IN THE SUPREME COURT OF FLORIDA

JOHN SEXTON,	:	
Appellant,	:	
vs.	:	Case No. SC14-0062
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

John Sexton was charged by indictment in Pasco County with first-degree murder of Ann Parlato committed on or between September 22 and 23, 2010, in violation of section 782.04(1)(a), Fla. Stat. (2010). (1/6, 7) The State filed a notice of intent to seek the death penalty on March 1, 2012. (1/52) The State filed a notice of Williams Rule Evidence on July 20, 2012. (1/104) In response, the defense filed a motion to exclude Williams Rule Evidence. (1/108) On April 11, 2013, the State filed a motion in limine to disallow any questions about the DNA analyst's knowledge of incidents of contamination in other cases. (11/1840) The State's motion in limine was granted. (11/1919)

On April 11, 2013, Appellant's 14 pre-trial motions were heard and denied. (19/3227-36) Motions to declare Florida's death penalty unconstitutional were denied. (19/3236-47) The case proceeded to jury trial on April 15, 2013. Prior to jury selection the trial court heard several pre-trial motions. Appellant's motion to find Florida Penalty Scheme Unconstitutional and to not death qualify the jury based upon Ring v. Arizona, was denied. (22/3573-75) The trial court denied Appellant's motion to exclude evidence concerning postmortem injuries. (22/3575-91) The State's motion in limine to prohibit the defense from cross examining the State's DNA expert regarding prior incidents of contamination was granted. (22/3592-3603) On April 19, 2013, the jury returned a verdict of guilty of first-degree murder as charged. (12/2064, 30/5064)

At status conference on Monday, April 22, 2013, Byron Hileman, chief of the homicide division for Regional Counsel, asked for a continuance of the penalty phase trial until May 6, 2013. First chair trial counsel, Stephen Fisher, notified Hileman on Sunday that his wife was struck by a car going 45 miles per hour and was seriously injured. She had surgery on Saturday night and was in critical condition. She had displaced fractures in both legs and internal bleeding. She was to undergo her third surgery on that Monday afternoon. Hileman and Fisher were the two certified first chair attorneys with Regional Counsel. Second chair defense counsel, Dustin Anderson presented the guilt phase, so Fisher's presence was critical to present the penalty phase. Hileman indicated he could do the penalty phase, but he did not think he could be up to the standards the Supreme Court has set in such a short period of time. (13/2263-2268)

The State objected to the continuance and argued that Hileman could get ready to present the penalty phase in a day. (13/2268-2271) Sexton indicated Fisher was his primary counsel of choice to present the penalty phase. (13/2272) The trial court recognized that from the start, Fisher was the penalty phase attorney and that Anderson could not handle the penalty phase. (V13/2273) The trial court reset the penalty phase for May 6, 2013. (13/2274)

On April 29, 2013, defense counsel made an oral motion to continue penalty phase. (14/2476-2478) The trial court denied Defendant's oral motion to continue penalty phase. (13/2284, 14/2489) Hileman objected and formally requested a continuance.

The State withdrew their mental health witness. (14/2492) On May 1, 2013, Appellant filed a motion to continue penalty phase renewing his motion made ore tenus and denied on April 29, 2013. Mr. Fisher's wife underwent another major surgery on Friday, April 26. Mr. Fisher indicated he would not be capable of trying the penalty phase on May 6, 2013, due to the week-long ordeal, his exhaustion, and the ongoing serious medical emergency. At the hearing on April 29, 2013, Hileman announced that he was assigning himself as new first chair and he would try the penalty phase but it would be ineffective assistance of counsel for Hileman to attempt to try the penalty phase with less than two weeks of preparation time. Hileman moved to have the penalty phase continued until early to mid-June. Hileman explained he had not spoken to any penalty phase witnesses, he had not met with the mitigation specialist, he was just beginning to review the several thousand pages of records and reports, and he was not present at the guilt phase which is where the State's aggravating evidence was presented. In addition to the work Hileman had to do to prepare for the penalty phase, he supervised about 50 first-degree murder cases and was first chair on seven active death penalty cases. (13/2285-2288) On May 3, 2013, the trial court denied Appellant's motion to continue penalty phase. (13/2316)

Prior to the start of penalty phase on May 3, 2013, Hileman renewed his motion to continue the penalty phase. Hileman summarized the details of the events leading to the motion for continuance. (15/2539) On April 21, Hileman learned of Fisher's

inability to attend the penalty phase scheduled for April 23 and 24 because of the car accident. Fisher thought he would be able to participate in the penalty phase rescheduled for May 6 and 7. Hileman did not assign himself to the case because he thought Fisher would be able to do the penalty phase. On Friday evening, April 26, Hileman learned from Fisher that further major surgeries were being done on Fisher's wife. Fisher said he did not think he could do the penalty phase on May 6 and 7. (15/2542-44) Hileman determined he had no alternative than to reassign this case to himself. At the hearing on April 29, Hileman formally announced he was reassigning himself to the case and he could be ready to present the penalty phase if the case was set for June. (15/2544, 45) Hileman started working on this case the night of April 26, 2013. He worked 22 hours over that weekend, reading the file, notes, e-mails, and records. On April 29th and 30th Hileman met with Anderson. At least five other attorneys were providing assistance to Hileman. The day before the motion was the first time Hileman met by phone with Dr. McClain, a psychologist who would be presenting important mitigation testimony. Hileman was supposed to meet with Dr. McClain again over the weekend because there were testing issues they had not discussed. The defense team finally received a response from family witnesses in Oregon and they would need to set up video conferencing to have them testify. The alternate route would be to present testimony of family witnesses through a mitigation specialist. (15/2547, 48)

Once Hileman became first chair, ten days before the start of

penalty phase, he had to make his own tactical decisions and could not rely exclusively on notes prepared by another attorney. (15/2550)

Hileman estimated he spent 60 to 70 hours on this case since April 26, 2013. Hileman stated, "I believe if you require me to go forward on the 6th, you're you are essentially, requiring me to commit malpractice, to commit ineffective assistance of counsel." Hileman had yet to have the 3 to 4 hour meeting he needed to have with Dr. Maher, another important witness. Hileman felt he was being cornered into a position contrary to what is lawful and ethical based on his responsibilities. (15/2551-53) Hileman still had not talked with the family witnesses which he had to do before making a determination on whether to call them as witnesses. As first chair, that is not a duty Hileman could delegate to anyone else. Hileman was asking for any convenient date at least four weeks out. Mr. Sexton thought it preposterous for Hileman to represent him in a penalty phase beginning on that Monday. (15/2553-56)

The State responded that as of the April 22nd hearing, Hileman knew the penalty phase would begin on May 6, 2013. (15/2558-60) The State suggested defense counsel had ample opportunity to prepare for the case and the continuance should be denied. (15/2564)

Hileman responded it was only on April 26 that Hileman appointed himself as first chair. Hileman did not sit through the original trial where all of the State's aggravation was presented.

Hileman had only received the transcripts of two witnesses and closing arguments in the last few days and still had not received transcripts from the rest of the trial. It was simply not possible for him to be ready by May 6. Hileman had never gone to trial in a death penalty case without six to eight weeks of almost full-time preparation. (15/2565, 66)

The trial court wanted to clarify that she had vacation scheduled for June 3rd and she called jurors to find out their availability because she cancelled her vacation to have this case on June 3. The trial court indicated there was no day in June where 12 jurors were available. One juror had flown back to Wisconsin and would not be in Florida for the next five months. (15/2570, 71) The trial court indicated we are in this position because the defense demanded speedy trial. The defense attorneys knew the re-scheduled date for penalty phase was May 6. On April 28, the trial court denied an oral motion for continuance. (15/2574) The trial court indicated its belief that defense counsel could be ready for penalty phase as scheduled and denied the continuance. (15/2579, 80).

At the May 3, 2013, hearing the trial court denied the following motions by Appellant: motion for finding of fact by the jury, motion to require unanimous jury in the penalty phase, objection to the standard jury instructions, motion to declare 921.141 unconstitutional. (15/2585-2594) The defense renewed their pre-trial motions and the trial court stood on its previous rulings. (15/2598-2601)

During the penalty phase jury charge conference the trial court denied the defense's special jury instruction that anything that occurred after the victim became unconscious is irrelevant to the HAC aggravator. (34/5698-5706 35/5727) Sexton renewed his motion to dismiss counsel because Hileman failed to call three witnesses. Sexton's son was not even brought up with mitigation. Hileman indicated they couldn't set up video testimony in part due to time limitations and the witness told Anderson he could not appear. The son told Anderson there was a certain time he could appear by video that week. Anderson said it was a strategic decision to put on the mitigation expert to testify about the son's testimony. (34/5709-11) The defense renewed their objection to the standard penalty phase instruction that their duty is to advise the court and relied on their previously submitted motion and proposed instruction. The judge denied the motion again. (35/5719)

When reading penalty phase instructions the court read the following:

> If after weighing the aggravating circumstances you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of aggravating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole.

(35/5836, 37)(emphasis added)

After the judge read the penalty phase instructions defense counsel renewed all previous motions. The trial court maintained

previous rulings. (35/5843-45) The jury returned a recommendation of death by a vote of 10 to 2. (35/ 5847)

At the Spencer hearing on August 2, 2013, Fisher indicated there was a conflict between regional counsel attorneys regarding what to present at the Spencer hearing. Fisher indicated at that point there should be a Nelson hearing. (19/3308, 3309) Sexton indicated he was not satisfied with how he was represented at the penalty phase. Sexton's attorney's got it backward and they demonized rather than humanized him. (19/3310-13) Mr. Hileman did not want to present anything at the Spencer hearing. Sexton indicated Hileman and Anderson were disingenuous about their attempts to communicate with his out-of-town witnesses prior to the penalty phase. Sexton wanted those family members to testify at the Spencer hearing. (19/3314-16) Mr. Fisher was given time to consult with Sexton and the Spencer hearing was continued until September 13, 2013. (19/3322—26)

A Nelson hearing was conducted on August 20, 2013. Fisher was supposed to provide documents to Sexton. Sexton indicated since Fisher agreed with Sexton on how the case should be handled, Fisher had been taken off the case. Anderson informed Sexton if he wanted information from Hileman, Sexton would have to file a Freedom of Information Act request. Sexton indicated his attorney had become oppositional. Sexton said he did not know what to do and acknowledged he did not have the ability to represent himself. Anderson indicated it was their office's decision not to present additional witnesses at the Spencer hearing. (21/3493-3508)

Sexton's request to have counsel removed was denied. (21/3522-33) No additional evidence was presented at the Spencer hearing. (20/3477) The trial court stated that nothing in the PSI would be used as an aggravating factor. (20/3478, 79)

Appellant was sentenced to death and a written sentencing order was filed on December 13, 2013. Three aggravators were found and given great weight: 1) The capital felony was committed while the defendant was engaged, in the commission of, or an attempt to commit, or flight after committing sexual battery. 2) The capital felony was especially heinous, atrocious, or cruel. 3) The victim of the capital felony was particularly vulnerable due to advanced age or disability. The mitigating factors were: 1) The defendant had no significant history of prior criminal activity (moderate weight); 2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (little weight); 3) The capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired. (little weight); 4) The existence of any other factor in the defendant's background that would mitigate against imposition of the death penalty; The Defendant is amenable to rehabilitation and a productive life in prison. (little weight). (19/3185-97, 3202-06, 20/3407-29) A motion for new trial was filed on December 16, 2013. (19/3209-12) The motion for new trial was denied on December 23, 2013. (19/3214) Appellant filed his notice of appeal on January 8, 2014. (19/3215)

STATEMENT OF THE FACTS

GUILT PHASE

Dorinda Cifelli met Ann Parlato at church and they formed a five-year friendship in which Parlato called Cifelli her adopted granddaughter. Parlato was living at 8025 Colrain Drive in September of 2010. Cifelli would see Parlato at her home at least twice a week. Since Parlato did not drive, Cifelli would take Parlato to the grocery store, help around the house, and visit. Cifelli worked near where Parlato lived and she would usually go to Parlato's house after work about 2 o'clock in the afternoon. (24/3960-62, 4057)

Parlato had asthma and did not permit smoking in her house. (24/3963, 4056-4058) Parlato was 94 years old, about 5'1" tall, and 140 pounds. Parlato had a mastectomy and kept her prosthetic breast in the drawer in her bedroom. Parlato used the washer and dryer sparingly and would wash small amounts of clothing by hand. Typically, she set the air conditioner at 78 to 82 degrees. (24/3965, 66)

Cifelli went to Parlato's home on Tuesday, September 21, to visit and take Parlato to the grocery store. Cifelli cleaned and vacuumed the floors that day. The house looked clean and orderly when Cifelli left around 5 p.m. (24/3966, 67) Cifelli returned to Parlato's house on Thursday, September 23, 2010, about 12:05 p.m. The screen door, usually closed, was open about two inches. Leaves and dirt were in the entranceway. The room was in disarray. A

dolly was on the slate entryway where Cifelli noticed blood drops. (24/3968-72) Cifelli picked up Parlato's cane, walked past the entryway, and saw Parlato's feet sticking out from under a sheet. Parlato was lying on her back in the living room by the bookshelves. There was some jewelry lying by her body and the television was on. Parlato's face was all purple on one side. Cifelli called 911. Parlato was not breathing. (24/3973, 74, 81, 88) Parlato's bedroom was torn apart and the kitchen was a mess. Cifelli told the 911 operator that Parlato appeared deceased and no one else was in the house. Deputy Knorr arrived at about 12:30 p.m. Cifelli told Knorr what she had found in the house. (24/3975, 3986, 87)

Deputy Knorr went into the house through the unlocked front door. The tiled area was pretty well covered in blood. (24/3988) Knorr picked up the sheet and observed Parlato's damaged face. There was blood around the body of the elderly person. Fire rescue arrived and confirmed that Parlato was deceased. Knorr saw a cane and a knife on the ground. At that point, Knorr and the paramedic backed out in order to preserve the crime scene. (24/3989, 90)

It would be unusual for Parlato to run her air conditioner while the windows were open. A couple of days later, Cifelli went back into the house with some of Parlato's family members. About $700 was found in two envelopes amongst clothes in the bureau in her bedroom. (24/3980, 81) Cifelli did not notice any items missing from the house. (24/3983)

In September of 2010, Devlynn Saunders and her boyfriend,

David Carlin, and Patrick Grattan lived at 8019 Colrain Drive, next door to Parlato. (24/4059-62, 88, 89, 4106) Saunders had met Parlato's lawn man. The lawn man would park his vehicle in the street, not in the driveway, when he mowed Parlato's lawn. On several occasions, Parlato's lawn man asked Saunders or Carlin if they wanted their lawn cut, but they never took him up on the offer. (24/4063, 64, 91)

