IN THE SUPREME COURT OF FLORIDA

JOHN KALISZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. SC12-580

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

JOHN KALISZ, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. SC12-580

PRELIMINARY STATEMENT

The original record on appeal comprises sixteen consecutively numbered volumes. The pages of the first seven volumes are numbered consecutively from 1 to 1,076. Volume eight begins renumbering the pages sequentially from page 1 to 214. Volume nine begins renumbering the pages sequentially from page 1 to 1325. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate pages.

STATEMENT OF THE CASE

John W. Kalisz, hereinafter referred to as appellant, was indicted by Grand Jury with two counts of Murder in the First Degree, two counts of Attempted First

Degree Murder, one count of Burglary with a Firearm and one count of Possession of Firearm by Felon. (I 10) The appellant filed a Motion in Limine to Strike Portions of the Florida Standard Jury Instruction in Criminal Cases. (I 47) The appellant filed fifteen pretrial motions challenging the constitutionality of the Florida death penalty scheme.[1] The trial court denied these motions. (IV 608-611) The appellant filed a Motion for Notice of Aggravating Factors which the trial court denied. (IV 609)

The appellant filed a pre-trial Motion to Suppress statements made to law enforcement on January 27, 2010. (I 41) The trial court denied the Motion to Suppress. (IV 625) The case proceeded to trial. (IX 4) The appellant made a Motion to Sever Count VI (Possession of a Firearm by a Convicted Felon) which was granted. (IX 4)

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[1] Non-unanimous Jury Recommendation, Violates ***Apprendi v. New Jersey***, I 50; Indictment fails to include aggravating factors, I 53; Apprendi/Ring, II 57; Statutory factors vague and overly broad, III 261; CCP Aggravating Factor is vague and overly broad, III 266; Prior Violent Felony Aggravating Factor as applied fails to limit the class of death eligible defendants, III 305; Rule 3.202 Rule of Criminal Procedure is one-sided, III 315; HAC aggravating factor is vague and overbroad, III 326; Objection to Death Qualification of Jury, III 377; Use of Hearsay Evidence in Penalty Phase, III 412; Victim Impact Evidence, III 417; Felony Murder aggravating factor improper, IV 444; Victim Vulnerability Due to Age, Disability aggravating factor is vague and overly broad, IV 475; Under Sentence of Imprisonment aggravating factor is vague and overly broad, IV 492; Fact Finding by Judge Only/Ring, IV 496.

The appellant objected to the introduction of an autopsy photograph of victim Tillotson on the grounds that the gruesome picture was prejudicial and did not prove any fact in dispute. (XII 622) The trial court overruled the objection on the grounds that the autopsy proved the identity of the victim. (XII 624) The appellant also made the same objection to the autopsy photo of victim Donovan, and it was also denied. (XII 627)

The appellant renewed his Motion to Suppress the appellant's statement given from the hospital. (XII 660, 776) The appellant objected to autopsy photograph MM based on relevancy. (XIII 909) The appellant further argued that there was ample testimony of the extent of the victims wounds and the photograph was merely prejudicial and meant to inflame the passion of the jury. (XIII 909) The medical examiner confirmed that the autopsy photo would assist in his testimony. (XIII 910) The trial court overruled the objection. (XIII 910) The appellant further objected to autopsy photograph OO because it was redundant and repetitive. (XIII 912) The appellant further argued that the photo was disgusting and was being used to inflame the jury and "get them riled up." (XIII 912) The medical examiner stated that autopsy photo would assist in his testimony. (XIII 911) The trial court overruled the objection. (XIII 913)

The state rests. (XIII 919) The appellant made a Motion for Judgment of

Acquittal specifically to Count Five (Burglary) on the grounds that there was no evidence presented that the appellant did not have permission to be at the victim's home. (XIV 924) The evidence showed that the victim's home was a business which implies that it's open to the public, and further it would be a family member that people go and visit and see. (XIV 924) The state argued that before victim Kathryn Donovan was shot she stated "what the hell are you doing here." (XIV 924) This statement by victim Donovan supports the contention that the issue of consent of the appellant to be at the house is a jury question. (XIV 924) The trial court denied the appellant's Motion for Judgment of Acquittal. (XIV 925) The appellant rested. (XIV 928) The appellant renewed his Motion for Judgment Acquittal, and the trial court denied the motion. (XIV 929) The jury returned a verdict of guilty as charged as to all five Counts in the Indictment. (XIV 1022, 24)

Penalty Phase

The appellant objected to the jury being instructed on the aggravating factor of Knowingly Creating a Risk of Death to Many Persons. (XV 1033) The appellant argued that this case did not involve a bomb or an arson and the shooting was not in a public place. (XV 1034) The trial court will permit the instruction over appellant's objection. (XV 1036) The appellant objected to the jury being instructed on the aggravating factor of Avoiding or Preventing a Lawful Arrest or

Escape from Custody. (XV 1036) The trial court ruled that whether or not the Lawful Arrest aggravating factor applies is a jury question. (XV 1039) Concerning the Prior Violent Felony aggravating factor, the appellant made a Motion in Limine to exclude the crimes committed by the appellant in Dixie County on the grounds that the state has already proven beyond a reasonable doubt four contemporaneous violent felony convictions. (XV 1043) The trial court denied the appellant's Motion in Limine. (XV 1044)

The appellant objected to the state introducing victim impact evidence on the grounds that the penalty phase is to determine whether aggravating and mitigating factors exist and victim impact evidence is not relevant to this phase of the trial. (XV 1072) The trial court permitted the victim impact statement of the daughter of the victim Deborah Tillotson over appellant's objection. (XV 1074) The jury recommended a death sentence by a vote of 12-0. (XVI 1315)

At sentencing, the state announced a "nolle pros" as to Count IV Possession of a Firearm by a Convicted Felon. (VII 1067) The trial court submitted a written Sentencing Order where the court found six aggravating factors and one statutory mitigating factor and several non-statutory mitigating circumstances. (VI 829) The trial court found that the aggravating factors outweigh the mitigating factors and sentenced the appellant to death for the murder of Kathryn Donovan and for

the murder of Deborah Tillotson, and sentenced the appellant to life imprisonment on the remaining counts. (VI 845-846) This appeal follows.

STATEMENT OF THE FACTS

In the afternoon of January 14, 2010 John Kalisz went to Larry Lemon's house. (XI 468) Kalisz came to Lemon's residence in a white Ford Aerostar Van with Colorado license plates. (XI 472) Kalisz had a black semi-automatic 9mm handgun and asked Lemon if he could shoot target practice with the gun. (XI 473) Kalisz then proceeded to take 5 to 7 practice shots with his hand gun. (XI 474) Lemon felt threatened by Kalisz and "wanted to get away from him" and told Kalisz it was time to leave. (XI 475) Kalisz got in his van and drove out to the road and stopped for a while. (XI 475) Kalisz subsequently left. (XI 476) Lemon thought that Kalisz was acting strangely before he left. (XI 478) Soon thereafter, the Hernando County Sheriff's Office received a 911 call. (XI 456) The caller reported that there was a shooting at 15303 Wilhelm in Brooksville. (XI 460) The caller stated that an unidentified man came in the house and started shooting and he has "shot four of us." (XI 461)

