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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC12-2468

TIMOTHY W. FLETCHER,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PUTNAM COUNTY

CRIMINAL DIVISION

****

INITIAL BRIEF OF APPELLANT

J. RAFAEL RODRIGUEZ
Specially Appointed Public
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Oral Argument Requested

Appellant, Timothy W. Fletcher, respectfully requests oral argument in this capital appeal.

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INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, the pre-trial transcripts, the trial transcripts and the sentencing transcripts.

STATEMENT OF JURISDICTION

This Court has appeal jurisdiction in this case. Defendant was sentenced to death. Rule 9.030(a)(1)(A)(i), Florida Rules of Appellate Procedure, provides that the Florida Supreme Court has jurisdiction of final orders of courts imposing sentences of death. See also §921.141(4), Florida Statutes.

STATEMENT OF THE CASE

Guilt Phase

Defendant Timothy W. Fletcher was charged by Indictment with one count of escape, by unlawfully escaping from confinement while a prisoner at the Putnam County Jail on April 15, 2009, contrary to §944.40, Florida Statutes [**Count I**]; one count of grand theft of a motor vehicle, by taking a motor vehicle, the property of Todd Lewis, on April 15, 2009, contrary to §§812.014(1) and (2)(c)6, Florida Statutes [**Count II**]; one count of first degree murder by killing Helen Key Googe, by blunt trauma to the head and manual strangulation, on April 15, 2009, perpetrating the killing from a premeditated design and/or while engaged

in the commission of a home invasion robbery, contrary to §782.04(1), Florida Statutes [**Count III]**; one count of home invasion robbery, by unlawfully entering a dwelling with an intent to commit a robbery and taking currency and other property from Helen Key Googe, on April 15, 2009, contrary to §812.135, Florida Statutes [**Count IV**]; and one count of grand theft of a motor vehicle, by taking a motor vehicle the property of Helen Key Googe, on April 15, 2009, contrary to §§812.014(1) and (2)(c)6, Florida Statutes. [**Count V**]. (R. 7-8; R. 44-45). The State filed a notice of intent to seek the death penalty. (R. 65).[1]

Preliminary Proceedings

Prior to trial, the defense filed a motion to suppress his post-arrest statement. (R. 490-491). The defense also objected to the consolidation of offenses for trial involving two separate automobile burglaries. (R. 493). The defense also filed a motion *in limine* requesting that no mention be made of the offenses on which Defendant was serving jail time when he escape from Putnam County Jail. (R. 495-496). Defendant also filed another motion *in limine* requesting that no mention be made of uncharged criminal activity, including grand theft auto allegations and plans by Defendant and Doni Brown to flee to Mexico. (R. 497-498). The defense

[1] Defendant was also charged by Information in Case No. 2009-0807CF52 with burglary of a motor vehicle, the property of Sanford Doug Neely, with the intent to commit a theft, on April 15, 2009, contrary to §810.02(1), Florida Statutes (R. 50), and by Information in Case No. 2009-0806CF52 with burglary of a motor vehicle, the property of Justin McKinney, with the intent to commit theft, on April 15, 2009, contrary to §810.02(1), Florida Statutes (R. 49).

amended this motion later to add that no mention should be made of the fact that Defendant and his co-defendant were in jail on an unrelated charge of robbery when they escaped. (R. 569-571). Defendant also filed a motion for severance of the counts charged in the Indictment. In particular, Defendant argued that he should be tried for the escape charge, in Count I, separately, and that he should be charged for grand theft, in Count II, separately. The events concerning these charged offenses in the Indictment were temporarily and physically separate from the other counts. (R. 499-500).

Prior to trial, the defense also objected to the consolidation of offenses for trial involving the two separate automobile burglaries. Defendant maintained that severance was appropriate to promote a fair determination of his guilt or innocence. Moreover, the defense argued that the charges in the Indictment were temporarily and physically separate from the case and from each other. (R. 493; R. 647-648). The defense also filed a memorandum on disputed sections of Defendant's police interview. The defense pointed out those sections of the statement which ought to be redacted. (R. 608-610; R. 698-700). One particular section dealt with Defendant having just been sentenced to 10 years prison. The defense pointed out that this was unduly prejudicial under §90.403, Florida Statutes. (R. 609; R. 700). The State filed a response to the motion on the disputed

sections. (R. 668-670). As to Defendant's ten-year sentence, the State argued that the evidence was relevant to show Defendant's motive for escaping. (R. 670).

On May 10, 2012, the trial court conducted a hearing on the pre-trial motions. Det. Mark Andrews testified on Defendant's motion *in limine*. (R. 1414-1432). Subsequently, Det. Doug Schwall testified on Defendant's motion to suppress. (R. 1452-1464). The parties presented arguments on the motion to suppress. (R. 1465-1477). The Court entertained argument on Defendant's motion to sever. (R. 1481-1497). The Court also considered argument on Defendant's motion *in limine* regarding other crimes evidence. (R. 1506-1514).[2] The Court, thereafter, entered an order denying Defendant's motion to sever offenses. (R. 684-686). The Court also entered an order denying Defendant's motion to suppress statement. (R. 687-689). Finally, the Court entered orders on the various motions *in limine*. (R. 690-692). The defense also filed numerous penalty phase motions.[3] The Court entered several orders denying Defendant's motions. (R. 340-349).[4]

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[2] The Court conducted a proceeding on the perpetuated testimony of Thomas Buongiorne. Ultimately, the video-tape of Mr Buongiorne's perpetuated testimony was played for the jury.

[3] These motions were: Memorandum of law and Argument concerning the unconstitutionality of Florida's death penalty under Ring v. Arizona (R. 158-185); Motion to Declare Florida's Death Penalty Unconstitutional (R. 186-201); Motion to Declare Florida's Death Penalty Unconstitutional because Section 921.141, Florida Statute, and the Standard Jury Instructions cast a heightened standard of persuasion on the Defendant to obtain a life sentence (R. 202-220); Motion to Declare Section 921.141(5)(h), Florida Statutes, Unconstitutional as written and as applied (R. 221-248); Motion to Declare Section 921.141(5)(d), Florida Statutes,

The Trial

Trial commenced in the cause on May 21, 2012. The court began voir dire. (R. 1592). The jury was selected and sworn. (R. 2439). The court gave the jury preliminary instructions. (R. 2439-2448; R. 714-720). The State presented an opening statement. (R. 2448-2468). Defendant's counsel thereafter presented opening statement. (R. 2469-2475). At trial, the State called numerous witnesses in its case-in-chief. Following testimony of DNA examiner Maria Lam, the State rested its case. (R. 3257).

Defendant presented his arguments on motions for judgments of acquittal. (R. 3258-3259). The court denied the motion. (R. 3260). The defense announced

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Unconstitutional as written and applied (R. 249-253); Motion to Declare Section 921.141(5)(e), Florida Statutes, Unconstitutional as written and applied (R. 254-260); Motion to Declare Section 921.141(5)(f), Florida Statutes, Unconstitutional as written and applied (R. 290-294); Motion to Declare Florida's Death Penalty and Section 921.141, Florida Statute, Unconstitutional (Faulty Appellate Review) (R. 295-325); Motion to Declare Section 921.141(1), Florida Statute, Unconstitutional and to Bar State's Use of Hearsay Evidence at Penalty Phase (R. 326-330; R. 331-335); Motion for Interrogatory Penalty Phase Verdict (R. 336-339); Renewed Motion to Declare Florida Statute 921.141 Unconstitutional per Ring v. Arizona (R. 394-489); Objections to Standard Jury Penalty Phase Jury Instructions (R. 510-539); Motion to Declare §921.141(7), Florida Statutes, Unconstitutional and for Pretrial Determination of Admissibility of all victim impact evidence under §§90.104(2), 90.105, 90.403, Florida Statutes or, alternatively, that victim impact evidence be presented only at a Spencer hearing (R. 814-823); Motion to Declare Section 921.141(5)(a), Florida Statutes, Unconstitutional as applied (R. 824-828).

[4] On May 10, 2012, the Court considered Defendant's renewed motion on Ring grounds, relying on the federal district court's decision in Evans v. McNeil. The Court ruled that it was bound by rulings of the Florida Supreme Court and the rulings of the United States Supreme Court. (R. 1520-1523).

it would not present any evidence. The court asked Defendant if he desired to testify and Defendant stated that he did not want to testify or call any witnesses. Defendant stated he was satisfied with the witnesses called. (R. 3160-3162; R. 3260-3261). The court conducted a charge conference. (R. 3141-3171). The defense rested its case. (R. 3265; R. 3266). Defendant's renewed motion for judgment of acquittal was denied. (R. 3265). Subsequently, counsel for the State presented closing argument. (R. 3267-3282). The defense then presented closing argument. (R. 3283-3290). Counsel for the State presented a rebuttal closing argument. (R. 3290-3302).

The court instructed the jury. (R. 3302-3357; R. 733-778). The jury retired to deliberate. (R. 3357). Thereafter, the court reconvened to consider the jury's verdicts. Defendant was found guilty on all counts as charged in the indictment and both informations. (R. 3364-3367; R. 728-732). The jury was polled. (R. 3367-3369). The court instructed the jury to return for the penalty phase. (R. 3369).

Penalty Phase

At the penalty phase, the Court gave the jury preliminary instructions. (R. 3386-3387). The State presented an opening statement. (R. 3387-3393). The defense presented its opening statement. (R. 3393-3398). The State called David Sanders, PCSD, who testified about comparing Defendant's fingerprints with the

conviction record . (R. 3398-3403). The State also called Randall Key, the victim's brother, who read a letter on behalf of the family in connection with victim impact. (R. 3407-3409). Thereafter, the State rested its case. (R. 3409). The defense called Dr. Harry Krop, a licensed psychologist. (R. 3410). After Dr. Krop's testimony, the defense called Donna Bailey, a mental health specialist at Suwanne Correctional Institution. (R. 3477). After Ms. Bailey's testimony, the Court conducted a charge conference on the penalty phase instructions. The defense reiterated its objections to some of the instructions. (R. 3493-3499). The defense called Jeffrey Fletcher, Defendant's brother (R. 3506), and Ricky Fletcher, Defendant's father. (R. 3522). Thereafter, the defense rested its case. (R. 3537). Defendant was questioned by the court about his decision not to testify. (R. 3538; R. 3545). The State called Dr. Gregory Prichard, a licensed psychologist, in rebuttal. (R. 3547). At the conclusion of Dr. Prichard's testimony, the State rested its rebuttal case. (R. 3625). After the jury was excused for the day, the Court denied Defendant's pending motion against the prior felony/sentence of imprisonment aggravating circumstance. (R. 3628-3629). The court completed the charge conference. The defense reiterated its constitutional objections to the instructions. The defense also objected to the giving of the financial gain and EHAC instructions. The Court overruled the defense objections. The defense also reiterated its objections to the verdict form on grounds that there needs to be a

unanimous finding for an aggravating circumstance. Additionally, the defense requested that the life recommendation precede the death recommendation on the verdict form. The Court denied the objection and the request. (R. 3630-3641).

The prosecution presented a penalty phase argument. (R. 3649-3670). The defense presented its penalty phase argument. (R. 3670-3690). The court instructed the jury. (R. 3690-3706; R. 832-841). After deliberations, the jury returned an advisory verdict recommending a death sentence by a vote of 8-4 as to Count 3. The jury was polled. (R. 3707-3711; R. 813). The court ordered a pre-sentence investigation report. (R. 3715-3716; R. 843-844).

The Spencer Hearing and Final Order

On July 25, 2012, the court conducted the final sentencing hearing, pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993). (R. 1387-1408). The State called Douglas Cruz, who read a victim impact statement from the victim's brother and nephew. (R. 1389-1393). Defendant read a prepared statement. (R. 1398-1404; R. 848-854). The State presented a sentencing memorandum. (R. 863-887). The defense presented a sentencing memorandum. (R. 888-905; R. 906-928).

On October 12, 2012, the Court issued its sentencing order. (R. 929-954).[5]

[5] The Court found four (4) aggravating circumstances: heinous, atrocious and cruel; financial gain; commission during a robbery; commission of offense by a person previously convicted of a felony and under sentence. (R. 935-939). The Court found the two aggravators of financial gain and commission during a robbery as one aggravating circumstance. (R. 937). The Court considered and

weighed Defendant's mitigating circumstances. The Court gave the statutory mitigating factor of age minimal weight. (R. 941). The Court gave little weight to the non-statutory mitigating factor that Defendant suffered from physical abuse from his alcoholic father (R. 942), moderate weight to the non-statutory mitigating factor that Defendant suffered from chronic addiction to drugs in the past (R. 943), little weight to the non-statutory mitigating factor that Defendant has been treated for and suffers from depression (R. 943), slight weight to the non-statutory mitigating factor that Defendant has been treated for post-traumatic stress disorder (R. 944), some weight to the non-statutory mitigating factor that Defendant previously witnessed his mother being physically abused by his father as a child (R. 944), little weight to the non-statutory mitigating factor that Defendant has attempted suicide in the past (R. 944-945), no weight to the non-statutory mitigating factor that Defendant has been treated in the past for bi-polar disorder (R. 945), little weight to the non-statutory mitigating factor that Defendant has responded well to counseling while at the Suwanne Correctional Institution (R. 946), very little weight to the non-statutory mitigating factor that Defendant had reported to law enforcement that he had been up all night before the escape consuming methamphetamines in the jail (R. 946-947), some weight to the non-statutory mitigating factor that Defendant obtained his GED while incarcerated (R. 947-948), some weight to the non-statutory mitigating factor that Defendant comes from a dysfunctional family (R. 948), little weight to the non-statutory mitigating factor that Defendant's mother died when he was 18 years of age and that he had a close relationship with her (R. 948), slight weight to the non-statutory mitigating factor that Defendant has artistic ability (R. 949), and, in conclusion, some weight to Defendant's statement of apology, some weight to Defendant's good behavior during trial, moderate weight to Defendant's cooperation with police, and great weight to Donnie Brown's sentence of life imprisonment. (R. 949-950). As to this last factor, the Court pointed out that the evidence suggested that Defendant was the leading offender in the case. (R. 950-951).

In sum, the court gave the jury verdict of 8-4 great weight. (R. 951). Additionally, the Court announced it had independently considered and weighed the mitigating circumstances against the aggravating circumstances. The Court ruled that the mitigating circumstances pale in comparison to the strength of the aggravating circumstances. (R. 952). The Court found that the aggravating circumstances greatly outweighed the mitigating circumstances. Moreover, the Court stated that even in the absence of the first two aggravating circumstances, the remaining aggravating circumstance, that the murder was especially heinous, atrocious or cruel, is so strong that it, standing alone, would far outweigh the mitigating circumstances. (R. 952).

The Court sentenced Defendant to death on Count III, to run consecutive to any active sentences he was serving. The Court also sentenced Defendant to 15 years on Count I (escape), 5 years on Count II (grand theft of a motor vehicle), 30 years on Count IV (home invasion robbery), 5 years on Count V (grand theft of a motor vehicle), 5 years on Count I of the consolidated information in Case No. CF09-806 (burglary of a conveyance), and 5 years on Count I of the consolidated information in Case No. CF09-807). (R. 952-953; R. 1009-1017; R. 3718-3725). The Court ordered that the sentences in Counts I, II, IV and V of the indictment to run consecutive to any active sentence Defendant was serving, and ordered the sentences in Case Nos. CF09-806 and CF09-807 to run consecutive to any active sentence Defendant was serving. Moreover, the Court ordered all sentences in Count I-V of the Indictment and Count I of the consolidated informations to run concurrent with each other. (R. 953; R. 1009-1017; R. 3718-3725).[6] The Court entered an order denying Defendant's motion for new trial. (R. 955-958).

Defendant filed a notice of appeal. (R. 1022). This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase

At trial, the State called Deputy Charles Word, Putnam County Sheriff's Department (PCSD), who testified that on April 14, 2009, he was working at the

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[6] A sentencing guidelines scoresheet was prepared. (R. 1006-1008).

Putnam County Jail. After he began his shift at 11:30 P.M., Word began checking the cells in B-pod. (R. 2476-2480). Deputy Word explained that fifteen cells are included in each cellblock. Each cellblock contains 25 to 30 inmates. Word knew inmates Timothy Fletcher and Doni Brown were in the cell 76 of the cellblock. During his check, Word saw both Fletcher and Brown. (R. 2483-2487). Word identified photographs from a video. Both Fletcher and Brown were in one of the photographs. (R. 2490-2491). Early the next morning, Officer Leland Evans conducted a cell check. Meanwhile, Word prepared the inmates' breakfast. As Word was conducting his own inmate count, he did not see either Fletcher or Brown. He entered the cell and found that the linen and stuffing were shaped as bodies. He noticed a hole in the window. He also saw an apparent exit route. (R. 2493-2500).

Deputy Tommy Underwood, PCSD, testified that he processed cell 76. He noticed there was damage to the commode-sink combination. There was a hole on the window screen. He also saw a jack handle on the floor. Underwood photographed the cell. Underwood described the photographs to the jury. He also pointed out that there was a razor blade. The jack handle was introduced into evidence. (R. 2516-2526). Underwood testified that the commode-sink combination had been pulled out from the wall. Underwood described and reviewed photographs of the damage done to the wall area. (R. 2527-2529).

