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IN THE SUPREME COURT OF FLORIDA

LEON DAVIS,	:	
Appellant,	:	
vs.	:	Case No. SC13-0001
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG,II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The State filed an Indictment on January 9, 2008, charging Appellant, LEON DAVIS, JR., with the first-degree murders of Pravinkumar Patel and Dashrath Patel, with attempted murder and attempted armed robbery of Prakashkumar Patel, and with possession of a firearm by a convicted felon (1/46-50). The charges arose from events of December 7, 2007, at a BP gas station, located at the I-4 exit and County Road 557 in Lake Alfred, Florida (S1/12).

On the day that the jury trial was to begin, in September 2012, Davis elected to waive his right to a jury (27/4720-33). Judge Jacobsen conducted a bench trial in September and October 2012 and found Davis guilty of all counts (S1/1,S10/1627-28). Davis then waived a jury recommendation for the penalty phase (S10/1632). On November 30, 2012, Judge Jacobsen imposed death sentences for the two murder counts and sentences of life in prison, twenty years, and fifteen years for the noncapital counts (34/5946-51). The judge filed a written sentencing order providing the "Facts," "Analysis of Guilt," "Analysis of Penalty," and "Conclusion." (34/5950,5960-77).

A. Other-Crime Evidence Ruled Inextricably Intertwined

In May 2012, the State filed a Notice of Intent to Prove Other Crimes, Wrongs or Acts through the inextricably intertwined doctrine. The State asserted that in order to prove the identity element for the charged offenses, it would rely on evidence of

other crimes that occurred six days after the events at issue, during the afternoon of December 13, 2007, at the Headley Insurance Agency in Lake Wales, Florida. (25/4263) The Defense responded with a Motion in Limine objecting to the State's Notice[1] (25,4263-65,4330). On May 21, June 28, and July 3, 2012, hearings were held on the State's Notice and the defense Motion in Limine.

Davis had been tried by a jury and sentenced to death on the Lake Wales charges by the time that the pretrial hearings occurred on the admissibility of the Lake Wales evidence in this case. To educate Judge Jacobsen on the collateral crime evidence they sought to introduce, the prosecutors gave him a CD containing the trial transcripts from the Lake Wales trial conducted by Judge Hunter in January and February 2011 and an outline of the testimony from the Lake Wales case prepared by the prosecution, indicating the significance to the State of each witness's testimony. (25/4365,4414-15,4454,4467;S118/12031-37).

Over the course of the hearings, the State repeatedly emphasized that it was not seeking admission of the collateral crime evidence through a Williams rule theory. Instead the State sought admission of the evidence under an inextricably intertwined theory only. At the hearing of May 21, 2012, Judge Jacobsen commented that the State's notice referenced the evidence being inextricably

[1] The defense objected to paragraphs 2 and 4-9 involving the testimony of James Kwong, Brandon Greisman, Carlos Ortiz, Lt. Elrod, John Johnson, Ernest Froehlich, Evelyn Anderson, Jennifer DeBarros, various witnesses pertaining to the car that Mr. Davis allegedly used, and videotapes taken at WalMart, Beef O'Brady's, and MidFlorida Credit Union depicting events on December 13, 2007 (25,4263-65,4330).

intertwined and clarified that "we're not dealing with Williams rule here," which the State confirmed:

> THE COURT: First of all let me just ask this . . . we're not dealing with Williams rule here, we're dealing with inextricably intertwined, takes us to the case law dealing inextricably intertwined. Is that accurate from the State's perspective?
>
> [PROSECUTOR] MR. AGUERO: That is accurate from the State's perspective.

(25/4406). At the hearing of July 3, 2012, Prosecutor Wallace stated, "Just as a very preliminary matter, so our record is clear, the -- we're not talking, of course, of the Williams Rule in the sense that similar evidence, but as the court has noted, the whole line of cases that are inextricably intertwined." (26/4457). And later, after conceding that the other crime evidence was "more substantial" than "in cases that any of us have reviewed," the prosecutor reasserted the evidence was not being offered under Williams rule. Prosecutor Aguero stated:

> [F]rankly, I tend to agree with Mr. Norgard's assessment that the evidence of other crimes, wrongs, or acts in this case are going to be more substantial than perhaps in cases that any of us have reviewed.
>
> I do wish, though, to try and get us away from calling anything Williams Rule. What's involved in this case and what we're talking about today is not Williams Rule evidence in the classic sense. It really is evidence of other crimes, wrongs, or other acts that are inextricably intertwined in a sense, and that's why we gave that one case to the court. And there are many others on inextricably intertwined evidence, so –

(26/4479).

At the hearing on July 3, 2012, Judge Jacobsen explained that in preparation for the hearing he had "read pretty much the entire

transcript" of the Lake Wales trial and "outlined the testimony of the various witnesses called by the state." The judge used the names listed in the State's notice as an initial point of reference, but then he "started looking at those that might have had testimony about certain subjects which may or may not be inextricably intertwined" with the instant case. (26/4454-55). The judge also agreed to watch the six videos admitted in the prior trial. (26/4464). Judge Jacobsen stated at the outset that he had concluded there was "inextricably intertwined evidence" from the Lake Wales case "concerning specifically the gun":

> First of all, after having reviewed all this and reviewing the testimony, I think independently I've come to the conclusion that there's inextricably intertwined evidence concerning specifically the gun. Other facets of it may be somewhat collateral, but the gun and the history of it, I think, is inextricably intertwined. Therefore, I believe that there is some testimony that may be elicited by some of the witnesses that were witness to the incident that occurred at the Headley Insurance Company that are -- is appropriate to have in this trial.

(26/4455-56). Later in that hearing, accepting the State's position fully, Judge Jacobsen ruled that the Lake Wales events were inextricably intertwined and were not admissible under Williams rule.

> THE COURT: Let me just – for clarity's sake, on the record, I do find that this is not a Williams Rule situation. So all the cases dealing with Williams Rule, I don't think, really are applicable. I find this to be a case of inextricably intertwined evidence.

(26/4479; see also 26/4569: "THE COURT: . . . the Williams Rule instruction that is contained in the standard criminal instructions is not directly applicable because this is not a Williams

Rule case.").

The judge recognized that graphic details of the Lake Wales events would be more prejudicial than probative, and he acknowledged that the defense would be in a difficult position cross-examining witnesses on their ability to observe and identify the man they claimed was Davis at the scene of the chaos in Lake Wales without eliciting overly prejudicial details.

> THE COURT: Right. Well, as an example, . . . with Greisman. . . . he goes into, in his testimony, some rather graphic details, the condition of the person he runs into and his contact with, and I don't know if that's that relevant. I mean, the prejudice of the description somewhat outweighs the probative value of putting [it] in there.
>
> And this is where I have a real problem from your perspective, Mr. Norgard. And that is, as I read some of this, I was saying to myself, okay, in order to set up a defense of eyewitness identification as being something less than reliable, it's necessary to demonstrate – excuse the language -- all hell is breaking loose, and what you're going to be concentrating on. And that becomes a question I had -- and I know the state would like to put on evidence. I don't know to what extent you want to expand on what they might have to say to demonstrate, you know, or be able to argue that their testimony is not reliable because of what was going on. And I wasn't -- what I was trying to do in my own mind as I read through this is say – play devil's advocate. If I were the state, I would want this in. If I were the defense, I would want this in. How am I going to argue -- I was trying to do that as I went through this. And that becomes a question that you'll have to answer, to what extent you want some of this other information of what was going on there to be able to set up any defense as far as unreliability of eyewitness testimony.

(26/4488-89)

The prosecutor told the judge that the dying declaration of Yvonne Bustamonte was "critical," but the State did not intend to

introduce specifics of what occurred inside the Headley Insurance Agency. The judge ruled that the State could not get into the events that occurred inside the agency involving a fire or the condition of the woman.

> [Prosecutor Wallace]: . . . So the dying declarations are critical to prove the identity of the black male. And so we're not introducing that because Yvonne Bustamonte said he had a gun and he fired it, because she didn't say that. But her testimony, the dying declaration of it's Leon Davis is critical. So that's what we intend to introduce, not the specifics of what had gone on inside.
>
> THE COURT: And there was a projectile bullet recovered from her wrist.
>
> MR. WALLACE: Yes. Right. Right.
>
> THE COURT: And I think that that, as far as that dying declaration, is that -- you know, I think it can be established that there was a woman on a gurney that had a bullet wound and that had come out of the Headley Insurance. We're not going to get into what -- the fire and all that in there or her condition . . . .

(26/4505)

The defense had filed a number of pretrial motions in the Lake Wales case challenging, among other things, identification testimony and evidence. After ruling that the Lake Wales case was inextricably intertwined with the BP gas station case, Judge Jacobsen took judicial notice of the entire appellate record in the Lake Wales case (pending in this Court as SC11-1122), and adopted the pretrial rulings of Judge Hunter in that case to deny the defense motions filed in the present case challenging the State's Lake Wales witnesses' testimony (25/4388-90,4396). These included: "Motion to Exclude Victim (Bustamante) Hearsay"; "Motion

to Suppress In-Court Identification (Carlos Ortiz)"; and "Motion to Suppress In-Court Identification (Brandon Greisman)" (25/4268,4279,4282; orders denying, 26/4430,32-33). Judge Jacobsen also found independently, based on his reading of the transcripts, that Yvonne Bustamonte's statement was admissible as a dying declaration. (26/4506). At the start of the trial in this case, Judge Jacobsen granted the defense a standing objection to the rulings made on all the pretrial motions: "You can have a standing objection. In the absence of a particular objection on any particular subject, it should not be considered as a waiver on that matter." (S1/9).

B. Guilt Phase, BP Gas Station, Lake Alfred

Deputy Brown of the Polk County Sheriff's Office was assigned to the northeast area of the county (S3/326). A call went out from dispatch on December 7, 2007, at 9:04 p.m., about an armed disturbance at the BP station at CR 557 and I-4. (S3/326-27,334). Deputy Brown was the first officer to arrive at the gas station at 9:12 p.m. (S3/327,334). He parked near the gas pumps and walked toward the store (S3/328). There were vehicles with people in them in the parking lot. Another deputy arrived, and Brown yelled for him to contact the cars while Brown went to see what was going on inside the store (S3/328-29). Brown looked inside the broken glass from a bullet hole in the front of the store. There was no one in the immediate area of the store, but there was a light on in a rear room with a closed door (S3/329-30). Brown contacted dispatch to get back with the caller and have the person step out of the

store (S3/321). After five minutes, the store clerk, Prakashkumar Patel, came out to the front door from the back room (S3/331).

Prakashkumar[2] had worked at the cash register that afternoon until closing time, around 9:00 p.m. (S4/540-41). At closing time, the gas prices needed to be changed on the sign outside, so the other two clerks, Dashrath Patel and Pravinkumar Patel, went outside with a pole to change the plastic numbers on the sign (S4/543-44). As soon as they went out the front door, the outdoor store light was turned off and the front door was locked from the inside by Prakashkumar using a switch behind the counter (S4/545-46). The outside lights by the gas pumps were still on, and the gas pumps were still operational at that time (S4/550-551). Prakashkumar was alone in the store, standing at the counter and talking on the telephone, when he heard some kind of noise that caused him to look at the front door, where an individual who had tried to open the door was standing, pointing a gun at him (S4/546,549). Without ever speaking a word, the person fired once into the store. The bullet hit the chapstick display on the counter (S4/552,557,560). Prakashkumar dropped to the floor, pushed a silent alarm, and called 9-1-1 (S4/552-53). The 9-1-1 operator told him to stay on the phone and not go out until the police came (S4/553-54). As he was making his way to the back storage room to wait for the police to arrive, he looked outside and saw the person going toward the diesel pump (S4/555,557). He heard two gunshots, about five or ten seconds apart (S4/557).

[2] Prakashkumar Patel and Babubhai Patel both testified through

The person with the gun was "just around 6 feet" tall and on the heavier side. Prakashkumar himself was over six-feet tall (S4/551-52). Prakashkumar thought it was a man, but he was not sure, and he thought the person was black, but could not tell if the person was African-American, dark-skinned Hispanic, or Indian (S4/558,567-69). The person wore dark-colored clothing and "a kind of mask" that covered his face (S4/557,560,565).

After speaking to Prakashkumar, Deputy Brown informed the other responding deputies that two of the store clerks were missing. When the clerks were found, Deputy Brown went over to them and did not feel a pulse on either one (S3/333-34,336). Each man had a single bullet wound on the left side of the head (S2/174,177). Neither man had his pockets pulled out (S2/188-90). Dashrath had twenty-three dollars in cash in his pocket (S2/178,191). Pravinkumar had a wallet in his pocket with forty-two dollars in cash (S2/178,188-89).

Deputy Steven Hearth was a canine handler of a dog dually trained for patrol work and narcotics detection (S3/344-45,351). He arrived at the scene at 9:18 p.m. and was the first to locate the bodies of the store clerks in the area southeast of the store (S3/346-47). There were no shoe impressions where the bodies were found (S2/193). He tried to use the dog to locate a scent of any person or persons that had left the area immediately surrounding the business (S3/348). He and the dog circled the entire property of the business. Eventually, they went about a quarter of a mile

(..continued)
an interpreter who translated Gujaradi to English. (S4/536,597).

north along Highway 557 (S3/348-49). The dog stopped near a power line access road. The deputy saw footprints traveling in the same direction he was, and once the dog stopped, he saw tire tracks and noticed that the footprints went no further north than the tire tracks (S3/349-50).

A crime scene technician focused on a dirt area north of the business on the west side of the roadway where there were shoe impressions, various tire impressions, and an unsmoked Newport cigarette on the ground near the shoe impressions (S2/225,229-46,283-89,300;S6/1033-34). After Davis became a suspect a week later in connection with the Lake Wales events, police impounded his black Nissan Altima (S4/592). A Newport cigarette box was seized from the center console of the car (S2/269-70). The Newport cigarette found on the ground at the scene had DNA material with a profile of a male, but that DNA profile was not linked to Davis (S6/1034;S7/1047). The police never identified the man whose DNA was on the cigarette.

> Q In fact, even to this day, has it been identified as to what male that DNA material came from that was found on the cigarette?
>
> A It has not.

(S6/1034).

Most of the tire impressions north of the gas station were parallel to the road, but there was one set that was perpendicular, at a 90-degree angle (S2/231). The technician marked the shoe and tire impressions and photographed them (S2/232-245). Casts were made of the tire impressions (S2/232-33). The tires

from Davis's Altima were sent to FDLE for comparison with the casts and photographs of tire tracks on the dirt road north of the gas station (S7/1059-61).

The tires on the Altima were fairly new and did not have individual characteristics (S7/1066). The majority of the casts made from the tracks had damage or limited detail (S7/1062-63). The FDLE analyst relied on photos of the impressions to determine that the Altima tires could have made the impressions but there were significant limiting factors in the impressions that did not permit a stronger association between them and the tires (S7/1064-65,1070-72,1083-85). There were similar design features, but due to the lack of sufficient detail and the low quality of the cast impressions, a more conclusive association was not made (S7/1083-84).[3] The analyst was not able to determine the width of the tire from the impressions; nor could she determine the wheel base of the vehicle that made the tire impressions (S7/1079-80).

The analyst was unable to say how many tires there were on the road on December 7th, 2007, with the same characteristics as the tires from Davis's Altima (S7/1087-88). Nor did she know how long the company that manufactured the tires had been producing tires with that particular design, nor whether the company made tires for other companies. She acknowledged that tire manufacturers can use similar tread designs (S7/1087-88).

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3 At a pretrial hearing on April 15, 2010, Prosecutor Wallace characterized the lab results for the judge: "What they say is that it's consistent in terms of the tread design and things of that nature. It's not what you would consider a positive match." (S117/11968).

The FDLE analyst was dually trained to analyze tire and footwear impressions, and some of the photo exhibits she received had footwear impressions in them, but none of Davis's footwear was submitted by law enforcement for comparison (S7/1076-77).

> Q [Y]ou did receive some footwear impression evidence; is that correct?
>
> A I noted that there were footwear impressions in some of the exhibits that I examined, yes.
>
> Q . . . [Y]ou did not carefully look at those to try to determine if the footwear impression . . . photographs were sufficient for any type of comparison; is that correct?
>
> A That's correct. I didn't do that because there were no footwear items submitted for comparison. So without any shoes to compare, it doesn't really matter at this stage of the examination of whether they're of value. That would be determined later if footwear were then submitted.
>
> Q . . . [N]obody submitted to you, in this case, any shoes that belonged to a gentleman by the name of Leon Davis, Jr.?
>
> A That's correct.
>
> . . .
>
> Q . . . [E]ven though you may not have shoes to make a comparison with, you certainly could look at the photographs and determine from them whether or not it's -- you're able to determine the size shoe that made those impressions; is that correct?
>
> A If you have a full impression from toe to heel.
>
> Q All right. But in this instance, given that you weren't really asked to do anything with footprint evidence, you did not look to see if any of those shoe impressions -- where you could tell the size from them; is that correct?
>
> A That's correct.
>
> Q All right. The other thing that you could do if you look at shoes, even if you don't have shoes to com-

pare, is you can look at the tread design; is that correct?

A Yes.

. . . .

Q . . . And then similar to tire impression evidence, footwear impressions can sometimes contain sufficient individual characteristics to make a more conclusive identification; is that correct?

A Yes. Footwear impressions are identifiable.

(S7/1077-78).

Davis's shoes were seized both from his home (four pairs) and from his feet (size 13 Nikes) when he turned himself in on December 13, 2007 (S2/286,S7/1098,1104). The lead detective, Ivan Navarro, who viewed the actual shoe impressions at the scene and then photographs of the impressions taken by the technician, refrained from sending Davis's shoes to the lab for comparison with the shoe impressions at the scene because "they didn't appear to resemble each other." (S7/1099,1103-05). Navarro concluded that there was no way that Davis's shoes could have made the shoe impressions he viewed (S7/1105). The detective made no determination as to the size of the shoes that made the marks on the side of the road (S7/1105). Both Davis and Detective Navarro wore a size 13 shoe (S7/1105-06).

At the BP store, there was a large hole in the window next to the door where the glass shattered as a result of the bullet going through (S2/193-94). The projectile and pieces of bullet jacketing were collected (S2/161,163-66). The hole in the window was too wide to do a trajectory analysis (S2/195). A crime scene

technician processed the whole outside of the door and window for fingerprints (S2/180,196-98) Five cards of prints were taken from the exterior door handle and turned over to the ID section of the sheriff's office (S2/201-02, S6/1032). None of the latent prints of value matched Leon Davis (S6/1032-33).

The technician collected an earring with a stone of some type and a post for an earring from the ground (S2/161,199; S6/1028, 1033). These items were sent to the FDLE lab for testing, and none produced a DNA profile (S6/1033).

Babubhai Patel has owned the BP station since 2005 (S4/598). The station was equipped with a video surveillance system with motion-activated cameras that record onto a computer (S4/599-600). A computer forensic technician employed by the sheriff's office retrieved the video off the system (S2/304-11). There were thirteen cameras in use around the station that recorded images to the hard drive of a computer (S2/307-08). The technician pulled the video and burned CDs for the detectives on the scene (S2/311). He then took the computer to his office and made still images of the individual shooting through the glass and tried to magnify the human form. But he was not able to see the face of the person that came up to the door (S2/311-12).

He also downloaded all the video from the computer, a month to three months of video, which took many hours (S2/313-14,321). The police wanted all the video to see who had been to the store.

> Q [by Defense Counsel] Okay. So I would assume if you had a month to three months of video footage, somebody could have looked at that to see if -- this is my client, Mr. Davis. I don't know if you've ever seen

> him or know who he is. But, somebody could have looked at that video and say, has that guy ever been at this store, ever been in here to check this place out, or anything. They can do that; right?
>
> A [by Computer Technician] Yeah. That's why I gave it to them. That's what they wanted it for.

(S3/322-323).

The system showed a blue screen when a camera was not recording because there was no motion (S2/314). The technician took the blue screens out from the recordings and created individual movies from the cameras that recorded the shooting. The State entered into evidence exhibit 1502, which is a CD created to show events at the BP station around 9:00 p.m., using various cameras with the blue screens taken out (S2/315-316). Six stills that were taken from the video were also admitted (State's exh. 1503-1508) (S2/319).

Leon Davis became a suspect after he was arrested in connection with the events occurring during the afternoon of December 13, 2007 at the Headley Insurance Agency in Lake Wales. Davis turned himself in to the Lake Wales police station on December 13, 2007. The police turned their attention to investigating him as a suspect in the BP case, and by the end of December 2007, after the bullet testing was done, he was a suspect for the BP case (S7/1046).

FDLE analyst James Kwong concluded that the bullets collected from the BP scene were shot from the same unidentified gun that was used at the Lake Wales scene (S6/925). He received two jacketed bullets, two bullet jacket fragments, two lead fragments,

and one lead core from the BP case (exh. 13-19) (S6/910-11). The jacketed bullets were .38 caliber class, and were consistent with the .38 special or the .357 magnum caliber bullets (S6/921-22). They displayed six lands and six grooves with right twists (S6/922). The bullets had been fired from the same gun, but the type of gun was unknown. Kwong also received submissions consisting of one jacketed bullet initially, and a later submission of two jacketed bullets and six lead fragments from the Lake Wales case (exh. 6,93,94,109,110) (S6/911-12).

Kwong could not tell whether the bullets were fired from a .38 or a .357 caliber gun (S6/927,931). Kwong identified twenty-one companies that manufacture firearms with the same rifling characteristics as those found on the bullets he examined.

> A [Mr. Kwong] Based on my measurements of the six lands and six grooves with the right twist, as well as the measurement of the width of each land and each groove, I consulted a database and an FBI rifling characteristic database, to -- trying to come up with a list of possible firearm manufacturers that would have the same rifling profile as on these bullets. And I was able to come up with a list of 21 firearms manufacturers.
>
> Q [Prosecutor] So from what you can see in the evidence submitted, there are at least 21 different manufacturers that could have manufactured the gun which fired 13 and 15?
>
> A Yes, sir.
>
> Q And could there also even be more than that?
>
> A It could be more.