The appellant's niece Manessa Donovan described the shooting that was first reported on the 911 call. (XI 495) Appellant's sister Kathryn Donovan and her employees were finishing work early. (XI 495) Kathryn Donovan was getting

ready to leave to run some errands. (XI 495) Donovan's employee Debra Tillotson went out to smoke a cigarette and Manessa Donovan joined her. (XI 496) Donovan's employee Amy Wilson was inside the shed cleaning up everything. (XI 496) Suddenly Kathryn Donovan screamed "what the hell are you doing here." (XI 497) Three gunshots rang out from within the house. (XI 497) The appellant said nothing as he approached Manessa Donovan and shot her three or four times. (XI 499) Donovan thought that the appellant would not stop shooting her until he thought she was dead so she closed her eyes and put her head down. (XI 499) When Donovan opened her eyes again, she saw the appellant walking away towards Amy. (XI 499) Amy Wilson began to flee, and the appellant shot her and Wilson fell to the ground. (XI 500) The appellant then walked over to Wilson and shot her one more time. (XI 500) After Wilson was shot the initial time, she plead for her life stating please don't kill me. (XI 501)

Donovan could not tell whether the appellant had been drinking the day of the shooting. (XI 510) Donovan described the appellant as being like a statute. (X 510) Donovan further described the appellant as having eyes that were black and she thought he was on drugs. (XI 512) The appellant had no recognition, and Donovan thought the appellant was "demon possessed." (XI 512) Law enforcement subsequently recovered eleven bullet casings from the scene of the

shooting. (XI 536)

The Sportsman Attic is a store in Hernando County that sells firearms, ammunition and other accessories for firearms. (XII 560) The day before the shooting, the Sportsman Attic sold to "John" two magazines for a Barretta handgun and full metal jacket ammo for target practice and hollow point bullets for home protection. (XII 563)

Todd Linville has been a friend with the appellant for the past four years. (XII 577) Linville and the appellant attended AA meetings together. (XII 594) The night before the shooting, the appellant came to Linville's home and returned a "Speaker CD" and asked Linville to put a package in the mail. (XII 579) The appellant had a bottle of liquor with him, which was out of character because the appellant did not drink and the appellant was a member of Alcoholics Anonymous. (XII 580) The appellant was "a wreck and hopeless." (XII 594) The appellant sat in Linville's living room and watched the news and talked for a while, all the while taking sips of liquor straight out of the bottle. (XII 581) The appellant "almost threw up." (XII 582) The appellant fell asleep in Linville's recliner at 4:30 am. (XII 583)

The appellant awoke the next morning and told Linville his plans for the day. (XII 584) The appellant planned to go to the trailer park where he had his

trailer, touch base with his brother and then he had an appointment with somebody concerning his parole. (XII 584) Later in the afternoon the appellant called Linville and told him that he had taken care of a problem at his sister's house. (XII 585) The appellant told Linville that his sister ruined his life, so he ruined her life. (XII 592) The appellant blamed his sister for his problems including losing his job in Colorado and losing his inheritance. (XII 595) The appellant further told Linville that he was thinking of heading to the Keys and if anyone tried to stop him the appellant would put his gun to his head. (XII 593)

After the shooting, Lieutenant Michael Brannin of the Dixie County Sheriff's Department received a BOLO for a white Ford van with racks on the top and Colorado license plates. (XII 633) Deputy Brannin found the appellant traveling north on U.S. 19. (XII 635) The appellant turned into a parking lot of a BP gas station. (XII 636) Deputy Brannin parked his vehicle in front of the appellant, and after the Deputy exited his pick-up truck, the appellant brandished a firearm. (XII 637) Deputy Brannin fired four shots into the appellant's windshield. (XII 639) The appellant was disarmed, arrested and subsequently transported from the scene by EMS. (XII 641, 651)

Special Agent Barbara McGraw of FDLE investigated the officer involved shooting of the appellant. (XII 658) Agent McGraw obtained a recorded statement

from the appellant at Shands Hospital. (XII 659) The appellant had been in the hospital for thirteen days. (XII 738) The appellant indicated that he understood his rights because "he had been read them a million times;" and waived his ***Miranda*** rights prior to making the statement. (XII 662, 727, 736) The appellant was orientated to self (he knew he was in a hospital) but did not know the correct city, date or year. (XII 726)

Amy Green[2] was a survivor of the appellant's shooting spree. (XIII 749) Green heard a big bang and saw Kathryn Donovan fall to the floor. (XIII 750) Green hollered to the others to run, and then Green got shot in the stomach and fell to the ground. (XIII 751) Green got up and ran to the other side of the house. (XIII 752) The appellant came behind Green and tripped her. (XIII 752) Green asked the appellant: "Who are you?" "Why are you doing this?" "I don't even know you." (XIII 752) The appellant then shot Green in the neck. (XIII 752) Green then "played possum" and acted like she was dead waiting for the appellant to leave. (XIII 753) The bullet in Green's neck can not be removed because it could cause paralysis. (XIII 755)

Kalisz's Confession

The appellant bought a gun to conduct an operation against his sister Kitty.

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[2] Amy Green was formerly known as Amy Wilson.

(XIII 810) The appellant had been planing the operation for a while. (XIII 873) The operation was to "erase the hell out (of) that Kitty and her blood line." (XIII 811) The appellant asked whether his sister lived after he had started shooting everybody. (XIII 817) The appellant entered his sister's house through the backdoor and shot his sister first. (XIII 861) The appellant then shot everyone else at the house until they shut up. (XIII 820) The appellant was at Kitty's house for a couple of minutes. (XIII 858) After shooting everyone at Kitty's house the appellant's plan was to get out of Florida. (XIII 821) The appellant was subsequently stopped at a gas station, and guns were drawn and many shots were fired. (XIII 822)

Kitty was the main objective. (XIII 853) The appellant decided to carry out his plan after the appellant's probation officer Ms. Whipple told appellant he could not leave the State of Florida and return to Colorado to get his tools. (XIII 853, 54)

Medical Examiner

Dr. Kyle Shaw is the medical examiner who conducted the autopsy on the victims Deborah Tillotson and Kathryn Donovan. (XIII 889, 906) Tillotson had a gunshot wound on her right arm just above the bend of the elbow. (XIII 894) Tillotson also had a gunshot wound on her left thigh. (XIII 896) Finally, there

were also two gunshot wounds on her left lower abdomen. (XIII 898) Tillotson's cause of death was multiple gunshot wounds. (XIII 903) Donovan had three gunshots wounds on her back. (XIII 911) Donovan's cause of death was also multiple gunshot wounds. (XIII 917)

Penalty Phase

State Case

The appellant shot and killed Capt. Chad Reed of the Dixie County Sheriff's Office at a BP station in Dixie County on January 14, 2010. (XV 1065) The state introduced a certified copy of a judgment involving the appellant where he was convicted and sentenced on a charge of first-degree murder while armed with regard to Capt. Chad Reed. (XV 1066)

Sheena Whipple of the Florida Department of Corrections, Probation and Parole began probation supervision of the appellant in November 2009, for the charge of aggravated assault with a deadly weapon in Hernando County, Florida. (XV 1070)

Appellant's Case

The appellant had five brothers and sisters. (XV 1088) After the appellant left the Army, he became close to his younger sister Linda. (XV 1089) For three years in the early 80s, the appellant would do "a lot of partying." (XV 1089) The

appellant did not have a home, and he drifted with different people and crash where he could find a place. (XV 1089) The appellant would spend his days and evenings drinking until he would fall asleep. (XV 1089) The appellant's sister Linda ended the relationship because she wanted to leave the partying lifestyle. (XV 1090) The appellant drifted out West and became homeless. (XV 1090)

