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IN THE SUPREME COURT OF FLORIDA

BILL PAUL MARQUARDT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-555

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case presents a direct appeal from the Circuit Court for Sumter County, Florida, following the Appellant's convictions for first degree murder and sentences of death. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Marquardt." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Unless indicated otherwise, bold-typeface emphasis is supplied. Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations. Cites to the record are by volume number, "V_" followed by "R_" for the page number.

STATEMENT OF RELATED CASES

The case now presented to this Court was a cold case until 2006 when blood recovered from the Defendant's impounded vehicle yielded a DNA match to one of the victim's in this case, Esperanza Wells. The Defendant had been arrested and indicted for the murder of his mother in Chippewa County, Wisconsin, case number 2000-CF-104. She was killed on March 13, 2000; her blood was also found in the Defendant's car and on the Defendant's pocket knife.[1] A Wisconsin jury returned a verdict of not guilty. The Defendant was also indicted in Eau Claire

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[1] V23, R881.

County, Wisconsin, case number 2000-CF-137 for animal cruelty and found guilty by the jury. Despite being found competent to stand trial, however, under a unique Wisconsin sentencing scheme, and after an agreement with the local prosecutor, the trial judge fashioned a ruling of not guilty by reason of mental illness (not specified) and sentenced Marquardt to 75 years in a mental health institution. In his Wisconsin cases, the Defendant challenged the sufficiency of the search warrant obtained by Wisconsin law enforcement agents for the March 15, 2000, search of his cabin and moved to suppress the evidence seized from his cabin as well as evidence seized from the Defendant's vehicle that was impounded when he was arrested on March 18, 2000, in Wisconsin.

The trial court in Chippewa County denied the motion to suppress and the trial court in Eau Claire County granted it. On appeal by the state, the Wisconsin Supreme Court found that law enforcement relied in good faith on the sufficiency of the search warrant. *See State v. Marquardt*, 705 N.W. 2d 878 (Wis. 2005); *State v. Marquardt*, 635 N.W. 2d 638 (Ct. App. Wis. 2001) (interlocutory appeal by the defendant where he initially prevailed but was later overturned by the Wisconsin Supreme Court). When Wisconsin law enforcement officials searched the defendant's cabin on March 15, 2000, arrested the Defendant on March 18, 2000, and searched the Defendant's cabin again on March 29, 2000, and located Marquardt's pistol secluded underneath the refrigerator in his cabin, they were

unaware that Margarita Ruiz and Esperanza Wells had been murdered with Marquardt's pistol and a knife like Marquardt's in Sumter County, Florida, and would remain unaware for six more years until the DNA match was brought to the attention of the Sumter County Sheriff's Office.

STATEMENT OF THE CASE

On December 15, 2006, Bill Paul Marquardt was indicted by the grand jury of Sumter County, Florida, for the March 15, 2000, murders of Margarita Ruiz and Esperanza Wells. (V1, R1-2). At the time of the Sumter County indictment, Marquardt was serving his 75 year sentence at the Mendota Mental Health Institution in Madison, Wisconsin. After a request for extradition from the Governor of Florida to the Governor of Wisconsin, the Sheriff of Sumter County was able to take custody of the Defendant on May 2, 2009. (V1, R8-14). The Defendant was arraigned on the Sumter County indictment on May 21, 2009, and appointed a public defender. (V11, R2180, 2194). The public defender later withdrew from representation and the office of regional conflict counsel was appointed. (V1, R72-74). Attorney Junior Barrett from the office of regional conflict counsel subsequently withdrew and Attorney Charles Vaughn was then appointed to represent the Defendant. (V1, R120-121, 122, 125). Subsequent to a

court-ordered competency evaluation[2] and a *Faretta*[3] hearing, the trial court granted Marquardt's motion to represent himself and appointed Attorney Vaughn as stand-by counsel. (V1, R159).[4] Following various pre-trial proceedings, Marquardt's trial began on October 3, 2011. On October 12, 2011, the jury found the Defendant guilty of two counts of Murder in the First Degree: Count 1 for the murder of Margarita Ruiz and Count 2 for the murder of Esperanza Wells; and one count of Burglary of a Dwelling with a Firearm (Count 3).

Marquardt waived a jury recommendation for the penalty phase. The Defendant also elected to continue representing himself at the penalty phase. (V9, R1762; V12, R1384-85). When Marquardt refused to present any mitigation, the trial court appointed stand-by counsel Attorney Vaughn as special mitigation counsel to present mitigation for the court to consider in sentencing. (V12, R1401). The trial court also appointed two investigators to serve as mitigation specialists, a

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[2] The evaluation conducted by Dr. Harry Krop, forensic psychologist, was sealed. (V1, R152; V12, R2290).

[3] *Faretta v. California*, 422 U.S. 806 (1975).

[4] Both the Public Defender and Regional Conflict Counsel moved to withdraw from representing the Defendant do to irreconcilable disputes over trial strategy and communication. Specifically there were concerns over whether the Defendant would take advice from female or African-American attorneys. (V12, R2236-2237, 2239-2246, 2254-2261).

psychologist to evaluate for mental health mitigation,[5] and a comprehensive pre-sentencing investigation (PSI) report from the Department of Corrections. (V27, R1402, 1405). On February 1, 2012, the trial court conducted a combined *Faretta*-Penalty Phase-*Spencer*[6] hearing. On February 28, 2012, the trial court imposed two death sentences, one for each murder victim, and a sentence of life in prison for the armed burglary conviction. Notice of appeal was filed on May 4, 2012. After this Court granted the Appellant two extensions of time to file, the Appellant filed his *Initial Brief* on or about June 4, 2013. This answer follows.

STATEMENT OF THE FACTS

The Statement of the Facts set out in Marquardt's Initial Brief is incomplete and is denied. The State relies on the following facts from the testimony and evidence presented at trial.

The Murder

Pam Ruiz is the daughter-in-law/sister-in-law of the victims, Margarita Ruiz and Esperanza "Hope" Wells. (V18, R288, 289). In March 2000, Ruiz and Wells

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[5] V27, R1405. Dr. Krop was appointed for a penalty phase mental health evaluation but he did not testify and no evaluation was submitted to the court, sealed or unsealed.

[6] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

cared for Pam's children[7] while Pam and her husband worked. (V18, R291-92, 294, 297). On March 15, 2000, about 7:00 a.m., Pam dropped her children off at Ruiz's home.[8] Pam did not notice anything amiss in the residence at that time. There was no damage to the appliances; neither was there any blood. Ruiz latched the lock on the screen door when Pam left. At 1:30 p.m., (police notified Pam at work to immediately go to her mother-in-law's home "because something had happened.") (V18, R295).

The Initial Investigation of the Ruiz and Wells Murders

Captain Kevin Hofecker,[9] Sumter County Sheriff's Office, responded to Ruiz' home at 1:36 p.m. on March 15, 2000. (V18, R303, 306, 312). Hofecker saw Paige and Trevor Ruiz hiding[10] underneath the dining room table. He found the deceased bodies of Margarita Ruiz and Esperanza Wells in the southwest bedroom. (V18, R309, 315). Detective Havens escorted the children out of the house as

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[7] Paige Ruiz was three-years-old and Trevor Ruiz was one-year-old. (V18, R290). Pam said her daughter Paige did not tell her that she saw the skin color of the murderer—only that she saw "dark-colored clothing." (V18, R299).

[8] The home was located off Highway 50 in a rural area of Sumter County. (V18, R306, 307).

[9] Hofecker was a deputy at the time of the murders. (V18, R305). Deputy Stravino also responded to the call but was deceased at the time of trial. (V18, R306).

[10] See V19, R469.

Hofecker secured the crime scene. (V18, R311).

Major Jerry Brannen, Sumter County Sheriff's office, reported to Ruiz' home on March 15, 2000. (V19, R449, 450). Brannen observed the broken latch on the screen door to the porch at the back of the house. There were shell casings lying nearby. He also saw the defect in the freezer door as well as the blood spatter. (V19, R452, 467). After seeing the bodies of Ruiz and Wells, Brannen decided the Florida Department of Law Enforcement ("FDLE") was needed to process the scene. (V19, R452-53).

Steven Stark, crime lab analyst, FDLE, processed the crime scene at Ruiz' home. (V18, R316-17, 321). He collected evidence which included hairs and fibers, processed fingerprints, and sketched, photographed, and videotaped the interior and exterior of Ruiz' home. (V18, R321, 322, 327). Stark collected fired cartridge casings from the back porch area. (V18, R323). Stark saw that the latch to the screen door was broken. (V18, R341). There were several bullet holes near the back screen door. Stark also located a tooth on the floor near the southwest bedroom and additional fired cartridge casings in the dining room, living room, and southwest bedroom area. (V18, R324, 340; V19, R362). Stark observed a bullet hole in the freezer door of the refrigerator as well as blood spatter. The area was processed and swabbed. (V18, R329, 330). Stark determined that the shooter fired a few rounds outside the home because the cartridge cases were ejected from

the weapon and found near the porch area. One of the bullets passed through the screen door, through a person,[11] and then embedded in the freezer coils. (V18, R331-32, 333). The blood spatter on the exterior freezer door of the refrigerator indicated a person was struck by the bullet before it entered the freezer. (V18, R332). Four casings and fragments were collected and transported to the firearms section of FDLE. (V18, R335, 347). There were no fingerprints located on the casings and fragments. (V18, R347). Stark swabbed a blood stain located on the floor outside the southwest bedroom. (V18, R337). Swabs were transported to the DNA section of FDLE. (V18, R341). Stark said none of the fingerprints processed at Ruiz' home matched Marquardt's. An unidentified palm print was located on the kitchen countertop near the back door knob. (V18, R342; V19, R365, 367, 371). Evidence indicated the killer entered the home through the back door. (V18, R344).

Corporal Elmer Havens, Sumter County Sheriff's Office, responded to Ruiz' home on March 15, 2000. (V19, R372, 373-74). Upon arrival, Havens saw a

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[11] John Thogmartin, medical examiner, testified that Ruiz' shirt had three bullet holes in the back—two were exits, one was an entrance. (V19, R401). Thogmartin recovered one intact projectile as well as a projectile fragment from Ruiz' clothing. (V19, R401, 402). Thogmartin said Ruiz was shot three times—two bullets perforated her right lung with one of those bullets exiting out her back and into the freezer. (V19, R403, 404, 406, 414-15).

toddler looking out the living room window. (V19, R374). Havens then went inside and removed Paige and Trevor Ruiz from the house and placed them in his car. Havens asked Paige if she knew who had "committed the crime" but she did not know. Havens then asked Paige "if he was a black man or a white man; she said she didn't know." (V19, R375, 380, 383). Havens went back inside the house and saw the deceased bodies of Ruiz and Wells in the southwest bedroom. (V19, R376). Havens obtained a search warrant which indicated that Paige Ruiz had said the killer was a black male in a green car. The warrant's description of the car was for "a '64 four-door Oldsmobile." (V19, R380, 383). Havens checked with neighbors in the area to see if anyone heard or saw anything "out of the ordinary." (V19, R376-77).

From March 2000 to June 2006, Havens followed up on over 60 leads regarding the Ruiz and Wells murders. On June 13, 2006, Havens received a lead that led him to Wisconsin where he met with Marquardt. (V19, R378). Havens obtained buccal swabs from Marquardt. (V19, R379).

Havens drew a map that included homes located in the vicinity of Ruiz' house that were known as "drug houses." (V19, R384). In addition, Havens obtained a March 15, 2000, video surveillance tape from a convenience store near Ruiz' home on Highway 50 that was pointed toward the parking lot area of the store. Marquardt's 1995 green Thunderbird did not appear on the tape. (V19,

R385, 386). Havens said there was no available video of the intersection area of Highways 301 and 50. (V19, R387).

The Autopsies

John Thogmartin, medical examiner, responded to the crime scene. (V19, R388, 392). He photographed the interior and exterior of the scene. (V19, R433). He observed the shell casings on Ruiz' porch, bullet holes in the porch screen door, and a bullet hole in the freezer. He also noticed the blood spatter "all over the front of the fridge." (V19, R395).

Thogmartin performed the autopsies on Ruiz and Wells.[12] (V19, R399). Fluids as well as oral swabs were taken from both victims. (V19, R397-98). Ruiz and Wells both suffered gunshot[13] wounds. In addition, they both suffered stab wounds to the left side of their necks. Ruiz had three stab wounds and Wells had eight stab wounds. (V19, R399).

Ruiz' shirt had three bullet holes in the back—two were exits, one was an entrance. (V19, R401). Thogmartin recovered one intact projectile as well as a projectile fragment from Ruiz' clothing. (V19, R401, 402). Ruiz was shot three

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[12] Ruiz was 72 years old and Wells was 41 at the time of their deaths. (V19, R421, 432).

