Electronically Filed 09/06/2013 08:21:48 AM ET

RECEIVED, 9/6/2013 08:23:34, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

WILLIAM ROGER DAVIS III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-6

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 998818

Office of the Attorney General
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Primary E-Mail:
ken.nunnelley@myfloridalegal.com
Secondary E-Mail:
CapApp@MyFloridaLegal.com
(386)238-4990
(386)226-0457 (FAX)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE#

Contents

TABLE OF CITATIONS

CASES **PAGE#**

STATUTES

RULES

STATEMENT OF THE CASE AND FACTS

As authorized by *Fla.R.App.P.* 9.210(c), the State submits its rendition of the case and facts.

STATEMENT OF THE CASE

On November 17, 2009, the grand jury of Seminole County, Florida, indicted William Roger Davis III for the October 29, 2009, murder of Fabiana Malave. (V1, R17-8).[1] Following various pre-trial proceedings, Davis' trial began on April 23, 2012. On May 3, 2012, the jury found Davis guilty of the following: Count 1-First Degree Murder; Count 2-Armed Kidnapping; and Count 3-Sexual Battery by Use or Threat of a Weapon. (V15, R2187). On August 6, 2012, the capital conviction proceeded to the penalty phase. On August 8, 2012, the jury returned an advisory sentence of death by a vote of seven to five (7-5) for Malave's murder. (V19, R2711). The trial court held a *Spencer*[2] hearing on September 10, 2012, (V21, R2969-3004), and, on December 15, 2012, imposed a sentence of death. (V21, R3005-21). The court found the following six aggravating circumstances: (1) previously convicted of a felony and under sentence of imprisonment - great weight; (2) previously convicted of another

---

[1] Cites to the record are by volume number, "V_" followed by "R_" for the page number.

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

capital felony or of a felony involving the use or threat of violence to the person - great weight; (3) especially heinous, atrocious or cruel - great weight; (4) committed during the course of a sexual battery and kidnapping - great weight; (5) committed for the purpose of avoiding or preventing lawful arrest - great weight; (6) cold, calculated, and premeditated – great weight. (V4, R635-48). In mitigation, the sentencing court found no statutory mitigators and gave "little weight" to "some weight" to the non-statutory mitigating circumstances (except for Davis' behavior, which was given substantial weight). The court considered and weighed the following as mitigation: chronic mental problems – some weight; mental condition can be treated with medication - some weight; ability to adapt to prison - little weight; ability to hold gainful employment - some weight; remorse – some weight; and defendant displayed appropriate courtroom behavior - substantial weight. (V4, R648-55).

The Appellant filed a notice of appeal on January 2, 2013, and filed his *Initial Brief* on or about July 3, 2013.

STATEMENT OF THE FACTS

The State relies on the following facts from the evidence and testimony presented at trial.

Deputy Paul Adamson, Seminole County Sheriff's Office, was working the night shift on October 29, 2009, when he received a

call to report to the Super Sport Auto dealership in Sanford, Florida, regarding a missing person report. (V10, R1126-27). Adamson met with the business' owner, Jose Hernandez, who reported the disappearance of his employee, Fabiana Malave. (V10, R1127, 1179, 1197). Malave had been working alone **a**nd was last heard from around noon. Hernandez and Malave's family were unsuccessful in their attempts to find her throughout the day. (V10, R1129).

Adamson was informed that Malave drove a 1997 red Mazda. (V10, R1129). The information Adamson gleaned from Hernandez and Malave's family led him to believe that Davis was the last person in contact with Malave. As a result, Adamson called Davis' phone but there was no answer. (V10, R1130). After he spoke to family members, Adamson determined Malave's disappearance was more than a "typical runaway juvenile"[3] case so he contacted Investigator Luge. (V10, R1130, 1131).

While Adamson was talking to Luge, Hernandez started shouting, "there he goes, there he goes," referring to Davis who was driving by Hernandez' business in a "very recognizable" vehicle.[4] (V10, R1131). Adamson and Deputy Hanna followed Davis

---

[3] Malave was 19 years old. (V10, R1170).

[4] Jose Hernandez sold Davis a Toyota 4Runner with a "big dent" in it on October 22, 2009. (V2, R316, State Exh. 49; V10, R1177-78;

but lost sight of Davis' vehicle. (V10, R1132, 1133). Adamson then heard a call over the police radio that a "disturbance" was occurring at a nearby business, the Post-Time Lounge. (V10, R1133). When Adamson and Hanna reported to that scene, Adamson observed Davis' SUV backed into a rear corner spot of the lounge's parking lot. Malave's vehicle was parked next to Davis'. (V10, R1134). Davis had already been placed in another police car. (V10, R1135).

Deputies looked through the windows of Davis' and Malave's vehicles. Adamson saw "something large being covered by a blanket" on the rear floorboard inside Davis' SUV. When the blanket was pulled slightly aside, Adamson saw a human hand. (V10, R1135, 1151). Deputies moved the front passenger seat completely forward. The blanket was moved aside which revealed Malave's body. A garbage bag was over her head. (V10, R1136, 1140-41). Adamson ripped the bag off Malave's head and checked for signs of life. However, Malave's body was stiff and cold to the touch. Adamson said, "It seemed like she had been dead for quite a while." (V10, R1136). Police units and emergency services responded to the scene. (V10, R1136-37).

V11, R1212).

Rosa Hernandez[5] co-owns the Super Sport Auto car business with her husband, Jose.[6] (V10, R1164). Malave was their employee and was working on October 29, 2009. (V10, R1168, 1170). Rosa said Davis bought a car from them in October 2009. (V10, R1164, 1165, 1169-70). However, Davis never showed up for several scheduled appointments to pick up the title for the SUV. (V10, R1169, 1170).

Rosa said she and Jose were home on October 29, 2009, when Rosa received a call from Malave. (V10, R1171-72). Rosa told Malave that she would be at work in about 25 minutes, and then instructed Malave to tell Davis to come back later for the title or to make an appointment. (V10, R1172). When Rosa arrived at work at about 12:10 p.m., no one was there. Rosa found the office door unlocked which Rosa said never happened before. (V10, R1171, 1173).

Rosa noticed that Malave's 1997 Mazda car was missing. Rosa did not see Malave's keys and purse, either. (V10, R1173-74, 1175). Rosa made several calls to Davis throughout the day but they went unanswered. (V10, R1174).

---

[5] For clarity, Rosa's and Jose's first names will be used for their testimony.

[6] Herman Bernal, State certified court interpreter, translated Rosa Hernandez' testimony. (V10, R1163).

Jose Hernandez, co-owner of the Super Sport Auto business, said Davis bought a car from him a few days prior to October 29, 2009. (V10, R1177-78). Only Jose or Rosa gave out the car titles, which usually occurred at a scheduled appointment within 30 days of the purchase. (V10, R1178-79).

Jose said Malave was working at the business on the morning of October 29, 2009, while Jose and Rosa were still at home. (V10, R1179). Jose heard Rosa talking to Malave on the phone at about 11:30 a.m. (V10, R1180, 1196). Jose told Rosa to instruct Malave to tell Davis to leave and return in about 30 minutes, that Rosa would arrive and have the car title ready for Davis. (V10, R1180). Jose went about his business throughout the day. At some point, he received a disturbing call from Rosa. (V10, R1181, 1182). Jose then tried to find out where Malave was and eventually called Malave's mother. (V10, R1182, 1196).

Jose arrived at the car lot late in the afternoon on October 29. Malave was still missing. (V10, R1179, 1181). Jose told Malave's mother to meet him at the car lot. He called police from the lot at 5:30 p.m. (V10, R1197). Prior to police's arrival, Jose, Rosa, and a couple of his brothers checked the trunks of the cars "looking for Fabiana." Malave's mother also arrived. (V10, R1197). When police arrived, Jose told them he "thought" his employee was missing and asked for help in finding Malave. (V10, R1198). Jose was "very worried" because "this is

not the way she (Malave) will do things ...” (V10, R1198).

Jose said Davis had broken several prior scheduled appointments for picking up his car title. Jose wanted to talk to Davis to see if he “had any information about Fabiana.” (V10, R1198). Jose told police that Davis had been at the lot earlier that day when Malave was working. Jose thought Davis might be able to fill in the gap of time when Malave went missing so he gave police Davis’ phone number. (V10, R1199).

While talking to police, Jose saw Davis’ 4Runner drive by the dealership “very slow, very extremely slow.” Jose told police “that’s the guy.” Jose wanted to talk to Davis about Malave. (V11, R1212). Police attempted to follow Davis while Jose got into his own car to catch up him. Jose saw Davis’ SUV in a nearby parking lot. He pulled into the lot and circled around the business with the intent of parking in front of Davis’ vehicle. (V11, R1212, 1213). However, Jose then noticed Malave’s car parked next to Davis’. Jose suspected that Davis knew where Malave was and decided against confronting him. (V11, R1213). Jose noticed a police car nearby and flagged it down. Jose then drove back to the lot where Davis was parked while the police car followed him. Jose blocked Davis’ vehicle with his own car. (V11, R1214). Jose got out of his car and yelled at Davis, “Where was Fabbie?” Davis “just reacted very happy to see me - - he smiled at me like I was his best friend ...” (V11,

R1215, 1221). When police arrived a few moments later, Jose observed Davis' "whole face went blank." (V11, R1216, 122). Jose heard Davis tell police, "I want to tell you something." (V11, R1218-19, 1220). Jose said about "a minute later" Davis asked to be secured. (V11, R1220, 1221). Shortly thereafter, Deputies Adamson and Hanna arrived. (V11, R1219).

Deputy Camille LeBlanc was working near the intersection of Highway 17-92 and Dog Track Road in Sanford, Florida, on October 29, 2009, when Jose Hernandez' car pulled up beside him. Hernandez flagged him down and was "screaming about ... a missing girl and he knew where the girl was." Hernandez was "very upset, screaming." (V10, R1144, 1146, 1147). LeBlanc followed Hernandez' car into a nearby parking lot of the Post-Time Lounge. (V10, R1146). Hernandez parked his car in front of Davis' Toyota 4Runner which was parked next to a red Mazda. LeBlanc said Hernandez exited his car, "screaming the girl is in the vehicle. The girl is in the vehicle." Davis, who was sitting in the driver's seat of his car, exited through the driver's side door. (V10, R1147-48). LeBlanc had Davis place his hands on his car and he told Hernandez to stay back. (V10, R1149). Davis asked LeBlanc to "secure" him, which LeBlanc did. LeBlanc checked Davis for weapons and then place him in his patrol car. (V10, R1149-50). LeBlanc took a "quick glance" through the window of Davis' 4Runner and then checked the trunk of Malave's

car.[7] (V10, R1150). LeBlanc returned to Davis' SUV and then observed a blanket "tucked around something in the back seat." LeBlanc opened the door and moved the blanket aside. Malave's body was found with a garbage bag over her head. (V10, R1150, 1151). LeBlanc said Adamson removed the bag from Malave's head. However, there were no signs of life. (V10, R1151-52).

LeBlanc said Davis was "very calm. No real emotions. Just very calm." LeBlanc transported Davis to jail. (V10, R1152).

Jason Chesteen, EMT/paramedic, responded to the scene at the Post Time Lounge. (V10, R1154, 1155). Chesteen observed Malave's body in "an unnatural position essentially in a fetal position with a yellow blanket partially covering her body." Chesteen saw a black plastic bag in the passenger seat. (V10, R1156, 1157). He checked Malave's arm for a pulse but determined "rigor mortis" had already set in. (V10, R1158).

Dr. Marie Hermann, medical examiner, performed the autopsy on Malave on October 30. Malave's body was "well preserved."[8] (V11, R1223, 1226, 1227). In addition to results and conclusions obtained during the autopsy, Hermann considered photographs

---

[7] Hernandez had a set of keys to Malave's Mazda. (V10, R1150). Malave's set of keys was found on the front seat of Davis' SUV. (V10, R1279).

[8] Malave was five foot one and weighed 95 pounds. (V11, R1237).

taken at the crime scene by one of her investigators. (V11, R1227).

There was no evidence of drugs or alcohol in Malave's system. (V11, R1239). Hermann collected head and pubic hair samples, a blood standard, swabs from Malave's oral cavity, anus, and vagina, swabs from her fingernails,[9] and also collected a sexual assault kit. (V11, R1240, 1241). The samples and Malave's clothing were given to crime scene analyst, Jacquline Grossi. (V11, R1240, 1241).

Hermann said Malave had "somewhat limited" external injuries on her body. (V11, R1228). Malave had two linear, faint pink contusions on the left side of her neck as well as a blue contusion. (V11, R1228-29). There was also a linear, pink contusion on the right side of Malave's neck as well and a small, pink contusion under her chin. (V11, R1230). In Hermann's opinion, the contusions were inflicted as a result of pressure "applied to the skin." (V11, R1229). Hermann observed a small, faint blue contusion on Malave's left upper eyelid as well as a faint blue contusion on her left cheek. (V11, R1229). Four pink contusions, "bruises," were on the left side of Malave's lower pelvic area. (V11, R1230). Hermann observed blood-tinged fluid

[9] In order to preserve possible evidence, brown paper bags had been placed over Malave's hands at the crime scene. (V11, R1246).

oozing from the left side of Malave's mouth and fluid in her nostrils and on her lips. (V11, R130). Hermann found the presence of frothy pulmonary edema, "frothy buildup from the lungs," that had formed and continued up into Malave's airway and ran out her nose and mouth. (V11, R1230-31). In addition, Malave's left thumbnail was torn off and there was a linear scratch on her left knee. (V11, R1231).

Hermann said Malave sustained injuries to her external genitalia in the pubis area. There was pink discoloration and a superficial contused laceration near the opening of Malave's vagina. Hermann explained that a contusion is a bruise; an abrasion is a scraping of the skin; and a laceration is the tearing of the skin. (V11, R1231). In Hermann's opinion, the laceration to Malave's vaginal area was a recent injury which occurred prior to her death. It measured about 1/8 of an inch in width and 1/4 inch in length. (V11, R1242). In Hermann's opinion, she could not say any of the external injuries inflicted to Malave "in and of themselves" were fatal without first examining the structures inside Malave's body. (V11, R1232).