Underwood inspected the outside of the building. He found another piece of a jack handle outside the cell. This piece was introduced into evidence. (R. 2530-2532).

Officer Steven Faulkner, PCSD, testified that in April, 2009, he worked as a bailiff transporting inmates to court. Faulkner transported Timothy Fletcher to court on April 14, 2009 from the Putnam County Jail at around 7:30 or 8 in the morning. (R. 2533-2536). Faulkner described the van he drove the inmates in between the jail and the courthouse. (R. 2536-2538). Additionally, Faulkner testified that he transported Defendant back to the jail from the courthouse. He reviewed a video tape of the sally port area where inmates are unloaded in the transportation process. Faulkner described certain policies and procedures he needed to follow when transporting inmates, including the separation of juveniles from adults and separation of male and female inmates. (R. 2539-2542). Faulkner recalled Defendant telling him that he would rather ride in the back of the van. (R. 2550). After he unloaded Defendant, Faulkner did not see anything unusual. (R. 2554-2555). Faulkner described Defendant wearing a plastic boot or case on his left leg and a tennis shoe on his right leg. (R. 2555). Faulkner later inspected his van and did not see anything out of place. (R. 2556). The following morning, Faulkner learned that Defendant and Doni Brown had escaped from the Putnam County Jail. (R. 2556-2557). At that point, Faulkner checked his van to see if his

jack was there. He noticed it was gone. (R. 2558-2559). Faulkner identified the jack in evidence as just like the one kept in the van. (R. 2559).

Sergeant Randy Hayes, PCSD, testified that he worked as a canine officer. Sgt. Hayes stated that in April, 2009, he and his partner Zeck, a German shepherd, were ordered to track a possible suspect. Hayes was made aware that there were two individuals who had escaped from jail. (R. 2561-2565). Hayes took Zeck and began working in the employee parking lot next to the jail. Another officer indicated he had found a footwear impression by a ditch. Hayes proceeded to the ditch area. Zeck is trained to smell for human-being scent. He picked up a scent and started tracking toward State Road 17. The track terminated just south of the Academy of Rising Stars. (R. 2567-2570).

Sergeant Mike Pinner, PCSD, testified that he worked as the assistant shift commander at the jail. In April, 2009, Sgt. Pinner was a line officer working the cellblock pods. Pinner recalled inmates Timothy Fletcher and Doni Brown. On the morning of April 15, 2009, Pinner was working the booking desk when the officers at the booking desk got a call. Pinner and another officer were directed to go to one of the pods due to the fact that two inmates had escaped. When they reached cell 76, the officers noticed blankets and inner mattresses in shape of bodies. The steel mesh on the window was pulled back. Pinner looked at the toilet and saw a small light. He kicked the toilet and it fell off the wall. Pinner

explained that on the outside of the cell there was a door which allowed access for plumbing work. The plumbing chase is big enough for someone to crawl through. (R. 2580-2589). Sgt. Pinner testified that he and the others procured their weapons and proceeded to secure the perimeter of the jail. The officers walked over to the area of the plumbing chase door on the outside of cell 76. The door was pried open. It was determined that no one was inside. (R. 2590-2592). Pinner described the perimeter fence around the facility, which included barbed wire atop the fence. The fence was 15 to 20 feet tall. Outside of that there is an outside fence. (R. 2592-2594). Pinner noticed an area in the fence which was pulled up from the bottom. He saw a long jack handle. In addition, two footprints were located on the other side of the fence. (R. 2595). Pinner estimated that the plumbing chase door was about five feet from the pulled up fence area. (R. 2596). Pinner proceeded to the area outside the jail perimeter. At a ditch near a cow pasture, Pinner found a boot print. Highway 17 is directly to the right of the ditch. (R. 2597-2598). Pinner believed the mark was made by a cast because inmates are not issued boots. The print appeared consistent with the cast that Defendant Fletcher was wearing. (R. 2598-2599). Pinner remained on the scene of the boot print until Deputy Hayes arrived with his dog. (R. 2599). Pinner described various photographs taken of the jail surroundings. (R. 2600-2610). Pinner testified that he reviewed the video footage of the cameras located at the jail. He pointed out that Defendant is seen on

the morning of the 14th in one of the holding cells. (R. 2611-2613). The video was played for the jury. (R. 2614). Additionally, a video of Pod B was played for the jury. (R. 2615-2616). The video depicted both Defendant and Doni Brown during the afternoon of the 14th. (R. 2617).

Justin McKinney testified that in April, 2009, he put up for sale his tan 1997 GMC pickup truck. He parked the truck on Highway 17 at a business called the Academy of Rising Stars. (R. 2619-2620). He placed a for-sale sign on the truck. (R. 2622). On April 15th, McKinney received a call from the sheriff's office that his truck had been broken into. McKinney went to the scene and noticed that the passenger side rear window was busted out. The glass was inside the vehicle. He also noticed that the steering column and ignition were tampered with. (R. 2622-2624).

Sanford Douglas Neely testified that on April 15, 2009, he lived directly across from the Putnam County Jail. That morning, he noticed sheriff's cars on Highway 17. At the time, Neely owned a blue 1995 GMC Safari van. It was parked in the driveway beside his house. Neely noticed that the key switch was broken off and Neely reported this damage to the police. Neely also noticed some shoe prints in his driveway. The prints led from Highway 17 to his business. (R. 2625-2631). Neely identified several photographs of his shop, his van and his

driveway (R. 2632-2634) and he also identified the shoeprints he saw that morning. (R. 2635).

William Meetze, a former public service assistant with the PCSD, testified that in April, 2009, he was working with Detective Dan Fleming, the lead crime-scene investigator. On April 15th, Meetze assisted Fleming in processing a business on Highway 17 in Palatka. This business was directly across from the jail. Fleming took some photographs. There were a couple of muddy footprints outside of the business. (R. 2637-2642).

Todd Louis testified that he owns a tire store in Palatka on Highway 17. Louis stated he could see the jail from his business. On April 15, 2009, Louis arrived at his business and noticed that the gates were laying down in the driveway and the fence was pulled away. It appeared that someone had rammed a vehicle through the gate. Louis noticed officers nearby and asked them to come to his place. (R. 2643-2647). Louis described certain photographs depicting his business. (R. 2648-2649). Louis noticed that his F150 Ford truck was missing. Louis also testified that his 1979 Ranchero appeared to have been tampered with. (R. 2650-2651). Louis noticed some acceleration marks in front of the fence. It appeared that someone was trying to gather momentum to get through the gate. (R. 2655-2656).

Det. Lynn Nicely, a warrants officer with the PCSD on April 15, 2009, testified that she was called to assist in the search for two inmates who had escaped from the jail. Det. Nicely attempted to make contact with Helen Googe, a family member of Defendant Fletcher. The police had found her vehicle, a Lincoln Town Car, in another county. Nicely proceeded to Googe's residence located on 314 Bardin Road in Putnam County. (R. 2657-2659). Nicely noticed an older model pickup truck parked in one of the carports. The detective knocked on the door, but there was no answer. She walked around the property and knocked on the windows, which were all curtained. She saw a lot of cats in an enclosed in-law suite. The detective noted some tire impressions in the front yard leading to the back of the house and to another open field. (R. 2560-2561). Two other officers, Sgt. Byers and Det. Foreman, eventually joined Det. Nicely at the residence. They walked around the property and continued attempts to make contact with Ms. Googe. Sergeant Byers was directed to make entry into the house. The three officers entered the house through the kitchen area. Byers rounded to the right of the house, Foreman went forward and Nicely remained in the center for security reasons. Eventually, Nicely entered the living room area and saw Ms. Googe, facedown on the floor, in front of a fireplace. (R. 2562-2665). Nicely testified she noticed that Ms. Googe's left arm was bent behind her back. Sgt. Byers checked for a pulse. There was no pulse. The officers cleared the house to make sure there

were no other victims and to check for possible suspects. The house was secured as a crime scene. (R. 2665-2667). Nicely was informed that a St. Johns County Sheriff's Office helicopter possibly located the stolen red and white truck in a nearby wooded area just north of the residence. The truck was found about ¾ of a mile north of the residence, about 200 yards off a dirt road. Nicely used an aerial map to describe the area for jurors. (R. 2667-2670). Nicely identified the stolen truck. (R. 2671).

Det. Mark Andrews, Clay County Sheriff's Office, testified that in April, 2009, he was working as a patrol deputy. Andrews stated that at around 6 A.M. on April 15th, he ended his shift and headed to the police station to pick up his personal vehicle. He picked up his car and headed home. At around 6:40 or 6:50 A.M., Andrews noticed a gold Lincoln with a Putnam County tag pass him. Andrews, who was aware of a BOLO for two escaped inmates from the Putnam County Jail, attempted to get a good look at the occupants of the Lincoln. Andrews wrote down the tag number on his hand. (R. 2678-2684). Det. Andrews testified that the passenger in the Lincoln was wearing an Atlanta Braves baseball hat. Andrews proceeded home. (R. 2685-2686). After a short nap, Andrews entered the tag he had written on his hand into the database on his computer. He ascertained the registered owner of the car was Helen Googe. Andrews knew Googe's husband, Don Googe, from the community and he also Don Googe's

grandson, Timothy Fletcher. At that point, Andrews realized that one of the escaped prisoners was Fletcher. Andrews immediately contacted his sergeant and the Putnam County Sheriff's Office. (R. 2687-2689). Andrews identified a photograph of the vehicle he saw on that day. (R. 2690). Later the same day, Andrews saw a television report on the escaped inmates and he recognized Doni Brown as the passenger he had seen. (R. 2691-2692).

Douglas Crews, first cousin of Helen Googe, testified that Googe previously worked at the Putnam County Tax Collector's Office for 35 years. Crews testified that Helen Googe was married to Don Googe for about 10 to 12 years. Timothy Fletcher was Don's grandson. At one point, Helen and Don Googe separated. (R. 2695-2698). Crews testified that he lived about ¼ mile or less from Googe's residence. Crews knew that Helen Googe owned a car. (R. 2699-2700).

Joanna Curtis testified that on April 15, 2009, she woke up when Doni Brown, her nephew, knocked on her door. Curtis, who lives in Clay County on the west side of Jacksonville, stated she brought Brown into her kitchen where Brown used her computer. Brown was apparently using MapQuest. (R. 2702-2704). Brown wrote down some information. Brown remained inside the house for about 10 minutes. Curtis followed him to the door and watched him get into a tan Cadillac. Brown got in the passenger side of the car. Curtis did not see any injuries on Brown. (R. 2704-2706).

Willie Graves testified that he lives in Tompkinsville, Kentucky. Mr. Graves stated that Defendant Fletcher is his wife's nephew. On April 15, 2009, Graves got a call from Fletcher asking directions to his house. Fletcher was about 5 miles from his house. Graves called local law enforcement. (R. 2709-2713). Eventually, Fletcher showed up. Graves's wife had arrived home a few minutes before Fletcher's arrival. When Fletcher arrived he remained in the car. He began speaking with Graves's wife. Fletcher was sitting in the driver's side. Graves was on the phone with the authorities. Fletcher asked him if the authorities were on their way. At that point, Fletcher backed out and left the area at a high rate of speed. (R. 2713-2716).

Jerry Pitcock, a former deputy sheriff with Monroe County, Kentucky, testified that on April 15, 2009, he was working with law enforcement. (R. 2720-2721). Pitcock stated that law enforcement was informed that two escaped inmates were in the area and he joined the search. The police were looking for a beige-colored Lincoln with a Florida license tag. Eventually, Pitcock heard through the police radio that the car was found. Pitcock drove over to where the car had been found. There were no occupants. The car was impounded. The vehicle had been left in a rural, remote part of Monroe County. It was about four miles from the Graves residence. (R. 2723-2727).

Dr. Predrag Bulic, Chief Medical Examiner for St. Johns, Putnam and Flagler Counties, testified that he was asked to review an autopsy performed on an individual by the name of Helen Googe. The autopsy occurred on April 16, 2009. (R. 2750). Dr. Bulic stated that Dr. Terrence Steiner, the prior chief medical examiner, conducted the autopsy. (R. 2750-2751). Dr. Bulic reviewed the photographs from the scene, the narratives of investigators, Dr. Steiner's autopsy report and autopsy photographs. There also was a toxicology report and a DNA analysis performed by FDLE. (R. 2751). After his review, Dr. Bulic was able to reach the conclusion that Helen Googe's death was asphyxia due to manual strangulation. (R. 2753). Dr. Bulic explained that asphyxia is a broad diagnosis which means cutting off the air supply and blood supply to the brain. (R. 2753). Dr. Bulic described Googe's external injuries as follows: blunt force injuries to the face, contusion to the right side of the scalp, fingerprint contusions on the neck area under the chin, fingertip contusions on the right arm, skin slippage or abrasion on the right arm, abrasions on the knees. (R. 2755). Dr. Bulic described Googe's internal injuries as follows: hemorrhages in the neck area, and fractured cartilage of the larynx or voice box with contusions and hemorrhages. (R. 2755). Dr. Bulic used photographs from the autopsy to describe the injuries he mentioned. (R. 2758-2768).[7] Dr. Bulic stated that the injuries he described occurred within the same

[7] Dr. Bulic concluded that the bruising indicated that the victim was manually

time frame. He could not state the order of the injuries. Dr. Bulic was able to state, however, that Googe was alive when the injuries occurred because there were hemorrhages, indicating blood flow. (R. 2768-2770). With regard to the strangulation injuries, Dr. Bulic testified that in his opinion the victim was conscious since there was no significant trauma to the head. The blunt force injuries were not to such an extent that would cause loss of consciousness. In particular, Dr. Bulic noted that the injury to the left eyelid was superficial and the injury to the right side of the scalp did not have a corresponding fracture of the bone. There were no hemorrhages on top of the brain which would cause someone to lose consciousness. (R. 2770-2771). According to Dr. Bulic, a person on average would lose consciousness about 10 seconds when dying of strangulation, depending on the musculature of the neck and on the pressure applied. (R. 2772-2773). If the pressure is applied continuously, a person would die in about 2 or 3 minutes, or up to 5 minutes. (R. 2773-2774). Dr. Bulic testified that a person undergoing strangulation would be highly alerted, and suffer anxiety and apprehension of impending doom. (R. 2774). Additionally, the person would feel pain in the area of the neck where the pressure is applied. (R. 2775).[8] In

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held. (R. 2765; R. 2767; R. 2781).

[8] Dr. Bulic acknowledged that Dr. Steiner, who conducted the autopsy, had stated on deposition that he could not say or give an opinion as to whether Ms. Googe was conscious at the time she was strangled. He disagreed with Dr. Steiner. (R. 2782-2783). Dr. Bulic admitted that at his own deposition he had stated that he

conclusion, Dr. Bulic reached the conclusion that Googe was the victim of homicide. (R. 2775-2776).

John Holmquist, crime laboratory analyst for the Florida Department of Law Enforcement (FDLE), testified that on April 15, 2009, he responded to the residence at 315 Bardin Road in Putnam County. Holmquist stated that there were numerous law enforcement officers at the scene. Holmquist conducted a walk-through of the premises. He took measurements and prepared a diagram. (R. 2789-2792). Holmquist explained that the walk-through is done to ascertain what the police had seen and to give the crime scene technicians a layout of the residence and a chance to see any disturbances. (R. 2795). Holmquist took photographs and described the premises for the jury. (R. 2796-2808).[9] Holmquist described the body of Ms. Googe. He noted that her arm was bent at the elbow on her hand was on her back. Just above her wrist, there appeared to be some type of impression. (R. 2808-2809).[10] Holmquist also pointed out that there were a couple of long knives, a sword and a revolver on the wall. (R. 2809). There were pegs above the revolver with nothing hanging on them. (R. 2811). Holmquist recovered eyeglass

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could not rule out that Googe was unconscious at the time of the strangulation. (R. 2784-2785). He explained that he could not rule it out. There was a small possibility that Googe was not conscious at the time. (R. 2787).

[9] Holmquist described damage to the exterior firewood door which leads into the house. Holmquist processed the metal door for fingerprints but not for DNA. He was not successful in lifting any latent prints. (R. 2827).

[10] Holmquist swabbed Googe's neck for DNA. (R. 2833).

pieces and impounded them into evidence. (R. 2812-2813).[11] Holmquist also processed a truck found near the residence. (R. 2814). Holmquist attended Googe's autopsy. He took photographs at the autopsy. (R. 2814). He also collected fingernail scrapings from both of her hands, fingerprint standards and a DNA standard. (R. 2815). Subsequently, Holmquist photographed and processed a Lincoln Town Car which belonged to Ms. Googe. (R. 2815-2819). He also collected certain items from the car. (R. 2821-2824).

Det. Doug Schwall, PCSD, testified that he was working as a detective on April 15, 2009. He responded to the residence at 315 Bardin Road. Schwall knew that Defendant was the grandson of Donald Googe, Helen Googe's former husband. When he arrived at the residence, Schwall was provided with a credit-card statement found inside the home. Schwall contacted the customer-service line for the credit-card company to obtain information concerning possible usage. Subsequently, Schwall obtained a subpoena to obtain additional information fro transactions made on April 15, 2009. According to the records which were obtained, the credit-card was used in Middleberg, Florida and Cordele, Georgia.

