So. 2d 292 (Fla. 1992). A close reading of Fenelon suggests that Shepard's is in error on both counts.

P. 2d 665 (Cal. 1957).

This court addressed the same issues in Penalver v. State, 926 So. 2d 1118 (Fla. 2006), where the State proved the defendant told a police officer he might as well just kill himself, after seeing his name in print connected to a murder investigation. In Penalver this court held that that comment was not a clear statement of intent to commit suicide, and therefore was not admissible. 926 So. 2d at 1134. In reaching that decision this court noted that in other contexts where consciousness of guilt is shown by, e.g., flight, this court has required a clear showing that the act is motivated by an intention to avoid responsibility. Id. at 1133-34. In Penalver, as in Meggison, no such motivation was shown; no such motivation was shown below either. As the defense showed before trial, the suicide letter the defendant left for counsel showed that his state of mind revolved not around guilt, but despair over being "led to the slaughter." Since the State could not show consciousness of guilt motivated the attempt, evidence of the attempt should have been excluded. Penalver; Meggison; State v. Mann, 625 A. 2d 1102 (N.J. 1993); Pettie v. State, 560 A. 2d 577 (Md. 1989); People v. Carter, 48 Cal. 2d 737, 312 P. 2d 665 (1957).

If this court holds the suicide attempt correctly came to the jury's attention, it should also hold that it was error to exclude the suicide letter. The letter was

admissible to rebut the suggestion of consciousness of guilt. Meggison. The State took the position the letter was hearsay, and the trial court agreed. However, "a statement of the declarant's then-existing state of mind" is admissible despite the general rule against hearsay, where that statement is offered to "prove or explain acts of subsequent conduct of the declarant." Section 90.803(3), Fla. Stat.

Allowing proof of the suicide attempt, without also letting in the explanatory letter, was outside the scope of the trial court's discretion. Twilegar, supra; Meggison; 90.803(3). Review of those rulings is therefore *de novo*. Pantoja, supra. The combined rulings amounted to error as a matter of law. They further resulted in deprivation of the federal constitutional guarantee of a meaningful opportunity to present a complete defense. The Supreme Court recognized in Crane v. Kentucky, 476 U.S. 683 (1986), that such a guarantee is recognized, "whether rooted directly in the due process clause of the Fourteenth Amendment or in the compulsory process or confrontation clauses of the Sixth Amendment." 476 U.S. at 690 (citations omitted). The Court reversed Crane's conviction after he was precluded from introducing evidence, at his trial, which would have shed light on the circumstances surrounding his out-of-court confession; the Court held Crane had been deprived "of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Id. (citations and

punctuation omitted). Here Appellant was deprived of the right to meaningfully test the prosecution's case, to the extent its case depended on showing consciousness of guilt. The State relied on the suicide attempt in its closing argument to the jury.

If this court disagrees with the foregoing constitutional analysis, it should still hold that the combined rulings addressed on this point amounted to an abuse of discretion. Penalver; Meggison; section 90.803(3). The State cannot show beyond a reasonable doubt that the error was harmless, given the sketched-in quality of the proof it put on in this cold case. Reversal for a new trial is warranted.

POINT FOUR

THE JURY FOREMAN'S GOOGLE SEARCH AND RELATED CONDUCT AMOUNTED TO MISCONDUCT. THE MOTIONS FOR A NEW TRIAL AND FOR A NEW PENALTY-PHASE JURY SHOULD HAVE BEEN GRANTED. DENIAL OF RELIEF RESULTED IN DENIAL OF APPELLANT'S RIGHTS PROTECTED BY ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Standard of review. The standard of review when a motion for new trial based on juror misconduct is denied is whether the court abused its discretion. State v. Hamilton, 574 So. 2d 124, 126 (Fla. 1991).[5]

Argument. The defense sought a new jury below for the penalty phase, based on the research the jurors did into the defendant's past just after the guilt phase ended and based on the patent dishonesty some of them exhibited when the court interviewed them. The defense also sought a new guilt phase, arguing the additional possibility that the jurors began their research before the guilt phase ended. The judge effectively found that some misconduct took place, but was harmless. The court denied any relief although the State failed to show there was no reasonable possibility the jurors' misconduct affected the verdicts. Denial of all

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[5] Shepard's citator reports that Hamilton has been superseded by statute as stated in Ramirez v. State, 922 So. 2d 386 (Fla. 1st DCA 2006). A review of Ramirez shows that Hamilton is still valid precedent.

relief amounted both to an abuse of discretion and to error of constitutional dimension, and reversal for a new guilt phase and penalty phase is warranted.

During his inquiry, the judge initially found that the jurors, when they conducted their own internet research, did not commit willful misconduct. The judge then heard the investigator's description of his own Google search, and noted that it cast doubt on the jurors' accounts of what happened in the jury room. After completing the inquiry, the judge found in his written sentencing order that the jury foreman "told several of his fellow jurors...what he discovered" on the internet. The foreman had told the judge he learned nothing new from his internet research; the judge's findings therefore establish that the judge disbelieved the foreman. The record supports that disbelief: the jurors' versions of events were so inconsistent that all of them cannot have been telling the truth.

A NEW PENALTY PHASE JURY SHOULD HAVE BEEN CHOSEN

The trial court abused its discretion in denying the defense motion for a newly empaneled jury for the penalty phase. Juror misconduct gives rise to a rebuttable presumption of prejudice. Tapanes v. State, 43 So. 3rd 159, 162 (Fla. 4th DCA 2010); State v. Hamilton, 574 So. 2d 124, 129 (Fla. 1991). Once juror misconduct is established by juror interviews, the moving party is entitled to a new trial unless the opposing party can demonstrate there is no reasonable possibility

that the misconduct affected the verdict. Id. Misconduct was established in this case when the judge effectively found the foreman had lied to the court.