September 22, 2010 was an ordinary night until after Saunders, Carlin, and Grattan went to bed. (V24/4065) Prior to going to bed around 11:30, Carlin went outside to smoke a cigarette and did not see any pickup trucks parked in Parlato's driveway. (24/4092, 93) All three heard a large bang or thud sound around midnight. The dogs started barking loudly. Carlin went out of the house, followed by Saunders, and Grattan. It was unusual that the curtains and window were wide open and the light on at Parlatto's house. Saunders and Carlin were about 20 feet away when they saw the lawn guy in the window at the sink, although they could not see him in perfect detail. It sounded like water was running and he was doing dishes or using the sink. The lawn man's big bluish truck did not have a trailer attached and was backed into Parlato's driveway. (24/4067-71, 77, 82, 93-96, 4107-10) Grattan heard Saunders and Carlin say that it looks like the lawn guy's truck. (24/4112)

At Carlin's request, Saunders got paper and a pen so he could write down the license plate number. (24/4070, 96, 97) When Carlin met with Detective Robert Grady he gave Grady a piece of paper

with the tag number, "Handicap Y2JMI", of a truck he observed in Parlato's driveway. Grady wrote on the paper in blue ink: "A tag written down by David Carlin." (24/4071, 99; 26/4365-67) They wrote down the license plate number in case something came up missing, but they did not call the police because they thought maybe the lawn man was helping Parlato clean up or something. (24/4073)

The next day Saunders received an unusual and upsetting phone call from Dominique LeBlanc, an across the street neighbor. Shortly thereafter, Saunders spoke to law enforcement and told them what she observed that night. Law enforcement showed Saunders a photo pack but Saunders did not remember whether she identified the lawn man. Saunders could not remember if she was shown a photo pack on more than one occasion. Saunders and Carlin made in-court identifications of the defendant as the lawn man. (24/4074, 75, 84, 4100, 01) Carlin was shown one or two photo packs with six photographs, and Carlin was able to narrow it down to two people. (24/4100) Grattan was not able to make a description of the person he saw in the window. Grattan could not tell if the person was black or white nor was he able to identify anybody from the photo pack. Grattan did not recall either Carlin or Saunders saying they recognized the person in the window. (24/4115, 4116)

On September 23, 2010, Stephen Hayden got in his vehicle to go to work between 1:45 and 2:00 in the morning to deliver newspapers. Hayden lived very near Colrain Drive. When Hayden went to get into his vehicle that was parked on the street, a dark

colored pickup truck going extremely fast flew through the stop sign at Colrain and almost took out Hayden and his vehicle door. The pickup truck was dark blue or black and had a louder exhaust system. The vehicle was consistent with the size and type of a Dodge Ram pickup. Hayden could not see the driver. (24/4118-20)

Dominique LeBlanc and her husband Henry LeBlanc lived on Colrain Drive for 30 years and had a very close relationship with Ann Parlato. The LeBlancs had been in Parlato's home many times. Parlato did not allow people to smoke in her home. Parlato owned a dolly that she kept in the garage. The ladder by Parlato's house was normally kept in the garage. (25/4221-24, 4229-31) The lawn man would park his pickup truck on the street when he cut Parlato's grass. (25/4228, 32)

Susan Miller, a forensic investigator, worked the crime scene along with two other investigators, Melanie Linton-Smith and Rachel Spivey, for three days. (26/4459-62) Rachel Spivey, videotaped the outside and inside of the house. The video of the scene was admitted into evidence and played to the jury. There was an open window on the west side of the house that leads into the kitchen. (24/4002-09) There was blood on the exterior of the bedroom door, on a sheet, and on a stool in the master bathroom. (24/4010) There was blood on the floor and shower curtain in the hall bathroom, in the entryway, and in the living room. (24/4011) A knife was stuck in the large wooden clock on the north side of the living room. (24/4012)

There was blood on the linoleum floor and the window blinds

in the kitchen. There were several opened bottles of cleaner on the floor near the washer and dryer in the garage, and a bloody handprint on the dryer. Spivey photographed the crime scene and collected physical evidence. (24/4012-14) Spivey took measurements and completed a sketch of the entryway, and dining room. Photographs of the entryway and items collected were admitted into evidence. (24/4015-4020) A wicker basket in the entryway contained a paper towel, a rag, and a pair of woman's panties. There was a box of matches on the ground near the wicker basket. The box indicated 32 matches, but only 29 matches were in the box. (24/4024-28)

On the hutch on the west side of the dining room, there was a notepad with handwritten notes, names, and phone numbers. (24/4028) Exhibit 4-H was a notepad with handwriting entitled "Lawn." Written on the pad was "John-Lawn" followed by the number "727-251-4351."(24/4029-4033) Spivey completed a sketch of the dining room. (24/4033) There were numerous items on the counter and two handbags hanging from a chair on the north side of the counter. One bag was empty and one contained money and Parlato's Florida Identification card. (V24/4034, 35)

Spivey collected a cigarette butt from the kitchen trashcan. (24/4035-40) There were several knives in the south basin of the kitchen sink. (24/4042) Next to the footstool in the dining room, there was a cylindrical shaped cigarette ash. (V24/4043, 44) There was a rag and bottle of Era Plus cleaner in the master bathroom sink, and a cigarette butt in the toilet. (24/4045, 46) There were

no signs of forced entry at the front door. (24/4046, 47)

Miller did the overall photographs of the scene and the master bedroom. Defense renewed the objection to exhibit 38, the photograph of the victim in the position she was found, but without the sheet covering her. The photo had already been admitted into evidence and the judge noted the objection. (26/4462-70) Miller collected the curtain so it could be tested but for larger items they did a presumptive blood test and if positive they took a swab. (26/4481, 822)

The temperature shown in the photograph of the thermostat was 78, but it was set to 65. (26/4491, 92) Photographs 9-J and 7-S, depicting the victim on the living room floor were admitted into evidence over defense objection. (27/4511, 12) Miller noticed a strong odor of bleach when in the vicinity of the body of Parlato. State's exhibit M was a photo of Parlato with the sheet removed showing the position in which she was found. The photo was admitted over defense objection. (27/4516, 17) There was blood on the prosthetic breast case located inside a dresser drawer. (27/4521-23)

There was blood on the master bedroom door, cedar chest, sheet, and pillow from the master bedroom. (27/4527- 31) Miller found cigarette ashes in front of the nightstand, the hallway leading to the bedroom, and in the garage near the utility sink, washer, and dryer. (27/ 4533, 36, 41) There was blood on top of the washer and on the side of the dryer. (27/4542) There was a white towel and bottle of detergent in the master bathroom, and

bottle of bleach between the toilet and the vanity. (27/4534) There was blood on the cane in the master bathroom shower. Miller collected a cigarette butt from the bottom of the toilet. (27/4540) There was blood on a bottle of bleach found in the garage. (27/4543)

Clothing and grass were inside the washing machine. The inside of the washer was wet, like it had just gone through the rinse cycle. A shirt, dress, sweater, T-shirt, pants, underwear, socks, gloves, and two cigarette butts were found in the washing machine. (27/4544-46)

Melanie Linton-Smith, in addition to working the crime-scene, went to Sexton's house and the District office when Sexton was there. (28/4683, 84) While at Sexton's house, Linton-Smith photographed the blue Dodge Ram pickup truck. She also took a swab from the driver's side window crank handle. The swab presumptively tested positive for blood. Linton-Smith collected a sheet and pillow from the couch, but she did not notice any blood on them. A photograph taken of a laptop at Sexton's residence was admitted into evidence. The laptop was opened to an article entitled, "Elderly Woman Murdered in Home," which related to the investigation Linton-Smith was doing. (Supp2/233-38)

Linton-Smith went to the District Office where Sexton was located to take photographs, swabs, and fingernail clippings. Photos of Sexton were admitted into evidence. Linton-Smith noticed discoloration under Sexton's nose and on his chin. (Supp2/239-244) While at the station, Linton-Smith collected the shirt, shorts,

and boots that Hatcher previously obtained from Sexton. She photographed the boots and did a presumptive test on the right boot that was positive for blood. (28/4691-97) The blood tested from the boot was from bottom inside the tread area. (28/4703) Linton-Smith photographed the shirt and shoes at her office. (28/4729) Back at the crime scene, Linton-Smith collected a knife from the kitchen sink between the dish drainer and the sink edge with the point side up. Presumptive tests for blood around the sink came back positive. (28/4698-4700)

Linton-Smith photographed cigarette ashes at the crime scene. There were round intact ashes at a coffee table in the living room near the victim's body. Linton-Smith collected a pair of bloody women's underwear from the living room floor. She collected the knife that was stuck into the antique radio/cabinet and a piece of linoleum flooring with a blood stained shoe print. (28/4704-11) Linton-Smith created a sketch of the living room with measurements. (28/4713, 14) She collected another knife found on the living room floor. (28/4721)

Jason Hatcher, a detective with the Pasco County Sheriff's Office, responded to Parlato's house. After receiving a tag number, Hatcher went to Sexton's residence at 7811 Niagara Drive. There was a black Toyota pickup truck and a blue Dodge pickup truck in front of Sexton's house with a tag matching the number he had received. The information from the tag, Y2JMI, showed the vehicle was registered to Catherine and John Sexton. (25/4239-41, 46, 49) Detective Robert Grady accompanied Hatcher to Sexton's

home. Grady noticed what appeared to be blood stains on Sexton's shirt, and shorts. (25/4241, 26/4367, 68) Sergeant Eric Seltzer also noticed dried blood spots on the T-shirt and shorts Sexton was wearing. Sexton's house is less than a mile from Parlato's house. (25/4247; 26/4382-84)

Hatcher came into contact with John Sexton about 3:30 in the afternoon in the front yard. Hatcher introduced himself and asked Sexton if he knew Ann Parlato. Sexton appeared nervous and his hands started shaking. Sexton was turning his knuckles inward. Sexton said he usually doesn't like cops and gets nervous when he talks to them. Sexton had a cut on his right knuckle that looked like it was scabbed over. (25/4253-55) Sexton was wearing a gray USF Bulls T-shirt, a pair of khaki shorts, and flip flops. (25/4255) Hatcher had a recorded conversation with Sexton at the front of the black Toyota truck. (25/4257) The recording was admitted into evidence and played to the jury. (25/4266)

Sexton acted surprised to hear Parlato was deceased. He said he stopped by and saw Parlato at sunset, around 8 or 8:30, to see if she had more yard work for him. Sexton stayed there about ten minutes. He only entered the foyer area. Sexton then went to a bar near State Road 52 and Little Road where he had one beer. He then drove around and drank beer before getting home about 10:30 that night. Sexton initially had his trailer on his truck, but dropped it off at Sandstone Road near his house. Sexton said he was not at Parlato's home after midnight, he was not in her kitchen, and his pickup was not backed into Parlato's driveway. (25/4258-60)

Hatcher asked Sexton if he could have Sexton's shirt, shorts, and boots he was wearing that night. Sexton gave the items to Hatcher and Hatcher brought them back to the office. Hatcher recognized the USF T-shirt, khaki shorts, and Coleman boots Sexton provided to Hatcher as the clothes he was wearing that night. (25/4261-65) Sexton provided a buccal swab to Hatcher for a DNA standard. The swab from Sexton and bloodstain from Parlato were admitted into evidence. (25/4285, 86, 93) Sexton went to the Sheriff's Office with Hatcher. Hatcher took custody of a pack of Clipper cigars from Sexton. (25/4297)

Catherine Sexton married John Sexton in 2006 and they were living together at 7811 Niagara in September of 2010. On September 22, 2010, Catherine Sexton came into contact with her husband while he was mowing grass around 7 p.m. at Sea Grape Lane. Catherine was upset because Sexton had beer in the truck and he appeared a little impaired. They argued and then Catherine returned home. Catherine went back out looking for her husband around 9:15 p.m. Catherine located Sexton in the driveway at a vacant house on Fox Hollow Drive. Their argument continued and it appeared Sexton had more alcohol and was impaired. Catherine asked Sexton to come home, but he did not. She found him about 9:45 p.m. at a Circle K. Sexton came out with a beer in his hand, and he got into his blue Dodge pickup truck with a trailer attached to the back. Catherine was concerned about her husband's well-being and called 911 to report he had been drinking and was driving down Little Road. Catherine went home and tried to call her husband a

number of times, but received no answer. (26/4344-48)

Catherine closed her back door and lay down about 1:45 a.m. She heard a knock on the door about 1:55 a.m. and it was her husband. A lot of times, Mr. Sexton would come home, sit on the porch, drink beer, and listen to music before knocking on the door. Mrs. Sexton did not know what time Mr. Sexton got to the house that night. Sexton slept on the couch and did not take a shower. Mrs. Sexton did not see any blood on Mr. Sexton's clothes that night or the next day prior to the police arriving. Both Sextons smoked whatever filtered cigars were cheapest. (26/4349, 4353-55) Catherine had seen a cut on Sexton's hand on the Sunday or Monday before the night she called 911. (26/4352, 53)

Kristen Ann Shrader, manager at Circle-K, turned over a video surveillance tape to Pasco County Sheriff's Office. Shrader watched the tape in the presence of the officers. The video showed Sexton's pickup pulling a trailer. Sexton entered Circle K at 9:46 p.m., bought beer, and exited the store at 9:47 p.m. No blood stains were visible on his gray USF T-shirt. Sexton was wearing the same shirt and shorts the next day when Detective Hatcher contacted Sexton. (26/4385-92, 4410-14)

Detective Michael Rosa arrived at Sexton's house around 4:30 p.m. on September 23, 2010, and contacted Catherine Sexton. She rode with Rosa to a location on Fox Hollow Drive where Mrs. Sexton had seen her husband earlier the previous day. They also located the trailer at 9726 Sandstone Lane. (26/4350, 4389-92)

Jon Thogmartin, District 6 Medical Examiner, responded to the

crime scene where he saw Parlato was covered with a sheet. There was trauma to her face and head, blood spatter all around her head, and she was undressed. She had burns in her mid-thigh, anal, and vaginal area. There was an object in her rectum, and sharp force injury to her chest. Her right breast was removed and she had a left breast mastectomy a long time ago. A synthetic breast pad was placed over the hole where the right breast was. Thogmartin removed a ceramic vase from her rectum. She was cool to the touch and not overly stiff. (27/ 4518-21, 28/4638-47)

The body was transported to the Medical Examiner's Office where Thogmartin completed the autopsy the next day. (28/4648) It was apparent right after the autopsy that the cause of death was blunt trauma. She had sharp force trauma, but that did not kill her. She died of repeated blows mostly to the face and head, and specifically the right side of the face. (28/4649, 50) Her right eyebrow was disfigured, and her cheek bones were crushed. Her mandible was dislocated and hyper mobile. Her upper cervical spine was partially dislocated and her spinal cord was impinged. Parlato was 94 and previously had hip fracture surgery, so her bones were fragile. (28/4551, 52)