(S6/922-23). Kwong's report listing the twenty-one manufacturers was admitted as defense exh 1 (S6/932). Most, if not all, of the

gun manufacturers listed make both .357s and .38s and the particular characteristics, i.e., the lands, grooves, and twists, have been in use for years and years by the various manufacturers (S6/932-933).

Dan Wesson is one of the twenty-one companies identified by Kwong that manufactures both .38 caliber and .357 caliber revolvers with the same rifling characteristics as the bullets he examined (S6/926,931). Leon Davis acquired a Dan Wesson firearm on December 7, 2007, from his cousin, Randy Black. Randy Black was living in a rooming house in Waverly, FL (S5/726-28). Leon visited Black on December 7th between 12:00 and 2:00 p.m. (S5/731,738). He stayed for awhile, talking. There were several other people there. Black owned two guns, a .44 Magnum and a .357 Dan Wesson. Black had recently purchased the Dan Wesson from Wagle's Pawnshop for $200 (S5/728-30,749-51). Black was a regular customer at Wagle's and was always looking for a bargain. He had purchased other firearms there over the years (S5/748,752-53).

Leon saw Randy Black's new gun lying on a table and asked about it (S5/740). He agreed to buy it for $220 (S5/731,740). Leon did not seem to be anxious about getting the gun (S5/741). He told Black that was going to Miami for a vacation and he needed some kind of protection (S5/735). Leon drove to the bank and returned with the cash to pay Black for the gun, which was not loaded (S5/732). Black gave Leon a small handful of .38 rounds, and Leon took the gun into the field behind the house to fire it. Black heard one shot (S5/732-33,742-43). When asked how many

bullets he gave Leon, Black said: "It could have been two, it could have been three. . . . [I]t wasn't a lot, is all I can tell you." (S5/745). (The day after the Lake Wales incident, Black told Detective Navarro that he gave Davis two bullets (S8/1326-1327)).

Leon's mother, Lynda Davis, recounted a conversation she had with Leon on a Sunday afternoon in the garage at his home in Winter Haven during which he showed her a gun. Leon told her that he and Randy had a gun (S6/1003). Lynda Davis told him to get rid of the gun because he did not need it, and he should not have something that could cause him to violate his probation (S6/1004). She insisted that the gun he showed her was a .45 automatic and not a .357 (S6/1002-04,1010).

Leon was married to Victoria Davis in December 2007, and he owned a house on Summer Glen Drive in Winter Haven (S7/862,879). Victoria was on leave from her job due to a difficult pregnancy in December 2007 and was staying in bed most of the time (S7/867). On December 7, she saw Leon throughout the day (S7/875). In the evening, he went out to the store between 6:00 or 7:00 driving the Nissan Altima (S7/876). Leon was gone an hour or so (S7/876). He was not gone long because he knew Victoria was not feeling well and they were going out to get something to eat when he got back (S7/876,898). Victoria did not remember what time he returned. She said that he returned possibly earlier than 9:00 (S7/877,883). Over objection, the State was allowed to impeach Victoria with what the prosecutor said was her grand jury testimony of five years earlier in which she said that Leon returned home "around

9:00," and that she was "not positive" if it could have been later than 9:00 but it was "probably between 9:00 and 9:30, no later." Victoria did not remember making the statement to the grand jury but did not deny that she made it.

> Q [by Prosecutor] Okay. And I'll be on Page 9, beginning at Line 2. And, again, let me read the series of questions and answers. Question: About what time did he return that night? Answer: Around 9:00. Question: Could it have been later than 9:00? Answer: I'm not positive, but I know it was probably between 9:00 and 9:30, no later. Question: Okay. Between 9:00 and 9:30? Answer: Yes, sir. Do you remember that series of questions and answers before the grand jury?
>
> A [by Victoria Davis] I remember them asking me questions. I don't remember answering them, but --
>
> Q Okay. Again, the bottom line question: Do you dispute making this statement that I just read to you, to the grand jury?
>
> A No.

(S7/898-903). The State did not enter any grand jury testimony into evidence.

Leon was dressed in a tee shirt and baggy grey basketball shorts that evening, which is what he usually wore. (S7/885-86, 904-06). When he got home, Leon drove Victoria and his son, Garrion, to pick up dinner at Wendy's and to buy milk at a Shell gas station (S7/878).

Police went to Davis's home at 6:15 p.m. on December 13, 2007, after Leon had turned himself in at the Lake Wales police station. They thoroughly searched the house looking for a handgun or ammunition, but found neither (S4/590-91;S7/1040). The police never recovered a gun in connection with the Lake Wales scene or

the BP station (S6/969-70). A team of officers spent weeks trying unsuccessfully to document any purchase of ammunition by either Randy Black or Davis. They made a comprehensive effort to contact any store that sold .38 or .357 caliber ammunition (S4/593). They could find no evidence of Davis or Randy Black having purchased any ammunition (S4/594;S6/970-72).

When Davis's Nissan Altima was seized on December 14, 2007, technicians processed the car inside and out for any trace of blood, with negative results (S7/1038). Items of clothing found in the car and seized from Davis's house were sent to the lab to be processed for any blood, again with negative results. (S7/1036-37). The clothes and shoes that Davis was wearing at the time he turned himself in on December 13, 2007 were also tested for blood. There was no evidence found on any of the items (S7/1048). A latent print that had been lifted from a piece of tape that was on a camera inside the Headley building was sent for analysis; the result was that it "did not have value" (S7/1039-40).

A week after the BP shooting, after the police had seized Davis's Nissan Altima, they set up a roadblock near the BP station and stopped every car that passed to ask if the driver had been traveling that way on the night of the shooting (S3/354,370, 403,406). Four drivers who regularly passed the BP station were shown a photograph of Davis's Altima and thought it was similar to a car parked near the gas station on the night of December 7 (S3/358,370-71,388-89,422-23).

Jonathan Adkinson travelled on I-4 and took the off ramp to

CR 557 in the evenings between 7:30 and 11:00, which took him in front of the BP station (S3/353-56). He was stopped by police at the roadblock a week after the incident at BP and asked if he recalled anything from the week prior (S3/354,369-71). He said that when he drove past on December 7, between 7:00 and 10:00, he had noticed, somewhere between the I-4 exit and the store, a dark blue Nissan parked at an angle facing the road with a chrome billeted grill that had a "blue halo" from the shine (S3/357-59,368). "[I]t was definitely a blue dark-colored Nissan." (S3/359). He also thought he saw someone walking from the store, in between the store and the car (S3/360). He did not notice any activity in front of the store as he drove by (S3/359-60). Adkinson may have seen the silhouette of a person in the car and may have seen a person walking back to the car from the store, as he told the police initially, but he clarified: "with all the media I don't know if that's something I saw on TV. But it's in there. It's in the memory somewhere." (T371-72).

William Finley passed the BP station at about 8:40 p.m. on his way to work (S3/381). As he took the exit from I-4, he made a left turn and saw a black or dark-colored car that was parked by a cattle gate (S3/385). He could not tell the size or make of the car (S3/386,399). When shown a photo of Davis's car, Finley said that the headlights were consistent with what he had seen (S3/388). Finley could not tell if anyone was seated in the vehicle. He did not see anyone near the vehicle and did not notice anything unusual at the store (S3/389-90).

Jessie Brown was stopped at the police roadblock a week after the incident (S3/406). Between 7:45 and 8:15 on December 7, she was coming from Tampa, and as she got off the exit and turned left, she saw a car parked by the gas station backed up into the bushes (S3/407-09). It was dark, and the BP store was still open. (S3/407,411). It was a black, four-door compact car (S3/409,418). She did not know the model of the car and she could not see if anybody was in the car (S3/420-21). The police showed her a picture of Davis's car after she gave her statement (S3/422-23).

Stephinie Chism first heard that there had been a shooting at the BP station on the 11 o'clock news (S3/428). She had driven past the location at around 9 p.m. and the gas station was lit up, as usual (S3/428-30). She noticed the front end of a car backed up to a gate (S3/430,433). It was a dark sporty sedan, that could have been black, dark green or dark midnight blue (S3/431,434-36). She did not see people wandering around there (S3/432).

In the month prior to the trial in September 2012, Detective Navarro drove the distance between the Davis home and the BP station, taking different routes, and determined that it was approximately a twenty-two minute drive, with minimal traffic (S7/1041-46). One of the routes he took went through a toll booth on the Polk Parkway (S7/1045). Investigators did not try to pull any photographs of cars going through the tollway on December 7, 2007 (S7/1046).

C. Headley Insurance Agency, Lake Wales

The State presented extensive testimony about the Lake Wales

case from the following witnesses: Brandon Greisman (shot on the nose), Evelyn Anderson (client of Headley Agency), Carlos Ortiz (neighbor of Greisman), Mary Knight (Enterprise car rental clerk), Diane Kent (homicide detective), Fran Murray (Ortiz's roommate), Anndee Kendrick (crime scene investigator), Kimberly Hancock (crime scene investigator), Aaron Campbell (homicide detective), Joe Elrod (police officer), David Black (police lieutenant), Lynette Townsel (police officer), Mark Trexler (deputy sheriff), Ernest Froehlich (EMT), John Johnson (paramedic), Mark Gammons (Walmart manager), Jennifer DeBarros (Walmart clerk), James Riley (Walmart asset protection), Jessica Stroud (Beef O'Brady's manager), Jacqueline Hare (Headley Insurance employee) and Scott Headley (Headley Insurance owner).

Evelyn Anderson was a customer of the Headley Insurance Agency, who went to the office monthly to deliver her insurance premium (S4/604-05). On December 13, 2007, she arrived at Headley at around 3:00 in the afternoon with her two grandkids (S4/606). The children stayed in the car while she went in to make her payment, but she found the door of the business locked. She tried several times to open the door, since she knew the business stayed open until 5:00 (S4/607). While she was standing there, the door opened and a young black man came out (S4/607-08). He was slim, tall, nice-looking, and neatly dressed in long pants (S4/608,617-18). He walked to her left and went around the building. He had something in his hand that he put under his arm. She did not see what it was, and she did not see any type of weapon (S4/608,615).

It happened fast, and she did not see the man clearly enough to identify him (S4/609).

After the man came out, a woman came out who worked in the office (S4/609-610). The woman kept repeating that he shot my sister-in-law (S4/618). She never used any names (S4/618). The woman went over to where Anderson's Tahoe was parked, and Anderson was there with her when the medical personnel came up (S4/610). The paramedics asked who did this to her, and she said Leon Davis (S4/611).[4]

Brandon Greisman lived on Stuart Street, on the corner of Stuart and Phillips, behind the Headley Insurance Agency. Carlos Ortiz and Fran Murray lived nearby (S1/69,S6/756) At around 4:00 p.m., Brandon Greisman saw smoke from the front of his house (S1/68). Greisman walked with his neighbor Vicky Rivera through a little alleyway and came around the antique building (S1/71-72,98). According to Greisman, Fran Murray was not with them (S1/95,99). Greisman did not see Fran until he came back to his house (S1/95-96). Greisman saw a woman and went over to her (S1/72). (On cross, when questioned about his ability to recall events, he agreed that her condition was pretty horrific (S1/100). There were "a lot of things happening. The lady was on fire, a building was on fire." (S1/102)).

A lot of people, white and black people, were just standing around watching. (S1/102-03). Greisman saw a black man come down Phillips Street, walking toward the Headley Insurance Agency. The

[4] The record shows that the question was actually asked by

man had an orange and black bag over his shoulder, and Greisman thought the man was coming to help (S1/74,103). He was about six-feet tall, a big build, with a small Afro and no facial hair (S1/127-29). (When shown State's exhibit 561, a photo of Davis, Greisman agreed that the photo depicted short hair that was not a small Afro (S1/131-132). Greisman concluded that Davis must have cut his hair (S1/132)). The man walked over, took a black gun from the bag and pointed it at Greisman, who pushed the lady and tried to get out of the way (S1/75,106,132). Greisman testified that the black gun did not have a cylinder (S1/134). The man fired a shot, hitting Greisman on his nose (S1/75-76). Greisman fell on the ground, but then got up and walked back home (S1/76). He did not know he was shot until he made it to the corner of Phillips and Stuart (S1/77). He made it to his driveway before Carlos Ortiz and Fran Murray came to his side to assist him (S1/78,123).

Greisman was taken to the hospital and was released the next day (S1/78-80). His mother drove him from the hospital to the Lake Wales Police Department (S1/79-80). The police put some photos in front of him and asked him to pick the person that he thought did this to him (S1/82). Greisman picked the photo of Davis from the photo pack, Exhibit 4467, and identified Davis in court (S1/84-86). On cross, Greisman stated that he did not know how many people were in the photopack because he thinks that there were actually two photopacks. He thinks he was given two pieces

(..continued)
Officer Elrod. See Issue VIII.

of paper with pictures on it (S1/136).

On December 13, 2007, Carlos Ortiz was a four-time convicted felon and was on probation (S1/770-71). He was in the driveway talking on his cell phone when Vicky Rivera told him she saw smoke coming from across the street (S5/757-58,764,771-72). Ortiz got off the phone, went to lock his door, and walked across the street where he saw smoke coming from behind the building (S5/758). According to Ortiz, Vicky Rivera and Fran Murray had crossed the street together and gone down an alleyway toward the Headley Insurance Agency (S5/772). Greisman had also headed that way, but he had gone across Stuart and was going down the Phillips Street side (S5/758,772-73).

Ortiz went toward the corner of Phillips and Stuart at a slow jog (S5/773). As he was crossing Stuart, he heard what appeared to be gunshots (S5/773). As he cleared the corner of the building, he saw Greisman coming back from the area holding his face, with blood coming from it (S5/758,773). Ortiz grabbed Greisman and helped him across the street (S5/759). Greisman said, that guy shot me in the face, and he pointed to a man who was twenty or twenty-five feet behind him (S5/759,776-77). The man was moving at a quick walk and putting a gun inside a red bag that looked like a lunch bag (S5/760,778-79). The gun looked like a shiny chrome revolver (S5/784). Ortiz thought the man had a goatee and curly black hair (S5/786,787). At the time, Ortiz described the man as having a small afro (S5/787-88).

There were all kinds of people screaming and running toward

the smoke (S5/781). The circumstances were very stressful (S5/786). Ortiz watched the man walk north passed the house on the corner and out of sight while Ortiz was dealing with Greisman, figuring out how badly he was hurt, and helping him across the street back to his house (S5/763,780).

Ortiz had seen the man before at Florida Natural, where he had worked six or seven months before, through a temp agency, as a temporary employee (S5/761,814). He never saw the man inside the Florida Natural plant; rather, he saw him near the gate area where he went in and out during a shift change (S5/762-63,814). He did not know the man's name, had never conversed with him, and had never worked in the same area with him (S5/763). There were hundreds of people that went through each of the many gates at Florida Natural during a shift change, and Ortiz used a gate that was for temporary employees. He did not have a card to let him in any other gate, like the full-time employees did. (S5/811-13).

Ortiz stayed with Greisman until the ambulance personnel came and took him away (S5/764). Different police officers came and went to deal with Griesman and some just stood around and stayed there, but Ortiz never provided them with any information about the man he had seen walking away and he never called the police to provide them with any information about the man he had seen (S5/806).

Four days later, on December 17, 2007, Ortiz talked to a female officer who came to his home to ask questions and show him a photopack (State's Exhibit 9015) (S5/766). Ortiz told the

officer that he had not seen any newscasts or read anything in the newspaper about the incident before he identified Davis's photograph (S5/766-67). He claimed at trial that before speaking to the officer he had not read the newspaper nor watched television, had not seen anything about the incident in the media, and did not know that anyone had been caught for the crimes, even though there were news trucks and reporters out there at the scene every day for four days and more (S5/807)

On cross, Ortiz was impeached with his deposition testimony in which he acknowledged seeing the name Leon Davis, Jr. in the newspaper the next day and seeing a report of the incident on TV during the morning news the next day.

> Q Now, as far as your claim that you had not seen anything in the newspaper about the case . . . . you were asked the question:
>
> > Question: And do you know what source you may have heard the name [Leon Davis] from?
> >
> > Answer -- answer: Hard to remember. Hard to remember because, I mean, that's all anybody talked about for awhile. So I couldn't tell you where I heard it. It might have been the newspaper.
> >
> > * * * *
> >
> > Answer: Yes, it was in the paper, I believe the next day.
>
> Do you recall giving that question and – being asked those questions and giving those answers?
>
> A Yes.
>
> . . . .
>
> Q Now, you've also told us that you did not see anything on TV; right?
>
> A Right.

Q But at Page 39 of your deposition, Line 23, you were asked a question:

> Question: Yeah. Did you watch any of the news coverage on TV with them or yourself?
>
> Answer: The next day, I caught the report on the morning news, but I was -- I didn't need to watch it on the news. I had the news right outside my door.

. . . .

Do you recall being asked those questions and giving those answers?

A Yes.

(S5/808-809, emphasis added).

On cross, Ortiz was shown a picture of Davis taken on December 13, 2007, and he conceded that he thought the hair of Davis in the photo was different than that of the person he saw on Phillips Street (S5/801). He had previously stated that maybe Davis got a haircut before the photograph was taken (S5/797). When asked in the prior trial if he could explain why a photograph of Davis taken before the incident showed a different hairstyle than the one he saw, Ortiz could not explain (S5/800). Before the Headley incident, Ortiz had seen a black Nissan Maxima car parked in the area (S5/802-05).

Fran Murray was an inmate at the time she testified in this trial (S3/460). On December 13, 2007, she lived in an apartment with Carlos Ortiz (S3/461). She was sitting outside with Vicky Rivera when they saw smoke in the area, which caused them to walk across the street to the back of the Headley building. (S3/466-67,

477). Brandon Greisman walked down Phillips Street ahead of them. Fran and Vicky walked down an alley and heard three pops, which caused Vicky to run back to the house. Then Fran saw a woman, who she thought was Yvonne, coming from behind the building, progressing down the chain linked fence, toward the roadway of Phillips (S3/467,471,480-81,484). The woman was on the Headley side of the chain linked fence, walking toward Phillips (S3/482). She was squeezing between a telephone pole (S3/483).

A black male was behind this woman heading toward Phillips. Fran did not see his face (S3/468). He was about 6-foot 4 and stocky (S3/469). His hair was about one-inch long and definitely not shaved to the head (S3/496). He was walking at a natural pace (he never ran) toward Stuart Avenue and he was putting something in his lunch pail (S3/469,471-723). Murray did not recall what he was wearing (S3/473).

When Fran got to the corner of the building, she saw Greisman on the ground (S3/482). Greisman was not anywhere near the woman. He was in the road and she was by the telephone pole (S3/484-85). Fran went over to Greisman (S3/487). The black man was almost to Stuart Avenue (S3/487). Greisman was holding his nose and there was lots of blood. Fran took off her tee shirt and packed his nose, and they started walking toward Stuart (S3/488-89). Fran escorted Greisman across the street to his driveway (S3/493). Ortiz met Fran and Greisman at the end of the driveway and brought a plastic chair for Greisman to sit down (S3/494). Ortiz did not help Greisman across the street (S3/494).

Fran went to the front of the Headley building where she saw Yvonne, who had a gunshot wound on her left wrist (S3/473,497). Yvonne was screaming that she was hot, so Fran went to Havana Nights to get a cup of water for her (S3/497). Fran started talking to Yvonne and asked her if she knew who did it. Yvonne talked about the person in the third person and never gave a name; she said the person should be on camera (S3/499;S4/501).

Police Lt. Elrod arrived at the Headley Insurance Agency at about 3:40 p.m. (S4/619-21). Ambulance personnel were there with Ms. Bustamante (S4/621-22). Elrod asked her if she knew who had done this to her and she said it was Leon Davis. She said he was a prior client of the business (S4/623-24). Bustamante told Elrod other things, but he did not relate them during his testimony (S4/624).

EMT Froehlich treated Yvonne Bustamante, who said she was shot in the left hand (S4/634-37). When she was in the ambulance, an officer stepped up on the back step of the ambulance and asked her if she knew who did this to her. She said it was Leon Davis (S4/636).

Paramedic Johnson did not remember hearing the officer ask who had done it. The officer was asking her a question or two and at some point he heard her say that Davis did this to me. Johnson did not recall hearing her say a first name, or else the first name was unintelligible. She said he was a customer. (S4/639-41).

The police processed the entire Headley scene for finger-prints and there were no latent fingerprints of value that were in

any way matched to Davis (S7/1047). On the night of December 13, 2007, police took Davis's Nissan Altima into custody from where it was parked at the Lagoon Lounge on Lake Howard in Winter Haven (S6/946,967). They conducted extensive searches, including aerial searches, of the area near the vehicle looking for a gun, a bag, or clothing described by witnesses, but they never found anything that matched the descriptions (S6/967-68). Police also searched inside and all around the outside of Davis's house but never found a gun or an orange soft-sided cooler (S6/969-970)

Testimony and documents were introduced regarding Davis's auto insurance policy with the Headley Insurance Agency (S6/948-962,1011-1025). Davis cancelled his auto policy for his Nissan Maxima in October 2007, telling the clerk, Ms. Luciano, that he was cancelling his policy because it was too expensive, and he was going to park his car and drive his wife's car. (S6/961-92,1018).

Walmart employees testified that Davis was in the store shopping in the morning of December 13, 2007. They connected him (circumstantially) to the purchase of a red six-can cooler (S4/643-648,658-62;S5/689,696). The State introduced a Walmart video of a person they alleged was Davis (S4/654, exh.9034). The defense challenged the identification of the person in the Walmart video on grounds including that the person in the store did not appear to have Davis's large tattoos on his arms and the person in the video had hair that was bushy, unlike Davis's hair, which was closely cropped on December 13, 2007 (e.g. S4/671,676,678-80).

The prosecution introduced a security video (Exh. 9032) taken

during the afternoon of December 13, 2007, at the Beef O' Brady's Restaurant in Lake Wales (S6/943). Another video (exh. 9026) was entered into evidence of Davis at the MidFlorida Federal Credit Union in Winter Haven on December 13, 2007, at 4:21, where he made a deposit of $140 (S5/834-35,842-43,837-39).