In the early months of 1990, the appellant called his sister Linda and said it had been three days and he did not have a drink. (XV 1091) Soon thereafter, appellant's brother Michael committed suicide. (XV 1093) The appellant's brother Michael had a substance abuse problem and was a terrible alcoholic. (XV 1093) The appellant's two other brothers were alcoholics too. (XV 1093)

The appellant stopped drinking and looked vibrant and healthy again. (XV 1093) The appellant started a new life with his home-based business at Estes Park, Colorado. (XV 1094) The appellant became a member of Alcoholics Anonymous, and that group became a very big part of his life. (XV 1095) The appellant also became a roofer, and the appellant would hire people that needed his help. (XV 1095) The appellant dedicated his life to helping other alcoholics. (XV 1096) In Estes Park, everyone knew the appellant and loved him. (XV 1110) With his brother's ex-wife the appellant went to AA meetings twice a day, performed service work and traveled the country to AA conferences. (XV 1118)

The appellant became an Alcoholics Anonymous group service representative where he traveled to assemblies three times a year, and then reported back to the local group to let them know what happened at the area level. (XV 1119) The appellant became know as a "Big Book Thumper." (XV 1143) The Alcohol Anonymous Big Book is the story of the two founders of Alcohol Anonymous and their struggles to recover from alcoholism. (XV 1144) A Big Book Thumper is person that is sponsoring someone and strictly follows the methods found in the Big Book. (XV 1144)

In 2008 the appellant's mother died of colon cancer. (XV 1096) The appellant returned to Colorado and just broke down. (XV 1098) The appellant cried and told his friends how much his mom had meant to him. (XV 1098)

The appellant had legal problems involving his niece Manessa, and the appellant was placed on probation in 2009. (XV 1098) The appellant was not allowed to return to Colorado. (XV 1099) Colorado was the appellant's sanctuary and where he had support for his alcoholism. (XV 1099) In Florida the appellant's support started to falter. (XV 1099) The appellant could not reach his sponsor which was like a priest to him. (XV 1100) The appellant was living in a mobile home that he had purchased in Springhill. (XV 1100) The mobile home had burnt to the ground and all the appellant's material things "went up in smoke." (XV

1100) The appellant sounded worse than he had ever been in his homeless days, he was filled with despair, he was extremely depressed and he was lost. (XV 1101) The appellant was hopeless, he had nothing left, he had failed to reach his sponsor, and had nowhere to go. (XV 1101) The appellant's family shunned him and Alcoholics Anonymous shunned him "so he was just lost." (XV 1101) The night before the shootings, the appellant tried to reach his sponsor several times without success. (XV 1169) The appellant spoke to his sister Linda two times the day of the shooting. (1103) In the second phone call the appellant told his sister about murdering his other sister. (XV 1104) The appellant told his sister Linda "that it was over." (XV 1104) The appellant's sister questioned the appellant further and the appellant was very difficult to understand. (XV 1104)

Carl Sauerwein is an LP Gas Inspector for the State of Florida. (XV 1192) Sauerwein investigated a LP gas fire at the appellant's RV that occurred on January 12, 2010. (XV 1194) Sauerwein concluded that there was an open gas line in the appellant's mobile home, and the appellant's mobile home exploded when the appellant tried to light the stove. (XV 1196)

Dr. Peter Bursten is a forensic psychologist that evaluated the appellant. (XVI 1211) Prior to meeting the appellant, Bursten reviewed discovery information, police reports and other background information pertinent to the

appellant. (XVI 1211) The appellant had a conflictual relationship with his father. (XVI 1213) The appellant's father was an alcoholic, and the appellant had a terrible relationship with him. (XVI 1213) The appellant was physically abused, and the appellant felt rejected by his father and he felt very disliked and very inadequate. (XVI 1213) The appellant became an oppositional young adolescent, very angry and very defiant. (XVI 1213) The appellant began substance-abuse at the age of 12. (XVI 1213) The appellant became involved in Alcoholics Anonymous, and he developed a sense of belonging and acceptance and a sense of self-esteem. (XVI 1218)

The appellant's life began to unravel in 2008 when his mother died. (XVI 1219) The following year the appellant was convicted of a criminal offense involving his niece. (XVI 1219) This had a very negative impact on the appellant because it was viewed as a regression from his fight against alcoholism. (XVI 1220) Next, the appellant lost family support because the criminal offense with his niece caused his sister Kitty to be very angry with the appellant and they became estranged from one another. (XVI 1221) The appellant was placed on probation and could not return to the State of Colorado. (XVI 1223) The appellant had developed a very strong identity in Colorado, and when the appellant could not return a big part of his identity was removed from him against his will. (XVI

1224) Staying in Florida also caused the loss of esteem from his involvement in Alcoholics Anonymous because his group was primarily in Colorado. (XVI 1225)

The appellant felt terrible about himself for being on probation, and that all those positive aspects of himself that he worked hard to develop and maintain had been eroded. (XVI 1225) The appellant further believed that no one would want him as an Alcoholics Anonymous sponsor. (XVI 1226) After losing his home in Colorado, the appellant then lost his home in Florida due to the gas explosion. (XVI 1227) At this point the appellant felt that he had nothing left, that his whole life was gone, and he felt hopeless and helpless. (XVI 1227)

In Dr. Bursten's opinion, after the appellant's home exploded the appellant developed what is called an acute stress disorder. (XVI 1227) The appellant felt completely hopeless, completely helpless and he thought his life was over. (XVI 1228) This caused the appellant's judgment to be impaired. (XVI 1229) The appellant blamed his sister Kitty for what had transpired. (XVI 1228) Immediately prior to the shootings the appellant drank alcohol again. (XVI 1230) This increased the likelihood that the appellant would act aggressively towards his sister. (XVI 1231) At the time of the shooting the appellant lost his sense of self, his identity, his reasons for living, and he was faced with intense feelings of anger and he very inappropriately projected them onto his sister and the other people that

were killed in the process. (XVI 1232)

Former Florida State Prison Warden Ronald McAndrew opined that a Florida prison warden would welcome the development of an Alcoholics Anonymous program at their prison. (XVI 1250) After reviewing the appellant's record, McAndrew believed that the appellant was a leader in Alcoholic Anonymous. (XVI 1251) Should the appellant to receive a life sentence, he would be housed in general population and would be an asset to the Department of Corrections system. (XVI 1251)

SUMMARY OF ARGUMENT

Point I: The trial court should have suppressed Kalisz's hospital bed statement to police. Kalisz's statement was inadmissible because the police interrogated him while he was incapacitated from the side effects of drugs taken for injuries suffered during his arrest. Law enforcement questioned the appellant during a period where the appellant demonstrated obvious cognitive impairment. The appellant had disorientation, confusion, mental clouding, short attention span, sedation, altered speech and tangential thought. The appellant has had a lengthy history of prior arrests and stated he knew his ***Miranda*** rights. But when asked whether he was waiving his rights, the appellant did not answer. Given that the appellant gave no express waiver of ***Miranda***; given that the appellant was immobile in a hospital bed and was not free to leave; and given that the appellant was not advised of the charges against him before questioning began all create the totality of circumstances that the appellant's questioning was done without a knowing and voluntary waiver of his right to remain silent and have counsel present during questioning.