[11] According to Holmquist, there were no areas of the house which yielded latent prints. (R. 2828-2829). In addition to the eyeglass pieces, Holmquist collected pliers, a jacket from a table, a box of matches from the counter bar, a Winchester long gun, a white blanket from bathroom counter sink, a Daisy pellet gun, two plastic bags from the floor, a jewelry box, a phone base from the bedroom floor, wires from the chain belonging to the phone base, and a phone handset. (R. 2635-2636). Many of these items were never submitted for DNA analysis. (R. 2837-2838).

(R. 2853-2861). Det. Schwall testified that he received information that Ms. Googe's vehicle was found in Tompkinsville, Kentucky. (R. 2862). On April 18, 2009, Schwall received information that Defendant Fletcher and Doni Brown had returned to Putnam County. Eventually, Schwall and other investigators responded to Huntington Shortcut Road near the Volusia County line. Both Fletcher and Brown were arrested north of Huntington Road.[12] They were transported to the sheriff's office. Defendant was placed in an interview room. Schwall conducted an interview of Defendant. (R. 2863-2865).

Defendant's interview was recorded. Prior to his statement, Defendant was read his *Miranda* rights. (R. 2866-2867). Schwall identified the videotaped statement. (R. 2868). The videotape, along with a transcript of the statement, was published to the jury. (R. 2870).

In the recording, Defendant admitted taking the car jack from the transport van on April 2nd and the jack handle on April 14th. (R. 2898; R. 3670). He first tried to pry open the cell window. (R. 2896). His cellmate, Doni Brown, suggested going behind the toilet. (R. 2899). They successfully jacked the toilet off the wall. (R. 2900; R. 3080). Defendant held the toilet while Brown crawled behind to get the outside door opened. (R. 2904). Once outside, Defendant and Brown realized the bottom of the fence was loose and they crawled underneath it. (R. 2907). They

[12] When Defendant was taken into custody he was wearing a walking boot on one foot and a blue nylon-type shoe with a white sole on the other. (R. 3121).

climbed over the second fence and went over the gate. (R. 2907). Defendant and Brown ran out onto a field. (R. 2909). They tried to steal two vehicles. Finally, they got into a truck. (R. 2910; R. 3085). The truck had keys in it. (R. 2914). They drove to Bardin Road in order to get some money. (R. 2916-2917).

His step-grandmother, Helen, was home. She let them in. (R. 2918). She did not know they had escaped from jail. (R. 2919). They decided to rob her. (R. 2921-2922). Defendant knew she kept a lot of money in a safe. (R. 2923). Brown made her open the safe in the back room. (R. 2926). Helen and Brown began arguing. (R. 2928). They exchanged blows. (R. 2928-2929; R. 2933). Brown grabbed her by the neck and placed her in a choke hold. (R. 2933). Brown began wrenching her up. (R. 2934). Helen was kicking, clawing and screaming. (R. 2935). In the meantime, Defendant went into Helen's bedroom and took some jewelry. (R. 2936). Brown brought Helen into the room. (R. 2936). Brown had taken a handgun from the wall. (R. 2937). Helen was shaking. (R. 2938). Defendant got tired of the arguing and smacked Helen on top of her head. (R. 2938). Helen said she had to go to the bathroom and then she struck Brown with a hairdryer. She tried to slam the door shut. Brown pinned her against the bed. (R. 2940). Helen opened the safe. (R. 2942). When Defendant went to check on them, he saw they were arguing again. (R. 2943). There was no money in the safe. (R. 2943-2944). Defendant got angry. (R. 2944). He got $37 out of her purse. (R.

2945). Her wallet had a credit card. (R. 2945). Defendant maintained that "I did not kill Helen." (R. 2947). According to Defendant, Brown told him Helen had a heart attack while they were arguing. (R. 2947). Defendant saw her lying on her stomach. (R. 2949).

In the statement, Defendant stated he took Helen's Lincoln vehicle and left. (R. 2956; R. 3092). Brown took the truck and left it on a nearby dirt road. (R. 2957; R. 3092). They drove in the Lincoln toward Middleberg, Florida. (R. 2960). They proceeded to Jacksonville. (R. 2961). They stopped for gas in Georgia. (R. 2963). They took I-10 to I-75 and proceeded north. (R. 2964). They traveled to Tennessee. (R. 2966). They sold Helen's jewelry to a jeweler in Tennessee. (R. 2967). They traveled to Defendant's aunt's house in Tompkinsville, Kentucky. (R. 2969). His uncle called the police and they fled. (R. 2970).[13] Brown threw away Helen's gun when the police started chasing them. (R. 2974; R. 3114-3115). They decided to return to Florida because that was the only place they knew where people had money. (R. 2976). They found $40 inside a car. (R. 2983-2984). They got back to Florida and drove to Putnam County. (R. 2984-2985). They were planning to get some money. (R. 2987).

At this point in the statement, Defendant asked the detectives what they were going to charge him with. (R. 2990). Defendant asked if he was going to be

[13] Defendant went to Kentucky in the hope that his family would put him up. (R. 3096).

charged with murder. He was told it was possible. (R. 2990). Defendant maintained: "I didn't kill her." (R. 2991). After the detectives mentioned that Defendant's DNA could be found in Helen's fingernail scrapings, Defendant said he helped hold Helen down. (R. 2995). Thereafter, Defendant provided a different version of events. He stated that Helen did not let them in. (R. 2998). Rather, they got in the house by going through the chimney door. (R. 3006; R. 3086). They changed clothes first. (R. 3007). Defendant gave Brown the gun and told him to wake Helen up. (R. 3007). Defendant tied a shirt around his face so Helen would not recognize him. (R. 3009; R. 3086). Brown put on an Atlanta Braves hat. (R. 3010). Brown told Helen: "Wake up, lady." (R. 3012). Helen started screaming, saying: "I'm frightened." (R. 3013; R. 3022; R. 3089). Brown asked Defendant to step into the bedroom, saying: "Come here, John." (R. 3014). Defendant pushed Helen down on the bed to try and tie her hands with a phone cord. (R. 3014-3015). Brown assured Helen that nothing would happen to her if she cooperated. (R. 3015). Defendant tied up Helen's hands. (R. 3017; R. 3023). They had already checked out the area where the safe was located. (R. 3018). Their original plan was to tie Helen up and then call later to have someone check in on her. (R. 3019). Helen said she didn't have any money. (R. 3024). She sat up in the bed. (R. 3024). Her hands came untied. (R. 3025). Brown struck her in the head with the gun. (R. 3025). Defendant pushed her down and told her to listen. (R. 3025). They

demanded the PIN number to her credit-card, but she said she didn't have one. (R. 3026). Defendant already had the credit-card. (R. 3027). Helen said she needed her glasses and jumped out of the bed, but Brown pushed her back. (R. 3031). Brown had his hands close to her neck. (R. 3032). He had one hand on her neck and the other hand on her chest. (R. 3033). Helen was kicking her legs. (R. 3034). Defendant struck her on her leg with the gun. (R. 3034). She was taken to the safe and she asked for her glasses. She then tried to use the bathroom. (R. 3034). Brown told Defendant that Helen hit him with a hairdryer. (R. 3035). She was fighting and kicking. (R. 3035). Brown had her pinned on the bed again with a pillow over her face. (R. 3037). They took her back to the safe and she opened it. She pulled out some paperwork. (R. 3038). They took everything from the safe, including what appeared to be a check for $789,000.00. (R. 3039-3040). Helen got up and Brown got on top of her and told Defendant he was going to kill her. (R. 3041). Brown tried to choke her. (R. 3042). Defendant smacked Helen a few times as she was fighting. (R. 3042). Brown continued to choke her. (R. 3044). Defendant did nothing to stop it. (R. 3045). At one point, Defendant grabbed Helen around the neck. (R. 3048). She clawed at him. (R. 3038). She scratched him once. (R. 3048-3049). Defendant put her on the ground. (R. 3049). Defendant smacked her because she scratched him. (R. 3050).[14] Defendant maintained: "I

[14] Det. Schwall testified that he saw scratches on Defendant's arms and hands.

wasn't going to kill her." (R. 3051). Brown got on top of her and began choking her as Helen lay on her back. (R. 3053). Brown had his knees on her elbows. (R. 3054). Helen started kicking her legs and Defendant held them down. (R. 3055). Brown kept choking her for about one minute. (R. 3056-3057). Eventually, Helen quit fighting. (R. 3058). Defendant left to get jewelry and when he returned Brown was still choking her. (R. 3058). Defendant heard Helen "snoring" and Brown let her go. (R. 3059). Helen's eyes were closed. (R. 3061). Brown went to the kitchen and returned with a Ziplock bag. He put it over Helen's head and tied a phone cord around her neck. (R. 3062). The bag fogged up. (R. 3062-3063). Brown later told Defendant she was dead. (R. 3064).[15] Brown took the bag off and asked Defendant to help him put her in the bed. (R. 3064). At one point, Brown tried to break Helen's neck. (R. 3067-3068).[16]

Det. David Sanders, PCSD, testified that on April 18, 2009, he was asked to travel to Georgia and try and locate certain items taken from Ms. Googe's residence. He traveled on I-75 to Pinehurst, Georgia. He located numerous items spread out in the water and began photographing them. He retrieved some of the

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Photographs of Defendant Fletcher's scratches on his arms and hands were also taken. (R. 3118-3120).

[15] In the statement, Defendant maintained that Helen never called out his name. However, she glanced at his tattoos and looked at him "funny." (R. 3093).

[16] In his statement, Defendant said he had last seen Helen a few months before. (R. 3089-3091). The last time he called her she accused him of doing his "grandpa wrong" and cussed him out. (R. 3091-3092).

items. He located a credit card belonging to Ms. Googe. He returned to Florida. Sanders collected what appeared to be jail-issued clothing as well as some papers from Ms. Googe's residence, including life insurance policies and social security information. He also collected a birth certificate for Ms. Googe. (R. 3125-3134).

The Court permitted the playing of the video recording of Thomas Buongiorne, who had provided perpetuated testimony. Buongiorne, a footwear and tire-track examiner with FDLE, testified that he received various items of evidence from the PCSD for purposes of analysis. In particular, Buongiorne received two compact discs from the crime scene, an orthopedic walking boot stated to be from Fletcher and an additional right canvas shoe. (R. 3190-3192). Buongiorne reviewed the images on the compact discs for comparison purposes with the submitted shoes. He prepared two-dimensional standards using ink on the bottom of the shoes. Three-dimensional standards were prepared by stepping in a sandbox and photographing the image for comparative purposes. (R. 3194-3196). Buongiorne proceeded to examine class and individual characteristics. Class characteristics are placed by the manufacturer, such as tread design and the size and shape of the shoe. Individual or wear characteristics are created by an individual's use of the shoe. Moreover, individual characteristics could include foreign substances on the shoe. Based on his examination, Buongiorne concluded that the left footwear impression was definitely made by the walking boot based on

tread design, physical size, shape, wear and individual characteristics. The remaining images had a similar tread design and shape to the right shoe of Mr. Fletcher. (R. 3196-3199). Buongiorne pointed out that the boot itself had identical class characteristics. Additionally, there was a lot of damage to the bottom of the walking boot which reproduced in the impressions found at the crime scene. (R. 3201). Buongiorne testified that Fletcher's right shoe yielded class, but not sufficient individual, characteristics. (R. 3202-3203). Buongiorne did not receive any tire for tire impression comparisons. (R. 3205).

Allison Harms, crime laboratory analyst, FDLE, testified that she had worked as a latent print examiner for eleven years. In May, 2009, Harms was asked to analyze several items for the presence of latent prints in the investigation of the murder of Helen Googe. She was provided the standards for Helen Googe, Timothy Fletcher and Doni Brown. (R. 3213-3216). Harms analyzed a Mountain Dew bottle, found in the right rear floorboard of a Lincoln Town Car, and found one latent matching Doni Brown. (R. 3217-3219). Harms also analyzed an AARP Road and Tow Membership Handbook and Winn-Dixie Bag. The book and bag were found in the Lincoln Town Car. Harms identified two latents from the book and they were matched to Doni Brown. Harms identified two latents from the bag and they matched to Brown. (R. 3220-3222). Harms also analyzed a piece of paper with handwritten directions found in the Lincoln. Harms identified two latents

which matched Brown. Two palm prints matched Brown. (R. 3222-3223). Harms found no latents belonging to Defendant Fletcher. (R. 3223). Harms also received numerous other items for analysis. These items were: a matchbook, a .22 caliber air gun, two plastic bags, a large wooden jewelry box, three pieces of paper, an envelope, a plastic gouge, a black cordless phone handset, vice grips, nail clippers, a bible box, additional pieces of paper, a piece of sandpaper, a book, a four-page receipt, a pamphlet, three receipts, a pharmacy bag receipt, two paper wrappers, four plastic bags, a piece of plastic wrapper, a sticker, a folder, a plastic cup, a piece of paper wrap, another Mountain Dew bottle and eight other latent cards. Harms did not find Defendant's prints. (R. 3224-3225).

Maria Lam, forensic technologist with FDLE, testified that in 2009 she was assigned to conduct DNA testing on a number of items seized in this case. Ms. Lam described the process she used for the PCR-STR testing. (R. 3230-3231). Lam explained that she takes certain precautions to make sure there is no contamination of items. (R. 3232). In order to compare DNA profiles, Lam needs a profile from a questioned sample and a standard from a particular person. In this case, she received standards from Helen Googe, Defendant Fletcher and Doni Brown. (R. 3233-3234). Lam received 3 swabs from a Lincoln Town Car. She was able to get results matching Defendant Fletcher from the swab taken from the headlight switch and interior strap handle. Based on statistical calculations, Lam

determined the frequency at one in 490 trillion Caucasians, one in 13 quadrillion African Americans and 1.1 quadrillion Southeastern Hispanics. (R. 3235-3238). Additionally, Lam analyzed a Mountain Dew bottle from the Lincoln Town Car and found a mixed DNA profile of at least two persons. No determination could be made if Defendant Fletcher was a contributor. (R. 3238-3239). On a second Mountain Dew bottle, Lam found another mixture. Defendant Fletcher is included as a possible contributor. (R. 3239-3240). Moreover, Lam analyzed fingernail scrapings taken from the autopsy of Helen Googe. Lam found a partial DNA profile from the left nail scrapings which matched Defendant's profile. (R. 3240-3241). Her population frequency calculation was one in 260 million Caucasians. (R. 3245). Lam explained that Defendant matched at two of 13 loci and was included in the remaining areas of the DNA. (R. 3247). Lam did not analyze another item of evidence labeled fingernail clippings from Helen Googe. Lam assumed that if the clippings were scrapped first, then they would be in the scrapings which were submitted. She did not do any DNA analysis on the clippings. (R. 3249-3250). Lam did not analyze other items submitted including: a pair of pliers, a Winchester long gun, and a phone base. (R. 3251-3253). Lam could not date the DNA. (R. 3256). She was not able to detect any foreign DNA from a swab taken from Helen Googe's neck. (R. 3256-3257).

Penalty Phase

At the beginning of the penalty phase, the Court considered the admissibility of victim impact evidence and the extent of such evidence. The defense maintained that no victim impact evidence be admitted, but rather, be deferred until the *Spencer* Hearing. (R. 3375-3376). The Court directed the State to pick one letter from the family and have it read to the jury. (R. 3378-3379).

After opening statements, the State called Det. David Sanders, PCSD, who testified about comparing Defendant's fingerprints with the conviction record. Sanders compared Defendant's standard prints to the conviction record. (R. 3398-3403). The State also called Randall Key, the victim's brother, who read a letter on behalf of the family in connection with victim impact. (R. 3407-3409). Thereafter, the State rested its case. (R. 3409).

The defense called Dr. Harry Krop, a licensed psychologist. Dr. Krop testified about his credentials. (R. 3410-3412). Dr. Krop first met with Defendant Fletcher on December 11, 2009 at the Clay County Jail. His assistant met Defendant on December 16, 2009 for testing and evaluation. Dr. Krop met Defendant again on May 19, 2012 and the previous night. (R. 3412-3413). Dr. Krop stated he reviewed numerous other items, including depositions, statements, medical records, police reports and jail records. He also reviewed a 2007 evaluation by Putnam Behavioral Healthcare. (R. 3414-3415). Based on his

review, Krop testified that Defendant had suffered a number of head injuries. He drank a lot and used a lot of recreational drugs. (R. 3416). Additionally, Defendant from a fairly early age had impulse control problems. The neurological testing showed that Defendant had an average IQ, functioning in the top 40 percent of the population. He was an underachiever in school. (R. 3416).[17] Krop did not see any evidence of brain damage. (R. 3417).[18] Based on his review and evaluation, Krop concluded that Defendant had prior symptoms of bipolar disorder, a significant mood disorder manifested by sudden mood changes, irritability, easy frustration and sometimes acting out. (R. 3418). Additionally, Krop diagnosed him with post-traumatic stress disorder in the past. (R. 3419).