Dawn Henry lived with Davis in Lake Wales from 1998 to 2003. Their child, Garrion, was born in 1999. Garrion spent equal time with Henry in Lake Wales and with Davis at his house in Winter Haven (S5/848-49). Garrion had spent the night with Davis on December 12, 2007, and Davis dropped him off at Dawn Henry's house the next morning between 6:30 and 7:00, in time for her to take Garrion to school (S5/850-51,860). Henry called Davis after she dropped Garrion off at school to tell him there may be a small birthday party for Garrion at school that afternoon (S5/851-52). There was a chance that Leon would not be able to make it because he was doing some things to help his sister, India, and he might not be done in time (S5-S6/860-61).

The prosecution admitted into evidence a redacted transcript of Davis's testimony during the Lake Wales trial. Davis grew up in Lake Wales and was twenty-nine years old on December 13, 2007 (33/5654-55). He is six feet, five inches tall, and he weighed 249 pounds in December 2007. Davis bought a house in Winter Haven in 2006, and a new Nissan Maxima in August 2007 with the help of his father, who works for a Nissan dealership. He traded in an Altima when he bought the Maxima, and he went to the Headley Insurance Agency to cancel his Nationwide policy and start a new

policy with Victoria Insurance for the Maxima (33/5658-59, 5675). The insurance payments were set up as a direct withdrawal from his bank account (33/5660-61). Davis eventually cancelled the Victoria policy on the Maxima because he could not afford it, and he went into the agency to sign a paper (33/5660,5685). That was the last time Davis was ever in the Headley Insurance Agency. Davis also turned in the tag for the car (33/5660). After he cancelled the insurance, Davis started driving his wife's Altima (33/5687).

Davis worked at Florida Natural Growers from 1999 to 2005. He always used the west gate, off of Washington Avenue and 27. When he left Florida Natural in September 2007, he was making $13.06 per hour (33/5664-67). Davis went to work for the City of Eagle Lake in October 2007, making $9.00 per hour, with the opportunity to do overtime work (33/5666-68,5677). Davis stopped working for Eagle Lake at the end of November (33/5668). He received his final paycheck on December 6, 2007 (33/5678). Davis also earned income by cutting hair, $200 to $250 a week, and he made income by hosting sales parties at home with his wife (33/5674,5679,5695).

When Davis stopped working for Eagle Lake, he was confident that he could get another job, as there had never been a substantial period in his adult life when he did not have a job (33/5694). He also knew he could get a loan from his father, who had loaned him $6000 and $2000 in the past, and from his sister, India, who had offered to loan him a couple of thousand (33/5694-95). Davis was expecting a tax refund of $7500 for the year

(33/5695).

Davis bought a gun from Randy Black in early December 2007, and showed the gun to his mother at his house in Winter Haven. She told him to get rid of it because he was not supposed to have a gun while he was on probation (33/5669). When he bought the gun, he did not think that it could get him in trouble with his probation officer, but after the conversation with his mother, he looked at his probation paperwork and realized that his mother was right. He sold the gun for $200 to a man in Inwood, a rough area of Winter Haven (33/5670-72).

The prosecution also entered into evidence certified copies of Davis's prior grand theft convictions (Exh. 9047-48). It was agreed that the convictions were being entered solely to establish prior felony convictions to prove the possession of a firearm by a convicted felon offense in count five, and the nature of the prior convictions would be irrelevant (S6/935, see also S4/516).

D. Motion for Judgment of Acquittal

Davis argued that a reasonable hypothesis of innocence existed with regard to the identity of the perpetrator at the BP station because different people could have committed the BP and Headley Insurance offenses, even if the same gun was used in each case:

> [C]ertainly, a perpetrator could have committed the crimes at the BP station, gotten rid of the gun. . . . [A] reasonable hypothesis could be that a different person committed the BP. Mr. Davis came into possession of the firearm after the fact, when the perpetrator got rid of the gun. . . .
>
> . . .
>
> [E]ven if they have evidence that he was . . . involved

> in the Headley case, that doesn't preclude the reasonable hypothesis that I've just laid out.

(S7/1120-21). The State did not prove that the gun Davis purchased from Randy Black was the gun used in the BP or Headley case:

> Even in the light most favorable to the state, we don't know that the gun Mr. Davis purchased from Randy Black, then showed his mother, was the gun used at either BP or Headley. We just simply don't know that.
>
> And the unrebutted testimony in this case is Mr. Davis' testimony that he had sold that gun prior to the Headley incident. There is no evidence that contradicts that. You know, so we don't know what gun was used at Headley. We don't know what gun was used at BP.

(S7/1136).

With regard to the attempted robbery charge, Davis asserted a reasonable hypothesis of innocence that the perpetrator had no intent to commit a robbery, since the evidence was consistent with a crime of violence directed at the employees of the store:

> The clerk testified that, you know, he heard a noise. He looked up. Sees a person standing at the door. He motions to them that they're closed. And almost as soon as those things are happening concurrently, the person fires a shot at the clerk.
>
> The person then goes to an area where we know the other two employees were, and they were shot and killed. The evidence in this case is that they both had -- one of them had a wallet that had money, and the other simply just had money.
>
> There was no physical evidence of any nature that after these people were shot, that there was any effort to search their persons. . . .
>
> They were both laying face down, and the wallet would have been exposed on the one gentleman, yet the wallet was there. . . . [P]ockets were not pulled out in any way. . . .
>
> You then have the person go back to the store, the door

> of the store. Again, you can see a person kind of rattle the door -- and it's still locked -- and then leave. A reasonable hypothesis of innocence is that the perpetrator in this case had no intent of a robbery, that it was a crime directed at the employees of that store. . . . [A]s soon as the person could not get in the door, they fired a shot at the clerk, something that at that point, would not, in any way, have effectuated . . . a robbery or the completion of a robbery. I mean, it was fired through the glass at the clerk.
>
> . . . [W]e do know that the person in the video is a dark-skinned individual. . . . [A]t least from the testimony of the clerk, from what he could see, it could have an African-American. It could have been another Indian. It could have been any -- a dark-complexioned Hispanic. This very well could have been some type of hate crime, or a crime directed at the people who were involved with that store. We simply don't know.
>
> . . . [T]here is no verbal communication from the person at the door . . . saying . . . this is a robbery. We have nothing like that. . . . [W]e just have a complete absence of evidence as to the motive as to why this occurred.

(S9/1121-24).

E. The Defense Case

Leon Davis testified that he was not familiar with the area of CR 557 where the BP station was located (S9/1480-81). On December 7, 2002, he left his home at around 5:00 p.m. to pick up his son, Garrion, from Dawn Henry's house in Lake Wales. He was driving his wife's Altima (S9/1476,1482). It was a 30-minute drive back to his Winter Haven home, and he returned there at about 6:15 p.m. (S9/1475-77). He left Garrion at home with Victoria and drove to the Eagle Ridge Mall, which was about twenty minutes away, at about 7:15. He was wearing gray shorts, a sleeveless white tee shirt and flip-flops (S9/1477-79).

He bought four shirts for Garrion at Dillards and some baby

stuff for his pregnant wife, paying cash (S9/1478, 1483-84). He had taken $300 in cash with him, as he had gotten paid the day before (S9/1484-85). He left the mall at 8:30 or 8:35, and he returned home close to 9:00. "It wasn't after 9:00." (S9/1478). Shortly after returning home, he left the house again with Victoria and Garrion to go to Wendy's (S9/1481). They returned home sometime after 10:00, and he did not go anywhere else that evening (S9/1481-82).

The prosecutor questioned Davis on his ability to corroborate his testimony:

> Q (By Mr. Wallace) Mr. Davis, the – the bottom-line question I have is: Do you have anything that you can offer to us that will corroborate your statement that you were at the Eagle Ridge Mall that Friday evening, shopping in Dillard's and maybe other stores?
>
> A Well, the shirts and the clothes; that's all I have.
>
> Q Okay. Well, where are the shirts and the clothes?
>
> A Oh, you would have to ask Dawn Henry where the shirts are, and you would have to ask Victoria what happened to the baby clothes.
>
> Q Did you see anybody at the Eagle Ridge Mall which you recognized?
>
> A I can't recall at this time, sir.
>
> Q You grew up in Lake Wales?
>
> A Yes, sir, I did.
>
> Q And did you shop a lot at the Eagle Ridge Mall?
>
> . . . .
>
> A I did a little bit of shopping at the Eagle Ridge Mall, not much.
>
> Q But not to the point that you got to know any of

the people that worked in any of the stores?

A I wouldn't -- no, sir, I wouldn't say that.

Q In other words, you didn't have any school friends that grew up in Lake Wales that you knew worked at particular stores, that you would maybe go by and see them when you went to Eagle Ridge Mall?

A When I was in high school.

Q You're talking maybe ten years after high school at this point?

A That's correct.

(S9/1488-90).

The defense put on several witnesses to impeach Carlos Ortiz's claim to having seen Leon Davis at the gate of Florida Natural Growers. Managers from the temporary employment agency that sent Carlos Ortiz to work at Florida Natural Growers in 2006 testified that Ortiz worked there in 2006, but not in 2007 (S7/1151,1156-58,1182). Florida Natural maintains a very large, secure, access-controlled complex, with multiple entrances (S7/1161-62). It takes an hour-and-a-half to walk to each department through the entire plant (S7/1165). The managers scanned all temporary employees in and out of the east gate, which has its own parking lot. (S7/1162-63). You cannot see the other gates from there (S7/1164-6,1196). The Human Resource Manager at Florida Natural Growers testified that the company employed 700 to 800 workers during the fruit season and 600 workers out of season (S7/1190). Davis worked in warehousing on the day shift from 6:00 a.m. to 6:00 p.m. The plant is on 50 fenced acres (S7/1194-95). There are three main gates where the guards are located and

additional turnstiles beyond that. Each of the six entry points have parking lots associated with them. Temporary employees use the east gate, while permanent employees use other gates (S7/1196-97). Davis used the northwest turnstile which was at least 500 yards away from the east gate (S7/1199-1200).

A long-time friend of Davis, Leon Marion, testified that he saw Davis in Lowes on December 13, 2007 between 1:00 and 2:00. Marion knows Leon Davis well; they often played basketball through the years and Marion would see Davis two or three times a month at Lowes Home Improvement in Winter Haven, where Marion works (S7-S8/1218-25). When Marion saw the newscast about Davis' arrest for the Lake Wales crimes, Marion realized that he had seen Davis in Lowes. Marion was in a hurry to leave that afternoon, so he did not talk to Davis at the time, but he nodded at him (S8/1225). Marion called police to let them know that he had seen Davis in the store that afternoon (S8/1223-24).

The defense submitted a variety of other witnesses and evidentiary items going toward impeachment of the State's witnesses who identified Davis with regard to the events in Lake Wales (S8/1233-1259). In addition, the defense presented expert testimony from several witnesses. Richard Smith, a video expert, showed the Walmart security video with the highest output level that is available. (S9/1290-1303, 1318). Davis's tattoos on his arms (displayed in court) were of "very high contrast" and they would be expected to show up on the high-resolution monitor in the Walmart video (S8/1310). The expert was not able to enhance the

BP security video because the quality was "pretty bad" on the views of the suspect. (S8/1315).

Dr. Richard Marshall testified regarding memory and brain function. People do not record events; they reconstruct the experience of the events. High doses of stress hormone impair the making of memories for emotional events. (S8/1260-1289).

Dr. John Brigham testified as an expert in eyewitness memory. (S8/1367). Research indicates that the ability to encode an accurate memory is less if stress is high. (S8/1379) Remembering a face is a complex task and as stress increases, performance at complex tasks increases up to some moderate level, but as stress gets higher, ability to perform complex tasks is diminished (S8/1380). When a weapon is involved, a person's ability to encode an accurate memory is diminished for two reasons: (1) the weapon is likely to increase the level of stress, and (2) people are likely to focus on the weapon rather on the face of the person holding it (S8/1383). Research shows that with regard to cross-racial identification, there is an "own-race bias," meaning that people tend to recognize faces of persons of their own race better than faces of another race (S8/1384). Research shows that for eyewitness memory, a person's confidence in the accuracy of their memory is only weakly related on average to the actual accuracy of the memory (S8/1386). Hundreds of studies have shown that simply because a witness is more confident does not necessarily mean they are accurate (S8/1386-87).

Dr. William Gaut testified as an expert in the area of police

work (S9/1432-40). The standards for photopack showings call for a double-blind procedure where the showing is audio and video recorded to document what the officer said to the person viewing the photopack (S9/1445-49). The standard is to show the different photos sequentially, rather that showing six at one time (S9/1449-50). The standard is to not have any writing on the photopack. The photopack in this case with the number 2007 written under the photo of Davis (while the other photos had numbers beginning with '93 and '94), could lead a witness to simply conclude that "it must be the 2007 guy." (S9/1452).

F. The Trial Court's Written Order

Judge Jacobsen's Sentencing Order (34/5960-5977) contains the Facts, Analysis of Guilt, Analysis of the Penalty, and Conclusion. In the Facts and Analysis of Guilt sections, the judge remarks on facts that were not in evidence and even remarks on the jury verdict in the Lake Wales case. (See Issue II). To support the death sentences, Judge Jacobsen found three statutory aggravators, assigning them "very great," "great," and "moderate" weight: (1) Davis was on felony probation for six counts of grand theft at the time of the crime, § 921.141(5)(a), Fla. Stat. (2007), moderate weight; (2) Davis was previously convicted of the murders in the Lake Wales case, § 921.141(5)(b), very great weight; and (3) the murders occurred during an attempted robbery of the BP station or the flight after an attempted robbery, § 921.141(5)(d), great weight.

The judge rejected as unproven the proposed aggravator that

the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. In rejecting the aggravator, the judge found that (1) the motive for the shootings remained unclear, (2) the victims would not have been able to see the perpetrator clearly enough to make an identification, and (3) the store video did not capture the events that occurred under the gas sign where the victims were shot.

> [T]here is no evidence to suggest that either of the victims were able to clearly see the perpetrator. The perpetrator had dark clothing on, a hood, and a mask. There is no way for the victims to have been able to see the perpetrator clearly enough to later make identification.
>
> The video clearly depicts one of the victims standing in the distance with his arms raised; however, after the video goes blank, there is no way to determine exactly what happened out under the gas sign. Did the other victim take a defensive posture, or even make some offensive move towards the perpetrator? Did the victim, with his hands depicted in a raised position, lower his hands and make some aggressive move towards the perpetrator? Was there some sort of scuffle before the fatal shots were fired? We will never know.
>
> . . . [T]he Court cannot find beyond and to the exclusion of all reasonable doubt that the "sole or dominate motive" for the killings was to eliminate witnesses.
>
> Therefore, the Court concludes that this Aggravator has not been proven.

(34/5970-71).

The judge found that the Defense proved the statutory mitigator that the capital felony was committed while Davis was under the influence of extreme mental or emotional disturbance and assigned it little weight. The judge also found fifteen (15) nonstatutory mitigators, assigning them moderate, little, and

slight weight. The five moderate weight mitigators are: (1) Victim of bullying throughout childhood--Davis was regularly bullied and beaten up by others while in school and continuing up until the time he was in the Marine Corps; (2) Victim of sexual assault as a child—-Davis was forced to perform oral sex on an older boy who was bullying him; (3) Victim of child abuse, both physical and emotional by a caretaker--Davis's mother left him in the care of a woman who beat him and was verbally and physically abusive; (12) Good son, good sibling, good husband--Family members have nothing but good things to say about Davis. It is obvious that they hold him in high regard and that he was devoted to his family; (13) Good father to child with Down's syndrome--Davis is a loving, caring, generous father to his son Garrion, who has Down's syndrome, and regularly participated in young Garrion's life. He actively took care of his son and provided monetary support without hesitation.

The six little weight mitigators are: (4) Overall family dynamics; (5) Military service in the U.S. Marine Corps; (9) Stressors at time of incident; (10) Good person in general--Davis was a loving husband, who was devoted to his Down's syndrome son, Garrion. He was actively involved in his family, regularly seeing his brother and his sisters, and was very well regarded by his family, friends, and employers; (15) Good behavior in jail and prison; (11) Good worker. The four slight weight mitigators are: (6) History of being suicidal both as child and adult; (7) Diagnosed with personality disorder; (8) History of depression; (14)

Good behavior during trial and other court proceedings.

SUMMARY OF THE ARGUMENT

The trial court erred by admitting the collateral crime evidence as inextricably intertwined since the events at the Headley Insurance Agency, occurring six days after the charged offenses, do not satisfy the test for inextricably intertwined evidence. It was not necessary to admit the evidence to adequately describe the deeds at the BP gas station. Reversal for a new trial is required because the collateral crime evidence was a major component of the State's case that was admitted for an improper purpose and, as such, it is presumptively prejudicial. The trial court used the collateral crime evidence to draw conclusions as to bad character and propensity and to stack inferences to justify the verdict.

The trial judge erred by relying on facts that were not admitted as evidence during the guilt phase of this trial to find Davis guilty. In his written rendition of the "Facts" and "Analysis of Guilt," the judge mentions specific facts about the Lake Wales case that were not brought out during the trial, and he mentions that Davis was found guilty by the jury in the Lake Wales case, which was also not a fact in evidence. Because the judge failed to base his verdict solely on the facts in evidence, a new trial is required.

The trial court made a factual finding as to the time that

Davis arrived home on December 7, 2002, that could only be made by considering impeaching questions of the prosecutor as substantive evidence bearing on Davis's guilt. The trial judge first erred by allowing the State to impeach Victoria Davis with out-of-court statements she made about the time that Leon returned home from shopping where Victoria maintained a loss of memory as to the time that Leon returned home that night. The impeaching questions posed by the prosecutor were not substantive evidence and the State never offered into evidence Victoria's grand jury testimony that it referenced during the attempted impeachment. Consequently, there was no substantive evidence or testimony in evidence showing that Leon arrived home after 9:00; however, the court indicated that it relied on substantive evidence to make that finding. This was error that requires reversal for a new trial.

The trial court's written findings of fact and analysis of guilt show that it shifted the burden to Davis to produce corroborating evidence that he was not at the BP station on December 7, 2012. The trial court violated Davis' right to due process by shifting the burden of proof to him to show corroboration for his testimony that he went shopping at the Eagle Ridge Mall and arrived home before 9:00 p.m. The judge's analysis of the guilt-phase evidence demonstrates that Davis's exculpatory testimony was rejected based on a failure to corroborate, which, in turn, served to bolster the State's case. Even if the judge disbelieved Davis's testimony and deemed it false, a defendant's false exculpatory statement cannot be used by the factfinder as substantive

evidence of guilt without violating a defendant's right to due process.

The trial judge erred in using evidence that Davis was a convicted felon for an improper purpose. Davis's prior felony theft convictions were introduced for the sole purpose of proving the crime of possession of a firearm by a convicted felon. The judge violated Davis's right to due process when he considered the fact that Davis was a convicted felon as circumstantial evidence that Davis purchased a gun in order to commit the crimes at the BP station.

The State failed to meet the heightened standard of proof that is required when it relies on circumstantial evidence to prove the identity of the perpetrator. The evidence taken in the light most favorable to the State fails to show that Davis was the person who committed the crimes at the BP station. Because the State produced insufficient evidence to prove the identity of the perpetrator at the gas station, the trial court erred in denying the motion for judgment of acquittal. When the circumstantial evidence is insufficient to show that a defendant committed the charged offenses, the conviction violates the constitutional right to due process.

The trial court erred in denying the motion for judgment of acquittal on the attempted robbery charge because the evidence was insufficient to show an attempted taking, which is necessary to prove attempted robbery. The evidence fails to reveal the perpetrator's motive for shooting through the glass into the store at

Prakashkumar Patel. The trial court also erred in finding and assigning great weight to the aggravating circumstance that the murders occurred in the course of an attempted robbery.

The trial court erred in admitting the dying declaration of Yvonne Bustamonte. The admission of the statements violated Davis's constitutional right of confrontation. Admission of the statements also violated the hearsay rule.

The trial court erred in admitting the identification testimony of Brandon Greisman and Carlos Ortiz because the identifications were tainted by impermissibly suggested photopacks and were otherwise unreliable.

The trial court distorted the weighing process that is mandated for a death sentence by first prematurely comparing individual mitigating factors with aggravating factors, which resulted in a reduction of weight assigned to two mitigators, and then by mistakenly attributing more weight than was actually assigned to one of the aggravators during the overall weighing of aggravators and mitigators.

This Court should remand for imposition of a life sentence because death is a disproportionate penalty in this case and because the Florida death penalty statutory scheme is facially unconstitutional.

ARGUMENT

ISSUE I: THE TRIAL COURT ERRED IN ADMITTING THE LAKE WALES EVENTS AS "INEXTRICABLY INTERTWINED" WITH THE BP GAS STATION EVENTS OF SIX DAYS EARLIER.

The trial court made a pretrial ruling that the events at the Headley Insurance Agency in Lake Wales on December 13, 2002, were inextricably intertwined with the charged offenses that occurred on the night of December 7, 2002, at the BP gas station in Lake Alfred. This ruling resulted in the judge considering extensive evidence that was largely irrelevant to the question of identity of the perpetrator in this case.

The Lake Wales identification issue was a feature of the trial, but that evidence could not resolve the issue of whether Davis committed the crimes at the BP station. Evidence linking the gun used by the perpetrator at the Lake Wales scene to the BP crimes was circumstantial. In order for that evidence to produce the legal conclusion that one person committed both crimes, a stacking of inferences is necessary. Even if the hotly contested issue of identification of Davis at the scene in Lake Wales was resolved in the State's favor, the trier-of-fact was still required to stack inferences to reach the ultimate determination of the identity of the perpetrator at the BP station. And even if the identity of Davis at Lake Wales is deemed marginally relevant to the issue of identity at the BP station, the ruling that the Lake Wales events were inextricably intertwined was error because the ruling did not limit the consideration of the evidence to this identity issue.