Hermann found internal injuries that were restricted and isolated to Malave's neck. There was hemorrhaging in Malave's front neck muscles and "hemorrhage deep in to the muscles along the spine in the deeper portions of the neck." (V11, R1232,

1235, 1236). There were bloody contusions on the upper portion of the esophagus near the epiglottis which is "the structure that closes the airway when we swallow." (V11, R1232-33). In addition, there was pulmonary edema in Malave's lungs and frothy edema fluid in her airway. There was no evidence of a skull fracture or significant head injuries. (V11, R1233, 1247). In Hermann's opinion, the injuries to Malave's neck were caused by "a significant amount of pressure" being applied, consistent with a choke-hold type of strangulation. (V11, R1236, 1238, 1239, 1250). Hermann explained that a "choke hold" is "using the arm to obstruct air flow ... either putting the neck in the wedge of the arm or pressing the arm against the neck with someone on a rigid surface." (V11, R1239). Hermann concluded that "the bleeding in the structures of the neck [were] the footprints of injury to the neck." Hermann said this finding, "combined with the other findings of the frothy edema and the lack of any natural disease," was the cause of death for Malave. (V11, R1236). In Hermann's opinion, there was no indication that hands or ligatures were applied to Malave's neck. (V11, R1238, 1243). Hermann concluded that the cause of death for Malave was asphyxia due to "choke-hold strangulation." (V11, R1238-39, 1244). The manner of death was a homicide. (V11, R1239, 1247, 1249).

Jacquline Grossi, crime scene analyst, Seminole County

Sheriff's Office, responded to the crime scene at the Post-Time lounge. (V11, R1255, 1256). She photographed the front and back of Davis which included photographs of scratches on the back of his neck. (V2, R334-36, State Exhs. 67, 68, 69; V11, R1257-58). Grossi also used a buccal swab kit to obtain a DNA standard from Davis. She also collected fingernail scrapings from him. (V11, R1258).

Grossi sketched and photographed the area surrounding the Post-Time lounge. She also photographed the inside of Davis' car, which included photographing the victim. (V11, R1259-60, 1261). In addition, she sketched the position of Malave's body as she lay inside Davis' car. (V11, R1262, State Exh. 135).

Grossi also assisted in processing Davis' home. She took several photographs of the house and sketched the area. (V11, R1262-63; State Exhs. 119 127, 128, 131, 133, 134). Grossi also photographed and processed Davis' bedroom. (V11, R1265). She collected a pair of jeans from Davis' hamper as well as another pair found lying on a chair in his room. (V11, R1267-68, State Exhs. 5, 6). In addition, she collected a steak knife located on the top of his nightstand. (V11, R1269, State Exh. 8).

Grossi photographed the underside of Davis' bed where she found several plastic garbage bags. (V11, R1269). She noted that there were no bedsheets on the bed, only a balled-up comforter and a pillow. However, she found a balled-up, light blue-colored

fitted sheet on the floor in the corner of the Davis' bedroom. (V11, R1263, 1271, State Exh. 4). Grossi located and photographed a cell phone, a bottle of cleaner, and a small piece of black plastic bag found on the top of Davis' nightstand. In addition, she used a forensic light source on Davis' bed which yielded positive results for bodily fluids. (V11, R1270, 1273).

Grossi was aware that a black, plastic bag had been found covering the victim's head. "So we were looking for additional black plastic bags." (V11, R1273). As a result, she photographed and collected another black, plastic garbage bag found on a dining room chair in Davis' home. (V11, R1272, State Exh. 9).

Grossi attended Malave's autopsy. She collected several pieces of evidence including Malave's clothing, personal effects, DNA standards, fingernail and toenail clippings, pubic hair and head hair, and different swabs taken off Malave's body by the medical examiner. (V11, R1273). Grossi also collected the sexual assault kit. (V11, R1275).

Grossi processed Davis' and Malave's vehicles which included photographing the inside and outside and collecting evidence. (V11, R1276, 1292). Evidence from Malave's car included the following: a purse and its contents, a broken wristwatch, a piece of plastic, a passport, and a cell phone. (V11, R1276-78). Evidence collected from Davis' vehicle included the following:

two sets of keys (1 set found in the ignition and 1 set belonging to Malave's car-found on the SUV's passenger seat), a pair of sunglasses, a rag, a screwdriver, a cell phone, a watch, a razor blade, a silver ring, a yellow blanket (that had been covering Malave's body), 2 pillow cases (1 white, 1 blue), a black plastic bag (that had been covering Malave's head), miscellaneous paperwork, the SUV's bill of sale, an Adidas backpack, and Davis' wallet. (V11, R1279, 1280, 1282-1284).

Grossi examined the inside of the blue pillowcase which she found on the rear driver's side floorboard of the 4Runner. The pillowcase contained the following items: a pair of women's black shoes and a white, blinds cord. (V11, R1285). The white pillowcase, also collected from the rear driver's side floorboard, contained brown shoelaces. There were no shoes in Davis' vehicle that the shoelaces fit in. (V11, R1286, 1287). Several items were sent to the Florida Department of Law Enforcement, FDLE, for processing. (V11, R1287-88).

Eric Brothers, crime scene analyst, Seminole County Sheriff's Office, performs biological screening, "prescreening," on items of evidence to check for the presence of biological fluids. (V11, R1318, 1319, 1320). Evidence containing biological substances is then forwarded to FDLE for further analysis. (V11, R1320).

Brothers prescreened the sexual assault kit collected from

Malave. He examined four sets of swabs contained within the kit. Three of the four sets - the oral swabs, vaginal swabs, and perineal area were positive for the presence of semen. (V11, R1320, 1321, 1322). The swabs were then separately re-packaged, sealed in an envelope, returned to the evidence section, and sent to FDLE for further analysis. (V11, R1323).

Catherine Johnson, crime lab analyst, FDLE, examines evidence for the presence of biological fluids and compares the evidence to known standards. (V11, R1327). Johnson examined the buccal swab obtained from Davis and developed a DNA profile. (V11, R1330, 1332). She also developed a DNA profile from blood collected from Malave. (V11, R1333). Johnson received the buccal standards, vaginal swabs, and perineal swabs from Malave's sexual assault kit. (V11, R1333). She performed an analysis on the vaginal swab and developed a male DNA profile from the sperm cells that were present as well as a female profile that was present on the epithelial cells. (V11, R1334). The male DNA profile developed from the vaginal swab matched Davis' DNA at thirteen areas, to which Johnson said, "That's rare." (V11, R1333-34, 1335, 1342).

Johnson examined the blue bed sheet found in Davis' bedroom. She looked for semen stains and possible skin cells from Malave. (V11, R1335). She was able to develop DNA profiles from a semen stain which contained a mixture of Davis' sperm and Malave's

skin cells. The mixture contained six of thirteen areas that matched Malave. (V11, R1336, 1337, 1342-43). Johnson also examined the white, blinds cord found inside a pillow case in Davis' SUV. After the whole length of the cord was swabbed, Johnson obtained a DNA mixture of two individuals. Although Johnson determined the major DNA profile matched Malave,[10] she could not determine the DNA profile of the minor contributor. (V11, R1338, 1343-44). In addition, Johnson could not determine if Malave's skins cells were deposited when she was alive or deceased. (V11, R1345).

Johnson examined the scrapings taken from Malave's fingernails and toenails and developed a DNA profile containing a mixture. (V11, R1339, 1345). Although Malave's DNA was present, Johnson could not develop a profile from another individual. Johnson said, "When DNA is kind of at equal amounts or there's a lot of DNA there, I can't always ... separate them out. What I can do is include somebody in the mixture or I can exclude them from it and in this case I was able to include William Davis in the mixture." (V11, R1339, 1345). Johnson said Davis' DNA matched at four areas "so it's not a very high

[10] Johnson said there was no "obvious staining" on the cord so she swabbed the cord to search for skin cells. Johnson then determined the DNA found on the cord contained Malave's skin cells. (V11, R1344).

[statistic]." (V11, R1339, 1345-46). A mixed profile is always lower than a single source. (V11, R1346).

Johnson said, "If a person scratched another person, I would expect some of their DNA possibly to be under [the fingernails] depending on how much they scratched them." However, Johnson said, "Skin cells are fickle." Some people easily shed epithelial cells and some people do not. (V11, R1347). Johnson could not develop a DNA profile from Malave's steering wheel or gear shift, either, because "it was so limited that I couldn't tell who was included or excluded." (V11, R1349).

Investigator Robert Hemmert, Seminole County Sheriff's Office, responded to the crime scene at the Post-Time lounge at about 8:00 p.m., on October 29, 2009. (V11, R1351-52, 1360). Hemmert spoke briefly with patrol officers before he met Davis, who was sitting in the rear, caged area of a patrol car. (V11, R1353). Hemmert said that Davis was willing to talk and answer questions at that time. Therefore, he chose to interview Davis in the front seat of his unmarked police car, which was a more conducive setting than the back seat of the patrol car. (V11, R1355-56). Hemmert recorded the interview which was published for the jury. (V11, R1356, 1360, State Exh. 139). Hemmert said Davis understood his questions, Davis' speech was coherent, and he declined having an attorney. Davis did not invoke his right to remain silent. (V11, R1358-59).

Hemmert informed Davis of his *Miranda*[11] rights which Davis acknowledged. (V11, R1360-62). Hemmert asked Davis, "What happened?" Davis said, "Well, long story short grabbed her, threw her in the car, took her to my house, raped her, killed her, and brought her back here." (V11, R1363).

Davis said that a week earlier, he bought a 1989 4Runner from the dealership where Malave worked. The tags on his vehicle were currently stolen. (V11, R1363). Davis had returned to the dealership at about 11:30 a.m. the morning of October 29 to get the title which he had been "trying to get for a few days" but "no one is ever there to give it to me." (V11, R1365, 1366). Malave was the only person there when Davis arrived. Davis asked Malave for the title but she did not have it. Malave then "called somebody. I don't remember who it was." (V11, R1366). After the phone call, Davis said Malave told him that someone would be there to give him the title. However, "I said okay and I grabbed her, walked her outside - - and put her in the car ... her car." (V11, R1367). Davis said he "had a knife[12] so she wasn't going to resist" which Davis admitted, Malave did not. (V11, R1368). Davis held Malave by the back of the neck as he

---

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

[12] Davis later stated that he put the knife ("steak knife") in the back of his truck. (V11, R1394).

walked her to her car. (V11, R1369). Davis knew which car was Malave's because "the times that I've gone up there looking for the title, it's the only car that's ever sitting there so I asked her at one point if that was her car and she said yeah." (V11, R1368-69). Davis told Malave to put her keys in the ignition.[13] He then drove them to the Post-Time lounge where he had earlier parked his truck.[14] Malave did not resist. (V11, R1369). Davis said he told Malave, "... if she screamed, I would kill her." (V11, R1370). At the Post-Time lounge, Davis told Malave to get into the back seat of his truck.[15] Malave laid down and then he drove to his house. (V11, R1367-68, 1370). Davis said Malave complied with whatever he told her to do. (V11, R1375).

Davis said that when they got to his house,[16] he opened his bedroom door which opened to the outside of the home. Davis "got her out of the truck, put her in the bedroom, raped her. She wanted to put her clothes back on. I let her put her clothes back on and then I killed her." (V11, R1371, 1374; V12, R1413).

---

[13] Malave had her purse with her. (V11, R1379).

[14] Davis said he parked his truck at the Post-Time lounge and then walked to the dealership where Malave worked. (V11, R1368).

[15] Malave left her purse in her car. (V11, R1379).

[16] Davis lived with four roommates in a "transition house" for people with drug and/or alcohol problems. (V11, R1372-73).

Davis raped Malave on his bed. She did not resist, scream, or ask him to stop. He threatened her several times that if she screamed, he would kill her. (V11, R1392-93). Davis said he killed Malave from behind by using a "choke hold" on her with his forearm and elbow. (V11, R1371, 1372). Davis "had her lay face down on the bed. She laid down on the bed face down and I choked her." (V11, R1375). No one else was in the home at the time. (V11, R1373). Davis said Malave did not say anything to him when he told her to lay on the bed. He did not use any type of ligature on Malave's throat. (V11, R1385). He did not hold a knife or any weapon against her. (V11, R1392).

Davis said he did not use a condom when he raped Malave and he did not hit her. (V11, R1374). Malave was at his house "twenty-five minutes maybe." Davis said that as soon as he got Malave inside his home, he raped her and then killed her. (V11, R1374). Davis said Malave scratched him on the back of his neck. (V11, R1375).

Davis "crammed" Malave into a blanket that he got from a closet. (V11, R1376). He went outside, pulled his truck into the carport, and put Malave in his truck "as best I could." (V11, R1377). Davis changed his clothes after he killed Malave. (V12, R1412). Malave was in his truck for "quite a while actually" before he drove back toward the dealership. (V11, R1372). Davis was "riding around" and did not stop anywhere. (V11, R1377,

1398; V14, R1415). When Davis attempted to park next to Malave's car (in the Post-Time lounge parking lot), a silver Mercedes "pulled in and blocked me in and then a cop pulled right up behind him." (V11, R1378). Davis recognized the driver of the Mercedes as the car lot's owner. (V11, R1378).

Davis said he "hoped how I raped and killed her that it would be capital murder so you just go ahead and kill me too." (V11, R1379). Davis did not "really have an answer" as to why he killed Malave. He said, "I guess it's a cruel world."

Davis said he was not intoxicated and had not abused any drugs that day. In addition, he had not taken his medication in over a year. (V11, R1380). The last medications Davis took were Lithium and Zoloft for "manic depressive bipolar" which he said he was diagnosed with at age nineteen.[17] (V11, R1381). Davis said he last saw a doctor for his mental issues in September 2008, a year prior to Malave's murder. (V11, R1388).