Most of the trauma was to the face. She had a bruise on the back of the head, probably from the back of her head hitting the floor as the front of her head was getting hit. She had rib fractures from blunt impact injuries of someone either sitting on her chest, hitting her chest, or her chest hitting something during the initial struggle. (28/4653, 54) Because her injuries

were severe, Thogmartin did a hysterectomy and removed the rectum and vagina to examine them further. She had three vaginal tears associated with bleeding which means those tears occurred while she was alive. Some object was in her vagina and caused the tears. The object could have been a penis or a manmade object like the vase that was removed from her rectum. Something entering the vagina would have caused pain. (28/4654-56)

Thogmartin had no way of telling if Parlato was conscious when the vaginal tear occurred. The injuries she received were consistent with receiving a knock-out blow and her becoming unconscious, but Thogmartin could not say at what point she became unconscious. Parlato did have an injury to her middle finger which was like a defensive type wound, when people get their hands in the way. So at some point during the attack, she was awake. However, Thogmartin did not know when that injury occurred and it could have been at the end or near the beginning. She could have been unconscious after the first or second hit. (28/4676-78)

There was a stab wound in the abdomen that was likely after her heart stopped beating. The face was discolored. Thogmartin did not know the number of blows inflicted but considered three or four to be the minimum and as many as 20 to 40. Thogmartin thought it was more likely that a blunt object was used rather than fists or it could have been a combination of fists and an object. The rectal tear and breast removal occurred most likely after death. (28/4664-68)

Prior to cross examination defense counsel stated on the

record by his cross examination he was not waiving his objection to discussion about post mortem wounds. (28/4673) The parties stipulated that the body of Ann Parlato was autopsied by Dr. Thogmartin on September 24, 2010. (28/4680)

Jerry Findley, a forensic consultant specializing in blood pattern analysis, crime scene reconstructions, and crime scene investigations, assisted in this death investigation. (25/4155, 56, 63) Prior to Findley testifying, defense counsel renewed his motion in limine objecting to photographs showing post mortem wounds. Specifically exhibit 6-S is more prejudicial than probative because it highlights the removal of the breast. The motion was denied. (V25/4150-53)

Findley was provided with four CDs containing 2,304 photographs, a homicide timeline, reports, two crime scene diagrams, a property evidence list, and a video. Findley reviewed all these materials and reached some conclusions regarding what occurred at the crime scene. (25/4164, 65) Photos were admitted into evidence without objection except for 6-S for which defense renewed their objection. 6-S came in as State's exhibit 38. (25/4166-69)

Findley found two areas of impact stains and two lines of cast off stains in the vicinity of the foyer. One of the earrings was found right next to the foyer. These stains indicated there were at least two impacts at the front door or in that vicinity. There were a minimum of three blows in the foyer area. A chair close to the north wall in the middle of the living room had at

least one impact stain which indicates Parlato was there by the chair. (25/4170, 72)

Parlato received at least seven blows in the area where her body was found. For one of those blows her upper body was in a raised position. Findley did not know if Parlato raised herself or somebody else raised her up. For the remainder of those blows her head was on the floor. Impacts radiated out from the head onto the nearby chair, bookcase, and onto the ceiling above. (25/4173, 74)

There were three circles the size of the bottom of a two-gallon bucket in the living room. This, combined with crime scene officers observing a strong odor of bleach, indicated an attempt to clean up the area. There were shoe impressions and blood on the floor in the bathroom. There were drops of blood in the tub, and hair and blood in the sink. In the kitchen area, there were shoe impressions, and blood on the curtain above the sink. The washer had bloodstains inside and outside, and the dryer had bloodstains outside. There were transfer bloodstains on the pillow and the sheet that was partially pulled off the bed. The blood being in other locations means the person moved around the house after the blood incident took place. There appeared to be an effort to clean up but not cover up the crime scene. (25/4175-77)

Exhibit 56 was identified as the right shoe coming from Sexton. There are impact stains all over the right side of the shoe. The impact stains indicate the person wearing those shoes was in close proximity to point of impact of the person letting the blood at the time of impact. Exhibits 57, and 58 were

photographs of both shoes showing impact stains on the sides of the shoes. Findley pointed out the small stains in the pictures saying they are all impact stains. (75/4196-4198)

When Findley was asked if anything told him about the identity of the perpetrator, Findley responded; "whoever was wearing the shoes was in close proximity to the point of impact at the time those impacts were made; so whoever was wearing the shoes had to be there." Findley said some of the stains on the shoes were tested and the stains came straight from the source of the blood. (25/4207)

Elizabeth Isbell, a latent fingerprint examiner, received 52 latent prints from the crime scene technicians. Isbell discarded 43 of the 52 prints because they had insufficient detail to make a comparison to a known print. The known prints from Parlato were not the best quality. Isbell matched four latent prints to Parlato. Two other latent prints could have been Parlato's but that was not confirmed. (26/4415-22)

Of the three unaccounted for latent prints, State's exhibit 4-O was a latent print from the exterior kitchen window of Parlato's house. Isbell opined that the latent print from the exterior kitchen window was the palm print of John Sexton. (26/4424-26) Isbell was able to exclude Parlato and Sexton as the source of the two remaining latent prints. These two prints came from a plastic tub of coins found on Parlato's living room coffee table. There were latent lifts from the exterior west garage door and interior slider that Isbell was able to exclude Sexton, but

could not say if they belonged to Parlato. Isbell made comparisons in the fall of 2010, and again on July 27, 2012. (26/4429, 30)

The print that was matched to Sexton was evaluated in 2010, but Isbell did not do that evaluation. Isbell did not recall looking at that evaluation in 2010. (26/4430) In 2010, another analyst looked at the latent print card and determined there were no identifiable lifts from that card. In 2012 Isbell made the determination that the same latent lift card matched Sexton's print. Isbell whited out some notations on the envelope containing the latent print. Isbell wrote "N" indicating that originally she put negative. So originally that latent print developed from the exterior window was not identifiable. Isbell definitely wanted to white out the results section. (26/4447-51)

Lisa Thomas, a Florida Department of Law Enforcement (FDLE) DNA analyst, tested items submitted to FDLE for testing. (27/4553-69) Thomas tested the T-shirt, boots, and shorts. She found a DNA profile on all three items. The DNA profiles that Thomas obtained from the, shirt, shoes, and shorts matched the DNA profile of Parlato. (27/4569-71) Thomas would expect to find this profile in approximately 1 in 69 trillion Caucasians. (27/4573, 74)

Thomas developed DNA profiles from the right hand cuticle of Sexton indicating that there was DNA there from at least three people. Parlato's DNA profile was consistent with part of the sample from the fingernail cuticles and would be expected to be found at a statistical rate of 1 in 420,000 Caucasians. The

statistical rate for Parlaot's DNA on the right fingernail was 1 in 4,200 Caucasians, and on the left hand cuticle was 1 in 76 million Caucasians. Thomas was unable to make an inclusion of Parlato as a contributor to the DNA on the left hand fingernails. Washing or cleaning could remove some DNA. (27/4578-84)

Thomas tested two knives, one found in a wooden clock cabinet and one found the kitchen sink. The DNA profile from the blade portion of the knife from the sink matched the DNA profile of Parlato at the expected statistical rate of 1 in 69 trillion Caucasians. Parlato's DNA profile was also found on the handle of the knife. There was an indication of DNA from another individual on the knife handle, but Thomas was unable to make a determination as to that DNA profile. The DNA could have originated from Sexton but there was not enough information to include him as a possible contributor. (27/4585-88) For the knife stuck in the cabinet, Thomas developed DNA profiles from the blade and the handle that matched Parlato at the statistical frequency of 1 in 69 trillion Caucasians. (27/4588, 89)

The stains found on the shirt and shorts appeared to be diluted, like some type of washing occurred with less force on the outside than the inside of the shirt. (27/4591) Defense renewed their objection to the trial court's ruling on the motion in limine concerning cross examining the witness on incidents of lab error for which she was written up, since her answer that she processed 5,000 samples for DNA opened the door to that line of questioning. The trial court maintained the same ruling and did

not allow cross examination of prior errors. (27/4593, 94)

On cross examination, Thomas agreed she also analyzed a knife found on the living room floor. On all three of the knives tested, none of the DNA matched Sexton. Thomas obtained a partial DNA profile from the blade of the knife found on the floor which was consistent with Parlato. The handle of that knife showed the presence of DNA form at least two individuals. The major profile matched Parlato and the minor profile originated from a male other than Sexton. (27/4601-05)

Thomas found a positive reaction for presence of blood on the boots only on the sole. The test is very sensitive but it is possible to get a sample so diluted that it would not test positive for blood. (27/4607, 18) Defense counsel asked to proffer questions about prior incidents of bad lab work. The trial court agreed to just put in the deposition as the proffer. (27/4613, 14) Later there was a proffer regarding contamination logs. Thomas recognized Defense Exhibits 46 through 65 as contamination logs from January 23, 2007, until September 6, 2011, specific to Lisa Thomas. The judge put the logs into the record as a proffer along with Thomas' deposition testimony. (27/4622, 23)

Sean Michaels a crime laboratory analyst in the Biology section for FDLE did DNA analysis on a cigarette butt on September 19, 2012, and on knives on August 9, 2012. (28/4732, 37) The cigarette butt with two dark colored stripes that came from the kitchen trashcan matched the DNA profile of Sexton at a statistical frequency of one in 150 quadrillion. (28/4740-44)

Michaels received two swabs, one from a knife blade and one from a knife handle. A presumptive test for possible blood on one of the knives was negative. Michaels developed a partial profile from the swab of the knife handle that matched Parlato. No interpretation was made from the other swab. (28/4746, 47) Defense counsel proffered the deposition of Michaels regarding past incidents of contamination. (28/4753, 54)

Dianne McConaghey, a crime laboratory analyst in the impression evidence section of FDLE, compares footwear impressions to known shoes. (28/4756, 57) McConaghey received four pieces of linoleum and one pair of Coleman Excursion shoes. (28/4762) McConaghey analyzed the linoleum and determined there were five right footwear impressions that could have been made by the right shoe in the exhibit. (28/4777) McConaghey could not make a positive ID in this case, nor could she say it is most likely Sexton's boots made the impressions. (28/4780) The State rested. (28/4783)

The Defense moved for a judgment of acquittal based on the hypothesis of innocence that the DNA samples were contaminated and that someone else could have committed the murder. The murder could have been committed in an unthinking rage rather than pre-meditated. As to felony murder it was not certain wither or not the sexual battery was before or after death. Defense renewed their motion that the indictment did not list the elements for felony murder. (28/4787) The motion for judgment of acquittal was denied. (28/4788-90)

The Defense proffered the testimony of Stephen Tarnowski. On September 22, 2010, between the hours of 1 a.m. and 3 a.m. Tarnowski woke up and went outside to smoke a cigarette. Tarnowski saw two men with no shirts on trying to get into his neighbor's car. Tarnowski yelled at them, and they took off running south down Rainbow Drive. Tarnowski learned of what happened a couple of streets over and because of the timeline maybe these two men had something to do with that other situation. So, Tarnowski went to the crime scene and reported what he saw to the officer there. (29/4803-12) The trial court did not allow Tarnowski's testimony. (29/4818)

Detective Anthony Bossone went to Sexton's residence and took a photo of Sexton and he did not remember anything noticeable about Sexton's clothing. (29/4830, 31) Bossone contacted Saunders twice. The first time he presented a photo pack to Saunders and she was not able to make an identification. Bossone came back later and showed an updated photo pack, using a more recent photo of Sexton, to Saunders. He also showed a separate photo pack to David Carlin. Neither Saunders nor Carlin was able to identify Sexton. (29/4832-39) Carlin picked out two people one of which was Sexton. (29/4849, 50)

Catherine Sexton pulled up the website on her computer with the article about the elderly woman that was murdered. Sexton pulled up the article after the officers told her what happened. The time on her computer was accurate. (29/4868, 69) The defense rested. (29/4874) Defense counsel's renewed motion for judgment of

acquittal was denied. All previous motions were renewed and the trial court maintained the same rulings. (29/4878-81)

PENALTY PHASE

Penalty phase commenced on May 6, 2013. Hileman renewed his motion for continuance. The trial court denied the continuance. The judge learned that only 10 jurors would be available the first two weeks in June. Twelve jurors would not be available until the middle of June. Hileman raised the possibility of empaneling a new jury and that was denied. (33/5317-19) Hileman felt due to time limitations he was not prepared to fulfill the high standards required of capital litigators and his client would not be receiving a fair trial. Hileman asked to withdraw as counsel and the motion was denied. (33/5320, 21) Hileman clarified that by calling witnesses he was not waiving his objection to the denial of his motion for continuance. (33/5328, 29)

Previous defense motions were renewed and denied. (33/5330) Sexton voiced his concern that Hileman failed to provide effective assistance of counsel by not reassigning the case immediately to another attorney after the accident. Sexton noted that Fisher was not here nor were his witnesses from Oregon. Sexton was told Anderson was going to do the penalty phase closing argument. Anderson had never even seen a penalty phase and had lost credibility with the jury in the guilt phase of the trial. Based on these reasons Sexton moved to have his counsel dismissed and other counsel assigned to defend him in penalty phase. (33/5332-35)

The trial court inquired why Sexton felt Anderson had no credibility with the jury. Sexton said Anderson told the jury for five days that Sexton did not commit the crime and now he is supposed to argue you found he did commit the crime but here is why you shouldn't kill him. That was the whole idea of having two attorneys and splitting the defense by having one attorney do guilt phase and one attorney do penalty phase. Sexton was also concerned over the lost time because Hileman did not immediately reassign an attorney to do penalty phase and the delay caused three of his penalty phase witnesses not to be present. (33/5335-37) Anderson was not able to contact one of the Oregon witnesses and the other one could not come to Florida because of employment obligations. On Friday, May 3, Jonathan Sexton and Lorina Smith told Anderson they would not be available to fly to Florida on May 6. So, Anderson listed Springer, the mitigation specialist, as a witness to present their testimony. The State agreed to allow Springer to present the testimony of Madison Sexton, Jon Sexton, and Lorina Smith, even though it would be hearsay. (33/5338-40) The trial court denied the request to dismiss court appointed counsel because it did not rise to the level of ineffective assistance of counsel. (33/5343)

Deputies Michael Habib and Adam Smith, correctional deputies, had observed Sexton at the jail. Sexton caused no problems, and followed the rules. Sexton had no problems with other inmates. (33/5365, 74) Sexton talked about sports and had no problems with his memory or train of thought. (33/5370) Habib was not contacted

by Dr. Valerie McClain or Dr. Michael Maher. Habib started working at the jail in 2011 and had no contact with Sexton from the time Sexton was arrested in September of 2010 until he started working at the jail in 2011. (33/5371)