Presently, Defendant has a diagnosis of polysubstance dependence, from which he has suffered since he was 11 or 12 years of age. At that age, Defendant began drinking and using marijuana and many other drugs, including cocaine and meth, as well as prescription drugs. (R. 3419-3420). Krop testified that Defendant also has a history of chronic insomnia and has depressive disorder. He pointed out that Defendant's use of drugs and alcohol was his method of self-medicating. According to Krop, Defendant's depression stemmed from his family environment and things he experienced in his family. (R. 3420). Dr. Krop testified that

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[17] Defendant was administered the MMPI. The results were invalid. Krop could not state the exact reason for invalid results. (R. 3443-3444). Because the results were invalid, the MMPI test was not interpreted. (R. 3446).

[18] There was no evidence of malingering. (R. 3447).

Defendant also met the criteria for antisocial personality disorder, which is often seen in persons who get into trouble at a relatively early age. (R. 3421).[19]

Dr. Krop testified that Defendant got into trouble at school. He had suspensions in school and suffered behavioral outbursts in school. He started getting into the criminal system in his adolescent years. When he was 11 or 12, Defendant was using prescribed medication for depression and was seen by a psychiatrist because of depression. His adjustment issues were related to family difficulties. He was prescribed psychotropic medications when he was 11. This medication was Prozac. (R. 3423).[20] Defendant did not take the medication for long because, apparently, Defendant's father was unwilling to pay for the medication and mental health professionals did not feel Defendant needed it or did not feel it was effective in modifying his behavior. (R. 3424). According to Dr. Krop, polysubstance drug dependency involves a person's dependency on various drugs and alcohol. Defendant began using alcohol when he was 11 years old. Defendant's father was a severe alcoholic, so Defendant was introduced to alcohol early on. Eventually, Defendant moved on to drugs. He snorted powder cocaine and smoked crack cocaine. He used meth and abused pharmaceuticals, various prescription drugs, acid, mushrooms, and marijuana. (R. 3424-3426). According

[19] Krop explained that antisocial personality disorder is a pattern of behavior beginning to the age of 15 where the individual engages in antisocial acts. There is a failure to conform to social norms. (R. 3451-3452).

[20] Prozac is used to treat depression. (R. 3424).

to Krop, Defendant reported using meth at the Putnam County Jail. Additionally, he was prescribed pain medications due to a fractured leg. Defendant stated another inmate was providing him with the unlawful drugs. (R. 3426-3427).[21]

Dr. Krop testified that Defendant reported taking large quantities of alcohol. He suffered from depression since the age of 11 when he was prescribed medication. (R. 3427). Krop identified various drugs from the records, including Effexor, Remeron, Risperdal, Trazodone, and Stelazine. Most of these medications are antidepressants or antianxiety drugs and help a person with insomnia and depression. (R. 3428). Additionally, Risperdal and Stelazine are antipsychotic medications. Krop explained that psychotic episodes or processes is a major mental illness, usually manifested by hallucinations and delusions. However, Krop did not see Defendant as psychotic or any diagnosis of schizophrenia. (R. 3428). Krop testified that the people at the Putnam Behavioral Healthcare in 2007 had prescribed medication for Defendant. (R. 3429). Krop noted that Defendant had not been on any consistent medication regimen. (R. 3430).

Krop testified that presently Defendant was doing well.[22] His medication was changed recently. He is very depressed, but understandably so, given his

[21] According to Dr. Krop, Defendant explained that he had been using meth in jail and was up for four days continuously close to when he escaped. (R. 3439).
[22] Krop reported that Defendant obtained his GED while in jail. (R. 3440).

present circumstances. Dr. Krop pointed out that Defendant has been one of the most cooperative individuals he has ever evaluated. He noted that Defendant's history was not particularly self-serving. (R. 3431-3432). Krop addressed Defendant's past bipolar disorder diagnosis. He indicated that attention deficit disorder has similar symptoms. Krop maintained, however, that Defendant had symptoms of bipolar disorder when he was young. (R. 3432-3433).[23] Defendant described an extremely dysfunctional family environment, which included physical abuse, emotional abuse, domestic violence and abuse of children. There were fights between the parents, sometimes with a gun being involved. Defendant was used as an intermediary between both unfaithful parents. After his parents separated, Defendant and his brother moved in with his father. However, when the father returned, the siblings were separated. Defendant remained with the father, who physically and emotionally abused him. His father would hit him with a belt on his butt, his legs and lower back. His father would also use a paddle. The father struck him with his fist once and choked him. He pulled a gun on him on two different occasions. Still, Defendant was very protective of his father. (R.

[23] According to Dr. Krop, the records indicated that Defendant was diagnosed with post-traumatic stress disorder, depressive disorder, bipolar disorder, cocaine abuse and antisocial personality disorder. (R. 3449). Dr. Krop stated that Defendant had mood disorder which would fit in the same category as bipolar disorder. (R. 3449). The reference in the records to bipolar disorder could have been a misdiagnosis. (R. 3450). During the time that Dr. Krop had contact with Defendant, Defendant did not meet the criteria for bipolar disorder. (R. 3451).

3433-3436). Dr. Krop discussed the history of the father's physical abuse with Melissa Googe, the sister of Defendant's mother. There were domestic violence incidents when law enforcement officers called. According to Defendant, the earliest incident of domestic violence he could remember occurred when he was six or seven. (R. 3436-3437).

Krop testified that Defendant's mother died of brain cancer in 2002. Her last six months were horrific and Defendant was present much of that time. He could not attend her funeral because he was incarcerated at the time. (R. 3438). Dr. Krop addressed Defendant's prior suicide attempts. According to Dr. Krop, there was documentation of attempts at self-harm. Defendant told him that when he was 15 he cut himself. (R. 3439).

Dr. Krop testified that he diagnosed Defendant with antisocial personality disorder. (R. 3451). Defendant failed to conform to social norms with respect to lawful behavior as indicated by repeated arrests. (R. 3453-3454). Dr. Krop found that Defendant nearly met the second criteria of deceitfulness to the extent that he manipulated others. Additionally, Defendant met the third criteria of impulsivity or failure to plan ahead. Defendant nearly met the fourth criteria of irritability and aggressiveness, especially as to fights in school. Defendant met the fifth criteria of reckless disregard for safety of self or others, which was satisfied in the present case. Defendant also showed consistent irresponsibility and was indifferent to or

rationalizing having hurt or mistreated or stolen from others. (R. 3454-3455). Dr. Krop also testified about the psychopathy scale, which lists various criteria to determine whether an individual basically meets psychopathy traits. Dr. Krop explained that a psychopath is not a diagnosis, but rather, there are certain traits that are often seen with individuals with antisocial personality disorders. Dr. Krop did not conduct a psychopathy scale on Defendant because he met the criteria of antisocial personality disorder. (R. 3459-3461). Dr. Krop did opine that Defendant would score high with regard to psychopathic traits. (R. 3463). He explained that Defendant exhibited certain psychopathic traits such as manipulation, selfishness, insensitivity to other's needs, getting into trouble without looking at the consequences of actions, impulsivity and engaging in criminal acts. (R. 3464).[24] Dr. Krop testified that Defendant told him he resented the victim because she would get upset with his grandfather, who would continue to be supportive of Defendant even though Defendant kept getting into trouble. (R. 3469-3470).

After Dr. Krop's testimony, the defense called Donna Bailey, a mental health specialist at Suwannee Correctional Institution. Ms. Bailey testified that she had contact with Defendant at Suwannee. She was assigned to him to help him adjust to his current incarceration. She has had contact with him for several

[24] Dr. Krop testified that Defendant's abuse of alcohol and drugs was a contributor to Defendant's criminal behavior. Such abuse lowers inhibitions and impulse control. (R. 3473-3474).

months. Defendant would listen and was trying to get help. (R. 3477-3480). Ms. Bailey testified that Defendant was taking psychotropic medications and was diagnosed with depression. He would take Willbutrin and Benadryl. Defendant acknowledged his depression and anxiety. Bailey would try and give him ways of dealing with these problems. Defendant did not like a stress-management group and requested individual counseling. She last saw Defendant in February. (R. 3480-3483). Bailey testified that Defendant informed her about his pending escape charge but did not tell her about his murder charge. (R. 3485). Bailey did not want to ask Defendant what his charges were. (R. 3486). She did not know Defendant was facing the death penalty. (R. 3487). Bailey explained that as a counselor she is more concerned about helping inmates not become suicidal. (R. 3491).

The defense called Jeffrey Fletcher, Defendant's brother. Jeffrey Fletcher testified that their mother died of brain cancer in 2002. He stated that his parents separated when he was young. He lived with his mother. He started living with her when he was seven. Defendant remained with their father. He would not see Defendant very often. Within three years, his mother was diagnosed with cancer. (R. 3506-3512). Jeffrey's mother underwent chemo and radiation. Defendant had a good relationship with their mother. Jeffrey had a close relationship with Defendant. (R. 3512-3513). Jeffrey identified a photograph of him and Defendant. He also identified a photo of Defendant when he was 8 or 9 years old. (R. 3514-

3517; R. 4433-4434). Jeffrey testified that there were times when Defendant could not see his mother because he was incarcerated. (R. 3517). Jeffrey stated that his father never abused him. He would spank him. He never saw his father punch or kick Defendant. (R. 3520). His father would drink back then. (R. 3521). Ricky Fletcher, Defendant's father, testified that his wife died of a brain tumor. (R. 3522-R. 3524). Ricky married his wife a year after Defendant's birth. (R. 3525). He admitted that eventually his marriage changed for the worse. There were incidents of domestic violence. (R. 3527). It started around when Defendant was five or six. (R. 3527-3528). There were times when he was arrested for violence. (R. 3528). At one point, his wife took out an injunction against him. (R. 3529). There was one incident when he threatened his wife with a gun. The children were present. (R. 3529-3530). Usually, one or the other drank too much. (R. 3531). Eventually, he separated from his wife. Defendant was about 11 at the time. Defendant stayed with him. (R. 3532). Ricky identified family photographs. (R. 3526; R. 3533-3534; R. 4435-4437). Additionally, Ricky identified a picture drawn by Defendant, who is an excellent drawer. (R. 3534-3536; R. 4438). Thereafter, the defense rested its case. (R. 3537). Defendant was questioned by the court about his decision not to testify. (R. 3538; R. 3545).

The State called Dr. Gregory Prichard, a licensed psychologist, in rebuttal. Dr. Prichard testified that he worked in all areas of forensic psychology, including

competency and sanity assessments, sexual predator assessments and mitigation/aggravation work. (R. 3550-3551). Dr. Prichard discussed his educational and professional background and credentials. (R. 3551-3553). He estimated he has done between 5,000 and 7,500 forensic evaluations in the last ten years. He has testified between 500 and 750 times across Florida. (R. 3553-3554). Dr. Prichard conducted an evaluation of Defendant. Prior to his evaluation, Dr. Prichard reviewed Corrections records, police reports, Defendant's statement, the co-defendant's statement, a letter from Defendant to his grandfather, pleadings, and case file documents from prior cases. (R. 3554-3555). After his evaluation of Defendant, Dr. Prichard reviewed additional materials. (R. 3555). According to Dr. Prichard, he talked to Dr. Martin, who evaluated Defendant in the Department of Corrections and Ms. Bailey, the psychological specialist who counseled Defendant. (R. 3556).

Dr. Prichard met Defendant on May 30, 2012. He did not see from the records, nor did he conclude, that Defendant had any type of neurological problems or brain damage. In particular, Dr. Prichard stated that he reviewed a letter from Dr. Krop to defense counsel indicated that there did not appear to be any neurological issues. (R. 3556-3557). Based on his evaluation of Defendant, Dr. Prichard concluded that Defendant was functioning at an average level around the 50th percentile. Defendant had good word usage and comprehended well. (R.

3558). Dr. Prichard's primary diagnosis of Defendant was that Defendant has an antisocial personality disorder. A secondary diagnosis is that Defendant had polysubstance dependence.[25] The third diagnosis is that Defendant had a depressive disorder. (R. 3559).[26] Dr. Prichard came to the depressive conclusion on the basis of his review of prison records which showed Defendant had been treated with antidepressants when he was in prison between 2003 and 2007. When he was released in 2007 he went to Putnam Behavioral on an outpatient basis and he was given a couple of antidepressants. However, Defendant returned to street-drug use. When he returned to jail, he was given antidepressant medications again. Dr. Martin confirmed the depressive disorder diagnosis in discussions with Dr. Prichard. Additionally, Dr. Martin stated that Defendant also had antisocial personality disorder. The records also showed a diagnosis of PTSD, but Dr. Martin did not know where that came from. Dr. Martin did not see any indication of bipolar disorder. (R. 3559-3561). Dr. Prichard did not see any indication of bipolar disorder when he evaluated Defendant, although he conceded the records did reflect such a diagnosis in 2007. (R. 3561-3562).[27] He pointed out that there

[25] This diagnosis means that the dependent pattern of chemical intake is related to more than one substance. (R. 3614).

[26] Depression is a mental illness, not a personality disorder. (R. 3622).

[27] Dr. Prichard explained that bipolar disorder is a very serious mental illness. Persons with such a disorder are extremely irrational and impulsive. Their judgment is extremely poor. Such persons need to be medicated. Otherwise, they

was no indication that Defendant received medications usually given for bipolar disorder and that one would expect to see episodic manifestations of the disorder while incarcerated. (R. 3563-3464).[28]

Dr. Prichard testified about the MMPI personality inventory, which was given to Defendant. Invalid results would indicate that the person filling out the test responded in an invalid way. As such, it cannot be interpreted. Dr. Prichard explained that in Defendant's case, he was either intentionally exaggerating mental illness or was crying out for help. (R. 3564-3565). Dr. Prichard testified that he diagnosed Defendant with antisocial personality disorder, which is not neurochemically driven such as a mental illness. According to Dr. Prichard, persons with antisocial personality disorders usually tend to have them for their entire life and do not respond to medications. He pointed out that many people call this disorder the criminal personality. Basically, the disorder is a pervasive pattern of the violation of the rights of others in societal norms. (R. 3566-3568). Dr. Prichard explained that a person with this disorder continuously gets into trouble, breaks the rules, gets into criminal trouble, says he going to change things but does not, and gets into a lot of fights and steals things. (R. 3568). This disorder usually shows up in the early teens. (R. 3568). Further, Dr. Prichard testified there were

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will have major adaptation problems. The medications given are usually lithium and depakote. (R. 3562-3563).

[28] Dr. Prichard confirmed that his review of the records showed an attempted suicide by Defendant in 2001 when he was in a juvenile facility. (R. 3615).

four criterion (A through D) for the disorder. Under the first criteria there are seven symptom patterns of behaviors. All seven applied to Defendant. (R. 3570). The first criteria (A) involves failure to conform to social norms with respect to lawful behaviors indicated by repeatedly performing acts that are grounds for arrest. Dr. Prichard explained Defendant began criminally offending at age 13 or 14. He began stealing cars. He had ten juvenile arrests. He had ten school suspensions before finally being expelled in the 9th grade. He was first sent to prison as a youthful offender in 2000. (R. 3570-3571).

Dr. Prichard reviewed the seven criteria for antisocial personality disorder. He testified Defendant met all seven criteria. (R. 3597-3598). In particular, he stated Defendant exhibited lack of remorse as indicated when Defendant stole a vehicle when keys were left in it. Additionally, this factor was established in Defendant's post-arrest statement. In that statement, Defendant said the victim was ignorant because she wanted to fight over 37 dollars and all she had to do was hand over the 37 dollars and her PIN number for her credit car and she would only have been tied up. This was rationalization in that if the victim had only behaved herself there would have been a different outcome. (R. 3599-3600). Dr. Prichard explained antisocial personality disorder is chronic, beginning at age 13 until 28. (R. 3601). Dr. Prichard addressed the psychopathy checklist. He explained that a psychopath is a criminal variant that has a number of personality and behavioral

characteristics. According to Dr. Prichard, it is "kind of the turbocharged antisocial personality disordered individual." (R. 3602-3604). The checklist consists of 20 items, on which a person can score up to 40, that is, a maximum of two on each point. A score of 2 on an item indicates that the characteristic is present without a doubt. (R. 3604). Dr. Prichard confirmed Defendant was prescribed antidepressant medications before any term of incarceration. (R. 3617-3618). He learned Defendant did not stay on his medications for very long. (R. 3617). Dr. Prichard agreed the records showed domestic violence occurring between Defendant's parents. Some of these incidents occurred in Defendant's presence. The first incident occurred when Defendant was six. He confirmed Defendant's mother died of brain cancer in 2002. (R. 3618-3619). Dr. Prichard had information that in addition to drug use Defendant used excessive amounts of alcohol. He would use the alcohol along with drugs. (R. 3619-3620). Defendant was diagnosed with PTSD in 2007. (R. 3621). The records showed Defendant was ADHD (attention deficit disorder hyperactivity disorder) or ADD (attention deficit disorder) as a child. Both disorders involve problems maintaining focus and ADHD also involves excessive hyperactivity. (R. 3623-3624).