When Davis' parents divorced, he lived with his father. He joined the army in 1996 but went AWOL after one year. (V11, R1381-82). Davis had previously been incarcerated for five years for a violation of probation for a burglary with assault

[17] Davis was thirty-one years old at the time of Malave's murder. (V11, R1381). He was five-nine and weighed about 140 pounds. (V12, R1414).

conviction and new charges of aggravated assault with a deadly weapon and armed false imprisonment.[18] (V11, R1383).

Davis said Malave's murder was the first time he killed someone. (V11, R1390; V12, R1419, 1423). He said, "pretty interesting though ... squeeze the life out of somebody."[19] Davis said he did not feel any remorse, "No, no. Zero." (V11, R1390). He was not sorry for what he had done and had nothing to say to Malave's family. (V12, R1421). However, after he parked at the Post-Time lounge and walked to the dealership, he did not know what he was going to do. (V11, R1390). He said Malave's murder just happened, he "just did it." "It was liberating actually." (V11, R1391). When Hemmert asked Davis "Would you do it again?" Davis replied, "Oh, yeah. Oh, yeah." (V12, R1423).

Davis said Malave would have known him when he walked into the dealership that day. (V11, R1391). He gave Hemmert consent to search his truck and recover Malave's body. (V11, R1397).

Davis' motion for a judgment of acquittal was denied. (V12, R1443).

Subsequent to Davis' arrest, Hemmert received a call that

---

[18] Davis said he entered a plea to these charges which involved crimes against his girlfriend at the time. (V12, R1419-20).

[19] Davis said Malave urinated on him when he was choking her. (V11, R1390).

Davis wanted to speak to him. Hemmert interviewed Davis a second time on November 2, 2009. (V12, R1450, 1451). Hemmert recorded their interview which was published for the jury. (V12, R1453, 1454).[20]

Dr. Charles Golden, Ph.D., is a neuropsychologist and psychology professor at NovaSoutheastern University. He directs the University's psychological assessment clinics and he also maintains a small private practice. (V12, R1578, 1579).

Golden administered a neuropsychological evaluation to Davis in January 2010. (V12, R1586, 1587). In Golden's opinion, Davis "was neuropsychologically normal." Golden "saw no signs of brain injury." (V12, R1588). As part of the evaluation, Golden administered the Wechsler Adult Intelligence Scale-IV. ("WAIS-IV."). The result indicated Davis' full-scale IQ score was 127, which Golden said "places him just short of the genius range." (V12, R1589; V13, R1755).

Golden reviewed Davis' jail and prison records, mental health records, childhood records, depositions, "everything" that Davis' counsel was able to find. (V12, R1589-90). He interviewed Davis' mother, father, step-mother, maternal grandparents, and

---

[20] This statement implicated "Dr. Paul" in the murder. (V12, R1454-1568). Because Davis was convicted of the murder, this statement is omitted in the interest of maintaining a brief of manageable length. The substance of the statement is repeated by various mental state witnesses. *See, infra*, at 28-44.

Mark Agola, a friend of Davis'. (V12, R1590; V13, R1673).

Golden also administered "a psychological psychiatric evaluation."[21] In Golden's opinion, Davis was competent to stand trial. (V12, R1591). Golden said that when Davis is on "the right medications ... he was rational ... he wasn't entirely stable, but certainly more than met the legal qualifications for being competent to stand trial." (V12, R1592).

Golden explained that the Rorschach Inkblot test is a subjective test where people are shown pictures of inkblots that do not actually look like anything. "So what you see in them comes from inside of you rather than from that and that's a good way of testing people who may not be completely able or willing, either one, to reveal everything about their lives to you." (V12, R1592). The MMPI is an objective test consisting of over five hundred true/false questions that identify certain types of psychopathology. (V12, R1593).

In Golden's opinion, after reviewing Davis records, "it was very clear from the records that he had a mental illness." (V12, R1595). Davis had been diagnosed repeatedly with bipolar disorder, in the community, as well as prison. He had psychotic episodes and heard voices. Davis had been treated numerous

---

[21] Golden administered the Minnesota Multiphasic Personality Inventory test, "MMPI"; the Rorschach Inkblot test; and the Millon Clinical Multiaxial Inventory test. (V12, R1593).

times. (V12, R1596). Davis improved considerably when he was taking medication. (V12, R1596-97).

Golden said Davis' records indicated he attempted suicide several times during his life. (V12, R1597). Davis had "a lot of difficulty in his early life ... Part of that wasn't his fault." (V12, R1597). Davis' father had an undiagnosed bipolar disorder of his own which, in Golden's opinion, made it difficult to raise Davis. Davis' mother did not want to raise him. (V12, R1597). Davis went back and forth between his parents until his father re-married and he then lived with his father and step-mother. (V12, R1598). Davis' stepmother told Golden that her husband was harsh with his children, which Golden said "is typical ... of his bipolar disorder." (V12, R1599).

Golden said Davis was considered "a troublesome child all of the time." He had mood swings with periods of depression. Davis got into fights, stole, and fought with his father. (V13, R1613). He had difficulties forming friendships and usually ran around with younger children. (V13, R1614). In Golden's opinion, Davis had "elements of conduct disorder." However, "when conduct disorder or the problems are caused by another psychiatric disorder - - you do not diagnose conduct disorder."(V13, R1615, 1778). Golden concluded that Davis did not have conduct disorder because he diagnosed Davis with "other diagnoses -- his depression and his personality problems." Although Davis was

"very bright," his depression and mania interfered with his intelligence. (V13, R1619).

Golden said Davis suffered physical abuse as a child but not sexual abuse. (V13, R1620). Davis joined the army after high school but went AWOL after a year.[22] At some point, Davis "holed himself up" in a hotel room and claimed he would hurt himself. Davis called his stepmother to come get him and bring him to the hospital. (V13, R1622). Golden said Davis "alternates between loving her and despising her, same towards his father" which "is one of the symptoms of his personality disorder." (V13, R1623). After Davis left the army, he returned home where he continued to get into legal trouble and eventually ended up in prison.[23] (V13, R1625). During Davis' incarceration, he was evaluated and diagnosed with "severe mental health problems." Golden said Davis attempted suicide, "the second suicide attempt that we know about" and was referred to the Peace River Mental Health Center. (V13, R1630). The Peace River Center records and correctional records indicated that Davis had two suicide attempts all together. He was diagnosed with bipolar disorder

---

[22] Davis' military records could not be located. (V13, R1625).

[23] Davis stole his father's jet ski and later damaged the garage. His father pressed charges and Davis ended up in jail. After his release, Davis' legal troubles continued with an attempt to crack open a safe, and a conviction for sexually assaulting an ex-girlfriend. (V13, R1625-29).

and treated with medication. Davis continued to have "mental swings" and "a great deal of depression." In Golden's opinion, "it does not appear that they had the correct medication."(V13, R1631). During his incarceration, Davis was found to be "cognitively normal" and "competent to stand trial." (V13, R1632). However, in Golden's opinion, when Davis is "on the right medications he does much, much better." (V13, R1635).

Golden said that after Davis was released from prison in 2008, it was recommended that he seek treatment. (V13, R1635). Davis did not seek treatment and continued to have problems until he met Jody and Matthew. Davis considered Jody's son his own. (V13, R1636-37). However, after Jody entered an alcohol treatment program, she cut off contact with Davis. (V13, R1637). Davis got a job and continued to write to Jody, even though she was dating someone else. (V13, R1638). Davis claimed Jody told him to "stay away" in her letters to him. However, her letters to Davis could not be found. (V13, R1638). Jody's father told Davis to stay away from her, as well. (V13, R1642). Davis was not medicated during this time frame. (V13, R1640). Golden said, "This is where he hit the bottom." (V13, R1642).

Golden said Davis "starts ... hearing voices ... someone he calls Dr. Paul." (V13, R1644). Dr. Paul, "the voice," told Davis he had to kill one of three women in order to ensure Jody's and Matthew's safety. (V12, R1644-45). Golden said it was unclear to

him whether or not Davis visually hallucinated the appearance of Dr. Paul or that Davis "fantasized about the voice." Golden said that, in most cases, people who experience visual hallucinations are abusing drugs. Davis denied abusing drugs during this time frame. (V13, R1645). Davis told Golden that "the voice ke[pt] coming after him" during this time, which Golden said is "typical of auditory hallucinations." (V13, R1646). Golden said Davis was "getting worse" after Jody's rejection. Davis was worried about the truck title, "probably not eating," and may have forgotten about previously-made appointments with the car dealer to pick up the title. (V13, R1647).

Golden said that, on the morning of Malave's murder, Davis parked his truck elsewhere because he feared the dealer would take the truck back. Davis went into the office and demanded the title. (V13, R1647). In Golden's opinion, Davis was not planning on kidnapping and killing Malave. Davis gave his name to Malave prior to her calling her boss when she asked about the title to the truck. In Golden's opinion, "it is very unlikely he'd give his name and ask her to call her boss and tell it to him." (V13, R1648). Golden said Davis continued to get agitated while he waited for Malave's boss to come with the car title. Golden said, "he hears ... the voices increase, pushing him to kidnap the girl, kill her in order to save Matthew and Jody." Davis "finally gives in." (V13, R1648).

Golden said Davis pulled out a steak knife and kidnapped Malave. Malave "cooperates apparently." (V13, R1649). Davis and Malave first drove around in her car before driving to where his truck was parked. Davis tried to tell Malave "what he's doing is the right thing. That he has to hurt her to save his son." (V13, R1649). After arriving at Davis' home, he forced Malave to perform oral sex and then raped her. "All of this is being done with the commentary of Dr. Paul." (V13, R1649).

Golden said Davis admitted to trying to strangle Malave but did not admit to actually killing her, "even though he feels himself responsible for the death absolutely." (V13, R1650). In Golden's opinion, due to Davis mental problem, Davis "disassociated" himself from thinking he killed Malave. (V13, R1651). Davis had opportunities to get rid of Malave's body but he did not do so.

Golden said Malave had previously told her mother, "I'm going to quit my job. I'm walking out on these people because I'm so unhappy being here at this job." Golden said no one was even looking for Malave because her family members were "confused" and were not sure if she "had just walked out." (V13, R1651-52). Therefore, Davis "had tons of time to get away." (V13, R1652). Davis did not know Hernandez and police were following him when he returned to Malave's car which was parked at the Post-Time lounge. Davis said "Hi" to Hernandez when he exited his truck

but then asked police to arrest him. (V13, R1652). Golden said, "at this point in time, [Davis] is emotionally totally flat." In Golden's opinion, Davis had disassociated himself from the crimes. (V13, R1653). Further, " ... if he admitted to himself what he had done, he would want to kill himself. He would want to destroy himself." (V13, R1653). Golden said that, because Davis had disassociated himself from what he had done, he drove around randomly because he did not know what to do. (V13, R1653-54). He ultimately returned to the Post-Time lounge because "he knew there's going to be lots of people around, and he turns himself in ... they don't have to chase him, they don't have to find him. He says, yeah, I did it. I should be killed." (V13, R1654).

Golden said he has treated people in similar situations as Davis, "real ones where they had to kill somebody to save their family or in the military where they had to kill somebody." Further, "they did the right thing, but they had the same reaction that he did, which is, I've done a horrible, terrible thing even though I did the right thing. And I should be killed." (V13, R1654). Golden said Davis recognizes "he was fooled ... that's why he is where he is now." (V13, R1655).

Golden said Davis was consistent in describing the events that led to Malave's murder. Golden said, "I gave him chances to make his story better." However, Davis told him, "I kidnapped

her. I held a knife. She never wanted to come with me." (V13, R1656, 1657). However, Golden said, "Now, that doesn't mean that everything he said happened." (V13, R1658).

Golden said Davis does not suffer from brain damage. He is not schizophrenic, either. (V13, R1660, 1756). In addition, Davis' scores on the MMPI indicated that he overstated what is wrong with him - - he achieved a score that is "exaggerated." (V13, R1660, 1677). In Golden's opinion, Davis' disorders are "cyclic. They go up and down over time." (V13, R1671). Davis did not share his symptoms with people. Golden said the problems Davis has "are mostly things that go on in his head." (V13, R1672). In Golden's opinion, Davis is "tortured by these voices, he's tortured by his own failure, he's tortured by the rejection of his own family, he's tortured -- by his mental illness." (V13, R1674). Davis' scores on the MMPI-2 and the Millon Clinical Multiaxial Inventory were within the normal range. Neither of these tests indicated Davis was malingering. (V13, R1678, 1743m 1758). In addition, Golden administered the Structured Interview of Reported Symptoms, SIRS, test in which Davis scored "completely normal." Golden said the SIRS test "is sort of the gold standard" test for determining psychiatric malingering over all other tests. (V13, R1681, 1743).

Golden concluded that Davis suffers from bipolar disorder-2 and borderline personality disorder. Davis' "severe" manic and

depressive episodes led to suicidal and self-destructive type behavior. (V13, R1689, 1690). Golden said Davis also suffers from Post-Traumatic Stress Disorder (PTSD) due to his father's verbal and occasional physical abuse towards him. (V13, R1692). In addition, Davis suffers from borderline personality disorder. (V13, R1690). At least five of the nine criteria have to met to be diagnosed with this illness. In Golden's opinion, Davis meets all nine: 1) frantic efforts to avoid real or imagined abandonment; 2) a pattern of unstable intense interpersonal relationships; 3) identity disturbance; 4) impulsivity; 5) recurrent suicidal behavior; 6) affective instability; 7) chronic feelings of emptiness; 8)inappropriate intense anger; and 9) transient stress-related paranoid ideation or severe dissociative symptoms. (V13, R1693-1701).

Golden administered the HARE PCL test to Davis, the "gold standard" test for determining whether or not a person is a psychopath. Davis scored "average levels" which indicated he is not a psychopath. Testing also revealed that Davis does not suffered from ADHD. (V13, R1708-09).