Anderson did the direct examination of Carol Springer, the mitigation specialist. In an attempt to learn everything about Sexton, Springer spoke to Sexton's common-law wife, his children and his two sisters. (33/5397-5400) Springer reviewed school and medical records. Sexton was born in Indiana, and in search of warmer weather to alleviate his severe asthma, Sexton's family moved to Pangburn, Arkansas. (33/ 5401, 02) Sexton's two sisters were at least ten years older than him. Sexton's brother Duey was born when Sexton was about five years old. Sexton went to Pangburn High School. Sexton's parents were masons and taught him the mason trade. (33/5403) Brenda Lister, Sexton's older sister wrote a letter to Springer that was admitted into evidence. The letter detailed Sexton's asthma and tough childhood growing up with an abusive father and a mother who wanted to party. Sexton was an excellent student despite living in an abusive home. The children would go into their own little world to get away from the hurt and abuse. (33/5404-07)

Sexton graduated from high school when he was in the eleventh grade, and started drinking alcohol in his first year of college. There was no evidence of Sexton having mental health treatment before he started drinking alcohol. After his first year in college, Sexton enlisted in the Marine Corps. That lasted about

five weeks and Sexton received an honorable discharge in July of 1981. On August 14, 1983, Sexton's brother Duey was killed in a tragic accident involving children playing with a gun. Sexton was about 19 and Duey was 14 at the time of his death. A newspaper article about Duey's death was admitted into evidence. (33/5407-13)

The State objected to photos, indicating maybe it was Fisher's fault, because they had not received any of the pictures. Anderson indicated he was not involved in penalty phase preparation as far as what discovery was provided, but the existence of photos Springer received was disclosed. The trial court asked the relevance of the photos. Anderson said it humanizes Mr. Sexton. The trial court stated, "You're asking me to allow you to put in a chronological picture order of his life. Then you want me to allow you to put in pictures of his dead brother. That is not happening." The trial court excluded the photograph of Duey Sexton. (33/5413-18) The judge did not allow a photo of Sexton in a St. Louis Cardinals uniform. Defense indicated Springer would testify to his little league. The judge cut Anderson off. The judge said she is a little league coach and that's not a little league outfit. The trial court excluded the picture of Sexton in a St. Louis Cardinals cap and jacket. (33/5422) Anderson again indicated part of the problem was that Fisher was prepared to do penalty phase, not Anderson. (33/5423)

Pictures of John Sexton at age seven, and his parents and brother at age six, were admitted into evidence. (33/5426, 27)

Sexton re-entered college in 1985 majoring in journalism and he wrote articles as sports editor for the Arkansas Sun until 1989. (33/5428, 29) In 1987, Sexton married Lori Osborne, who is the mother of his two children Jonathan and Madison. Jonathan was born in November of 1988 and Madison was born in March of 1991, after they moved to Oregon. (33/5429, 30)

The first mental health or alcohol treatment Sexton received was in 1991 when he was treated for his alcohol problems at Cedar Hills in Beaverton, Oregon. After Sexton moved to Oregon, in 1990 and 1991, he was working at Pardue Restoration, a waterproofing business. At Pardue, he was introduced to chemicals such as Methyl Ethyl Ketone (MEK) and Toluene. Sexton was hospitalized for work related injuries. Sexton was also producing and filming short movies for the cable access station in Portland. Sexton separated from his wife in early 1992. He retained custody of his children, Jonathan age three and Madison, 13 months. In April of 1992, Sexton moved in with Lorina Smith in Portland, Oregon. (33/5430, 31)

In 1993, Sexton attempted suicide, and he was treated for depression. In 1994, Sexton and Smith started a commercial waterproofing business named Pointing West Construction. (33/5432, 33) In 1997, Sexton's mother died and he started drinking more. Pointing West Construction went out of business and Sexton had to declare bankruptcy. In early 2000, Sexton worked for Western Water Proofing and then he was a full-time sports writer for a newspaper in Woodburn, Oregon, until he was fired. During that time, he was

arrested for DUI. (33/ 5435, 36, 5479, 80) In November of 2000, Sexton was treated at Pacific Ridge for alcoholism where he checked himself in for an 18 day stay. The treatment was unsuccessful and Sexton continued to drink. Sexton lost custody of his children in 2002, and he left Portland, moved around for a while, and eventually ended up in Florida. He moved to Key West in June of 2003 where he was a tour guide on a boat. (33/5437-39)

Sexton moved to St. Petersburg in August of 2004, and then to Brooksville. (33/5439, 40) In 2005, Sexton worked for Gulf Stream Charters selling fishing trips. Sexton met Cathy Clap in October of 2005, and they married about a year later. (33/5441) On April 20, 2009, Sexton was Baker Acted and taken into mental-health custody, because he tried to kill himself by taking muscle relaxant pills. Sexton was intoxicated when he was brought into the facility, PEMHS. Sexton voluntarily went back to PEMHS about six months later. Sexton was arrested in September of 2010 and has been in Pasco County Jail since then. (33/5442, 43)

Sexton had only two disciplinary reports in over two years while in jail. Once was for putting a piece of paper over a vent because he was cold. When told he could not do that, Sexton removed the paper from the vent. The second report was for family photographs Springer gave to Sexton during one of their meetings. Sexton was written up for inappropriately obtaining the photographs. (33/5444-46)

Springer went to Oregon to speak to witnesses. Lorina Smith met Sexton at the cable access station. Sexton and his children

moved into Smith's home. They were together as a unit for ten years. Sexton and Smith started a waterproofing business together. Smith indicated that Sexton had a nervous breakdown after his mother's death in 1998. Sexton was drinking a lot and the business went bankrupt a year later. When Sexton was doing the waterproofing business he would come home every day smelling like chemicals. Sexton was treated at Pacific Ridge for his alcoholism. (33/5446-50)

Springer spoke to Sexton's daughter Madison and learned that after Sexton's mother died, he had frequent random temper outbreaks followed by episodes of gushing tears. Photos of Sexton and his daughter and son during the time period he had custody of the children were admitted into evidence. (33/5450-54) Madison said when her father came home from work he always had gray grimy goo on his arms and a chemical smell. Sexton appeared to have chemical burns on his arms. (33/5454)

Springer also spoke to Jonathan Sexton. Jonathan observed changes in his father's life around 2000 about the time Sexton got the DUI. (33/5454) A photo of Lorina Smith, Madison Sexton, and Madison's three children was admitted into evidence. (33/5455)

Sexton married his first wife in 1982 and was married to Laura Osborne from 1987 to 1991. Sexton had an alcohol problem when he was married to Osborne. (33/5475, 76) When Sexton was in Pacific Ridge for treatment he said he tolerated his father, and his mother was an overbearing bitch. (33/5476-78) Both of Sexton's parents were heavy drinkers. (33/5504) When Sexton was arrested

for DUI in February of 2000 both of his children were in the car with him. (33/5507)

Dr. Valerie McClain, a licensed psychologist, was retained by the defense to assist in Sexton's case. (34/5517-24) McClain first interviewed Sexton on October 12, 2012. McClain interviewed Sexton one time and did not do any testing. McClain relied on the discovery, detailed interviews with Sexton, and collateral interviews. She also looked at crime scene photos, mental-health records, medical records, interviews of family members, and information from the mitigation specialist. McClain also had one MMPI-II profile done by another psychologist in October of 2010. (34/5524, 25)

McClain diagnosed Sexton as having Bipolar Disorder and Alcohol Dependence. Bipolar is commonly known as manic depression and includes episodes of mania or expansive mood that alternates with the opposite extreme of depressed mood, and in some cases suicidal thoughts. There was a pattern with Sexton's behavior over the years that suggested he showed a pattern of Bipolar Disorder. The pattern began to show in Sexton's late teens and worsened at the time his brother died. There is a genetic component to Bipolar and environmental stressors can cause Bipolar to be more active. There is also a biochemical component involving brain chemistry. (34/5527-30)

Environmental factors that affected the development of Sexton's Bipolar Disorder included being raised in a household where both parents were alcoholics or used alcohol, a history of

domestic violence between the parents that the children witnessed, and his brother was shot and killed. Early developmental factors can significantly affect the development of mental illness. (34/5530, 31) McClain saw the video of Sexton in the convenience store on the night of the murder. The state Sexton was in showed a manic state where there's restlessness, and the inability to sit still. The other side is depression and Sexton had been treated for depression a number of times and there were reports of suicide attempts. (34/5533, 34)

Sexton clearly has alcohol dependence. People with Bipolar, if untreated, will attempt to self-medicate with alcohol. When alcohol is overused it can cause damage to the brain. Sexton was also exposed to toxic chemicals in his work that can cause problems with brain functioning. Over time, Bipolar Disorder left untreated becomes worse. (34/5535-37) Other than crisis stabilization, records indicated Sexton was never treated for Bipolar Disorder. There was no record of sustained aftercare. (34/5538, 39)

McClain found that both statutory mental mitigators applied to Sexton. She opined that Sexton was under the influence of extreme mental or emotional disturbance at the time the murder was committed. McClain's opinion was based on his mental-health history, review of interviews with collateral parties, pattern of behavior over time: problems with relationships, problems holding a job, admissions into mental hospitals for crisis stabilization, patterns of stress and attempts to get help, doctor's opinions,

and his depression. (34/5543-45)

McClain also opined that Sexton's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. When a person with Bipolar Disorder is experiencing pressured-type of thoughts, they get caught up in a behavioral path driven by those thoughts leading to irrational behaviors that can be destructive to self or others. When that happens there is an inability to pull back. The mechanism to stop, focus, and think is not present and if alcohol is involved the ability to reason is lessened. Because of Sexton's untreated Bipolar Disorder he did not have the ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. (34/5546-48)

Other life experiences that affected Sexton were being exposed to domestic violence at a tender age, being exposed to parents actively using alcohol during his upbringing, the loss of his brother by gunshot wound, and the loss of his children. McClain learned that Sexton was physically and emotionally abused. (34/5549, 50)

McClain has testified in court over 1,000 times. Most of McClain's practice involves forensic work with that being divided into 85% for criminal defense and 15% for the State. (34/5554-57) McClain reviewed the police reports, crime scene photos, and deposition of the Medical Examiner. (34/5563, 64) McClain never asked Sexton what happened on September 23, 2010. (34/5574, 89, 90) The reports from Sexton's mental-health treatments did not

evaluate him with Bipolar Disorder. (34/5576-787) The crime scene was consistent with a person in a manic rage, totally out of control and a person with a mental disorder. (34/5594, 95) Sexton's MMPI-II revealed an elevated mania scale which is consistent with Bipolar Disorder. (34/5595)

Dr. Michael Maher, a psychiatrist, was contacted on May 14, 2012 to work on the Sexton case. (34/5598-5606) Maher interviewed Sexton on one occasion for about two hours. (34/5629) Maher reviewed the indictment, the autopsy, some of Sexton's medical records, an MMPI, social history from Springer, and police reports. Maher also did some research on toxic substances and their interaction with alcohol and their effect on the brain. (34/5607, 08) Maher specifically researched Toluene, MEK, and other organic solvents used in industry. These chemicals tend to get into the brain rapidly and accumulate in fat in the brain. They are also absorbed through the skin, get into the bloodstream and are circulated throughout the body. Other routes of entry are through the lungs after breathing the fumes or through the mucus membranes. (34/5610-13) If a person is repeatedly exposed to the same chemicals the body does not have the ability to recover and rebuild. Repeated daily exposure may produce disabling brain disease.

Sexton was exposed to these chemicals in his employment. The frontal lope that is involved in the executive functioning of the brain is especially sensitive to the effect of toxic chemicals. The capacity to stop and think about what you are doing, or what

is the right thing to do is lost in persons exposed to these toxic chemicals. People who have been exposed to toxic chemicals tend to become impulsive, less patient, and less considerate. They are more inclined to act in a rapid, unwise manner. They act on impulse without consideration because they lack the capacity of the frontal lobe to stop and think. (34/5614-17) They might misunderstand or misconstrue other people's actions. (34/ 5618, 19)

Maher reviewed a reliable history of Sexton abusing alcohol over a long period of time. Regular daily consumption of alcohol has deleterious effects on the brain. Three drinks a day hurt people and Sexton has a history of higher consumption levels. Alcohol causes brain damage in chronic long term use similar to but less severe than toxic chemicals. Both toxic chemicals and alcohol has bad effects on the brain which is multiplied when exposure is to both substances. (34/5620-23) The damage progressively affects behavior. Unless the toxic substances, including alcohol, are completely withdrawn the rate of damage increases. (34/5623)

Maher determined that Sexton suffers from cognitive impairment related to a combination of exposure to organic solvents and alcohol. (34/5624, 25) Maher indicated there is substantial evidence of an underlying mental or emotional disturbance of a variety of diagnoses. However, Maher did not have sufficient information to conclude whether Sexton committed the offense while under the influence of extreme mental or emotional

disturbance. Maher was of the opinion to a reasonable degree of medical certainty, at the time of the offense, Sexton's capacity to appreciate the criminality of his conduct or his ability to conform his conduct to the requirements of the law was substantially impaired. (34/5626-30) The description of the murder was consistent with an outburst of manic rage. A person with the kind of brain damage that Sexton has would almost inevitably behave better in a structured environment. (34/5631, 32) Sexton did not want to talk about the time period of the crime and he said he was not there. (34/5657)

Cathy Sexton married John Sexton in 2006. At that time Sexton was making good money as a mason in construction work. As the economy declined Sexton lost his construction job and went to work on a charter fishing boat. Tourists stopped coming to Florida and Sexton lost that job. He was washing windows for a while and then did day labor jobs where he was hardly making enough money to get by. He then became a lawn man trying to make any money he could. (34/5662)

In 2009 Cathy Sexton had John Sexton involuntarily committed because he was very depressed. All he wanted to do was sleep, and he took medication while he had been drinking a lot of beer and liquor. They recommended a course of treatment, but the Sextons did not have the money to get him help. They did not have any insurance. He went to churches and community service centers to try to get help, but none was available. They lived with Cathy Sexton's mother and her boyfriend during most of their marriage

because of lack of money. Cathy and John Sexton moved to St. Petersburg for six months while she was in school, but then, because of no money, they had to move back in with her mother in May of 2010. John Sexton felt like a failure having to move back in with Cathy's mother. He was extremely depressed and his drinking escalated. It was obvious Sexton was drunk the night Parlato was murdered. (34/5664-68) Cathy told Sexton he should stop drinking. Cathy received a disability check and Sexton would use her disability or student loan money to buy alcohol. (34/5680)

Cathy Sexton said she planned on maintaining contact with John Sexton through phone calls and personal visits. (34/5673) Madison Sexton indicated she would move to Florida to be able to visit her father. Lorina Smith and Jonathan Sexton said they would help Cathy Sexton make payments toward telephone and commissary items for Sexton. (34/ 5675, 76)

SUMMARY OF THE ARGUMENT

Issue 1. The trial court erred in denying Sexton the opportunity to cross-examine the DNA analysts Lisa Thomas and Sean Michaels. Both Thomas and Michaels presented damaging evidence regarding their DNA analysis which linked Sexton to the crime scene. A defendant has an absolute right to full and fair cross-examination. When a trial judge abuses its discretion in limiting a defendant's right to cross-examine a witness in a capital case, it constitutes reversible error.