ISSUES PRESENTED

(I)

DEFENDANT WAS DENIED A FAIR TRIAL WITH THE ADMISSION OF TESTIMONY THAT DEFENDANT WAS PREVIOUSLY SENTENCED IN ANOTHER CASE

(II)

DEFENDANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE PROSECUTOR'S IMPROPER GUILT PHASE CLOSING ARGUMENTS

(IIII)

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO DEFENSE COUNSEL'S ADMISSIONS OF GUILT DURING OPENING STATEMENT

(IV)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENT

(V)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S OBJECTIONS TO CONSOLIDATION OF OFFENSES

(VI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

(VII)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE ADMISSION OF IMPROPER NON-STATUTORY AGGRAVATING EVIDENCE

(VIII)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

(IX)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

(X)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

(XI)

DEFENDANT'S CONVICTIONS AND SENTENCE OF DEATH MUST BE VACATED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE AND PENALTY PHASE ERRORS

STANDARDS OF REVIEW

(I) A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. Dessaure v. State, 891 So.2d 455, 464 (Fla. 2004). **(II & VI)** The control of comments by counsel is within the trial court's discretion. Perez v. State, 919 So.2d 347, 363 (Fla. 2005); Goodrich v. State, 854 So.2d 663, 664 (Fla. 3d

DCA 2003); Frazier v. State, 970 So.2d 929, 930 (Fla. 4th DCA 2008). An appellate court may reverse a conviction based upon improper prosecutorial comments if the comments are of such a nature as to (1) deprive the defendant of a fair trial; (2) materially contribute to his conviction; (3) to be so harmful or fundamentally tainted as to require a new trial; or (4) be so inflammatory that they might have influenced the jury to reach a more severe verdict than that which they would have reached otherwise. Lewis v. State, 780 So.2d 125, 131 (Fla. 3d DCA 2001). The propriety of a prosecutor's closing argument may be reviewed for fundamental error. D'Ambrosio v. State, 736 So.2d 44 (Fla. 5th DCA 1999). **(IV)** With respect to a trial court's ruling on a motion to suppress, an appellate court presumes the court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence. Appellate review of the court's application of the law to the facts is de novo. Appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the 5th Amendment and Article I, §9, Florida Constitution. Cuervo v. State, 967 So.2d 155, 160 (Fla. 2007). **(III)** Review of trial counsel's admissions of guilt as to his client requires the defendant to demonstrate that counsel's performance was deficient and that he was prejudiced by the deficient performance. Nixon v. State, 932 So.2d 1000, 1017 (Fla. 2006). **(V)** Review of a court's order consolidating offenses is reviewed for abuse of

discretion. Crossley v. State, 596 So.2d 447, 450 (Fla. 1992). **(XI)** An appellate court may consider the cumulative effect of errors even where each of the trial court's asserted errors, standing alone, are insufficient to merit reversal, and an appellate court may find prejudice requiring reversal. See Parker v. State, 904 So.2d 370, 380 (Fla. 2005). **(VII)** Admission of non-statutory aggravating circumstances at a penalty phase is subject to harmless error analysis. See Colina v. State, 570 So.2d 929, 933 (Fla. 1990). **(VIII)** To determine whether death is a proportionate penalty, this Court must consider the totality of the circumstances and compare the case with other cases. Dessaure v. State, 891 So.2d 455, 472 (Fla. 2004). **(IX)** The standard of review applicable to a trial court's finding of a capital aggravator is whether competent, substantial evidence supports the finding. Smith v. State, 28 So.2d 838, 866 (Fla. 2009). The weight to be accorded a mitigator is within the discretion of the court. Peterson v. State, 94 So.3d 514, 536-537 (Fla. 2012). It is within the trial court's discretion to decide whether a mitigating circumstance is proven and the weight to be given each mitigating factor. Frances v. State, 970 So.2d 806, 810 (Fla. 2007).

SUMMARY OF ARGUMENT

(**I**)Testimony and evidence that Defendant was serving a sentence and that the term of his sentence was ten years at the time of the charged escape was unduly prejudicial and deprived Defendant of a fair trial. Permitting the introduction of

evidence of the nature of the offense for which a defendant is in lawful custody and the term of imprisonment was error. **(II)** The prosecutor commented on Defendant's post-arrest silence and asked jurors to "send the message" to Defendant. Both such arguments have long been held to be improper. **(III)** Defense counsel's admissions of guilt during opening statement rendered Defendant's trial fundamentally unfair. In effect, defense counsel conceded that Defendant participated in a home-invasion robbery, which led to the victim's death (i.e., felony murder) and conceded to the aggravating circumstances of pecuniary gain/commission during felony and commission while under sentence. This was not reasonable. **(IV)** The trial court erred in denying Defendant's motion to suppress statement. The police did not scrupulously honor Defendant's invocation of his right to remain silent. Defendant flatly stated to corrections officers: "I don't want to talk to nobody then." Defendant's statement was unequivocal and unambiguous. The detectives commenced the interrogation almost immediately. The circumstances surrounding Defendant's assertion cannot be ignored. Defendant made clear he did not want *to talk*, a clear reference to the impending interrogation in the interview room. He was apparently aware it was a recording room. (**V**) The court abused its discretion in denying Defendant's objections to consolidation of offenses. The fact that a defendant may be involved in a series of crimes involving similar circumstances does not warrant joinder. Even where

counts are properly joined, a defendant is entitled to severance of counts upon a showing that such is necessary to achieve a fair determination of the defendant's guilt or innocence. The mere fact of a general temporal and geographic proximity is insufficient in itself to justify joinder except to the extent it helps prove a proper and significant link between the crimes. Consolidation of the escape charge with the remaining counts of the indictment was unduly prejudicial because it required the introduction of evidence that Defendant was in lawful custody at the time of the offenses against the victim. Admission of evidence concerning *two other burglaries* was wholly unnecessary and was presented to unduly prejudice Defendant. **(VI)** Defendant is entitled to a new penalty phase based upon the prosecutor's improper penalty phase arguments. The State argued that Defendant lacked remorse. The State also improperly argued that mitigating circumstances were actually aggravating circumstances. The prosecutor improperly denigrated mitigating evidence. The prosecutor improperly asked jurors to weigh non-statutory aggravating circumstances. The cumulative effect of the prosecutor's comments during closing argument amounted to fundamental error. (**VII**) Defendant is entitled to a new penalty phase due to the admission of improper non-statutory aggravating evidence at the penalty phase. Through his questioning, the prosecutor repeatedly elicited testimony that Defendant lacked remorse, had a long and troubled criminal history, was a "*turbocharged* antisocial personality

disordered individual," and psychopath. The State painted a picture of someone who clearly posed a future danger. (**VIII**) Defendant's death sentence is disproportionate under Florida law. Although, the EHAC, commission of the crime while under sentence of imprisonment and felony-murder aggravators were found by the Court, the present case presents a long and heavy list of mitigating circumstances. The law reserves the death penalty only for the most aggravated and least mitigated murders. **(IX)** The trial court committed several errors in its sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence. The Court should not have given the commission of the offense while under sentence of imprisonment and the felony murder aggravator great weight. As to the EHAC factor, there was some question in the expert testimony as to whether, and for how long, the victim was conscious at the time of the strangulation. Also, the trial judge failed to properly assess all the mitigating circumstances and failed to give those mitigating circumstances found sufficient weight. **(X)** Defendant maintains that Florida's capital punishment statute violates the United States Supreme Court decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). **(XI)** Defendant's convictions and sentence of death must be vacated due to the cumulative effect of the guilt and penalty phase errors.

ARGUMENT

(I)

DEFENDANT WAS DENIED A FAIR TRIAL WITH THE ADMISSION OF TESTIMONY THAT DEFENDANT WAS PREVIOUSLY SENTENCED IN ANOTHER CASE

Defendant was denied a fair trial under the Florida and U.S. Constitutions. At trial, Officer Steven Faulkner, PCSD, testified as follows:

> MR. JOHNSON (PROSECUTOR)- "Tell us a little bit—when you're there at the Putnam County Courthouse…
> OFF. FAULKNER- When Mr. Kuleski told me that I had to go back, the juvenile, I was a little concerned about him… And as Mr. Kuleski and I were carrying them out to the van, I mentioned it to Mr. Kuleski. And I believe Mr. Fletcher told me that *he had been sentenced* for—
> MR. WOOD (DEFENSE COUNSEL)- Objection.
>
> THE COURT: Sustained." (R. 2542-2543)(emphasis supplied).[29]

At sidebar, the defense moved for a mistrial, arguing that Off. Faulkner's testimony violated the Court's order *in limine*. (R. 2543). The State argued that evidence of Defendant's sentence was appropriate to prove the crime of escape. (R. 2544-2546). The prosecutor also argued that Faulkner never testified on what Defendant had been sentenced for or for how long. (R. 2546). The Court denied the motion because Faulkner never testified that Defendant had been sentenced to

[29] Previously, Officer Charles Word had testified that B-pod, where Defendant was housed, was a felony area. The defense objected to this comment and the Court sustained the objection, instructing jurors to disregard the comment. (R. 2481).

prison. (R. 2546). The defense declined the Court's offer of an instruction to jurors to disregard the testimony. (R. 2547).

Det. Doug Schwall, PCSD, was called by the prosecution to testify about Defendant's post-arrest statement. The State introduced Defendant's video statement at trial accompanied by redacted copies of transcripts. During the course of the presentation of the statement, the following occurred:

> "THE DEFENDANT: No. I didn't really – I didn't fully plan on escaping before that, but I had talked about it. *And I had just got sentenced to the ten years*. My grandma just died, my – my real grandma, my grandpa's first wife—
>
> INVESTIGATOR BRENDEL: Right.
>
> THE DEFENDANT: -- just died in December. And I don't know. I just – *ten years is a long-ass time*. I thought it was before, but"—
>
> MR. WOOD: Judge, I need to take something out of the—
>
> THE COURT: All right.
>
> MR. WOOD: -- something with the Court.
>
> THE COURT: Can you stop it—stop." (R. 3073-3074)(emphasis supplied).

After the jury was excused, the defense moved for a mistrial. (R. 3076). The State argued that the transcripts had been provided two days before and that nothing had been said. Moreover, the State maintained that the jury was not even paying attention. (R. 3076-3077). The Court noted that the jury was following along with the transcripts and the transcripts included the statement. (R. 3077).

Although the Court agreed that the transcripts had been provided to the defense, there were very few redactions and the Court had been assured that everything had been redacted. The matter was not redacted in either the tape or in the transcripts. (R. 3077-3078). The State then asserted that there was no mention of the crime or the severity of it. (R. 3078). The Court pointed out that ten years had been mentioned and that "it doesn't take a rocket scientist to figure out that *you got to do something pretty bad to get ten years, I mean, quite frankly*." (R. 3078) (emphasis supplied). The prosecution then averred that the evidence was relevant to the escape charge. (R. 3078). The defense pointed out it agreed to the stipulation on the escape element in order to avoid the issue. (R. 3079).[30] After a brief recess, the Court announced that it would take the motion for mistrial under advisement.[31] The Court ordered all transcripts to be collected. (R. 3079).[32]

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[30] The stipulation provided:

> "You're notified the Office of the State Attorney, by and through the undersigned Assistant State Attorney and Garry Wood, Attorney for the defendant, have entered into a stipulation that the defendant, Timothy Wayne Fletcher, was under arrest and in the lawful custody of a law enforcement official on April 14, 2009." (R. 2675-2676; R. 708).
>
> The Court read the stipulation to the jury. (R. 2677).

[31] The Court did not rule on the motion for mistrial at the close of the case. The defense filed a motion for new trial noting that the Court had reserved ruling. (R. 677-678). The Court entered an order denying Defendant's motion for new trial and renewed motion for mistrial. (R. 955-958). The Court found that the evidence against Defendant was overwhelming. (R. 958).

The admission of testimony and evidence that Defendant was serving a sentence and that the term of his sentence was ten years at the time of the charged escape was unduly prejudicial and deprived Defendant of a fair trial. The defense attempted to avoid any problems concerning his sentence by reaching a stipulation with the State on the issue of lawful custody, one of the elements of the escape charge. (R. 708). Defendant's efforts were to no avail. The jury was plainly informed that Defendant was a sentenced prisoner and was serving ten years. It was left to the jury's imagination as to what the offense or offenses were for which Defendant was incarcerated. Clearly, the offense was not a minor crime or misdemeanor. Permitting the introduction of evidence of the *nature of the offense* for which a defendant is in lawful custody in generally held to be error. See Brown v. State, 719 So.2d 882 (Fla. 1998); Sanders v. State, 517 So.2d 134 (Fla. 4th DCA 1987). Additionally, permitting the jury to know the *term of imprisonment* is likewise error. See Cannon v. State, 529 So.2d 814 (Fla. 1st DCA 1988). In this

[32] Subsequently, the Court revisited the issue. The Court noted that it had taken precautions in withdrawing the transcripts and had decided not to instruct the jury because it did not want to draw attention to it. The Court announced again that it was holding the mistrial request under advisement. (R. 3173-3174). The defense informed the Court it did not want a curative instruction. (R. 3181-3182). The defense presented the agreed redactions on the transcripts for appellate review. (R. 3183-3184- Court Exhibit 1; R. 4177-4432). The CD video recordings played to the jury were also marked for the record as Court Exhibit 2. (R. 3187-3188).

case, the error mandates reversal in light of Defendant's continual objections and the highly prejudicial impact of evidence of Defendant's criminal background.[33]

(II)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER GUILT PHASE CLOSING ARGUMENT

Defendant was denied a fair trial, under Art. I, §§9, 16 and 17, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution, by the prosecutor's improper guilt phase closing argument. During closing argument, the prosecutor stated:

> MR. JOHNSON: "When you—when he was – when the defendant was confronted with the possibility that he left DNA behind, all of a sudden, he went from I didn't touch her, I wasn't involved in her strangulation, I went into the other room, I didn't see anything, you, know, until it was all over, Doni Brown came to me and he said, oh, she had a heart attack. He went from that story to, oh, oh, I kind of lied to you. And I – at first, he said *I don't really want to talk about it.* And then he says I – I admit, I kind of lied to you…" (R. 3276)(emphasis supplied).

In this comment, the prosecutor flatly stated that Defendant did not want to talk about the incident. Comments on a defendant's post-arrest silence are improper. See State v. Hoggins, 718 So.2d 761, 769 (Fla. 1998); State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Rather, the prosecutor argued that Defendant

[33] Compare Sigler v. State, 805 So.2d 32, 37 (Fla. 4th DCA 2002)(evidence of the defendant's 20-year sentence on murder charge stemming from escape not abuse of discretion where prosecution's theory was that disparate sentences of cohorts tended to show defendant's motive to escape and cohort's desire to assist). No such "theory" was advanced in this case.

did want to talk to the detective about the incident *in the absence of Defendant's testimony at trial*. This was not a case where Defendant was cross-examined about his statement. Compare Downs v. Moore, 801 So.2d 906, 910-912 (Fla. 2001)(prosecutor's cross-examination of the defendant on his failure to tell police about circumstances of crime proper impeachment).

During rebuttal argument, the prosecutor argued:

> MR. LEWIS: "And I ask you, ladies and gentlemen, *send the message to this defendant* that his behavior is not acceptable. *Send the message to him* and tell him, it's not okay to kill people. *You send that message* and you find him guilty as charged. And you tell him Helen Googe was not supposed to be murdered that night, and his activities are responsible for it." (R. 3301).(emphasis supplied).

The prosecutor improperly asked jurors to "send the message" to Defendant in this case. It has long been held that prosecutors may not argue that jurors send a message with their verdict. See Campbell v. State, 679 So.2d 720, 724 (Fla. 1996). It is apparent that the prosecutor, aware of this proscription, attempted to bypass the prohibition by asking jurors to send the defendant a message through their verdict. The use of the words "to the Defendant" amounted to a distinction without a difference. Jurors were still improperly asked to send a message.[34]

[34] For example, in Bowman v. United States, 652 A.2d 64, 71 (D.C. App. 1994), the D.C. Court of Appeals concluded that comments asking jurors to send a message to the defendant were improper because '[J]uries are not in the message-sending business."

The defense did not object to the foregoing comments. Fundamental error exists because the comments go to the foundation or merits of the cause of action. This Court may review the record and take into consideration the context of the closing argument. See Crump v. State, 622 So.2d 963, 972 (Fla. 1993); Brooks v. State, 762 So.2d 879, 899 (Fla. 2000). Here, the prosecutor's arguments involving Defendant's right to remain silent and the need for jurors to send a message were highly improper. The cumulative effect of the comments cannot be considered harmless. See Pait v. State, 112 So.2d 380, 384 (Fla. 1959).