When a venire member lies or conceals material information during jury selection, the entire proceeding is tainted and the parties are deprived of a fair and impartial trial. Redondo v. Jessup, 426 So. 2d 1146, 1147 (Fla. 3rd DCA 1983). When such misconduct is discovered after the fact, inherent prejudice to the party opposing the juror's service is presumed and the party is entitled to a new trial. Young v. State, 720 So. 2d 1101, 1103 (Fla. 1st DCA 1998). To determine whether juror misconduct amounts to reversible error, this court in criminal cases applies the three-part test first set out in DeLaRosa v. Zequeira, 659 So. 2d 239 (Fla. 1995). See Nicholas v. State, 47 So. 3rd 297, 313 (Fla. 2d DCA 2010). That test requires a showing that material information was involved, that that information was concealed, and that the opposing party exercised due diligence in bringing the problem to light. Id.

In the jury-selection context, undisclosed information is material when its concealment impairs the opposing party in intelligently deciding whether to exercise a challenge against the juror involved. Nicholas at 304. In the novel procedural context involved in this case, the jurors' lack of candor was material: their purpose for not coming clean about what happened in the jury room was

either to remain on the jury through the penalty phase, or else to avoid a dressing-down at best, and contempt sanctions at worst, from the judge. If their intent was to stay on the jury, the penalty-phase proceeding is tainted here; certainly if defense counsel had had the opportunity to exercise challenges after the court inquiry, she would have done so. If the jurors' motive was self-preservation, they experienced a conflict of interest during the inquiry that the court should have ruled disabled them from further service in the case.

Article I, Section 16 of the Florida Constitution, and the Sixth Amendment to the United States Constitution, guarantee a verdict by impartial, indifferent jurors. Singer v. State, 109 So. 2d 7, 15 (Fla. 1959); Dyer v. Calderon, 151 F. 3rd 970, 973 (9th Cir. 1998). That guarantee entails the right to be tried by twelve, not nine or even ten, impartial and unprejudiced jurors. Parker v. Gladden, 385 U.S. 363, 366 (1966). Lying to stay on a jury reflects "an impermissible partiality on the juror's part" and exhibits "a personal interest in [a] particular case that...not only suggests a view on the merits and/or knowledge of evidentiary facts but is also quite inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court." United States v. Colombo, 869 F. 2d 149, 151 (2d Cir. 1989). A perjured juror is as incompatible with our truth-seeking process as a judge

who accepts bribes. Dyer v. Calderon, 151 F. 3rd at 983.

The Sixth Amendment further protects the rights to counsel, confrontation and cross-examination. Marino v. Vasquez, 812 F. 2d 499, 505 (9th Cir. 1987). All of those rights are affected when a jury is exposed to facts through a method that skirts courtroom procedures designed to give meaning to those constitutional guarantees. See id., and see United States v. Lawson, 677 F. 3rd 629, 645-46 (4th Cir. 2012) (reversing conviction where a juror researched a statutory term on Wikipedia and shared his research). When a juror communicates extrinsic facts to the rest of the panel, by doing so he becomes an unsworn witness in the jury room. Sassounian v. Roe, 230 F. 3rd 1097, 1108 (9th Cir. 2000). Also impacting negatively on the right to counsel, as defense counsel argued below, was the fact the jurors may well have lost faith in the defense team after they read the mistaken press report that the defendant visited an area south of Sumter County, rather than Flagler Beach as the defense had shown, during the week before Adrian Mobley's death.

As defense counsel also argued below, after the court inquiry the jury could no longer be trusted to follow the court's penalty-phase instructions. The right to heightened reliability in penalty-phase proceedings protected by the federal Eighth Amendment was therefore adversely affected, as was the right to due process of

law. "Due process means a jury capable and willing to decide the case solely on the evidence before it." Smith v. Phillips, 455 U.S. 209, 217 (1982).

Once misconduct was shown, the burden devolved onto the State to show no harm would result in the penalty phase. State v. Hamilton, supra, 574 So. 2d at 129. This court has observed that that burden is easily discharged when the allegation of misconduct is trivial. Hamilton, 574 So. 2d at 130. Here, however, the allegation was weighty, and the defense concerns were not adequately addressed below. The jurors asserted that they could put aside what they had learned and be fair and impartial. The State argued, and the judge concluded in his written findings, that those assertions controlled the case and precluded the need for further inquiry. However, the First District Court holds that if a juror lies or conceals material information during voir dire, his later statement that he can be impartial "is of no moment." Nicholas v. State, supra, 47 So. 3rd at 305, *citing* Singer v. State, 109 So. 2d 7 (Fla. 1959). In Singer this court held, in the jury-selection context, that a juror's statement that he can be impartial should not be taken at face value where the record belies the protestation. 109 So. 2d at 22-25. Accord Williams v. State, 638 So. 2d 976, 978-79 (Fla. 4th DCA 1994). On this record, the judge's trust in the jury's assurances of impartiality was not warranted, and he abused his discretion by denying all relief.

The error is a structural one, not subject to harmless error analysis. "The right to an impartial adjudicator, be it judge or jury, is so basic to a fair trial that its infraction can never be treated as harmless error." Gray v. Mississippi, 481 U.S. 648, 668 (1987). In Johnson v. State, 53 So. 3rd 1003 (Fla. 2010), this court held that among the errors which must be deemed *per se* reversible is a bailiff's unsupervised communication with the jury. 53 So. 3rd at 1008, *citing* State v. Merricks, 831 So. 2d 156 (Fla. 2002); see id. at 1011-12 (Canady, J., dissenting), noting that the "presence of a biased adjudicator" can never be harmless. A new penalty phase is warranted by the record of this case.