[13] Thogmartin was informed that the caliber of the bullets was 9-millimeter. (V19, R435).

times—two bullets perforated her right lung with one of those bullets exiting out her back and into the freezer. (V19, R403, 404, 406, 414-15). The other bullet "grazed" Ruiz' thumb, entered her right chest, went through the right lung, and then exited through her back. In Thogmartin's opinion, Ruiz was shot twice as she stood by the screen door. (V19, R404-05, 420). In addition, Thogmartin opined that after the first two initial wounds were inflicted, Ruiz turned, took a few steps toward the back part of the house, "running with two gunshot wounds through her lung" and was then shot in her back. (V19, R421). This wound entered the right side of her back, which went through her spinal cord, through her aorta, which perforated her heart, and then exited through the left side of her chest. (V19, R415, 416, 417, 421). This gunshot wound was the most severe, it "obliterated" Ruiz' spinal cord. (V19, R417, 421). In Thogmartin's opinion, this gunshot wound was inflicted to Ruiz in the living room area, where "she was able to take a couple of steps and just dropped, her legs were not working anymore." (V19, R418). Ruiz also had three stab wounds[14] to her neck. (V19, R418, 435). One of the stab wounds severed Ruiz' jugular vein. (V19, R421).

Thogmartin concluded that the cause of death for Ruiz was multiple gunshot

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[14] Stab wound one was 1.3 inches wide and 1.5 inches deep; stab wound two was .5 inch wide and .5 to 1.0 inch deep; stab wound three was .75 inch to 1.0 wide and 1.0 inch deep. (V19, R436).

wounds with a contributory factor of sharp force injuries to her neck. The manner of death was homicide. (V19, R422, 423).

Thogmartin performed the autopsy of Wells. (V19, R423). Wells was shot one time in her face. (V19, R425). Thogmartin observed powder stippling on Wells' face, which, in Thogmartin's opinion, meant the gun was between one and eighteen inches away when Wells was shot. (V19, R426, 427). Thogmartin said the bullet entered through Wells' chin, traveled though her face, fractured her jaw, pierced the carotid artery and jugular vein, and landed in the soft tissue on the side of her neck. (V19, R426, 429). Once the bullet severed the carotid artery, Wells might have been "able to stand and move for maybe ten or eleven seconds, but she's gonna feel faint and it's just a matter of time before she dies." Further, "It's pretty, pretty quick unconsciousness and a pretty quick death." (V19, R429). Thogmartin recovered the bullet underneath the skin on the left side of Well's neck. (V19, R428). Thogmartin also observed eight stab wounds[15] to Wells' neck. The stab wounds severed the carotid artery and jugular vein, same as the bullet had

[15] Stab wound one was .66 inch wide and .5 to .75 inch deep; stab wound two was not discussed; stab wound three was 1.0 inch wide (1.0 plus) and 3.0 inches deep; Stab wound four was .75 inch wide (.75 plus) and 1.0 inch deep; stab wound five was .66 inch wide and .75 inch deep; stab wound six was .24 inch wide (.24 inch plus) and .5 inch deep; stab wound seven was .4 inch wide and .5 inch deep; and stab wound eight was .18 inch wide and .24 inch deep. (V19, R436-37).

done. (V19, R430, 435). The stab wounds "doubled up" on the damage of the gunshot wound. (V19, R431).

Thogmartin concluded that the cause of death for Wells was a gunshot wound to her face with a contributory factor of multiple stab wounds to her neck. The manner of death was homicide. (V19, R431).

Thogmartin did not observe any defensive wounds on either victim. In addition, neither victim had been sexually assaulted. (V19, R431, 432). Of the eleven stab wounds between the victims, only one was deeper than one inch. (V19, R438, 444). In Thogmartin's opinion, a four-inch pocket knife blade could have inflicted the wounds on the victim's necks. (V19, R438). The stab wounds were not specific to any type of knife. (V19, R439). In Thogmartin's opinion, Marquardt's knife was "capable" of inflicting all the knife wounds on the victims. (V19, R446). In addition, in Thogmartin's opinion, if a knife "regardless of its size, was subject to DNA testing" and revealed the victims' blood on the blade, that knife would be consistent with inflicting the wounds on Ruiz and Wells. (V19, R447). Thogmartin concluded, "the best way to figure out what knife did it, is if you find a knife that's anatomically consistent with the wounds, if you find blood of the victim on the knife, then that's probably your knife; pretty simple concept." (V19, R447).

The Murder Investigation Continued

Major Brannen attend Ruiz' and Wells' autopsies. He collected projectiles and fragments removed from the victims by the medical examiner. (V19, R453, 454, 457). Brannen said there were many leads in this case, "too many to quantify," but many were discounted with phone calls or computer inquiries. None of the leads received prior to June 2006 proved fruitful. (V19, R460-61).

In June of 2006, however, the Wisconsin District Attorney's Office contacted the Sumter County Sheriff's Office. (V19, R462). A lead was developed that involved DNA evidence from a Wisconsin case that was compared the victims' DNA in this case. (V19, R461).

Brannen said a BOLO was initially issued for "a black male driving a green car," based on the information given by Paige Ruiz. (V19, R465, 466, 468). However, BOLOs are broadcast with a "wide net" with the hope of narrowing the investigation for potential suspects. (V19, R468). Subsequent interviews with Paige Ruiz reflected that she never saw the skin of the perpetrator, only "an individual with dark-colored clothing." (V19, R469). In addition, information that the victims were stabbed was not released to the public. (V19, R467).

Forensics - DNA and Blood Analysis

Patricia Bencivenga was a crime lab analyst with FDLE at the time of these murders. (V20, R484, 485). Bencivenga received the buccal swabs from Ruiz and

Wells obtained by the medical examiner and utilized them as the victims' referenced standards. (V20, R497). In 2000, Bencivenga analyzed the blood stain sample taken from the area outside the southwest bedroom. She determined it contained the DNA of both victims as well as an "unknown individual." (V20, R502, 503, 505). Bencivenga did not have a known DNA sample of Marquardt's at that time. (V20, R505, 507).

Darren Esposito, crime lab analyst, FDLE, conducted DNA testing on the blood swab taken from the area outside the southwest bedroom of the victims' home. He compared the known DNA sample of Marquardt to the swab and determined Marquardt was also a contributor to the blood mixture. (V20, R510, 524-25, 526). Esposito said there were "three or more individuals" that contributed to this sample. (V20, R527). Ruiz and Wells were also contributors. (V20, R532).

The Wisconsin Investigation

Deputy Jeffrey Wilson, Eau Claire County Sheriff's Department, Eau Claire, Wisconsin, responded to Marquardt's cabin in Eau Claire on March 18, 2000.[16] (V21, R611, 612-14). Wilson recalled Marquardt was wearing a jean jacket, along

[16] Police initially used a bull horn to get Marquardt's attention for him to exit his cabin. Subsequent to that, tear gas was used to force Marquardt out. (V21, R628, 629, 652-53, 678).

with dark clothing and sunglasses. (V21, R614). Wilson searched Marquardt and collected several items from Marquardt's pockets, including a large amount of currency and a folding knife. (V21, R615, 630). Deputy Edgar Hendricks took custody of the knife. (V21, R616-17). Wilson, along with at least seven other law enforcement personnel,[17] participated in arresting Marquardt at 8:45 a.m. on March 18, 2000. (V21, R625). Marquardt's cabin was searched subsequent to his arrest. (V21, R626).

Deputy Edgar Hendricks (retired), Eau Claire County Sheriff's Department, responded to Marquardt's Wisconsin cabin on March 18, 2000. (V21, R633-34). After searching Marquardt's pockets, Deputy Wilson handed Hendricks several items of evidence that included a key, money, and a pocket knife. (V21, R636). The knife was then submitted to Sergeant Vogler. (V21, R637). Marquardt was then arrested and taken to jail. (V21, R653). The cabin was searched subsequent to Marquardt's arrest. (V21, R654).

Captain John Vogler (retired), Eau Claire County Sheriff's Department, (V21, R657), responded to Marquardt's Wisconsin cabin on March 18, 2000.

[17] They were all members of the SWAT team as there was a felony arrest warrant issued for Marquardt. The SWAT team is utilized in high-risk situations. (V21, R631).

(V21, R657, 659). Vogler was present when Marquardt was arrested, placed in a vehicle with Agent Rehrauer, Wisconsin Department of Justice, and Detective Richard Price, Chippewa County Sheriff's Department, and transported to jail. (V21, R660-61, 677, 679). Vogler took possession of Marquardt's knife from Hendricks and submitted it to Wisconsin's State crime laboratory. (V21, R662). Vogler also obtained Marquardt's clothing, shoes, and a blood sample, which was submitted to the State crime laboratory. (V21, R663-664, 666-667, 679). Marquardt's green Ford Thunderbird was seized and transported to the crime lab on March 18, as well. (V21, R668, 669).

Vogler participated in a previous search of Marquardt's cabin on March 15, 2000. (V21, R669). Vogler recalled that many items, including a carton for a pocket knife, were seized. (V21, R670, 673, 675, 676). Marquardt was not present at the cabin on this date. (V21, R709). Vogler did not participate in a subsequent search of Marquardt's cabin that occurred on March 18, 2000, but did participate in the March 29, 2000, search. (V21, R681-82). On March 29, a 9-millimeter handgun and 9-millimeter boxes of bullets were found underneath the refrigerator's cooling coils. (V21, R682, 684, 685).

Vogler recalled the March 29 search of the cabin and surrounding area was divided into grids and searched by several law enforcement officers. (V21, R701). Detective Price, Chippewa Falls Sheriff's Department, was assigned to search the

kitchen area. Agent Rehrauer was assigned to be the custodian for the inventory. (V21, R701, 703). Vogler said Deputy Marc Christopher was the inventory custodian for the March 15 search. The March 15 two-page inventory and return list did not include a Tifton, GA, motel receipt dated March 16, 2000. (V21, R703-04, 705).

Sheriff James Kowalczyk, Chippewa County,[18] Wisconsin, was an investigator with the detective bureau in March 2000. (V22, R718, 719). On March 18, 2000, Kowalczyk assisted the Eau Claire County Sheriff Department's investigation at Marquardt's cabin. (V22, R719-20). Kowalczyk searched Marquardt's Thunderbird and found a Masters Inn motel receipt from Tifton, Georgia.[19] (V22, R726, 727, 746). On March 20, Kowalczyk and Vogler escorted Marquardt's Thunderbird to the crime lab. (V22, R720). An additional search revealed receipts, an atlas, and road maps, including a map of Florida, all of which were taken into custody. (V22, R722, 740, 746). The receipts were from the Fiesta Bay Resort KOA, Long Boat Key, Florida, and the Masters Inn, Tifton, Georgia. (V22, R723, 724). The registration receipts indicated a Wisconsin license plate of

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[18] Chippewa County is the contiguous county north of Eau Claire County in Wisconsin. (V22, R719).

[19] Kowalczyk later stated the receipt was found on Marquardt. (V22, R729).

"PW483." (V22, R724-25). The Long Boat Key resort receipt indicated a check-in date of March 15, 2000, and a check-out date of March 16, 2000. The Masters Inn receipt indicated a check-in date of March 16, 2000, and a check-out date of March 17, 2000. Both receipts bore Marquardt's name and Wisconsin address. (V22, R725, 726, 730-31, 742).

Deputy Marc Christopher, Eau Claire County Sheriff's Department, Wisconsin, assisted in the investigation at Marquardt's cabin on March, 18, 2000, and March 29, 2000. (V22, R754, 755, 756). At the March 18 search, Christopher found a 9-millimeter bullet approximately three feet in front of the refrigerator. (V22, R759, 760). Christopher recalled that the cabin contained "so many items on the floor that were stacked, sometimes up to a foot-and-a-half high . . . clothing, garbage, packaging from food, VHS tapes." (V22, R770-71). In addition, the cabin contained a large amount of tear gas residue. (V22, R776). When the items within the cabin were moved about, the tear gas re-activated and irritated personnel. (V22, R776). At the March 29 search, Christopher witnessed the pumping of the septic tank. He did not enter Marquardt's cabin that day. (V22, R757, 760).

Agent John Rehrauer (retired) was employed by the Wisconsin Department of Justice in criminal investigations. (V22, R783, 784). On March 18, 2000, he

assisted local law enforcement with an investigation at Marquardt's cabin.[20] Rehrauer did not assist in searching the cabin; he and Deputy Price escorted Marquardt to the Eau Claire Law Enforcement Center. (V22, R785, 786, 793, 794). Rehrauer returned to Marquardt's cabin on March 29, 2000, and assisted with a search. Rehrauer was assigned as the evidence control officer that included photographing evidence and taking custody of it. (V22, R787, 797-98).