The erroneous admission of statements obtained in violation of ***Miranda*** rights is subject to harmless error analysis. There was overwhelming evidence of the appellant's guilt. The appellant concedes that based upon the entire appellate

record, the admission of the statements by the appellant was harmless error and did not substantially contribute to the first-degree murder convictions. However, the statements that the appellant made on January 27 was essential to prove the CCP aggravating factor. Under the circumstances of this case, the State is unable to sustain its heavy burden related to the penalty phase. Therefore, the appellant's death sentence should be reversed and a new penalty phase ordered with the exclusion of the appellant's admissions made at the hospital on January 27, 2010.

Point II: The trial court provided a short sentencing order concluding that the appellant knowingly created a great risk of death to many persons during the murder of Kathryn Donovan and Deborah Tillotson. Not counting the murder victim Kathryn Donovan, the appellant shot Deborah Tillotson, Manessa Donovan and Amy Wilson. This does not meet the threshold stated by this Court in ***Johnson v. State***, 696 So.2d 317 (Fla. 1997) on a numerical basis because this Court has defined "many persons" as four people in addition to the victim being put in great risk of death by the appellant. It also was individual shootings, and no other person was at risk of death while the appellant shot each victim in different places at Kathryn Donovan's home. The instruction to the jury and the finding of this weighty aggravating circumstance requires that the death sentence must be vacated and reduced to life or remanded for a new penalty phase.

Point III: The trial court claimed in the sentencing order that the avoiding arrest aggravating circumstance was proven but under the circumstances should be given moderate weight. In this case the victims in this case were not law enforcement officers, the supporting evidence must be very strong to show that "the sole or dominant motive for the murder was the elimination of the witness." ***Preston v. State***, 607 So.2d 404 (Fla. 1992) The trial court found that the circumstances surrounding the crime clearly show it was the motive. This finding was error.

In the instant case there is direct evidence of the appellant's motive for the shootings. In fact, the trial court identified in his sentencing order the precise motive for the shootings. In the sentencing order the trial court stated: "He had one intention upon entering the residence and that was to kill all of its occupants." When interview by law enforcement the appellant stated that he bought a gun to conduct an operation against his sister Kitty. The appellant had been planing the operation for a while. The operation was to "erase the hell out (of) that Kitty and her blood line." Therefore the motive of the murder of Kathryn Donovan and Deborah Tillotson was not to avoid arrest, but rather a revenge killing of his sister, his sister's family and friends. As such, the state has failed to prove this factor beyond a reasonable doubt. The conclusion of the trial court should be rejected.

The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

Point IV: In imposing the death penalty, Judge Merritt found that the State had proved six aggravating circumstances. The aggravating factors the that the appellant knowingly created a great risk of death to many persons and the murder was committed for the purpose of avoiding arrest should not have been before the jury and were improperly found. Moreover, that the finding that murder was committed in a cold, calculated and premeditated manner may not be proper in the event this Court was to accept the argument in Point I and exclude the statements by the appellant made during his recovery in the hospital. This Court should find that the trial court's actions in the penalty phase do not meet the test that this Court laid down in ***State v. Dixon,*** 283 So.2d 1 (Fla. 1973), and this Court should order a new penalty phase evidentiary hearing before a jury to give a new recommendation without the taint of the confession, and without the improper instruction on aggravating factors that do not apply.

Point V: In the guilt phase trial, the appellant objected to the introduction of autopsy photograph of victim Tillotson and Donovan on the grounds that the gruesome picture was prejudicial and did not prove any fact in dispute. Great care should be taken prior to waving ghastly pictures in front of lay jurors who may

never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt and as in appellant's case, penalty.

Point VI: The appellant objected to the state introducing victim impact evidence on the grounds that the penalty phase is to determine whether aggravating and mitigating factors exist and victim impact evidence is not relevant to this phase of the trial. The appellant urged the trial court to have this evidence presented to the trial court after the jury made a sentencing recommendation. The trial court followed the law of this Court and ruled the evidence admissible.

Point VII: The present death penalty scheme is unconstitutional pursuant to the United States Supreme Court decision of ***Ring v. Arizona***, 536 U.S. 584 (2002). At this time, Appellant asks this Court to reconsider its position in ***Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002), and ***King v. Moore***, 831 So.2d 143 (Fla. 2002), ***cert. denied***, 537 U.S. 1069 (2002), because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.

POINT I

THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS STATEMENT OBTAINED WHILE THE APPELLANT WAS INCAPACITATED FROM INJURIES SUFFERED DURING HIS ARREST.

The trial court should have suppressed Kalisz's hospital bed statement to police. Kalisz's statement was inadmissible because the police interrogated him while he was incapacitated from the side effects of drugs taken for injuries suffered during his arrest. The appellant also contends that his confession is inadmissible because it was obtained through police coercion.

Standard of Review

The standard of review is that appellate courts should 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, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, Article I, Section 9 of the Florida Constitution. ***Miller v. State***, 42 So. 3d 204, 220 (Fla. 2010) "In addition, the State bears the burden to establish by a preponderance of the evidence that the confession was freely and voluntarily given." ***Miller*** at 220.

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." As part of preserving this right, in ***Miranda v. Arizona***, 384 U.S. 436 (1966) the United States Supreme Court explained that if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. The right to remain silent is one of four procedural warnings that must be provided to a suspect who is taken into custody to protect his privilege against self-incrimination. These four warnings are that a suspect must be warned prior to any questioning [1] that he has the *right to remain silent*, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. ***Miranda***, 384 U.S. at 479 (emphasis supplied); ***see also Traylor v. State***, 596 So. 2d 957, 966 (Fla. 1992). "Once warnings have been given . . . [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." ***Miranda***, 384 U.S. at 473-74.

The appellant was admitted to Shands Hospital after his arrest in Dixie

County, Florida on January 14, 2010. On January 27, 2010 the hospital clinical social worker Michael Johnson informed the appellant that law enforcement wished to interview him. On that day Johnson's progress notes stated that the appellant was orientated to self but not correct to place or date.

Bruce Goldberger, an expert in forensic toxicology, examined the medication records of the appellant. On January 27, 2010 the appellant was taking the controlled drug Roxicet. In Goldberger's expert opinion, the appellant's faculties were not impaired to the extent that he could not give consent or factual information regarding past events. Goldberger watched the appellant's interview and acknowledged that appellant gave inappropriate answers to questions and would ramble on. The appellant did not know where he was or the correct date. Goldberger opined that the appellant was "pretty good" considering what happened to him.

Detective Brian Faulkingham of the Hernando County Sheriff's Department conducted the interview of the appellant. The appellant stated to Detective Faulkingham "Not exactly sure what I'm doing here." Before questioning appellant, Faulkingham gave the appellant his ***Miranda*** warnings. The appellant did not acknowledge that he was waiving his ***Miranda*** rights, nor did the appellant execute a written ***Miranda*** waiver form. Due to appellant's injuries at his arrest,

the appellant still did not have a first appearance before a Judge and was not advised of his charges. At times during the interview the appellant gave inappropriate answers and had slurred speech. The appellant complained of being "screwed up on drugs" and being in and out of the hospital for rehab.

Daniel Buffington is an expert in clinical pharmacology and reviewed the medication records of the appellant. The appellant was given seven different drugs on January 27, 2010. Buffington was not concerned with toxication but rather the adverse side effects that would impact the appellant's cognizant or psychiatric status. Buffington reviewed the videotape of the appellant's statement and in his expert opinion the appellant demonstrated clinical presentations consistent with cognitive impairment. The appellant had disorientation, confusion, mental clouding, short attention span, sedation, altered speech and tangential thought.