In Golden's opinion, Davis knew what he was doing when he killed Malave, "but it was based upon a delusion and hallucinations." Davis knows the difference between right and wrong. "No question about that." However, Golden said Davis did not think what he had done was wrong, "he thought he was

defending Jody and Matthew" but it was "a delusional choice." (V13, R1711, 1789, 1792). In Golden's opinion, Davis "knows that murder is wrong, he knows that rape is wrong, he knows that being out of control is wrong, but he had no choice and he could not control himself." (V13, R1712). Although Davis initially disassociated himself with Malave's murder, he turned himself in because "he couldn't live with himself." (V13, R1713). Davis knew that killing Malave was against the law. Golden had "no question of [Davis'] ability to understand the law and right from wrong." (V13, R1793, 1798). However, when Davis murdered Malave, "he thought he was doing the right thing." (V13, R1799).

Golden reiterated that the neuropsychological evaluation he administered to Davis indicated Davis was "within normal limits." (V13, R1722).

Dr. Daniel Tressler, psychologist, evaluated Davis on March 21, 2011. (V14, R1823). Tressler spent two hours with Davis which consisted of a questions-and-answers type session. (V14, R1826, 1827). Tressler also reviewed voluminous documents pertaining to Davis which contained prison records, audiotaped statements, psychological evaluations, raw psychological test data, and correspondence between Davis and a prior girlfriend. (V14, R1829-30).

Tressler said Davis' mental status was "essentially clear. He was reality oriented." (V14, R1826, 1873). Davis described

frequent experiences of psychotic symptoms. However, Tressler did not observe any evidence of that at the time of the interview. (V14, R1827). Tressler said Davis is "a bright individual." He described his thoughts, feelings, and experiences in great detail. (V14, R1827).

Davis' psychosocial history indicated an early disturbance in the relationship between Davis and his mother. During Davis' middle childhood, other people noted various kinds of antisocial behavior, fighting, possible cruelty to animals, and an early onset of drug use at age 11. (V14, R1831-32). During Davis' late adolescent years, a pattern of criminal behavior developed. From age 19, Davis was involved in a series of legal problems that resulted in incarceration. In addition, Davis was not successful in forming a healthy relationship with a woman. (V14, R1832).

Tressler administered the MMPI-2-RF to Davis, which is the restructured format version of the MMPI-2. Tressler said the MMPI is "the gold standard" of assessing personality and psychopathology. (V14, R1832, 1838). In Tressler's opinion, the test results indicated Davis "was apparently over reporting pathology" because there were elevations in the "F" scale.[24] (V14, R1833-34, 1838, 1862). Davis is "not as mentally ill as he

[24] The "F" scale consists of sixty true/false questions/items. (V14, R1836).

wished to appear." (V14, R1838). In addition, Davis reported a number of deviant symptoms that included antisocial behavior and aggressiveness toward others. (V14, R1839).

Tressler also administered the Structured Inventory Malingering Symptoms test to Davis. In Tressler's opinion, the results indicated Davis was exaggerating his symptoms in the areas of mood disorders and memory problems. (V14, R1841). Tressler said Davis' high IQ score of 129 indicated a superiority in problem-solving skills. However, Tressler said there should have been a decline in those type of skills if Davis was acutely impaired by hallucinations or some kind of psychosis. (V14, R1843). In addition, Davis' high score of 136 on the working memory index was inconsistent with a person who suffered from hallucinations, impaired thoughts, or acute mania. Davis' working memory index score was contraindicative of acute psychosis at the time Davis was administered the IQ test. (V14, R1844).

In Tressler's opinion, there was no indication Davis was acutely psychotic at the time of the crimes. Davis was working as a telemarketer, doing most of the activities of daily living, and had negotiated the purchase of a car. (V14, R1846). However, Davis had indicated that "Dr. Paul" directed him to commit his crimes. In Tressler's opinion, combinations of auditory and visual hallucinations occurring simultaneously are "extremely

rare." (V14, R1846-47). In Tressler's opinion, Davis' scenario involving "Dr. Paul" was "more likely either fabricated or the product of intoxication with a hallucinogenic drug like LSD. It's not symptomatic ... of any problem that Mr. Davis was known to have." (V14, R1847). Further, Davis' memory of the events that occurred the day of Malave's murder was consistent with the circumstances relayed in the police report. (V14, R1847). In Tressler's opinion, Davis was composed, unemotional, and provided little elaboration when he initially described to Inv. Hemmert what had happened. There was no indication he was suffering from hallucinations at that time. (V14, R1849-50, 1874). Tressler said Davis told him that he committed these crimes in order to protect Jody Oehmke. However, when Oehmke informed Davis that she was not interested in a relationship with him, he became angry, which he relayed to her in a letter approximately a week before Malave's murder. (V14, R1851). In Tressler's opinion, Davis' "painful rejection" by Oehmke led to his rage against Malave. (V14, R1855).

In Tressler's opinion, Davis suffers from bipolar disorder NOS, as well as long-term polysubstance dependence, which was in remission due to incarceration. In addition, Tressler also diagnosed Davis with antisocial personality disorder. (V14, R1852).

In Tressler's opinion, Davis knew what he was doing when he

kidnapped, sexually assaulted, and murdered Malave. Davis knew he was harming another person, that he committed various criminal acts against her, and knew his actions would cause the death of Malave. (V14, R1858). Davis did not have any condition that prevented him from knowing his actions were wrong. He did not have a condition that prevented him from understanding that killing another person in this manner was wrong. (V14, R1860).

Tressler was aware that Davis had a history of reporting auditory hallucinations. (V14, R1869). In addition, in Tressler's opinion, there was also evidence that Davis suffered from conduct disorder. Evidence included Davis' marijuana use at age 11, reports of cruelty to animals, and reports of fist fights. Tressler said that conduct disorder must exist in order to meet the diagnostic criteria for antisocial personality disorder, according to the DSM-IV-TR.[25] (V14, R1869-70, 1871).

In Tressler's opinion, Davis was not legally insane due to delusional thinking at the time he murdered Malave. (V14, R1880-81). Davis had a motive to fabricate a command hallucination - - exculpatation on the basis of an insanity plea. (V14, R1881). In Tressler's opinion, Davis' "hallucination report" of Dr. Paul

---

[25] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

did not represent any kind of symptoms that Davis had based upon his diagnosis. (V14, R1884).

Tressler was aware that Davis had a history of suicide attempts which is consistent with bipolar disorder. In addition, Davis' statement to Hemmert subsequent to Malave's murder, that he wanted to be killed, was not an uncommon response by a defendant who is facing very serious consequences. (V14, R1885).

Dr. William Riebsame, psychologist, evaluated Davis in March 2011. (V14, R1904-05, 1907). He administered several tests which included the Millon Clinical Multiaxial Inventory, Third Version, the Miller Forensic Assessment of Symptoms, the Paulhus Deception Scale test, and the "M" test, which is a test that indicates symptoms of schizophrenia. (V14, R1933-34). Riebsame reviewed Davis' statements to law enforcement, police reports, criminal history, depositions, psychological data and test results, mental health reports prepared by Drs. Dee and Hartig, and the information Drs. Golden and Tressler obtained subsequent to their evaluations of Davis. (V14, R1909, 1925, 1943).

Riebsame said Davis was cooperative during the evaluation. Davis explained himself in a coherent, logical manner. His thoughts were organized and he did not appear to be in any kind of emotional distress. Davis was "very detailed" and shared information spontaneously which was unusual. (V14, R1910-11). Riebsame has dealt with many mentally ill people. In his

experience, they prefer to keep their symptoms to themselves or downplay their symptoms. “That’s the common cast that a person with legitimate mental health issue is not really eager to discuss them with you.” (V14, R1911).

Riebsame said Davis told him he had been working the Monday before Malave’s murder. He left work because he was “losing control of himself.” Davis claimed he was hearing voices, felt like he was in a crowded restaurant, and then a single voice of "Dr. Paul” stood out to him. (V14, R1912). Davis “spontaneously” described that Dr. Paul showed Davis three photos of women he knew. Dr. Paul told Davis, “pick one. To take to his house.” (V14, R1912). Davis told Riebsame he went to the car lot to get the title to his recently purchased vehicle. Davis obtained a stolen license plate and brought it with him. Davis told Riebsame, “... he grabbed a female ... took her in his vehicle to his house ... told by Dr. Paul to rape her, which he did. Then he’s told to kill her ... he tries to strangle this woman ... He’s not successful ... He recalled throwing up in the bathroom at least a couple of times ... he hears two thuds in the bedroom and he throws up again ... he’s told by Dr. Paul to get a blanket and wrap up Ms. Malave. He puts her into his truck floorboard. He doesn’t remember how the strangling is finished. Dr. Paul is talking to him and being very critical of him at this time.” (V14, R1913). Riebsame said Davis told him that he

used a knife during the abduction. Davis told Riebsame that he was told to remove Malave's clothing and that he raped her. Davis claimed Malave did not tell him no, "but I made her do it." Davis recalled having intercourse and ejaculating inside of Malave. Davis said Malave, "is sickening for him." Riebsame said Davis did not recall at this point if Dr. Paul was in the room, but, "if I didn't do what he said he would do, he was going to hurt people he cared about ... Jody and her son Matthew." (V14, R1914). Davis told Riebsame about his relationship with Jody, that she was in a rehab center, that he had attempted to visit her, but she was visiting with another male at the time. Davis was frustrated about that situation. (V14, R1917, 1918). Riebsame said Davis told him that he did not go to police about Dr. Paul because he did not "want to appear weak." (V14, R1914).

Riebsame said Davis told him that Dr. Paul's voice was familiar to him since his release from prison the prior year. Davis claimed Dr. Paul had tried to get him to commit suicide by cutting his wrists or hanging himself. Davis said Dr. Paul was "very critical of him." (V14, R1914). Further, Davis told Riebsame that Dr. Paul was "always inside my head talking to me." (V14, R1915). However, Riebsame said Davis was inconsistent in his statements about Dr. Paul. "It depends on which version of events from Mr. Davis as to when Dr. Paul became known to him." (V14, R1918).

Riebsame said Davis told him he drove back to where Malave's car was parked after her murder. There, Davis saw the car lot owner, and then the police. Davis said he asked police to handcuff him. Davis claimed he did not recall the conversation he had with Investigator Hemmert, "but that it probably did happen." Davis claimed, "everything is going super fast ... in his head." Davis claimed Dr. Paul was around and talking to him in the squad car. Davis said he told Dr. Paul to shut up and leave him alone. (V14, R1915). Riebsame said Davis' statements regarding his memory of his conversation with Hemmert and the presence of Dr. Paul during those statements were inconsistent. (V14, R1919).

Riebsame said Davis claimed his next memory occurred in the suicide cell at the Sanford County jail. (V14, R1915). Davis recalled talking to police again but only after he had been prescribed medicine in the jail. However, Riebsame said jail records were not consistent with what Davis told him. (V14, R1916, 1917). Davis said he talked to an officer that came three or four days after his arrest. Riebsame said Davis claimed, "the voices are tapering off ... he's functioning better ... he relays to the detective information about Dr. Paul." (V14, R1916).

Riebsame said Davis did not show any self-destructive behavior subsequent to his arrest for Malave's murder. (V14,

R1919). In Riebsame's opinion, after listening to Davis' initial statements to Hemmert, and being aware of Davis' request to be handcuffed, Riebsame said Davis knew he had done something wrong. In Riebsame's opinion, Davis explained himself in a coherent, logical fashion, and tied the events of the day together "in a very matter of fact and organized way." Further, although Davis referred to a history of mental illness in his statements to Hemmert, in Riebsame's opinion, Davis was not suffering from any mental health problems at that point in time, "hours after the death of the victim." (V14, R1923). Riebsame said Davis was not distracted by hallucinations, he was attentive to Hemmert, and answered questions in a relevant manner. (V14, R1923-24, 1949).

Riebsame also reviewed the second statement Davis made to Hemmert while in the Seminole County jail, four days after his arrest. (V14, R1924). In Riebsame's opinion, Davis appeared to be in emotional distress. Davis was crying while he relayed what Dr. Paul had allegedly made him do. (V14, R1924). However, there was no indication that Davis experienced any hallucinations during those statements - - "he just appears and sounds very distraught." (V14, R1925). In Riebsame's opinion, Davis' hallucination "appears to be contrived. It's not a typical hallucinatory phenomenon." Riebsame said auditory hallucinations are typically experienced outside one's head, not as Mr. Davis

described [Dr. Paul] as being the voice inside my head." (V14, R1926). Riebsame said that the prolonged nature of the ongoing presence of a visual and auditory hallucination "according to Mr. Davis, is not one that I've experienced in my career as a psychologist." (V14, R1926).

Riebsame was aware that Davis had been administered the MMPI at least four times. With the exception of Dr. Golden, the other experts' opinions were that Davis' results were invalid due to exaggerating or over reporting symptoms. (V14, R1928, 1945). In Riebsame's opinion, Davis reports mental health issues when "they're to his advantage" *i.e.*, "be relieved from the military ... gets incarcerated ... when he's in trouble, or when he wants to get out of trouble." (V14, R1930).

After administering tests, reviewing Davis' family history, and the history he took from Davis, in Riebsame's opinion, Davis was malingering a variety of psychological problems. (V14, R1934, 1945). Riebsame concluded that Davis suffers from Bipolar disorder, a history of substance abuse disorders, which includes marijuana, alcohol, and hallucinogenic type substances, and also suffers from a personality disorder that includes antisocial and borderline types of characteristics. (V14, R1934-35, 1954). In addition, in Riebsame's opinion, Davis was experiencing symptoms of bipolar disorder and cannabis dependence at the time he murdered Malave. In Riebsame's opinion, Davis knew what he was

doing, knew his actions were wrong, and knew the consequences of his actions regarding the offenses against Malave. (V14, R1939-40, 1941). Riebsame said it was "possible" that Davis' high scores on the "F" scale of the MMPI tests were "normal" for Davis, but Riebsame did not reach that conclusion. (V14, R1947). Finally, in Riebsame's opinion, Davis does not meet the criteria for legal insanity. (V14, R1957).

On May 3, 2012, the jury found William Roger Davis III guilty of all counts as charged in the indictment. (V15, R2188-89).

The penalty phase began on August 6, 2012. (V17, R2229).