(III)

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO DEFENSE COUNSEL'S ADMISSIONS OF GUILT DURING OPENING STATEMENT

Defendant was denied a fair trial under the Florida and U.S. Constitutions, based on defense counsel's opening statement, where defense counsel admitted Defendant's guilt on at least six of the seven charges against Defendant. Counsel stated: "As you know, there are seven charges against Timothy Fletcher, six of which we are not going to seriously dispute." (R. 2469). Counsel proceeded to tell jurors that Defendant escaped from jail (R. 2470), attempted thefts of two automobiles (R. 2471), stole a third vehicle (R. 2471), unlawfully entered the victim's residence (R. 2471), and stole items from the victim's house (R. 2472). Counsel's stated that Doni Brown killed the victim and that Doni Brown "was an

active participant in what was going on…" (R. 2472). Counsel maintained there would be reasonable doubt on the charge of first degree murder. (R. 2474). He concluded by stating:

> "As I say, I say this with a focus that the other charges, the theft of Mrs. Googe's car, the attempted burglary of two other vehicles, the theft of Mr. Louis' vehicle, those really are not going to be in dispute, the escape from the Putnam County Jail."(R. 2474).[35]

The prosecutor emphasized defense counsel's admissions during closing argument as follows:

> "*They've essentially conceded the home-invasion robbery*, that defendant actually entered into Mrs. Googe's home with the purpose of robbing her and then they – and then stealing her car. What I want to talk to you about *and what, apparently, is the point of contention between the two sides in this trial*, is the first-degree murder charge." (R. 3268)(emphasis supplied).
>
> "And principals is simply that you're helping somebody do something, helping somebody commit the home-invasion robbery. The defense in this particular case *conceded* that in opening statement, just about." (R. 3275)(emphasis supplied). [36]

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[35] In his closing argument, defense counsel stated: "We told you at the beginning of this case that Timothy Fletcher certainly is guilty of a lot of things." (R. 3284).

[36] After opening statement, and following the testimony of the first witness, the Court inquired of Defendant about defense counsel's statements.

> THE COURT: "…Mr. Fletcher, during opening statements, your attorney, although not necessarily conceding guilt on the other counts other than first-degree murder, did indicate there would not be really contesting the other counts. Have you had a discussion with Mr. Wood about the strategy in defending you in this case?
> DEFENDANT: Yes, ma'am.
> THE COURT: And do you agree with the strategy that – that he's proceeding with?
> DEFENDANT: Yes, ma'am.

Defense counsel's admissions of guilt rendered Defendant's trial fundamentally unfair. The record clearly shows counsel admitted to the offenses, which resulted in Defendant's guilty verdicts, and conceded two of the three aggravating circumstances (on which the Court gave "great weight" (R. 935-937)). The trial court's colloquy was insufficient to cure the prejudice in this case because the Court did not plainly inform Defendant that counsel was conceding guilt, only not contesting some of the counts. Additionally, the Court did not address Defendant on the implications such concessions would have in Defendant's penalty phase, where two of the three aggravating circumstances would be established. In effect, defense counsel conceded that Defendant *participated* in a home-invasion robbery, which led to the victim's death (i.e., felony murder) and conceded to the aggravating circumstances of pecuniary gain/commission during felony and commission while under sentence. This was not reasonable and resulted in prejudice to Defendant. Compare Kormondy v. State, 983 So.2d 418, 431 (Fla. 2007)(counsel's concession of guilt to noncapital offenses reasonable because counsel was trying to *eliminate* any consideration that *defendant*

THE COURT: All right. So you agree with the strategy in the opening statement?
DEFENDANT: Yes, ma'am.
THE COURT: All right. Very good. Okay." (R. 2509).

The Court later entered an order denying Defendant's motion for new trial and noted that during opening statement, with Defendant's consent, defense counsel *conceded* guilt on every charge except first degree murder. (R. 956).

participated in rape and murder). These concessions, and the repercussions (guilt and penalty) stemming from those concessions, are obvious on the face of the appellate record.[37] This Court should reverse. See, e.g., Benitez-Saldana v. State, 67 So.3d 320, 323 (Fla. 2d DCA 2011)(counsel's factual concessions amounted to admissions to charges warranting new trial).

(IV)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENT

Defendant's motion to suppress his post-arrest statement should have been granted pursuant to the Florida and U.S. Constitutions. Defendant filed a pre-trial motion to suppress his post-arrest statement, maintaining that he invoked his right to remain silent. Subsequent to his invocation, Defendant made incriminating statements. (R. 490-491). On May 10, 2012, the Court conducted a hearing on the motion. The State called Det. Doug Schwall, PCSD. Det. Schwall testified that he became involved in the investigation of the murder of Helen Googe. During the course of the investigation, Det. Schwall came into contact with Defendant in the Pomona Park community in southern Putnam County, where Defendant and Doni Brown were arrested. (R. 1452-1454). Det. Schwall testified that while

[37] A defendant need only establish a probability sufficient to undermine confidence in the outcome of the penalty phase. Porter v. McCollum, 558 U.S. 30, 44, 130 S.Ct. 447, 455-456, 175 L.Ed.2d 398 (2009)(citing Strickland v. Washington, 466 U.S. 668, 693-694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

transporting Defendant he engaged in casual conversation with Defendant. At the sheriff's office, Defendant was taken into an interview room. Thereafter, the detective re-initiated contact with Defendant. (R. 1454-1456). Det. Schwall explained that when he entered the interview room, no other officers were present. Investigator Rich Brendel joined Schwall in the interview room. Defendant's interview was video-recorded. Schwall read Defendant his *Miranda* rights. Defendant indicated to Schwall that he was willing to give a statement. (R. 1456-1459). Det. Schwall testified he was not aware of anyone speaking with Defendant prior to Schwall's entry into the interview. No one informed him of any statements which Defendant made prior to the detective's entry into the interview room. (R. 1459-1460). Det. Schwall was aware that Captain Art Gibson and Major Paula Carter, who worked for the Department of Corrections, were at the station, but he did not know what they were doing. Defendant was shackled and handcuffed at the time. (R. 1460-1462). Neither Gibson nor Carter conversed with Schwall. (R. 1462). The detective testified that no one told him that Defendant had stated he did not want to talk to anyone from law enforcement. (R. 1463).

The defense pointed out that at the very beginning of the recording, Defendant informed officers he did not want to talk to anyone. (R. 3813). The transcripts reflect the following conversation:

> UNIDENTIFIED MALE DEPUTY: "Come on in here. Have a seat on that black chair right there.

> MR. FLETCHER: Will you do me a favor and loosen the (inaudible) around the shackle?
> UNIDENTIFIED MALE DEPUTY: What's that?
> MR. FLETCHER: Will you loosen the shackle a little bit, please?
> UNIDENTIFIED MALE DEPUTY: Have a seat.
> UNIDENTIFIED FEMALE DEPUTY: No. No.
> MR. FLETCHER: *No? It's too tight. I don't want to talk to nobody then.*
> UNIDENTIFIED FEMALE DEPUTY: Sit down. (Inaudible) waist chains first and then we can do the shackles." (R. 3813)(emphasis supplied).[38]

The defense argued Defendant had invoked his right to remain silent and the police should not have questioned him. (R. 1467-1470). The State argued that the invocation was equivocal. The prosecutor argued Defendant was simply engaged in a negotiation with law enforcement concerning his shackles. Also, Defendant's invocation did not occur during the reading of *Miranda* and he ultimately agreed to talk to the detectives after *Miranda*. (R. 1472-1476). The Court entered an order denying Defendant's motion ruling that Defendant's statement did not warrant suppression because Defendant was informed of his *Miranda* rights and voluntarily gave a statement. His statement about not wanting to talk to anyone was conditional on the deputies loosening his cuffs and not in response to any questioning and not made in relation to any inquiry about Defendant's desire to waive his constitutional rights. The Court noted neither officer was present when

[38] Subsequently, during the interrogation, when detectives challenged Defendant's first version of events, Defendant stated: "I really don't even want to tell you everything that happened, to be honest with you." (R. 3927). The detectives proceeded with their questioning, telling Defendant that being open and honest "can work in your favor." (R. 3927).

Defendant made his statement. Moreover, the Court found Defendant's statement was equivocal and the deputies had no duty to clarify his statement. (R. 687-689).[39] The defense preserved his objections at trial. (R. 2867, R. 2869; R. 2871; R. 3186).

The police did not scrupulously honor Defendant's invocation of his right to remain silent. As noted previously, Defendant flatly stated to corrections officers: "I don't want to talk to nobody then." Defendant's statement was unequivocal and unambiguous. The detectives commenced the interrogation almost immediately. Once a defendant invokes his right to silence, all further questioning must cease and the defendant's right to cut off questioning must be scrupulously honored. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). See also Pierre v. State, 22 So.3d 759, 769-770 (Fla. 4th DCA 2009). Once a defendant asserts his right to remain silent, law enforcement should not engage in further questioning. See Cuervo v. State, 967 So.2d 155. 160-161 (Fla. 2007). The prohibition on further questioning applies not only when the defendant requests counsel but also when the defendant exercises his or her right to remain silent. Id., at 164. The prosecution bears a heavy burden of showing that the police scrupulously honored his rights and that the defendant subsequently initiated a conversation and waived his right to silence. See, e.g., Bowen v. State, 404 So.2d

[39] The Court pointed out that the defense had not challenged the waiver in this case. (R. 688). It should be noted, however, that at the time of the statement Defendant had not eaten for two days (R. 3815; R. 3818) and had not slept since the day before. (R. 3321).

145, 146 (Fla. 2d DCA 1981). If a defendant indicates "**in any manner**" that he or she does not want to be interrogated, interrogation must cease. Traylor v. State, 596 So.2d 957, 966 (Fla. 1992). The State does not meet burden of proving waiver by a defendant when the police attempt to wear down resistance of an accused who invoked right to remain silent. Spradley v. State, 442 So.2d 1039, 1043 (Fla. 2d DCA 1983).

In the present case, Defendant did not initiate any of the conversation with the officers. In Globe v. State, 877 So.2d 663 (Fla. 2004), this Court considered the five factors set out in the Mosley case: (1) whether *Miranda* rights were given; (2) whether interrogation ceased immediately when the defendant expressed his desire to remain silent; (3) whether there was a significant time lapse between the questioning; (4) whether the questioning took place at a different location; and (5) whether the subsequent statement involved a different crime. Id., at 670 (citing Henry v. State, 574 So.2d 66, 69 (Fla. 1991)). Here, Defendant stated flatly he did not want to talk. Although the State argued that Defendant's statement was made as part of a negotiation over his shackles, in fact, Defendant made an invocation which the police needed to scrupulously honor. The ensuing interrogation occurred in the same location where he had invoked his right to remain silent and followed immediately in the wake of his invocation. While it is true that Defendant was later given *Miranda* rights, no one factor is dispositive, standing

alone, in assessing whether a defendant's invocation to remain silent is "scrupulously honored." Globe, supra, at 670. The Court below noted Defendant's statement was not in response to any questioning. However, the circumstances surrounding Defendant's assertion cannot be ignored. Defendant made clear he did not want *to talk*, a clear reference to the impending interrogation in the interview room. He was apparently aware it was a recording room. (R. 3816). Additionally, the Court termed his statement equivocal and, therefore, the police had no obligation to ask clarifying questions. (R. 689). In Cuervo, supra, this Court reaffirmed the principle that the police need not ask clarifying questions on an equivocal request to terminate an interrogation once a suspect validly waives his *Miranda* rights. Id., at 162 (distinguishing Owen v. State, 862 So.2d 687 (Fla. 2003)). Here, *Miranda* rights had not yet been read to the suspect. As such, the Court's reliance on Owen was misplaced. (R. 689). See also Miles v. State, 60 So.3d 447, 452 (Fla. 1st DCA 2011)(even if right to remain silent assertion was equivocal the detectives were required to clarify his intent because the defendant had not yet waived his *Miranda* rights).[40]

[40] The Court gave some significance to the fact that Det. Schwall was apparently unaware of Defendant's invocation. (R. 688). However, knowledge of a suspect's assertion of his right to remain silent should be imputed to all law enforcement officers who subsequently deal with the suspect, including officers from another agency. See, e.g., United States v. Scalf, 708 F.2d 1540, 1544 (10th Cir. 1983)(right to counsel); United States v. Obregon, 748 F.2d 1371, 1377 (10th Cir. 1984)(right to silence and right to counsel).

(V)

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S OBJECTIONS TO CONSOLIDATION OF OFFENSES

The trial court erred in denying Defendant's motion objecting to the consolidation of offenses. In addition to the Indictment charging Defendant with first degree murder, escape, two counts of grand theft of an automobile and home invasion robbery, Defendant was also charged by Information in Case No. 2009-0807CF52 with burglary of a motor vehicle, the property of Sanford Doug Neely, with the intent to commit a theft, on April 15, 2009 (R. 50), and by Information in Case No. 2009-0806CF52 with burglary of a motor vehicle, the property of Justin McKinney, on April 15, 2009 (R. 49). The State moved to consolidate both burglary offenses on grounds that the offenses were two or more connected acts or transactions. (R. 48). The Court granted the State's motion. (R. 51). Prior to trial, the defense also objected to the consolidation of offenses for trial involving the two separate automobile burglaries. Defendant maintained that severance was appropriate to promote a fair determination of his guilt or innocence. Moreover, the defense argued that the charges in the Indictment were temporarily and physically separate from the case and from each other. (R. 493; R. 647-648; R. 1481-1485; R. 1487-1492). The Court entered an order denying Defendant's motion to sever, ruling that all seven charges were part of the same episode and pointing out that since evidence of the offenses would be admissible as collateral

crimes evidence even if the counts were severed, Defendant would not be prejudiced by the court's denial of severance. The Court ruled evidence of the nature of the underlying offense for which Defendant was sentenced and committed at the time of the escape would not be admissible and, as such, Defendant would be not be prejudiced by denial of severance of the escape charge. (R. 685-686).[41]

The Court should have granted severance of the counts in the consolidated Indictment and severance of the two informations as requested . Consolidation was not warranted because the offenses of escape and grand theft, charged in Counts I and II, were improperly charged in the same indictment. Rule 3.152(a)(1), Florida Rules of Criminal Procedure (FRCP), provides that a trial court may sever offenses which are improperly charged in the same indictment. In this case, offenses which occurred at different times, in different places and with different victims were joined. Additionally, under Rule 3.152(a)(2)(A), FRCP, a trial court may grant severance of counts, even if the charges are related, if severance is appropriate to promote a fair determination of the defendant's guilt or innocence. Furthermore, the Court erred in permitting a joint trial of the indictment and the two informations charging burglaries of two vehicles.

[41] Of course, events at trial proved otherwise. (See Issue I, supra).

The primary purpose of requiring separate trials on unconnected charges is to assure that evidence adduced on one charge will not be misused to dispel doubts on the other and so effect a mutual contamination of the jury's consideration of each distinct charge. Garcia v. State, 568 So.2d 896, 898 (Fla. 1990). There is an additional danger that evidence relating to each of the crimes may have the effect of bolstering the proof of the other. See Crossley v. State, 596 So.2d 447, 450 (Fla. 1992). In other words, testimony in one case may be insufficient standing alone to convince a jury of a defendant's guilt, but evidence that the defendant committed another offense can have the effect of "tipping the scales." Id. Courts must be careful that there is a meaningful relationship between the charges of two separate crimes before permitting them to be tried together. Id. In fact, severance should be granted liberally where prejudice is likely to follow from refusing to sever. Sosa v. State, 639 So.2d 173, 174 (Fla. 3d DCA 1994); Tartarini v. State, 84 So.3d 1185, 1187 (Fla. 1st DCA 2012). Practicality and efficiency should *not* outweigh a defendant's right to a fair trial. Wright v. State, 586 So.2d 1024, 1030 (Fla. 1991)(citing Garcia, supra at 899). The fact that a defendant may be involved in a series of crimes involving similar circumstances does not warrant joinder. See State v. Fudge, 645 So.2d 23 (Fla. 2d DCA 1994). Offenses are "related," and may be tried together, where they are based on the same act or transaction or on two or more connected acts or transactions. Rule 3.151(a), FRCP. This Court has noted

that the "connected acts or transactions" requirement of this rule means that the acts joined for trial must be considered in an "episodic sense." Fotopoulos v. State, 608 So.2d 784, 789-90 (Fla. 1992). Even where counts are properly joined, a defendant is entitled to severance of counts upon a showing that such is necessary to achieve a fair determination of the defendant's guilt or innocence. Id. at 790. The trial court placed great emphasis on the temporal and geographic proximity of the crimes (within ten miles and on the morning of April 15th). (R. 685). However, the mere fact of a general temporal and geographic proximity is insufficient in itself to justify joinder except to the extent it helps prove a proper and significant link between the crimes. See Smithers v. State, 826 So.2d 916, 923 (Fla. 2002) (citing Ellis v. State, 622 So.2d 991, 1000 (Fla. 1993)). See also Hart v. State, 70 So.3d 615 (Fla. 1st DCA 2011)(while two criminal episodes were separated by only a few hours and a couple of blocks, severance was warranted as there was no proper and sufficient link even though same weapon used). Additionally, consolidation of the escape charge with the remaining counts of the indictment was unduly prejudicial *because it required the introduction of evidence that Defendant was in lawful custody at the time of the offenses* against Helen Googe. See Sosa v. State, supra at 174 (offenses should be separated where one charge requires proof of a previous felony conviction and one does not); Oehling v. State, 109 So.3d

1199, 1202 (Fla. 3d DCA 2013)(same).[42] Severance should have been granted as to Count II as well because that charge merely established the means of transportation the defendants initially used to get to Ms. Googe's residence and that vehicle was quickly abandoned once the defendants stole Ms. Googe's vehicle. In this respect, severance should have been granted as to the burglaries charged in the two informations because those cases involved different victims and had no connection to the crimes charged in the indictment. The State had evidence (as charged in Count II) that the defendants had taken a vehicle, which they used to travel to Ms. Googe's residence. Admission of evidence concerning *two other burglaries* was wholly unnecessary and was presented to unduly prejudice Defendant. The lower court maintained that evidence of all these crimes was relevant because they were committed to evade re-arrest after the escape. However, Count II already served this purpose. The two other burglaries (in light of Count II) were superfluous and only served to unduly prejudice Defendant.