The trial court ruled that by a preponderance of the evidence that the state demonstrated that the appellant's statements to police were voluntary and knowingly and intelligently given. The court recognized that the appellant did not answer direct questions concerning whether he understood or waived his ***Miranda*** rights. However, the appellant's earlier reaction to being given ***Miranda*** warnings stating "have you seen my record" indicating that he had been given his

Miranda rights several times before, was an indication that he understood and waived his rights. The trial court ruling was error.

The US Supreme Court in ***Miranda*** concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." ***Miranda*** at 467 Therefore, "unless and until [the ***Miranda***] warnings ***and waiver*** (emphasis added) are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." ***Miranda*** at 479 "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." ***Miranda*** at 476. The Supreme Court has also recognized that the prophylactic ***Miranda*** warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." ***Oregon v. Elstad***, 470 U.S. 298 at 305 (1985). As recognized in ***Elstad***, the ***Miranda*** exclusionary rule sweeps more broadly than the Fifth Amendment itself: "A ***Miranda*** violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all

unwarned statements." ***Elstad*** at 307 This presumption is irrebuttable for the purposes of the State's case in chief. ***Elstad*** at 307.

The appellant asserts that he did not knowingly and intelligently waive his ***Miranda*** rights. This Court in ***Ramirez v. State***, 739 So. 2d 568, 575-76 (Fla. 1999), provided the factors to consider in determining whether a defendant knowingly and intelligently waived his ***Miranda*** rights: 1) the manner in which the ***Miranda*** rights were given, including any trickery or cajoling; 2) the defendant's age, intelligence, background, and experience; 3) whether the juvenile's parents were contacted and given an opportunity to speak with him before questioning; 4) the location of the questioning; and 5) whether police obtained a written waiver of the ***Miranda*** rights.

Manner in Which the Rights Were Given

Detective Faulkingham began the interrogation of the appellant with questions to determine whether the appellant was aware of his surroundings. The appellant thought he was in Hernando County, thought the year was 2010 and thought that the date was January 19.[3] Moreover, the appellant did not know how he got hurt or why he was in the hospital because "these people got me so screwed

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[3] The interrogation of the appellant took place at Shands Hospital in Gainesville, Florida on January 27, 2010.

up on drugs." Detective Faulkingham asked the appellant what he last remembered and the answer was illogical.

At this point the appellant had not had a first appearance before a Judge and was not advised of his charges nor advised that he had the right to counsel. Detective Faulkingham told the appellant that he going to advise him of his charges but that he had to first advise the appellant of his ***Miranda*** rights. Detective Faulkingham asked the appellant if he knew his ***Miranda*** rights and the appellant stated "oh yeah." Detective Faulkingham responded that he was going to read them, and the appellant responded "Have you seen my record." Detective Faulkingham then read the appellant his ***Miranda*** warnings. Detective Faulkingham asked the appellant whether he understood his rights and there was no response. Detective Faulkingham getting no response from the appellant on the critical question whether he was waiving his rights he stated: "You said you've had those read to you before? I read them off the form here, okay?" Detective Faulkingham claims under cross-examination that at this point the appellant made the oral response "a million times."

The Age and Experience of the Appellant

The appellant was an adult with several years of experience with the criminal justice system. In fact, the appellant stated that he understood his

Miranda Rights because of his past experience with the criminal justice system.

Location of Questioning

The appellant was questioned in a hospital bed while recovering from gunshots wounds suffered during his arrest. The appellant did not have any mobility, and could not leave his hospital bed.

Written Waiver of Miranda rights

Detective Faulkingham did not obtain a written waiver of the appellant's ***Miranda*** rights.

The trial court ruled from the bench after the suppression hearing and found that the appellant's statements to police were "voluntary and knowingly and intelligently given." The trial court conceded that the appellant never affirmatively waived his ***Miranda*** rights. But since the appellant continued answering questions and had been Mirandized before, trial court found that the lack of a ***Miranda*** waiver was irrelevant. The trial court also found that there were times when the appellant did not give appropriate answers. But there was times when he did give appropriate answers. Therefore the trial court reasoned that the adverse effects of the seven drugs given the appellant in the totality did impact the finding that the appellant made a knowing and voluntary statement. The trial court's ruling was in error.

The trial court's reliance on the appellant's claim that the appellant had actual knowledge of his rights based on his prior dealings with law enforcement is missplaced. In ***Miranda*** the US Supreme Court disapproved of a case-by-case inquiry into whether or not a suspect was aware of the unarticulated right. The Court said:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Miranda at 468-69 The appellant's prior dealings with law enforcement cannot substitute for adequate ***Miranda*** warnings, and therefore can not substitute for a lack of a voluntary waiver of the ***Miranda*** warnings.

In sum, pursuant to ***Ramirez*** the totality of the circumstances support the finding that the appellant's statement was made without the necessary waiver of his ***Miranda*** rights. Law enforcement questioned the appellant during a period

where the appellant demonstrated obvious cognitive impairment. The appellant had disorientation, confusion, mental clouding, short attention span, sedation, altered speech and tangential thought. The appellant has had a lengthy history of prior arrests and stated he knew his ***Miranda*** rights. But when asked whether he was waiving his rights, the appellant did not answer. This was because he was asked during an obvious interlude of disorientation. Specifically, just moments before being given his ***Miranda*** rights the appellant was asked what he last remembered before being in the hospital and his answer was totally inappropriate to the question. Moreover, given that the appellant gave no express waiver of ***Miranda***; given that the appellant was immobile in a hospital bed and was not free to leave; and given that the appellant was not advised of the charges against him before questioning began all create the totality of circumstances that the appellant's questioning was done without a knowing and voluntary waiver of his right to remain silent and have counsel present during questioning.

The conclusion that the statements given by appellant on January 27th should have been suppressed does not end the inquiry. This Court has held that "[t]he erroneous admission of statements obtained in violation of ***Miranda*** rights is subject to harmless error analysis." ***Mansfield v. State***, 758 So. 2d 636, 644 (Fla. 2000) (quoting ***Caso v. State***, 524 So. 2d 422, 425 (Fla. 1988)). In ***State v.***

DiGuilio, 491 So. 2d 1129 (Fla. 1986), this Court set forth the harmless error test, which places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. ***DiGuilio*** at 1135. As ***DiGuilio*** emphasizes, "harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence." ***DiGuilio*** at 1136. In fact, ***DiGuilio*** emphasizes that constitutional errors such as comments on the right to remain silent are "high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial by influencing the jury verdict."

Certainly, in this case, there was overwhelming evidence of the appellant's guilt, including physical evidence, two surviving eyewitnesses to the actual

shootings including the appellant's niece, and admissions by the appellant apart from his statements of January 27. In this case, the appellant concedes that based upon the entire appellate record, the admission of the statements by the appellant was harmless error and did not substantially contribute to the first-degree murder convictions. However, the statements that the appellant made on January 27 were relied on by the State to prove the CCP aggravating factor, and the trial court emphasized the appellant statements in the sentencing order. Under the circumstances of this case, the State is unable to sustain its heavy burden related to the penalty phase. Therefore, the appellant's death sentence should be reversed and a new penalty phase ordered with the exclusion of the appellant's admissions made at the hospital on January 27, 2010.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The trial court provided a short sentencing order concluding that the appellant knowingly created a great risk of death to many persons during the murder of Kathryn Donovan and Deborah Tillotson. The trial court found that: "This Court is aware of the "four-person threshold" required in Johnson.[4] However, the facts and circumstances of this particular case, in the opinion of this Court, as distinguishable from this case." The trial court was in error.