A NEW GUILT PHASE SHOULD HAVE BEEN GRANTED

The court further abused its discretion when it denied a new guilt phase. *Only the jurors' assurances* established that their research did not begin until after the guilt phase was over, and the record as a whole casts doubt on the value of their assurances. The burden was on the State below to show there was no reasonable possibility that harm resulted in the guilt phase from the jury's research. State v. Hamilton, supra. That showing was not made below, and reversal for a new trial should result. See United States v. Lawson, supra, 677 F. 3rd at 645 (government failed to meet burden of showing juror's midtrial Wikipedia research did not taint the verdict); Russ v. State, 95 So. 2d 594 (Fla. 1957) (reversing where juror

conveyed prejudicial knowledge about a party to his fellow jurors); Banos v. State, 521 So. 2d 302 (Fla. 3rd DCA 1988) (reversing where jury learned during deliberations that defendant was a convicted felon). Denial of a new guilt phase resulted in deprivation of Appellant's Sixth Amendment rights and his right to due process of law, and, as it did in the penalty phase, amounted in the guilt phase to structural error not subject to harmless error analysis. Redondo v. Jessup; Smith v. Phillips; Gray v. Mississippi.

POINT FIVE

DOUBLE JEOPARDY RESULTED WHEN THE COURT ADJUDICATED APPELLANT GUILTY OF BOTH FIRST-DEGREE MURDER AND AGGRAVATED BATTERY.

Standard of review. A double jeopardy claim presents a pure question of law and is reviewed *de novo*. McKinney v. State, 66 So. 3rd 852, 853 (Fla. 2011).

Argument. Appellant was convicted below of both murder and aggravated battery of the same victim; the proof does not show or suggest that any time elapsed between two distinct offenses. On similar facts, the Third District Court of Appeal has held that "[w]e fail to see how an aggravated battery can be parsed out of any of the murderous acts which the defendant committed...as, in totality, such acts indisputably led to the victim's death." Laines v. State, 662 So. 2d 1248 (Fla. 3rd DCA 1995), *receded from on other grounds in* Grene v. State, 702 So. 2d 510 (Fla. 3rd DCA 1997). Accord Campbell-Eley v. State, 718 So. 2d 327 (Fla. 4th DCA 1998).

The District Courts correctly held in both Laines and Campbell-Eley that the dual convictions violated the right to be free of double jeopardy. Murder has as an element that the victim has died, and aggravated battery has as an element that the defendant intended great bodily harm, permanent disability, or permanent disfigurement. The federal and Florida double jeopardy clauses thus preclude dual

convictions for murder and for aggravated battery, when both arise out of the same single incident involving a single victim. Blockburger v. United States, 284 U.S. 299 (1932); Section 775.021(4), Florida Statutes. The remedy for multiple convictions entered in violation of the double jeopardy clauses is vacation of the conviction for the lesser offense, State v. Barton, 523 So. 2d 152 (Fla. 1980), and this court should accordingly vacate Appellant's conviction and sentence for aggravated battery.

POINT SIX

THE STATE DID NOT SHOW BEYOND A REASONABLE DOUBT THAT THE CHARGED MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL. THE PROOF FAILED TO MEET THE REQUIREMENTS OF THE FEDERAL CONSTITUTION OR THIS COURT'S CASELAW.

Standard of review. This court reverses a trial court's finding that an aggravating factor is present when that finding is not supported by competent, substantial evidence. Cole v. State, 36 So. 3rd 597, 608 (Fla. 2010). Where the proof supporting an aggravating factor is circumstantial, that proof must be inconsistent with any reasonable hypothesis that might negate the existence of the aggravating factor. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992).

Argument. The court found below that "[t]he evidence at trial proved beyond a reasonable doubt that Adrian Mobley was bound, beaten, and stomped in the chest and head and left to die by the side of C.R. 476 during the middle of the night." The judge further found that "it would have taken several minutes for the victim to die" and that "[c]learly, the death of Adrian Mobley was deliberate and extraordinarily painful." Here, as in Williams v. State, 37 So. 3rd 187 (Fla. 2010), the trial court's specific findings are unsupported by the evidence and thus do not support its overall finding that the murder was heinous, atrocious and cruel.

In Williams, the medical examiner testified that the victim underwent five blows to the head, and that any of them could have caused unconsciousness or death. 37 So. 3rd at 200. The judge who tried the case concluded from the locations of the blows, and the direction of blood flow, that the victim must have been alive and standing as the blows continued. Id. at 199-200. This court held that those conclusions were "speculative," and struck the court's finding that the killing had been especially heinous, atrocious or cruel. Id. at 200-01. Here, the medical examiner testified that the injury to the victim's head took place before the injury to his neck, that the victim was unconscious or barely conscious when the neck injury was inflicted, and that the injuries taken together would have resulted in loss of consciousness and death within minutes. The judge concluded from that testimony that "it would have taken several minutes for the victim to die," and that "[c]learly, the death of Adrian Mobley was deliberate and extraordinarily painful." As it did in Williams, this court should hold that those specific findings are speculative and unsupported by the proof.

In order to support a finding of the HAC aggravator, the evidence must show that the victim was conscious and aware of impending death. Williams, 37 So. 2d at 199; Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1998). In Williams and in Zakrzewski, this court struck HAC findings where the evidence showed the victim

could have been rendered unconscious by the perpetrator's first blow. Williams at 201, *citing* Zakrzewski at 493. Similarly, in Elam v. State, 636 So. 2d 1312 (Fla. 1994), the proof showed the victim died in no more than a minute and never recovered consciousness, and this court struck the HAC finding. Williams, Zakrzewski, and Elam all support reversal because the medical examiner's testimony in this case did not establish the victim was aware of his impending demise. Cf. Buzia v. State, 926 So. 2d 1203 (Fla. 2006) (defendant's admissions established victim was aware of impending death). Further, the medical examiner in this case testified that the victim had no defensive wounds. Cf. Guardado v. State, 965 So. 2d 108 (Fla. 2007) (affirming HAC finding; medical examiner testified that bruising was formed, and defensive wounds were inflicted, while victim was alive).

The HAC aggravator also requires a showing that the murder was "accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Williams, 37 So. 2d at 198. The judge found that the victim in this case was "bound, beaten, and stomped," suggesting that the victim was tied up while he was still alive; the record does not support the suggestion. The testimony showed that the victim was killed by as few as two hard blows, that the

body was loosely hog-tied with a sheet, and that the body was dragged to the place where it was found. The medical examiner saw no indication that the victim had struggled. The inference that the dead body was tied in order to move it arises at least as readily from those facts as does the inference that the living victim was tied to facilitate his murder. The conclusion that the victim was bound while alive depends on circumstantial evidence which is not inconsistent with the reasonable hypothesis that the victim's body was bound after death.