Rehrauer said the cabin was a "mess; things were strewn all over." At some point, Deputy Price called Rehrauer's attention to two yellow boxes containing bullet shells, which were located underneath the refrigerator. (V22, R788, 789). When law enforcement personnel moved the refrigerator[21] away from the wall, they located a Stallard Arms 9-millimeter handgun. Deputy Price took the weapon into evidence. (V22, R790, 792, 799).

Investigator Richard Price, Chippewa County Sheriff's Department, Wisconsin, assisted Agent Rehrauer in escorting Marquardt from his cabin to the Eau Claire Law Enforcement Center on March 18, 2000. (V23, R907, 908, 910, 920). Price returned to Marquardt's cabin on March 29 and photographed several

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[20] Rehrauer said the police tactical team removed the windows from Marquardt's cabin. (V22, R796).

[21] A microwave oven was first removed which sat atop of the refrigerator. (V22, R790).

areas. (V23, R911, 912). Price also requested that a septic tank company pump the cabin's septic system. (V23, R913).

Price said the cabin was "in extreme disarray" which made it difficult to navigate through the cabin without stepping on items of clothing or furniture. (V23, R914). Bags of garbage, clothing, and boxes obstructed the view underneath the kitchen cabinets and appliances. As Price moved items about, residue from tear gas irritated his eyes and nose. (V23, R916). Price used a flashlight to look underneath the cabinets and appliances. He located boxes of bullets and a 9-millimeter handgun underneath the refrigerator. (V23, R917, 922). Agent Rehrauer, previously designated the evidence control person, photographed the bullet shells and handgun and collected the items as evidence. Price and Rehrauer transported the weapon to the Wisconsin State Lab. (V23, R918, 919). In addition, Price said Marquardt's four vehicles were impounded. (V23, R935-36).

Firearms

John Romeo, crime lab analyst, firearms section, FDLE, examined a 9-millimeter Stallard semiautomatic handgun that had been found in Marquardt's Wisconsin cabin underneath the refrigerator. (V20, R541, 549, 552; V23, R917-19, 922, State Exh. 61). He test-fired the weapon and obtained known exemplars. (V20, R552). Romeo also examined eight casing fragments and four fired 9-millimeter Lugar caliber cartridge casings that had been collected at the crime

scene. (V19, R335-337; V20, R543, 544). He compared three of the fired bullets with the exemplars and determined they came from the Stallard Arms pistol. (V20, R553). Romeo concluded that the four fired cartridge cases and three fired bullets collected at the crime scene were all fired from the 9-millimeter Stallard semiautomatic handgun recovered from Marquardt's cabin by Wisconsin law enforcement. (V20, R548-49, 551, 554).

DNA Analysis

John Ertl, DNA analyst, Wisconsin State crime laboratory, performed DNA analysis on Marquardt's Thunderbird in 2000. (V23, R839, 855-56). At that time, Ertl only had a known standard of Marquardt's DNA. (V23, R858). Ertl analyzed swabs from blood stains located on the arm rest of the driver's side door and determined Marquardt was a possible minor contributor and an unknown female was the "major contributor." (V23, R855, 856, 858). In November 2006, Ertl received a known standard of Esperanza Wells' DNA. Ertl compared her DNA to the blood swab taken from the arm rest of the driver's side door of Marquardt's car. The analysis revealed that Well's blood was the "major contributor" of the blood mixture found on the arm rest in Marquardt's car. (V23, R860, 861).

Ertl analyzed the clothing and shoes Marquardt was wearing at the time of his March 2000 arrest. (V23, R863, 880). Several areas on Marquardt's jean jacket tested positive for blood stains. (V23, R863). Ertl examined three stains which

revealed mixed profiles that included Marquardt as a "possible contributor" as well as two "unknown female contributors." (V23, R863). Prior having the known samples of Ruiz and Wells to compare, Ertl's DNA analysis revealed the "unknown contributors" to the jeans jacket mixture had a "parent/child" relationship, "possibly mother/daughter." (V23, R871). It was "possible" that the blood stains belonged to Ruiz and Wells. (V23, R878). Ertl did not locate the presence of Ruiz' and Wells' blood on Marquardt's shirt, pants, boxers, or socks. (V23, R866-868, 879).

Ertl also performed DNA analysis and testing on Marquardt's shoes which appeared to contain "visible blood stains." (V23, R869). Ertl extracted DNA from several stains and obtained profiles. The blood stain on the right Nike shoe contained the same DNA profile as the "major contributor" to the blood stain on the arm rest of Marquardt's car, which Ertl had previously determined belonged to Wells. (V23, R869, 870, 877). Ruiz' blood was not found on the shoes. (V23, R877).

Ertl performed DNA analysis on Marquardt's folding pocket knife.[22] (V23,

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[22] The knife was dismantled in the lab. (V23, R873). Mary Marquardt's (Defendant's mother) DNA was a major contributor to the DNA located on the knife. (V23, R881, 884). Marquardt had been charged with his mother's murder in Chippewa County, Wisconsin, Case No. 2000CF000104 in which he was

R872). He observed several stains which tested positive for blood. In addition, he observed fingerprint ridge details on the smooth part of the blade. As a result, the knife was transferred to the fingerprint section of the lab. When the fingerprint analyst[23] examined the knife, he noticed "some reddish brown flaky material" fall out of the handle. The flakes were collected and given to Ertl for processing. Ertl said the flakes tested positive for blood. Ertl was also able to extract DNA from the flakes, as well as from other swabs he had taken. (V23, R873). A swab from the divot area revealed a mixture of DNA belonging to Marquardt and a "possibility" of Ruiz and Wells. (V23, R874, 875, 881, 885).

Kevin Noppinger has worked as a DNA analyst for various State agencies since 1978. In 2004, he became lab director for his own firm, DNA Labs International. Noppinger has performed DNA analysis on "hundreds of thousands of samples" during his career. (V23, R893-95). Noppinger received a sample of Marquardt's DNA in order to perform Y-STR analysis. Noppinger explained that Y-STR testing is utilized in identifying only the male DNA in a sample because females do not have the Y chromosome. (V23, R897, 900-01). Noppinger compared Marquardt's DNA to a DNA extract from Ruiz'/Wells' living room

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acquitted. (V14, R2691-92).

[23] See Gerald Kotajarvi's testimony. (V24, R1028).

floor. The testing revealed a match to Marquardt. In addition, Noppinger could not exclude Ruiz and Wells as contributors to the sample. (V23, R902-03).

The Case in Defense

Sergeant Robert Cunningham, Chippewa County Sheriff's Department, collected videotapes from a gas station, in Osseo, Wisconsin, on March 17, 2000. (V24, R1014-15, 1017). He did not view the tapes. (V24, R1018).

Gerald Kotajarvi, forensic scientist, (retired), was employed by the Wisconsin crime lab from 1992 to 2009. (V24, R1020). Kotajarvi examined the 9-millimeter handgun and boxes of bullets found at Marquardt's cabin and determined there were no identifiable prints. (V24, R1021). He also examined Marquardt's pocket knife. Although there was "some ridge structure" on a part of the knife, Kotajarvi could not identify any prints of value. (V24, R1022, 1027). Kotajarvi observed dried blood flakes on the knife which he reported to DNA analyst Ertl. (V24, R1028).

Kotajarvi also examined a knife carton box and developed an identifiable palm print. However, it did not belong to Marquardt. (V24, R1023). In addition, Kotajarvi examined a bus ticket from Vernon, Texas, dated February 14, 2000, which he determined did not contain any identifiable prints. (V24, R1025). Kotajarvi said there is no way to tell when a print is left on an item. (V24, R1026).

Michael Connor manages a self-storage facility on Valdosta, Georgia. (V24,

R1029). On February 21, 2000, Marquardt rented a storage unit in which he stored his 1995 green Thunderbird. Connor then drove Marquardt to the bus station. (V24, R1030, 1040).

Connor said each unit has its own code to gain entrance to the unit, in addition to a keypad on a gate that surrounds the units. He maintains a computer system that tracks when someone inputs the code for a particular unit and when the person leaves. (V24, R1030-31, 1034). Connor's records indicated someone entered the code to the Marquardt's unit containing the Thunderbird on March 15, 2000, at 8:08 P.M., and exited at 8:28 P.M. (V24, R1031, 1036, 1037).[24] Connor did not recall if he had recalibrated the computer system to recognize Leap Day, which, if he had not done so, would indicate the person entered the unit on March 16. (V24, R1033, 1041). Connor said a person could enter the storage unit area if they followed someone else in and then out, through the gate. (V24, R1036).

Sheila Marquardt is Marquardt's sister. (V24, R1048). She identified a family photo taken on Christmas 1999. Sheila said the shoes Marquardt was wearing in the photo were different than the shoes collected the date of his arrest. (V24, R1049, 1050). However, Marquardt "possibly" wore the same style and

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[24] Connor said law enforcement entered the unit around March 31, 2000. A red Tracer vehicle was located in Marquardt's unit. (V24, R1038, 1047).

color of shoes during 1999 through 2000. Other than the holidays, Sheila did not often see her brother during 1999 through 2000. (V24, R1052, 1053). Sheila said she notified her father on March 18, 2000, that Marquardt's cabin required fixing. (V254, R1050). Sheila acknowledged that her brother could not fix the cabin as he was in jail. Sheila also acknowledged that her mother was deceased prior to March 15, 2000. (V24, R1051).

Alfred Marquardt is Marquardt's father. (V24, R1054). Alfred went to Marquardt's cabin on March 18, 2000, subsequent to the police search. (V24, R1054-55). Alfred moved the refrigerator in the cabin "about halfway out" away from the wall in order to get to the electrical box. (V24, R1055, 1065, 1074, 1076). The entire area around the refrigerator was not exposed. (V24, R1074). Alfred did not see the two boxes of bullets underneath the refrigerator. (V24, R1055, 1066). Alfred also replaced the cabin's kitchen window that had previously been removed by the police tactical team. (V22, R796; V24, R1067). Alfred did not remove anything from the cabin. (V24, R1073).

Alfred said the knife taken from Marquardt the day he was arrested looked like one he had given to Marquardt as a gift prior to the year 2000. (V24, R1074-75). In April or May 2006, Alfred said Marquardt told him that he was expecting

the State of Florida to file criminal charges against him. (V24, R1075).[25]

Cathy Buchanan lived in Webster, Florida in 2000. On March 15, 2000, she was driving to work at about 8:15 a.m. As she passed by the Ruiz/Wells home, she noticed a "late '70's" two-toned, green Cutlass car parked on the side of the house. (V24, R1097, 1101, 1102). Buchanan had noticed the car parked at the house the night before along with a gold-colored station wagon. She also saw a black male standing on the porch. However, only the green car was there on the morning of March 15. (V24, R1102, 1103).

Wayne Wright initially said he drove by the victim's home on the morning of March 15, 2000. He saw a "brand new" small, green car parked across the street from the house, with the driver's side door open. He later corrected the date he noticed the vehicle as May 15, 2000. (V24, R1107, 1009, 1110).

Investigator Richard Price obtained copies of several travelers checks in Marquardt's name from Royal Credit Union. (V24, R1111-12). The copies indicated Marquardt cashed the checks on or about February 9, 2000 (in Aurora, Illinois); on or about February 11, 2000 (in Tomah, Illinois); on or about February 15, 2000 (in Decatur, Illinois); and, on or about February 17, 2000 (in Texas).

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[25] At this time during the proceedings, the court dismissed a juror for a medical emergency. (V24, R1079-83).

(V24, R1113, 1115). Price also had contact with Michael Overheart in Aurora, Illinois, whereby he seized Marquardt's black Thunderbird from Overheart. (V24, R1116-17). Price said Overheart told him that the last time Overheart saw Marquardt was in the Fall of 1999. (V24, R1128). Price was aware that a blood sample was drawn from Marquardt on March 18, 2000, but he did not know the results. (V24, R1121).

Thomas Fedor, forensic serologist, performs DNA analysis at the Serological Research Institute in Richmond, California. (V24, R1133). Fedor attempted to analyze several pieces of evidence that included a swab obtained from Marquardt's shoe and a swab obtained from Marquardt's jean jacket. Fedor was asked to analyze this evidence for the presence of "fetal hemoglobin." Fedor explained that the presence of fetal hemoglobin would indicate that it arose from someone six months old or less. (V24, R1138). However, Fedor was not able to obtain a "fetal hemoglobin" type from either swab as the stains did not contain a sufficient quantity to test. (V24, R1135, 1136, 1137, 1140). Fedor said the non-existence of fetal hemoglobin would not have foreclosed a DNA analysis of the items. Fedor said, "In fact, I expect I would have been successful in doing DNA analysis on the materials that were sent to me." (V24, R1138). Fedor did not conduct any DNA analysis and thus, did not dispute any DNA analysis conducted on these items of evidence. (V24, R1139).