The trial court violated Sexton's sixth amendment right to confront his accuser by limiting cross examination of the DNA analysts. The analysts were allowed to testify about astounding numbers that suggested any error was impossible, but the defense was not allowed to present evidence that there had been past incidents of contamination regarding their work that could result in errors. The conviction and sentence must be reversed and remanded for a new trial.

Issue 2. The trial court abused its discretion by not allowing Appellant to present the testimony of Stephen Tarnowski that two men were in the area attempting to break into cars and took off running when confronted by Tarnowski. The trial court mistakenly treated this testimony as reverse Williams Rule when it was being presented to show there were other suspicious men in a location at the time that had the opportunity to commit the murder. The trial court's ruling prevented Appellant from presenting his theory of the case and a reasonable hypothesis of innocence that someone else committed the murder. Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission. Since there were no eyewitnesses to the murder, all of the evidence against Sexton was circumstantial. This case must be reversed and remanded for a new trial where Sexton is allowed to present his theory of the case.

Issue 3. The trial court abused its discretion by admitting Catherine Sexton's hearsay statement: "He's not telling the truth. He got home at 2:00 A.M." Contrary to the trial court's ruling,

this statement was not a spontaneous statement because it was not made during or immediately after the event testified about. The trial court erred by allowing in Catherine Sexton's statement to the officer which was clearly hearsay. The statement was presented to prove Sexton was not telling the truth and that he arrived home at 2 a.m. rather than 10:30 that night. The erroneous admission of the hearsay statement was not harmless, the judgment and sentence must be reversed, and the case remanded for a new trial.

Issue 4. The trial court erred by allowing the State to present testimony and photographs of post mortem injuries that were irrelevant to any issue in dispute. The post mortem injuries were not relevant to the cause of death. If any such evidence is relevant it should be limited to the extent such evidence is not more prejudicial than probative of matters genuinely before the court. Since the probative value of the testimony and pictures of post mortem injuries was substantially outweighed by unfair prejudice, the trial court erred in denying Appellant's motion to exclude such evidence. The cumulative impact of the error in the first four issues requires a new guilt phase trial.

Issue 5. The trial court erred in denying defense counsel's motion for continuance of penalty phase. Due to a severe car accident involving penalty phase counsel's wife a substitute counsel had to step in to present the penalty phase. After one short continuance, counsel realized he could not be prepared for penalty phase and asked for a continuance of four to six weeks. The trial court abused its discretion in denying the motion for

continuance forcing defense counsel to present the penalty phase without being fully prepared. Appellant is entitled to a new penalty phase with fully prepared counsel.

Issue 6. The trial court erred by denying Appellant's motion to dismiss counsel. Appellant stated that he wanted his counsel dismissed because his counsel said he did not have time to present an adequate defense and his counsel failed to obtain Appellant's witnesses for the penalty phase. The trial court should have granted Appellant's motion and appointed substitute counsel. Appellant is entitled to a new penalty phase.

Issue 7. The trial court abused its discretion in excluding photographs of Sexton's deceased brother near the time he died and a photograph of Sexton wearing a St. Louis Cardinals cap and jacket. It is error to exclude a capital defendant's mitigating evidence. Sexton should be granted a new penalty phase where he is allowed to present this evidence.

Issue 8. The trial court committed fundamental error by mistakenly reading a penalty phase jury instruction that was confusing and would have permitted the jurors to return a death recommendation without finding the existence of any aggravating circumstances. Appellant is entitled to a new penalty phase.

Issue 9. The trial court erred in finding the murder was heinous, atrocious, or cruel where the medical examiner testified the first or second blow could have rendered the victim unconscious.

Issue 10. The trial court's sentencing order was inadequate because it failed to discuss all of the mitigating circumstances

and how much weight was accorded to each one. The case should be remanded for a new sentencing where the trial court considers all the mitigating circumstances and reweighs them against the remaining valid aggravating circumstances and determine if life or death is the appropriate sentence.

Issue 11. The trial court erred by rejecting Appellant's special requested jury instruction. The standard instruction did not adequately explain the law to the jury and the proposed instruction was a clear and accurate statement of the law that they were not to consider any actions by the defendant after the victim became unconscious in determining if the murder was HAC.

Issue 12. Florida's capital sentencing proceedings are unconstitutional on its face and as applied under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution pursuant to Ring v. Arizona.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY PREVENTING DEFENSE COUNSEL FROM CROSS EXAMINING THE DNA LAB ANALYSTS REGARDING PRIOR INCIDENTS OF CONTAMINATION.

The trial court granted the State's motion in limine to prohibit defense counsel from cross examining DNA lab analyst, Lisa Thomas regarding past incidents of cross contamination. The limitation of cross-examination of witnesses is reviewed for abuse of discretion. Boyd v. State, 910 So. 2d 167, 185 (Fla. 2005). A

trial court's discretion in this area is constrained by rules of evidence. Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003), and by a criminal defendant's Sixth Amendment and due process right to confront one's accusers. "One accused of a crime therefore has an absolute right to full and fair cross-examination." Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982). "Where a criminal defendant in a capital case, while exercising his Sixth Amendment right to confront and cross-examine a witness against him, inquires of a key prosecution witness regarding matters which are both germane to that witness's testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error." Coxwell v. State, 361 So. 2d 148, 152 (Fla. 1978)

The trial court denied Sexton the opportunity to cross-examine the DNA analysts Lisa Thomas and Sean Michaels. Both Thomas and Michaels testified regarding their DNA analysis and incredible statistical results which would lead the jury to believe their results were infallible. The jury was left with a false impression because they did not learn of past incidents of contamination which could lead to inaccurate results. Thomas tested the T-shirt, boots and shorts that were submitted by the Sheriff's Office. The DNA profiles obtained from the shirt, shoes, and shorts matched the DNA profile of Ann Parlato. (27/4569-71) Thomas would expect to find this profile in approximately 1 in 69 trillion Caucasians. (27/4573, 74)

Thomas developed DNA profiles from the right hand cuticle of Sexton indicating that there was DNA there from at least three people. Parlato's DNA profile was consistent with part of the sample from the fingernail cuticles and would be expected to be found at a statistical rate of 1 in 420,000 Caucasians. The statistical rate for Parlaot's DNA on the right fingernail was 1 in 4,200 Caucasians, and on the left hand cuticle was 1 in 76 million Caucasians. (27/4578-84)

Thomas tested two knives, one found in a wooden clock cabinet and one found the kitchen sink. The DNA profile from the blade portion of the knife from the sink matched the DNA profile of Parlato at the expected statistical rate of 1 in 69 trillion Caucasians. Parlato's DNA profile was also found on the handle of the knife. There was an indication of DNA from another individual on the knife handle, but Thomas was unable to make a determination as to that DNA profile. (27/4585-88) For the knife stuck in the cabinet, Thomas developed DNA profiles from the blade and the handle that matched Parlato at the statistical frequency of 1 in 69 trillion Caucasians. (27/4588, 89)

The trial court should have allowed defense counsel to cross examine Thomas on past incidents of lab error because she testified that she had processed 5,000 samples for DNA. Thomas answer opened the door for cross examination into the fact that in several of those 5,000 samples tested she had made errors involving contamination. The trial court abused its discretion in not allowing defense counsel to explore this area of cross

examination which could have resulted in faulty results.

Defense counsel asked to proffer questions about prior incidents of bad lab work. The trial court agreed to just put in the deposition as the proffer. (27/4613, 14) Later there was a proffer regarding contamination logs. Thomas recognized Defense Exhibits 46 through 65 as contamination logs from January 23, 2007 until September 6, 2011, specific to Lisa Thomas. The judge put the logs into the record as a proffer along with Thomas' deposition testimony. (27/4622, 23)

Sean Michaels did DNA analysis on a cigarette butt on September 19, 2012, and on knives on August 9, 2012. (28/4732, 37) The cigarette butt with two dark colored stripes that came from the kitchen trashcan matched the DNA profile of Sexton at a statistical frequency of one in 150 quadrillion. (28/4740-44) Michaels received two swabs, one from a knife blade and one from a knife handle. A presumptive test for possible blood was negative. Michaels developed a partial profile from the swab of the knife handle that matched Parlato. (28/4746, 47) Defense counsel proffered the deposition of Michaels regarding past incidents of contamination. (28/4753, 54)

Thomas and Michaels were key prosecution witnesses who presented damaging testimony linking Sexton to the crime scene by way of his DNA on the cigarette found at the scene and Parlato's DNA on his clothes and fingernails. The inquiry of past incidents of contamination was the only way the defense had to demonstrate to the jury that these DNA tests were subject to human error. The

trial court denied defense counsel the opportunity to engage in cross examination germane to the DNA analysts' testimony and relevant to the defense that someone other than Sexton committed the murder. Sexton was denied the opportunity to present evidence that the positive DNA tests were a result of cross contamination.

Sexton was denied the opportunity to present evidence that over the course of six years Michaels had approximately three or four incidents of contamination. It had been a year or two since his last incident of contamination. (8/1304) Thomas guessed that she had between six and ten incidents of errors or contamination. (9/1574) A defendant, especially in a capital case, has the right to fully cross examine a witness called by the prosecution. Cross examination should be allowed to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief. Coco v State, 62 So. 2d 892, 895 (Fla. 1953)

The testimony of Thomas and Michaels left the jury with the impression that the DNA results were infallible. Defense counsel should have been allowed the opportunity to show that there have been incidents of past contamination and errors could have been made. In Sybers v. State, 841 So. 2d 532 (Fla. 1st DCA 2003), Sybers wanted to exclude the lab findings of a particular chemical in the body of the deceased victim because of potential contamination. The trial court denied the motion because any problems regarding contamination went to the weight of the evidence rather than admissibility. Id. at 540. Since issues of contamination go to the weight of the evidence rather than

admissibility, Sexton should have been allowed to cross examine the DNA analysts to establish that the results could have been contaminated and unreliable.

When Thomas testified that she processed over 5,000 samples for DNA that certainly opened the door to cross examination that there were some problems with some of those 5,000 tests. Otherwise the juror is left with the impression that all of Thomas' tests went off without a hitch and she was infallible.

> It is too well settled to need citation of authority that a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree. For the sake of emphasis we make the observation that at the time of the proposed cross-examination appellant stood in jeopardy of being convicted of such capital offense. Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error. Moreover, the right of cross-examination stems from the constitutional guaranty that an accused person shall have the right to be confronted by his accusers.

Coco, 62 So. 2d at 894-95. The trial court abused its discretion by denying Appellant the right to cross-examine Thomas and Michaels about prior incidents of contamination. Appellant's case should be reversed and remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY PROHIBITING THE TESTIMONY OF STEPHEN TARNOWSKI ABOUT TWO MEN IN THE AREA WHICH WAS RELEVANT TO THE DEFENSE'S THEORY OF THE CASE THAT SOMEONE OTHER THAN SEXTON COMMITTED THE MURDER.

The defense theory of the case announced in the motion for judgment of acquittal was that someone else committed the murder. In support of this theory, defense counsel proffered the testimony of Stephen Tarnowski which placed other suspects in the immediate vicinity near the time the murder occurred. The proffered testimony was as follows: Between the hours of 1 a.m. and 3 a.m. Tarnowski woke up and went outside to smoke a cigarette. Tarnowski saw two men with no shirts on trying to get into his neighbor's car. Tarnowski yelled at them, and they took off running south down Rainbow Drive. Tarnowski learned of what happened a couple of streets over and because of the timeline maybe these two men had something to do with that situation. So, Tarnowski went to the crime scene and reported what he saw to the officer there. (29/4803-12)

The standard of review regarding the admissibility of evidence is abuse of discretion. White v. State, 817 So. 2d 799, 805 (Fla. 2002). Tarnowski's testimony was relevant to establish other possible suspects who had the opportunity based on time and

location to commit this murder. "[W]here evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990). Since there were no eyewitnesses to the murder, all of the evidence against Sexton was circumstantial. Two pieces of physical evidence indicated that someone other than Sexton was present at some time and could have committed the murder: 1) fingerprints on the tub of coins 2) DNA on the handle of a knife coming from a male other than Sexton. On all three of the knives tested, none of the DNA matched Sexton. Thomas obtained a partial DNA profile from the blade of the knife found on the floor which was consistent with Parlato. The handle of that knife showed the presence of DNA from at least two individuals. The major profile matched Parlato and the minor profile originated from a male other than Sexton.

The trial court erred by treating the proffered testimony as reverse Williams Rule and excluding the testimony because the suspects actions were not similar to the murder. The importance of Tarnowski's testimony is that it placed other suspects in the area near the time of the crime. This testimony was not being shown to establish identity which requires similarity of facts, but rather to show there were other suspects who had the opportunity to commit the murder. These two suspects were shirtless, they were up to criminal activity and when Tarnowski yelled, they took off running. These two suspects could have removed their shirts because they had blood on them from the murder. They were seen

shortly after the murder in the same neighborhood, several blocks away. They took off running when Tarnowski yelled and their flight was a sign of consciousness of guilt. Defense counsel pointed out the police could have dusted the car they were trying to break into for prints and determined if those prints matched the unknown prints found on the tub of coins in Parlato's house.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clause of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " California v. Trombetta, 467 U.S. 479, 485 (1984). The trial court violated Sexton's constitutional right to a meaningful opportunity to present a complete defense by prohibiting the presentation of Tarnowski's testimony.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING, AS A SPONTANEOUS STATEMENT, CATHERINE SEXTON'S STATEMENT TO THE DETECTIVE, "HE'S NOT TELLING THE TRUTH. HE GOT HOME AT 2 A.M."

The prosecutor was allowed to ask Detective Grady if Mrs. Sexton made a comment under her breath to Grady after Mr. Sexton asked her: "Didn't I get home at 10:30?" The trial court overruled defense counsel's hearsay objection under the theory that it was a spontaneous statement. Grady was allowed to respond that she said something to the effect: "He's not telling the truth. He got home at 2:00 A.M." (26/4369-74)

The standard of review of a trial court's ruling on

admissibility of evidence is abuse of discretion. Denny v. State, 617 So. 2d 323, 325 (Fla. 4th DCA 1993). The abuse of discretion standard applies in cases where the proponent of the evidence is seeking to have it come in under a hearsay exception. See, e.g., Cotton v. State, 763 So. 2d 437 (Fla. 4th DCA 2000). (Question of whether a statement falls within excited utterance exception is reviewed under abuse of discretion standard). Whether a statement is hearsay is a legal question subject to de novo review. K.V. v. State, 832 So. 2d 264 (Fla. 4th DCA 2002).