Dr. Marie Hermann, medical examiner, said Malave died as a result of asphyxia due to compression of the neck. (V17, R2259). A person can remain conscious for about ten to thirteen seconds before losing consciousness if there was complete obstruction of the vascular structures. (V17, R2262, 2263). If there is only partial obstruction, depending on what the obstructing factor is, the person will remain conscious for a longer period of time - - "up to perhaps three minutes." (V17, R2263). Hermann said there were no specific findings in the examination of Malave's neck to indicate whether or not the pressure to her neck was applied, then released, and then re-applied. However, Hermann said "a great amount of force had been applied to her neck resulting in bleeding in the neck structures with blood, leaving some of the finer blood structures to mix with edema fluid that

had built up in the lungs." (V17, R2264). There was no indication Malave was unconscious when the choking began. In addition, Malave had no other significant injuries. If she was conscious for ten to thirteen seconds, she would have known she was in trouble and "would fight against that."[26] (V17, R2265). Hermann said urinating is also a response to having one's neck compressed. (V17, R2266).

Sonia Perez, probation specialist, Florida Department of Corrections, supervised Rodgers' prior probation for a burglary with assault conviction which occurred in 2003. (V17, R2267, 2268, 2276). Davis was on probation for five years and was not to have contact with the victim. (V17, R2274). In addition, he was to submit to a mental health evaluation. (V17, R2279). On May 26, 2004, Perez filed an affidavit that Davis had violated his probation with a total of four violations: 1) he contacted the victim; 2) he absconded and left the State of Florida; 3) he was apprehended, returned to Florida, and he then contacted the victim via a letter; and 4) committed an armed false imprisonment along with an aggravated assault with a deadly weapon. (V17, R2273, 2279-80). On May 5, 2005, Davis was found guilty of leaving the State and received a five year prison

[26] In Davis' statements, he indicated Malave was kicking and scratching which Hermann said is consistent with a survival response. (V17, R2265).

sentence followed by five years probation. (V17, R2274, 2282).

Opal Badie, probation officer, Florida Department of Corrections, supervised Davis' probation for burglary with assault and armed false imprisonment, which began on October 1, 2008. (V17, R2285, 2286). Davis was not to have contact with the victim or the victim's family. (V17, R2289). On May 18, 2009, and August 31, 2009, Badie prepared violation reports on Davis because he left his residence without permission. (V17, R2289, 2290). As a result, a warrant was issued for Davis' arrest. On October 29, 2009, Davis was still on probation. (V17, R2290).

Michael Hurst Redden worked with Davis and dated him in 2002.[27] (V17, R2305, 2306). By February 2003, Redden and Davis were no longer together. One night Davis entered her home without her permission. Redden went into her bedroom and saw Davis come out of her bathroom. (V17, R2307). Davis struck her with his fist. Redden fell onto her bed and a struggle ensued. Davis ripped off Redden's clothes and then sexually assaulted her. (V17, R2307-08, 2313).

Redden's friend called the police on Redden's behalf. As a result of those crimes, Davis entered a plea and was placed on a probationary period. (V17, R2309, 2313). During that time, he

[27] Redden, who was separated from her husband at the time, had two children: a two-year-old and a four-year-old. Davis had occasionally stayed in her home. (V17, R2312).

was not to have any contact with Redden. However, in September 2003, Redden was in a Walmart parking lot when Davis approached the driver's side of her car, put a knife to her throat, told her to get into the car with him, and for her to drive off. Redden told Davis that the car belonged to her sister-in-law, who would report it stolen, "and he'd get caught." (V17, R2309). While holding Redden at knifepoint, Davis moved Redden over to his car and attempted to drag her into it. Redden slammed the car door on Davis' leg, jumped into her sister-in-law's car and drove off. Redden went home, told her husband what had happened, and subsequently called police.[28] (V17, R2310). Redden said Davis also made threats against her children. (V17, R2311).

Wenddy Velez, Malave's sister, read two statements for the jury: one from their mother, Gioconda Rodriguez, and one from herself. (V17, R2321).

Rodriguez' statement said Malave was an excellent student, quiet, and close with her family. (V17, R2322-23). Malave was dating and attending college at the time of her death. (V17, R2328, 2330). Malave was "fragile and easy to get along with. She had no malice and was trusting of everyone." (V17, R2328,

---

[28] During these instances, Redden said Davis made threats against her children. (V17, R2311). Redden did not know whether or not Davis entered a plea for this crime. (V17, R2315).

2329).

Velez read her statement to the jury. (V17, R2333). Velez was three years older than Malave.[29] (V17, R2333). Malave was quiet and shy, but also funny. Velez and Malave shared a room while growing up and spent a lot of time together. (V17, R2334). Velez was on a church mission when Malave was murdered. Malave had previously written Velez and told her that she "was excited" to work at the car dealership and was paying her way through college. (V17, R2336).

Barbara Shoop is Davis' mother. (V17, R2351, 2352). Shoop was married to Davis' father at the time of his birth. Davis' birth was normal but he contracted the Hong Kong flu at six weeks old. (V17, R2453-54).

Shoop said that, prior to Davis' birth, Davis' father mentally abused her. "He would do things to me and then afterwards thinking it was funny." For example, he took risks while driving in their car or, after he had been drinking, forced her to have sex in public places. (V17, R2356, 2357). Davis' father did not drink a lot, but "when he did drink, he was not very nice." After Davis was born, his father mostly smoked marijuana instead of drinking. (V17, R2362). Davis'

[29] Malave was born on December 25, 1989, and was nineteen-years-old at the time she was murdered. (V17, R2336).

parents separated after eight years of marriage when Davis was two-years-old. During their separation, Shoop recalled one time when Davis' father came into her home, tied her up, and forced her to have sex. Shoop subsequently got a restraining order against him. (V17, R2354, 2357). They divorced two years later. (V17, R2354).

Davis moved back and forth between his parents. (V17, R2355, 2357). When Davis was with his father and new wife Annette, Shoop spoke to him on a weekly basis. Davis spent summers and Christmas breaks with her. (V17, R2357). Davis did not complain about living with his father and stepmother. "He never said anything that was going on." Davis "was always a very social child." (V17, R2357-58). When Davis was in the sixth grade, his father became ill. Davis left North Carolina and went to live with his mother in California. Davis had a difficult time adjusting to life in California, "It's completely different cultures." (V17, R2359, 2360, 2366).

Shoop was not aware that students threw Davis' shoes in the trash. As a result, Davis failed gym class because he did not dress out properly. Davis started "acting out" - - Shoop felt he did respect her as an authority figure. (V17, R2366). Davis destroyed property at school and got kicked off his school bus. (V17, R2367). Shoop thought that Davis might be traumatized because his father was ill, he had two younger brothers back in

North Carolina, and Davis thought "he wasn't wanted back there." Shoop took her son to a psychologist. The psychologist told Shoop that Davis "was a well-adjusted child." However, Shoop and her new husband insisted, "No, something is not right." (V17, R2360, 2367). Nonetheless, Davis spent the summer prior to seventh grade in North Carolina. When it was time to return to his mother's home, Davis told her he wanted to stay with his brothers. As Davis also had cousins in the area and "he loved his father," Shoop decided to let Davis stay in North Carolina. (V17, R2360-61).

Shoop said Davis spent summers and every other Christmas break with her. (V17, R2362). She was not aware of any type of discipline Davis' father used other than grounding Davis. (V17, R2362). Shoop recalled a time when Davis' stepmother Annette called her and asked if Davis' father had ever raped her. Shoop said Annette told her that Davis' father had been drinking and attempted to break down the bathroom door to get to her. Shoop recalled that Davis was living with his father during this time. (V17, R2364, 2365).

Shoop attended Davis' high school graduation. During this time period, she witnessed Davis' father being verbally abusive toward Annette. As a result, Shoop told Davis to come with her to her hotel room. Davis later called his stepmother who assured Davis that she was okay. (V17, R2363).

Dr. Jeffrey Danziger, psychiatrist, has testified for both the State and Defense in numerous cases in State and Federal courts. (V17, R2383). Danziger performed an evaluation of Davis and met with him on four occasions.[30] (V17, R2391). In addition to evaluating Davis, Danziger reviewed numerous documents including depositions, police reports and arrest records, audio recording of Davis' interviews with Investigator Hemmert, guilt phase trial transcripts, mental health records and reports, North Carolina Department of Corrections records, March 1997 military records from Womack Army Hospital, and Davis' 2009 letters to Jody Oehmke. (V17, R2388-90, 2402).

After meeting with Davis on four separate occasions, it was Danziger's opinion that Davis was competent to stand trial. (V17, R2396-97). In addition, in Danziger's opinion, Davis did not meet the criteria for a determination of legal insanity. (V17, R2397, 2400).

During their first meeting, Danziger said Davis was a cooperative individual. Davis denied having current suicidal thoughts. He admitted to hearing voices but had not seen any

---

[30] November 4, 2009; November 13, 2009; October 31, 2009; and July 18, 2012. (V17, R2391). Danziger administered the Miller Forensic Assessment of Symptoms test, and the Structured Inventory of Malingering Symptomatology. (V18, R2438). Initial testing indicated Davis exaggerated his symptoms. (V17, R2425; V18, R2439).

visions in several days. His intelligence was intact. Davis appeared to be of at least average, and possibly higher, intelligence. (V17, R2398). When Danziger met with Davis in 2010 and 2012, Davis was taking medication which had improved his mental state from their initial meeting. Danziger said Davis told him that his mood was stable and he had not heard any voices or had any visions or delusions. (V17, R2399). Davis was consistent in relaying the substance of the command hallucinations that Davis claimed he received from Dr. Paul. (V17, R2400).

In reviewing Davis' military records, Danziger noted that Davis was diagnosed with bipolar disorder in March 1997. However, that diagnosis was changed to adjustment disorder and a personality disorder NOS. (V17, R2402). Danziger reviewed the North Carolina Department of Corrections records and noted Davis was administered Lithium, Prozac, and Paxil. (V17, R2402-03). Lithium is prescribed to treat bipolar disorder, and Prozac and Paxil treat depression. The records also indicated a family history of bipolar disorder as Davis' father and brother were also prescribed Lithium. (V17, R2403). Davis was also diagnosed with polysubstance dependence and psychothymic disorder, which refers to unstable mood periods of highs and lows. (V17, R2403). The 2003 medical records from Peace River Mental Health Center also diagnosed Davis as having either a mood disorder or bipolar

disorder. (V17, R2404). The 2003 Polk County jail records noted a family history of bipolar disorder and Davis' claim of auditory hallucinations. Davis was treated with a mood stabilizer and antidepressants. (V17, R2405, 2407). In 2004, Davis was diagnosed by Drs. Hartig and Dee with significant mental health issues. (V17, R2408). From May 2005 to September 2008, Florida Department of corrections records indicate Davis was administered Lithium and Zoloft for bipolar disorder and depression. (V17, R2409).

After reviewing all of Davis' records and meeting with him several times, Danziger concluded that Davis suffers from bipolar disorder I, currently in remission, and a history of polysubstance abuse, currently in remission, due to the treatment he was receiving in jail. (V17, R2409). In addition, Davis suffers from a personality disorder NOS, as well as "features" of both borderline and antisocial personality disorder. (V17, R2410, 2424). Although Danziger did not have direct evidence that Davis had conduct disorder as a youth, collateral sources indicated so. (V17, R2424).

Danziger said that according to Davis' mother, Barbara Shoop, her brother suffers from mental illness and was in and out of psychiatric hospitals. Shoop also reported that her father was an alcoholic who was violent toward his wife, and Davis' paternal grandfather was also an alcoholic. Shoop's uncle shot

his wife and went to prison. Danziger said that if history is accurate, Davis' family suffers from substance abuse, mental illness, and violent behavior, although "genetics are not necessarily destiny." (V17, R2415). In addition, there are many people with untreated bipolar disorder who do not kidnap, sexually batter, and murder others. (V17, R2423).

Danziger said that, in his opinion, Davis' letters to Oehmke were consistent with a person suffering from mental illness and a personality disorder. Davis' initial letters indicate euphoria which eventually, by the last letter, expressed hatred toward Oehmke. (V17, R2416, 2417). Danziger said Davis was off his medications from September 2008 to the time of Malave's murder. (V17, R2417). In Danziger's opinion, Davis' medications are essential for treatment his mental illness. (V17, R2418). In Danziger's opinion, Davis exhibits a normal mental status when prescribed a regiment of medications and would adapt well to a long-term prison life. (V17, R2418, 2419).

In Danziger's opinion, Davis was suffering from extreme mental or emotional disturbance at the time of Malave's murder, due to his breakup with Oehmke. (V17, R2419, 2425; V18, R2441). However, in Danziger's opinion, Davis' mental illness did not rise to the level of insanity. (V17, R2421, 2427). Further, in Danziger's opinion, Davis was aware of the consequences, knew what he was doing, and knew it was wrong, when he kidnapped

Malave at knifepoint, sexually battered her, and choked her to death. (V17, R2421-22).

Annette Davis, Davis' stepmother, said Davis lived with her and Davis' father starting at age three. Davis only lived with his mother in California for one year because "the schools were a little rougher and he missed his brothers." (V18, R2444-45). Annette said Davis visited his mother but the visits became sparse as he got older. (V18, R2446). Annette treated Davis and her own two biological sons "all equally. I think Billy would tell you that it was all equal." Her children played sports, Davis played baseball. (V18, R2447). Annette was a teacher for thirty-one years and mostly taught sixth grade. (V18, R2451).

Annette said she was concerned Davis had problems "from the beginning." (V18, R2448, 2456). Davis was an attention-seeker whether it was positive or negative. Davis was the class clown. Annette and her husband had many parent-teacher conferences about his behavior. Davis did not want to do schoolwork. "It seemed like he was on restriction all the time." (V18, R2448, 2456). There were many times when Davis stole from others, which started at four-years-old. (V18, R2456, 2457). Davis fought with other students at school and damaged school property. (V18, R2457, 2458). Annette said she and her husband "sometimes we were overbearing" but they tried to do the right things and the best they could as Davis' parents. (V18, R2448). Annette said

they were strict parents, they expected them to behave and to do the right things." (V18, R2450). Annette reasoned with their boys but her husband was much more physical. "He would use a belt on them." (V18, R2451). There were times Annette wanted to leave Davis' father, but she could not legally take Davis and she "was afraid to." (V18, R2451).