Not counting the murder victim Kathryn Donovan, the appellant shot Deborah Tillotson, Manessa Donovan and Amy Wilson. This does not meet the threshold stated in ***Johnson*** on a numerical basis because this Court has defined "many persons" as four people in addition to the victim being put in great risk of death by the appellant. It also was individual shootings, and no other person was at risk of death while the appellant shot each victim in different places at Kathryn Donovan's home.

The trial court claimed that the facts and circumstances in this case are distinguishable from this Court's holding in ***Johnson v. State***, 696 So.2d 326 (Fla.

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[4] ***Johnson v. State***, 696 So.2d 317 (Fla. 1997)

1997). The trial court reasoned that the appellant engaged in "indiscriminate shooting" in the direction of at least four persons who were not only put in "an immediate and present risk of death," (citation omitted) but were also "in the line of fire." (Citation omitted) for the definition of "knowingly put in great risk of death to many persons." This is not factually true. According to the surviving eyewitnesses Kathryn Donovan was inside the house when she was shot. At that time of that shooting Donovan's employee Debra Tillotson was outside smoking a cigarette with Manessa Donovan; and Donovan's employee Amy Wilson was inside the shed cleaning up everything. Three gunshots rang out from within the house at Kathryn Donovan. The claim by the trial court that the appellant shot indiscriminately in the direction of at least four people is not supported by the evidence.

It is obvious that the trial court is attempting to expand this aggravating factor beyond the dictates of this Court. This Court in ***Johnson*** made it clear that the instrumentality of the appellant's actions and the number people involved are two key components of this aggravating factor. In ***Johnson*** this Court held:

> We have stated that this aggravator cannot be supported in situations where death to many people is merely a possibility. Instead, there must be a likelihood or high probability of death to many people.

> (Citations omitted) Further, we have indicated that the word "many" must be read plainly. Therefore, we uphold the application of this aggravating circumstance in scenarios in which four or more persons other than the victim are threatened with a great risk of death. (Citations omitted)

Johnson at 327. To illustrate the point in practical terms, in example one a defendant uses a machine gun, or a hand grenade to kill his victim in a crowded nightclub with dozens of people and the victim is killed and miraculously no other bystander is injured. In example two, a defendant uses a handgun with an eleven round clip and goes to a home with the intent to shoot one person, and then proceeds to shoot the intended victim dead at the front door. The defendant then proceeds to go upstairs and wound one person in each of the three bedrooms upstairs, then wounds a person outside in the garage and wounds two people in the shed. In the first example this aggravating factor would apply because the instrumentality of the killing (machine gun; hand grenade) by its very nature puts many people at risk, and the number of people put at risk (dozens of people) together satisfy the statutory intent of the aggravating factor even though only one person (the intended victim) is injured. By contrast, in the second example the aggravating factor would not apply because although there are more that five people shot, the instrumentality of the shootings in and of itself never put many

people at risk of death to many persons.

If the Court were to reject this argument, nonetheless the aggravating factor is inapplicable based upon the facts of this case. This Court is quite clear. The use of the word "many" means that a great risk of death to the victim and four other people. The presence of three other people at Kathryn Donovan's home when Donovan was shot does not qualify as "many persons" as a matter of law. Rather, for capital sentencing purposes, the "risk of death to many people" can be applied as an aggravating circumstance in scenarios in which four or more persons other than the victim are threatened with great risk of death. "Great risk" means not a mere possibility, but a likelihood or high probability.

In the instant case, there was gunfire intended for Kathryn Donovan and Donovan's daughter and anyone else in the house at the time. When gunfire is involved, the evidence is insufficient to support the aggravating factor of great risk of death to many persons when there is only an intent to kill a particular person and there is no evidence of indiscriminate shooting in the direction of a group of people. In ***Williams v. State***, 574 So. 2d 136 (Fla. 1991) this Court explained that the mere fact that several people are present during a shooting is not sufficient to support this aggravating factor.

First, the trial court found the factor of great risk to many

> persons based on the fact that several other persons were present in the bank at the time of the robbery. We believe this factual situation, without more, is insufficient to support this factor. This factor is properly found only when, beyond any reasonable doubt, the actions of the defendant created an immediate and present risk of death for many persons. While we agree that Williams' actions created some degree of risk, we cannot say beyond a reasonable doubt that he created an immediate and present risk to the others in the bank. There is no evidence, for instance, of indiscriminate shooting in the direction of bank customers, but only of an intent to kill the bank guard.

Williams at 137. Like ***Williams***, the intended victim in this case was Kathryn Donovan and her daughter. The evidence is clear that the number of people present at the house was four people in total when the appellant shot Kathryn Donovan.

This Court has further held that where there is a shooting, for a person to be knowingly put in great risk of death, the evidence must show that many people were "in the line of fire" during the shooting. The trial court claimed in the sentencing order that the appellant engaged in indiscriminate shooting in the direction of at least four persons. As stated earlier the shooting of the first victim did not put four other victims in great risk of death at the time that shooting occurred. In ***Alvin v. State***, 548 So.2d 1112 (Fla. 1989) this Court held that:

> The judge's findings indicated that when the shooting took place there were four people in the vicinity, two of

> whom were Powell and Grimes. There were two women in the area, but they were not in the line of fire. We have previously held that the presence of two persons in the immediate proximity to the victim of a murder by shooting is insufficient to establish this aggravating factor. (Citations omitted) The judge also noted that five minutes after the shooting there were in excess of fifty people at the scene. The mere fact that the shooting occurred in an area where many people congregated *after* the shooting is not sufficient to support a finding of this aggravating circumstance.

Alvin at 1115. In the instant case, the evidence supports the finding that only one victim was in the line of fire during the multiple shootings. This does not meet the four person threshold that is required under ***Johnson***.

In summary, the evidence does not support the trial court's determination that the appellant knowingly intended to created a great risk of death to many persons. The evidence, in fact, suggests otherwise. The appellant entered the Donovan house with the intent to kill Kathryn Donovan and her daughter. It is uncontroverted that the appellant shot each victim individually. This is not consistent with the trial court's finding. Moreover, the evidence was insufficient to establish that "many" people were put in great risk of death. The instruction to the jury and the finding of this weighty aggravating circumstance requires that the death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT III

THE TRIAL COURT ERRED IN FINDING THAT THE SOLE OR DOMINANT MOTIVE OF THE CAPITAL FELONIES WAS THE ELIMINATION OF THE WITNESSES.

The trial court claimed in the sentencing order that the avoiding arrest aggravating circumstance[5] was proven but under the circumstances should be given moderate weight. The trial court stated that it was well aware of this Court's admonition that where the victim is not a law enforcement officer, the supporting evidence must be very strong to show that "the sole or dominant motive for the murder was the elimination of the witness." ***Preston v. State***, 607 So.2d 404 (Fla. 1992) The trial court found that the circumstances surrounding the crime clearly show it was the motive. This finding was error.

The elements of the Avoiding Arrest aggravator are:

1. The defendant committed a capital felony, and,
2. the dominant motive for the commission of the capital felony was:
   a. to avoid a lawful arrest, or
   b. to prevent a lawful arrest, or

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[5] The capital felony was committed for the purpose of avoiding arrest or effecting an escape from custody. §921.141(5)(e), Florida Statutes (2009).

c. to effect an escape from custody.