The ruling allowed all the evidence to be considered for the improper purpose of showing Davis' bad character and propensity.

A. The "Inextricably Intertwined" Doctrine

"There are two categories under which evidence of uncharged crimes or bad acts will be admissible—similar fact evidence, otherwise known as Williams rule evidence, and dissimilar fact evidence. The requirements and limitations of section 90.404, Florida Statutes (2009), govern similar fact evidence while the general rule of relevancy set forth in section 90.402 governs dissimilar fact evidence." Gosciminski v. State, SC09-2234, 2013 WL 5313183 (Fla. Sept. 12, 2013)(citations omitted). Similar fact evidence under section 90.404 is evidence unrelated to the charged offenses and is admissible to prove a material fact in issue, such as motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See Charles W. Ehrhardt, Florida Evidence § 404.9 (2006); see also Robertson v. State, 829 So. 2d 901, 907-08 (Fla. 2002).

Evidence is inextricably intertwined and therefore admissible under section 90.402 when the evidence constitutes an inseparable part of the act that is at issue.

> [E]vidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. . . . [I]t is necessary to admit the evidence to adequately describe the deed."

Griffin v. State, 639 So. 2d 966, 970 (Fla. 1994)(quoting Charles W. Ehrhardt, Florida Evidence, § 404.17 (1993 ed.)). Dissimilar

fact evidence is admissible to accurately describe the events leading up to the charged offense.

> Dissimilar fact evidence of uncharged misconduct—which is governed by section 90.402's general rule of relevancy—is admissible to "establish[ ] the relevant context in which the [charged] criminal acts occurred." Caruso v. State, 645 So.2d 389, 394 (Fla. 1994). "[T]o prove its case, the State is entitled to present evidence which paints an accurate picture of the events surrounding the crimes charged." Griffin, 639 So.2d at 970. Accordingly, evidence of uncharged misconduct is relevant when its admission is "necessary to adequately describe the events leading up to" the commission of the charged offense. Id.

Gosciminski v. State, SC09-2234, 2013 WL 5313183 at *6. In Gosciminski, this Court upheld admission of evidence of uncharged misconduct as inextricably intertwined that "explained Gosciminski's decision to kill Loughman for her jewelry and showed the sequence of events leading up to the murder." In Victorino v. State, 23 So. 3d 87, 99 (Fla. 2009), and Wright v. State, 19 So. 3d 277, 292-93 (Fla. 2009), dissimilar collateral crime evidence was admitted that showed a continuing chain of events leading up to the murders.

Evidence of uncharged crimes is not inextricably intertwined where there is a clear break between the crime charged and the uncharged offense or where it is possible to give a complete account of the criminal episode without reference to uncharged crimes or bad conduct.

> [W]hen there is a "clear break between the prior conduct and the charged conduct or it is not necessary to describe the charged conduct by describing the prior conduct, evidence of the prior conduct is not admissible on this theory." Charles W. Ehrhardt, Florida Evidence § 404.17, at 237 (2005 ed.).

Wright, 19 So. 3d at 292 (citations omitted); see also Thomas v. State, 959 So. 2d 427 (Fla. 2d DCA 2007) (reversing first-degree murder conviction for new trial where extensive other crime evidence was introduced that took place after the events charged, most of which did not meet the test for inextricably intertwined evidence). The State recognized in Thomas, as it did here, that none of the collateral crime evidence was admissible under Williams rule because it was not similar-fact evidence. 959 So. 2d at 430.

Criticism of the inextricably intertwined doctrine has noted that the obscure nature of it leads to a tendency to abuse it by rationalizing the admission of testimony about uncharged offenses without sound policy justification:

> "Inextricably intertwined" is the "modern de-Latinized" equivalent of res gestae, and it has been savaged by a similar critique. The standard has been described as "lack[ing] clarity" and "obscure," because it does not embody a clear substantive principle. . . . The vacuous nature of the test's wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion. Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse.

Edward J. Imwinkelried, The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct, 59 Cath. U. L. Rev. 719, 729-30 (2010) (footnotes omitted).

B. The Lake Wales Case Is Not Inextricably Intertwined with the Charges in the Present Case.

It is entirely possible to give a complete and intelligent account of the Lake Alfred BP gas station events without reference to the events that occurred six days later in Lake Wales. There was a clear break between the events, and the testimony concerning the Lake Wales events did not explain the context in which the BP events arose.

The State's strategic attempt to link Davis to the BP case through the extensive testimony linking him to the Lake Wales events does not, by itself, create a justification for admission of collateral crime evidence as inextricably intertwined. The test for whether collateral crime evidence is inextricably intertwined cannot depend on the quantity and quality of other evidence the State possesses to link a defendant to the charged crimes.

There was no physical evidence that linked Davis to the BP crime scene, so by connecting the bullets from both crime scenes to the same gun, the State was able to explain why the police came to focus on Davis as a suspect for the BP crimes. Evidence that only shows why the police came to focus on Davis as the suspect in this case cannot justify the finding that the two events are inextricably intertwined. The question of why the police investigation came to focus on Davis bears no relevance to the issue of whether Davis committed the BP crimes and cannot be the basis for admitting the collateral crime evidence. See Keen v. State, 775

So. 2d 263, 272, 274 (Fla. 2000) ("an alleged sequence of events leading to an investigation and an arrest is not a material issue" and "there is no relevancy for such testimony to prove or establish such a nonissue").

The test for admissibility under the inextricably intertwined theory requires a showing that the Lake Wales events were directly and immediately connected to this case. Even if the State showed that Davis was the perpetrator of the Lake Wales crimes and the bullets used there came from the same gun used in the BP case, those circumstances do not make the Lake Wales events so directly and immediately connected as to be called part of the same transaction. Cf. Killins v. State, 28 Fla. 313, 333, 9 So. 711, 715 (1891) (holding it was proper to admit evidence of defendant's actions after shooting, because "it may fairly be said to be part and parcel of the same transaction").

The State presented the Lake Wales events to show that an unidentified gun was used at both places. This unidentified gun shared the same rifling characteristics with a gun that Davis owned, but also shared those same rifling characteristics with untold numbers of other guns manufactured by at least twenty-one different companies. The issue of whether Davis committed the offenses at the BP gas station cannot be resolved by showing that Davis was identified in connection with the same gun a week later. The expert opinion evidence linking the bullets from the crime scenes does not demonstrate that any single person was in possession of the unrecovered gun at both times that the gun was used.

See Miller v. State, 107 So. 3d 498 (Fla. 2d DCA 2013) (reversing conviction for felon in possession of firearm because State presented no evidence showing when defendant's DNA was left on gun); see also Issue VI, supra, discussing sufficiency of evidence.

There was a six-day interval between the two events during which the gun used in both places could have easily changed hands. Use of a particular gun is not like having an immutable personal characteristic that can serve to identify an individual. Instead, a gun, being an object like a car that can be used by different people at different times, cannot be said to identify the user. The fact that the same gun was used in both places can only lead to an inference that the same person used the gun, but that inference necessarily gets weaker with the passage of time. One can similarly draw a reasonable inference that the person who used the gun at the BP station got rid of it as soon as possible (see S7/1120). Knowing that some person used a gun (or drove a car) on a particular day does not prove the identity of an unknown person who used the same gun or car a week before. E.g., State v. Hepburn, 460 So. 2d 422, 426 (Fla. 5th DCA 1984) ("[T]here is evidence that appellee consumed alcoholic beverages at a time on August 26, 1982 before the pedestrians were struck in an intersection, there is also evidence that appellee was in possession on the day after the accident of the automobile which struck the pedestrians, but since there were no eyewitnesses to the accident and since the pedestrians did not know what hit them, there is no

evidence which places appellee behind the wheel of the automobile which struck the pedestrians at the time the accident occurred.").

C. The Erroneous Admission of the Lake Wales Evidence as Inextricably Intertwined Requires Reversal for a New Trial.

The admission of the Lake Wales evidence under the inextricably intertwined theory served to deny Davis his right to a fair trial and requires reversal. The judge used the evidence to impermissibly stack inferences to find Davis was the perpetrator at BP. Evidence that is inextricably intertwined is, by definition, relevant, for any purpose. The judge did not limit the use of the Lake Wales' evidence, although the judge placed limits on the admission of some facts deemed overly prejudicial. The judge's references to the Lake Wales case in his final order show that he did consider the evidence for propensity and bad character, which was an improper use of the collateral crime evidence.

In a nonjury trial, a judge is presumed to have disregarded inadmissible evidence, but the judge's express and specific finding of admissibility on the record or a statement on the record disclosing that the trial judge has actually relied upon the erroneous evidence to support the verdict rebuts that presumption. Petion v. State, 48 So. 3d 726, 730 (Fla. 2010). The judge's specific finding of admissibility of the many Lake Wales witnesses under the inextricably intertwined doctrine here rebuts any presumption that the judge limited his consideration of the evidence to a narrow purpose. Cf. Schwab v. State, 636 So. 2d 3, 7 (Fla. 1994)("There is no indication in the record that the judge

did other than what he stated he would do.").

Allowing the Lake Wales evidence as inextricably intertwined unduly influenced the judge's view of the facts and his ultimate decision to find Mr. Davis guilty of the charges in this case. Although many of the details of the Lake Wales crimes were omitted by the State during this trial, the trial judge considered all the details from the Lake Wales trial anyway, even details that were not put in evidence. In his written Analysis of Guilt, the judge referred to the jury verdict in the Lake Wales case and to details of the Lake Wales' trial that did not come into evidence in this case as evidence pointing to Davis's guilt. (See Issue II).

Finally, the defense was procedurally hamstrung in its ability to mount a vigorous defense to the Lake Wales charges (and by extension the BP charges) without opening the door to irrelevant details about the chaos on the scene in Lake Wales that likely affected the witnesses' ability to observe the perpetrator. Judge Jacobsen recognized at the pretrial hearing that by finding the events inextricably intertwined, this problem for the defense would be unavoidable. The identification testimony by the Lake Wales' witnesses was irreconcilable on key points. Challenging that tenuous identification evidence was central to the defense.

D. Because the State, Below, Waived its Option to Rely on Williams Rule, this Court Should Not Engage in a Tipsy Coachman Analysis or Otherwise Rely on a Williams Rule Rationale to Find the Error Harmless.

The State waived its right to ask the trial judge to consider

the evidence under a Williams rule theory, so the State should not be permitted to change its position here to argue that the evidence was admissible under that section of the Evidence Code. The State repudiated reliance on Williams rule as a matter of strategy, and, in so doing, it explicitly waived the right to invoke that theory of admissibility. "The touchstone of waiver is a knowing and intentional decision." United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005). "[A] waiver is the manifestation of an intentional choice not to assert the right." United States v. Cooper, 243 F. 3d 411, 416 (7th Cir. 2001); see also United States v. Brodie, 507 F.3d 527, 530 (7th Cir. 2007) (explaining that waiver of a right is an intentional relinquishment which "extinguishes any error and precludes appellate review"). "Deviation from a legal rule is 'error' unless the rule has been waived." United States v. Olano, 507 U.S. 725, 732-33 (1993). Cf., LaMarca v. State, 785 So. 2d 1209, 1216 (Fla. 2001) (Because appellant waived the presentation of mitigating evidence, he cannot subsequently complain on appeal that the trial court erred in declining to find mitigating circumstances that might otherwise have been found). Because the State explicitly rejected Williams rule as a basis for admitting the collateral crime evidence, it would violate due process to now rely on Williams rule as a basis for upholding the trial court's erroneous ruling.

The doctrine of estoppel against inconsistent positions provides that a party who assumed a certain position in a legal proceeding may not thereafter assume a contrary position. See

Sanchez v. Gen. Motors Acceptance Corp., 842 So. 2d 283 (Fla. 3d DCA 2003); Dubois v. Osborne, 745 So. 2d 479 (Fla. 1st DCA 1999). The doctrine serves to prevent a party who has gained something from the assertion of its first position to, by the assertion of the second, inconsistent position, gain something more, to which it would not have been entitled under the first position. By taking the position that the other-crime evidence was inextricably intertwined and by asking the judge not to consider the evidence under Williams rule, the State gained the advantage of admitting a large quantity of irrelevant collateral crime evidence for an improper purpose.

The tipsy coachman doctrine cannot be the basis for affirmance where the potentially alternative basis for admitting evidence was not advanced and ruled on in the trial court. See Robertson v. State, 829 So. 2d 901, 908-09 (Fla. 2002) ("[B]ecause the State never attempted to seek the admission of this evidence on the basis of Williams rule, Robertson never received an opportunity to present evidence or make argument as to why the incident involving his ex-wife should not have been admitted under the Williams rule."). Even if the State can show that some limited evidence about the matching of the bullets from the Lake Wales case could have been admitted under a theory other than the inextricably intertwined theory it advanced in the trial court, reversal is required because any other grounds for admission would necessarily require a more limited consideration of the evidence. The admission of evidence under section 90.404 requires a limiting

instruction in a jury trial. And before evidence is admitted under section 90.404, the trial judge is required to make an individualized, factually intensive inquiry on (1) whether that the defendant committed the collateral crime, (2) whether the other crime meets the similarity requirements, (3) whether the other crime is too remote so as to diminish its relevance, and (4) whether the prejudicial effect of the other crime substantially outweighs its probative value. Robertson, 829 So. 2d at 907-08.

Judge Jacobsen never made a preliminary finding that Davis actually committed the collateral crimes. The Lake Wales evidence could not be properly admitted under section 90.404, in any event, because the crimes lacked similarity with the charged offenses. "In cases where there are significant dissimilarities between the collateral crime and the crime charged, the evidence tends to prove only two things—propensity and bad character—and is therefore inadmissible." Gore v. State, 599 So. 2d 978, 984 (Fla. 1992) (citing Peek v. State, 488 So.2d 52, 55 (Fla. 1986), and Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981)), see also Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990) ("Erroneous admission of collateral crimes evidence is presumptively harmful."), Castro v. State, 547 So. 2d 111 (Fla. 1989) (same).

An error may be found to be harmless only when there is no reasonable possibility that it contributed to the conviction. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). There was no physical evidence linking Davis to the BP crime scene and the State relied on a stacking of inferences involving the gun to

prove Davis's criminality. The inextricably intertwined doctrine was selected by the State as a matter of strategy which put the defense in the position of cross-examining the identification witnesses without discussing the chaos on the scene in Lake Wales. This was a significant disadvantage because the question of whether Davis committed the Lake Wales crimes remained a hotly contested issue throughout the trial and was the feature of this case. The Lake Wales evidence was used for the improper purpose of propensity and overall bad character. The error of admitting and considering the Lake Wales case as inextricably intertwined was an abuse of discretion and harmful error that violated Davis's constitutional rights to due process and a fair trial. U.S. Const., Amends. 5, 6, 14; Art. 1, § 9, Fla. Const.

ISSUE II: THE TRIAL COURT ERRED IN RELYING ON FACTS NOT IN EVIDENCE TO FIND DAVIS GUILTY, I.E., THE VERDICTS IN THE LAKE WALES CASE AND DETAILS OF EVENTS THAT OCCURRED INSIDE THE HEADLEY INSURANCE AGENCY.

In the trial judge's final order, details about the Lake Wales case are discussed that were not presented by the State in the trial of this case. The judge mentioned three times in the "Facts" and "Analysis of Guilt" sections of the order that Davis was found guilty by a jury of the Lake Wales crimes. The order demonstrates that the verdicts and other evidence from the prior trial were relevant to the judge's determination of guilt in this case, even though the verdicts and other evidence mentioned were not admitted during the guilt-phase of the trial in this case.

In the "Facts" section of the final order, the judge wrote:

> On December 13, 2007, a robbery and two murders occurred at the Headley Insurance Agency in Lake Wales, Florida.

Further, the judge wrote:

> On Thursday, December 13, 2007, the Headley Insurance Agency in Lake Wales was robbed and Yvonne Bustamonte and Juanita "Jane" Luciano were bound with duct tape, saturated with gasoline, and set on fire. They died as a result of their injuries.

There was no evidence presented by the State in this case that the insurance agency was robbed and that the two women "were bound with duct tape, saturated with gasoline, and set on fire." None of the witnesses who testified for the State in the guilt phase addressed these details, nor the fact that the women died from their injuries.

Further, the judge wrote in the sentencing order:

> The Jury in case number CF07-009386 found, beyond and to the exclusion of all reasonable doubt that the Defendant, Leon Davis, Jr., was the tall black male involved in the Headley Insurance Agency robbery and murders. He was seen wielding and shooting a firearm during those crimes. The Court finds that the same firearm fired the projectiles that were recovered during the investigation of the crimes occurring at the BP Station.

(34/5961,5965-66) Neither the jury verdicts nor the convictions in the Lake Wales case were admitted as evidence during the guilt phase of this trial.

In the "Analysis of Guilt" section of the order, the judge wrote:

> The circumstantial and non-circumstantial evidence concerning the Headley Insurance Agency crimes proves, be-

> yond a reasonable doubt, that Leon Davis, Jr. robbed the Headley Insurance Agency and killed Yvonne Bustamonte and Juanita "Jane" Luciano as was found by the Jury in that case.

And, again, in the "Analysis of Guilt" section:

> The evidence comes down to this; Leon Davis, Jr. was positively identified as the gun wielding perpetrator of the Headley Insurance Agency crimes and was convicted of those crimes.

(34/5967-68, emphasis added)

As the trier-of-fact, Judge Jacobsen was tasked with deciding the case based on the evidence presented at the trial, but his written order shows that he failed to do this. He failed to disregard facts learned during the pretrial hearings and failed to base his verdict only on the evidence presented in this trial.

Judge Jacobsen was fully aware of the facts of the Headley Insurance crimes because studied the transcript of that trial in preparation for the pretrial hearing on the collateral-crime evidence that occurred on July 3, 2012. He explained how he had prepared for the hearing by outlining the testimony of the Headley witnesses.

> THE COURT: Just to set this up, we're here this morning in regard to State versus Davis. This is Case CF07-9613. To put this in some context, the state had earlier filed its motion or notice of intent to prove crimes, wrongs, or acts -- other crimes, wrongs, or acts. And the defense has, in essence, formally or, at least, orally moved in limine to restrict some of the testimony that might be forthcoming concerning the crime that occurred at what's been called the Headley Insurance office. We had a preliminary hearing on this, where the notice was provided to me. I had an opportunity to review. We generally discussed the contents of it, and some of what we need to anticipate as far as possible testimony. At that time, the state provided me

> with a CD of the transcripts of the testimony taken at the Leon Davis trial back in August, 2011.
>
> * * * *
>
> THE COURT: What I was looking at was the dates that the transcripts were actually done. So, yeah, I see that trial held January 18, 2011, before Judge Hunter. What I have done in preparation for today was, I went through and read pretty much the entire transcript, but have outlined the testimony of the various witnesses called by the state. Not each and every one of them. I used as the initial point of reference the names listed in the notice, and then I started looking at those that might have had testimony about certain subjects which may or may not be inextricably intertwined with the case that is currently before this court. So that's kind of the backdrop of what I have done. I felt very much like I was back in private practice, outlining depositions as I went through and outlined the various facets and the testimony of the witnesses that were presented by the state.

At the pretrial hearing of July 3, 2012, the judge ruled that the State should not bring out evidence of the fire inside the Headley Insurance Agency and the details of what occurred inside the agency (26/4505), and so those facts never were admitted or discussed during the trial in this case. It is apparent from the final order that the judge's reading and outlining the transcript of the Lake Wales trial influenced his decision when he sat as the trier-of-fact for this trial because he considered facts that were excluded from this trial.

Because the order shows that he failed to confine his decision to the evidence presented at this trial and instead considered facts not in evidence, the judge violated Davis's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. "The theory of our system is that the

conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes, J.). A judgment based on testimony or other evidence that was not properly presented to the trier-of-fact violates the Fourteenth Amendment because "conclusions to be reached in a case" must be "induced only by evidence and argument in open court." Id.; see Skilling v. United States, 130 S. Ct. 2896, 2913 (2010) (quoting Patterson).

It is a central guarantee of fairness that the factfinder does not have a predetermined notion about the facts of the case. See Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("[A] juror must be 'indifferent as he stands unsworn.' . . . His verdict must be based upon the evidence developed at trial.") (quoting Lord Coke); Bridges v. California, 314 U.S. 252, 271 (1941) ("The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court."). The premise that a trial entails a decision based solely on the evidence admitted in the case is among the core group of procedures protected by the due process clause as part of the notion of "fundamental fairness." See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24-25 (1981). "[T]he requirement that the jury's verdict be based on evidence received in open court" is among those "legal procedures" that protect the "very purpose of a court system." Sheppard v. Maxwell, 384 U.S. 333, 350-51 (1966).

Evidence that was previously presented in open court, but to

a different jury, cannot serve as the basis for a decision unless it is presented anew. When the trial judge here relied on the evidence and the verdict in the Lake Wales trial, he violated the well-established principle of due process that each verdict be based on evidence that has been introduced and subject to cross-examination. See, e.g., Bridges, 314 U.S. at 271; see also Lee v. Illinois, 476 U.S. 530, 540 (1986) (holding confrontation rights were violated when trial judge who conducted bench trial expressly relied on the codefendant's untested confession in finding Lee guilty). "There are few subjects, perhaps - upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Lee, 476 U.S. at 540 (citations omitted).