Jerry Cirino, senior crime lab analyst, FDLE, analyzes textiles. (V24, R1141). Cirino examined three green fibers that were found near the bodies of Ruiz and Wells. (V24, R1142). However, Cirino was not able to compare the three fibers to a known standard. The three fibers did not match anything in Marquardt's green Thunderbird. (V24, R1143). Nonetheless, Cirino said that, because fibers can be mass-produced, or are part of a larger object (such as a T-shirt or pair of pants), he could not definitely say that the three fibers came from a particular source. (V24, R1144).

Scott Lange is a private investigator in Wisconsin. (V25, R1152). Lange calculated that it would take approximately 24 hours to drive from the Ruiz/Wells home in Sumter County to the Speedway gas station in Osseo, Wisconsin. Several routes were available in order to drive the distance of 1404 to 1458 miles from one place to the other. In addition, Lange calculated that it would take about 21 hours to drive from Osseo, Wisconsin, to Valdosta, Georgia, in order to cover that 1200 mile distance. (V25, R1155).

Rojelio Estrada[26] lived four blocks from the Ruiz/Wells home in March 2000. (V26, R1189-90). Estrada said that, at about 9:00 a.m., on March 15, 2000, he was returning home when he noticed a "little green car," "a Beretta ... or a

[26] Estrada testified that he has several felony convictions. (V26, R1195-96).

Cavalier" parked at Ruiz/Wells' home. (V26, R1190). Sometime between 9:30 a.m. and 10:00 a.m., Estrada and his wife were standing by the road at their house when he heard several gunshots. Estrada "didn't think nothing of it, because there is always someone shooting around there, in that area." (V26, R1191).

Estrada said he knew a black male named Pernell Williams who lived in nearby Webster, Florida, who had a car just like the one parked at Ruiz' home, "same color, same make and everything." (V26, R1191, 1192). However, Estrada only remembered "seeing the car. I didn't see nobody." (V26, R1196).

Estrada initially spoke to police on March 16, 2000. (V26, R1194). At that time, he told police that he was returning home at 10:30 a.m. on March 15, and saw "something unusual" at Ruiz' home. (V26, R1194).

Deputy Lee Baker (retired) worked homicide cases and cold cases (murder cases over a year old) during his 36-year career in Ohio and Florida. (V26, R1224, 1231). Baker went to Wisconsin in June 2006 and spoke to Marquardt's father and John Fitts. (V26, R1225, 1229). Baker did not collect any evidence regarding Marquardt's case. (V26, R1228).

State's Case in Rebuttal

Sheriff James Kowalczyk was recalled as a witness. He said that he and Agent Miller went to the self-storage units in Valdosta, Georgia, on March 31, 2000. (V26, R1232-33). Michael Connor gave Kowalczyk copies of documents

related to Marquardt's unit. (V26, R1233). The documents indicated a date of March 15, 1999. Connor told Kowalczyk that his computer "was wrong" and had not acknowledged the year 2000 was a leap year. (V26, R1234). Further, Connor said the date should have read March 14, 2000, and not March 15, 2000. (V26, R1235). However, the search warrant indicated Connor told Kowalczyk that the computer gate records indicate a date of March 16, 2000. (V26, R1240).

Agent John Rehrauer was recalled as a witness. He stated that he interviewed[27] Marquardt on March 18, 2000, after reading Marquardt his *Miranda*[28] rights. Marquardt did not appear to be under the influence of drugs or alcohol. (V26, R1241-42, 1243). Marquardt initially told Rehrauer he had been on vacation for two weeks and then said "one week, not two." (V26, R1250). Rehrauer also spoke with Alfred Marquardt on March 29th who indicated he had been in his son's cabin on March 24th. (V26, R1250). Alfred told Rehrauer he had moved the refrigerator in the cabin that day so he could get to the electrical box. (V26, R1251). Alfred also indicated he had replaced the cabin's kitchen window. (V26, R1251-52).

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[27] Deputy Richard Price was also present. (V26, R1245).

[28] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Deputy Price was recalled as a witness. Price witnessed Marquardt being advised of his *Miranda* rights. (V26, R1253). Marquardt did not appear to be under the influence of drugs or alcohol. (V26, R1254-55). Marquardt said he was not aware police had been looking for him because he had been on vacation[29] for two weeks, then corrected himself and said one week. (V26, R1255-56).

On October 12, 2011, the jury found Marquardt guilty on all counts. (V27, R1377-78).

Second *Faretta* Hearing, Penalty Phase, and *Spencer* Hearing

On February 1, 2012, the trial court conducted a combined *Faretta*/Penalty Phase/*Spencer* hearing. (V14, R2754-2808). Marquardt elected to represent himself and chose to waive a jury for the penalty phase. (V14, R2760, 2762-63; V27, R1384-85).

State's Case in Aggravation

Pam Ruiz, daughter-in-law and sister-in-law of the victims, read a statement to the court. Ruiz said both victims were very family-oriented and devoted their time to the Ruiz family. (V14, R2774-79). Ruiz took care of Pam's children while she and her husband worked. Wells "was the backbone for (the) family." (V14,

[29] During closing arguments, Marquardt objected to the State commenting that Marquardt said he had been on vacation "in Florida." (V27, R1307).

R2775, 2778).

Robert Wells, son-in-law and husband of the victims, read a statement to the court. Ruiz loved "to serve her family and did so with great joy." Wells and his wife Hope had planned on building a new home, and were going to have Ruiz live with them. Wells said, "This was a new and wonderful adventure for Hope, me, and Ma." Wells said the deaths of his mother-in-law and wife greatly altered the course of his future and affected his life forever. (V14, R2780-84).

Dr. Jon Thogmartin, medical examiner, said Ruiz suffered four gunshot wounds. (V14, R2785, 2789). One of the wounds was a through and through wound to Ruiz' thumb, which was consistent with her hand being raised. (V14, R2789). Two of the gunshot wounds to Ruiz' chest area perforated her lung. (V14, R2791). Based upon Thogmartin's observations at the crime scene, Ruiz was shot several times at the rear doorway of the house; she then attempted to walk or run to the rear part of the house. (V14, R2791). Ruiz would have been coughing up blood within several seconds—she would have suffered decreased respiratory capacity. Her lung would have collapsed, which would have taken several minutes. (V14, R2791-92). However, these wounds were survivable if Ruiz had gotten immediate medical attention and surgery. (V14, R2792, 2795). In Thogmartin's opinion, after Ruiz was initially shot, she "ran, like anyone else would." (V14, R2792). As Ruiz ran, she was shot a fourth time, in her back. This wound severed her spinal cord.

Thogmartin said this kind of wound is the kind "that immediately drops a person." (V14, R2793). Ruiz had several stab wounds to her neck which contributed to her death. (V14, R2794). The stab wounds were not the main cause of her death; "she would have died anyway, even without the stab wounds. It just probably would have taken a little bit longer." (V14, R2794).

Thogmartin said Wells suffered a gunshot wound to her face and eight stab wounds to her neck. (V14, R2796). Wells had "tiny red dots" on her face which Thogmartin said was actually gun powder embedded in Wells' skin. In Thogmartin's opinion, the gun was within one to eighteen inches away from Wells' face when she was shot. (V14, R2796-97). The bullet severed Wells' left carotid artery. (V14, R2797). In Thogmartin's opinion, the stab wounds to Wells were similar to Ruiz' but "more severe." One of the stabs transected the carotid artery, which had already been severed by the bullet. The stab wound also severed the jugular vein. (V14, R2798).

In Thogmartin's opinion, the dying process for Ruiz took longer than it did for Wells. Thogmartin said Wells went down "in five to eleven seconds. Once she's down, there may be a period of consciousness for a period of time, but not very long." Wells had a big pool of blood underneath her—blood that should have been going to her brain. Ruiz had some blood flow to her brain because she did not have a destroyed artery as did Wells. Therefore, Ruiz would have lived a bit longer

than Wells. (V14, R2799).

Special Mitigation Counsel's Presentation in Mitigation

Scott Lange, private investigator, assisted in conducting an investigation in preparation for Marquardt's trial and penalty phase. (V14, R2808; V15, R2809). In November 2011, Lange went to Chippewa Falls, Wisconsin, and reviewed Marquardt's high school records which indicated Marquardt was an average student. Lange also learned that none of the teachers that were currently employed by the school district recalled instructing Marquardt. (V15, R2810, 2811). Lange interviewed Marquardt's father, Alfred, his sister, Sheila, and his brother, Gene. (V15, R2811).

Lange said Alfred recalled that Marquardt was born via cesarean section and was carried full-term. (V15, R2812). Alfred said Marquardt had a normal childhood, was social, and always smiled. The family was close-knit and went on family vacations. Marquardt enjoyed music and earned several music awards. (V15, R2812). Marquardt was offered several music scholarships for college because of his musical abilities. However, Marquardt did not accept any of the scholarships and did not attend college. (V15, R2814, 2815).

Lange said the family reported that Marquardt dated and worked in a restaurant after high school graduation. The family spent holidays together. Marquardt was very close to his mother, Mary. Marquardt, his brother, and their

father hunted together. (V15, R2813). The family did not want to testify at the penalty phase "at Bill's request." (V15, R2815). Lange learned that Marquardt had many felony convictions in Wisconsin but that he did not know the exact number. (V15, R2815).

State's Case in Rebuttal

Investigator Richard Price, Chippewa County Sheriff's Department, was recalled to the stand and testified that Marquardt had 12 felony convictions in Wisconsin. (V15, R2817, 2818-19). The convictions were for animal cruelty, armed burglary, and possession of a firearm by a convicted felon. Price said Marquardt was committed to a mental health facility as opposed to State prison for the convictions as Marquardt was found to be incompetent to assist in his defense, subsequent to the convictions. Price said that finding is permissible absent a finding of not guilty by reason of insanity. (V15, R2819). Marquardt was sentenced to a mental health facility for a term of 75 years for a mental illness. (V15, R2822).

Marquardt's Statement to the Court at the Close of Sentencing

Marquardt said he never saw a doctor before he was charged with the offenses in Wisconsin. Every doctor he saw found him "competent with no mental illness." However, his attorneys stipulated to a plea that Marquardt was not guilty by reason of insanity. Marquardt said, "There was no second phase. I would not

have stipulated it (sic) if I had to argue for it, because I have no mental illness." (V15, R2829). Marquardt said standby counsel Vaughn should not have used testimony from his family to say "good things about me to hurt me (sic) in my best interest." (V15, R2830). Marquardt insisted he worked "to the extreme" to ensure his family would not appear for the penalty phase because, "good things about me could hurt my chances of getting the death sentence." (V15, R2830).

Marquardt told the court that he had several felonies in Wisconsin but was "innocent of these crimes." Marquardt said his mother was murdered and he "could relate to the victim's family." (V15, R2831). Finally, Marquardt said, "I prefer the death sentence so I can appeal straight to the Florida Supreme Court." (V15, R2832).

On February 28, 2012, the trial court sentence Marquardt to two death sentences for the murders of Margarita Ruiz and Esperanza Wells. (V13, R2525-2565). This appeal follows.

Sentencing

The trial court found the following aggravating circumstances and supported each with findings of fact. (V10, R1993-2007).

1. The Murders were Heinous, Atrocious, and Cruel. (Great weight).
2. The Murders were Cold, Calculated, and Premeditated. (Great weight).
3. The Murders were committed during the course of a burglary.

(Great weight).

4. The Defendant has committed prior violent felonies. (Some weight).

The Defendant requested that the trial court not consider any mitigation. Nevertheless, in compliance with this Court's precedent, the trial court made findings with regard to each statutory mitigator and any non-statutory mitigation presented.

The trial court **rejected** the following mitigation as not established by the evidence and gave each **no weight**:

1. The defendant has no significant history of prior criminal activity;

2. The defendant was under extreme mental or emotional disturbance;

3. The victim was a participant in the conduct or consented to the act;

4. The defendant was an accomplice in the capital felony committed by another person or his participation was relatively minor;

5. The defendant acted under extreme duress or under substantial domination or another person;

6. The age of the defendant at the time of the crime;

The trial court found the following statutory mitigation:

1. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. This statutory mitigation was argued by special mitigation counsel. The trial court, however, found minimal evidence to support the mitigation. (Some

weight).

The trial court considered and rejected all other statutory mitigation. The trial court found the following non-statutory mitigation and gave it indicated weights:

1. Prior to the reported instances of criminal activity, the Defendant appeared to be a law abiding citizen, who was close to his family. (Minimal weight).

2. The Defendant's family reported that the Defendant was never violent or mean to anyone in the family nor did they hear about the Defendant being violent toward anyone. (Minimal weight).

3. The Defendant's behavior during the court proceedings was appropriate, in-control, quiet, and respectful. (Minimal weight).

