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IN THE SUPREME COURT OF FLORIDA

DONALD OTIS WILLIAMS,

Appellant,

vs.

CASE NO. SC14-814

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY

APPELLANT'S INITIAL BRIEF

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

THE INDICTMENT

A Lake County grand jury charged the appellant, Donald Otis Williams, with one count of robbery of a car and credit cards; one count of kidnapping with the intent to inflict bodily harm, or to terrorize, or to facilitate a robbery, a murder, or both; and one count of first-degree murder, either premeditated or committed while engaged in kidnapping or robbery or both, by a means unknown to the Grand Jury. (II 392) The alleged victim as to each count was Janet Patrick, and all of the offenses were alleged to have taken place between October 18 and 23, 2010. (II 392)

THE VICTIM'S DISAPPEARANCE

The State's proof, in the guilt phase of the trial, established the following:

Janet Patrick was 81 years old in October, 2010. (XXI 696-97) At that time she was in good health, except for osteoporosis and some hypertension; she suffered from no life-threatening conditions. (XXI 696-97) She lived alone with a dog in the Lakes of Leesburg subdivision, across the street from her girlhood friend Jenny Suter. (XIX 373-74, 376-79) The last time Jenny saw Janet, Janet took Jenny's shopping list to run their errands at around 2:00 in the afternoon. (XIX 379, 381-83) Witnesses and surveillance video from a nearby Publix showed

that at 4:24 on October 18, Janet arrived at the store and was engaged there in conversation by a man later identified as the defendant. (XIX 410-16, 422-23, 426-36; XXI 778-92; XXV 1514) The witnesses and video showed she left Publix in her own car at 5:13, with the defendant as a passenger. (XIX 436, 443)

Janet's next-door neighbor Lucy Koenig testified that on the afternoon of the 18th she drove home from Lowe's, which is about five minutes away from the Lakes of Leesburg, and that on her return she saw Janet's car in the carport as usual. (XXIII 952-67) A Lowe's receipt showed that Lucy had made her purchase at 5:23. (XXIII 965-67) Lucy further testified that a few minutes after 6:00 she was surprised to notice Janet backing her car out of the carport, since Janet did not usually drive at night. (XXIII 953, 961-62) Lucy could not see if anyone was in the car with Janet. (XXIII 961)

Jenny Suter called police when Janet did not return home the following morning, and responding officers had Jenny let them into Janet's home. (XIX 384-85) The officers testified the dog was there, and there was no sign of a disturbance. (XIX 359-60, 363-64; XXIII 992-93, 997-98) One of the officers testified that she retrieved the last number dialed on Janet's home phone, and that the number was "911." (XXIII 994) That officer testified that she followed up with the dispatch center, and learned that no recent 911 calls had been completed from

that number. (XXIII 995, 1006)

The defendant was arrested in Polk County on October 23, while in possession of Janet's car and her credit cards. (XIX 445-51) He was transferred on October 24 to the Lake County jail, where he spoke at length to the local press. (XX 542-46) He told the press that he and Janet had been kidnapped together by a little black kid, and that Janet expired during the ordeal but he escaped; the State played a tape of the press conference at trial. (XX 547-70) The defendant, who acted *pro se* for part of the guilt phase and presented an insanity defense, told the jury in his opening statement that he was hallucinating when he talked to the press, that the victim died in the driver's seat of her car at 5:30 on October 18th, that he would not have taken her "all the way up almost into Georgia and into Live Oak" had he been in his right mind, that he did not kidnap her, and that he did not remember committing any act that would have caused her death. (XXIII 1018, 1028-29, 1031-32, 1044-45)

SELF-REPRESENTATION

At his first appearance, after the original indictment was returned in January, 2011, Appellant refused appointment of counsel. (I 18) The trial judge, the Honorable Mark A. Nacke, Circuit Judge, convened a hearing on February 4, 2011, to determine if he would allow the defendant to represent himself. (XI 1974-

2010) At the hearing the defendant stated

> I know that my mental capacities aren't very well right now and there could be times that - during the trial - that may affect my representing myself. So I don't think that I am capable of hiring an attorney. I don't think I'm capable of representing myself. But on the other side of that, I don't think that the Public Defender's Office ... and I have ever met eye to eye.... And so the thing is, if you had appointed me an attorney from the Public Defender's Office I don't think they're going to represent me very well.... If I could get another attorney outside the Public Defender's Office, I would be readily agreeable to that.