Further, the proof does not support the finding that the victim was "stomped" to death. The medical examiner agreed with the State, during her testimony, that the blow to the victim's neck area, which resulted in small parallel bruises, was consistent with a "stomp;" the term was the prosecutor's, not the witness's. What she did affirmatively establish was that the blow to the neck - the result of which is visible in the appendix to this brief - did not break any cartilage or bone, but caused only bruising. The record does not support a finding of "additional acts" which were "unnecessarily torturous" to the victim.

This court held in Buzia v. State, supra, that "[w]e have upheld the HAC aggravator in numerous cases involving beatings." Buzia involved knowledge of impending death, as did the cases cited in this court's opinion in that case. See Colina v. State, 634 So. 2d 1077, 1081 (Fla. 1994) (victim attempted to get to his

feet during beating); Owen v. State, 596 So. 2d 985, 990 (Fla. 1992) (victim awoke during fatal attack and lived up to an hour); Lamb v. State, 532 So. 2d 1053, 1053 (Fla. 1988) (victim was struck six times with a hammer then had his feet pulled out from under him). In this case, the trial court's finding that the murder was especially heinous, atrocious and cruel is unsupported by substantial, competent evidence.

The proof failed to meet constitutional requirements as well. The federal Eighth Amendment requires that aggravating factors must each be proved beyond a reasonable doubt. Lewis v. Jeffers, 497 U.S. 764, 780-83 (1990). The test on appeal is an objective one, i.e., whether any rational trier of fact would have concluded the aggravator was proved beyond a reasonable doubt. Id. at 781. Viewed in this light, the record in this case does not support a finding that the murder was especially heinous, atrocious, and cruel. Williams, supra; Zakrzewski, supra; Elam, supra. The trial court's finding to that effect should therefore be struck by this court on constitutional grounds.

POINT SEVEN

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AGGRAVATING FACTORS THAT WERE UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE. APPELLANT'S RIGHT TO HEIGHTENED RELIABILITY IN PENALTY PHASE PROCEEDINGS, PROTECTED BY THE FEDERAL EIGHTH AMENDMENT, WAS ADVERSELY AFFECTED.

Standard of review. A trial court may instruct a penalty phase jury on an aggravating circumstance if the evidence is legally sufficient to support a finding that the circumstance is present. Miller v. State, 42 So. 3rd 204, 226 (Fla. 2010). This court refers interchangeably to "credible and competent evidence" and to "competent and substantial evidence" as the quantum of proof required to support such an instruction. Id. at 227. The test is clearly one of legal sufficiency. Id. at 226.

Argument. The trial court instructed the jury that it could consider, in aggravation, the merged factors whether the murder was committed for pecuniary gain and whether it was committed in the course of a robbery. It was error to give that instruction, since competent, substantial evidence did not support either factor.

Here, as in Williams v. State, 37 So. 3rd 187 (Fla. 2010), the facts the State relied on to show the charged murder was committed for pecuniary gain were

circumstantial. Williams was shown to have a cocaine habit and no job, home, or operable vehicle; here the proof tended to show the killer needed transportation. The State showed that Williams killed a benefactor who had provided him with a home, and showed that Williams continued to live in the home after the killing; this court held that those facts were not inconsistent with a reasonable hypothesis that the defendant continued to use the home without having considered that continuing access as motivation for the murder. Here, the facts that the killer acquired the victim's 1981 Honda Civic as a result of the victim's death, then abandoned it the next day, are not inconsistent with the reasonable hypothesis that the car was taken purely as a means to flee the scene of the victim's death.

This court in Williams concluded there had been insufficient competent, substantial evidence to support instructing on the pecuniary gain aggravator. In reaching that conclusion, this court distinguished Orme v. State, 25 So. 3rd 536 (Fla. 2009), where the defendant was convicted of robbery and this court affirmed that conviction. Here, in contrast, robbery was not charged and the trial court ruled the State had failed to prove the pecuniary gain aggravator, or the "in the course of a robbery" aggravator, beyond a reasonable doubt. In Williams this court also distinguished Deparvine v. State, 995 So. 2d 351 (Fla. 2008), where the State had showed the defendant made a well-thought-out plan to steal the victim's truck, and

kept the truck after the murder; Huggins v. State, 889 So. 2d 743 (Fla. 2004), where the defendant had the victim's truck in his possession two weeks after the murder; Rogers v. State, 783 So. 2d 980 (Fla. 2001), where the victim's car was not abandoned after the murder; and Jones v. State, 690 So. 2d 568 (Fla. 1996), where the defendant took the papers to the victim's car and concealed the car. Durousseau v. State, 55 So. 3rd 543 (Fla. 2010), is also distinguishable here; in that case this court noted, in affirming a finding that the killing was committed as part of a felony-murder involving robbery, that the television and jewelry stolen from the victim *neither expedited nor facilitated the defendant's ability to flee the scene.* 55 So. 3rd at 558. Here, in addition to the car, the victim's wallet was taken. However, the State conceded it did not show the wallet had any money in it on the night of the murder.

In short, the record does not tend to show that the victim was killed for his older-model Honda Civic or for whatever money he may have had on his person. It was error to instruct on the merged aggravators since substantial evidence to support them is absent, and the record does not support a conclusion that the error was harmless. In Harris v. State, 843 So. 2d 856 (Fla. 2003), this court held that the "pecuniary gain" aggravator was not proved by competent, substantial evidence, and held that the error in instructing on it was not harmless in light of the jury's 7-5

split. In this case, where the split was 8-4, the proof that tended to support a finding that the killing was especially heinous, atrocious and cruel was weak. (See point VI *supra.*) The instruction on the unsupported merged aggravators may therefore have been responsible for some of the eight votes for death. The appellant's right to heightened reliability in penalty-phase proceedings, protected by the federal Eighth Amendment, was compromised, on this relatively slender record, by the instruction on the merged aggravators. See United States v. Friend, 92 F. Supp. 2d 534, 541-42 (E. D. Va. 2000) (aggravators "must be measured in perspective of the fundamental requirement of heightened reliability;" aggravators should be struck when they are irrelevant, as well as when they are overbroad or vague). This court should reverse the penalty of death, and remand for a new penalty phase where the jury can be properly instructed.