[42] The trial court cited to Pugh v. State, 518 So.2d 424 (Fla. 2d DCA 1988), in its order. (R. 685). In Pugh, the trial court denied severance of an escape count. The appellate court affirmed noting that the alleged kidnappings in the case were arguably committed to facilitate the defendant's escape and the jury was so instructed. Id., at 426 (citing Ayendes v. State, 385 So.2d 698 (Fla. 1st DCA 1980)(charge of attempted kidnapping with intent to facilitate escape)). In the present case, there was no kidnapping charge and the jury was not instructed that any of the offenses were committed in order to facilitate Defendant's escape. (R. 3302-3338). Notably, there was *no* avoid-arrest aggravator in this case.

The trial court took a "fall back" position[43] that the evidence would have been admissible as collateral crime evidence. (R. 685-686). However, the standard for determining whether offenses are properly consolidated for trial is "vastly different" from the standard of when evidence of a second collateral crime may be introduced. Roark v. State, 620 So.2d 237, 240 (Fla. 1st DCA 1993). For example, when collateral crimes evidence is introduced, evidence of the separate crime may not become a feature of the trial and a defendant is entitled to a limiting instruction. In consolidation cases, no such limitation on evidence occurs and no such instruction is given. Id.[44] Even if admissible as either collateral crimes evidence or as inextricably intertwined evidence, §90.403, Florida Statutes, still requires the court to conduct a proper balancing analysis. See Holmes v. State, 91 So.3d 859, 863 (Fla. 1st DCA 2012). Nowhere in the court's order does the trial court *even mention* §90.403, let alone conduct such a balancing test. (R. 684-686). Defendant was denied a fair trial under the Florida and U.S. Constitutions.

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[43] See Fudge, supra, at 24 (rejecting state's "fall-back argument" that the testimony could have been introduced as similar fact evidence); Crossley, supra at 450 (rejecting "fall-back argument" that testimony on criminal episodes could have been introduced as similar fact evidence).

[44] Additionally, the State is required to give pre-trial notice of its intent to present collateral crimes evidence. §90.404(2)(b), Florida Statutes. This permits full pre-trial litigation on the merits and admissibility of collateral crimes evidence. See Tartarini v. State, supra at 1189-1190; Hart v. State, supra at 620.

(VI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

Defendant is entitled to resentencing based upon the prosecutor's improper penalty phase arguments, which rendered Defendant's penalty phase unfair under Art. I, §§9, 16 and 17, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution.

Lack of Remorse: The assistant state attorney pointed to Defendant's lack of remorse. The prosecutor argued as follows:

> MR. JOHNSON:"What is the appropriate sentence for someone who, just *three days after her murder*, refers to her with – by terms such as bitch, ignorant, dumb-ass?" (emphasis supplied)(R. 3651).

It is clear that the prosecution must not argue a defendant's lack of remorse. See Pope v. State, 441 So.2d 1073 (Fla. 1983); Robinson v. State, 520 So.2d 1 (Fla. 1988); Colina v. State, 570 So.2d 929 (Fla. 1990); Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990). The prosecutor was clearly referring to the fact that well after the killing of Ms. Googe, Defendant was bad-mouthing the victim; a clear indication that he lacked remorse for her death.[45] The prosecutor was not referring to any mitigation evidence that

[45] The prosecutor's reference to Defendant's attitude three days after the death of Ms. Googe was no accident. When the prosecutor questioned Dr. Krop during the penalty phase, he asked about one of the criteria for antisocial personality disorder

was being argued to the jury. Rather, the State was making an explicit and improper argument that Defendant had a total lack of remorse and deserved death. *Denigration of Mitigation/Converting Mitigation into Aggravation*:

The following remarks were made by the assistant state attorney:

> MR. JOHNSON: "Number three, the defendant has suffered from a chronic addiction to drugs in the past. *I submit to you a lot of people have drug addictions. Most of them do not murder other people*.")(emphasis supplied)(R. 3663).
>
> MR. JOHNSON: "Number four, the defendant is depressed. *A lot of people are depressed, but they don't go and murder other people*.")(emphasis supplied)(R. 3663).
>
> MR. JOHNSON: "The defendant – number six, the defendant has witnessed his mother being physically abused by his father. Now, *there's a lot of people who come from tough circumstances, abusive families, but they, too, most of them, do not go and murder other people*.") (emphasis supplied)(R. 3664).
>
> MR. JOHNSON: "You will also hear the mitigation that will be presented to you that the defendant has artistic ability. *A lot of people have artistic ability.* You could ask why wasn't he putting it to good use? *A lot of people have artistic ability, but they don't murder other people*.")(emphasis supplied)(R. 3669).

The foregoing argument was irrelevant for the jury's consideration. Further, the argument improperly converted mitigating circumstances into aggravating

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which involved being indifferent to or rationalizing having hurt others. The prosecutor specifically asked: "A lack of remorse, correct?" (R. 3455). The prosecutor followed this question with explicit references to Defendant's comments in his post-arrest statement that Defendant called the victim a "dumb-ass" for not recognizing the gun used was hers (R. 3457) and was "ignorant" for fighting over 37 dollars. (R. 3458).

circumstances. A prosecutor may not attach aggravating labels to factors that actually should militate in favor of a lesser penalty. See Walker v. State, 707 So.2d 300, 314 (Fla. 1997) (citing Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)). Additionally, the prosecutor improperly denigrated mitigating evidence. See Brooks v. State, 762 So.2d 879, 904 (Fla. 2000); Delhall v. State, 95 So.3d 134, 167-168 (Fla. 2012). The prosecutor placed whole groups of persons in Defendant's mitigation categories and then asked jurors to compare their life choices and non-criminal activities with his. This was patently improper. Cf., Hayward v. State, 24 So.3d 17, 42-43 (Fla. 2009(prosecutor may not compare life or choices of victim with defendant). *Consideration of Non-Statutory Aggravating Circumstances*: The prosecutor improperly asked jurors to weigh non-statutory aggravating circumstances when he asked: "What is the appropriate sentence for *someone who murders someone who was essentially his step-grandmother*?" (emphasis supplied) (R. 3651). And when he asked: "What is the appropriate sentence for someone who, rather than recognizing the heinous crime that they have committed, instead *blames the victim* and says—essentially, says that it is her fault, that if she had not fight—fought them, that she – they would have left her alone." (emphasis supplied)(R. 3652). The prosecutor's request that juror take these matters under consideration was impermissible.

The cumulative effect of the prosecutor's comments during closing argument amounted to fundamental error. See Card v. State, 803 So.2d 613, 622 (Fla. 2001)(court to consider the totality of errors in closing argument to determine whether cumulative effect deprived defendant of a fair trial). See also Cochran v. State, 711 So.2d 1159, 1163 (Fla. 4th DCA 1998)(improprieties in the prosecutor's closing argument reached critical mass of fundamental error that reached down into validity of trial itself)(citing Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996)). The defense submits that the evidence at trial did not establish by overwhelming evidence that Defendant was the person who actually strangled the victim such as to render harmless the prejudicial impact of the prosecutorial misconduct. The foregoing does not establish overwhelming evidence of guilt, such as to render the prosecutor's improper comments harmless.

(VII)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE ADMISSION OF IMPROPER NON-STATUTORY AGGRAVATING EVIDENCE AT THE PENALTY PHASE

Defendant's penalty phase was rendered unfair under the Florida and U.S. Constitutions. Dr. Gregory Prichard testified for the State that he diagnosed Defendant with antisocial personality disorder, which is not neuro-chemically driven. Dr. Prichard said that persons with antisocial personality disorders usually tend to have them for their entire life and do not respond to medications. He

pointed out that many people call this disorder *the criminal personality*. Basically, the disorder is a pervasive pattern of the violation of the rights of others in societal norms. (R. 3566-3568). Dr. Prichard explained that as such a person with this disorder continuously gets into trouble, breaks the rules, gets into *criminal trouble*, says he going to change things but does not, and gets into a lot of fights and steals things. (R. 3568). This disorder usually shows up in the early teens. (R. 3568). Dr. Prichard testified that there were four criterion (A through D) for the disorder. Under the first criteria there are seven symptom patterns of behaviors. All seven applied to Defendant. (R. 3570). The first criteria (A) involves failure to conform to social norms with respect to lawful behaviors indicated by repeatedly performing acts that are grounds for arrest. Dr. Prichard explained that Defendant began *criminally offending* at age 13 or 14. He began stealing cars. He had *ten juvenile arrests*. He had ten school suspensions before finally being expelled in the 9th grade. He was first *sent to prison* as a *youthful offender* in 2000. (R. 3570-3571). At this point, the defense objected. Defense counsel pointed out that Dr. Prichard's testimony violated the Court's prior ruling on Defendant's prior criminal record. (R. 3571). The State maintained that the defense had "opened the door" to this issue through the notice of mental mitigation." (R. 3571).[46] Further,

[46] The defense had filed a Notice of Intent to Present Mental Health Mitigation Expert During Penalty Phase, listing Dr. Harry Krop. It was asserted that Dr. Krop could be called to testify about statutory and non-statutory factors. (R. 574).

the prosecutor argued that both the defense and prosecution psychologists had diagnosed Defendant with the antisocial personality disorder. (R. 3571). Outside the presence of the jury, the Court considered further argument. The Court noted that the State could bring forth the testimony without getting into every single criminal offense. (R. 3573-3574). The defense pointed out that Dr. Prichard's testimony was not in the nature of rebuttal. Defense counsel noted that the State just wanted to get much more detailed about the disorder in a prejudicial way. (R. 3574). The State made clear that Defendant's pervasive pattern of criminal conduct was not mitigation. (R. 3575). The defense noted that it was not arguing that the prior record was mitigation. (R. 3575).[47]

Subsequently, the defense filed a supplement to the notice, stating that Dr. Krop would address the mitigating factors of physical abuse, chronic addiction, depression, post-traumatic stress disorder, inter-parental physical abuse, attempted suicide by Defendant, bi-polar disorder, group counseling, drug use at the jail and age of Defendant. (R. 622).

[47] The Court asked Dr. Prichard to proffer the information he was going to testify about. Dr. Prichard mentioned Defendant's ten juvenile arrests, his first adult conviction as a youthful offender at age 17, his sentence in 2002, his re-arrest and conviction which resulted in his incarceration until 2007, and his re-arrest in 2008. (R. 3576). The State also proffered Dr. Prichard's testimony concerning the other criteria for antisocial personality disorder, including deceitfulness, which was shown after his 2002 arrest when Defendant repeatedly violated the law although he gave assurances that he would correct his problems. (R. 3578-3581). Dr. Prichard noted Defendant says what people want to hear when the moment arises, but he is not genuine about what he is saying. (R. 3582). Dr. Prichard noted a last example, where Defendant wrote to his grandfather apologizing for what he had done only when he found himself "in this pickle." (R. 3582). Dr. Prichard stated this is what conning is. (R. 3583). Dr. Prichard also testified about the third criteria of impulsivity. Defendant showed this trait through all of his criminal

Lack of Remorse: Before the jury, Dr. Prichard stated that Defendant *exhibited lack of remorse* as indicated when Defendant stole a vehicle when keys

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conduct by not considering the consequences. A good example of this was Defendant's escape because he was not going to do ten years in prison. (R. 3583-3584). The fourth criteria is irritability and aggressiveness, which was shown by his repeated fights and assaults. Dr. Prichard pointed to the 2007 evaluation which mentioned repeated fights. (R. 3584-3585). The fifth criteria is reckless disregard for the safety of self and others. Dr. Prichard pointed to Defendant's early drug use, selling drugs, stealing and gang involvement. Defendant was sexually promiscuous as shown when he got prostitutes in exchange for selling drugs. Additionally, Defendant once stole a four-wheeler and tried to outrun a police officer. In this incident, he broke his own leg when the vehicle flipped over. He also broke his girlfriend's arm and dislocated her shoulder. (R. 3585-3586). The sixth criteria is consistent irresponsibility, which is indicated by Defendant's failure to sustain consistent work behavior or honor financial obligations. Dr. Prichard noted there was very little in Defendant's life that was responsible. (R. 3587). The seventh, and last, criteria is lack of remorse. Dr. Prichard noted Defendant's lack of remorse was clearly shown by Defendant's post-arrest statement about the victim, in which he said she was not his grandmother and that she was a "bitch" and a "dumb-ass." He also called her stupid for resisting over 37 dollars. He called her ignorant and blamed her. He slapped her because she clawed his arm. (R. 3587-3590). After the proffer, the defense reiterated its objections. In particular, defense counsel pointed out that Dr. Prichard should not be allowed to testify about Defendant's gang membership and or about Defendant's specific dates of arrests and sentences. Counsel was also concerned about the testimony concerning lack of remorse. (R. 3590-3592). The Court noted that the State could elicit testimony from Dr. Prichard without going into specific crimes. (R. 3592-3593). The State argued that the defense should not be able to argue that antisocial personality disorder was a mitigator and then have the State's hands tied. (R. 3593). The Court pointed out that the State could not turn a mitigator into an aggravator. Additionally, the State could not make any type of lack of remorse argument. (R. 3593-3595). The Court noted that it had not yet heard anything different than what Dr. Krop stated and that the State could not bolster what was raised by the defense and say it is bad. (R. 3595-3596). After the Court's ruling, Dr. Prichard reviewed the seven criteria for antisocial personality disorder. He testified that Defendant met all seven criteria. (R. 3597-3598).

were left in it.[48] Additionally, this factor was established in Defendant's post-arrest statement. In that statement, Defendant said the victim was ignorant because she wanted to fight over 37 dollars and all she had to do was hand over the 37 dollars and her PIN number for her credit car and she would only have been tied up. According to Dr. Prichard, this was rationalization, in that if the victim had only behaved herself there would have been a different outcome. (R. 3599-3600). Testimony by Dr. Prichard on the issue of lack of remorse advanced a non-statutory aggravating circumstance. This Court has repeatedly held that lack of remorse evidence or argument is inadmissible in the penalty phase unless the defense offers lack of remorse or other mitigating factors such as rehabilitation. See Eaglin v. State, 19 So.3d 935, 946 (Fla. 2009). Even though Dr. Krop diagnosed Defendant with antisocial personality disorder, the defense *did not argue* that such a disorder was a mitigating circumstance and, therefore, the prosecutor's cross-examination of Dr. Krop, and the long and detailed direct examination of Dr. Prichard, on the issue of lack of remorse was error. See, e.g., Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993)(even though defense expert testified that defendant had an antisocial personality the prosecutor could not question the expert on lack of remorse); Robinson v. State, 520 So.2d 1, 5-6 (Fla.

[48] At this point there was an objection:

> MR. WOOD: "Objection, your Honor.
> THE COURT: Well, that's – he can – overruled." (R. 3598).

1988)(disapproving argument that defense expert [Dr. Krop] said defendant suffers from antisocial tendencies and is indifferent to others). Compare Tanzi v. State, 964 So.2d 106, 114-115 (Fla. 2007)(State's questions on lack of remorse appropriate *to rebut* mitigating circumstance of bipolar disorder *and* State presented *no* testimony or evidence on lack of remorse).

Defendant's prior criminal record: Time and again, Dr. Prichard made reference to Defendant's long criminal history. He continually and repeatedly labeled Defendant a ***psychopath***. This testimony constituted a non-statutory aggravating circumstance and was a feature of the penalty phase. The State is not permitted to present evidence of a defendant's criminal history under the pretense that it is being admitted for some other purpose. See Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996); Poole v. State, 997 So.2d 382, 392 (Fla. 2008).

Future Dangerousness: Dr. Prichard testified that antisocial personality disorder is chronic, beginning at age 13 until 28. (R. 3601). Dr. Prichard addressed the psychopathy checklist. He explained that a psychopath is a criminal variant that has a number of personality and behavioral characteristics. According to Dr. Prichard, it is "kind of the ***turbocharged*** antisocial personality disordered individual." (R. 3602-3604) (emphasis supplied). The checklist consists of 20 items, on which a person can score up to 40, that is, a maximum of two on each point. A score of 2 on an item indicates that the characteristic is present without a

doubt. (R. 3604).[49] At this point, the defense objected. The jury was excused. The defense pointed out that the testimony appeared to address future dangerousness. The State argued it was simply rebutting the mitigation offered by Dr. Krop. (R. 3605-3606). The Court pointed out that the State, not the defense, had brought out the psychopathy checklist with Dr. Krop. (R. 3607-3608). The State continued to argue that it was not mitigation. (R. 3608-3609). The Court reiterated that testimony of the test was inappropriate as it dealt with future dangerousness. (R. 3610-3611). The Court announced that the State could ask Dr. Prichard if he agreed with whether the test should be given or not. The defense objected. The State agreed to bypass the issue. (R. 3612-3613). Dr. Prichard's testimony constituted evidence of an impermissible future dangerousness non-statutory aggravating circumstance. See, e.g., Delhall v. State, 95 So.3d 134, 168 (Fla. 2012) (defendant "dangerous" and "can't be fixed"). Admission of the foregoing non-statutory aggravating circumstances cannot be considered harmless error, where Defendant was repeatedly branded a remorseless psychopath and career criminal. See, e.g,, Poole v. State, supra, at 392 (prosecutor's questions suggested defendant was a career felon); Hitchcock v. State, supra, at 862 (defendant characterized as a pedophile); Robinson v. State, supra, at 5-6 (prosecutor argued defendant suffers from antisocial tendencies and showed no remorse).