SUMMARY OF ARGUMENT

The Defendant's motions to suppress were legally insufficient under the rules of criminal procedure. Several of the motions were filed while the Defendant was still represented by counsel and were therefore a legal nullity. The motion that the trial court considered as legally sufficient and for which the trial court provided a substantive order was governed by the doctrine of collateral estoppel because the same parties—Wisconsin law enforcement and the Defendant—had previously litigated the issue and it was settled as a matter of law by the Wisconsin Supreme Court. The exclusion of the challenged evidence would not have any discernible effect on police officers of other states who conduct investigations in accordance with the laws of their state and of the United States Constitution. Law enforcement from a sister state are permitted to follow the law of the state where the search took place rather than having to follow Florida law extra-territorially.

Neither the trial court nor the prosecutor committed fundamental error. There was not improper in the trial court inquiring of the Defendant the list of witnesses he anticipated calling in his case in defense. The trial court only mentioned possible admonishing some of the defense witnesses as to the penalty for perjury based on a concern that the Defendant may perpetuate incredible and false testimony before the court. The trial court never actually admonished any of the Defendant's witnesses about perjury. The prosecutor simply stated that the

autopsy photographs were evidence of the murders the Defendant committed and that he had to prove that to the jury. The prosecutor's statement did not rise to the level of "personally vouching" for the guilt of the Defendant or credibility of any witnesses or evidence. There was no fundamental error in the trial below.

The trial court found the heinous, atrocious, and cruel aggravator and the cold, calculated, and premeditated aggravator based on competent, substantial evidence. The Defendant armed himself with two weapons, attacked the victims unprovoked, and carried out the murders as a matter of course. The victims suffered mental and physical torment prior to their deaths. The stab wounds were gratuitously and unnecessarily inflicted on the victims—they would have died from the gunshots alone—while the victims were still alive. The victims also suffered the mental anguish of perceiving their impending death as they attempted to flee from the Defendant. The victims also experienced the emotional torment of knowing their small grandchildren, niece, and nephew could be harmed or killed in the process.

The trial court did not deprive the Defendant of his due process rights by appointing stand-by counsel to serve as special mitigation counsel after the Defendant refused to contest the death penalty. This Court has specifically authorized trial courts to appoint stand-by counsel—most of whom has previously had an attorney-client relationship with the pro se defendant—to serve as special

mitigation counsel for that limited purpose. The trial court went to great lengths to comply with this Court's precedent and ensure that this Court could engage in a meaningful proportionality review.

ARGUMENT

ISSUE I: WHETHER THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS WITHOUT AN EVIDENTIARY HEARING BECAUSE THE MOTION WAS LEGALLY INSUFFICIENT AND COLLATERALLY ESTOPPED

Marquardt claims the trial court erred in denying without an evidentiary hearing his pre-trial motion to suppress evidence seized by Wisconsin law enforcement from his cabin in Chippewa Falls, Wisconsin. (V2, R311-328, 375-377, 380-401). This issue was preserved through a pre-trial motion. The Defendant filed numerous motions to suppress that the trial court ruled were legally insufficient under *Florida Rules of Criminal Procedure, Rule* 3.190. (V13, R2581). Several other motions were dismissed as a nullity because Marquardt filed them pro se while he was still represented by counsel. (V12, R 2292). The motion to suppress filed on November 10, 2010, for which the trial court issued a substantive order on December 3, 2010, is the motion and order that concerns this issue as it relates to collateral estoppel. (V2, R311-328, 375-377, 380-401).

A. The Standard of Appellate Review.

On review, a trial court's ruling on motions to suppress is presumed correct. The evidence is considered in the light most favorable to the ruling, and mixed questions of fact and law are reviewed de novo. *Smith v. State*, 998 So. 2d 516, 524 (Fla. 2008).

B. The Trial Court's Orders and Rulings

Marquardt claims the trial court improperly denied or dismissed several of his motions to suppress as legally insufficient or moot. *Initial Brief* at 19. Marquardt also claims the trial court erred in ruling on the merits of his motion to suppress after denying several of them without an evidentiary hearing as legally insufficient. Marquardt also argues that the trial court erred in applying the doctrine of collateral estoppel. *Initial Brief* at 20. The State contends that the evidence and the law support the trial court's rulings. In its order on the motion, the trial court found:

> In the Motion to Suppress, which was filed with the Court on November 10, 2010, Defendant seeks to have suppressed all evidence obtained from the March 15, 2000 search of his home in Wisconsin. Defendant maintains the search warrant and affidavit lacked indicia of probable cause. Defendant also asserts the Magistrate issuing the search warrant was misled by material misstatements and omissions. To support his arguments, Defendant relies on his appeal of the Chippewa County Circuit Court's denial of his motion to suppress the evidence obtained through the March 15, 2000 warrant. In *State v. Marquardt*, 635 N.W. 188 (Wis. App. 2001), the Wisconsin Court of Appeals concluded there was insufficient probably cause to justify the March 15, 2000 search warrant for the Defendant's home. Defendant also seeks to suppress all evidence obtained from the March 18, 2000 search of his automobile. Defendant argues there was no search warrant or probably cause to search the automobile.
>
> In the Response to the Defendant's Motion to Suppress, filed with the Clerk on November 22, 2010, the State argues Defendant has failed to plead a legally sufficient motion. The State asserts Defendant failed to aver with any particularity any violations of Wisconsin or United States law by the enforcement officers who applied for and obtained the various search and arrest warrants for the Defendant and property in Wisconsin. The State also asserts that Wisconsin law controls the

> search and seizure issues in this case and with a valid ruling from the Wisconsin Supreme Court in *State v. Marquardt*, 705 N.W. 2d 878 (Wis. 2005), the doctrine of collateral estoppel applies.
>
> The State correctly notes that collateral estoppel prevents this Court from relitigating a motion to suppress the evidence obtained from the search warrant issued on March 15, 2000 and obtained from the search of Defendant's automobile. *Brown v. State*, 397 So. 2d 320 (Fla. 2d DCA 1981); *Miller v State*, 545 So. 2d 343 (Fla. 2d DCA 1989). The Wisconsin Supreme Court upheld the submission of the exact evidence obtained from Defendant's residence and automobile that Defendant seeks to have excluded in this motion to suppress. *See State v. Marquardt*, 705 N.W. 2d 878 (Wis. 2005). Defendant has erroneously relied upon the appellate case that concluded there was insufficient probable cause to justify the search warrant of Defendant's home. The Wisconsin Supreme Court subsequently overruled this finding and determined the search warrant was based on an affidavit that contained sufficient indicia of probable cause to satisfy *United States v. Leon*, 468 U.S. 896 (1984) and the State showed compliance with the requirements in *State v. Easton*, 629 N.W. 2d 625 (Wis. 2001).

(V2, R375-77).

On December 8, 2010, Marquardt filed a Motion to Reconsider his Motion to Suppress. (V2, R382-401). In its order on the motion to reconsider, the trial court found:

> On December 8, 2010, Defendant filed the present Motion to Reconsider on Defendant's Motion to Suppress. Defendant requests the Court reconsider the denial of his motion to suppress. Defendant argues that collateraal estoppel is inapplicable in this case since the issues presented in his motion to suppress are not identical to the Wisconsin case and were never litigated or raised before. Defendant states his Wisconsin counsel was ineffective and that he needs a *Franks v. Delaware* hearing.
>
> The Court notes that in the order issued on December 3, 2010, the Court mentioned that denial of both of Defendant's motions to

suppress his home and automobile were affirmed by the Wisconsin Supreme Court. This was in error, Denial of Defendant's motion to suppress the search of his automobile was affirmed by the Wisconsin Court of Appeals and the denial of Defendant's motion to suppress the search of his home was affirmed by the Wisconsin Supreme Court.

Evidence that is validly obtained in another state in admissible into evidence in this state, even if it is obtained through a warrant that would have been invalid if issued in Florida. *McClellan v. State*, 359 So. 2d 869 (Fla. 1st DCA 1978). *See also Echols v. State*, 484 So. 2d 568 (Fla. 1985); *Tarawneh v. State*, 562 So. 2d 770 (Fla. 4th DCA 1990). There is no indication in this case that the search of Defendant's home and automobile is invalid under Florida law, however, consideration of the admissibility of such evidence is determined under Wisconsin law. Consequently, Defendant is seeking to suppress evidence obtained by the State of Wisconsin and not the State of Florida.

The doctrine of collateral estoppel—which is also known as issue preclusion and estoppel by judgment bars relitigation of the same issues between the same parties in connection with a different cause of action. The doctrine thus comes into play in a case, when, in an earlier proceeding involving a different cause of action, the "same parties" litigated the "same issues" that are presented once again for decision. The doctrine bars the parties from litigating in the second suit-issues that is to say points and questions-common to both causes of action and which were actually adjudicated in the prior litigation. The determination must be essential to the prior adjudication in order to be given preclusive effect. Collateral estoppel ..., like its near relative res judicata, serves to limit litigation by determining for all time an issue fully and fairly litigated. The doctrine may be applied in criminal and civil contexts. For the doctrine of collateral estoppel to apply to bar relitigation of an issues, five factors must be present: (1) an identical issue must have been presented in the prior proceedings, (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated. *Cook v. State*, 921 so. 2d 631, 634 (Fla. 2nd DCA 2005) (citations omitted).

> In this case, collateral estoppel prevents the Court from considering Defendant's motion to suppress. Defendant is raising the identical issues he raised in the Wisconsin case, the motions to suppress were a critical and necessary part of the determinations made in the Wisconsin case, Defendant had the opportunity to litigate the issues, the parties in these two proceedings are identical, and the issue was fully litigated through the Wisconsin trial court, appellate court, and for the motion to suppress the search of Defendant's home, the Wisconsin Supreme Court. *See Brown v. State*, 397 So. 2d 320 (Fla. 2nd DCA 1981); *Tamer v. State*, 463 So. 2d 1236 (Fla. 4th DCA 1985); *Miller v. State*, 545 So. 2d 343 (Fla. 2nd DCA 1989); *Ritch v State*, 14 So. 3d 1104 (Fla 1st DCA 2009); *Zeidwig v. Ward*, 548 So. 2d 209 (Fla. 1989).

(V4, R630-32).

D. Law Supporting the Trial Court's Finding.

Legal Sufficiency

Marquardt states in his brief, "If the motion is timely filed **and the trial court determines that the motion is legally sufficient**, the court is required to hear it before proceeding to the trial. (*Initial Brief* at 20) (citing *Fla. R. Crim. Pro.* 3.190(g) and (h)) (emphasis added). Marquardt's brief only states that an evidentiary hearing is required if the court determines the motion to suppress is legally sufficient. He cites no case to this Court to suggest that his legally insufficient motions should have proceeded to an evidentiary hearing. None of Marquardt's motions prior to his motion on November 10, 2010, complied with Rule 3.190 and the trial court ruled accordingly. Therefore, the trial court applied the correct law and its ruling should remain undisturbed by this Court. (V2, R223).

Collateral Estoppel

In *Echols v. State*, 484 So. 2d 568 (Fla. 1985), this Court addressed the issue of evidence lawfully obtained in another state subsequently being admitted at trial in this state, even if the evidence may have been inadmissible under Florida law. In *Echols v. State*, the defendant argued that evidence lawfully obtained in Indiana should have been excluded in his Florida prosecution because Florida law should have applied. This Court disagreed and stated:

> Appellant argues, however, that much of the evidence was obtained in violation of his rights and should be excluded. We disagree. Appellant's initial point is that the first tape obtained by informant Adams in appellant's Gary, Indiana, home violates either *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981), or chapter 934, Florida Statutes (1981). Appellant does not deny that under Indiana and federal law the tape is admissible, but argues that we should apply Florida law to the actions of Adams and the Indiana police because Florida's interest in the prosecution of this capital felony is greater than that of Indiana. In support, appellant cites *People v. Rogers*, 74 Cal.App.3d 242, 141 Cal.Rptr. 412 (Ct. App. 1977), *vacated on other grounds*, 21 Cal. 3d 542, 579 P. 2d 1048, 146 Cal.Rptr. 732 (1978). We agree that Florida's interest in prosecuting the case is greater than that of Indiana and that it would be appropriate to apply Florida law if we found that Florida's interests were served thereby. However, we do not agree that Florida's interests are served by excluding relevant evidence which was lawfully obtained in Indiana in conformity with the United States Constitution and Indiana law. *McClellan v. State*, 359 So. 2d 869 (Fla. 1st DCA), *cert. denied*, 364 So. 2d 892 (Fla.1978). The primary purpose of the exclusionary rule is to deter future official police misconduct. *United States v. Janis*, 428 U.S. 433, 446 96 S.Ct. 3021, 3028, 49 L.Ed.2d 1046 (1976). **We do not believe exclusion of the evidence would have any discernible effect on police officers of other states who conduct investigations in accordance with the laws of their state and of the United States Constitution**. Further, **we do not believe that the interest of Florida is served by imperially attempting to require that out-of-state police officials follow Florida law, and not the law of the situs**,

> when they are requested to cooperate with Florida officials in investigating crimes committed in Florida. We agree with Justice White that:
>
> > [A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by detering official unlawlessness.
>
> *Illinois v. Gates*, 462 U.S. 213, 257-58, 103 S.Ct. 2317, 2342, 76 L.Ed.2d 527 (1983) (White, J., concurring in the judgment). *See also United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3430, 82 L.Ed.2d 702 (1984).