Annette recalled a time when Davis was AWOL from the army and he called her for help. (V18, R2449, 2459). Davis had threatened to commit suicide. (V18, R2458). Annette went to Davis' hotel room and took him to the hospital. (V18, R2450, 2458). Davis was admitted to a military hospital for mental care. (V18, R2450).

Annette said Davis' father suffered from manic depression. (V18, R2451). However, seventeen years into their marriage, he sought help and started medications. Annette said, "It was like living with a different man afterwards." (V18, R2452). Prior to that, she and their three children would wait at the window and watched him come home from work. "When he came in the door and we knew he was in a bad mood, we scattered. It was very stressful." (V18, R2452). Annette said there were occasions when Davis' father was physically violent with her prior to the time of being administered medications. When they were married about twelve years, Davis' father "basically raped" her. However, Annette only recalled one time that she called local police about the physical violence. (V18, R2453).

Annette recalled when Davis served time in boot camp for young offenders in North Carolina because he stole his girlfriend's father's SeaDoo and damaged the garage door. (V18, R2459). On another occasion, Davis stole a car from a Ford dealership in town. Annette could not recall when Davis' actions took place because "he's been in and out of jail or prison so much of the time ... it all runs together." (V18, R2459-60). Annette said that from the time Davis was young, he lied about "almost everything." (V18, R2461).

John Sink is Annette Davis' father, Davis' step-grandfather. (V18, R2462-63). Sink treated Davis as his own grandson. (V18, R2464). Sink was not aware of any specific problems that Davis had while growing up, "He was like any young boy. He probably misbehaved at times, but I never noticed anything serious." (V18, R2464). Sink never saw anything in Davis' behavior where he thought Davis needed a psychiatrist. (V18, R2466). However, Sink became aware of Davis' criminal behavior subsequent to his high school years and going AWOL from the army. (V18, R2466, 2469).

Sink was aware that Davis spent time in prison. He kept in contact with Davis and was aware that Davis had been convicted of Malave's murder. (V18, R2464-65). Sink said Davis told him that he was going to church and bible study in jail and that he had been baptized, as well. (V18, R2465). Sink said there were

times when Davis was communicated with him that he thought Davis was not being truthful. (V18, R2470).

Davis testified on his own behalf.[31] (V18, R2483). Davis lived most of his childhood with his father and stepmother. His relationship with his father was "rocky." (V18, R2484). They always ended up "at each other's throats." At that point, Davis got grounded or "whipped" or was taken into the yard where his father "proceeded to kick the snot out of me." (V18, R2484). Davis said his father is twice his size. (V18, R2485).

Davis realized he had mental problems when he was in high school. He was up one day and down the next. However, he did not say anything about it because, in his father's house, he would have been showing weakness. He did not talk to his mother about it because she was "fragile ... about stuff like that." And, he did not talk to Annette about it because she had enough "dealing with my father." (V18, R2485, 2486).

Davis joined the army right after high school. Although he did fine in basic training, he did not have any friends, he decided he did not want to be there, and then things "got progressively worse." His behavior became erratic and suicidal. (V18, R2487). He called Annette who then brought him to the

[31] Davis has been convicted of eight felonies. (V18, R2484).

hospital. However, Davis returned to Ft. Bragg and was placed in the mental health ward for most of the week where he was administered Paxil. However, he chose not to attend recommended outpatient group sessions and quit taking the medication because he did not like the side effects. (V18, R2488-89).

Davis said that since his incarceration for Malave's murder, the medication he has been administered "works .. I don't hear things." Davis said that when he is "medicated properly, I don't really have a problem." (V18, R2491). However, due to the expense, Davis had discontinued taking them in the past. (V18, R2492). He had not taken any medication for thirteen months prior to Malave's murder. (V18, R2494). Davis was "ashamed" for what he did to Malave. However, he said he is not "the craziest guy under the sun" and asked the jury to recommend a sentence of death. (V18, R2497).

Dr. William Riebsame,[32] psychologist, said that, in his opinion, Davis was not under extreme mental disturbance when he kidnapped, sexually battered, and murdered Malave. (V18, R2501, 2512). The audiotaped statements between Davis and Investigator Hemmert indicated Davis provided a very detailed account of what had occurred that day "in a coherent, logical way." Davis did

[32] Riebsame has testified for both the State and the defense in capital cases. (V18, R2508).

not present himself as emotionally distressed. In addition, there was no evidence of hallucinations or delusions. (V18, R2501, 2503, 2505). Riebsame gave more weight to Davis' statements to Hemmert rather than his mental health history because it was "closest in time to the offense." (V18, R2512, 2515). However, Riebsame does not disregard mental health issues in any case. (V18, R2515).

On August 8, 2012, the jury returned an advisory sentence of death by a vote of seven to five (7-5) for Malave's murder. (V19, R2711). Following the *Spencer* hearing, the trial court imposed a sentence of death, finding six (6) aggravating factors: that Davis was on felony probation; that he had previously been convicted of a violent felony; that the murder was especially heinous, atrocious or cruel; that the murder was committed during a sexual battery of kidnapping; that the murder was committed to avoid arrest; and that the murder was cold, calculated and premeditated. (V4, R635-47). The sentencing court found and weighed various non-statutory mitigation. (V4, R647-55).

SUMMARY OF ARGUMENT

The claim of some error in submission of the avoiding arrest aggravator to the jury has no factual basis. A fair reading of the jury instruction conference does not lead to the conclusion that the trial judge did anything at all improper in asking if

the State wanted the jury instructed on the avoid arrest aggravating factor. Davis' counsel did not object, and there is no basis for relief.

The trial court correctly evaluated the mental health mitigation evidence. There is no error in the court's weighing of that evidence, and no basis for relief of any sort.

The sentencing court correctly found the avoiding arrest aggravating factor. It is supported by competent substantial evidence, and there is no error. Settled Florida law supports the application of that aggravator.

The sentencing court correctly found that the murder committed by Davis was cold, calculated and premeditated without any pretense of moral or legal justification. Settled Florida law supports the applicability of the coldness aggravator, and there is no error.

Davis' sentence of death is proportionate to other, similar, cases in which a sentence of death has been imposed and upheld. There are six aggravators supporting that sentence, and the mitigation is comparatively weak. Death is the proper sentence.

There is no basis for the claim that the jury instruction given on the heinous, atrocious or cruel aggravator is "vague" in light of Davis' concession that that aggravator applies. In any event, the vagueness challenge was rejected long ago. Additionally, that claim was not preserved for review by timely

objection.

The *Ring v. Arizona* claim is meritless. The prior violent felony aggravator is unchallenged in this case, and, because that is so, the *Ring* claim has no basis. Additionally, Davis did not preserve the claim contained in his brief. That is an additional basis for the denial of relief.

ARGUMENT

ISSUE I. THERE WAS NO ERROR ASSOCIATED WITH SUBMITTING THE "AVOIDING ARREST" AGGRAVATOR TO THE JURY.

On pages 41-45 of his brief, Davis says that he is entitled to relief because the trial court "suggested a new theory of aggravation" during the jury instruction conference. Specifically, while not identified in the argument section of Davis' brief, his complaint is that the trial court asked the State if they intended to argue the "avoiding arrest" aggravating factor. Davis claims that it was "fundamental error" because the trial judge, according to Davis, suggested that the State argue the avoiding arrest aggravator. This "claim" is based on a creative and inaccurate interpretation of the jury instruction conference. When the facts are objectively considered, there is no basis for relief.

The jury instruction conference begins at V18, R2528. When read, it is apparent that the Court and counsel are reviewing and discussing a written draft of the possible jury instructions. It is not apparent who had prepared the written

draft, but it is very clear that the parties are going through the proposed instructions and making changes and corrections as appropriate. *See*, V18 R2529-30. The final version of the jury instructions is found in Volume 3 of the record at pages 544-48. The references to "number two" and "number four" on page 2530 of the record (for example) are obvious references to the numbering employed in the draft jury instructions.[33] The same reference to "number four" appears at page 2543 of the record, where the following appears:

> THE COURT: And then number four, Mr. Caudill, any issues with regard to that?
>
> MR. CAUDILL: Well, as the Court is aware, in order for that aggravating circumstance of the law it has to be the dominant motive for the murder and I would argue that has not been proven in this case.
>
> THE COURT: All right. And counsel?
>
> MR. WHITAKER: Well, the State -- the law is it can be proved circumstantially. It doesn't have to be the dominant motive expressed by the Defendant in any way. And the State's position is -- let me find --
>
> THE COURT: Maybe I can streamline this for you. I understand that the objection is being made. The State brought out some testimony that they can argue to the jury, the jury could determine circumstantially that the actions of Mr. Davis were in the nature of one of avoidance of arrest by the driving around, and that

[33] The fact that the record at 2531 indicates that the assistant state attorney was unsure where the court was reading from in the instructions means nothing. It is certainly not indicative of anything improper or sinister.

> because he parked next to the vehicle that they opined the possibility that he was intending on leaving the body and taking off. So I think that you have the ability to argue that because it was a sequence of events from the very beginning, plus because he's been charged with and convicted of the kidnapping and the rape, sexual battery, then because of the nature of the those crimes alone, that it could be argued that he committed the murder to avoid arrest for those – -
>
> MR. WHITAKER: If I could just add two more things?
>
> THE COURT: Yes, sir.
>
> MR. WHITAKER: He new (sic) she could identify him. I mean, this was clear. Second of all, it was no provocation. She did nothing to provoke him to kill her.
>
> THE COURT: And your arguments are noted. Mr. Caudill, I note your objections for the record purposes, but I'm going to allow number four.

(V18, R2543-45).

Defense counsel was clearly not surprised by the inclusion of the avoiding arrest aggravator in the proposed jury instructions, and immediately made an appropriate argument against submitting that aggravator to the jury.[34] Moreover, **defense counsel never so much as suggested that anything inappropriate had taken place.** There is nothing in the record to suggest any "judicial bias," and any such claim is untimely at

---

[34] Trial counsel's argument was the same as the one appellate counsel raises in Claim III of the *Initial Brief.* That is wholly inconsistent with "surprise."

this point. It is apparent from the record, when it is read in context, that there was no legal basis for a motion to disqualify the trial judge. There is no "fundamental error," and Davis' claim is untimely as well as unpreserved because there was no timely objection at trial.

In his brief, Davis says that this Court's decision in *Robards* helps him in some way. In context, that is simply not so:

> As noted by the State, Robards did not object to the addition of the fourth aggravating circumstance. Moreover, **Robards did not seek to have the trial judge disqualified from the case on the grounds of lack of impartiality. As a result, this claim is unpreserved.** *See McKenzie v. State*, 29 So. 3d 272, 279 (Fla. 2010) (concluding that the appellant's claim of departure from judicial impartiality was not preserved where the alleged conduct was not objected to nor was it the grounds for a motion to disqualify the trial court). Consequently, Robards is only entitled to relief if he demonstrates fundamental error.
>
> Generally, the State is not required to provide notice of aggravating circumstances that it intends to prove. *See Lynch v. State*, 841 So. 2d 362, 378 (Fla. 2003). Given that the State is limited to the statutory aggravating circumstances listed in section 921.141(5), *Florida Statutes*, this Court has rejected the argument that the death penalty scheme is unconstitutional because it fails to require specific notice. *See id.* (*citing* § 921.141(5), *Fla. Stat.* (1987)). However, in this case, the trial court granted Robards' motion to have the State specify the aggravating circumstances it intended to prove and consequently, it required the defense to specify which mitigating circumstances it intended to pursue.
>
> Robards has not demonstrated fundamental error. The defense received an amended notice of aggravating circumstances before trial. Moreover, in order to prove the prior capital felony conviction based on

> Robards' contemporaneous murder of the second victim, the State first had to prove that Robards murdered both Frank and Linda Deluca. Therefore, the basis of the aggravating circumstance in question is Robards' guilt or innocence of first-degree murder. While we strongly caution the trial court that it must remain neutral and avoid any appearance of partiality to any party, we conclude that Robards is not entitled to relief on this claim.

Robards v. State, 112 So. 3d 1256, 1268-1269 (Fla. 2013). (emphasis added). It is true that the original circuit judge had ordered the State to give notice of the anticipated aggravating factors to the extent allowed by case law. (V1, R146-47; V20, R2798). It is also true, contrary to Davis' claims, that that notice was filed twice. *See*, State's motion to supplement the record, filed August 28, 2013. (*Initial Brief*, at 43, n. 3).

When fairly considered, this claim has no factual (or legal) basis. *Robards* simply has nothing to do with the case because that case is factually distinguishable.[35] Nothing in a reasonable reading of this record leads to the conclusion (or even supplies

---

[35] The problem in *Robards* was the following:

> THE COURT: Okay. All right. And then the only other question that I had -- I really don't want to give the State or defense or anyone any additional ideas. But after I went through the affidavit and the case law on that I thought that another prior aggravating factor may be previous conviction of capital or violent felony because of the alleged contemporaneous murder of the other person. Are you going to be asking for that or not?

Robards v. State, 112 So. 3d at 1268.

the inference) that the trial court added an aggravator for the State. Davis' argument to the contrary is an attempt to force a square peg into a round hole and unnecessarily, and inappropriately, impugns the integrity of the trial judge. There is no "judicial bias" claim to be made from these facts.