[49] Dr. Prichard informed the Court outside the presence of the jury that Defendant scored 30. (R. 3608).

(VIII)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

In capital cases, this Court must engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny. Id. Here, there was a *non- unanimous*, 8 to 4 vote jury verdict (R. 813). A shift of only 2 votes would have resulted in a life verdict. The trial court entered an order finding four (4) aggravating circumstances: 1) the capital felony was committed by Defendant, who was previously convicted of another felony and under a sentence; 2) the capital felony was committed while Defendant was engaged in the commission of a robbery; 3) the capital felony was committed for financial gain; 4) the capital felony was EHAC. (R. 935-939). A review of the order imposing death shows that the court, in effect, found three (3) aggravating circumstances, as it merged the robbery and financial gain factors (R. 937). The court gave only minimal weight to the age statutory mitigating circumstance. (R. 940-941). The court found several non-statutory mitigating circumstances and gave such factors varying weights. (R. 942-

951). The two of the three (3) aggravating factors found by the trial judge involved Defendant's prior convictions (prior burglaries on which he was serving a sentence, and the accompanying robbery of the victim). (R. 935-936). The court's findings of EHAC, challenged by the defense here, must nevertheless be viewed along with Defendant's long list of mitigating circumstances, found to exist by the Court or otherwise established in the record. (R. 940-950). Under these circumstances, imposition of the death penalty would be disproportionate. Both the EHAC and under sentence-of-imprisonment aggravating circumstances were found by the Court, but the present case presents a long and heavy list of mitigating circumstances. The law reserves the death penalty only for the *most* aggravated and *least* mitigated murders. This Court's role is to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Cooper v. State, 739 So.2d 82, 85 (Fla. 1999). The Court in Cooper (an 8 to 4 case) gave numerous examples of cases where death was found to be an inappropriate sentence, despite the existence of aggravating circumstances. For example, the Court cited to Urbin v. State, 714 So.2d 411 (Fla. 1998)(death vacated where multiple aggravators were weighed against substantial mitigation), Curtis v. State, 685 So.2d 1234 (Fla. 1996)(vacating death where multiple aggravators weighed against substantial mitigation), Morgan v. State, 639 So.2d 6 (Fla. 1994)(death vacated where multiple aggravators weighed against

copious mitigation), Livingston v. State, 565 So.2d 1288 (Fla. 1988)(death vacated where multiple aggravators weighed against substantial mitigation). Cooper, supra, at 85-86 n.10. Here, the defense presented substantial mitigation, as outlined above. As such, Defendant's sentence of death was disproportionate.

(IX)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

The trial court committed several errors in its sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence and a remand for resentencing. The court gave great weight to the fact that Defendant was under a sentence of imprisonment for another felony at the time of the murder. (R. 935). In this respect, the court noted that Defendant had been convicted of escape from the jail where he was serving time for prior burglary convictions. Defendant submits that this aggravating circumstance should not have been given great weight in view of the fact that the burglary convictions were primarily property crimes. See, e.g., Snelgrove v. State, 107 So.3d 242, 258 (Fla. 2012)(court properly gave *little or some* weight to aggravator per §921.141(5)(a), Florida Statutes, as community control was for non-violent offense).

The court also found that the capital felony was committed while Defendant was engaged in the commission of robbery and gave this factor great weight. (R. 935-936). Defendant submits that the contemporaneous conviction aggravator operates as an impermissible automatic aggravator because it is duplicative of felony murder. See Blanco v. State, 706 So.2d 7, 11-12 (Fla. 1997)(Anstead, J., concurring). Moreover, the court should not have given this aggravator great weight because the prosecution already relied almost exclusively on the felony murder theory. Cf., Scott v. State, 66 So.3d 923, 935-936 (Fla. 2011)(prior violent aggravator based on contemporaneous conviction militates against weight prior violent felony would normally carry). Here, there was very little, if any, evidence relating to premeditation.[50] Consequently, evidence relating to the felony-murder aspect of the crime was pivotal to the State's case.[51]

As to the EHAC factor, the defense recognizes that this Court has previously held that EHAC applies to murder by strangulation of a conscious victim. See

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[50] It is apparent that the State principally relied on the felony-murder theory in its case. At the close of the guilt phase, the prosecutors argued in closing argument that Defendant was guilty of first-degree murder because he was engaged in a home-invasion robbery. (R. 3275; R. 3292; R. 3294). When discussing the aggravating circumstances during closing argument, the prosecutor stated: "By your own verdict that he is guilty of the home-invasion robbery, you have already decided that he is guilty of that crime. And coming into the penalty phase, you can be confident that you have already found him to have committed that murder during the course of that robbery." (R. 3655-3656).

[51] Without a special verdict form, there is no way of knowing which, or, if any, of the jurors convicted on a premeditated or felony murder theory.

Frances v. State, 970 So.2d 806, 815 (Fla. 2007). However, Defendant submits the facts and circumstances of this case do not justify the finding of EHAC. Not every strangulation murder is heinous, atrocious or cruel. See, e.g., Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989); Herzog v. State, 439 So.2d 1372, 1379-80 (Fla. 1983). Dr. Bulic, the medical examiner, testified that on deposition he stated he could not rule out that the victim was unconscious at the time of the strangulation. (R. 2784-2785). Dr. Bulic testified that Ms. Googe had suffered a head injury, but she was probably conscious for about 10 seconds during the strangulation before losing consciousness. (R. 2771-2772; R. 2786). Dr. Bulic was *not* the medical examiner who actually conducted the autopsy. Rather, Dr. Steiner, who performed the autopsy, stated on deposition that he could not rule out the possibility that Ms. Googe was unconscious at the time of the strangulation. (R. 2782-2783). Notably, the Court below made *no* mention of Dr. Steiner's opinion in its order. (R. 937-939). While the State did present evidence that the victim initially struggled, the time factor remained at issue. There was reasonable doubt as to the existence of the EHAC aggravator. See, e.g., Deangelo v. State, 616 So.2d 440 (Fla. 1993)(strangulation of unconscious victim does not qualify for EHAC). Further, Defendant made clear that Doni Brown strangled Ms. Googe and he explained exactly how his DNA may have been found under her fingernails. This version of events was not clearly disproven by the prosecution. The facts in this case do not

warrant the imposition of this aggravating circumstance. Compare Willacy v. State, 696 So.2d 693 (Fla. 1997)(victim beaten, bound, strangled and *set afire* while alive); Bogle v. State, 655 So.2d 1103 (Fla. 1995)(victim's head *crushed with a piece of cement* and likely *subjected to sexual activity* before death); Wilson v. State, 493 So.2d 1019 (Fla. 1986)(in *double homicide* case victim beaten with a hammer, *pursued within the house* and then shot dead).

The trial judge failed to assess all of Defendant's mitigating circumstances and failed to give established mitigating circumstances sufficient weight. The mitigators provided by the defense, and supported in the record, should have been accorded great weight by the trial court. Instead, the court gave no weight, or little or some weight to all but one of the mitigating circumstances (R. 940-951). A sentencing order must evaluate each mitigating circumstance offered, decide if it has been established, and assign it a proper weight. See Orme v. State, 25 So.3d 536, 547-548 (Fla. 2009). Here, the court did not carefully evaluate each mitigating circumstance.[52] The sentencing order outlined seventeen mitigating circumstances. The court gave no weight to a proffered mitigator that Defendant had been treated for bipolar disorder. (R. 945). A court's rejection of a mitigating

[52] Mitigating evidence must be considered and weighed when it is contained *anywhere in the record* to the extent it is uncontroverted and believable. See Spann v. State, 857 So.2d 845, 857 (Fla. 2003). Here, the Court did not mention or consider the mitigating factors that Defendant had ADD and ADHD. (R. 3432-3433; R. 3623-3624), or that he had a mood disorder (R. 3449).

factor cannot be sustained unless supported by competent substantial evidence refuting existence of factor. Maxwell v. State, 603 So.2d 490 (1992). See also Knowles v. State, 632 So.2d 62 (1993). The Court pointed out that neither Dr. Krop nor Dr. Prichard testified that they saw Defendant exhibit any symptoms of bipolar disorder. However, the fact remains that there was a notation of bipolar disorder in the records introduced at trial. (R. 3418-3419). It cannot be said that there was substantial evidence refuting *the existence* of the factor.

Additionally, the defense notes the following: 1) The Court gave moderate weight to Defendant's addiction to drugs, but downplayed the plain existence of poly-substance abuse as a "disease of choice." (R. 943). The Court obviously disregarded the effect of Defendant's depression and the fact that he may have self-medicated with drugs in light of the poor financial situation he lived through while growing up. There was testimony that his medications were suspended, at least in part, due to financial constraints. (R. 3424). The Court should have given this factor great weight. 2) The Court also gave little weight to Defendant's depression diagnosis. *Both experts* testified that Defendant suffered from depression. The Court once again ascribed this clear diagnosis to Defendant's incarcerations and noted that it was of Defendant's "own making." (R. 943).[53] In fact, Defendant was

[53] The Court continued this theme when discussing the mitigating factor that Defendant responded well to counseling in prison. The Court stated that the source of Defendant's stress "is of his own making." (R. 946).

first prescribed medication (Prozac) for depression when he was 11 years old, well before any incarceration periods. (R. 3423). The Court should have given this factor great weight. 3) The Court gave slight weight to the fact that Defendant has been treated for post-traumatic stress disorder in the past. The Court pointed out that Defendant does not currently suffer from PTSD and, "of most significance, did not suffer from PTSD at the time of the offense." (R. 944). This finding appears to clearly contravene well-established law that mitigation *need not have a nexus to the crime*.[54] The Court should have given this factor great weight. 4) The Court gave some weight to the fact that Defendant previously witnessed his mother being physically abused by his father as a child. Although the testimony on this point was unrefuted and clearly established, the Court found that the "impact of this evidence on the Defendant is unknown, although it shaped him psychologically." (R. 944). The Court should have given this factor great weight. Defendant's entire penalty phase presentation was primarily based on the fact that Defendant suffered from depression early on and he attempted suicide on multiple occasions. Consequently, it is clear abuse within his family had a definite, not an unknown, impact on him psychologically. 5) The Court gave little weight to the fact that Defendant attempted suicide on multiple occasions. (R. 944-945). The Court

[54] See Florida Standard Jury Instructions, 7.11 ("A mitigating circumstance is not limited to the facts surrounding the crime.")(R. 3698). See also Martin v. State, 107 So.3d 281, 317-318 (Fla. 2012)(court acts improperly if it attempts to enforce nexus requirement on mitigating circumstance).

stated it "is of little significance as it relates to the murder of Helen Googe." (R. 945). Again, this finding appears to clearly contravene well-established law that mitigation *need not have a nexus* to the crime. The Court should have given this factor great weight. 6) The Court gave some weight to the fact that Defendant obtained his GED while incarcerated. (R. 947). However, the Court noted that this proves that Defendant is capable of focusing on a task and that "the nature and sophistication of the very crime shows that Defendant has the ability to focus on a task and achieve a goal, even if the goal is not a particularly good one." (R. 947). It is apparent from the foregoing that the Court converted a mitigating circumstance into an aggravating circumstance by tying it directly to the commission of the instant crime. Whatever weight the Court gave this circumstance was clearly undermined by this inappropriate consideration. The Court should have given this factor great weight. 7) The Court gave some weight to the fact that Defendant came from a dysfunctional family. (R. 948). However, the Court downplayed the significance of this mitigator by alluding to the fact that "[M]any people grow up in dysfunctional homes and still manage to become successful, law abiding citizens." (R. 948). Such an observation is irrelevant to *Defendant's* background. Whatever the truth or merits of this conclusion, it clearly had the effect of wholly diminishing this unrefuted mitigating circumstance. The Court should have given this factor great weight. 8) The Court gave little weight

to the fact that Defendant's mother died of cancer when he was 18. The Court, however, noted that her death seven years before the crime "can have little, if any significance" as a mitigating factor. (R. 948). Obviously, the Court did not consider this factor as one of many which led to Defendant's depression. Also, this appears to be another improper allusion for the need for a nexus with the crime. The Court should have given this factor great weight.

The Court gave great weight to the fact that Doni Brown, the co-defendant, received a life sentence. (R. 950).[55] The Court, however, found that Defendant was the primary actor in this offense. He knew the victim and he planned the robbery. Moreover, the Court found that Defendant procured the tools needed to escape and that he had knowledge about how to get into Ms. Googe's home and where the safe was located. The Court concluded that Defendant, not Doni Brown, struggled with the victim, as shown by his scratches and his DNA found under the victim's fingernails. (R. 950-951). The evidence introduced at trial, through Defendant's statement, established that Doni Brown strangled the victim. While the State did present DNA evidence linking Defendant to the victim's fingernail scrappings, the DNA evidence was based on only 2 of 13 loci. (R. 3247). Neither Defendant's DNA nor his fingerprints were found on the victim's neck. Defendant's case is not

[55] A co-defendant's life sentence should be accorded substantial weight. See, e.g., Heath v. State, 648 So.2d 660, 665-666 (Fla. 1995); Hertz v. State, 803 So.2d 629, 653 (Fla. 2001).

one of the "most aggravated and least mitigated cases," warranting the death penalty. The death sentence here violated Defendant's right to a fair trial under Art. I, §§9, 16 and 17, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution.

(X)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has rejected constitutional challenges to Florida's capital punishment statute. See, e.g., Miller v. State, 42 So.3d 204 (Fla. 2010). However, this issue continues to be raised before this Court and the United States Supreme Court. As such, the defense maintains that the death penalty scheme is unconstitutional because the law allows a *non-unanimous* jury (as in this case)[56] to render an advisory *recommendation*, and not a binding decision.[57] Also, the law permits the judge, not the jury, to make the findings necessary to impose the death sentence. Further,

[56] The trial court instructed the jurors that their verdict need not be unanimous. (R. 840). This instruction invites jurors to find aggravating circumstances by "floating majorities" as to aggravating circumstances. The instruction also undermines the need for heightened reliability and consistency in capital litigation.

[57] The trial court repeatedly instructed the jury that it would be rendering an "advisory sentence" (R. 832; R. 835; R. 837; R. 840; R. 841); that the final decision was the responsibility of the judge (R. 832); that the jury would render a "recommendation" (R. 832; R. 834; R. 835; R. 839; ; R. 840; R. 841). Even the verdict was entitled "penalty *recommendation*." (R. 813)(emphasis supplied).

in this case, the indictment improperly failed to allege any of the aggravating circumstances; the jury was not required to render a specific verdict stating forth its findings as to aggravating circumstances; no meaningful appellate review is possible without these specific findings by a jury;[58] the jury was not given proper guidance on how the jury is to go about determining the existence of the sentencing factors or how to weigh them; the felony-murder aggravating circumstance amounts to an "automatic" aggravating factor creating a presumption for a death sentence; the jury was permitted to consider victim impact evidence, which is not relevant to any aggravating circumstance; and the EHAC factor is vague and overbroad because the jury was not properly instructed on the precise meaning and application of EHAC. The defense raised these issues below. See footnotes 3 and 4, supra.

(XI)

DEFENDANT'S CONVICTIONS AND SENTENCE OF DEATH MUST BE VACATED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE AND PENALTY PHASE ERRORS

Should Defendant's individual issues be considered harmless error, Defendant would tender that the cumulative effect of the guilt phase errors (Issues I through V) and penalty phase errors (Issues VI through XI) renders Defendant's convictions and sentence fundamentally unfair under Art. I, §§9,

[58] In this case, the defense specifically asked for an interrogatory verdict. (R. 336-339).

16 and 17, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution. This Court may consider the cumulative effect of errors. See Patrick v. State, 104 So.3d 1046, 1068-1069 (Fla. 2012). These serious errors included improper testimony concerning Defendant's sentence, prejudicial closing remarks during the guilt and penalty phases, admission of guilt and aggravators by defense counsel, improper admission of post-arrest statements, improper consolidation of offenses, improper admission of non-statutory aggravating circumstances and an erroneous sentencing order.

CONCLUSION

Timothy W. Fletcher respectfully requests that this Honorable Court reverse his convictions and corresponding sentences, or alternatively, requests that this Court vacate his death sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Mitchell Bishop, Esq., Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118, and sent to e-mail address CrimappDAB@myfloridalegal.com, on this 9th day of July, 2013.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his initial brief is 14 Times New Roman.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