The trial court erred by allowing in Catherine Sexton's statement which was clearly hearsay. Section 90.801 Fla. Stat. (2012), defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." The statement was presented to prove Sexton was not telling the truth and that he arrived home at 2 a.m. and not 10:30 in the night. This statement fits clearly within the definition of hearsay.

The trial court admitted the hearsay statement under the spontaneous statement exception. It was not a spontaneous statement because it was not in response to an event recently observed. The statement Catherine Sexton made to Grady occurred around 2 to 4 in the afternoon and referenced an event that occurred over twelve hours earlier at 2 in the morning. A spontaneous statement must be made at the time of or immediately after observation of the event. J.M. v. State, 665 So. 2d 1135, 1137 (Fla. 5th DCA 1996). The spontaneous statement exception

requires that "the statement must be made without the declarant first engaging in reflective thought." Id. In J.M., the trial court admitted a hearsay statement made by McAllister to a police officer. McAllister was approached by a police officer immediately after McAllister purchased drugs. McAllister's statement to the officer describing the seller of the drugs was hearsay and found not to be spontaneous because by the time McAllister made the statement implicating J.M., he had been approached by an officer that questioned him, he admitted to committing a crime, and he moved about in his wheelchair to assist the officer in recovering the cocaine. The Fifth District found these events gave McAllister time to engage in reflective thought that is inconsistent with aspects of reliability upon which the spontaneous statement exception is based. The trial court committed reversible error by admitting the hearsay statement. Id. at 1137, 38.

In the present case, Catherine Sexton had a whole night to sleep, all morning, and part of the afternoon to reflect upon her statement. Catherine Sexton's statement to Grady was not made while she was observing Sexton arrive home or immediately thereafter. A statement not descriptive or explanatory of a contemporaneous event or observation is not admissible as a spontaneous statement. Deparvine v. State, 995 So. 2d 351, 371 (Fla. 2008). Catherine Sexton's statement should have been excluded because it was not spontaneous.

To find this error to be harmless, the State must establish

beyond a reasonable doubt that the error did not contribute to the jury's verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The improperly admitted hearsay directly contradicted Sexton's statement to the detective that he arrived home around 10:30. Absent the hearsay statement, the jury could have determined that the timeline of Sexton arriving home around 10:30 at night provided him a valid alibi and was inconsistent with him being at Parlato's house at the time of the murder. It cannot be said that the admission of the hearsay testimony did not affect the verdict. The erroneous admission of the hearsay statement was not harmless and the judgment and sentence must be reversed and remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT EVIDENCE AND PHOTOGRAPHS OF POST MORTEM INJURIES THAT WERE NOT RELEVANT TO ANY ISSUE IN DISPUTE.

Defense counsel filed a motion in limine to prohibit the State from presenting any evidence regarding post mortem injuries because they were not relevant to the cause of death. If any such evidence is relevant it should be limited to the extent such evidence is not more prejudicial than probative of matters genuinely before the court. (11/1882) Defense was objecting to all testimonial and pictorial evidence of post mortem injuries also on the grounds it is overly gory or offensive to the jury's sensibilities because of what is depicted. Specifically, defense

counsel objected to any mention of postmortem burning injuries to the genitals and the perineum between the genitals and the anus, postmortem anal injury when a soap bottle or vase was inserted into the anus, and the postmortem cutting off of the victim's one real breast. (22/3576, 77) The trial court denied Appellant's motion to exclude evidence concerning postmortem injuries suffered by the victim. (22/3575-91)

Defense renewed the pre-trial motion in limine and objection to testimony and photographs whenever the State presented evidence of post mortem injuries. (25/4150-53; 4166-69; 27/4511, 12; 4516, 17; 28/4644; 4658; 4663) Defense objected to exhibit 6-S as more prejudicial than probative because it highlights the removal of the breast. The motion was denied. (25/4150-53) 6-S came in as State's exhibit 38. (25/4166-69) Photographs 9-J and 7-S, depicting the victim on the living room floor were admitted into evidence as exhibits 93 and 94 over defense objection. (27/4511, 12) Exhibit M, a photo of Parlato, with the sheet removed, showing the position in which she was found, was admitted as exhibit 95 over defense objection. (27/4516, 17) These photographs were extremely prejudicial with minimal probative value. They did not show the cause of death or the identity of the perpetrator.

Thogmartin testified that the cause of death was blunt trauma. She had sharp force trauma but that did not kill her. She died of repeated blows mostly to the face and head, and specifically the right side of the face. (28/4649, 50) That testimony was relevant to the cause of death, but the following

testimony was irrelevant and highly prejudicial. Thogmartin was allowed to testify that Parlato had burns in her genital, anal, vaginal, and mid-thigh area. A ceramic vase like object was in her rectum partially protruding, and her right breast was cut off and was on the floor. A synthetic breast pad was covering the area where her right breast had been. (28/4644-47) There was a stab wound in the abdomen that was likely after her heart stopped beating. The rectal tear and breast removal, and stab wound to the abdomen occurred most likely after death. (28/4664-68)

Defense counsel preserved this issue for appellate review by making clear that by cross examining Thogmartin he was not waiving his objection to any testimony about post mortem wounds. (28/4673)

The standard of review of a trial court's ruling on admissibility of evidence and photographs is abuse of discretion. Arbelaez v. State, 898 So. 2d 25, 44 (Fla. 2005). The trial court erred in admitting testimony and photographs regarding the burning around the vaginal area, the vase inserted in the rectum, and the cut off breast because they were all post-mortem injuries not relevant to any issue in dispute. In order to be relevant, and therefore admissible, "a photo of a deceased victim must be probative of an issue that is in dispute." Almeida v. State, 748 So. 2d 922,929 (Fla. 1999)(emphasis in opinion); Seibert v. State, 64 So. 3d 67,88 (Fla. 2011). Since, in the instant case, it was clear that the only contested issue in this case was the identity of the perpetrator, and that nobody was disputing the cause of death was blunt force trauma to the head, it follows that any

testimony and photographs about the post mortem injuries were irrelevant and inadmissible.

The medical examiner should not have been allowed to testify about the postmortem injuries because they were not a cause of death. In Looney v. State, 803 So. 2d 656, 669 (Fla. 2001) it was error to admit two gruesome autopsy photographs showing the effects of a fire that occurred postmortem. The damage caused to the deceased victim's bodies after their deaths was not an issue in dispute and the medical examiner's testimony about the cause of death did not rely at all on the photographs. In Looney admission of the photographs was found to be harmless error, but there was direct evidence along with corroborating physical and testimonial evidence implicating Looney. Id. at 670.

In the present case the medical examiner's testimony about the burned genital area, the vase in the rectum, and cut off breast was not used to explain the cause of death. The photograph showing the victim's naked body and burned vaginal area was highly inflammatory and had no relevance to the cause of death or identity of the perpetrator. It cannot be said beyond a reasonable doubt that the improperly admitted evidence of the highly inflammatory postmortem injuries did not contribute to the jury's verdict. DiGuilio, 491 So. 2d at 1135.

In addition to the relevancy test for admissibility of evidence, the trial court must also balance whether the probative value of the relevant evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the

jury, or needless presentation of cumulative evidence. See section 90.403 Fla. Stat. (2000). Wright v. State, 19 So. 3d 277, 296 (Fla. 2009). When the unfair prejudice substantially outweighs the probative value of the evidence it should be excluded. Unfair prejudice means an undue tendency to suggest a decision on an improper basis such as an emotional basis. Id. at 296. The testimony and pictures have little or no probative value as to the perpetrator of the murder yet create a significant emotional response suggesting a decision by the jury to convict Appellant based on their emotional repulsion to the discussion and photographs of the post mortem injuries sustained by the victim.

This rule of exclusion is directed toward evidence which inflames the jury or improperly appeals to their emotions. Steverson v. State, 695 So. 2d 687, 688-89 (Fla. 1997). To determine if the unfair prejudice outweighs the probative value of the evidence, the trial court must perform a balancing test considering the need for the evidence, tendency of the evidence to suggest an emotional basis for the verdict, the chain of inference necessary to establish the material fact, and effectiveness of a limiting instruction. Taylor v. State, 855 So. 2d 1, 22 (Fla. 2003). The trial court must exclude evidence in which unfair prejudice outweighs the probative value to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt. McDuffie v. State, 970 So. 2d 312, 327 (Fla. 2007).

In the present case the testimony and pictures of the post

mortem injuries was not needed because it was not relevant to the cause of death or identity of the perpetrator. These events occurring after the death did not establish premeditation. The combination of the naked picture of the burned vaginal area, the cut off breast, and the vase in the rectum could do nothing but inflame the jury and create an emotional basis for finding Appellant guilty of the murder. The trial court abused its discretion in admitting this unfairly prejudicial evidence which substantially outweighed any probative value. Appellant is entitled to a new trial. Appellant contends each of the first four issues on their own involving guilt phase errors requires a new trial. Alternatively, the cumulative impact and combined prejudicial effect of the errors set forth in the first four issues denied Appellant his constitutionally guaranteed right to a fair guilt phase trial. See Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986). Appellant is entitled to a new trial.

ISSUE V

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO CONTINUE PENALTY PHASE LEAVING SUBSTITUTE COUNSEL WITH INADEQUATE TIME TO PROPERLY PREPARE FOR AND PRESENT AN ADEQUATE PENALTY PHASE DEFENSE.

The trial court erred by denying Appellant's request for a continuance of penalty phase so substitute counsel could be fully prepared to adequately represent Sexton. A court's ruling on a motion for continuance will only be reversed when there is an abuse of discretion. Hernandez-Alberto v. State, 889 So. 2d 721,

730 (Fla. 2004). An abuse of discretion is generally only found when the court's ruling on the continuance results in undue prejudice to a defendant. This general rule applies to death penalty cases. Id. at 730. A trial court does not abuse its discretion where the requesting party has unjustifiably caused a delay or requests an indefinite suspension. Snellgrove v. State, 107 So. 3d 242, 251 (Fla. 2012). In the present case, as explained in the convoluted and tragic circumstances, defense counsel did not unjustifiably cause the delay nor did he ask for an indefinite extension. Hileman asked for an extension for a definite length of time of four weeks until early or mid-June.

At status conference on Monday, April 22, 2013, Byron Hileman, chief of the homicide division for Regional Counsel, asked for a continuance of the penalty phase trial until May 6, 2013. First chair trial counsel, Stephen Fisher notified Hileman on Sunday that his wife was struck by a car going 45 miles per hour and was seriously injured. She had surgery on Saturday night and was in critical condition. She had displaced fractures in both legs and internal bleeding. Obviously, defense counsel did not cause the need for a continuance in this case.

Hileman and Fisher are the two certified first chair attorneys with Regional Counsel. Hileman only had a supervisory role and had not worked on Sexton's case. Anderson presented the guilt phase, so Fisher's presence was critical to present the penalty phase. Hileman indicated he could do the penalty phase, but he did not think he could be up to the standards the Supreme

Court has set in such a short period of time. (13/2263-2268)

The State objected to the continuance and argued that Hileman could get ready to present the penalty phase in a day. (13/2268-2271) Sexton indicated Fisher was his primary counsel of choice to present the penalty phase. (13/2272) The trial court recognized that from the start, Fisher was the penalty phase attorney and that Anderson could not handle the penalty phase. (V13/2273) The trial court reset the penalty phase for May 6, 2013. (13/2274)

On April 29, 2013, defense counsel made an oral motion to continue penalty phase. (14/2476-2478) The trial court denied Defendant's oral motion to continue penalty phase. (13/2284, 14/2489) On May 1, 2013, Defendant filed a motion to continue penalty phase renewing the motion made ore tenus and denied on April 29, 2013. Mr. Fisher's wife underwent another major surgery on Friday, April 26. Mr. Fisher indicated he would not be capable of trying the penalty phase on May 6, 2013, due to the week-long ordeal, his exhaustion, and the ongoing serious medical emergency. At the hearing on April 29, 2013, Hileman announced that he was assigning himself as new first chair and he would try the penalty phase but it would be ineffective assistance of counsel for Hileman to attempt to try the penalty phase with less than two weeks of preparation time. Hileman moved to have the penalty phase continued until early to mid-June. Hileman needed a continuance because he had not spoken to any penalty phase witnesses, he had not met with the mitigation specialist, he was just beginning to review the several thousand pages of records and reports, and he

was not present at the guilt phase which is where the State's aggravating evidence was presented. In addition to the work Hileman had to do to prepare for the penalty phase, he supervised about 50 first-degree murder cases and was first chair on seven active death penalty cases. (13/2285-2288)

Prior to the start of penalty phase on May 3, 2013, Hileman renewed his motion to continue the penalty phase. (15/2539) At the hearing on April 29, Hileman formally announced he was reassigning himself to the case and he could be ready to present the penalty phase if the case was set for June, since he was starting from scratch. (15/2544, 45) Hileman started working on this case the night of April 26, 2013. He worked 22 hours over that weekend, reading the file, notes, e-mails, and records. On April 29th and 30th Hileman met with Anderson. At least five other attorneys were providing assistance to Hileman. The day before the motion was the first time Hileman met by phone with Dr. McClain, a psychologist who would be presenting important testimony relating to mitigating circumstances. Hileman was supposed to meet with Dr. McClain again over the weekend because there were testing issues he did not have a chance to discuss with her. The defense team finally received a response from family witnesses in Oregon and they would need to set up video conferencing to have them testify. The alternate route would be to present testimony of family witnesses through a mitigation specialist. (15/2547, 48)

Hileman indicated once he became first chair, ten days before the start of penalty phase, he would have to make his own tactical

decisions, and could not rely exclusively on notes prepared by another attorney. (15/2550) Hileman estimated he spent 60 to 70 hours on this case since April 26, 2013. Hileman stated, "I believe if you require us to go forward on the 6th, that you are, essentially, requiring me to commit malpractice, to commit ineffective assistance of counsel." Hileman had yet to have the 3 to 4 hour meeting he needed to have with Dr. Maher, another important witness. Hileman felt he was being cornered into a position contrary to what is lawful and ethical based on his responsibilities. (15/2551-53) Hileman still had not talked with the family witnesses which he had to do before making a determination on whether to call them as witnesses. As first chair, that is not a duty Hileman could delegate to anyone else. Hileman was asking for any convenient date at least four weeks out. (15/2553-56)

The State responded that as of the April 22nd hearing, Hileman knew the penalty phase would begin on May 6, 2013. (15/2558-60) The State suggested defense counsel had ample opportunity to prepare for the case and the continuance should be denied. (15/2564)

Hileman responded that he still anticipated Fisher being able to do the penalty phase on May 6 and had not yet appointed himself as first chair. It was only on April 26 that Hileman appointed himself as first chair. Hileman did not sit through the original trial where all of the State's aggravation was presented. Hileman had only received the transcripts of two witnesses and closing

arguments in the last few days and still had not received transcripts from the rest of the trial. Hileman said it was simply not possible for him to be ready by May 6. Hileman said he had never gone to trial in a death penalty case without six to eight weeks of almost full-time preparation. (15/2565, 66) The trial court indicated its belief that defense counsel could be ready for penalty phase as scheduled and denied the continuance. (15/2579, 80).