Echols, 484 So. 2d at 571-572.

Similarly, in *Brown v. State*, the causes of action in two prosecutions were not the same but the parties were identical. The issues presented were identical to those previously litigated. 397 So. 2d 320, 322 (Fla. 2nd DCA 1981). In *Brown*, the defendant was involved in a robbery in Pinellas County and another in Paso County. *Id*. The defendant's moved to suppress his out-of-court identification by a witness and the Pasco trial court denied the motion "on the ground that the motions had previously been ruled on in the [Pinellas] case." *Id*. The Second District held that the trial court's denial of Brown's motion to suppress in Pasco County was properly denied on the theory of collateral estoppel. *Brown*, 397 So. 2d at 322. Collateral estoppel has traditionally operated to preclude litigants from relitigating the same issue not only in the same court, but as well in a different forum. *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375 (Fla. 1977).

As this Court has held, "Appellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts." *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). "We presume that the trial court's ruling on a motion to suppress is correct, and interpret evidence and reasonable inferences in the manner most favorable to sustaining its ruling." *State v. Lopez*, 923 So. 2d 584, 586 (Fla. 5th DCA 2006).

In this case, the trial court found that collateral estoppel applied because the lawfulness of the search of Marquardt's cabin—the exact issue he raised in his motion to suppress—had been settled by the Wisconsin Supreme Court when it ruled that the good faith exception to the exclusionary rule applied to the Wisconsin law enforcement agents' reliance on the defective warrant. *Marquardt*, 705 N.W. 2d at 884. While there are no facts from a suppression hearing to which this Court should defer, the trial court made procedural findings and identified the correct legal precedent as articulated by this Court and applied it to the undisputed circumstances. This Court has previously held that it would apply the law of the situs of the search—in this case, Wisconsin law—to its determination of the admissibility of the evidence seized. *See Echols*, 484 So. 2d at 571-572. This Court has also left undisturbed numerous opinions from our District Courts of Appeal applying the doctrine of collateral estoppel. *See generally McClellan v. State*, 359

So. 2d 869, 873 (Fla. 1st DCA 1978); *Tarawneh v. State*, 562 So. 2d 770, 772 (Fla. 4th DCA 1990); *Brown v. State*, 397 So. 2d 320 (Fla. 2nd DCA 1981); *Tamer v. State*, 463 So. 2d 1236, 1240 n.2 (Fla. 4th DCA 1985); *Miller v. State*, 545 So. 2d 343, 344 (Fla. 2nd DCA 1989); *Ritch v State*, 14 So. 3d 1104 (Fla. 1st DCA 2009). Furthermore, like Wisconsin, this Court has ruled that the good-faith exception to the exclusionary rule applies in Florida criminal procedure. *State v. Peterson*, 739 So. 2d 561, 564 (Fla. 1999); *Johnson v. State*, 660 So. 2d 648, 654 (Fla. 1995) (*citing United States v. Leon*, 468 U.S. 897 (1984).

Accordingly, the trial court's ruling was correct. There is no basis for relief on this claim.

F. Harmless Error.

Even if the trial court erred in denying Marquardt's motions to suppress, error, if any, was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Even if the trial court had conducted an evidentiary hearing with the Wisconsin law enforcement agents and found that the search warrant was legally defective, the court would have applied the good faith exception to the exclusionary rule, based on this Court's precedent, and the evidence would have been admitted nonetheless. *See Peterson*, 739 So. 2d at 564.

ISSUE II: WHETHER IT WAS FUNDAMENTAL ERROR FOR THE TRIAL COURT TO REQUIRE THE DEFENDANT TO PROFFER HIS LIST OF WITNESSES AND THEIR

EXPECTED TESTIMONY AND WHETHER THE PROSECUTOR'S STATEMENT ABOUT THE AUTOPSY PHOTOGRAPHS WAS FUNDAMENTAL ERROR

In this issue, Marquardt challenges the trial court's action in asking the pro se Defendant to proffer his list of witnesses and their expected testimony. Marquardt also challenges the prosecutor's comments before the jury regarding the admissibility of the autopsy photographs. The Appellant claims that the trial court abandoned its neutral role by requiring the witness proffer and discussing the potential admonition of some defense witnesses for perjury. The Appellant claims that the prosecutor "personally vouched" for the guilt of the Defendant to the members of the jury.

The Appellant acknowledges that neither of these issues were preserved through objection nor motion and in order for this Court to grant relief, the actions must have risen to the level of fundamental error.

A. The Standard of Appellate Review

Failing to raise a[n] objection waives any claim for appellate review. *Mosley v. State*, 46 So. 3d 510, 519 (Fla. 2009). "The sole exception to [this] general rule is where the unobjected-to comments rise to the level of fundamental error." *Id*. *See also Crump v. State*, 622 So. 2d 963, 972 (Fla. 1993) ("Absent fundamental error, we find that the defense counsel failed to preserve the issue for review, thus precluding appellate review").

B. The Trial Judge's Action and the Prosecutor's Statements

The Defendant's Witness Proffer

On the third day of trial, as the State drew close to finishing its case-in-chief, the trial court dismissed the jury for the remainder of the day. (V20, R563). The Court inquired of the prosecutor how much more time he anticipated the State's case taking. The Court also asked the Defendant if he was able to proffer the witnesses he anticipated calling in his case-in-defense.

> THE COURT: . . . Mr. Marquardt, are you in a position to kind of give us an idea of what these witnesses that are coming up, at least for, let's say, Friday morning?
>
> THE DEFENDANT: Um, um, you want to know the list of the witnesses?
>
> THE COURT: well, let's go ahead and let's get a list of your witnesses again, and just if you could – and go slowly so I can write them down so I have notes here to go through.

At which point the Defendant commenced to listing his witnesses that he would call in his case-in-defense. The trial court had patiently struggled with the Defendant previously in pre-trial hearings when Marquardt was asking for deposition orders from the court but his discovery witness list had his witnesses categorized incorrectly under *Florida Rule of Criminal Procedure* 3.220. (V21, R2350-2355; 2413-2414).

During the bench conference in question under this issue, the State raised concerns that some of the witnesses the Defendant listed had no relevant testimony

to offer. The trial court was concerned about the Defendant eliciting from his witnesses irrelevant, cumulative, hearsay, or otherwise legally inadmissible testimony. (V20, R566-567). The trial court, however, noted that the Defendant is permitted to develop his defense and some of the credibility issues can be explored by the State on cross-examination. One of the Defendant's witnesses, Billy Sizemore, told the State's investigators he could lead the police to the murder weapon and he would implicate some third-party in the murders. (V20, R573-575). There were significant concerns with Mr. Sizemore's credibility and the lack of reliability of trustworthiness, the legal standard for third-party admission/confession. (V20, R574) (When detectives interviewed Sizemore in a jail in New Mexico, he essentially indicated that he would do anything in exchange for leniency from the State). Then the Defendant proffered the name of a witness, a Mr. Estrada, who he claimed lived next door to the victims, heard gunshots, and saw a Parnell Williams' car at the murder scene and had sworn to all of this before a notary public within a few weeks of the trial. (V20, 577-578). However, the prosecutor indicated that Mr. Estrada's information came primarily from hearsay sources. (V20, R579). The Court then discussed the potential for admonishing some of the defense witnesses of the punishment for perjury. (V20, R580-581).

The trial court was concerned that the Defendant had no good faith basis to believe the witnesses had legally admissible testimony and that the Defendant

would be conducting discovery on the witnesses stand. (V20, R584). When asked about Parnell Williams, the Defendant told the trial court, "I don't know what he's going to say on the stand." (V20, R584). The entire colloquy between the trial court, the Defendant, and the prosecutor concerned whether or not the Defendant's witnesses had anything relevant to offer that was legally admissible before the jury. (V20, R562-604).

The Prosecutor's Statements about the Autopsy Photographs

During the prosecutor's direct examination of the medical examiner about the autopsies he performed on the victims, the State offered into evidence the "photo ID shot" of Margarita Ruiz as she appeared before the pathologist began the autopsy. (V19, R396). The following exchange took place:

> MR. MAGRINO: Judge, I'd offer R for identification into evidence.
>
> THE COURT: That would be, I think at this point would be State's --
>
> THE CLERK: Fifteen.
>
> THE COURT: Any objection?
>
> THE DEFENDANT: Yes, Your Honor. I don't like autopsy photos being admitted, they're too explicit or not.
>
> MR. MAGRINO: Judge, if he's got a legal objection, that's fine. **That's evidence involved in this case as a result of what he did, and that's something that I have to prove to these members of the jury**.
>
> THE COURT: As to the objection then, is overruled and that will be State's 15 in evidence.

(The above-mentioned document was marked as State's Exhibit number 15, as of this date.)

BY MR. MAGRINO:

Q Doctor, if you would --

MR. MAGRINO: If I could publish briefly, Judge?

THE COURT: Yes.

(The above-mentioned exhibit was published to the jury as follows:)

BY MR. MAGRINO:

Q Would you explain to the members of the jury what an autopsy consists of.

That brief exchange was the extent of the prosecutor's comments to which the Appellant now takes issue.

C. Supporting Case Law

This Court has defined fundamental error as an error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Mosley*, 46 So. 3d at 519. If the action by the trial court or the statement by the prosecutor in this case did not rise to the level of fundamental error—that is to say, the action or statement did not vitiate the Defendant's right to a fair trial—then this Court should deny relief for the claim. *Braddy v. State*, 111 So. 3d 810, 843 (Fla. 2013), *Pooler v. State*, 980 So. 2d 460, 472 (Fla. 2008). *See also Peterson v. State*, 94

So. 3d 514, 523-525 (Fla. 2012) (in a capital murder trial, the court did not commit fundamental error in allowing evidence to be presented to the jury that implied the defendant had committed a collateral murder).

For the trial court to have abandoned its neutral role, it must take action to interject itself into the proceedings and take on the role of a particular party to the case. *Williams v. State*, 967 So. 2d 735, 750-751 (Fla. 2007), *citing Williams v. State*, 901 So. 2d 357 (Fla. 2d DCA 2005) (court prompted the State during trial to alter allegation in first of two counts of information to fit proof of offense); *Evans v. State*, 831 So. 2d 808 (Fla. 4th DCA 2002) (trial court suggested that prosecution inquire into the immigration status of the defendant); *Sparks v. State*, 740 So. 2d 33 (Fla. 1st DCA 1999) (trial court indicated evidence that prosecution could use for impeachment).

While this Court has condemned prescreening remarks and prosecutors who personally vouch for the defendant's guilt or make other improper comments, not all comments are improper and not all improper comments are fundamental error. *Wade v. State*, 41 So. 3d 857, 870-871 (Fla. 2010) (finding no error in prosecutor's argument that a vote for life would be irresponsible and a violation of the jurors' duty); *Mosley*, 46 So. 3d at 522 (condemning prescreening comments claiming State Attorney does not seek death in all cases—implying that death is proper for the case before the jury—but finding no fundamental error in

prosecutor saying generically, "not every case is a death case"); *Farina v. State*, 937 So. 2d 612, 629-630 (Fla. 2006) (Prosecutor elicited Biblical scripture implying that he was God's servant and that all should submit to his authority, held to be improper but not fundamental error).

In this case, the trial court asked the Defendant to indicate the witnesses that he might call, at least through the morning of the fifth day of trial. The trial court inquired of the Defendant's witness list so that he could plan logistically for the next few days of trial. When the Prosecutor indicted that there may be some evidentiary concerns with the testimony of some of the witnesses, the trial court inquired further of the potential substance of the testimony to ensure that the Defendant would not put witnesses on the stand that would offer irrelevant, cumulative, hearsay, or otherwise legally inadmissible testimony to the jury. The entire colloquy between the trial court and the parties was conducted outside the presence of the jury. It is also worth noting that the trial court did not admonish any of the Defendant's witnesses of the potential punishments for perjury.[30]

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[30] Sergeant Robert Cunningham, Chippewa County Sheriff's Department, Wisconsin (V24, R1014); Gerald Kotajarvi, forensic scientist, (retired), Wisconsin (V24, R1020); Michael Connor, Manager, self-storage facility in Valdosta, Georgia (V24, R1029); Sheila Marquardt, Marquardt's sister (V24, R1048); Alfred Marquardt, Marquardt's father (V24, R1054); Cathy Buchanan, resident of Webster, Florida (V24, R1097); Billy Sizemore, resident of Ruiz/Wells' town

The prosecutor did not personally vouch for the guilt of the Defendant in front of the jury. The prosecutor's statement about the autopsy photographs only indicated that it was evidence of the murders that he was offering in order to meet the State's burden of proof. The prosecutor said that the photograph was "evidence of what [Marquardt] did, **and that's something that I have to prove to these members of the jury**." It is axiomatic that the prosecutor is permitted to offer legally competent evidence to prove the Defendant is guilty. It is equally as axiomatic that the prosecutor is permitted to argue that the Defendant is guilty of the crime charged based on the evidence. In this case the prosecutor did nothing more than offer evidence to meet his burden of proof and state that he was doing just that when the Defendant raised on objection. As this Court has stated in past cases, "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Chavez v. State*, 832 So. 2d 730, 763 (Fla. 2002) (*quoting Henderson v. State*, 463 So.2d 196, 200 (Fla. 1985)).