POINT EIGHT

THE RECORD DOES NOT SUPPORT THE COURT'S REASON FOR GIVING MINIMAL WEIGHT TO MITIGATING EVIDENCE THAT SHOWS APPELLANT SUFFERS FROM ORGANIC BRAIN DAMAGE. APPELLANT'S RIGHT TO HEIGHTENED RELIABILITY IN PENALTY PHASE PROCEEDINGS WAS ADVERSELY AFFECTED.

Standard of review. Where a judge has considered all of the evidence the defense put on to support a mitigating factor, the court's decision whether that factor was established is reviewed for abuse of discretion. Ault v. State, 53 So. 3rd 175, 186-87 (Fla. 2010). The court's decision how much weight to give to mitigating factors is also reviewed for abuse of discretion. Id. A trial court's findings with regard to mitigation will be upheld if there is competent, substantial evidence to support them. Id. Where there is no competent, substantial evidence to support a finding made with regard to mitigating evidence, this court considers whether there was a reasonable possibility the error contributed to the sentence. Ault at 195.

Argument. As the trial court correctly noted in its sentencing order, Dr. Chacko concluded that "the defendant's reasoning abilities were substantially impaired due to the defendant's personality disorder [and] excessive drug use, combined with...organic brain damage." The court gave that nonstatutory

mitigating factor minimal weight, based on its finding that "there was not any testimony or evidence to indicate or opine the Defendant suffered from mental illness or organic brain damage at the time of the commission of the murder in this case. Nonetheless, our law does establish that *all* evidence of mental disturbance or impairment is relevant if it may have some bearing on the crime or the defendant's character." The judge's finding that the mental mitigation was not tied to the date of the offense is not supported by competent substantial evidence.

This court is not bound to accept findings regarding mitigation where they are based on a misconstruction of undisputed facts or a misapprehension of law. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). In Mahn v. State, 714 So. 2d 391 (Fla. 1998), the trial court concluded the evidence was "clear" that the influence of drugs was absent at the time of the murder. This court, reversing Mahn's death sentences, held that there was no basis in the record for that finding, and further held that there had been insufficient reason for the court to reject the proposed mitigating circumstance of long-term substance abuse.

In its sentencing memorandum in this case, the State argued that "[a]lthough Dr. [Chacko] opined that the defendant suffered from [polysubstance] abuse based upon the defendant's self report nowhere in Dr. [Chacko's] testimony did he opine that the defendant suffered from it at the time of the commission of the murder.

Thus this mitigating circumstance has not been established." (VII 1368) For that argument the State relied solely on Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). (VII 1368) In Provenzano, the defendant became obsessed with a 1983 arrest, and argued he had murdered a bailiff in 1984 while under the influence of extreme mental or emotional disturbance stemming from the earlier event. This court rejected the argument, given the passage of time. Here the defense did not attempt to prove the statutory mitigating factor of extreme mental or emotional disturbance, but instead argued, with evidentiary support, that the defendant's organic brain damage amounted to significant non-statutory mitigation.

In Nibert, supra, the trial court rejected the defendant's argument that his offense was mitigated by significant documented child abuse; the court's reason for rejecting the argument was that the defendant was 27 years old at the time of the murder and had not lived with his abusive mother since he was 18. This court held that that analysis was "inapposite." The defendant in this case was 28 years old when the charged murder took place, and the proof in the penalty phase showed concerted substance abuse on his part throughout his youth. Dr. Chacko clearly testified that the corrosive stimulants Appellant was shown to have favored cause irreversible brain damage, and that such brain damage causes loss of impulse control. The State's analysis in this case, which the trial court adopted, was

"inapposite," as in Nibert. This court should hold that competent, substantial evidence does not support the judge's reason for giving minimal weight to the doctor's testimony, and that the record does not support giving minimal weight to the presence of organic brain damage. See Mahn.

The record shows a reasonable likelihood that the sentence in this case would have been different had the court not reached a mistaken factual conclusion regarding the mental mitigation evidence. See Ault v. State, 53 So. 3rd at 195. The Eighth Amendment insists upon reliability in the determination that death is the appropriate punishment in a specific case. E.g., Oregon v. Guzek, 546 U.S. 517, 525 (2006). That guarantee of reliability was undercut by the court's unsupported finding. Appellant's death sentence should be reversed, and the case remanded to the trial court for the mitigating evidence to be reweighed. See Crook v. State, 813 So. 2d 68, 78 (Fla. 2002).

POINT NINE

THE DEATH PENALTY IS NOT PROPORTIONAL IN THIS CASE.

Standard of review. This court undertakes a qualitative proportionality review in every capital case, in which it compares the totality of the circumstances in the case before it with those in other capital cases. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). The number of aggravating and mitigating factors is not dispositive of the proportionality question. Urbin, 714 So. 2d at 416. This court deems death to be a disproportional remedy where the case is not *both* one of the most aggravated, and least mitigated, cases to come before it for review. Crook v. State, 908 So. 2d 350, 357 (Fla. 2005).