It is clear from the facts presented here that the need for the continuance arose from the unfortunate circumstances of a critical accident to Mr. Fisher's wife and her subsequent surgeries which eliminated Fisher as penalty phase counsel. Due to the trauma and repeated surgeries of his wife, Mr. Fisher was not capable of presenting the penalty phase. Hileman held out hope that with the continuance until May 6, Fisher would be able to return and present the penalty phase. As soon as Hileman realized Fisher would not be able to work on the penalty phase, Hileman appointed himself to the case.

Hileman was at a distinct disadvantage presenting the penalty phase because he was not present for the guilt phase of the case. Hileman had less than two weeks to read the entire trial transcript, consult with Dr. McClain, Dr. Maher, and interview witnesses to determine who they would call in penalty phase. Hileman was only asking for a four to six week continuance until the beginning or middle of June. Hileman indicated he was being forced to be ineffective, but rather than risk being held in

contempt he proceeded to penalty phase. A specific glaring problem in the presentation of penalty phase is that due to time constraints Hileman never obtained the presence of the defense witnesses from Oregon. Although a summation of their testimony was presented by the mitigation specialist, that is not a viable substitute for the testimony of real live family members to present a humanizing picture of Appellant.

The present case is similar to Wike v. State, 596 So. 2d 1020 (Fla. 1992), where the trial court was reversed for denying defense counsel's request for a continuance prior to penalty phase. After conviction, Wike's penalty phase was scheduled for the next morning. Wike moved for a one week continuance which was denied. Id. at 1023. Wike wanted a continuance to procure additional mitigating witnesses. This Court held that the trial court abused its discretion in denying the continuance because the request was for a short time and a specific purpose. Wike's case was remanded for a new penalty phase. Id. at 1025.

In the present case, although the time requested for the continuance was longer than in Wike, it was not unreasonable because Hileman was not present for the guilt phase of the trial. The State presented all of their aggravating evidence at the guilt phase. Hilemen was faced with the insurmountable task of developing an entire penalty phase, without having witnessed the guilt phase, in less than two weeks. There was a specific need for Hileman to interview the witnesses from Oregon to determine how to best present that mitigation. Hileman still had not talked with

the family witnesses which he had to do before making a determination on whether to call them as witnesses. Hileman clearly did not have time to develop and prepare the witnesses for trial and as a result, the witnesses from Oregon never testified at the penalty phase.

Hileman could not be any more specific in his objections because of the lack of time he had for preparation. Hileman simply did not know what he did not know. If Hileman had time to talk to Dr. Maher before trial he would have learned that Maher was not an expert on the effects of chemicals and had to do research to learn about MEK and Toluene. Had Hileman been aware Maher's inexperience he could have hired a neuropharmacologist who could have fully explained to the jury what Sexton was experiencing from his chemical and alcohol exposure. This case should be remanded for a new penalty phase where defense counsel has the opportunity to fully prepare and present testimony from the defense mitigation witnesses.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING SEXTON'S REQUEST TO HAVE COUNSEL DISMISSED.

On May 6, 2013, the morning of penalty phase, Sexton requested to have defense counsel dismissed after Hileman's renewed motion for continuance was denied. (33/5332) Hileman had previously contacted the Florida Bar and was informed he could not refuse to proceed even though he felt like he could not fulfill

his ethical duties. Hileman reiterated that he felt that by being forced to go forward he was violating his oath and sense of ethics because of lack of preparation time. Hileman's motion to withdraw from the case was denied. (33/5317-21)

Sexton indicated Hileman failed to be proactive in re-assigning the case to another attorney and squandered two weeks of preparation time. Hileman said he could not provide an adequate defense. Sexton noted that Fisher was not there and neither were his witnesses from Oregon. Sexton also complained that he was told Anderson would do the closing in the penalty phase and Anderson lost credibility with the jury during guilt phase. Anderson had never even seen a penalty phase. Sexton asked to have his counsel dismissed and re-assigned to someone who could defend him from the death penalty. (33/5332-35) Sexton reiterated that miscommunication and feet dragging resulted in three of his defense witnesses not being able to be present for the penalty phase. (33/5337)

The defense had brought the three witnesses in from Oregon at the originally scheduled penalty phase. After that was continued they returned to Oregon. (33/5338) Anderson spoke to Sexton's daughter Madison but he did not hear from the other two witnesses, Jonathan Sexton and Lorina Smith, until May 3rd. They both told Anderson they would not be available to fly to Florida for the penalty phase on May 6th. (33/5339) The trial court denied Sexton's request to dismiss court-appointed counsel and found their representation did not rise to the level of ineffective.

(33/5343). Sexton renewed his motion to dismiss counsel at the close of all evidence but prior to closing arguments in penalty phase. Sexton pointed out his three witnesses were not called and only two were touched on briefly by the mitigation specialist. One witness, his son, was not even brought up in mitigation and his other counsel advised Sexton his son was his most powerful mitigation witness. Sexton felt counsel's failure in organization contributed to the absence of his witnesses. (34/5708-09) Hileman indicated due in part to time limitations they were unable to acquire the witnesses presence for penalty phase. (34/5710)

The trial court properly followed the procedure by inquiring of Sexton why he wanted his counsel dismissed. Jackson v. State, 33 So. 3d 833, 835 (Fla. 2d DCA 2009). If the request is unequivocal and the defendant indicates the reason is counsel's ineffectiveness, the court must make inquiry "to determine if there is reasonable cause to believe that court-appointed counsel is not rendering effective assistance and, if so, appoint substitute counsel." Milkey v. State, 16 So. 3d 172, 174 (Fla. 2d DCA 2009) (quoting Maxwell v. State, 892 So. 2d 1100, 1102 (Fla. 2d DCA 2004). The adequacy of the trial court's Nelson hearing is reviewed for an abuse of discretion. Crosby v. State, 125 So. 3d 822, 825 (Fla. 2d DCA 2013).

The trial court erred by refusing to dismiss counsel and appoint substitute counsel. Sexton's attorneys had brought his three witnesses from Oregon with full intention to have them testify at the original penalty phase. When that proceeding was

delayed the witnesses returned to Oregon. Defense counsel had not maintained contact with the witnesses and was not able to have them present for the penalty phase that took place on May 6. Because counsel did not maintain contact with the witnesses from Oregon they were forced to abandon their original plan to present live testimony of family witnesses and move to plan B of calling a mitigation specialist. Sexton clearly stated a reason for his attorney's ineffectiveness was not having his witnesses present. Hileman indicated due in part to time limitations they were unable to acquire the witnesses presence for penalty phase. Based on the lack of due diligence, the trial court should have found defense counsel ineffective and either appointed new counsel or granted a continuance so current counsel could produce Sexton's witnesses to testify at his penalty phase. The trial court abused its discretion and Sexton is entitled to a new penalty phase.

ISSUE VII

THE TRIAL COURT ERRED BY EXCLUDING PHOTOGRAPHS OF APPELLANT AND HIS BROTHER DURING PENALTY PHASE.

The trial court prohibited defense counsel from admitting into evidence during penalty phase a photograph of his brother (14/2508) near the time of his death and a photograph (14/2512) of Appellant wearing a St. Louis Cardinals cap and jacket. Capital defendants have an opportunity to advance any mitigating factors, so the death penalty is reserved only for the most culpable

defendants committing the most serious offenses. Miller v. Alabama, 132 S.Ct. 2455, 2467(2012). The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The loss of his brother had a great impact on Sexton. It was error for the trial court to exclude the photograph of Sexton's brother in juxtaposition with his own photograph at that time so the jury could get a complete picture and understanding of the toll this tragic event had on Sexton at such a young age. The admission of evidence is within the sound discretion of the trial judge, but in this case that discretion was abused. This case can be distinguished from Zack v. State, 753 So. 2d 9, 25 (Fla. 2000), where the trial court did not commit error in excluding a photograph of Zack's niece. Zack was allowed to introduce numerous family photographs and testimony that he had with whom he could form a relationship with if he was sentenced to life in prison. This court determined the photograph of Zack's niece was unnecessarily cumulative. Id. at 25.

In the present case there was an article admitted referencing Sexton's brother and his untimely demise. However, there were no pictures to show their relative ages at the time of this devastating accident. This was a tragic event that had a terrible impact on Sexton's life and the jury should have been able to see

what he and his brother looked like at the time of the event.

The trial court further erred by not allowing the defense to present of photograph of Sexton in a St. Louis Cardinals baseball cap and jacket. Defense counsel tried to explain Sexton's connection with little league baseball, but was cut off by the trial court. Judge Handsel went outside the record utilizing her own knowledge as a little league baseball coach in announcing that what Sexton was wearing was not an official little league coaches outfit. The trial court's action is similar to prohibited conduct noted in Alamo Rent-A-Car v. Phillips, 613 So. 2d 56, 58(Fla. 1st DCA 1992) of a judge rejecting an expert's opinion based on the judge's personal opinion or lay experience. In addition Sexton should have been allowed to present the photograph in order to establish as part of his background that he was an avid St. Louis Cardinals fan. The excluded pictures were relevant to provide the jury a sense of Sexton's life and who he is. The photographs are clearly mitigating evidence that the jury should have been allowed to consider.

ISSUE VIII

IT WAS FUNDAMENTAL ERROR FOR THE TRIAL COURT TO INCORRECTLY READ THE PENALTY PHASE JURY INSTRUCTION RESULTING IN A CONFUSING INSTRUCTION.

When reading penalty phase instructions the court read the following:

> If after weighing the aggravating circumstances you determine that at least one

> aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of aggravating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. (35/5836, 37)(emphasis added)

The trial court incorrectly read the jury instruction stating: "in the absence of aggravating factors" when it should have been read: "in the absence of mitigating factors." This error left the jury confused and wondering if there is a difference between aggravating circumstances and aggravating factors and if they may recommend death in the absence of aggravating factors.

Since the misreading of the jury instruction was not caught and there was no objection, Appellant realizes this error must be fundamental to constitute reversible error. Smith v. State 76 So. 3d 379, 383 (Fla. 1st DCA 2011). A claim of fundamental error is reviewed de novo. Elliot v. State, 49 So. 2d 269, 270 (Fla. 1st DCA 2010).

Even a minor error, such as the addition of a single comma can cause fundamental error in a jury instruction if it significantly alters the meaning of the instruction. In Talley v. State, 106 So. 3d 1015 (Fla. 2d DCA 2013), the Second District found fundamental error when the instruction read to the jury contained an additional comma making the words "including deadly force" a non-essential part of the sentence. The additional comma changed the meaning of the sentence and eliminated Talley's sole defense by suggesting he had the right to defend himself with any

force only if the victim threatened him with deadly force. Because the error was fundamental, Talley was granted a new trial. Id. at 1017, 18.

When jurors are faced with both correct and erroneous instructions as to applicable legal rules, there is no reason to believe they will figure out which instruction is correct and which is wrong. Murray v. State, 937 So. 2d 277 (Fla. 4th DCA 2006). It is fundamental error to instruct a jury in such a way as to define a legal defense out of existence. Sigler v. State 590 So. 2d 18, 20 (Fla. 4th DCA 1991).

The failure to recite a complete or accurate jury instruction constitutes fundamental error if the omission is pertinent or material to what the jury must consider in order to convict. Seavey v. State, 57 So. 3d 978, 980 (Fla. 5th DCA 2011). In the present case, the instruction as misread by the trial court left the jury with the option of recommending a sentence of death in the absence of aggravating factors. Appellant was denied a fair trial and must be given a new penalty phase where the jury instructions are read correctly.

ISSUE IX

THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATTROCIOUS, OR CRUEL.

This aggravating circumstance applies only where there is proof beyond a reasonable doubt that the victim experienced prolonged physical pain or mental anguish. Here, the evidence

established that the victim may have been killed or rendered unconscious by the first or second blow to the head. Accordingly, this aggravating circumstance cannot be sustained.

The standard of review is a trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by competent, substantial evidence. Almeida, 748 So. 2d at 932. Competent, substantial evidence means legally sufficient evidence. Id. at 932.

In finding this aggravator, the trial judge stated:

> The evidence in this case shows that a violent struggle occurred prior to the death of the victim, Mrs. Parlato. The testimony showed that . . . After the initial struggle at the front door area the struggle continued into the living room area. The testimony of the State's blood spatter expert was that at least three blows had to occur at the front door area. There is no indication that the victim was moved by the defendant from the front door to the living room where she was located after death. So the evidence clearly shows that the victim Mrs. Parlato was awake and alert for those minimum of three blows at the front door and moved herself to the living room area. Next the expert testified that the victim was still upright for at least one of multiple blows she must have suffered in the living room area prior to death. Blood was spattered across the living room on the book shelves and around the body of the victim. Mrs. Parlato had at least one defense wound to her hand area. Given the victim's advanced age it would have been difficult to fight against a significantly younger, taller, and stronger male. The medical examiner described the multiple injuries that the victim suffered to her face and neck areas during the beating. She had to be stuck (sic) multiple times, possibly as many as twenty(20) or more to cause the damage to her facial area. She was repeatedly

> struck in her facial area causing fractures to her eye sockets, her cheek bones, chin, nose, skull and her neck. On top of the significant facial and neck fractures Mrs. Parlato also suffered three or four rib fractures. To describe this any other way, then(sic) a severe beating would not correctly describe the damage done to the victim during the attack. The medical examiner testified that the beating was the cause of death. In Hall v. State, 107 So. 3d 262 (Fla. 2012), the court upheld the finding of "heinous" in a beating death of a victim. Additionally, in Quince v. State, 414 So. 2d 185 (Fla. 1982), the Florida Supreme Court found that a severe beating and rape of an 82 year old woman qualified as heinous to justify the imposition of the death penalty. This murder was indeed a conscienceless, pitiless crime in which Mr. Sexton unnecessarily attacked a helpless 94 year old woman, inflecting(sic) great torture on her with his repeat blows to her head and body area. Then raping her as she lay helpless on her living room floor.
>
> The evidence established this aggravator beyond a reasonable doubt. This aggravator is given great weight.

(19/3191-93)

It is uncontested that Parlato suffered a severe beating, but the trial court failed to consider Parlato's state of mind during the event. Other than the mention of one defensive wound indicated Parlato was awake for a time, there is inadequate consideration of the possibility that Parlato was unconscious early on in the confrontation. Because there was no evidence Parlato was moved from the foyer to the living room, the trial court assumed she moved herself. This assumption was not supported by competent substantial evidence. Since there were no eyewitnesses to the event, there would not likely be any evidence to suggest either Parlato was moved or she moved herself. The trial court noted that

the expert indicated the victim was upright for at least one of the blows in the living room, but failed to recognize that Findley did not know if Parlato raised herself or somebody else raised her up. For the remainder of those blows her head was on the floor.