(XI 1979-80) The judge responded that the only attorney he would appoint would be the Public Defender. (XI 1980, 1983-84) The defendant declined the offer, and the court held the colloquy required by Faretta v. California, 422 U.S. 806 (1975). (XI 1984-2001)

During the colloquy the defendant disclosed that he had previously been diagnosed with a mental illness, and that he was currently prescribed Depakene, Doxepin, and Depakote. (XI 1990) Asked whether those medications affected his ability to understand his rights and the proceedings, he responded "Not at the present." (XI 1990) Also during the colloquy, the defendant emphasized

> I don't want the Public Defender's Office representing me...I'd rather walk to the gallows than be represented by the Public Defender's Office.

(XI 1993) After the court assured him he could seek appointment of new counsel if dissatisfied, the defendant agreed to be represented by the Public Defender. (XI 2000-01)

From February, 2011 through August, 2012, discovery changed hands and the parties perpetuated testimony for trial. (I 28-109; XI 2040-67) As of August, 2012, the case was set for trial in October, 2012. (I 105) The defense moved in August, 2012, to continue the matter, noting that an insanity defense was under consideration. (I 105-06) The court granted the continuance and set trial for January, 2013. (XI 2077; I 110) On December 27, 2012, Mr. Williams filed a notice with the Circuit Court invoking the right to represent himself. (II 345-46) The court held a hearing on January 7, 2013, to inquire of the defendant. (XII 2122-65)

At the January 7 hearing, the defendant complained that the Public Defender's Office had been slow in getting him documents he requested regarding his history of seizures and bizarre behavior. (XII 2125-37) One of the Assistant Public Defenders assigned to the case announced that no decision had yet been made whether to pursue an insanity defense, and the defendant responded that counsel had clearly already decided not to pursue that defense. (XII 2164) The court ruled that the Public Defender was providing reasonably effective assistance,

and the defendant announced he would represent himself. (XII 2139-40, 2158-59) The court conducted another Faretta hearing. (XII 2141-53) Asked during that colloquy about his mental-health history, the defendant said he had been diagnosed with schizophrenia, bipolar disorder with psychotic features, post-traumatic stress disorder, and "split personality." (XI 2156-57) Counsel for the State provided the court with a report written by Dr. Alan Berns, a psychiatrist who had evaluated the defendant, and asked the court to consider whether the defendant should be deemed too mentally ill to represent himself. (XI 2161-63) The court took the matter under advisement. (XI 2165)

At another hearing two days later, the judge announced he had considered Dr. Berns's diagnosis of bipolar affective disorder, in light of the defendant's representations at the January 7 hearing and in light of reports that the defendant's family had seen him hallucinate. (XXXIV 3196-3200) The judge found, based on those factors, that the defendant suffered from such severe mental illness that he could not represent himself. (XXXIV 3200) The defendant asked the judge to reconsider, and defense counsel joined in objecting on the defendant's behalf, arguing that the caselaw did not support the judge's finding. (XXXIV 3202-03)

A week later, counsel for both parties announced that they had agreed, and that Mr. Williams also agreed, that psychologist Dr. Eric Mings should evaluate

the specific question whether Mr. Williams was too mentally ill to represent himself. (XII 2237-38) The judge appointed Dr. Mings to evaluate the defendant and provide a report to the court. (XII 2242; II 396-97)