This Court addressed an error like this in Dailey v. State, 594 So. 2d 254, 259 (Fla. 1991), where the sentencing order noted that the judge considered evidence presented at the prior trial of a codefendant: "In considering evidence from a different trial that was not introduced in the guilt phase of the present trial, the trial court deprived Dailey of the opportunity to rebut this proof." 594 So. 2d at 259 (citing Engle v. State, 438 So. 2d 803 (Fla. 1983)). Judge Jacobsen's references in the sentencing order show that he relied on the prior verdict instead of strictly on the evidence submitted during the trial to determine that Davis was the perpetrator at the Lake Wales scene, and by extension,

this case. Further, the remarks in the sentencing order portray Davis as a person of bad character with the propensity to commit robbery and murder, which demonstrate that the trial judge used the extra-record facts for an improper purpose: as propensity and bad character evidence. The only possible relevance to the fact that Davis was convicted of committing a robbery at the Headley Insurance Agency would be to show propensity, since Davis was accused of attempted robbery in this case. And reference to the Lake Wales victims as murder victims who were doused with gasoline can only be construed as relevant to the issue of bad character. The trial court's reliance on the evidence and verdict from the prior Lake Wales trial to find Davis guilty in this case violated Davis's rights to a fair trial and due process and his right of confrontation. Amends. 5, 6, 14, U.S. Const.; Art. 1, § 9, Fla. Const. A new trial is required.

ISSUE III: THE TRIAL COURT ERRED BY ALLOWING IMPEACHMENT OF VICTORIA DAVIS WITH STATEMENTS THAT WERE NOT MATERIALLY DIFFERENT FROM HER TRIAL TESTIMONY AND BY USING THE PROSECUTOR'S IMPEACHING QUESTIONS AS SUBSTANTIVE EVIDENCE TO CONTRADICT THE TRIAL TESTIMONY REGARDING THE TIME THAT LEON DAVIS RETURNED HOME ON THE NIGHT OF THE BP SHOOTINGS.

The trial court improperly allowed the State to attempt the impeachment of Victoria Davis and then erred by using the impeaching questions posed by the prosecutor as substantive evidence against Davis regarding his whereabouts at the time of the BP

incident.

A. Error to Allow the Attempted Impeachment of Victoria Davis

It was error to allow the State to attempt the impeachment of Victoria with her grand jury testimony because there was no material inconsistency shown between her trial testimony and her grand jury testimony where Victoria maintained a memory lapse as to the events of December 7, 2007, and as to the statements she made to the grand jury almost five years earlier.

> In a case where a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the witness with a prior inconsistent statement. Of course, the statement should be truly inconsistent, and caution should be exercised in permitting impeachment of a witness who has given favorable testimony but simply fails to recall every detail unless the witness appears to be fabricating.

Morton v. State, 689 So. 2d 259, 264 (Fla. 1997) (emphasis added).

When Victoria was questioned on direct as to Leon's activities on the night of December 7, 2007, she was not able to recall what time Leon had returned home from shopping that evening. The prosecutor questioned her about her grand jury testimony from January 2008, and she maintained a memory lapse:

> Q At some point in time after he brought Garrion to your house, did Leon go and leave the residence by himself, leaving you and Garrion there?
>
> A Yes.
>
> Q What time would that have been?
>
> A I don't remember. If I'm remembering off what I had to read earlier, it was anywhere between 6:00 and 7:00.
>
> Q And I know you said it's been almost five years.

A Yes.

Q How long do you recall Leon being gone?

A Not long.

Q And when you say not long, about --

A I remember it wasn't too long because I knew it had to be maybe like an hour or so because we -- we had to get dinner. We had to get something to eat.

Q Did Leon say where he was going?

A To the store.

* * * *

Q And do you remember what time he returned that night?

A Sitting here, no, I don't remember.

Q I want to ask you to take a look --

MR. WALLACE: And, Bob, this is going to the grand jury testimony on Page 9, Line 2.

Q What I'd like you to do is, Ms. Davis, read to yourself the lines I have highlighted here.

A Okay. Okay.

Q And what I'd like to ask you is whether or not you recall talking about this incident?

A I do recall talking about it.

Q Okay. About what time was it that Leon came home that evening after he had gone to the store?

A Like I said -- like, if I'm sitting here saying I can remember, I can't. But if I'm going off this, and that's what I said -- I said -- I'm not positive, but anywhere between 9:00 or 9:30.

On cross, Victoria testified that Leon had been gone about an hour or so and possibly could have been home earlier than

9:00.

Q [by MR. NORGARD] . . . And you've indicated to us that you believed he had left around 6:00 or 7:00.

A Yeah.

Q And your recollection is, is that he had not been gone very long; is that correct?

A I don't remember him being gone long, because he knew I wasn't feeling good.

Q All right. And the plan was that when he got back, you all were going to go to eat dinner?

A Yes.

Q And so, again, your recollection was that he had been gone maybe an hour or so?

A Yes.

Q Okay. And at least according to the grand jury testimony, the latest that he would have been home would have been 9:30; correct?

A If that's what they have, yes.

Q Okay. But then he could have been home even as early as 9:00, is that right?

A Yes.

Q Or even earlier? Just --

A Possibly.

On redirect, the Prosecution attempted to impeach Victoria with a prior inconsistent statement, and a Defense objection was overruled. Victoria did not deny making certain statements to the Grand Jury, but she did not recall the testimony.

Q Okay. And did you tell the officer that Leon was gone for a few hours that evening?

A I don't remember.

Q Ms. Davis --

A I remember it wasn't long, so I don't think I would have said a few hours.

Q As you sit here today, do you remember how long he was gone?

A Exactly?

Q No, not exactly.

A I remember that it wasn't too long, that it had to be somewhere around an hour, maybe a little more or a little less. I can't exactly tell you. I just know it wasn't that long because he knew I was sick.

Q I want to ask you to listen to a series of questions and answers. And again this is the grand jury testimony, and I'll be on Page 8, beginning --

A These are my answers?

Q What I'm going to do is I'm going to read you a question and an answer.

A Okay.

Q And then wait until I've finished, and then I'll ask you a question about what I've just read to you.

A Okay.

Q This is on Page 8, beginning at Line 1. Question: All right. Was there a time on the evening of December the 7th, 2007, when Leon left the house that evening? Answer --

MR. NORGARD: Your Honor, I would have an objection. She said she doesn't really remember. If he's doing that -- I mean, I think the appropriate way to do it, because of that, would be to do it as refreshed recollection by allowing her to see it, versus reading it as true impeachment -- as opposed to true impeachment.

THE COURT: If she doesn't remember, it's not a matter of impeaching her. It's a matter of refreshing her recollection. "I don't remember" is not something that you can impeach on, as I recall.

MR. AGUERO: Well, Judge, but she said, I'm sure it wasn't that long.

MR. WALLACE: Right.

MR. AGUERO: So it is a matter of impeachment.

* * * *

MR. NORGARD: Yeah. I mean, the objection I would have is that the one on Page 8 is exactly what she's already told us, and the one on Page 9 is what she's already told us.

MR. WALLACE: Your Honor, my position is, it is proper impeachment, because it does impeach her statement that he was only gone for a short time.

THE COURT: Okay. I'm going to overrule the objection. What I'm looking at specifically is in Ehrhardt, Section 608.4 talking about impeachment: Inability of a witness to recall a fact is not inconsistent with prior statement. But you're saying that there's an inconsistency in her testimony today and what she said in this prior statement.

MR. WALLACE: That's the state's position, yes, sir.

THE COURT: So I'll allow -- I'll overrule the objection on that basis, that it's a prior inconsistent statement.

MR. NORGARD: What I'll do is, I'll let him read the question and answer on Page 8, and then I'll do my objection and tell you why.

Q (By Mr. Wallace) Ms. Davis, let me again read a question and answer, and then I'll ask you a question about that. Okay?

A Okay.

Q On Page 8, Line 1. Question: All right. Was there a time on the evening of December 7th, 2007, when Leon left the house that evening? Answer: It wasn't an exact time. It's not exact time, but between 6:00 and 7:00. Question: In between 6:00 and 7:00, he left? Answer: Yes, sir.

MR. NORGARD: And my objection is, that's what she testified to.

THE COURT: Right. But I think he's - that is a preface for the balance of the statement, as I understand

it.

MR. WALLACE: That is correct, Your Honor. And --

THE COURT: So I'll overrule the objection that being -- that statement only being a predicate.

MR. WALLACE: Right.

Q (By Mr. Wallace) But I do want to ask, do you remember being asked that before the grand jury, and giving that answer?

A I remember them asking me questions, but I don't remember if -- I don't -- I don't understand what you're trying to ask me, because I'm -- it was five years ago. I know they asked me a series of questions, what time he left, what time he came back, and everything.

Q I think the simplest way is to ask: Do you dispute making that statement to the grand jury?

A No.

Q Okay. And I'll be on Page 9, beginning at Line 2. And, again, let me read the series of questions and answers. Question: About what time did he return that night? Answer: Around 9:00. Question: Could it have been later than 9:00? Answer: I'm not positive, but I know it was probably between 9:00 and 9:30, no later. Question: Okay. Between 9:00 and 9:30? Answer: Yes, sir. Do you remember that series of questions and answers before the grand jury?

A I remember them asking me questions. I don't remember answering them, but --

Q Okay. Again, the bottom line question: Do you dispute making this statement that I just read to you, to the grand jury?

A No.

(S7/898-903).

The trial court erred in overruling the Defense objection because the State did not show that Victoria had made a prior inconsistent statement. "To be inconsistent, a prior statement

must either directly contradict or materially differ from the expected testimony at trial." State v. Smith, 573 So. 2d 306, 313 (Fla. 1990). The purpose of impeachment is to challenge credibility. Because the prosecution was not attempting to show that Victoria actually did remember the events of five years earlier, it was not in the position to impeach her testimony that she did not remember the details of the evening of December 7, 2007. It is error to allow the impeachment of a witness whose trial testimony is that of no recollection because it is not truly inconsistent with the previous statement.

> Florida courts have held that a witness's inability to recall making a prior statement is not synonymous with providing trial testimony that is inconsistent with a prior statement. See James v. State, 765 So.2d 763, 766 (Fla. 1st DCA 2000); Calhoun v. State, 502 So.2d 1364, 1365 (Fla. 2d DCA 1987) (deeming it improper to impeach a witness who testified that she could not recall stating that she had a reputation as an aggressive female police officer with the testimony of another witness who heard her make such a statement). In James, the district court adopted the reasoning employed by the Oregon Court of Appeals in holding:
>
> The controlling issue on appeal is whether it was appropriate to impeach [a witness'] asserted lack of memory by showing substantive statements that she made when her memory was fresh. As a matter of logic, that is not appropriate impeachment by inconsistent statement. The fact that a witness once stated something was true is not logically inconsistent with a subsequent loss of memory. The only thing that is inconsistent with a claimed loss of memory is evidence that suggests that the witness in fact remembers.
>
> James, 765 So.2d at 766 (quoting State v. Staley, 165 Or.App. 395, 995 P.2d 1217, 1220 (2000)).

Brooks v. State, 918 So. 2d 181, 200 (Fla. 2005); see also Rodriguez v. State, 65 So. 3d 1133, 1136 (Fla. 4th DCA 2011) ("[I]f the

crucial issue in a case is whether a traffic light was red, and at trial the witness cannot remember either the color of the light or the contents of an earlier statement, the witness cannot be impeached by a prior inconsistent statement that the light was red."); Espinoza v. State, 37 So. 3d 387, 388 (Fla. 4th DCA 2010) (Improper to permit witness to be impeached with previous statements about the incident during cross-examination where "The only foundation laid by defense counsel was that the witness had a lack of memory.").

Brooks is on point and mandates reversal for a new trial. The trial in this case occurred in September 2012, nearly five years after the events of December 2007. A common refrain from the State witnesses was the inability to recall details due to the passage of time. See S1/96, Brandon Greisman stating that he was uncertain of events because "this happened five years ago"; S1/118, Greisman stating, "I don't remember even giving a taped statement, so you're pulling up something I don't remember"; S1/119, Greisman testifying, "I might have said that, I don't -- I don't recall that"; S1/125, Greisman, about his prior testimony, "If you say so. I don't remember."; and S7/855-56, Dawn Henry testifying she did not remember if there was a party for her son on December 13, 2007.

Mr. Greisman was the first witness to testify in this trial and the prosecutor and trial judge demonstrated their knowledge of the rules governing impeachment of a witness with a memory lapse when the State objected to the defense attorney's attempt to

impeach Greisman. The trial judge sustained the objection on the basis his memory lapse was not a proper basis for impeachment with a prior inconsistent statement.

> Q [by defense attorney] Okay. You believe it was a short-sleeved shirt?
>
> A [by Mr. Greisman] I don't remember what I said.
>
> Q Do you recall giving a deposition in this case?
>
> A Yes, I do.
>
> Q All right. That was on March 31st, 2010. You recall that; right?
>
> A I recall being here.
>
> Q All right. At Page 60, Line 15, you were asked the question --
>
> MR. AGUERO: Judge, I object to him reading it.
>
> THE COURT: Sustained. You can show it to him to see if that refreshes his recollection. He said he doesn't remember, so that's not an inconsistent statement.
>
> Q. (By Mr. Norgard) All right. Read it to yourself.
>
> A Okay. Do I know long-sleeved or short -- sleeved? I don't.
>
> . . . .
>
> A I don't remember that far back.

(S1/125-126)

It was error for the trial judge to allow the State's impeachment of Victoria under these same circumstances. There was no suggestion made by anyone that Victoria was fabricating a memory lapse. Because the State did not allege that Victoria's memory lapse was a fabrication, the State could not show that her trial testimony was inconsistent with a prior statement. See

Brooks, 918 So. 2d at 201 ("Given the other detailed evidence provided by Haley and the fact that Brooks' retrial occurred six years after the murders were committed, there is no basis on which to conclude that Thomas fabricated her lack of recollection. For that reason, the trial court erred in permitting the impeachment of Thomas's trial testimony with her previous statement."); Davis v. State, 52 So. 3d 52, 54 (Fla. 1st DCA 2010) ("Although the court may allow impeachment when the witness appears to be fabricating his or her lack of memory, the trial court made no such finding below.").

Victoria consistently maintained the memory lapse when she was cross-examined by the defense attorney as to why Leon had gone to the store that evening. She maintained the memory lapse even after the defense attorney attempted to refresh her memory with a prior statement. (S7/881-83) This exchange occurred before the State's redirect when the objected-to questioning at issue occurred.

Because the State did not offer a prior inconsistent statement to Victoria's testimony that she did not remember what time Leon returned home nor the statements she made during the grand jury proceedings in January 2008, the trial judge erred by overruling the defense objection and allowing the State to read Victoria's grand jury testimony under the guise of impeachment.

B. Error in Crediting Impeachment Material as Substantive Evidence

The trial court compounded the error by relying on the impeaching statements as substantive evidence. See Brooks, 918

So. 2d at 201 ("The State compounded the error by impermissibly relying on the impeachment as substantive evidence in closing arguments.") (citing McNeil v. State, 433 So. 2d 1294, 1295 (Fla. 1st DCA 1983)); Rankin v. State, 143 So. 2d 193 (Fla. 1962); Pitts v. State, 333 So. 2d 109, 111 (Fla. 1st DCA 1976) ("When a witness testifies that he does not remember what happened, the State may not use a prior statement of the witness to present substantive evidence to the jury."); United States v. Hill, 481 F.2d 929, 932 (5th Cir. 1973)(holding that impeaching testimony of a Government witness "may not be used to smuggle in the testimony which the Government expected the witness to supply"); United States v. Davis, 487 F.2d 112, 123 (5th Cir. 1973) (stating that use of a prior inconsistent statement for the purpose of supplying anticipated testimony "would be tantamount to permitting the use of hearsay").

The prosecutor put the substance of the grand jury testimony before the court by reading it under the guise of impeachment but he did not offer it into evidence. Victoria did not affirm she made the statements to the grand jury that the prosecutor asked about when she maintained that she did not remember her grand jury testimony, nor did she deny that she made the statements. No substantive evidence was admitted during the State's case to show that Leon Davis was away from home at the time of the BP incident.

However, the trial court considered the impeachment of Victoria as substantive evidence that Davis did not return home until after 9:00 p.m. The judge articulated this in his sentenc-

ing order.

> Victoria Davis testified at trial that the Defendant was gone for a "short period of time" and was only gone for an hour or so. However, she admitted that the Defendant could have gotten home as late as 9:30 p.m. and, indeed, testified in front of a Grand Jury that the Defendant did not arrive home until sometime between 9:00 p.m. and 9:30 p.m. This statement to the Grand Jury can be used as substantive evidence. See, *Moore v. State*, 452 So. 2d 559 (Fla. 1984).

(34/5962-63). The Court's recitation of what was read by the prosecutor is not entirely accurate. According to the prosecutor, what Victoria told the grand jury was that he returned home around 9:00 and she was not positive if it could have been later than 9:00.

> Q Okay. And I'll be on Page 9, beginning at Line 2. And, again, let me read the series of questions and answers. Question: About what time did he return that night? Answer: Around 9:00. Question: Could it have been later than 9:00? Answer: I'm not positive, but I know it was probably between 9:00 and 9:30, no later. Question: Okay. Between 9:00 and 9:30? Answer: Yes, sir. Do you remember that series of questions and answers before the grand jury?

Aside from the accuracy problem, the bigger issue here is that the prosecutor's impeachment cannot be used as substantive evidence. While the Moore case cited by Judge Jacobsen allows that grand jury testimony may be offered by the prosecution as substantive evidence, that case was not relevant in this instance because Victoria's grand jury testimony was not offered as substantive evidence by the prosecution.

This Court has recognized that it may be impossible for a jury to disregard impeaching facts that have not been admitted as

substantive evidence.

> When asked about giving a prior statement containing these facts, the witness does not deny having made the prior statement but asserts an absence of recollection of the facts in question. . . . Even if the jury is instructed that the facts should only be considered for purposes of impeachment, it may be impossible for the jury to disregard these facts as substantive evidence. Thus, the impeachment which appears to be permitted under the literal wording of section 90.608 can be subject to abuse.

Morton v. State, 689 So. 2d 259, 262 (Fla. 1997); see also Rankin v. State, 143 So. 2d 193, 196 (Fla. 1962) (holding State could not introduce content of witness' prior statements through questions to witness who does not recall statement). "The legal distinction between direct evidence and impeaching evidence is a fine one for the lay mind to draw." Dowell, Inc. v. Jowers, 166 F.2d 214, 219 (5th Cir. 1948); see also Slade v. United States, 267 F.2d 834, 839 (5th Cir. 1959) (quoting Dowell).

In Dudley v. State, 545 So. 2d 857 (Fla. 1989), this Court reversed where the prosecutor argued the prior inconsistent statement as substantive evidence during closing arguments because "[a]lthough limiting instructions were given to the jury, the evidence was used by the state as substantive evidence—not in its limited impeachment capacity." 545 So. 2d at 859-60.

C. The Errors Require Reversal of the Convictions

While there is a presumption in a bench trial that a judge did not consider inadmissible evidence, that presumption fails when the judge overrules an objection or remarks on the actual consideration of the evidence. Petion v. State, 48 So. 3d 726,

735 (Fla. 2010); State v. Crofoot, 97 So. 3d 866 (Fla. 1st DCA 2012). The fairness of the trial was compromised when the judge overruled the defense objection to the prosecutor's impeaching questions and then commented in his order that the grand jury testimony of Victoria could be used as substantive evidence against Davis to show had the opportunity to commit the offenses given the time he returned home. The question of whether Davis had the opportunity to commit the crimes at the BP station was in dispute and was an important factor in analyzing the guilt-phase evidence, as shown from the court's statements in its order. Because the BP incident occurred at around 9:00, Davis could not have committed the crimes unless he returned home significantly later than 9:00.

Because the trial court affirmatively remarked on Victoria's grand jury testimony as substantive evidence that Davis returned home after 9:00, thereby giving him the opportunity to commit the offense in Lake Alfred and make the (twenty-two minute) drive (under traffic optimal conditions) home to Winter Haven, it considered facts not in evidence to bolster the State's tenuous evidence on the identity element. This violates Davis' right to a fair trial and to due process under the U.S. and Florida Constitutions. Amends. 5, 14, U.S. Const.; Fla. Const. Because the trial court used the impeaching questions to supply a necessary element of the State's circumstantial case, this court should reverse for new trial.

ISSUE IV: THE TRIAL COURT VIOLATED DAVIS'S RIGHT TO DUE PROCESS WHEN IT SHIFTED THE BURDEN OF PROOF TO DAVIS, AS EVIDENCED BY THE COURT'S STATEMENT THAT DAVIS FAILED TO CORROBORATE HIS ALIBI.

The trial judge's written Analysis of Guilt reflects that he put the burden on Davis to substantiate with corroborating evidence his testimony that he was shopping at a mall on the night in question. The trial court wrote:

> On the evening of December 7, 2007, Mr. Davis left his home sometime between 6:00 p.m. and 7:00 p.m. in his wife's Nissan Altima, allegedly to go shopping. His whereabouts are unknown until he returned sometime after 9:00 p.m. to 9:30 p.m. Mr. Davis claims he was at the Eagle Ridge Mall, but there is no evidence whatsoever to corroborate that claim.

(S34/5967, emphasis added). In its Analysis of Guilt, the trial court explained that the primary evidence against Davis was the projectiles retrieved from the Headley and BP crime scenes that were fired from the same weapon (34/5966). The court then concluded that Davis was the perpetrator at the Headley crime scene (34/5967). But the court went beyond the fact that the gun was linked to both scenes and explained, "there are numerous other circumstantial facts that lead to the conclusion, beyond a reasonable doubt, that Leon Davis, Jr. committed the BP murders." (34/5967). These other facts include that Davis had financial difficulties at the time of the events and that Davis purchased a firearm (34/5967). The court then inserted the paragraph about Davis having testified he was at the Eagle Ridge Mall, and added: "but there is no evidence whatsoever to corroborate that claim."

(34/5967).

Unless it were shown that Davis was unique in having financial difficulties in December 2007 or in purchasing a gun around that time, these facts are not statistically significant in terms of identifying the perpetrator because they are based on generalities. See, e.g., Evans v. State, 26 So. 3d 85, 96 (Fla. 2d DCA 2010)(Wallace, J., concurring in part and dissenting in part) (rejecting state's argument that latex gloves on defendant established his constructive possession of cocaine: "Even if all drug distributors wear latex gloves to protect themselves and their merchandise, most people who wear latex gloves are not drug distributors.").