Argument. This court has reversed the death penalty on proportionality grounds on facts similar to those presented here. In Kramer v. State, 619 So. 2d 274 (Fla. 1993), this court concluded the death penalty was disproportional although this court affirmed the two aggravating factors the trial court had found, i.e., that the murder was especially heinous, atrocious and cruel and that the defendant had a prior violent felony on his record. After reviewing the overall circumstances of Kramer's case, this court concluded that substantial competent evidence "supports a jury finding of premeditation [but] the case goes little beyond that. The evidence

in its worst light suggests nothing more than a spontaneous fight." 619 So. 2d at 278. This case is similar to Kramer: the same two aggravating factors are present, but the crime at issue here appears to have involved little reflection. Further, here as in Kramer, the defense showing of non-statutory mitigation is significant. Unrebutted testimony by the defense expert established that organic brain damage is present and that such brain damage results in loss of impulse control; that showing relates directly to the apparent impulsivity behind Adrian Mobley's death. Dr. Chacko's testimony, and the testimony by the defendant's daughter, further show that the defendant has successfully committed to self-improvement in prison. He has not only earned his GED and associate's degree there, but has progressed significantly toward a bachelor's degree in counseling from a major university. His positive effect on his daughter's life comparably bespeaks patient dedication toward a long-term goal. Dr. Chacko concluded the defendant is "the perfect example of a person while in the correctional system bettering himself with self-education," and that he is capable of a normal emotional life while sober. Kramer, also, involved "potential for productive functioning" in prison coupled with significant non-statutory mental-health mitigation. 619 So. 2d at 278.

This court has found death a disproportional penalty in other cases where two aggravating factors were present. In Sager v. State, 699 So. 2d 619 (Fla. 1997)

and Voorhees v. State, 699 So. 2d 602 (Fla. 1997), this court held that neither of those co-defendants had received a proportional death sentence although their crime was found in both cases to be especially heinous, atrocious and cruel and to have been committed in the course of a robbery. This court viewed the totality of the circumstances, and concluded the murder arose swiftly out of a "drunken episode." Voorhees, 699 So. 2d at 615. Non-statutory mental-health mitigation was present in both cases. 699 So. 2d at 615, 623.

In this case, the "especially heinous, atrocious and cruel" aggravating factor is weakly supported and should be struck. See Point VI *supra*. Cases abound where this court has held that a single aggravating factor was insufficient to support a conclusion that death was proportional. In Jones v. State, 963 So. 2d 180 (Fla. 2007), and Terry v. State, 668 So. 2d 954 (Fla. 1996), this court found death to be disproportional where the only aggravating factor was that the murder was committed in the course of a robbery, and where this court concluded that little more than a "robbery gone bad" was involved. Jones, 963 So. 2d at 188; Terry, 668 So. 2d at 965. In Ross v. State, 474 So. 2d 1170 (Fla. 1985), the murder arose out of a domestic situation and was aggravated only by the heinous, atrocious and cruel aggravator; this court reversed, concluding that any reflection before the killing had been of short duration. 474 So. 2d at 1174.

Further, in this case the court's finding that the mental-health mitigating evidence should receive minimal weight is not well supported. See Point VIII *supra*. In Nibert v. State, 574 So. 2d 1059 (Fla. 1990), a case where the only aggravator was that the killing had been heinous, atrocious and cruel, this court found death disproportional based on uncontroverted expert evidence in the penalty phase. That testimony established both good potential for Nibert's rehabilitation and significant mental-health mitigation. 574 So. 2d at 1062-63. This court in Nibert relied on its decision in Songer v. State, 544 So. 2d 1010 (Fla. 1989). In that case this court held that the single aggravator involved, that Songer had been under sentence of imprisonment when he committed the murder, was outweighed by the proof in mitigation, which showed both that his reasoning abilities were substantially impaired by addiction to hard drugs and that he "had undergone a positive change while in prison." 544 So. 2d at 1011-12. Here, similarly, the unrebutted expert testimony established both "a positive change while in prison" and brain damage, affecting impulse control, from Appellant's abuse of particularly toxic drugs.

This case, like the cited cases, is neither among the most aggravated or least mitigated cases this court has reviewed. As it did in Kramer, Nibert, Songer, and the other cited cases, this court should conclude that the death penalty is not

proportional here.

POINT TEN

FLORIDA'S STANDARD PENALTY PHASE INSTRUCTIONS, AS READ IN THIS CASE, VIOLATED THE APPELLANT'S FEDERALLY-PROTECTED RIGHTS TO DUE PROCESS AND TO HEIGHTENED RELIABILITY IN PENALTY-PHASE PROCEEDINGS.

Standard of review. Review of jury instructions is, in general, governed by the abuse of discretion standard; however, the trial courts' discretion in criminal cases is "narrow" in that a defendant has the right to have the jury instructed on a valid theory of defense if any evidence supports the request. Peterson v. State, 24 So. 3rd 686, 690 (Fla. 2d DCA 2009) (reversing); Cruz v. State, 971 So. 2d 178, 181-82 (Fla. 5th DCA 2007) (reversing); Goode v. State, 856 So. 2d 1101, 1014 (Fla. 1st DCA 2003) (reversing).

Where a criminal defendant requests a special instruction he must demonstrate that it is supported by the evidence, that it correctly states the law, and that the standard instructions do not adequately cover the theory of defense. Stephens v. State, 787 So. 2d 747, 756 (Fla. 2001). While the standard instructions are presumed correct, use of the standard instructions does not relieve the trial court of its obligation to determine whether the standard instructions accurately and adequately state the law. Peterson, 24 So. 3rd at 690.

Argument. The defense filed written requested penalty phase instructions below; one would have told the jurors that death is reserved only for the most aggravated cases, and another would have expressly allowed the jury to exercise mercy. Also, before trial the defense filed a motion objecting to use of Florida's standard jury instruction defining "especially heinous, atrocious and cruel," arguing that the standard instruction does not narrow the class of persons eligible for the death penalty in that the language employed is both broad and subjective. Despite this court's decisions generally rejecting such arguments in the past, on the facts of this case all of the defendant's motions should have been granted.

"THE WORST OF THE WORST"

During the penalty phase, the defense argued to the jurors that "the death penalty is reserved only for the worst of the worst murders." The State responded that in its view the defendant does not meet that criterion, but went on to cavalierly suggest the law imposes no such requirement. Reading the defense's requested instruction that death is reserved only for the most aggravated cases would have prevented the jury from being misinformed on this essential aspect of the governing caselaw.