ISSUE II. THE "MENTAL HEALTH MITIGATION" CLAIM

On pages 46-52 of his brief, Davis says that the sentencing court erroneously rejected the "extreme mental disturbance" mitigator as well as committing other errors with respect to its findings as to that mitigating circumstance. In *Campbell v. State,* 571 So. 2d 415 (Fla. 1990), this Court established the framework for review of mitigating circumstances: 1) whether a particular circumstance is truly mitigating in nature is a question of law and is subject to *de novo* review; 2) whether a mitigating circumstance has been established in a given case is a question of fact that is subject to the competent substantial evidence standard; and 3) the weight assigned to a mitigating circumstance is within the discretion of the trial court and is reviewed for an abuse of that discretion. *See also Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigator exists and the weight to be given to it are matters within the discretion of the sentencing court); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from *Campbell* and holding that, while a court must **consider**

all the mitigating circumstances, it may assign "little or no" weight to a particular mitigator); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (explaining that the trial court may reject a claim that a mitigator has been proven so long as the record contains competent substantial evidence to support the rejection). There is no defect in the sentencing order, and there is no basis for relief of any sort.

In his brief, Davis says that *Oyola v. State*, 99 So. 2d 431, 447 (Fla. 2012) entitles him to relief. However, there is no similarity between the sentencing order in *Oyola* and the sentencing order in this case. This Court described the *Oyola* sentencing order as follows:

> . . . the sentencing order violated the requirements articulated in *Campbell* because the trial court did not expressly evaluate, in a well-reasoned fashion, how the evidence presented failed to support the mitigating evidence presented by Oyola. Rather, it merely gave a brief summary of its findings with regard to the mitigators, and did not expressly and specifically articulate why the evidence presented failed to support the proposed statutory mitigators, and why that same evidence warranted the allocation of slight weight to the nonstatutory mitigation evidence presented. In fact, the trial court's evaluation of the established nonstatutory mitigation evidence grouped three separate nonstatutory mitigators into a single sentence, and, in a single subsequent sentence, summarily gave them slight weight. In accordance with Campbell, the trial court should have separated and evaluated each nonstatutory mitigator, providing an evaluation and analysis as to why it gave each of them slight weight. In addition, the trial court's misplaced and confusing reference to what appears to be a finding with regard to nonstatutory mitigation inside the statutory mitigation section of the sentencing order further compounds its failure to

> render a sentencing order that reflects a well-reasoned evaluation and determination.

Oyola v. State, 99 So. 3d 431, 447 (Fla. 2012). In contrast, the sentencing order in this case devoted three (3) **pages** to analysis of the mental mitigator and concluded, based on the facts of the crime, that Davis was not under the influence of an extreme mental or emotional disturbance at the time of the offenses in this case. The sentencing court said:

> The Court is reasonably convinced that the facts above establish that the Defendant suffers from a mental illness, bi-polar and anti-social personality traits, that when he is medicated, can be controlled, but that those mental illnesses and anti-social traits were only contributing factors to his choices, and not the cause of his actions or that at the time of the murder his mental illness was so extreme that it was a major factor in an inability to control his behavior. His statements to the detective the night of the murder are the most telling of his calculating mind as well as his callous behaviors.

(V4, R651). As this Court said in *Ault*, which was relied on by the sentencing court:

> First, the record demonstrates that Ault was not substantially impaired in his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. **We have upheld a trial court's rejection of this mitigating circumstance when a defendant's actions during and after the crime has indicated that he was aware of the criminality of his conduct.**

Ault v. State, 53 So. 3d 175, 188 (Fla. 2010). (emphasis added). And, as this Court has made clear:

> A trial court may properly reject a proposed mitigating circumstance where there is competent, substantial evidence in the record to support its

> rejection. *See Lebron*, 982 So. 2d at 660. As we noted in *Coday*, "[e]ven expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case." 946 So. 2d at 1003. In the present case, there was sufficient evidence in the record to support the rejection of both mitigating factors.

Ault v. State, 53 So. 3d at 189. Whatever the deficiencies in *Oyola*, they are not present in this case, which comes to this Court with a carefully drafted, well-reasoned, order supporting the death sentence. There is no basis for relief. To the extent that Davis relies on *Miller v. State*, 373 So. 2d 882 (Fla. 1979), *Perez v. State*, 919 So. 2d 347 (Fla. 2005), and *Walker v. State*, 707 So. 2d 300 (Fla. 1997), those cases are entirely distinguishable on their face because the facts are different in this case. There is no "future dangerousness" considered as an aggravator in sentencing Davis to death -- any discussion about Davis' behavior while medicated (or not) is clearly a fact that exists. Recognition of it does not somehow transform it into a "non-statutory aggravator."[36] When the sentencing order is rationally considered, it more than satisfies this Court's requirements, and allows for full and proper review by this Court. In *Perez*, this Court said:

---

[36] "Non-statutory aggravation" is wholly a Florida law issue anyway. There is no federal constitutional prohibition against a sentencing scheme that allows consideration of such aggravating circumstances. *Barclay v. Florida*, 463 U.S. 939, 956 (1983).

> **In the present case, the trial court merely properly evaluated Perez's mental condition in its assessment of the weight to be assigned to the nonstatutory mitigation, not in determining that aggravating circumstances were present to justify a sentence of death.** Thus, under *Miller,* the trial court's actions do not constitute an abuse of discretion. *Cf. Sanchez-Velasco v. State*, 570 So. 2d 908, 916 (Fla. 1990) (rejecting defendant's claim that trial court improperly used a nonstatutory aggravating circumstance when it commented on defendant's "evil mind, superego, and tendency to lash out others" in its discussion of the reason it found that certain mitigating factors had not been established and where the trial court did not make a finding that the death penalty was required to protect the public based on defendant's "dangerous mental state").

Perez v. State, 919 So. 2d 347, 375 (Fla. 2005). (emphasis added). The highlighted portion of *Perez* is equally applicable to this case. There is no error.

In any event, even if there is some error, Davis' death sentence is supported by six aggravating factors, including the heinousness and coldness aggravators, which are two of the most serious aggravators under Florida's sentencing scheme. *Jean-Philippe v. State*, 2013 WL 2631159, 10 (Fla. June 13, 2013). Under these facts, any error was harmless beyond a reasonable doubt. *Ault, supra*; *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986).

ISSUE III. THE "AVOID ARREST" AGGRAVATOR WAS PROPERLY FOUND

On pages 53-58 of his brief, Davis says that the trial court should not have found the avoiding arrest aggravating factor. Whether an aggravator exists is a factual finding that is

reviewed under the competent substantial evidence standard. In *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), this Court made that clear, saying that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance, and, if so, whether competent substantial evidence supports its finding," *quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert. denied,* 522 U.S. 970 (1997).

In the sentencing order, the trial court said:

> (a) The Defendant is not a newcomer to violent crimes against women. Michael Hurst Redden testified in the penalty phase about the actions of the Defendant against her and the threats of harm toward her children. The Defendant in this case was, according to the testimony, in what could best be described by the Court as a rapid downward spiral due to his rejection by a woman he had already imagined would be his. Although he tried to suggest that a hallucinatory figure, Dr. Paul, made him do what he did, it is clear from the psychologists and psychiatrist except for Dr. Golden that this was a fabrication by an intelligent man who suffers from mental health disease.
>
> (b) There would be no need for him to park his vehicle on the day of the kidnapping, sexual battery and murder some distance away from the dealership if he had not intended to cause some harm to another. If he were truly there for the title only, why would he not do what a reasonable person would do, drive into the car lot and park? There is no evidence he had any intention to go back to the Post Time Lounge to conduct any lawful business. he did however in short order forcibly and at knife point with threats he

would kill her, remove the victim from the dealership and drive her car to where his vehicle was parked. He did advise the detective in the recorded statement that he had multiple roommates that were at work for the day and it would not be a leap to believe they would return home at some point. He committed sexual battery on the victim and killed her in his shared home. As was brought out by Dr. Riebsame, it would be believed that most who would want to commit such acts would spend their time disposing of the evidence (the victim). The Defendant removed her from his home, one arguable a place where a body would be discovered by other occupants, wrapped in a blanket, with her head covered by a plastic bag. She was bleeding from the mouth along with other fluids. He stated that from the time he arrived at his house with the victim until he killed her took about forty-five (45) minutes. So for some time thereafter he drove around town, stopping for cheese cake, at a guitar store and a park to smoke. He had not only killed Fabiana Malave, he was killing time.

(c) The victim clearly could identify him. He had interacted with her on more than one occasion. She did nothing to provoke the killing, she had in fact by his account cooperated fully with him, followed by his commands without resistance, and barely spoke save to ask if she could put her clothes on after he sexually battered her. The only resistance to anything he ordered her to do or did to her was to scratch the back of his neck while kicking and urinating as he strangled the life from her.

(d) The Defendant slowly drove past Super Sports Auto on October 29, 2009. It was about 5:30 p.m. He proceeded to where his vehicle was parked and parked right next to it. It is easy to believe his next step would be to transfer the body to her vehicle in the dark, and make his getaway. When confronted by the owner of the auto dealership who had blocked him in his demeanor was friendly and smiling, until law enforcement arrived when he became solemn. He had been caught and there was no escape.

(e) The Defendant was on probation. He had been down this road before. he went to prison because he tried to and succeeded in some plans to harm Michael Hurst Redden. he knew if he was caught this time he would

> for back to prison, not only for his prior crimes but these as well. he had just that day put a gift for Jody's child on layaway at Toys R Us. In his mind he could still salvage that relationship. He obviously did not want to take his rage out on her. He had done that with another woman before, Michael Hurst Redden, and that only got his a prison sentence. The Defendant has to insure he could save himself and his chance with Jody and her child. The only reasonable inference from the evidence is that the dominant motive for the murder was to avoid arrest. *Preston v. State*, 607 So. 2d 404 (Fla. 1992).
>
> This aggravating circumstance has been proven beyond all reasonable doubt and is given great weight by the Court.

(V4, R642-44).

The sentencing court's reliance on *Preston* is clearly correct, and clearly a sufficient legal basis to support the avoiding arrest aggravator. Further, *Reynolds v. State*, 934 So. 2d 1128, 1156-1159 (Fla. 2006), (*and the cases cited therein*), *Jones v. State*, 748 So. 2d 1012 (Fla. 1999), *Cave v. State*, 727 So. 2d 227 (Fla. 1998), and *Willacy v. State*, 696 So. 2d 693 (Fla. 1997), also well support the aggravator's applicability here. There is no error.

The cases relied on by Davis do not help him. The facts of *Doyle v. State*, 460 So. 2d 353 (Fla. 1984) are simply different. *See Adams v. Wainwright*, 764 F.2d 1356 (11th Cir. 1985).[37] *Menendez* is not controlling:

---

[37] Davis seems to be making a variant of the "mutual exclusivity" argument rejected in *Adams*.

> The motive for the murder in *Menendez* could have been based on any number of reasons. For example, the victim may have resisted the robbery either physically or by attempting to attract attention. In the case *sub judice*, however, we know what transpired immediately prior to the murder. Therefore, the case at bar is like *Riley* and unlike *Menendez* in this respect. Although there is no express statement by the defendant that indicates the elimination of the eyewitness as his motive, **the facts as found by the trial court support this finding. First, the defendant knew that the victim knew him and could later provide the police with his identity. Further, the defendant had no logical reason for binding the victim, kidnapping him and driving him to a secluded area except for the purpose of murdering him to prevent detection. In fact, defendant has not been able to assert any other explanation for this behavior in this appeal.**

Routly v. State, 440 So. 2d 1257, 1264 (Fla. 1983). And, Davis misleadingly relies on *Derrick* for the proposition that the avoid arrest aggravator is inconsistent with the coldness aggravator. That case did not reach that far, but instead said:

> If Derrick did not decide to kill Sharma until Sharma recognized him, then **it seems unlikely** that the facts would support the finding of the heightened premeditation necessary to find the murder was cold, calculated, and premeditated. **However, we note that the state may present new evidence on remand which supports these aggravating factors.**

Derrick v. State, 581 So. 2d 31, 37 (Fla. 1991). (emphasis added). The Court's observation proved correct, and the avoid arrest aggravator was upheld on appeal from resentencing. *Derrick v. State*, 641 So. 2d 378, 380-381 (Fla. 1994). ("The record in the instant case supports the aggravating factor that Derrick committed the murder to avoid arrest.").

In this case, the sentencing court correctly found the avoiding arrest aggravator. And, even if that aggravating circumstance is removed from the sentencing calculus, five strong, and weighty aggravators remain. If there was error, it was harmless beyond a reasonable doubt. *DiGuilio, supra; See, Aguirre-Jarquin v. State*, 9 So. 3d 593, 608 (Fla. 2009); *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000).

ISSUE IV. THE COLDNESS AGGRAVATOR

On pages 59-64 of his brief, Davis says that the trial court should not have found the cold, calculated and premeditated aggravating circumstance. The standard of review is the one set out in connection with the previous claim.[38]

In finding the coldness aggravator, the trial court said:

> (a) As the State points out in their memorandum in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection is required. The Defendant started out on the day of the murder going to a Toys R Us to purchase a toy on lay away for the son of the woman he became infatuated with (Jody). He saw himself as becoming the father to this child and the husband to his mother. He was tortured by his thoughts of her rejection, slipping in and out of anger and love for her. In the past he has clearly shown that when he is rejected by a woman he falls for, that he seeks to harm her in the most degrading way possible. He rapes, assaults, attempts to abduct, hits, threatens and more. In the past when he has

[38] Davis suggests that this Court struck an aggravating factor in its decision in *Cole v. State*, 36 So. 3d 597 (Fla. 2010). That is not what happened in that case.

reacted to this rejection, it has been against the woman who rejected him and not *a surrogate. In this* case for whatever reason, a surrogate was chosen. It would be speculation to assume why, but his actions are consistent with his past criminal behavior as it relates to violence towards women. There are two (2) key factors that are different here; this victim was a person he did not have a prior love relationship with and in the past when he tried to abduct and harm Michael Hurst Redden he was sent to prison and placed on a probation that constrained him.

(b) The Defendant's actions were clearly thought out and planned. He drove his vehicle and parked it some distance away from the dealership, which he had no logical reason for doing unless he planned to assault the victim. He also had possession of a knife when he entered the car dealership. This knife was not a pocket knife, a work knife or a type of knife someone would ordinarily carry for everyday use. It was a kitchen utensil normally used for eating a meal. The Defendant suggested it was one he had used to repair his vehicle, but it would not have been one someone ordinarily could carry unsheathed about their person for any routine purpose or one to be forgotten in a pants or shirt pocket.