This aggravating circumstance focuses on the motivation for the murder, and it is most easily found where the evidence demonstrates that the defendant killed a police officer who was attempting to apprehend the defendant. ***Farina v. State***, 801 So.2d 44 (Fla. 2001); ***Cruse v. State***, 588 So.2d 993 (Fla. 1991); ***Mikenas v. State***, 367 So.2d 606 (Fla. 1978); ***Cooper v. State***, 336 So.2d 1133 (Fla. 1976). The circumstance also applies to the murder of victims who are not police officers. ***Riley v. State***, 366 So.2d 19 (Fla. 1976). However, when the victim is not a police officer, the evidence must prove that the dominant or only motive was to eliminate the victim as a witness. ***Bell v. State***, 841 So.2d 329 (Fla. 2003); ***Anderson v. State***, 841 So.2d 390 (Fla. 2003); ***Hannon v. State***, 638 So.2d 39 (Fla. 1994).

The state must prove by positive evidence (rather than by speculation, default, or elimination) that the dominant motive was to eliminate a witness. ***Farina v. State***, 801 So. 2d 44 (Fla. 2001); ***Scull v. State***, 533 So.2d 1137 (Fla. 1988); ***Jackson v. State***, 592 So.2d 409 (Fla. 1986); ***Connor v. State***, 803 So. 2d 598 (Fla. 2001) (other motives as likely). Consequently, even when the victim knows the defendant, this factor does not apply unless the State has additional evidence showing witness elimination was the dominant motivation for the murder. ***Bell v. State***, 841 So.2d 329 (Fla. 2003); ***Zack v. State***, 753 So.2d 9 (Fla.

2000); ***Jennings v. State***, 718 So.2d 144 (Fla. 1998); ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992); ***Perry v. State***, 522 So.2d 817 (Fla. 1988); ***Floyd v. State***, 497 So.2d 1211 (Fla. 1986).

This Court has approved the finding of the avoid arrest aggravator based on circumstantial evidence, without any direct statements by the defendant indicating a motive to eliminate witnesses. **See *Swafford v. State***, 533 So.2d 270, 276 (Fla. 1988). Even without direct evidence of the offender's thought processes, the arrest avoidance aggravator can be supported by circumstantial evidence through inference from the facts shown. ***Swafford*** at 276. Circumstantial evidence generally relied upon to prove this aggravator includes whether the victim knew and could identify the killer and whether the defendant used gloves, wore a mask, or made incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant. ***See Farina v. State***, 801 So. 2d 44, 54 (Fla. 2001).

In the instant case there is no direct evidence that appellant shot the victims to avoid arrest. The circumstantial evidence is also weak. Ordinarily, circumstantial evidence is used to support this aggravating factor where the defendant had already engaged in a capital felony of robbery or sexual battery. It is logical to conclude that where there no other motive is known, the motive to

murder must have been to murder the eyewitness to avoid the arrest for the capital felony already committed. ***See Farina, Swafford, see also Harich v. State***, 437 So.2d 1082 (Fla. 1983) Here, in the instant case there is direct evidence of the appellant's motive for the shootings. In fact, the trial court identified in his sentencing order the precise motive for the shootings. In the sentencing order the trial court stated: "He had one intention upon entering the residence and that was to kill all of its occupants." In the appellant's own words he stated that he bought a gun to conduct an operation against his sister Kitty. The appellant had been planing the operation for a while. The operation was to "erase the hell out (of) that Kitty and her blood line." Therefore, there is competent substantial evidence in the record that supports that the motive of the murder of Kathryn Donovan and Deborah Tillotson was not to avoid arrest, but rather a revenge killing of his sister, his sister's family and friends. As such, the state has failed to prove this factor beyond a reasonable doubt. The conclusion of the trial court should be rejected. The death sentence must be vacated and reduced to life or remanded for a new penalty phase.

POINT IV

APPELLANT'S DEATH SENTENCE MUST BE REVERSED AND A NEW PENALTY PHASE TRIAL ORDERED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY ON IMPROPER STATUTORY AGGRAVATION THEREBY TAINTING THE JURY RECOMMENDATION.

In imposing the death penalty, Judge Merritt found that the State had proved six aggravating circumstances: that the appellant was under sentence of imprisonment; the appellant had previously been convicted of another felony involving the use or threat of violence to a person; the appellant knowingly created a great risk of death to many persons; felony murder; the murder was committed for the purpose of avoiding arrest; and the murder was committed in a cold, calculated and premeditated manner (CCP). The aggravating factors the that the appellant knowingly created a great risk of death to many persons and the murder was committed for the purpose of avoiding arrest should not have been before the jury and were improperly found.[6] Moreover, that the finding that murder was committed in a cold, calculated and premeditated manner may not be proper in the event this Court was to accept the argument in Point I and exclude the statements by the appellant made during his recovery in the hospital.

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[6] See Point II and III.

Due to the several errors of the trial court, the requirements of ***State v. Dixon***, 283 So.2d 1 (Fla. 1973) were impaired. In ***Dixon*** this Court outlined the Florida scheme as a five step process, each step an integral stage necessary to remove arbitrariness from the outcome as to who receives death and who does not. The first step is the evidentiary penalty phase hearing. Second is the jury's penalty recommendation. Third is the trial judge's decision as to penalty. Fourth is the requirement that the trial judge justify any sentence of death in writing. Fifth is the Florida Supreme Court's review. Each of these steps above have been comprised by the actions of the trial court.

The Evidentiary Hearing

In this case most of the evidence considered by the jury in the penalty phase was heard in the guilt phase. The damning evidence in the guilt phase was the appellant's confession. The confession overwhelmingly confirmed the weighty aggravating factor of CCP. Without the confession, the there is no direct evidence to support the CCP aggravating factor. Should this Court exclude the appellant's confession, a new penalty phase would be required for a jury to make a recommendation without the obvious taint of the confession.

The Jury Recommendation

The jury was improperly instructed on two or possibly three aggravating

factors in this case. The jury also heard the damning confession; improper victim impact evidence and viewed unnecessary gruesome autopsy photographs. Since there was statutory mental mitigation presented and found in this case, the combined errors listed above can not found to be harmless beyond a reasonable doubt and a new penalty phase trial is required.

Judge's Decision on Penalty

The perceived purpose of the Florida rule placing sentencing responsibility in the hands of the trial judge rather than the trial jury is to protect against those situations where a jury might inappropriately recommend death. The Supreme Court explained:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed - guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die, the sentence is viewed in the light of judicial experience.

Dixon at 8. In this particular case the trial court was overzealous in the manner upon which it determined the death sentence. In the sentencing order the trial

court recognized this Court's precedent on the legal requirements of various statutory aggravating factors (***See*** Point II and III), and then chose to ignore them and find aggravating factors that clearly do not apply. This "piling on" approach exhibited by the trial court made the trial court's decision on penalty improper.

Florida Supreme Court Review

In ***Dixon*** this Court held that: Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate. The solemn duty of this Court, commonly phrased proportionality review, can not realistically be performed on this record. This Court should not substitute itself for the trial court and try to re-balance the proper statutory aggravating factors that were proven against statutory mental mitigation and non-statutory mitigation. This Court should find that the trial court's actions in the penalty phase do not meet the test that this Court laid down in ***State v. Dixon***, and this Court should order a new penalty phase evidentiary hearing before a jury to give a new recommendation without the taint of the confession, and without the improper instruction on aggravating factors that do not apply.