The trial court's observation that Davis failed to show corroboration for his alibi is highly significant because the remark is set in the context of explaining the evidence tending to prove that Davis committed the crimes. The trial court's statement in the order, placed in context, shows that the judge shifted the burden of proof to Davis to disprove that he was at the BP crime scene on the night of the crime. This was a violation of Davis's constitutional right to due process. U.S. Const., Amend. 14; Stump v. Bennett, 398 F.2d 111, 118 (8th Cir. 1968) ("when the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, . . . then it is certain that the due process clause of the Fourteenth Amendment has been violated").

Due process requires the prosecution to prove beyond a

reasonable doubt every fact necessary to constitute the crime charged, including the defendant's criminal agency. In re Winship, 397 U.S. 358, 364 (1970); Sandstrom v. Montana, 442 U.S. 510, 520 (1979); Mullaney v. Wilbur, 421 U.S. 684, 704 (1975).

> Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. 197, 215 (1977).

Even if the trial judge disbelieved Mr. Davis's testimony as to his shopping trip, the State still had the burden of proving all the elements of the offense because false exculpatory statements cannot by themselves prove a defendant's guilt. United States v. Rahseparian, 231 F.3d 1257, 1263 (10th Cir. 2000). When a defendant puts forth an alibi, he does not admit any aspect of the State's case. See United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976) ("[F]ailure to establish an alibi does not properly constitute evidence of guilt since it is the burden of the government to prove the complicity of the defendant, not the burden of the defendant to establish his innocence"). A misidentification or an alibi defense simply denies the possibility of having committed a crime. Stump v. Bennett, 398 F.2d at 116; Robinson v. State, 316 A.2d 268, 272 (Md. App. 1974); see also Robertson v. State, 685 A.2d 805, 810 (Md. App. 1996) ("An alibi defense serves merely to negate an element of the crime, and is, therefore, not

an affirmative defense. As such, the defendant does not bear the burden of proof on that issue."); State v. Gladding, 585 N.E.2d 838, 843 (Ohio App. 3d 1990) ("Alibi is used to support the general plea of not guilty and simply applies to the claim that the defendant was elsewhere when the crime was committed.").

Because the State always bears the burden to show that the defendant is the person who committed the crime charged, a due process violation occurs if a jury is instructed that the defense has some burden of proving alibi. Smith v. Smith, 454 F.2d 572, 579 (5th Cir. 1971) (Invalidating Georgia alibi instruction and noting that "a shift in the burden of proof of an essential element of the crime does rise to constitutional proportions and renders the trial fundamentally unfair"); Stump v. Bennett, 398 F.2d at 122 (Invalidating Iowa alibi instruction that "deprived [defendant] of the presumption of innocence and shifted to him the burden of persuasion to negative an indispensable element of the crime, to-wit, his presence and participation at the time and place involved").

In the same vein, a prosecutor may not comment to a jury that a defendant did not call witnesses to corroborate his alibi because doing so could erroneously lead the jury to believe that the defendant carried a burden of introducing evidence to refute an element of the crime. See Lawyer v. State, 627 So. 2d 564 (Fla. 4th DCA 1993). This court recognized a narrow exception to this rule when a witness who could corroborate the alibi was not equally available to the State, see Jackson v. State, 575 So. 2d

181, 188 (Fla. 1991), but that exception does not apply here because there was no witness identified who could corroborate Davis's testimony. Davis was cross-examined on the issue of whether he ran into people he knew during his shopping trip and he said that he did not.

Because the trial court remarked upon the failure of the defense to produce corroborating evidence to show that Davis was at the Eagle Ridge Mall when he said he was, the trial court did what was constitutionally prohibited: it shifted the burden to Davis to prove his innocence. The trial court used the fact that the defense did not provide a corroborating witness to substantiate the alibi as a circumstance to bolster the State's circumstantial evidence of identity, thereby reducing the State's burden to prove identity. This error requires reversal for a new trial.

ISSUE V: THE TRIAL COURT ERRED IN USING THE FACT OF DAVIS'S PRIOR THEFT CONVICTIONS AS CIRCUMSTANTIAL EVIDENCE OF HIS GUILT FOR ALL CHARGES BECAUSE THE PRIOR CONVICTIONS WERE ADMITTED FOR THE LIMITED PURPOSE OF PROVING ONLY ONE ELEMENT OF THE CHARGE OF FELON IN POSSESSION OF A FIREARM.

Prior to trial it was agreed that Count V, the possession of a firearm charge would be severed from the other charges for the jury trial. (4/573-74,602;S117/11884). However after Davis waived his right to a jury, the charges were "unsevered" and all charges were tried together (27/4755). The State introduced evidence of Davis's prior grand theft convictions in this case for the limited

purpose of proving the crime of possession of a firearm by a convicted felon.

> MR. WALLACE: Your Honor, while we're talking about these exhibits, we're talking about Exhibit Number 9047, which is a certified copy of convictions in Case Number CF07-298, and 9048, State's Exhibit, which is the certified copy of the conviction in CF07-886, we simply ask if the defense is willing to stipulate that these can be introduced without calling someone from the clerk's office to validate these, since they are certified copies and have a seal on them.
>
> MR. NORGARD: We would -- I have no objection to it, with one limitation, is that -- it's being offered to prove he has prior felony convictions. And the nature of the convictions that's reported in there would be irrelevant to that. And so solely for the limited purpose of establishing prior felony convictions.
>
> MR. WALLACE: And that is correct, Your Honor. That is what we're attempting to establish through it.
>
> THE COURT: So for the purposes of Count 5 of the indictment, possession of a firearm by a convicted felon, these demonstrate or evidence the existence of prior felonies.
>
> MR. NORGARD: Yes, sir.
>
> THE COURT: Be received for that purpose as Exhibits 9047 and 9048. And, again, Mr. Davis, is that with your permission, without having to call somebody up here from the clerk's office?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Thank you.
>
> (A certified copy of the Defendant's conviction in Case Number CF07-298 was received in evidence as State's Exhibit Number 9047.)
>
> (A certified copy of the Defendant's conviction in Case Number CF07-886 was received in evidence as State's Exhibit Number 9048.)

In the trial judge's analysis of guilt, the fact that Davis

was a convicted felon is specifically cited as a circumstance leading to the conclusion that Davis committed the BP murders. In the sentencing order, under the Analysis of Guilt, the court detailed the facts and circumstances that lead to the verdicts:

> [T]here are numerous other circumstantial facts that lead to the conclusion, beyond a reasonable doubt, that Leon Davis, Jr. committed the BP murders.
>
> * * * *
>
> In spite of his financial difficulties, Mr. Davis decided to purchase a gun and spent $220.00 on a Dan Wesson .357 revolver. This is a very strange purchase, and an unlawful act, in light of the fact that the Defendant was a convicted felon on felony probation at the time of his acquisition of the firearm.

(34/5967).

This passage shows that the trial judge relied on facts not in evidence to find Davis guilty by using the evidence that Davis was a convicted felon at the time that he obtained the gun from his cousin as a fact tending to prove circumstantially that Davis was guilty of the BP murders. [See Issue II for the legal discussion of using facts not in evidence to sustain the conviction]. The prior grand theft convictions were admitted for a limited purpose, which was to prove an element of the charge of felon in possession of a firearm. By agreement, those prior convictions were not in evidence for any other purpose; the trial court could not use the fact of the prior convictions to conclude that Davis was a convicted felon who committed a new crime when he obtained the gun from his cousin. By using the grand theft convictions for the purpose of casting Davis in a bad light, as a convicted felon

who committed a new crime when he obtained a gun from his cousin, and then citing that as circumstantial evidence of his guilt in the BP murders the trial court violated Davis's constitutional right to due process under the Florida and U.S. Constitutions. A new trial is required.

ISSUE VI: THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO SHOW THAT DAVIS IS THE PERSON WHO COMMITTED THE CRIMES IN THIS CASE.

"[T]he state must prove the identity of the accused as the perpetrator beyond a reasonable doubt." Davis v. State, 438 So. 2d 973 (Fla. 2d DCA 1983) (citing Williams v. State, 68 Fla. 239, 67 So. 43 (1914)). The evidence taken in the light most favorable to the State was insufficient as a matter of law to show that Davis was the person who committed the crimes at the BP station. The State's evidence as to the identity of the perpetrator is wholly circumstantial. Therefore, not only must there be sufficient evidence establishing that Davis is the person that committed the crimes, but the evidence must also exclude Davis's reasonable hypothesis of innocence. See Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002).

A special standard of review applies where a conviction is based wholly upon circumstantial evidence.

> The special standard requires that the circumstances lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence."

Lindsey v. State, 14 So. 3d 211, 215 (Fla. 2009)(quoting Frank v. State, 121 Fla. 53, 163 So. 223, 223 (1935)). In Davis v. State, 90 So. 2d 629 (Fla. 1956), this court reversed a murder conviction, explaining that purely circumstantial evidence is not sufficient when it leaves uncertain several hypotheses.

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime,[] is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

90 So. 2d at 631-32. In Lindsey, 14 So. 3d at 215, this Court reaffirmed its duty to ensure that the State is held to its burden of proof.

> And, "[a]lthough the jury is the trier of fact, a conviction of guilt must be reversed on appeal if it is not supported by competent, substantial evidence." [Ballard v. State, 923 So. 2d 475, 482 (Fla. 2006)](quoting Crain v. State, 894 So. 2d 59, 71 (Fla.2004)).
>
> In Ballard, we held that it is the duty of "the courts to ensure that the State is held to its burden of proof when someone is charged with a serious crime and liberty and life are at risk. . . . [When a] case is purely circumstantial, we must determine whether competent evidence is present to support an inference of guilt 'to the exclusion of all other inferences.' " Id. at 485 (quoting Crain, 894 So.2d at 71).

Because the circumstantial evidence here does not support an inference of guilt to the exclusion of all other inferences, the

evidence is insufficient, and the conviction violates Davis's constitutional right to due process under the Fourteenth Amendment of the U.S. Constitution. See In re Winship, 397 U.S. 358, 364, (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

The trial court erred in denying the first motion for judgment of acquittal because the State produced insufficient circumstantial evidence to prove that Davis was the perpetrator, and it erred again in denying the renewed motion for judgment of acquittal at the close of all the evidence. Davis put forth a reasonable hypothesis of innocence that he was shopping at a mall and then out with his family on the night in question, which was not contradicted or rebutted by the State.

The State's case rested on forensic testimony linking the bullets in the Headley Insurance case to this instant case through the FDLE examiner who opined that based upon examination of the projectiles from the different crime scenes he inferred that the bullets were fired from the same unidentified gun. The State's case hinged upon a further inference that the same person fired that gun on both occasions.

"Where two or more inferences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramided to prove the offense charged, the evidence

lacks the conclusive nature to support the conviction." Collins v. State, 438 So. 2d 1036, 1038 (Fla. 2d DCA 1983), (citing Gustine v. State, 86 Fla. 24, 28, 97 So. 207, 208 (1923) ("Only by pyramiding assumption upon assumption and intent upon intent can the conclusion necessary for conviction be reached.")); see also State v. Sims, 110 So. 3d 113, 116 (Fla. 1st DCA 2013) (holding that circumstantial evidence of identity was insufficient to support convictions where "jury verdicts could be sustained only by stacking several inferences one on another").

The State's identity evidence essentially turned on Mr. Kwong's opinion testimony that the same gun was used at the BP station and in Lake Wales six days later. This evidence does not by itself establish that Davis was present at the BP station and committed the crimes. Assuming, arguendo, that the State showed that Davis committed the Lake Wales crimes six days after the events at BP, that fact alone will not produce a reliable legal conclusion that Davis committed the BP crimes. The gun used was never found and never linked to Davis, so one cannot reliably conclude that Davis had exclusive possession of it during the six-day interval between the two events.

The linking of the bullets from the two events does not identify one person as having committed both crimes because a gun is easily transferred between individuals. Any inference that the same person committed both crimes weakens with the amount of time that passes between two events because the opportunity to transfer a gun between individuals increases over time. In this case, too

much time elapsed between the two events for the gun evidence to be characterized as a reliable identifying characteristic of a particular individual. See State v. Hepburn, 460 So. 2d 422, 426 (Fla. 5th DCA 1984) (evidence was insufficient to show that Hepburn was driving automobile at the time of accident even though there was evidence that she was in possession of automobile on the day after the accident). With a six-day interval between the two events, an inference that the same person committed both crimes is too weak to support a criminal conviction.

In Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997), this court reversed a murder conviction for insufficient evidence, explaining that

> even where evidence does produce a positive identification, such as fingerprints, the State must still introduce some other evidence to link a defendant to a crime. See, e.g., Jaramillo v. State, 417 So.2d 257 (Fla.1982) (where only evidence connecting defendant to crime was fact that defendant's fingerprints were left at scene, evidence insufficient to convict). Here, the other evidence connecting Long to this murder was the carpet fiber; yet the State introduced no evidence to indicate that the carpet fiber could have come only from Long's car or that the carpet was placed in only a few cars.

The evidence in the instant case is weaker than the evidence in Long because there was no forensic evidence directly linking Davis to the BP crime scene. The inference that the same person committed both the BP and the Lake Wales crimes would be stronger if the two crimes had common characteristics or if there were other factors that tied the events together, but that common thread is missing here. The events here are akin to the insufficient evi-

dence discussed in Cox v. State, 555 So. 2d 352, 353 (Fla 1989):

> Cox did not know the victim, and no one testified that they had been seen together. Although state witnesses cast doubt on Cox' alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim.

The State's evidence in this case is hampered by the fact that the crimes at BP and Lake Wales bear no similarity in time, place, and manner, which the State recognized when it discarded the Williams rule argument. The many differences include (1) no geographical connection, where the episodes occurred in different cities, and (2) the different means of commission, where the BP events occurred after dark in a remote location off I-4 and involved a person disguised in dark clothing and a mask who ran from the scene and the Lake Wales events took place in an urban location in broad daylight and involved an undisguised person who walked away from the scene. There are many other obvious differences in the manner that the crimes occurred. The intervening time period between the two events, the geographical disparity, and the dissimilar methods render unreliable any inference that the same person committed both offenses simply based on the bullet analysis evidence.

Add to the disparities the reality that forensic evidence collected at the BP scene is inconsistent with a conclusion that Davis committed the offenses. See Davis, 90 So. 2d at 632 ("The pathologist who was the State's own witness, on direct examination, clearly established this possibility of innocence if his

testimony is to be believed.”). There were footwear impressions deemed significant by the officer with the tracking dog but the police did not submit Davis’s shoes for forensic examination because Detective Navarro could tell from visual observation that there was no way that Davis’s shoes made the shoe impressions found on the side of the road where the tire tracks were found (S7/1099,1105). The unsmoked Newport cigarette found near the tire tracks was deemed a significant piece of evidence and was tested for DNA, but the male DNA profile obtained from the cigarette did not match Davis’s profile (S7/1047). This evidence gives rise to a reasonable inference that someone other than Davis had been present in the remote location north of the gas station where witnesses spotted a car parked that night.

> If the facts in proof are equally consistent with some other rational conclusion than that of guilt, the evidence is insufficient. If the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be.

Gustine v. State, 86 Fla. 24, 27, 97 So. 207, 208 (1923).

The State conceded in its closing argument that its case rested on circumstantial evidence and that the State did not find a gun associated with the case and did not find the clothing that the perpetrator was wearing in the BP video (S10/1606,1608). The police obtained between one and three months worth of video taken by the security cameras at the gas station, but there was no evidence that Davis was on that video at any time.

The State never proved that Davis’s car was at the scene of

the crime. The testimony about a car parked near the gas station was vague and conflicting, and in no way could be said to reliably show that Davis's car was ever at the scene. E.g., Collins v. State, 438 So. 2d 1036, 1037-38 (Fla. 2d DCA 1983) (concluding that witness identification of vehicle was "ambivalent" where witness testified that because the parking lot was unlit and the vehicle windows were tinted, he could not say for sure that appellant's vehicle was the same vehicle he saw). The witnesses' vague description of the car parked near the gas station was insufficient to even justify a stop. Cf. Pantin v. State, 872 So. 2d 1000, 1003 (Fla. 4th DCA 2004) (stop of car matching description of a stolen late-model two door Mitsubishi with one occupant violated Fourth Amendment because it "described countless cars being driven on the roads of ... south Broward County").

There were no fingerprints, DNA, or any thing else that linked Davis to the BP crime scene. "The proof submitted is so meager that it leaves to conjecture much that must be proven beyond a reasonable doubt. For instance, the proofs taken as a whole are entirely consistent with the theory that some one other than appellant shot [the victim]." Stewart v. State, 158 Fla. 753, 758, 30 So. 2d 489, 491 (1947).

In arguing before trial that the Lake Wales evidence was critical to the State's case, the prosecutor acknowledged that the State had "no compelling forensic evidence" linking Davis to the BP crime scene without attempting to implicate him through the Lake Wales case:

> MR. WALLACE: . . . . [T]he analysis in this case is that the -- the firearms testimony that the same gun that was used at the Lake Wales was used in the BP is critical to the prosecution of the BP murders. It's not just extra evidence. It's not just -- it's actually critical to it, because from the BP case itself, there is no compelling forensic evidence.

(26/4459-62).

In arguing the motion for judgment of acquittal, counsel for Davis set forth the reasonable hypothesis of innocence that a different perpetrator could have committed the crimes at the BP station and gotten rid of the gun, which Davis then acquired (S7/1120). Davis maintained his innocence of the crimes committed at the Lake Wales scene but allowed, for the purpose of the motion for judgment of acquittal, that the facts in the light most favorable to the State showed an identification of him at the scene (Id.). The fact that the State could present some testimony to connect Davis to the Lake Wales case does not preclude the reasonable hypothesis of innocence for this case. The State cannot show what kind of gun was used in this case. The police never identified the manufacturer of the gun that fired any of the bullets examined by Mr. Kwong. The bullets recovered from both crime scenes were .38 caliber bullets, which could have been fired from either a .38 caliber gun or a .357 caliber gun.

The State showed that Davis had access to a .357 caliber gun that he obtained from his cousin on December 7. It also presented testimony that Davis had a gun in his garage, which he showed his mother after December 7th. Davis testified that he sold the gun he had showed his mother before December 13th. The State never

linked the gun that Davis possessed on December 7 to any of the projectiles recovered. The recovered projectiles did not reveal the type of gun used, and many different guns have been manufactured that could have fired the projectiles. The fact that Davis possessed a gun that could have been the gun used in this case does not prove that the gun reference by Randy Black was the gun involved in this case. See, e.g., Lindsey v. State, 14 So. 3d 211, 216 (Fla. 2009) ("No evidence shows that the bag of jewelry Nikki found in the closet is the same bag of jewelry that was missing from the pawn shop safe. In addition, no evidence shows that Lindsey placed the bag in the closet or that he ever had possession of it before he sold the items at a flea market.").

The fact that Davis had money problems and the fact that Davis drove a black car do not indicate that he was the perpetrator because there has been no showing that these facts narrow the field of suspects in any meaningful way. Untold numbers of citizens own .38 and .357 caliber guns, have financial setbacks, and drive dark-colored cars. See Evans v. State, 26 So. 3d 85, 95-96 (Fla. 2d DCA 2010)(discussing "the logical fallacy of the undistributed middle")(Wallace, J., concurring in part and dissenting in part).

Without any proof that Davis was at the BP station at the time of the shooting, an "intuitive leap" is required to presume Davis's guilt. Id. at 96; see also Lindsey, 14 So. 3d at 215 ("[T]he State's evidence, while perhaps sufficient to create some suspicion, is simply not sufficient to support a conviction.").

"Under the facts of this case, one could intuitively conclude that Mr. Davis might be guilty. However, 'guilt cannot rest on mere probabilities.' And intuition is not a substitute for evidence under our jurisprudence." Davis v. State, 761 So. 2d 1154, 1159 (Fla. 2d DCA 2000) (quoting Arant v. State, 256 So. 2d 515, 516 (Fla. 1st DCA 1972)). When all circumstances are considered, including the evidence that does not fit into the State's theory, it is not possible to conclude with reasonable certainty that Davis and no one else committed the offenses. This Court should reverse with directions to the trial court to enter a judgment of acquittal.

ISSUE VII: THE EVIDENCE IS LEGALLY INSUFFICENT TO SHOW THAT AN ATTEMPTED ROBBERY OCCURRED.

A. Insufficient Evidence for Attempted Robbery Charge

The trial court erred in denying the motion for judgment of acquittal on the attempted robbery charge because the State's evidence was insufficient to reveal the perpetrator's motivation for shooting through the glass window at Prakashkumar Patel. It is merely speculative to conclude that the perpetrator was at the scene to take money or other property[5] where the evidence is just as consistent with a conclusion that the shooting was a crime of violence directed at the individual.

The State did not charge Davis with attempted robbery of the

[5] Robbery, § 812.13, Fla. Stat. (2007), is, in relevant part: "the taking of money or other property which may be the subject of larceny from the person or custody of another . . . when in the course of the taking there is the use of force, violence, assault,

two men who were shot out by the gas sign, both of whom had cash in their pockets. Count Four of the indictment charges attempted robbery of only the clerk in the store. The indictment alleges that Davis

> did unlawfully attempt to take from the person or custody of Prakashkumar Patel certain property of value, to wit: U.S. currency and/or other personal property.

(1/48). The prosecutor explained to the court: "[T]he victim of the attempted armed robbery is Prakashkumar Patel. . . . the one that was behind the counter. There is no charge against the defendant for attempting to rob the two men who were out by the gas sign, who were killed." (S7/1124).

Davis moved for judgment of acquittal on the attempted robbery charge on the ground that the State's case did not preclude a reasonable hypothesis of innocence that the perpetrator had no intent to rob the store since it could have been a crime of violence directed at the employees of the store (S7/1121-23,1136-40). Davis argued that there was an absence of evidence showing the perpetrator's motive to take money or other property. Neither the store video nor the testimony of Prakashkumar Patel demonstrates that an attempted taking occurred. Prakashkumar testified that the perpetrator said nothing before firing into the store. The video does not show the perpetrator making a concerted effort to enter the store even after shooting through the window. There is insufficient evidence to show that an attempted "taking" occurred where the perpetrator never entered the store and never

(..continued)
or putting in fear."

made a demand for money or other property.