On February 4, 2013, the parties again reconvened before Judge Nacke, where they agreed the court could rely on Dr. Mings's report dated February 1, 2013, in lieu of live testimony.[1] (XII 2247-51) The judge found that based on Dr. Mings's "very thorough" report he would reverse his decision that the defendant was too mentally ill to represent himself. (XII 2252) The judge maintained his view that the Public Defender's Office was providing competent representation, and the defendant again announced he would represent himself. (XII 2252-53) The judge conducted a third Faretta colloquy regarding the dangers and disadvantages of self-representation, and entered an order permitting the defendant to represent himself at trial. (XII 2253-57; III 418-19)

Mr. Williams listed as witnesses, and subpoenaed for trial, the two Assistant Public Defenders who had represented him in this case, Morris Carranza and William Grossenbacher. (VII 1220; IX 1650) On the morning of jury selection, and on each of the first seven days of the guilt phase of the trial, the judge renewed

[1] The February 1 report was sealed and placed in the court file, but was omitted from the record on appeal. The undersigned will move this court to supplement the record with the report.

the offer of counsel; the defendant refused the offer on each of those occasions until the seventh day of trial, when he accepted it. (XVIII 3; XIX 321; XX 602; XXII 799; XXIII 951; XXIV 1131; XXV 1310; XXVI 1532)

JURY SELECTION

Before trial defense counsel moved the court to preclude various forms of improper argument, referring specifically to comments on matters outside the evidence (I 127), arguments urging an emotional basis for a verdict (I 128), and comments that the State has available to it more evidence than it presented. (I 129) At a hearing held on the motion, the State announced that "as a general rule" it had no objection to the defense motion, with the proviso that often in argument "it depends on the semantics." (XI 2118) The court noted "I do agree with a lot of the argument contained in the motion, however...it's situation-specific. It just depends. One word may change whether it's proper or improper. So we're going to have to rely on contemporaneous objections, and I will rule on individual matters as they present themselves." (XI 2118)

During jury selection, counsel for the State explained the process to the venire as follows:

> STATE: [I]f and only if the jury unanimously decides [the defendant is] guilty of first-degree murder, additional evidence presented going to the Defendant's

> background, going to his character, *possibly going to additional factors in the crime itself,* are allowed...things that you may not be allowed to hear in the first phase of the trial become relevant when you're trying to decide what is a fair sentence.

(XVIII 262) (emphasis added) In addition venire member King, who was eventually seated, initially expressed doubt whether his diabetes would allow him to remain focused. (XVIII 191-92) Later in the process, the following took place:

> STATE: How about your ability to pay attention and not fall asleep on us?
>
> MR. KING: Oh, Lordy.
>
> STATE: You doing okay?
>
> MR. KING: The case itself get my attention.
>
> STATE: I hope we do.
>
> MR. KING: Oh, yes, that's what keep my attention, because the person's life is at stake. 'Cause what you talking about today - wasn't nobody's life was at stake.
>
> STATE: *As well as justice for a little old lady.*
>
> MR. KING: That's what I'm saying.

(XVIII 273-74) (emphasis added)

GUILT PHASE: *THE STATE'S CASE-IN-CHIEF*

As noted above, the State proved that the victim went missing on October

18 and that the defendant was found, with her car and credit cards, on October 23. In its case-in-chief, the State also showed the following:

After his arrest, the defendant revealed where he had left the victim's body. (XX 564; see XXV 1502) The police went to that rural location in Polk County, and discovered her remains under two tires. (XX 588, 596) The remains by that time consisted of bones and some skin. (XXI 696) The only clothing with the remains was a pair of socks; the victim's other clothing, jewelry, purse and wallet were never recovered. (XX 619-20; XXI 699; XXII 925-26, 929; XXV 1511-12) In his opening statement, counsel for the State announced

> Janet's body was examined by the experts at the medical examiner's office here in Leesburg, as well as by anthropologists, what they call forensic anthropologists, at the C.A. Pound Human Identification Lab up in Gainesville, but due to decomposition...they just can't say exactly how she died. But one thing the experts are certain of is this, what happened to Janet Patrick is homicide.