POINT V

THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY PHOTOGRAPHS WHICH WERE OVERLY GRUESOME AND NOT RELEVANT TO ANY CONTESTED ISSUE.

Dr. Dr. Kyle Shaw testified at trial for the state. Dr. Shaw performed both autopsies in this case. In the guilt phase trial, the appellant objected to the introduction of autopsy photograph of victim Tillotson on the grounds that the gruesome picture was prejudicial and did not prove any fact in dispute. (XII 622) The trial court overruled the objection on the grounds that the autopsy proved the identity of the victim. (XII 624) The appellant also made the same objection in the autopsy photo of victim Donovan, and it was also denied. (XII 627) The appellant objected to autopsy photograph MM based on relevancy. (XIII 909) The appellant further argued that there was ample testimony of the extent of the victims wounds and the photograph was merely prejudicial and meant to inflame the passion of the jury. (XIII 909) The medical examiner confirmed that the autopsy photo would assist in his testimony. (XIII 910) The trial court overruled the objection. (XIII 910)

The appellant further objected to autopsy photograph OO because it was redundant and repetitive. (XIII 912) The appellant further argued that the photo

was disgusting and was being used inflame the jury and "get them riled up." [7] (VIII 912)

The objectionable evidence was presented at the guilt phase where the state's evidence of appellant's guilt was overwhelming. The state contended that the photographs help prove the identity of the victims or assist the medical examiner's testimony. The admission[8] of this evidence denied appellant due process of law guaranteed by Article I, Sections 2, 9, 12, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case. Any possible relevance of this evidence is outweighed by its prejudice. §90.403, Fla. Stat. (2004).

The test for the admissibility of a photo of the murder victim is relevance, not necessity. ***Ruiz v. State***, 743 So. 2d 1, 8 (Fla. 1999). The determination of the admissibility of such photos is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of abuse. ***Id.*** In ***Ruiz***, this Court found error in the penalty phase admission of a two by three feet blow-up of a

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[7] Appellant did not object to all the photographs, only to a few that were overtly gruesome, cumulative, or not relevant to any material issue.

[8] ***San Martin v. State***, 717 So.2d 462 (Fla. 1998).

photo showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. ***Id.***

This Court has outlined the standard for the admission of potentially prejudicial photo:

> To be relevant, a photo of the deceased victim must be probative of an issue that is in dispute. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous.

Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999). (Emphasis in original.) (Footnote omitted.) In a footnote, this Court quoted ***McCormick on Evidence***, 773 (John Williams Strong ed., 4th Ed. 1992):

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. (Footnote omitted.)

Almeida v. State, 748 So.2d at 929 (n.17).

Great care should be taken prior to waving ghastly pictures in front of lay

jurors who may never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt (or in appellant's case, penalty). In this case, it is clear that John Kalisz was denied a fair trial when the court allowed a gruesome photographs of the victims go to the jury, and in this case, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner. ***See People v. Garlick***, 360 N.E. 2d 1121, 1126-27 (1977).

POINT VI

THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The appellant objected to the state introducing victim impact evidence on the grounds that the penalty phase is to determine whether aggravating and mitigating factors exist and victim impact evidence is not relevant to this phase of the trial. (XV 1072) The appellant urged the trial court to have this evidence presented to the trial court after the jury made a sentencing recommendation. The trial court followed the law of this Court and ruled the evidence admissible.

At the penalty phase, the state called six witnesses, three witnesses concerning the "prior" violent felony in Dixie County, Florida, one witness to establish that the appellant was under sentence of imprisonment at the time of the offense, and two witnesses that were the daughters of victim Deborah Tillotson. One daughter explained that her birthday was the day after her mother was murdered and that she received a birthday card and gift in the mail from her mother the day after she died. The daughter went on to explain that her mother

was late to their last meeting before her murder because her mother had come across a dog in the middle of the road that had been hit by a car. The victim Deborah Tillotson stopped on the side of the road and rescued the dog from the road, called the owner from the information on the dog collar, and then delivered the injured dog to its owner. The victim's other daughter explained that victim Deborah Tillotson will never be a grandmother, nor ever hold a granddaughter or grandson.

Kalisz jury heard the above testimony and unanimously urged his execution. It is not surprising considering the highly emotional and inflammatory testimony that the jury heard from the victims' grown children. The introduction of this evidence, over defense objection, unconstitutionally tainted the jury's verdict at the penalty phase. This is exactly the type of evidence that prosecutors are presenting to juries throughout this state after this Court's holding in ***Windom v. State***, 656 So.2d 432 (Fla. 1995) and the enactment of §921.141(7), Fla. Stat. Prior to ***Payne v. Tennessee***, 501 U.S. 808 (1991), the Eighth Amendment to the United States Constitution prohibited the introduction of victim impact evidence at the sentencing phase of a capital murder trial. ***Booth v. Maryland***, 482 U.S. 496 (1987). ***Booth*** correctly pointed out that the admission of such evidence creates a constitutionally unacceptable risk that the jury may impose the death penalty in an

arbitrary and capricious manner. The focus is not on the defendant, but on the character and reputation of the victim and the effect on his family, factors which may be wholly unrelated to the blame-worthiness of a particular defendant. ***Booth*** pointed out that the presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. Of course, ***Payne*** overruled ***Booth***. This Court settled the question in this state by its holding in ***Windom***. Appellant submits that this Court's holding was erroneous and urges this Court to recede from ***Windom***. Additionally, the evidence in this case exceeded the proper bounds of victim impact evidence.

There is no doubt that the Deborah Tillotson was a wonderful human being – their grown children told the jury that their mother was very thoughtful and supportive. But her loving life was snuffed out by a reformed alcoholic that had no grievance with the victim, and was only shot because she was where Kalisz went on his emotionally charged shooting rampage. This is the type of weighing of human life that inflames the sentencing jury, infecting the entire process. Rather than making a reasoned judgment from the pertinent evidence and applicable law, the jury was told they could consider this evidence (somehow) in their advisory verdict.

The evidence shows the contrast between the victims' lives and the appellant's life. Deborah Tillotson had a caring family who loved her. They were intelligent and were poised to start good families of their own. On the other hand, John Kalisz is an alcoholic who was estranged from his sister and niece. His dysfunctional family had abandoned him. These considerations should not be the factors that determine whether Kalisz lives or dies. The state's introduction of the extremely inflammatory testimony crushed any chance that Kalisz would get a fair determination of a proper punishment. Any slight probative value (indeed if any exists in this unbalanced weighing of human lives) was outweighed by the substantial prejudice. §90.403, Fla. Stat. This Court must recede from ***Windom*** – the objectionable, inflammatory, unconstitutional evidence skewed the decision-making process. The state placed a thumb on the scales of justice with this evidence, canting them toward injustice. A new penalty phase is required, without the emotionally charged evidence.

POINT VII

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. None of the challenges were successful and appellant was ultimately sentenced to death on both murder convictions. Most challenges were based on a denial of appellant's Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed and clearly understood that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) Additionally, the appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. ***See, e.g.,***

State v. Steele, 921 So.2d 538 (Fla. 2005).

The jury recommendation for Kalisz's two death sentences was unanimous. However, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985). Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, Appellant asks this Court to reconsider its position in ***Bottoson*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse the sentences of death and order an new penalty phase trial with a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically by email to the Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, and mailed to John Kalisz, DC#U38267, Florida State Prison, 7819 NW 228th St., Raiford, FL 32026, this 7th day of December, 2012.

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CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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