In Fournier v. State, 827 So. 2d 399, 400-01 (Fla. 2d DCA 2002), the Second District recognized that although intent is generally a jury question, "the State must present some competent, substantial evidence from which the jury could infer the defendant's intent to deprive the victim of property." (citing Rosengarten v. State, 166 So. 2d 183, 184 (Fla. 2d DCA 1964)). The court reversed a conviction for attempted robbery where the evidence was insufficient to show the intent to steal.

> To prove attempted robbery, the State must show that the accused formed the intent to take the victim's property and committed some overt act to accomplish that goal. Green v. State, 655 So. 2d 208 (Fla. 3d DCA 1995). Here, the State did not present competent, substantial evidence of Fournier's intent to take property. The circuit court should have granted his motion for judgment of acquittal on the attempted robbery charge.

Fournier, 827 So. 2d at 401. In Rosengarten, the court reversed a conviction for grand larceny based on insufficient evidence of intent to permanently deprive an owner of his property:

> [W]e understand that the burden is on the State to prove felonious intent with the usual quantum and that the question is normally for jury determination. However, there must be some competent and sufficient evidence for the jury to consider and it remains the function of this court to review the evidence to determine if there is sufficient evidence upon which a jury could legally base a verdict. Here, without arguing or worrying the facts, we find that there was a total absence of direct or circumstantial evidence which would support the notion that the defendant had a criminal intent at the time to permanently deprive the owner of his property.

166 So. 2d at 184.

In response to the defense argument that the motive could

have been a hate crime as opposed to a robbery, the prosecutor argued that if the killing were a hate crime and the perpetrator simply wanted to kill the clerk in the store, he would not have tried to open the door before shooting into the store.

> [I]f in fact . . . this was a hate crime and [the person] simply wanted to kill the employee, it's not reasonable that he would shake on the door and try [to] gain entry to begin with. He would just simply open fire. And he clearly could have gotten inside if his intent was to commit a hate crime by simply killing someone, by knocking out part of the door and walking inside, but he didn't do that.

(S7/1126-27). The State's specious argument purports to discern motive based on the touching of the door handle (robbery) as opposed to kicking in the door and entering the store after shooting through it (hate crime).

The prosecutor also suggested that the motive for the killings of the two clerks was to eliminate potential witnesses. (S7/1128). This theory was specifically rejected by the trial judge in his sentencing order, based on the lack of evidence. The trial court's discussion in the sentencing order of elimination of witnesses as the motive for the killings applies equally to the question of whether the evidence was sufficient for discerning whether the perpetrator was motivated to take money from Prakashkumar Patel. For the same reason that the trial court was unable to find that the motive for the killings was to eliminate witnesses, it should have been unable to find that the motivation was to take money or other property from inside the store. See Fournier; Rosengarten; State v. Johnson, 702 S.E.2d 547, 550 (N.C.

2010)(holding that the evidence was sufficient only to raise a suspicion that defendant was attempting to rob the victim). It is merely speculative to assume that the motivation was to take money or other personal property where the perpetrator never communicated this or anything else to Prakashkumar, never entered the store, and never took the money that was in the pockets of the two people that were shot outside. The question of motive was subject to the circumstantial evidence standard. Because the trial court necessarily relied on insufficient circumstantial evidence to conclude that an attempted robbery occurred, this court should reverse the denial of the motion for judgment of acquittal on Count Four.

B. Insufficient Evidence for the Attempted Robbery Aggravator

"Aggravating circumstances require proof beyond a reasonable doubt." Johnson v. State, 969 So. 2d 938, 956 (Fla. 2007). The trial judge assigned great weight to the aggravating factor that the murders occurred during an attempted robbery of the BP station or the flight after an attempted robbery, § 921.141(5)(d). Just as the evidence was insufficient to show that the shootings arose from an attempted robbery, it was insufficient to support the finding of the aggravating circumstance that the murders occurred in the course of an attempted robbery. This court should reverse and remand for a life sentence because the record lacks competent substantial evidence to support this aggravating circumstance. See id. at 957. Without this aggravating factor, the death sentence is disproportionate. Alternatively, a new hearing is

required for the sentence to be reconsidered by the trial judge.

ISSUE VIII: THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY STATEMENT OF YVONNE BUSTAMONTE UNDER THE DYING DECLARATION EXCEPTION.

Hearings of June 3 and 4, 2010 concerned the defense motions to exclude victim hearsay in the Lake Wales case (12-14/2003-2441,S22-S24). The defense counsel made extensive legal argument, both on federal constitutional grounds and state law grounds, objecting to the introduction of Ms. Bustamante's dying declarations (14/2405-2436). Judge Hunter denied the defense's motion (15/2455-2482; S30/3074-81). Judge Jacobsen also orally denied the motion and filed a written order denying the defense motion (26/4430,4506-4515). The defense objections are preserved for review. See McWatters v. State, 36 So.3d 613, 627 (Fla. 2010); §90.104(1), Fla. Stat. (pretrial ruling on admissibility of evidence preserves objection for appellate review). At the beginning of the trial, defense counsel was granted a standing objection to the pretrial rulings (S1/7-9).

The introduction of Yvonne Bustamonte's statements violated Davis's Sixth Amendment right of confrontation because Bustamante's statements in response to Lt. Elrod's questioning were testimonial and dying declarations cannot be grandfathered in as an historical exception to the right of confrontation because the rationale for and application of the dying declaration exception under the pre-ratification English common law was fundamentally dissimilar to how dying declarations are viewed and applied today.

The common law doctrine of forfeiture by wrongdoing could not justify the introduction of Bustamante's statements, because under the circumstances of this case it would violate the constitutionally required presumption of innocence. In any event, the evidence did not establish that Bustamante's murder was specifically motivated by a desire to prevent her testimony.

Alternatively, even if this Court were to conclude that Bustamante's statements to Lt. Elrod were nontestimonial, or that unconfronted testimonial dying declarations can be introduced as an historically-based exception, or that the forfeiture doctrine can be applied, Bustamante's statements were inadmissible as dying declarations under Florida evidentiary law, due to insufficient evidence that she believed her death was imminent.

The state's evidence presented in the motion hearing, taken as a whole, shows convincingly that Yvonne Bustamante only identified Leon Davis on one occasion, and that was in response to Lt. Elrod's questioning. The two paramedics, Froehlich and Johnson, and the customer Evelyn Anderson each overheard the name Leon Davis (or, in Johnson's case, just Davis) at that time. Bustamante made only one statement identifying Leon Davis in response to Lieutenant Elrod's pointed questioning aimed at getting her statement before it wouldn't ever be gotten and the name Leon Davis (or Davis) was heard at that time by paramedics Froehlich and Johnson and by Evelyn Anderson. The prosecutor never made any specific argument to the contrary, and the trial judge never made any findings to the contrary. See 15/2458 (trial judge comments

"[o]nce the police lieutenant gets on the scene and starts making inquiries, that's where the crux of my ruling comes into play, and anybody that overheard it, how I rule on that applies to every-one").

The trial court correctly determined that Bustamante's statements to Lt. Elrod were testimonial (14/2421;15/2459,2475). Whether an out-of-court statement made in response to a police officer's questioning is testimonial or nontestimonial depends upon the primary purpose of the interrogation. The nature of what was asked by the officer, and what was answered by the declarant, must be viewed objectively to determine whether the primary purpose was (a) to resolve a present or ongoing emergency or (b) to obtain a narrative of past events and/or to create a substitute for live testimony. Michigan v. Bryant, 131 S.Ct. 1143, 1156, 1160-61 (2011); Davis v. Washington, 547 U.S. 813, 828, 832 (2006); Delhall v. State, 95 So. 3d 134, 156-58 (Fla. 2012).

The Bryant Court said, "We reiterate, moreover, that the existence vel non of an ongoing emergency is not the touchstone of the testimonial inquiry"; rather, the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the emergency. Bryant, 131 S.Ct. at 1165, citing Davis, 547 U.S. at 822; see also Petit v. State, 92 So. 3d 906,917 (Fla. 4th DCA 2012). This determination is made by means of a "combined approach" in which "the statements and actions of both the declarant and interrogators [along with the circumstances

in which the encounter occurs] provide objective evidence of the primary purpose of the interrogation." Bryant, 131 S.Ct. at 1160-61. Although the police officer's stated motivation is not necessarily dispositive, this Court has recognized that "Bryant focuses to a large degree on whether the statement was elicited primarily to create an out-of-court substitute for testimony." Delhall, 95 So.3d at 157.

The prosecutor asked Elrod if his conclusion that Ms. Bustamante was not going to survive affected how he handled his responsibilities, and Elrod said yes. Asked by the prosecutor "[W]hat did you do? Why did you do it?", Elrod answered, "I wanted to get her statement before it wouldn't ever be gotten" (S23/1791-92)]. Elrod even explained that he would not have started asking questions at that time if he thought the woman was going to survive and be in the hospital; he would have let the medical people try to take care of her. But because he believed otherwise, he began to speak with Yvonne and to ask her very pointed questions (S23/1792). Clearly, his questioning was aimed at ascertaining the circumstances of the crime and creating a substitute for live testimony, rather than dealing with the ongoing emergency that the suspect had not yet been apprehended. The totality of the surrounding circumstances objectively indicate that Lt. Elrod's primary purpose was to nail down the truth about past criminal events, and to elicit statements from Yvonne that do precisely what a witness does on direct examination--accuse a perpetrator of a crime.

In Crawford v. Washington, 541 U.S. 36 (2004), the Court held that out-of-court testimonial statements are barred by the Confrontation Clause of the Sixth Amendment, unless the witness is unavailable and the accused had a prior opportunity for cross-examination. The Crawford decision abrogated Ohio v. Roberts, 448 U.S. 56 (1980), and flatly rejected its rationale that testimonial statements could be introduced against an accused, notwithstanding the lack of an opportunity for confrontation, if the statements bear sufficient "indicia of reliability."

Crawford left open two potential exceptions to the Sixth Amendment right to confront testimonial statements; one of these (forfeiture) was later thoroughly addressed by the Court in Giles v. California, 554 U.S. 353 (2008), while the other, dying declarations, remains an open question. See Michigan v. Bryant, supra, 131 S.Ct. at 1151 n.1 ("We noted in Crawford that we 'need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.' 541 U.S., at 56, n.6., 124 S.Ct. 1354. Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here"). In Hayward v. State, 24 So. 3d 17, 33 (Fla. 2009), this Court similarly declined to address whether a dying declaration might be an exception to the Confrontation Clause requirements set forth in Crawford.

In order for a common law exception to trump the rights guaranteed by the Sixth Amendment's Confrontation Clause, it must be an exception which was established at the time of the founding.

Crawford v. Washington, 541 U.S. at 54; Giles v. California, 554 U.S. at 358. As the Supreme Court's historical analysis in Giles makes clear (in the context of forfeiture by wrongdoing), it is not sufficient that an exception existed at common law and an exception with the same name still exists today. In Giles the Court posed the questions, "We therefore ask whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right." 554 U.S. at 358 (emphasis supplied). The Court then determined that since California's theory was broader than the common-law doctrine, it could not be accepted on historical grounds as an exception to the right of confrontation. Using the Giles analysis, it can plainly be seen that the rationale, contours, and application of the dying declaration exception that existed at common law and at the time of the founding was so profoundly different from the dying declaration exception that exists today that it cannot be recognized as an "historical exception" to an accused's Sixth Amendment right of confrontation. Historically, the rationale for the admissibility of dying declarations, or at least for the dying declarations of individuals who adhered to the beliefs of the established Church, was ecclesiastical:

> The exception for dying declarations-which antedates the development of the hearsay rule and the adoption of the Constitution-was originally held to rest on the religious belief 'that the dying declarant, knowing that he is about to die would be unwilling to go to his maker with a lie on his lips.'

State v. Satterfield, 457 S.E.2d 440,447 (W.Va.1995), quoting 4

Weinstein and Berger, Weinstein's Evidence 804 (b)(2)[01] at 804-124 to 804-125(1994). Dying declarations were admissible only if the witness "apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her maker for the truth or falsehood of her assertions." King v. Woodcock, 168 Eng.Rep. 352,353-54, 1 Leach 500,503 (1789). Therefore, "[a]t common law, the absence of a belief in God and a future state of rewards and punishments" rendered a witness incompetent, and also rendered his or her dying declaration inadmissible in evidence. McClendon v. State, 36 Okla.Crim.11, 251 P.515, 516 (1926).

Clearly, then, the common law dying declaration exception which pre-existed the founding and the ratification of the United States Constitution was fundamentally different from the dying declaration exception which exists today; not only in its rationale but also in its application. The present-day exception may have evolved from a common law exception, but it is not the same thing.

Confrontation and cross-examination are indispensible to the truth-seeking function of a criminal trial, and it must be recognized that the right of confrontation is equally important whether the accused is trying to show that the witness is lying or whether he is trying to show that the witness is mistaken. See State v. Buckingham, 772 N.W. 2d. 64,72 n.6 (Minn. 2009). In the instant case, for example, nobody has contended or implied that Yvonne Bustamante had any reason to lie. The defense's argument was that she and Juanita Luciano (who may have discussed with each other at

some point during the robbery whether the robber was their insurance client Leon Davis (see S24/2006-14)) were mistaken in their identification. The defense's misidentification argument was buttressed by Yvonne's statement to Fran Murray (assuming arguendo that the conversation occurred) in which she did not identify Leon Davis, nor did she say it was a client or someone she knew; instead she told Murray that it was a black man and he should be on camera.

While this particular case involves a claim of mistake rather than a claim of deliberate falsehood, it has been recognized that the assumption that a dying person would never have reason to lie is equally faulty. For example, the witness might be motivated by personal animosity, or seeking vengeance for a past wrong, or the financial benefit of his family members. See State v. Satterfield, 457 S.E. 2d at 447, quoting Weinstein, at 804-125 ("[T]he lack of inherent reliability of deathbed statements has often been pointed out: experience indicates that the desire for revenge or self-exoneration or to protect ones' loved ones may continue until the moment of death").

Absent the fear of external damnation, which was the basis of the common law exception, the supposed reliability of dying declarations cannot overcome the accused's Sixth Amendment right of confrontation, at least not when the statements are testimonial. The specific issue left open in Crawford will ultimately be resolved by the U.S. Supreme Court. There is a split of authority among state and federal courts. Two federal district courts have

found that dying declarations are not an exception to the Confrontation Clause. United States v. Jordan, 66 Fed.R.Evid.Serv. (Callahan) 790 (D.Colo.2005) [2005 WL 513501]; United States v. Mayhew, 380 F.Supp.961,964-65 (E.D.Ohio 2005). Numerous state appellate courts (including Florida's Fifth DCA) have followed the lead of People v. Monterroso, 101 P.3d 956 (Cal. 2004).[6] The California Supreme Court in Monterroso, with no discussion of the differences between the English common law exception and the present-day exception, blandly concluded "that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment." 101 P.3d at 971-72. The ensuing opinions tended to rely upon Monterroso, and then upon the growing body of state court decisions reaching the same conclusion, as support for allowing an "historical exception" for dying declarations. The opinions focused on the mere existence of a common law dying declaration exception, rather than the nature, rationale, and application of the common law exception.

However, while the supposed reliability of or the claimed

[6] See Cobb v. State, 16 So.3d 207 (Fla. 5th DCA 2009); White v. State, 17 So.3d 822 (Fla. 5th DCA 2009); People v. Gilmore, 828 N.E.2d 293,302 (Ill.App. 2005); Wallace v. State, 836 N.E.2d 996 (Ind.Ct.App.2005); State v. Martin, 695 N.W.2d 578,585 (Minn. 2005); Harkins v. State, 143 P.3d 706,711 (Nev.2006); People v. Taylor, 737 N.W.2d 790,795 (Mich.App.2007); State v. Lewis, 235 S.W.3d 136,148 (Tenn. 2007); State v. Calhoun, 657 S.E.2d 424,428 (N.C. 2008); Commonwealth v. Nesbitt, 892 N.E.2d 299,311 (Mass. 2008); State v. Jones, 197 P.3d 815,822 (Kan. 2008); Gardner v. State, 306 S.W.3d 274,289 (Tex.Crim.App.2009); State v. Minner, 311 S.W.3d 313,323 n.9 (Mo.App.2010); Satterwhite v. Commonwealth, 695 S.E.2d 555,568 (Va. 2010); State v. Beauchamp, 796 N.W.2d 780,795 (Wis. 2011); People v. Clay, 88 A.D.3d 14,26-27, 926 N.Y.S. 598,608-09 (2011); Grindle v. State, 2013 WL 4516730 (Miss. App. Aug. 27, 2013).

necessity for dying declarations might have passed muster under the Ohio v. Roberts test, the internal logic of Crawford suggests that these factors cannot trump the constitutional right of confrontation. The contours of the common law doctrine were so fundamentally different from those of present-day dying declarations that no "historical exception" to the right of confrontation should be recognized.

As an alternative ground for overruling the defense's objection based on the Confrontation Clause, Judge Hunter relied by analogy on the federal doctrine of forfeiture (S30/3079; see S26/2397-2400,2409,2416). The judge recognized that Florida, at the time of this motion hearing, had no provision authorizing the introduction of hearsay evidence on this basis, but he asserted that "Florida law does acknowledge that a party's wrongdoing may constitute waiver under certain circumstances. See Ellison v. State, 349 So.2d 731, 732 (Fla. 3d DCA 1977)" (S30/3079). The judge characterized the forfeiture by wrongdoing doctrine as "extinguishing the defendant's constitutional right on essentially equitable grounds" (S26/2397, see 2319), and concluded that in Florida "it's part of the clean hands doctrine" (S26/2400, see 2409,2416). The underlying theory, he explained, is that the "defendant is responsible for the witness' unavailability" by killing him or her (S26/2397).

The trial court's alternative justification for admitting the unconfronted testimonial statements must fail because it is inconsistent with the limitation of the forfeiture doctrine

recognized in Giles v. California, and it is, under the circumstances of this case, inconsistent with the constitutionally required presumption of innocence. In Giles v. California, 554 U.S. at 355-57, in an opinion issued two years before this motion hearing and trial, the U.S. Supreme Court "ask[ed] whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right." 554 U.S. at 358. The Court concluded that it was not, flatly rejecting the broader theory of forfeiture by wrongdoing (i.e., that the defendant had forfeited his right of confrontation because his intentional murder of the victim had made her unavailable to testify, 554 U.S. at 357), and limited the use of that doctrine to the way it was applied at common law (i.e., only upon a showing that the motive for the murder was to procure the absence of a witness, 554 U.S. at 359-61 and 376-77).

Davis' defense was that he was misidentified as the perpetrator of the charged robbery and murders. It is therefore impossible to conclude that he waived by his conduct his constitutional right of confrontation (which is indispensible to the truth-seeking function of a criminal trial), unless one also concludes before trial, contrary to his equally important constitutional right to be presumed innocent unless and until proven guilty beyond a reasonable doubt, that he is in fact guilty. See, e.g., United States v. Lentz, 282 F.Supp.399, 426-27 (E.D.Va.2002). To accept Judge Hunter's forfeiture rationale in the instant case, in contrast, would violate the core principle of Crawford: confron-

tation cannot be dispensed with based on the assumed reliability of the out-of-court testimonial statement nor on the assumed guilt of the defendant. 541 U.S. at 62.

Bustamante's out-of-court testimonial statements were barred by the Confrontation Clause and were also inadmissible under state evidentiary law. See Michigan v. Bryant, 131 S.Ct. at 1162 n.13 ("Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence"). There are two components to the state law issue. The first is that the trial court's ruling finding Yvonne's statements to Lt. Elrod admissible is predicated on the testimony of Fran Murray, concerning a conversation which she claimed took place while Yvonne was leaning against Evelyn Anderson's Tahoe in front of Headley. When Murray's testimony is considered in pari materia with the observations of other state witnesses, there is considerable reason to doubt that this conversation ever occurred, and therefore there is simply no reliable predicate for the introduction of Yvonne's later statements made in response to Lt. Elrod's questioning because Murray's version of events is irreconcilable with that of the state's other witnesses.

In order for an out-of-court statement to be admissible as a dying declaration under Florida law (§90.804(2)(b), Fla. Stat.),

it is necessary to show that the declarant understood her "condition as being that of an approach to certain and immediate death". Hayward v. State, 24 So.3d 17,30 (Fla. 2009). The "[a]bsence of all hope of recovery" and "appreciation by the declarant of [her] speedy and inevitable death" are foundational requirements for admissibility. Hayward, at 31; see also Cardenas v. State, 49 So.3d 322,325 (Fla. 1st DCA 2010).

In excluding Juanita Luciano's out-of-court statements, Judge Hunter correctly applied this standard: "Although the Court thinks Ms. Luciano would have been aware that her injuries were extremely serious, the Court does not find that there is sufficient evidence to demonstrate that Ms. Luciano reasonably believed her death from her injuries was imminent" (S30/3081). Plainly, then, the judge's decision to allow the introduction of Yvonne's accusatory statements, while excluding those of the even more severely burned Juanita, was based entirely on Fran Murray's assertion that Yvonne had said to her that she wasn't going to make it.

Even assuming arguendo that the state's evidence considered as a whole was sufficient to show that the claimed conversation between Fran Murray and Yvonne occurred, it cannot be assumed that Yvonne's state of mind at the time of that conversation was necessarily the same as her state of mind when she was questioned by Lt. Elrod. According to Murray, Yvonne was screaming and was in extreme and obvious pain, and she was saying over and over that her body hurt so bad. By the time Lt. Elrod saw her, Yvonne

was calm and quiet, and she did not appear to him to be feeling any pain. Her main complaint to the paramedic concerned the gunshot wound to her left hand. Elrod was not surprised by this because, like the medical examiner and the paramedics, he was familiar with burn injuries and knew that the acute pain subsides after the nerve endings are destroyed. However, it is highly unlikely that Yvonne would have known this. Given that she was now being attended by paramedics and was about to be transported to a hospital for medical treatment, and given that the extreme pain she was feeling earlier had now subsided, it cannot be assumed that she believed at that time that she had no hope of recovery and that her death was certain and imminent. Therefore, under Florida law, her statements were inadmissible as dying declarations. Hayward. The introduction of impermissible evidence which could have contributed to the verdict is harmful error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Davis' conviction and death sentences must be reversed for a new trial.