Appellant acknowledges that this court held in Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) that a "worst of the worst" instruction is not necessary in capital

cases. This court denied relief on the basis that the defendant could cite to no case where such a requested instruction had already been held to be mandatory. 774 So. 2d at 644. However, the requested instruction correctly states the law, e.g., Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998), and the standard instructions do not state that the death penalty is reserved for the most aggravated and least mitigated cases. In Florida the jury's life-or-death recommendation is to be given great weight by the sentencing court. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Since its advisory role is central to the sentencing process, the jury should be made aware, on the defendant's request, that its power is to be exercised judiciously. In this close case, denial of the "worst of the worst" jury instruction cannot reasonably be deemed harmless.

MERCY

During the penalty phase, the defense argued to the jurors that the law allowed them to be merciful. That argument may have fallen on deaf ears, since it was not supported by the requested instruction to that effect. See generally Boyde v. California, 494 U.S. 370, 384 (1990) (argument of counsel is not the functional equivalent of an instruction from the court.) Appellant acknowledges that this court held, in Moore v. State, 820 So. 2d 199, 210 (Fla. 2002), that such an instruction is not necessary provided the court instructs the jury that it may consider any aspect

of the defendant's character, and any aspect of the offense. An appeal to mercy fits in neither category. There is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant. Penry v. Lynaugh, 492 U.S. 302, 327 (1989). A juror who believes that mitigating evidence diminishes moral culpability must receive a jury instruction that allows him or her to give effect to that conclusion. Id. at 323. In this close case, where four jurors voted for a life sentence, omitting the requested instruction may have been critical. Appellant therefore asks this court to reconsider Moore.

THE HEINOUS, ATROCIOUS AND CRUEL INSTRUCTION IS VAGUE

As counsel argued below, Florida's standard instruction defining the "especially heinous, atrocious and cruel" aggravating factor does not have the effect of narrowing the class of persons eligible for the death penalty. The language employed is subjective; such terms as "wicked," "evil," "shocking," "outrageous," and "vile" appeal to emotion rather than reason. The United States Supreme Court rejected instructions which define "heinous, atrocious and cruel" in just those terms, see Shell v. Mississippi, 498 U.S. 1 (1990), and Florida responded by adding that the crime must exhibit "additional acts" which are "torturous to the victim." See State v. Breedlove, 655 So. 2d 74 (Fla. 1995). The "additional acts" rider does not effectively operate as a narrowing factor; it directs jurors that they may find the

HAC factor in those cases which involve "additional acts" which are "conscienceless or pitiless" and which are "unnecessarily torturous to the victim." "Pitiless" and "conscienceless" are as broad and subjective as the terminology that was rejected in Shell, and the jury is not clued in, by the standard instruction, to this court's conclusion that the "torturous" clause refers only to the victim's subjective experience rather than the defendant's subjective intent. See, e.g., Hall v. State, 87 So. 3rd 667, 671-72 (Fla. 2012). That the specialized meaning of "torturous" is lost on juries is exemplified by the case now before this court: the medical examiner's testimony did not support a finding that the victim was aware of the nature of the attack and had time to anticipate his death.

Giving the standard instruction over the defense objection was error, adversely affecting Appellant's rights to due process and heightened reliability in penalty-phase proceedings. See Penry v. Lynaugh, supra. The error was not harmless on this record, since the case made for mitigation was well supported and the State's showing of "torturous" "additional acts" was not. Cf. Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995) (no harm in giving outdated, discredited HAC instruction where victim anticipated her death); Breedlove, supra, 655 So. 2d 76-77 (same error was harmless where victim drowned in his own blood and expert witnesses found no mental mitigation); Henderson v. Singletary, 617

So. 2d 313, 315 (Fla. 1993) (same error was harmless where HAC was established "beyond a reasonable doubt under any definition of the terms" and where mitigation was "of comparatively little weight.") Reversal for a new penalty phase, where the jury can be properly instructed, is warranted.

POINT ELEVEN

THE TRIAL COURT ERRED IN DENYING RELIEF BASED ON RING v. ARIZONA.

Standard of review. Review of a purely legal question is *de novo.* Jackson v. State, 64 So. 3rd 90, 92 (Fla. 2011).

Argument. This court holds that where, as here, the aggravating factor of a prior violent felony conviction is present, the defendant is entitled to no relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). E.g., Miller v. State, 42 So. 3rd 204, 218 (Fla. 2010). The United States Supreme Court has not clarified how Ring should be applied to Florida's sentencing scheme. While Ring by its terms does not require findings *as to proof of prior convictions*, Appellant is harmed by the jury's having returned no findings of fact, and no unanimous findings of fact, *as to the remaining aggravators proved and argued below.* The eight jurors who voted for the death penalty may have relied in varying degrees on the heinous, atrocious, and cruel aggravator and the unsupported merged aggravators; that reliance may have profoundly affected Appellant's sentence, in light of the great weight accorded jury recommendations. In the absence of specific findings, Appellant cannot avail himself of meaningful appellate review of his death sentence which would ensure the heightened reliability required by the federal Eighth Amendment. This court should reverse Appellant's sentence because in the absence of jury findings, there

is no way to determine whether the underlying sentencing recommendation was based on the unsupported merged aggravating factors. This case shows that notwithstanding State v. Steele, 921 So. 2d 538 (Fla. 2005), this court should hold that unanimous jury findings must be returned by the jury as to the existence of each aggravating factor.

CONCLUSION

Appellant has shown that this court should reverse his convictions and order his discharge, because insufficient competent, substantial evidence established he was the perpetrator of the charged offenses.

If that relief is denied, Appellant has shown that this court should reverse his murder conviction and remand for entry of judgment of guilt as to second-degree murder, on the ground the proof did not establish premeditation or felony-murder. If that relief is granted this court should further remand for vacation of the aggravated battery conviction entered on Count II, on double-jeopardy grounds.