(XIX 345-46)

Crime scene personnel, while processing the victim's car, found two small smears of blood on the inner trunk lid. (XX 608-10; XXI 755-56; XXXII 201, 203) Swabs taken from those smears showed the blood was the victim's. (XX 614; XXI 755-56) A DNA analyst testified that he also found traces of her blood on the

carpet in the trunk, and on the spare tire locking device in the trunk. (XXI 750-55; see XX 611-12, 617-18) The analyst described the bloodstain on the carpet as about the size of a quarter. (XXI 767, 752)

Photos of the car's interior, taken after the defendant's arrest, showed a towel, men's clothes, deodorant, cigarettes, and empty beer cans strewn about. (XXXII 72, 74, 76, 84, 88; see XX 573-75, 579-80) The clothes included a pair of jeans found on the floorboard, and two pair of briefs on the back seat. (XX 585, 587, 613-14, 617-18) The DNA analyst testified that he swabbed the waistband and inner crotch of the jeans, and that he obtained a mixed profile containing traces of DNA from both the victim and the defendant. (XXI 760-61) Hairs from the victim were found on the briefs, as was a trace of the defendant's semen and a mix of skin cells from both the defendant and victim. (XXI 762-65) The analyst testified that it is not uncommon to find traces of semen on underwear a man has worn, and that traces of skin and hair easily transfer among articles of clothing and from car seats to clothing. (XXI 765-67)

A police officer collected insects at various stages of life from the victim's remains. (XXII 807-10) A crime scene investigator with an advanced degree was accepted by the court, without objection, as an expert in forensic entomology; she testified that weather data, combined with her knowledge of insect reproduction

and development, showed that the victim had definitely died no later than sunset on October 20, and that there was a 99% likelihood she died sometime during the night of the 18th after darkness fell. (XXII 811-24) A doctoral candidate from the University of Florida was also accepted, without objection, as an expert in forensic anthropology; she testified that the remains showed no fractures that could have occurred around the time of death, no suggestion that the body was burned, and no trauma to the hyoid bone. (XXI 648-60)

The District Medical Examiner, Dr. Barbara Wolf, testified for the State that she has personally conducted over 8000 autopsies. (XXI 689-92) She testified that in addition to her autopsy of the victim she reviewed the victim's medical records, viewed photos of the crime scene, read the FDLE and police reports of the case, and listened to the statements the defendant gave to the press. (XXI 694-98) She went on to testify as follows:

> STATE: Did you learn through your investigation that she had been found in the woods?
>
> DR. WOLF: In a wooded area, yes.
>
> STATE: With no clothes on?
>
> DR. WOLF: She was clad only in a pair of socks.
>
> STATE: Covered by a couple of old tires?

DR. WOLF: That's correct.

STATE: Quite a distance from her home in the next county?

DR. WOLF: That's correct.

STATE: Did you learn that her blood was found in the trunk of her car?

DR. WOLF: Yes. As I said, I reviewed laboratory reports from the Florida Department of Law Enforcement Laboratory, and her blood was identified in the trunk of her vehicle.

STATE: In your professional opinion, Dr. Wolf, what is the cause and manner of death of Janet Patrick?

DR. WOLF: ...the cause of death is that which sets the process in motion. Manner of death refers to whether or not a death is an accident, suicide, homicide, natural, or, if we can't determine it, undetermined. It was my opinion, it is my opinion to a reasonable degree of medical certainty, that the manner of Ms. Patrick's death was homicide. As far as the actual cause of death, what happened to her that caused her to die at that point, I could not determine that, nor could the anthropologists. We did not find, because of the condition of the body, injuries that would have accounted for her death. Basically the body was largely a skeleton with some skin remaining. There were no bullets. There were no stab wounds that we could find, which doesn't mean there aren't any, but there was nothing specific that I could say "that's what caused this death." So the manner of - I'm sorry, the cause of death was certified as homicidal violence of unknown means, meaning that by my review of the circumstances and the scene of death, I was

> confident that the death was a homicide, but I could not determine specifically how she was killed.