The medical examiner testified that the one wound on Parlato's hand was a defensive type wound like when people get their hands in the way, not that it was definitely a defensive wound. This indicated she was awake at some point during the attack, but Thogmartin could not say if this was at the end or near the beginning. The trial court picked snippets of Thogmartin's testimony to support a finding of HAC. However, the trial court ignored the testimony that Parlato definitely became unconscious at some point and Thogmartin could not tell at what point she became unconscious. Thogmartin had no way of telling if Parlato was conscious when the vaginal tears occurred. Thogmartin said she could have been unconscious after the first or second hit.

The especially heinous, atrocious, or cruel aggravating circumstance (HAC) applies "only in torturous murders," those that inflict "a high degree of pain," either physical or mental. See Shere v. State, 579 So. 2d 86, 95 (Fla. 1991); Rose v. State, 787 So. 2d 786, 801 (Fla. 2001). A few minutes are enough if the victim is conscious. See, e.g., Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). A finding of HAC, however, cannot be based on the mere possibility that the victim may have suffered extreme pain or mental anguish. See Brown v. State, 644 So. 2d 52, 53

(Fla. 1994)(medical examiner's testimony that victim had been stabbed 3 times and none of wounds was immediately fatal held insufficient to prove HAC); Ferrell v. State, 686 So. 2d 1324, 1330 (Fla. 1996) (speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field insufficient to support HAC). In order to sustain the aggravating circumstance, there must be "no doubt" the victim suffered physical or mental torture. See Chavez v. State, 832 So. 2d 730, 765 (Fla. 2002)(HAC properly found where victim, who was held captive for 3-1/2 hours, twice asked defendant if he was going to be killed and was sobbing throughout this period).

Accordingly, although a beating usually will cause a high degree of pain, this Court has rejected the HAC factor in beating deaths where the victim may have been rendered unconscious after the first blow. See Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1998)(trial court erred in finding HAC where medical examiner's testimony established that victim may have been rendered unconscious upon receiving first blow from the crowbar); Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994)(trial court erred in finding HAC where medical examiner testified attack took place in a very short period of time and victim was unconscious at end of this period).

In the present case, contrary to the trial court's finding, the evidence did not show that Parlato was conscious after receiving the first or second blow. The medical examiner could not

determine at what point Parlato became unconscious, but she did receive blows similar to a knock-out punch that would have rendered her unconscious and it could have been the first or second blow. The cause of death was blunt trauma to her head.

In finding HAC, the trial judge did not refer to the medical examiner's testimony that she was rendered unconscious at some point and it could have been after the first or second blow. There was no way to determine when the victim became unconscious. The trial judge ignored portions of the medical examiner's testimony, and speculated about the circumstances of the crime scene. There was not competent substantial evidence to support the trial judge's finding that Parlato moved herself into the living room. The evidence did not prove the victim was conscious after the first or second blow.

Although the medical examiner testified Parlato was alive when her vagina was penetrated, there was no way to tell if she was conscious at that time. (28/4676) Thus although the vaginal tear would have caused great pain if the victim were conscious, there was not competent substantial proof that Parlato suffered pain because she may have been unconscious. Evidence of pain or fear of impending death must be based on more than mere speculation. Aggravating factors require proof beyond a reasonable doubt, not mere speculation derived from equivocal evidence or testimony. Brooks v. State, 918 So. 2d 181, 206 (Fla. 2005). Here, while the trial court's speculation as to what took place may have occurred, there is no evidence in the record to rule out

other possible scenarios (Parlato was knocked out after the first or second blow, carried into the living room, placed on the floor sitting up, hit and knocked to floor where she was repeatedly struck in a manic rage.)

The trial court's reliance on Hall v. State, 107 So. 3d 262 (Fla. 2012), is misplaced because the victim in Hall suffered blunt force injuries on both sides of her face while she was alive and she sustained seven defensive wounds on her arms and hands caused by a knife or sharp instrument. Id. at 276, 77. Hall is distinguished from the present case where there is only one possible defensive wound on the middle finger and the victim could have been rendered unconscious very early in the confrontation. The other case the trial court relies on to find HAC, Quince v. State, 414 So. 2d 185, 187 (Fla. 1982), is a 1982 case which fails to address whether or not the victim was conscious.

In the present case, the first or second blow could have rendered the victim unconscious. Anything occurring after Parlato became unconscious cannot support a finding of HAC because "the evidence must show the victim was conscious and aware of impending death." Williams v. State, 37 So. 3d 187, 199 (Fla. 2010). This Court has upheld HAC in beating deaths. Dennis v. State, 817 So. 2d 741, 766 (Fla. 2002) (upholding HAC where both victims suffered skull fractures and were conscious for at least part of the attack as evidenced by defensive wounds to their hands and forearms); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995) (upholding HAC where the victim was struck seven times on the head, victim was

alive during infliction of most of the wounds, and the last blow caused death); Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (upholding HAC where the victim was brutally beaten while attempting to fend off blows before being fatally shot).

However, the present case is more like cases where the HAC aggravator was stricken where there was not competent, substantial evidence to support the trial court's finding that the victim was conscious and aware of impending death. See Zakrzewski, 717 So. 2d at 493 (striking HAC where "[m]edical testimony was offered during the trial which established that [the victim] may have been rendered unconscious upon receiving the first blow from the crowbar, and as a result, she was unaware of her impending death"); Simmons v. State, 419 So. 2d 316-19 (Fla. 1982) (striking HAC where "[d]eath was probably instantaneous or nearly so; an expert testified that either of the two blows could have caused instantaneous death by itself"); Williams v. State, 37 So. 3d 187 (Fla. 2010) (striking HAC where there was not competent substantial evidence to support trial court's finding that the victim was conscious during the attack. There was testimony that any of the five blows to the head could have rendered the victim unconscious or caused death.)

In the present case there is only a single wound to the victim's middle finger that was like a defensive wound. The State failed to prove there was prolonged suffering or anticipation of death, and it was error for the trial judge to instruct the jury on this aggravating circumstance or to consider this aggravating

circumstance as a reason for imposing the death penalty. This Court should find that without the HAC aggravating circumstance a sentence of life should be imposed. In the alternative, as in Simmons, 419 So. 2d at 320, where this Court struck two aggravating circumstances, Sexton should get a new sentencing hearing before a new specially empanelled jury where consideration of HAC is excluded.

ISSUE X

THE TRIAL COURT FAILED TO ADEQUATELY ADDRESS WHETHER THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES AS EVIDENCED BY A DEFECTIVE ORDER THAT FAILED TO CLEARLY INDICATE WHICH MITIGATING CIRCUMSTANCES WERE FOUND AND HOW MUCH WEIGHT THEY WERE GIVEN.

The jury was instructed on twenty two mitigating circumstances. In the sentencing order, the trial court indicated that under subsection (h) the catch-all provision that permits the defense to seek mitigation using any other factor, the only other factor listed was: "The Defendant is amenable to rehabilitation and a productive life in prison." The trial court failed to address most of the following mitigating factors that were presented to the jury:

> Number three. The defendant has Bipolar Disorder.
>
> Number four. The defendant's mother and father were alcoholics.
>
> Five. The defendant suffered emotional and physical abuse from his parents during his childhood.

Number Six. The defendant was exposed to instances of domestic violence during his childhood.

Number seven. The defendant had chronic asthma during his childhood.

Number eight. The defendant graduated from high school after the 11th grade.

Number nine. The defendant received an honorable discharge from the United States Marine Corps.

Number ten. The defendant's younger brother died when the defendant was 20 years old.

Number 11. The defendant has chronic severe alcoholism.

Number 12. The defendant has had prolonged exposure through his work to industrial chemical toxins which has caused brain damage.

Number 13. The defendant has worked as a journalist and a television producer.

Number 14. The defendant attempted suicide on multiple occasions.

Number 15. The defendant was Baker Acted.

Number 16. The defendant sought treatment for his mental-health issues.

Number 17. The defendant was intoxicated at the time of the offense.

Number 18. The defendant displayed good behavior while in jail awaiting trial.

Number 19. The defendant displayed good behavior during trial.

Number 20. The defendant is capable of doing well in a structured setting.

Number 21. The defendant has the support of his family.

The trial court's sentencing order did address number 18 through 21 and assigned those mitigating factors little weight. The trial court failed to address number three through 17. The trial court's consideration of mitigating circumstances was insufficient to comply with the standards set by this Court. See e.g. Woodel v. State, 804 So. 2d 316, 326-27 (Fla. 2001); Bryant v. State, 656 So. 2d 426, 429 (Fla. 1995); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982).

The sentencing order entirely fails to address or evaluate the impact of growing up with alcoholic parents and being exposed to domestic violence, the impact of losing a younger sibling when Sexton was a young adult, the effect of having chronic asthma as a child, and the fact Sexton was Baker Acted and he sought mental health treatment. The trial court did not consider any of the positive mitigation such as: he graduated from high school after the 11th grade, he worked as a journalist and television producer, and Sexton received an honorable discharge from the United States Marine Corps. Failure of the trial court to address this mitigation deprived Sexton of a fair sentencing proceeding. A sentencing court must "expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990).

In Oyola v. State 99 So. 3d 431 (Fla. 2012), the trial court

summarily lumped three nonstatutory mitigators together and gave them slight weight. This Court found that sentencing order failed to meet the requirements of Campbell and reversed and remanded the case for the trial court to properly evaluate all mitigation and aggravation and provide a new sentencing order. Id. at 447. Sexton's sentence should be reversed and remanded where the trial court considers all of his mitigation and reweighs it to determine if the mitigation outweighs the remaining valid aggravating circumstances.

ISSUE XI

THE TRIAL COURT ERRED BY FAILING TO READ THE SPECIAL REQUESTED JURY INSTRUCTION THAT WHEN CONSIDERING HAC THE JURY IS NOT TO CONSIDER ANY EVENTS THAT OCCURRED AFTER THE VICTIM BECAME UNCONSCIOUS.

Defense counsel requested a special jury instruction because the standard instructions did not adequately inform the jury of the law for the HAC aggravating circumstance. The following instruction was requested to be read immediately after the standard instruction on the especially heinous, atrocious, or cruel aggravator:

> You are instructed that actions of the Defendant which were taken after the victim was rendered unconscious or dead are not relevant and should not be considered in determining whether the murder was especially heinous, atrocious, or cruel.

(14/2503)

The standard instruction read to the jury stated:

> The capital felony was especially heinous, atrocious, or cruel.

> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(15/2516)

The standard instruction read to the jury fails to adequately inform them of the law regarding HAC. The jury is told that they must follow the law, yet they were never advised of the well-established law that actions after the victim was unconscious or dead may not be considered to establish the crime was HAC. To support a finding of HAC, the evidence must show the victim was conscious and aware of impending death. Douglas v. State, 878 So. 2d 1246, 1261 (Fla. 2004).

When a court denies a defendant's special requested jury instruction, the defendant must show on appeal that the trial court abused its discretion in giving the standard instruction. Stephens v. State, 787 So. 2d 747, 755-56 (Fla. 2001). Failure to give a special requested jury instruction is error if: "(1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." Id. at 756.

The special instruction was supported by the evidence because there were clearly actions after the victim was unconscious or dead that the jury could have used in finding HAC. There was the mutilation of the breast, inserting an object in the anus, and burning of the vaginal area that all occurred after the victim was dead. Since it was possible that the victim lost consciousness after the first or second blow, the jury should have been advised they were not to consider anything after the victim lost consciousness or was dead. The standard instruction gave the jury no guidance on not considering actions that occurred after consciousness or death. As indicated in Douglas, the special requested jury instruction was a correct statement of the law. The instruction was supported by the evidence and was very simple and clear which was not confusing or misleading. The trial court abused its discretion in failing to give the special requested instruction. Accordingly, this case should be reversed and remanded for a new penalty phase.

ISSUE XII

THE TRIAL COURT ERRED IN SENTENCING SEXTON TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL PURSUANT TO RING V. ARIZONA.

This issue is preserved by Sexton's motion to declare Florida's Capital Sentencing Statute Unconstitutional. (10/1694) The trial court's denial of Appellant's motion is a legal conclusion which is reviewed de novo. Hurst v. State, 18 So. 3d

975, 996 (Fla. 2009).

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context. Section 921.141, Florida Statutes (2010), does not provide for such jury determinations.

Sexton acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.); cert. denied, 123 S.Ct. 662 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002).

Additionally, Sexton is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v.

Crosby, 911 So. 2d 1129, 1133-1135 (Fla. 2005); Steele. At this time, Sexton asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

Florida Statute section 921.141 requires the trial court to make "written findings of fact" that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. If the trial court does not make these required written findings it must impose a sentence of life imprisonment. Absent a judge's findings of fact, a life sentence must be imposed. In order for a maximum sentence of life to be increased to death, a trial court must make findings of fact. Ring requires that "if a state makes an increase in a defendant's punishment contingent on a finding of fact, that fact -no matter how the state labels it- must be found by a jury beyond a reasonable doubt." Ring, 536 U.S. at 602 (quoting Apprendi v. New Jersey, 530 U.S. at 482). Since the jury does not make the findings of fact necessary for imposition of the death penalty, Fla. Stat. section 921.141 stands in clear violation of Ring and Apprendi. The Statute is therefore unconstitutional under the Sixth, Eight, and Fourteenth Amendments of the United States Constitution.

Application of the Florida Capital Sentencing statute is particularly unconstitutional as applied to Sexton because the recommendation of death was not made by a unanimous jury. This

case is distinguished from Douglas v. State, 878 So. 2d 1246 (Fla. 2004) where the jury unanimously found Douglas guilty of sexual battery and expressly found in a special verdict that Douglas committed the murder during the commission or attempted commission of a sexual battery. In the present case Sexton was not charged with sexual battery and the jury did not make a specific finding that the murder occurred during the commission of a sexual battery. Contrary to Ring the finding that the murder was committed during the commission of a sexual battery was made only by the judge and not a jury. Only a judge, not a jury as required by Ring, found the three aggravating circumstances used to impose the death penalty: 1) The capital felony was committed while the defendant was engaged, in the commission of, or an attempt to commit, or flight after committing sexual battery. 2) The capital felony was especially heinous, atrocious, or cruel. 3) The victim of the capital felony was particularly vulnerable due to advanced age or disability. It is unknown which if any aggravating circumstances were found by a unanimous jury.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Sexton's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant asks this Honorable Court to reverse his conviction and death sentence and remand for a new trial. [Issues I, II, III, and IV]; remand for imposition of a life sentence [Issue IX, XII]; remand for a new penalty phase trial [Issues V, VI, VII, VIII, IX, XI]; or remand for a new sentencing by the trial court.[Issue X]

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, and to Christina.Zuccaro@myfloridalegal.com, on this 2nd day of January, 2015.

CERTIFICATION OF FONT SIZE

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

Respectfully submitted,

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