ISSUE IX: THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE THE PRETRIAL AND IN-COURT IDENTIFICATIONS MADE BY BRANDON GREISMAN AND CARLOS ORTIZ.

The defense preserved objections to the pretrial and in-court identifications made by Brandon Greisman and Carlos Ortiz. (25/4279-4284). See McWatters v. State, 36 So.3d 613,627 (Fla. 2010); §90.104(1), Fla. Stat. (pretrial ruling on admissibility of evidence preserves issue). At the beginning of trial, defense

counsel renewed his pretrial motions and was allowed a standing objection (S1/6-9). Because (1) Detective Townsel showed Greisman and Ortiz impermissibly and unnecessarily suggestive photopacks, and (2) Greisman's and Ortiz' in-court indentifications were insufficiently reliable to overcome their tainted pretrial identifications, the trial court erred in denying the defense's motion to exclude Greisman's and Ortiz' identifications (26/4432-4433).

Suggestive pretrial identifications "are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188,198 (1972).

> [T]he test for suppression of an out-of-court identification is two-fold: "(1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." Rimmer v. State, 825 So. 2d 304,316 (Fla. 2002). This Court considers the following factors in evaluating the second prong, the likelihood of misidentification:
>
> > [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
>
> Grant v. State, 390 So. 2d 341,343 (Fla. 1980)(quoting Neil v. Biggers, 409 U.S. 188,199-200, 93 S.Ct.375,34 L.Ed.2d 401 (1972)).

Fitzpatrick v. State, 900 So. 2d 495, 517-18 (Fla. 2005).

"Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Manson v. Brathwaite, 432 U.S. 98, 114 (1977). As recognized in Brathwaite, 432 U.S. at 114, "reliability is the linchpin" in determining the admissibility of both the pretrial identification itself and any ensuing in-court identification.

When a witness' pretrial identification is the product of an impermissibly suggestive procedure, any subsequent in-court identification may not be introduced "unless it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime." Fitzpatrick, 900 So. 2d at 519 (quoting Edwards v. State, 538 So. 2d 440, 442 (1989)). As to both the pretrial identification and the in-court identification, the witness' opportunity to observe the perpetrator, the witness' degree of attention, and the accuracy (or inaccuracy) of the witness' description are important factors in determining whether the identification is sufficiently reliable to overcome the taint of the suggestive procedures. See Edwards, 538 So. 2d at 442-45.

The photopack identification procedure administered by Detective Townsel was suggestive in several ways, the most egregious and unnecessary being the inclusion of the book-in numbers on the photopack. The number corresponding to Davis' picture began with 2007 (which was the current year), while the numbers corresponding to the five other pictures all began with 93 or 94. These telltale numbers could easily have been cropped

from the photopacks with scissors, or covered with tape. Whether or not they potentially could serve some later investigative purpose for law enforcement, there is simply no excuse for allowing the witness to see them. See Henderson v. United States, 527 A.2d 1262,1268 (D.C.App.1987)(photo array was unduly suggestive where, inter alia, "the date shown on appellant's mug shot is 1984, while all the others date from the early to mid 1960s except for one dated 1979"; remand necessary to determine whether identification was nevertheless reliable); State v. Davis, 504 A.2d 1372,1374 (Conn. 1986)(photo array was unnecessarily suggestive where "[t]he only recent arrest date on the photograph . . . was the date of March 1982, which was on the photograph of the defendant", and where the defendant was depicted in the photo wearing the same clothes worn by the robber; however, on the second prong, considering the factors outlined in Manson v. Brathwaite, the out-of-court and in-court identifications were found to be reliable); see also Adkins v. Commonwealth, 647 S.W.2d 502,504-05 (Ky.App.1982); Brown v. Commonwealth, 564 S.W.2d 24,27 (Ky.App.1978).

In the instant case, the reliability factors, especially those involving Greisman's and Ortiz' opportunity to observe the suspect (very fleeting), their degree of attention (under highly stressful and distracting conditions), and their descriptions of the suspect (extremely vague; except for the hairstyle which was different from Leon Davis'), weigh heavily in favor of the conclusion that their pretrial and in-court identifications were

insufficiently reliable to overcome the tainted photospread. The fact that the number corresponding with Davis' picture began with 2007, where the crime and the photo identification procedure both took place in 2007, and where the five other numbers all began with 93 or 94, was, or at least may have been perceived as, an arrow pointing to Davis.

Where the police have used an unnecessarily suggestive pretrial identification procedure, the witness' subsequent in-court identification may not be introduced "unless it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation." Edwards v. State, 538 So. 2d 440, 442 (Fla. 1989); see Fitzpatrick v. State, 900 So. 2d at 519. This inquiry delves into the totality of the circumstances, and weighs the nonexclusive lists of factors set forth in Neil v. Biggers and United States v. Wade, 388 U.S. 218 (1967); among these are the witness' opportunity to observe the perpetrator at the time of the crime; the witness' degree of attention, and the accuracy of the witness' description. Edwards, 538 So. 2d at 443.

Because the trial judge erroneously found that there was nothing suggestive about the way the photopacks were presented, he stated that he didn't need to address the second prong (S29/2836-37). Then he briefly addressed it anyway (as to Ortiz), and concluded that there was nothing to suggest that either his pretrial or in-court identification would be unreliable

(S29/2837-39). However, in his order issued three months later concerning the admissibility of Dr. Brigham's expert testimony on the factors affecting the reliability of eyewitness identification, the judge found that "Mr. Ortiz' encounter with the Defendant was brief, the conditions stressful, and . . . a weapon was involved" (S52/6606). In the same order he found that Brandon Greisman saw a black man with a pistol in his hand, who fired a shot and Greisman realized he'd been shot in the nose; "this encounter was brief and highly stressful." (S52/6606). The court also noted that the identifications were cross-racial; Greisman being white, Ortiz Hispanic, and Davis black (S52/6606). See Henderson, 27 A.3d at 904-07; State v. Almaraz, 301 P.3d 242, 252, n.6, 8 (Idaho 2013); Young v. Conway, 698 F.3d 69, 79 (2d Cir. 2012) (research has shown that among the variables which diminish the reliability of a witness' identification are stress, weapon-focus, and the cross-racial nature of the identification).

As recognized by this Court in Edwards, 538 So. 2d at 444, and by the U.S. Supreme Court in Wade, 388 U.S. at 228-29, the danger of misidentification is "particularly grave when the witness' opportunity to observe was insubstantial."

Both Greisman's and Ortiz' opportunity to observe the shooter was very fleeting, under extremely stressful and chaotic conditions. See Edwards, 538 So. 2d at 444. Neither Greisman nor Ortiz was able to give a very detailed description of the suspect, beyond the fact that he was black and tall. Greisman attributed some of this to his focus on the weapon, and his

trying to get out of the way (S95/2981-82,2986). Aside from the length of his hair, Greisman said, "I don't remember too much" (S95/2995). Ortiz had described the suspect as having a goatee, and he acknowledged (when shown a photo of Leon Davis at the Sheriff's substation taken the same night) that Mr. Davis does not have a goatee (S96/3102-03).

The one aspect of the suspect's appearance which both Greisman and Ortiz noticed and remembered was his hairstyle. Greisman had described it as an Afro but not a full Afro (S95/2994-95). When defense counsel showed him a photograph of Leon Davis (State Exhibit 7081) taken at the Sheriff's substation a few hours after the events at Headley, Greisman three times in quick succession parried counsel's question with a question: "Could he have gotten a haircut before he came in?" "You don't think he could have gotten clippers and cut his hair before he came in?" "But don't you think it is possible he cut his hair before he came in" (S95/2994). Defense counsel asked Greisman to listen to his question carefully:

> That can't be the person you saw because that person's hair is not an inch long, unless that person cut his hair before this picture, correct?
>
> GREISMAN: Yeah.

(S95/2994)

At the end of cross, Greisman agreed once again that the person he saw outside Headley had a different hair style than the person (Leon Davis) in the photo, and he could not explain why the hairstyle was different (S95/3006-07).

Similarly, Carlos Ortiz had described the black male he saw walking up Phillips Street as having a small Afro (S28/2782-83); "Afro hair curly hair" (S96/3103-04). Defense counsel showed Ortiz two photographs of Leon Davis taken at the Sheriff's office substation a few hours after the events at Headley. Counsel said, "That person doesn't have an Afro, do they?", and Ortiz said "No" (S96/3103-04). Ortiz acknowledged that the two hairstyles were different, and he had no explanation for the discrepancy other than "maybe he got a haircut" (S96/3108-09).

When shown the photographs of Leon Davis taken that evening when he turned himself in, neither Greisman nor Ortiz said anything like "That's what I meant by a small Afro" or "Yeah, that's pretty much what the guy I saw's hair looked like." Instead, they said the hair was different, and the only explanation either witness could think of was that maybe he got a haircut. However, the evidence in this case includes videos taken at Enterprise Car Rental on the morning of the crimes at Headley, Beef O'Brady's at lunchtime on same day, and Mid-Florida Credit Union around 4:20 p.m. (about half an hour after the crimes), depicting a large black male who both the state and the defense agreed was Leon Davis, showing him with the same closely cropped hair as he still has in the Sheriff's substation photos. [State Exhibits 9031 (Enterprise); 9032 (Beef's); 9026 (Mid-Florida, Davis in black shirt); Defense Exhibit 10 (Mid-Florida and Enterprise); State Exhibits 7081,7083 (photos at Sheriff's substation)].

In Edwards, 538 So. 2d at 444, this Court said, "Nor does Walters' prior description of the person he saw at the Quick Stop support an independent basis for the courtroom identification. Although Walters' prior description fits [Edwards], it also fits the general description of many black males." In Manson v. Brathwaite, 432 U.S. at 115 (emphasis supplied), regarding the "accuracy of the description" factor, the description given by the witness included the suspect's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included the clothing [he] wore. No claim has been made that respondent did not possess the physical characteristics so described."

In the instant case the suspect was described, in very general terms, as male, black, and tall. See Edwards. Ortiz was unable to describe the man's clothing at all; not as to color, or whether he was wearing long or short sleeves or long or short pants (S28/2780-81,2818). At the motion hearing he attributed this to the fact that it had happened almost two years ago, but in his interview with Detective Townsel four days after the events Ortiz told her he remembered nothing about the suspect's clothing (S26/2375,S28/2780). Greisman, at the time of the photopack procedure, had told Townsel that he thought the person he saw was wearing a dark colored shirt "like maybe gray or black," but by the time of the Headley trial he no longer remembered even that much (S26/2363; S95/2980-82). Ortiz described the person he saw as having a goatee, which Leon Davis did not

have (S96/3102-03). Greisman said the whole thing happened so fast that he didn't notice whether the man had facial hair or not; "I was just trying to get out of the way" (S95/2984-86). The only individualized description which either Ortiz or Greisman was able to give was hairstyle, and that part of the description did not fit Leon Davis.

Time and opportunity to observe, degree of attention, stress, weapon focus, cross-racial nature of the identification, vagueness of the description (and the inaccuracy of the one aspect of the description which was not vague), all of these factors demonstrate the unreliability of Ortiz' and Greisman's eyewitness identifications. Therefore, the introduction of both their pretrial and in-court testimony identifying Leon Davis, after being shown an unnecessarily suggestive photopack, gave rise to a very substantial likelihood of irreparable misidentification, in violation of the standard required by the Fourteenth Amendment's Due Process clause. See Manson v. Brathwaite, 432 U.S. at 113-114. Davis' convictions and death sentences must be reversed for a new trial.

ISSUE X: THE TRIAL COURT ABUSED ITS DISCRETION AND DISTORTED THE WEIGHING PROCESS WHEN IT (1) IMPROPERLY DIMINISHED THE WEIGHT IT ASSIGNED TO TWO MITIGATING FACTORS AND, (2) DURING THE OVERALL WEIGHING OF FACTORS, ATTRIBUTED A GREATER WEIGHT TO ONE AGGRAVATOR THAN WAS PREVIOUSLY ASSIGNED.

The trial court's order demonstrates an abuse of discretion in the assignment of weight to two mitigating circumstances and a

distortion of the overall weighing process where the wrong (and greater) weight is attributed to one of the aggravating factors.

First, regarding non-statutory mitigating circumstance #9, "Stressors at time of incident," the court found that Davis was under financial stress due to job loss and his wife's problem pregnancy, and that Davis spent a lot of time with his son, who was born with Down's syndrome. The trial court rationalized giving little weight to this proven mitigation with the following statement: "The Court finds this mitigating circumstance has been proven by a greater weight of the evidence, but it does not justify a decision to rob a convenience store and murder two victims in the course of the attempted robbery. The Court assigns this Mitigator little weight." (34/5975)

This rationalization for assigning the mitigation little weight puts the cart before the horse in the weighing process. An assignment of weight to a mitigating circumstance must be based on the virtues of that mitigating circumstance, not on whether the particular circumstance would "justify" the commission of the offense.

With regard to mitigating circumstance #10, Good person in general, the court again failed to base the assignment of weight on the attributes of the mitigation:

> The evidence establishes that the Defendant, Leon Davis, Jr., was a loving husband, who was devoted to his Down's syndrome son, Garion Davis. He was also actively involved in his family, regularly seeing his brother and his sisters. It appears that he was very well regarded by his entire family, his friends, and his employers. The Court finds this mitigator has been proven by a greater weight of the evidence but, in light of

the murders at Headley Insurance Agency, assigns it little weight.

(34/5975).

The murders at the Headley Insurance Agency were held to be inextricably intertwined with the instant case, so the mitigation is being discounted based again on a premature weighing against the aggravating factors. The Headley events occurred after the BP shooting and serve as the basis for the statutory aggravating factor of being previously convicted of another capitol felony or of a felony involving the use or threat of violence to the person, which the trial judge assigned very great weight. By discounting the proven mitigator of "being a good person in general" and assigning it little weight for conduct that was weighed and assigned very great weight as an aggravator, the trial court distorted the weighing process.

The assignment of weight of every single mitigating factor is important and must be based on the attributes of that factor. See § 921.141(3)and (6)(h), Fla. Stat.; Perez v. State, 919 So. 2d 347, 373 (Fla. 2005) ("[E]ach mitigating circumstance is to be analyzed and weighed individually"). To discount a mitigating factor by assigning it little weight because it is outweighed by an aggravating factor in the mind of the trial judge skews the outcome of the weighing process in favor of a death sentence. Each mitigating factor must be assigned a weight based on its own virtue and must not be discounted by being compared or weighed against an aggravator before the overall weighing of the aggravat-

ing and mitigating circumstances in the aggregate is undertaken, as contemplated by the statutory scheme. See § 921.141(2)(b), Fla. Stat.

During the final step, the overall weighing of all the aggravators against the mitigators, the trial court again distorted the process when it overlooked the fact that one of the three aggravating circumstances was assigned only moderate weight. The trial court had assigned moderate weight to the factor that "the Capital Felony was committed by a person previously convicted of a Felony and under . . . Felony Probation" § 921.141(5)(a), Fla. Stat. But in the final analysis, the Court attributed great weight to that factor stating: "The State has proven, beyond and to the exclusion of all reasonable doubt, 3 Statutory Aggravators, to which the Court has assigned great weight[.] The Court has also found numerous Mitigators exist and have been proven." (34/5976). This was an error of fact, where one of the three aggravators was given only moderate weight but then treated in the final analysis as though it had been assigned great weight. The mistake skewed the overall weighing process to favor a death sentence.

These errors render the death sentences unconstitutional under the Eighth and Fourteenth Amendments to the U.S. Constitution. See Mills v. Maryland, 486 U.S. 367, 375 (1988) (stating that it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling); see also

Lockett v. Ohio, 438 U.S. 586 (1978), Hitchcock v. Dugger, 481 U.S. 393 (1987), Eddings v. Oklahoma, 455 U.S. 104 (1982), Skipper v. South Carolina, 476 U.S. 1 (1986). Because the court's statements indicate an erroneous legal process was used to determine the weight assigned to the mitigating factors and the court made an error of fact when performing its overall weighing function, this court should reduce the death sentences to life in prison or, in the alternative, remand for resentencing.

ISSUE XI: THE DEATH SENTENCE SHOULD BE REVERSED UNDER THIS COURT'S PROPORTIONALITY REVIEW.

This court should reverse the death sentences in favor of life sentences because the aggravating and mitigating factors found by the trial judge do not support a conclusion that this case is among the most aggravated and the least mitigated of all first-degree murder cases. "The Legislature has reserved application of the death penalty only to the most aggravated and least mitigated of the most serious crimes." LaMarca v. State, 785 So. 2d 1209, 1216 (Fla. 2001) (citing Jones v. State, 705 So.2d 1364, 1366 (Fla. 1998)).

Each of the three aggravating factors found by the trial judge has a devaluing characteristic that must be considered for the proportionality analysis. First, this court should not include the attempted robbery aggravator in the proportionality analysis because the evidence was insufficient to show that the perpetrator was engaged in a robbery attempt. Even if that

aggravator is upheld, the tenuous nature of the evidence used to find this factor is relevant in the proportionality analysis. See Johnson v. State, 969 So. 2d 938 (Fla. 2007) (explaining that proportionality review "entails 'a *qualitative* review by this Court of the underlying basis for each aggravator.'") (quoting Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998)). Second, the fact that Davis was on felony probation was assigned only moderate weight as an aggravator, which the trial court apparently overlooked when conducting its overall weighing. Third, the Lake Wales convictions that provide the basis for the prior felony aggravator occurred after the events at issue here. This is relevant, as seen by the fact that this court previously mentioned such a scenario when reversing a death sentence on proportionality grounds. See Urbin, 714 So. 2d at 418 (reversing death sentence as disproportionate, and noting "there is no dispute that the prior violent felony used as an aggravator for this killing actually occurred approximately two weeks after Jason Hicks' murder.").

This case does not involve HAC (heinous, atrocious and cruel) nor CCP (cold, calculated, and premeditated), which is relevant to the proportionality analysis. See Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) ("While [the] absence [of HAC and CCP] is not controlling, it is also not without some relevance to a proportionality analysis."); Fitzpatrick v. State, 527 So. 2d 809, 812 (Fla. 1988)(noting HAC and CCP "are conspicuously absent").

Fifteen is a substantial number of mitigating factors, which

were found to be proven by the trial judge. The trial judge afforded moderate weight to five of them, which demonstrates this case is not among the least mitigated to warrant the death sentences. Those factors show that Davis had been bullied and physically abused in childhood and was a good son, sibling, and husband, and a good father to a child with Down's syndrome. The judge also found one statutory mitigating factor and ten other nonstatutory mitigating factors that were awarded less weight. It should be considered that two of those mitigating circumstances were prematurely discounted when the weight was assigned.

In Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988), this court reversed a death sentence where there were two aggravators: previously convicted of violent felony and committed during armed robbery. The factual scenario in that case is similar. Livingston "entered a convenience store/gas station, shot the female attendant twice, fired one shot at another woman inside the store, and carried off the cash register." 565 So. 2d at 1289. In Lloyd v. State, 524 So. 2d 396 (Fla. 1988), this court vacated a death sentence on proportionality grounds where the murder was found to have occurred in the course of an attempted robbery. In Jones, 705 So.2d 1364, this court reversed a death sentence where the murder was the shooting of a school boy that occurred during an attempted armed robbery. In Thompson v. State, 647 So. 2d 824 (Fla. 1994), the death sentence was vacated where the clerk at a sandwich shop was shot through the top of the head during a robbery. Lloyd, Jones, and Thompson were single aggravator cases,

and although the present case is not a single aggravator case, the factual scenarios are similar. See Green v. State, 975 So. 2d 1081, 1088 (Fla. 2008) ("When conducting a proportionality review, we consider the totality of circumstances and compare each case with other capital cases."). Because the aggravating circumstances all possesses diminishing qualities, the mitigating factors are numerous and substantial, and factually similar cases were not deserving of death, this court should reverse and remand for life sentences.

ISSUE XII: THE FLORIDA DEATH PENALTY STATUTORY SCHEME IS FACIALLY UNCONSTITUTIONAL UNDER RING V. ARIZONA

Prior to trial and prior to waiving his right to a jury, Davis filed a "Motion to Declare Florida's Death Penalty Unconstitutional under Ring v. Arizona," challenging the Florida death penalty statute on the ground that it violated the Sixth and Fourteenth Amendments to the U.S. Constitution and Ring v. Arizona, 536 U.S. 594 (2002). (25/4332-59). The U.S. Supreme Court has not specifically addressed whether the Florida death penalty statutory scheme violates the U.S. Constitution pursuant to Ring. See Evans v. Sec'y, Florida Dep't of Corr., 699 F.3d 1249, 1261 (11th Cir. 2012) ("The Supreme Court has not decided whether the role that a Florida jury plays in the death-eligibility determination is different enough from the absence of any role, which was involved in Ring, for the Florida procedures to be distinguishable."), cert. denied, 133 S. Ct. 2393 (2013). This Court should

reconsider its analysis of the Ring decision and hold the Florida death penalty statutory scheme facially unconstitutional pursuant to the Sixth and Fourteenth Amendments because the statute relies on the trial judge as the factfinder for an aggravating circumstance and does not require a unanimous jury recommendation. This issue was preserved by the pretrial motion that was heard and denied on June 13, 2012, before Davis waived his right to a jury on September 12, 2012. (26/4437,27/4759).

CONCLUSION. Based on the foregoing argument, reasoning, and citation of authority, Appellant respectfully asks this Court to reverse the judgment and death sentences.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Scott Browne at scott.browne@myfloridalegal.com and to the Office of the Attorney General at Capapp@myfloridalegal.com, on this 9th day of January, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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