(XXI 699-700)

On cross-examination, Dr. Wolf agreed with the defendant that the victim could have died from an accidental blow to her head, and that a fatal blow to some parts of the skull might not cause a fracture. (XXI 716-17) On redirect questioning, the following took place:

> STATE: Mr. Williams asked you about, I guess, hypothetically if somebody were hit hard enough by accident, it could have killed her, but in this particular case involving this particular lady, do you see an accidental death in this case?
>
> DR. WOLF: In my opinion, no, this death was not accidental. There is nothing in any, any of the various explanations that have been offered that would explain her death in an accidental manner.
>
> STATE: If I were kidnapping somebody or robbing somebody and caused them enough stress during that crime to cause them to have a heart attack and die, would you classify that as a homicide?
>
> DR. WOLF: Oh, absolutely...the term that we use in pathology is homicide by heart attack.... [S]tress can cause heart attacks and strokes, and if someone is in a situation resulting from criminal activity that leads to stress and the person has a heart attack, even if they're never touched, that's a homicide, because those activities caused her death.

> STATE: I think I already know the answer, but the same question, if I plugged in stress from the crime itself, but putting somebody in the trunk of their own car and they asphyxiate in the trunk of their own car during a crime, would that be a homicide, in your professional opinion?
>
> DR. WOLF: Absolutely, and that would leave no physical findings.

(XXI 719-20) Dr. Wolf also gave her opinion that when an injury is inflicted after death, "some blood" can exude although the heart has stopped beating. (XXI 714)

Among the items found in the victim's car was a length of plastic tubing. (XX 613; XXXII 82) Counsel for the State, William Gross, called a former employee of the State Attorney's Office as a witness; she testified that she took an interest in Janet Patrick's disappearance, and that in June, 2011 she went with Mr. Gross to "locations that were significant in the investigation," including a cemetery near Davenport in Polk County. (XXII 825-26) The State established that the witness had previously seen photos of the plastic tubing that was found in the victim's car, and that while at the cemetery she spotted a similar length of tubing discarded along the fence. (XXII 826-27) Further investigation within the State Attorney's Office disclosed photos that were taken at the cemetery in October, 2010; they show the same length of tubing, which excited no interest at the time. (XXIII 988-89; XXVI 1651-53) It was disclosed later in the trial that the

defendant had admitted to police that he went to that cemetery, where his family is buried, during the days immediately following the victim's death. (XXIII 978-81)

The State called as a witness Janice Taylor, who has a bachelor's degree in forensic science and works in FDLE's trace evidence section. (XXII 891-920) She testified that the trace evidence section "deals with examination and comparison of very small amounts of material like paint or glass or fibers," and that she has also "trained in the area of fractured materials, and that's comparing two items to try and determine whether or not they were at one time a single piece." (XXII 892-93) Without objection, the court accepted Ms. Taylor as an expert "in the field of trace evidence analysis, and more importantly, the area of fracture match determination." (XXII 895)

Ms. Taylor testified that she compared the tubes found in the victim's car with the tubes found in the cemetery, and found that they were the same color and width. (XXIII 896-98, 880-81, 900; see XX 613, 616-17) The State rejoined "after you had determined that at least as far as their overall dimensions, they could very easily have been from the same tube, where did you go from there?" (XXII 900) Ms. Taylor responded that she put the ends of the tubes under a microscope and took photos, which showed striations caused accidentally in the manufacturing process; she compared the striations on the different lengths of tubing (XXII 902-

03, 907-10) and found "quite a similarity." (XXII 910) She also testified that a test of how much infrared radiation the tubes would absorb established that both are made of polyethylene, which she characterized as "a very common plastic." (XXII 903-07) She could not testify that they were from the same manufacturing batch, but generally agreed with the State that they were "very consistent with having at one time been part of the same piece." (XXII 905-06, 910-11)