(V24, R1105); Wayne Wright, resident of Ruiz/Wells' town (V24, R1107); Investigator Richard Price, Chippewa County Sheriff's Department, Wisconsin (V24, R1111); Thomas Fedor, forensic serologist, Richmond, California (V24, R1133); Jerry Cirino, senior crime lab analyst, FDLE (V24, R1141); Scott Lange, private investigator, Wisconsin (V25, R1152); Rojelio Estrada, resident in Ruiz/Wells' town (V26, R1189); Deputy Lee Baker (retired), Florida (V26, R1224).

D. Appellant's Case Law is Distinguishable and Not Applicable

Appellant cites *Martinez v. State*, 761 So. 2d 1074 (Fla. 2000), *Gore v. State*, 719 So. 2d 1197 (Fla. 1998); *State v. Ramos*, 579 So. 2d 360 (Fla. 4th DCA 1991), to support his argument concerning the prosecutor's statement. These cases are distinguishable from this case.

In *Martinez*, during direct examination of one of the police detectives, the prosecutor elicited the detective's opinion on the defendant's guilty, to which the detective responded with his opinion that there was no doubt the defendant was guilty. 761 So. 2d at 1079-1081. Then the prosecutor compounded the issue by not only arguing the detective's opinion in closing argument, but also adding the additional opinion of another prosecutor that was not only inadmissible, but was not based on evidence before the jury. *Id*. The prosecutor in Martinez also offered additional improper argument in closing and found error in the combination of improper argument from the prosecutor in that case.

In *Gore*, during cross examination of the defendant, the prosecutor became emotional and stated, "Well, you know what, you're right, I am [trying to kill you], because somebody who does what you do deserves to die." 719 So. 2d at 1201. The prosecutor in Gore also argued to the jury that "he [the Judge] can never make me say that's [referring to Gore] a human being." *Id*. This Court held that, "Goaded by Gore, the prosecutor abandoned any semblance of professionalism . . . ." *Id*.

In *Ramos*, the prosecutor personally commented on his belief in the credibility of a witness. 579 So. 2d at 362. The prosecutor also implied that the defendant was the target of an "ongoing narcotics investigation" by the State; a point unsupported by the evidence. *Id.*

The errors that are present in the various arguments in *Martinez*, *Gore*, and *Ramos* are not present in this case. The prosecutor in this case indicated that the photographs are evidence of that the Defendant did—something he would be permitted to do in closing argument. The prosecutor also qualified his statement by say, "and that is something that I have to prove to these members of the jury." The prosecutor did not interject his personal views of the Defendant's guilt into his statements and he did not argue inadmissible or legally incompetent evidence to the jury.

E. Harmless Error

The state recognizes that a harmless error analysis is inapplicable to a fundamental error analysis. *Haygood v. State*, 109 So. 3d 735, 741 (Fla. 2013). Furthermore, should this Court find that the trial court's action and/or the prosecutor's statement constituted error, but not fundamental, then this issue is precluded from appellate review for lack of preservation. *Crump*, 622 So. 2d at 972.

ISSUE III: WHETHER COMPETENT, SUBSTANTIAL EVIDENCE

SUPPORTS THE TRIAL COURT'S FINDING THAT THE MURDERS WERE HEINOUS, ATTROCIOUS, AND CRUEL AND COLD, CALCULATED, AND PREMEDITATED

In its sentencing order, the trial court found that the murders of both victims were heinous, atrocious, and cruel, and committed in a cold, calculated, and premeditated manner.

A. The Standard of Appellate Review.

The review of a trial court's finding of an aggravating factor is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998); *see also Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997).

B. The Trial Court's Findings

In its sentencing order, the trial court found that the heinous aggravator and coldness aggravator applied to the murders of both Margarita Ruiz and Esperanza Wells and made the following findings of fact and conclusions of law:

> A. AGGRAVATING FACTORS
>
> 1. The murders of Margarita Ruiz and Esperanza Wells were especially heinous, atrocious or cruel ("HAC"). Section 921.141(5)(h).
>
> The Florida Supreme Court has held that the heinous, atrocious or cruel (hereinafter "HAC") aggravator applies "only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Rose v. State*, 787 So. 2d 786, 801 (Fla. 2001) (*quoting Guzman v. State,*

721 So. 2d 1155, 1159 (Fla. 1998)). In *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003), the Florida Supreme Court explained that in considering the HAC aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused to the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001) (citation omitted); *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997) ("fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.") (citations omitted); *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988) ("the victim's mental state may be evaluated for purposes of such determination in accordance with the common-sense inference from the circumstances.") (citations omitted).

The evidence at trial proved beyond a reasonable doubt that both the victims were shot and stabbed multiple times while still conscious. The physical evidence and testimony of Dr. John Thogmartin established that Margarita Ruiz was initially shot in the kitchen of her own home. Victim Ruiz then fled through the dining room and living room leaving blood droplets on the floor. While attempting to flee from the Defendant, Ruiz was shot in the back while entering the southwest bedroom, where she fell and was stabbed three times by the Defendant in the neck and head. Victim Esperanza Wells was shot in the face at the threshold doorway to the same bedroom and living room, where she fell and was stabbed eight times by the Defendant in the head and neck. Clearly the death of both victims was deliberate and extraordinarily painful and, thus, especially heinous, atrocious or cruel.

This Court finds that the evidence supports the conclusion that the Defendant's actions demonstrated a marked indifference to the suffering of both victims. In determining whether this aggravator applies, the victims' perceptions are the controlling criteria. The victims did not know the Defendant and where taken by surprise by the Defendant's shooting into their home. The evidence clearly established that the victims suffered extreme physical pain as well as severe emotional distress because of their wounds. It is not unreasonable to conclude that the victims knew they would die as a

result of their wounds. They likewise were aware that the other was shot, stabbed, and dying, thus heightening their terror of the potential result. In addition, at the time of the shootings and stabbings, Ruiz's grandchildren and Esperanza Well's niece and nephew were present in the house and the victims Ruiz and Wells must have been in tormented fear that the Defendant would also take the children's lives.

Based upon the foregoing, the Court finds that the State has proven beyond any reasonable doubt that the murders of Margarita Ruiz and Esperanza Wells were especially heinous, atrocious or cruel. This aggravating factor is given great weight by this Court.

2. The capital felony was a homicide and was committed in a cold, calculated, and premeditated ("CCP") manner without any pretense of moral or legal justification. 921.141(5)(i).

The Florida Supreme Court has held that to find the CCP aggravating factor: (1) the killing must be the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of moral or legal justification. *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994). "The focus of the CCP aggravator is the manner of the killing, not the target." *Bell v. State*, 699 So. 2d 674, 678 (Fla. 1997) (citations omitted). Deliberate ruthlessness is necessary to raise premeditation to the level of heightened premeditation required for the application of the cold, calculated, and premeditated death penalty aggravator. *Buzia*, 926 So. 2d at 1214 (citations omitted). The Florida Supreme Court has stated:

While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of premeditation over and above what is required for unaggravated first-degree murder. The plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony. However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of

> a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *Farina v. State*, 801 So. 2d 44, 54 (Fla. 2001) (internal citations and quotation marks omitted).
>
> The Defendant armed himself with not just one deadly weapon prior to entering the victims' home, but two. This supports the finding that the murders were calculated and premeditated. The initial shots which struck Margarita Ruiz were fired from outside the home while she faced the Defendant. This fact supports the Court's finding that the murders were cold and calculated. Defendant made certain the victims would die as a result of their wounds by stabbing them after shooting them. This supports the Court's fmding that the murders were cold, calculated, and premeditated. There was no pretense of moral or legal justification of the murder of the two victims, whom were strangers to the Defendant.
>
> Based upon the foregoing, the Court finds that the State has proven beyond any reasonable doubt that the murders of Margarita Ruiz and Esperanza Wells were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This aggravating factor is given great weight by this Court.

(V10, R1998-2001).

C. Law Supporting the Trial Court's Finding

Marquardt argues that the heinous, atrocious, and cruel (HAC) aggravator and cold, calculated, and premeditated (CCP) aggravator were improperly applied in sentencing. The premise of Marquardt's argument is that the trial court's findings of fact were not based on "any actual evidence" because "the whole incident occurred in a very short period of time." *Initial Brief* at 35, 37.

HAC

In *Hilton*, this Court explained the meaning of the HAC aggravator as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973); *see also Guzman v. State*, 721 So.2d 1155, 1159 (Fla. 1998) ("The HAC aggravator applies only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."). This Court has also stated that "[u]nlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998) (*citing Stano v. State*, 460 So. 2d 890, 893 (Fla. 1984)). Furthermore, we have held that "[i]n determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator." *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003); *see also Heyne*, 88 So. 3d at 122; *McGirth*, 48 So. 3d at 794. The victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances. *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988). "[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997); *see also Swafford*, 533 So. 2d at 277; *Hall v. State*, 87 So. 3d 667, 671-72 (Fla. 2012).

Hilton v. State, 38 Fla. L. Weekly S174 (Fla. Mar. 21, 2013). In the instant case,

the evidence established at trial indicated that both victims were shot and stabbed multiple times while still conscious. The physical evidence and testimony of the medical examiner established that Ruiz was initially shot in the kitchen of her own home. Ruiz then fled through the dining room and living room leaving blood droplets on the floor. While attempting to flee from Marquardt, Ruiz was shot in the back while entering the southwest bedroom, where she fell and was stabbed three times by Marquardt in the neck and head. Wells was shot in the face at the threshold doorway to the same bedroom and living room, where she fell and was stabbed eight times by Marquardt in the head and neck. The stab wounds appear to be gratuitously inflicted by the Defendant because, based on the testimony of the medical examiner, the victims would have died from the gunshot wounds alone. (V14, R2794). The death of both victims was deliberate and extraordinarily painful and, thus, especially heinous, atrocious or cruel. Further, the victims did not know Marquardt and were taken by surprise by Marquardt shooting into their home. The evidence clearly established that the victims suffered extreme physical pain as well as severe emotional distress because of their wounds. As the trial court found,

> It is not unreasonable to conclude that the victims knew they would die as a result of their wounds. They likewise were aware that the other was shot, stabbed, and dying, thus heightening their terror of the potential result. In addition, at the time of the shootings and stabbings, Ruiz's grandchildren and Esperanza Well's niece and nephew were present in the house and the victims Ruiz and Wells

> must have been in tormented fear that the Defendant would also take the children's lives.

(V10, R1999-2000). The trial court applied the correct rule of law. Competent, substantial evidence supports the trial court's finding of HAC. *Heyne v. State*, 88 So. 23d 113, 123 (Fla. 2012); *Hall v. State*, 87 So. 3d 667, 672 (Fla. 2012).

To the extent that further discussion is necessary, Marquardt argues that both victims were murdered within "a very short period of time." However, in *Baker*, this Court said:

> On one hand, the evidence in this case demonstrates that the victim was executed quickly by a single gunshot wound to the forehead. The medical examiner testified that death from this wound would have been instantaneous. "Execution-style killings are not generally HAC unless the state has presented some other evidence to show some physical or mental torture of the victim." *Ferrell v. State*, 686 So. 2d 1324, 1330 (Fla.) (quoting *Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996)). However, we believe that in light of the totality of the circumstances surrounding the murder, the State presented sufficient evidence of physical and emotional suffering to support the trial court's conclusion.

Baker v. State, 71 So. 3d 802, 821 (Fla. 2011). In this case, Marquardt shot his way into the victims' home, shot both victims, stabbed them multiple times—all of this occurring while both Ruiz and Wells knew the young children were nearby. It is not unreasonable to conclude that both victims experienced fear and terror and were aware of their impending death. *Gore v. State*, 706 So. 2d 1328, 1335 (Fla. 1997).

Notably, Marquardt does not cite to any case similar to the circumstances in this case that did not uphold a finding of HAC.