(c) It could be speculated that he only went there to get his title and became angered by the owners not being there, but then it is illogical that he would have reacted the way he did and committed the crimes of kidnapping and sexual battery because he had to wait for the owner to arrive with it in a short period of time. It is more logical that he planned to do exactly what he did. His fabricated hallucinations about Dr. Paul were clearly an attempt by a man of intelligence who suffers from a diagnosed mental illness to justify his actions after he had time to reflect upon what he had done. And in that contrived attempt to avoid responsibility, he revealed sufficient details to know he not only thought about killing someone in advance of the act, even before he went to the car dealership, but that he was in fact making a choice between three (3) women, a co-worker, an automotive supply store employee who had helped him or Fabiana Malave. He chose the woman who became his easiest and most accessible victim to funnel his rage against.

(d) The Defendant methodically executed his plan. He used the victim's car to travel to where he had left his own vehicle. He parked close enough to walk to where the victim was, but far enough away to not have his vehicle give rise to suspicion. He could have easily driven the victim in her own car to his house. However the Defendant consciously chose to drive it to where his vehicle was parked. His vehicle would not draw any notice at his own home. He threatened to kill the victim twice, once when he abducted her and once when he got her to his house before entering. The victim was clearly cooperative to a fault. There was no reason to kill her except to insure he would not be caught. And in his state of mind the sexual battery would not satisfy his need to punish someone. He had sufficient time from the abduction, through the long drive to his home, through the sexual battery and after to reflect upon the effect of the victim's death. By his own words he was calm and reflective at the time of the killing and after.

It was in the Defendant's own words "pretty intense" and that he had "squeezed the life out of her", He stated that killing the victim was "pretty liberating". He further admitted that the victim recognized him and he had no fear of her identifying him and that it had been "a hell of a day" Such comments are clear indications of a cold and callous mind, a planned killing where fear of identification was not an issue as death was the planned result, and it showed enjoyment of an act considered vial. He drove around for hours with her body that he had carefully wrapped and covered in cloth and plastic in an obvious attempt to prevent evidence from discovery in his vehicle and home. He arrived on this late October day at about 5:30 pm where daylight would have normally been receding or gone. He clearly intended to use the cloak of darkness to transfer this victim back to her car and escape without detection.

(e) All the facts of this case evince a mind that was ruthless, cold, calculating, and that the premeditation was not short, but had been derived over time, even days as the end result of a planned kidnapping and sexual assault.

(f) The Court has considered any issues of

> impermissible doubling and agrees with the State's contention that there is none. *Jackson v. State*, 530 So. 2d 269 (Fla. 1968); *Brown v. State,* 721 So. 2d 274 (Fla. 1998); Rodriguez v. State, 753 So. 2d 29, 47 (Fla. 2000), *Stein v. State*, 632 So. 2d 1361 (Fla. 1994).
>
> (g) Even with the Defendant's mental illness, the Court still finds that this man of above average intelligence carefully planned and designed a killing of the victim over time, and but for the chance that the owner of the car dealership spotted him and pursued him to a level of frantic hysteria he may not have been caught, *Evans v. State,* 800 So. 2d 182 (Fla. 2001).
>
> This aggravating circumstance has been proven beyond all reasonable doubt and is given great weight by the Court, *Richards v. State*, 604 So. 2d 1107 (Fla. 1992); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994), *Rogers v. State*, 511 So. 2d 526 (Fla. 1987) *Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992), *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988).

(V4, R645-48). Those findings are correct in all respects, and should not be disturbed.

As this Court has said, and as the sentencing court recognized:

> A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation. See Sexton v. State, 775 So.2d 923, 934 (Fla.2000) (evidence established heightened premeditation, lengthy and careful planning and prearrangement, and an execution-style killing to support CCP aggravator despite "great weight" given to the defendant's mental impairment). While the events leading up to the murder may have made Evans emotionally charged, his actions do not suggest a frenzied, spur-of-the-moment attack. The evidence in this case supports the trial court's findings; therefore, the trial court did not err in finding CCP.

Evans v. State, 800 So. 2d 182, 193 (Fla. 2001). *See also, Farina v.* State, 801 So. 2d 44 (Fla. 2001). Feelings of "sadness" do not equal "wild emotion." *Conde v. State*, 860 So. 2d 930 (Fla. 2003). There was a lengthy series of events leading up to the murder, allowing for a substantial period of reflection and thought. *Preston v. State*, 444 So. 2d 939 (Fla. 1984). In an effort to discount the trial court's finding that Davis was "calm and reflective" at the time of the murder, Davis relies on his self-serving statement that "he just did it." *Initial Brief*, at 61. The true facts, as set out by the trial court, are that Davis went to the victim's place of employment with the pre-arranged and formulated plan to kill. (V4, R646). There is no doubt whatsoever that this murder was the product of cool and calm reflection; that Davis had a "careful plan or prearranged design" to commit murder; that Davis exhibited heightened premeditation; and that there is no pretense of legal or moral justification. Those are the criteria that must be satisfied under *Jackson v. State*, 648 So. 2d 85 (Fla. 1994), and it is clear that Davis meets them in all respects. The coldness aggravator was properly found and weighed by the sentencing court.

Alternatively, and without conceding that there is error of any sort, any error in considering the coldness aggravator is harmless beyond a reasonable doubt based on the extensive

aggravation and weak mitigation. *DiGuilio, supra*.

ISSUE V. THE DEATH SENTENCE IS PROPORTIONATE

On pages 65-69 of his brief, Davis says that death is a "disproportionate" sentence for his offense. In fact, this argument is little more than re-argument of the previously-briefed aggravating circumstances that Davis says were improperly found. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362, 362 (Fla. 1984). This Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990).[39]

There is no question at all as to Davis' guilt based on his confession. Against the aggravating factors found by the trial court was minimal mitigation, none of which was compelling.

The trial court found and weighed the following aggravating circumstances as follows:

(1) previously convicted of a felony and under sentence of imprisonment -- great weight;

---

[39] As set out in the statement of facts, the mental state evidence was, in some ways, conflicting. The sentencing order implicitly credits the State experts over Davis' experts.

(2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person -- great weight;

(3) especially heinous, atrocious or cruel -- great weight;

(4) committed during the course of a sexual battery and kidnapping -- great weight;

(5) committed for the purpose of avoiding or preventing lawful arrest -- great weight;

(6) cold, calculated, and premeditated -- great weight.

This Court has recognized that CCP and HAC are "two of the most serious aggravators set out in the statutory sentencing scheme." *Aguirre-Jarquin*, *supra*; *Silvia*, *supra*; *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999); *see also Hodges v. State*, 55 So. 3d 515, 542 (Fla. 2010) ("Qualitatively, prior violent felony and HAC are among the weightiest aggravators set out in the statutory sentencing scheme"). Furthermore, **this Court has upheld death sentences where the prior violent felony aggravator was the only one present**. *See Rodgers v. State*, 948 So. 2d 655 (Fla. 2006); *LaMarca v. State*, 785 So. 2d 1209, 1217 (Fla. 2001); *Ferrell v. State*, 680 So. 2d 390, 391 (Fla. 1996).

In mitigation, the sentencing court found no statutory mitigators and gave "little weight" to "some weight" (V4, R651-55) to the non-statutory mitigating circumstances (except for Davis' behavior, which was given substantial weight), none of

which are compelling or in any way diminish the substantial aggravators.[40]

Davis says that his case is most similar to *Santos v. State,* 629 So. 2d 838 (Fla. 1994), *Crook v. State*, 908 So. 2d 350 (Fla. 2005), *Clark v. State* 609 So. 2d 513 (Fla. 1992), and *DeAngelo v. State*, 616 So. 2d 440 (Fla. 1993). *DeAngelo* is a single-aggravator case and the murder occurred in an ongoing quarrel between victim and defendant -- that case is simply not comparable. *Clark* is a single-aggravator case (pecuniary gain) -- it is not comparable. *Crook* included substantial mitigation not present here as well as less aggravation. *See*, *Bright v. State*, 90 So. 3d 249, 264 (Fla. 2012) (". . . there is no evidence that at the time of the murders Bright was hallucinating, delusional, or intoxicated to the point of substantial impairment, or that he lacked the ability to conform his conduct to the requirements of the law."). Finally, *Santos* is a single aggravator case with statutory mitigation, as well. *See Silvia v. State*, 60 So. 3d 959 (Fla. 2011).

---

[40] The trial court found the following mitigation existed: chronic mental problems -- some weight; mental condition can be treated with medication -- some weight; ability to adapt to prison -- little weight; ability to hold gainful employment -- some weight; remorse -- some weight; and defendant displayed appropriate courtroom behavior -- substantial weight. (V4, R651-5).

This crime is more analogous to *Kocaker v.* State, 2013 WL 28243 (Fla. Jan. 3, 2013) (three aggravators; distinguishing *Crook* and *DeAngelo*), *Miller v. State,* 42 So. 3d 204, 229 (Fla. 2010); *Turner v. State,* 37 So. 3d 212, 228 (Fla. 2010) (less aggravation and more mitigation); *Zommer v. State*, 31 So. 3d 733, 752 (Fla. 2010); and *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006), where this Court affirmed the sentences of death. The mitigators that were presented here are weak when weighed against the six aggravators, three of which are the most serious aggravators in Florida law (HAC, CCP, prior violent felony). The facts of this case are even more aggravated than *Miller, Turner*, *Zommer*, and *Buzia*. In *Gudinas*, this Court said "[f]inally, Gudinas argues that death is a disproportionate sentence in his case, although he cites no cases similar to his own where this Court imposed life sentences." *Gudinas v. State,* 693 So. 2d 953, 967 (Fla. 1997) (*citing Mendyk v. State*, 545 So. 2d 846 (Fla. 1989), and *Branch v. State*, 6845 So. 2d 1250 (Fla. 1996). Those cases were substantially less aggravated than this one -- this Court affirmed the death sentences. Death is the proper sentence in this case, as well.[41]

---

[41] In his brief, Davis says that his behavior was "erratic" without elaboration. The facts set out in the sentencing order show that his behavior was anything but erratic. It was purposeful and goal-directed.

ISSUE VI. THE HEINOUSNESS AGGRAVATOR JURY INSTRUCTION

On pages 70-73 of his brief, Davis says that the jury instruction given on the heinousness aggravator is "vague." He does not explain why this is so, and, for that reason alone, the claim is insufficiently briefed. Further, Davis concedes that the heinousness aggravator was established under "this court's caselaw." *Initial Brief*, at 73. In view of that concession, the claim makes no sense.

In any event, the vagueness challenge Davis makes was rejected long ago, as he admits in his brief. *Donaldson v. State*, 722 So. 2d 177, 186 (Fla. 1998); *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997) (rejecting same argument); *Reese v. State*, 694 So. 2d 678, 685 (Fla. 1997); *Hartley v. State*, 686 So. 2d 1316 (Fla. 1996); *Hall v. State*, 614 So. 2d 473, 478 (Fla. 1993); *Ragsdale v. State*, 609 So. 2d 10 (Fla. 1992); *Sireci v. State*, 587 So. 2d 450 (Fla. 1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992); *Jones v. State*, 569 So. 2d 1234 (Fla. 1990); *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990), *vacated on other grounds*, 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); *Eutzy v. State*, 541 So. 2d 1143 (Fla. 1989).[42]

---

[42] To the extent that Davis suggests that there is an "intent" element to the heinousness aggravator, this Court rejected that

Finally, Davis did not preserve this claim for review because he did not object to the jury instruction that was given. (V18, R2545, 2620-21). *McCray v. State*, 71 So. 3d 848, 879 (Fla. 2011); *Butler v. State*, 842 So. 2d 817, 830 (Fla. 2003); *Davis v. State*, 648 So. 2d 107, 109-110 (Fla. 1994).

ISSUE VII. THE *RING V. ARIZONA* CLAIM

On pages 74-75 of his brief, Davis says that he is entitled to relief based on *Ring v. Arizona*, 536 U.S. 584 (2002). As he admits, this Court has repeatedly rejected this claim when the prior conviction aggravator is present:

> Hall contends that Florida's death statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Ring*, the United States Supreme Court held that where an aggravating circumstance operates as the functional equivalent of an element of a greater offense in capital sentencing, the Sixth Amendment to the United States Constitution requires that the aggravating circumstance must be found by a jury. *Id.* at 602, 122 S.Ct. 2428. This Court has held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable. *Victorino v. State*, 23 So. 3d 87, 107–08 (Fla. 2009). Hall qualified for both the prior violent felony and the under-sentence-of-imprisonment aggravators. We find Hall's claim without merit.

---

claim long ago, as well. *Buzia v. State*, 926 So. 2d 1203, 1211 (Fla. 2006) ("The intention of the killer to inflict pain ... is **not a necessary element** of the aggravator." *Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001) (emphasis added) (*quoting Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998)).). (emphasis and quotation marks in original).

Hall v. State, 107 So. 3d 262, 280-281 (Fla. 2012).

In his brief, Davis seems to argue that "unanimity" is required as to **all** of the aggravators, regardless of whether the "prior conviction-based" aggravator is present. Aside from finding no basis or support in *Ring*, or in common sense, that claim was not raised below and is not preserved for review, anyway.

ISSUE VIII. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION

Davis does not address the sufficiency of the evidence in his brief. Because of Davis' unchallenged confession, and the unchallenged evidence of guilt, there is no need to belabor the point. The testimony and physical evidence set out at pages 3-24, above, establishes guilt beyond any doubt at all.

CONCLUSION

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

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-mail to Nancy Ryan, Esquire, ryan.nancy@pd7.org, perkins.lorraine@pd7.org, appellateefile@pd7.org, on September 6th, 2013.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Kenneth S. Nunnelley

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 998818
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
Primary E-Mail:
ken.nunnelley@myfloridalegal.com
E-Filing:
CapApp@MyFloridaLegal.com
(386)238-4990
(386)226-0457 (FAX)