If that relief is denied, Appellant has shown he is entitled to a new guilt phase trial based on his evidentiary and jury-misconduct arguments.

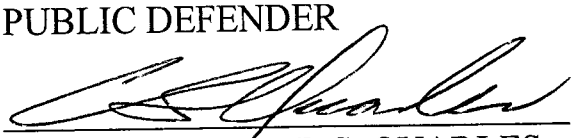
If that relief is denied, Appellant has shown that this court should reduce his death sentence to a life sentence, as a result of striking the HAC factor, proportionality analysis, or both.

If that relief is denied, Appellant has shown that this court should reverse the sentencing order and remand for a new penalty phase, based on juror misconduct or on the jury instructions given in the penalty phase.

If that relief is denied, Appellant has shown that this court should reverse the sentencing order appealed from and remand for reweighing of mitigation.

Respectfully submitted,

JAMES S. PURDY,
PUBLIC DEFENDER



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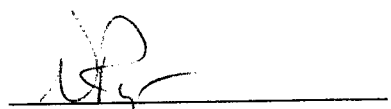

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant Attorney General Kenneth Nunnelly, at 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, and mailed to Carl Dausch, DOC #134926, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1000, on this 19th day of December, 2012.

Nancy Ryan

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

IN THE SUPREME COURT OF FLORIDA

CARL DAUSCH,

Appellant,

vs.

CASE NO. SC12-1161

STATE OF FLORIDA,

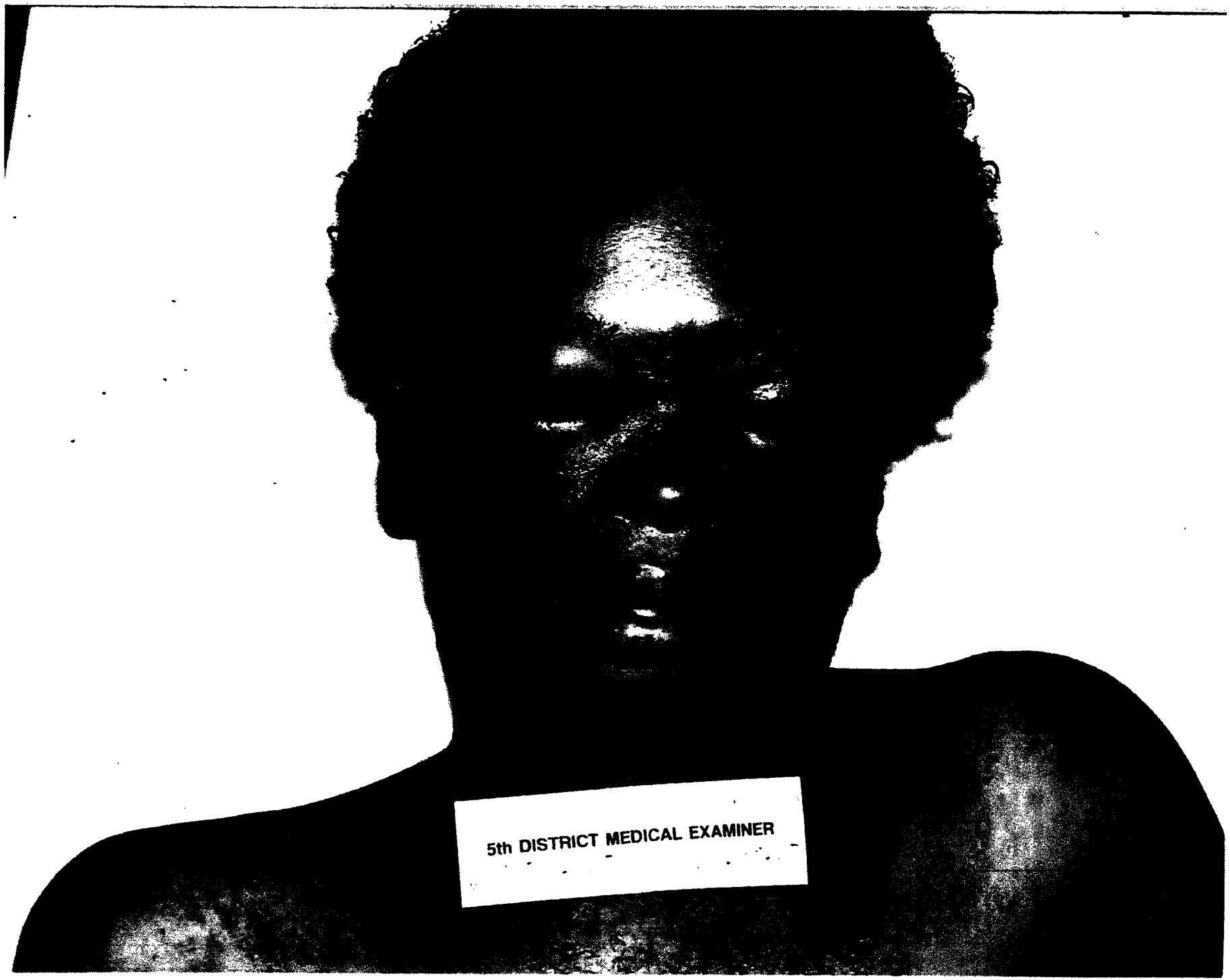
Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR SUMTER COUNTY

APPENDIX TO APPELLANT'S INITIAL BRIEF

1. State's Exhibit 2 from trial (Volume X, Disc 1).


5th DISTRICT MEDICAL EXAMINER

LAW OFFICES OF
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT
FLAGLER, PUTNAM, ST. JOHNS & VOLUSIA COUNTIES

JAMES S. PURDY
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CRAIG S. DYER
CHIEF ASSISTANT

December 19, 2012

Honorable Thomas D. Hall
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

RE: *CARL DAUSCH*, Case Number SC12-1161

Dear Mr. Hall:

Enclosed please find the original and seven copies of the Initial Brief in the above referenced case.

Sincerely,

Lorraine Perkins
Capital Assistant

Enclosures

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