CCP

Marquardt also argues that the trial court's finding of the CCP aggravator was erroneous. Marquardt claims, "The trial court's findings of fact in support of this aggravator consist of the defendant arming himself with two weapons, firing the initial shots from outside the home and stabbing the victims after shooting them. These are not the types of facts that this Court has consistently applied to CCP." *Initial Brief,* at 38. Incredibly, Marquardt also claims "there is simply no evidence of any plan to kill the victims." *Initial Brief* at 39.

As explained in *Walls v. State*, there are four elements to establish the CCP aggravator:

> Under *Jackson,* there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Jackson,* 1994 WL at *4, 19 Fla. L. Weekly at S216. Here, the calm and deliberate nature of Walls' actions against Peterson establish this element beyond any reasonable doubt.
>
> We recognize that Walls himself claimed a loss of emotional control. However, judge and jury were within their discretion to reject this statement of opinion as self-serving or inconsistent with the facts, based on the present record. The "cold" element generally has been found wanting only for "heated" murders of passion, in which the loss of emotional control is evident from the facts though perhaps also supported by expert opinion. *E.g., Santos v. State,* 591 So.2d 160 (Fla. 1991). Such was not the case here. Walls' actions against Peterson fall

within the category of a protracted execution-style slaying, which by its very nature is a "cold" crime. Coldness exists beyond any reasonable doubt.

Second, *Jackson* requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." *Jackson*, 1994 WL at *4, 19 Fla. L. Weekly at S216 (quoting *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)). Once again, the facts of the murder itself show that this element exists beyond a reasonable doubt. Here, Walls left his first victim, weapon in hand, then returned to the place where he had left Peterson bound and gagged, then taunted and abused her before shooting her to death. At the point where Walls left Alger's body, he obviously had formed a "prearranged design" to kill Peterson, a conclusion only reinforced by the time it took for him to kill her and Walls' confession.

Third, *Jackson* requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder. Again, the facts clearly show this element to be present. The acts by Walls not only were calm and careful, but they exhibited a degree of deliberate ruthlessness, as shown by the way he toyed with Peterson prior to her death. This was not merely a murder resulting from the specific and preexisting intent to kill; it was a murder in which Walls told Peterson that he was going to "hurt" her because of what her boyfriend had done, and in which he saw that the killing was a drawn-out affair. Heightened premeditation exists beyond any reasonable doubt.

Finally, *Jackson* states that the murder must have "no pretense of moral or legal justification." *Jackson*, 1994 WL at *10, 19 Fla. L. Weekly at S217 (*quoting Banda v. State*, 536 So. 2d 221, 224–25 (Fla. 1988), *cert. denied*, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989)). Our cases on this point generally establish that a pretense of moral or legal justification is any colorable [FN4] claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide. *E.g., Banda; Christian v. State*, 550 So.2d 450 (Fla. 1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990).

> [FN4] "Colorable" means "that which is in appearance only, ... having the appearance of truth." *Black's Law Dictionary* 265 (6th ed. 1991). "Appearance" means there must be at least some basis in fact to support the defendant's belief that the killing would be excusable, justifiable, or subject to a legal defense. Of course, we are not dealing here with delusional defendants, as in *Santos,* whose internal distortion of reality more properly is relevant to the "coldness" element.

Walls v. State, 641 So. 2d 381, 387-388 (Fla. 1994). *See also Jackson v. State*, 648 So. 2d 85 (Fla. 1994).

Marquardt armed himself with two weapons, (calculated and premeditated), shot Ruiz from outside her home while she faced him at the doorway, and then shot her again in her back as she fled through the hallway. He then stabbed her three times in the neck and head. As for Wells, Marquardt shot her in her face and then stabbed her eight times in the neck and head. The advanced procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course are indicative of the CCP aggravator. *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988); *See e.g., Thompson v. State*, 648 So. 2d 692 (Fla. 1994); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla. 1984).

D. Harmless Error

Alternatively, even if the heinous aggravator and coldness aggravator were improperly applied to Ruiz' and Wells' murders, death is still the proper penalty. Even if this Court were to strike the heinous aggravator and coldness aggravator

from Ruiz' murder and/or Wells' murder, two aggravators remain: previously convicted of another felony involving the use or threat of violence to the person, and during the course of a burglary. Under these facts, any error is harmless. In *Patrick v. State*, this Court said:

> "When this Court strikes an aggravating factor on appeal, 'the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.' " *Williams v. State*, 967 So. 2d 735, 765 (Fla. 2007) (*quoting Jennings v. State*, 782 So. 2d 853, 863 n. 9 (Fla. 2001)); *see also Douglas v. State*, 878 So.2d 1246, 1268 (Fla. 2004).

Patrick v. State, 104 So. 1046, 1068 (Fla. 2012). *See also Hill v. State*, 643 So. 2d 1071, 1073 (Fla. 1994) ("When this court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate.") *Diaz v. State*, 860 So. 2d 960, 968 (Fla. 2003) (harmless error found after court struck HAC). Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

The trial court also found two additional aggravators: previously convicted of another felony involving the use or threat of violence to the person (an Aggravated Burglary in Wisconsin), and during the course of a burglary. Additionally, this case is a double murder. Under the circumstances of this case, the Court should deny the Appellant's request for relief for this claim.

ISSUE IV: WHETHER THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY HAVING HIS STAND-BY COUNSEL APPOINTED AS SPECIAL MITIGATION COUNSEL FOR THE COURT

The Defendant elected to waive the presentation of mitigation during his penalty phase—something he alluded to doing as early as his pre-trial motions when he moved to waive his "2nd phase." (V12, R102). Despite the Defendant's insistence that he did not want mitigation presented, the trial court complied with this Court required procedure when a defendant waives mitigation and does not contest the imposition of the death penalty. The trial court appointed Attorney Charles Vaughn as special mitigation counsel to present mitigation for the court to consider in sentencing. Attorney Vaughn has been the third attorney to have represented the Defendant before he proceeded pro se and was the attorney appointed as stand-by counsel after the *Faretta* hearing.

A. The Standard of Appellate Review

The standard guidance this Court has provided to trial courts when a capital defendant refuses to present mitigation and does not contest the imposition of the death penalty is outlined in *Muhammad v. State*, 782 So. 2d 343, 364 (Fla. 2001). *See also Barnes v. State*, 29 So. 3d 1010, 1022 (Fla. 2010); *Hojan v. State*, 3 So. 3d 1204 (Fla. 2009); *Koon v. Dugar*, 619 So. 2d 246, 250 (Fla. 1993). Whether the trial court applied the correct law and procedure is reviewed de novo. *See Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992).

B. The Trial Judge's Ruling

After the Defendant refused to present any mitigation and contest the imposition of the death penalty. (V9, R1762; V12, R1384-85; V27, R1381). The trial court took action to comply with this Court's guidance under *Muhammad*. 782 So. 2d at 364. Over the Defendant's objection, the trial court appointed stand-by counsel for the limited purpose of acting as special mitigation counsel. (V12, R1401). The trial court also appointed two investigators as mitigation specialists to investigate mitigation, a psychologist—Dr. Krop, the same psychologist who conducted the competency evaluations in pre-trial—to present any mental health mitigation, and a comprehensive PSI. (V27, R1402, 1405).[31]

C. Case Law Supporting the Trial Court's Finding.

In all capital cases, this Court is constitutionally required to "engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." *Barnes v. State*, 29 So. 3d 1010, 1025 (Fla. 2010). In *Muhammad*, this Court held:

> We have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence . . . . Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation,

[31] Dr. Krop did not testify nor is there a report to the Court, sealed or unsealed, in the record.

> the trial court has the discretion to call persons with mitigating evidence as its own witnesses . . . . If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation . . . **or to utilize standby counsel for this limited purpose**.

782 So. 2d at 363-364.

Marquardt's argument and the cases he cites for this issue focus on the importance of the attorney-client privilege and the fact that in some cases different attorneys, who had never formed an attorney-client relationship with the defendant, have been appointed as special mitigation counsel. This Court, however, has clearly authorized trial courts to use stand-by counsel for the limited purpose of presenting mitigation for the court to consider in sentencing. Two conclusions can be drawn from this Court's holding in *Muhammad*: that these factors apply to pro se defendants and defendants represented by counsel; and that presenting mitigation over the defendant's objection may be something required of stand-by counsel for a pro se defendant in order for this Court to conduct a meaningful proportionality review. And it is also not uncommon for trial courts to appoint the last attorney to have represented the defendant before the *Faretta* hearing to act as stand-by counsel.

The Appellant's claim that his due process rights were violated when the trial court appointed his former attorney, stand-by counsel Attorney Vaughn, as special mitigation counsel is misplaced. It is unclear what due process the Defendant is

claiming he was denied. He was afforded the opportunity to present mitigation, which he elected to waive. At that point, the due process analysis should cease. It then became an independent duty of the trial court to ensure that this Court had evidence regarding mitigation to conduct a thorough proportionality review. This Court's obligatory proportionality review is rooted in its interpretation of Florida law. *Muhammad*, 782 So. 2d at 364, *citing Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990); *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). States are not required to conduct a proportionality review under the federal constitution. *Pulley v. Harris*, 465 U.S. 37 (1984).

Once the Defendant affirmatively waived his right to present any mitigation, the trial court was obligated to follow the procedure this Court requires under *Muhammad*. The trial court complied with *Muhammad* in more than one way—it ordered a PSI, appointed special mitigation counsel, appointed two mitigation investigators, and appointed a psychologist to present mental health mitigation. As required by *Koon*, even if Marquardt's attorney had represented him at the penalty phase (with an on-going attorney-client relationship), his attorney would have been required to disclose to the trial court any evidence in mitigation that he had discovered in his investigation. *Koon*, 619 So. 2d at 250. It does not stand to reason that stand-by counsel, who no longer represented the Defendant, would have violated the attorney-client relationship of a former client by presenting mitigation

evidence that is ostensibly helpful to the client's circumstances, albeit not the client's current desired wish. Special mitigation counsel presented, over Marquardt's objection, something he would have been required to disclose to the court, even over Marquardt's objection, if he had continued to represent the Defendant in the penalty phase. Attorney Vaughn was not required to disclose confidential information about his former client, use confidential information in a way that disadvantaged his former client, or act in a manner that was against his former client's objective best interest.

With regard to Marquardt's argument that his former attorney violated his attorney-client privilege, compare that Attorney Vaughn would be compelled to disclose a confidential communication, even without Marquardt's consent, in order to prevent someone's impending death. *Cf.* FL ST BAR Rule 4-1.6 (attorneys are required to reveal confidential communications of clients in order to prevent a death or substantial bodily harm). Although Marquardt did not want mitigation presented, Attorney Vaughn's role as special mitigation counsel was to present evidence for the trial court to considered whether a life sentence would have been more appropriate than death. Attorney Vaughn was presenting information to try and save Marquardt's life, albeit the mitigation was not enough to outweigh the aggravation in this case. Attorney Vaughn revealed nothing that violated the attorney-client privilege.

While the rules of professional conduct regarding the duty lawyers owe to current and former clients prohibits an attorney from acting in a way that is adverse to the client's interest or to use information to the client's disadvantage, those principles would ostensibly exclude an attorney ordered to present mitigation in a death penalty case for a former client, even when the former client wishes to receive the death penalty. *See generally* FL ST Rule 4-1.7 (Conflict of Interest; Current Clients), 4-1.8 (Conflict of Interest; Prohibited and Other Transactions), 4-1.9 (Conflict of Interest; Former Client). Indeed, death is different and the rules of professional conduct for attorneys simply do not contemplate the situation now presented to this Court. The overwhelming majority of actions an attorney is prohibited from taking with a current or former client involve business and financial transactions that arise in the civil context. This Court has established the requirements for a trial court to follow under *Koon* and *Muhammad* through its exclusive jurisdiction over the appellate review of death penalty cases in Florida. Because death is different, the regulation of this particular situation—where the court appointed special mitigation counsel had previously formed an attorney-client relationship with the capital defendant—should remain under the direction of this Court's rulings in *Koon* and *Muhammad* and the trial court below did nothing to violate this Court's rulings in those cases by appointing the Defendant's former attorney as special mitigation counsel.

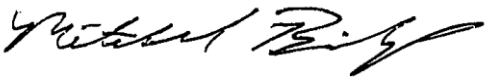
D. Harmless Error

Even if this Court found technical error with the proceedings, there would be no reasonable probability of a different outcome because there would be the same aggravating circumstances and *less* mitigation. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). A harmless error analysis is particularly appropriate in this case because there was no advisory jury.

CONCLUSION

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

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/S/ 

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by electronic mail to: Michael S. Becker, Assistant Public Defender, becker.mike@pd7.org and perkins.lorraine@pd7.org, on August 12th, 2013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

/S/ [signature]

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