The State in addition called Sally Streeter, who was the defendant's probation officer in 2010; she established that the defendant was homeless and actively seeking a place to stay in October 2010. (XXII 848-55, 873) The State did not ask what agency Ms. Streeter worked for in 2010. After direct examination the defense objected to her testimony, arguing that the State had revealed her position in that the jury heard the defendant had checked in with her regularly and called her "Officer." The judge found that the proof did not indicate what the witness does for a living, and ruled that if the defendant was asking for her past testimony to be struck, he was overruling the request. (XXV 857-61, 864-66)

The State also called the defendant's boyhood friend from Davenport, Danny Culverhouse, who testified that on October 20, 2010 the defendant came to his home; at that time he appeared to be flush with cash, and offered Danny a credit card from a pouch that appeared to contain several cards. (XIX 497-510)

Mr. Culverhouse also testified that the defendant returned to his home on October 21 and borrowed a shovel, and that he never saw the defendant outside of court again. (XIX 511-12)

GUILT PHASE: THE DEFENSE CASE, AND REAPPOINTMENT OF COUNSEL

As noted above, the defendant in his opening statement told the jury that the victim died in the passenger compartment of her car during the afternoon of October 18, and that he had consciously committed none of the charged crimes. (XXIII 1028-29, 1031-32, 1044-45) In opening he also told the jury he would prove that his history of seizures, head trauma and bipolar disorder had caused him to lose control, and awareness, on the 18th. (XXIII 1018-27, 1038, 1041-43) He called family witnesses and a former significant other as witnesses; they testified that they had observed the defendant engage in erratic behavior, and experience seizures, extended periods of sleeplessness, and apparent hallucinations. The witnesses specified that those incidents increased after he was in a serious car accident in 1989. (XXIII 1047-50, 1052-57, 1068-69; XXIV 1142-45, 1161-64)

The defendant also called psychiatrist Dr. Alan Berns and psychologist Dr. Steven Gold as witnesses. Dr. Berns testified that he had diagnosed the defendant with bipolar affective disorder and post-traumatic stress disorder, and that those

conditions can cause hallucinations and flashbacks. (XXIV 1189, 1193, 1201-02) On cross-examination, Dr. Berns testified that in this case he had evaluated the defendant's mental condition at the time of the offense, and had concluded that the defendant was legally sane at the time. (XXIV 1217-19, 1229) Dr. Gold testified that he had diagnosed the defendant with post-traumatic stress disorder, and testified that that condition, when combined with the symptoms of bipolar disorder, can cause flashbacks. (XXIV 1263, 1269-75) Dr. Gold also testified that in his opinion the defendant's history of trauma and untreated mental illness had left him prone to impulsive behavior, with a limited capacity to control his behavior. (XXIV 1282-83) The State established on cross-examination that Dr. Gold had not discussed the events surrounding the victim's death with the defendant in any detail, and that Dr. Gold had no opinion whether the defendant had been legally sane at that time. (XXIV 1284-85)

The defense called a third expert witness, neurologist Dr. Jean Cibula. She testified that the defendant had been sent to Shands Hospital in 2012 for observation of possible seizures, and that the staff there had tried unsuccessfully to induce a seizure during the five days he was under observation. (XXV 1404-07, 1437-40) She also testified that she had viewed a PET scan of the defendant's brain that was taken during his 2012 stay at the hospital, and that it revealed

metric decreased metabolic activity in both anteromedial and temporal lobes. (XXV 1443) No explanation of that testimony was sought or given during the guilt phase. (XXV 1443-44)

The following morning, Wednesday, August 21,[2] the court renewed its offer of counsel, and the defendant agreed to accept the reappointment of the Public Defender. (XXVI 1532) Mr. Carranza and Mr. Grossenbacher reported to the courtroom along with the elected Public Defender, Michael Graves. (XXVI 1536) Mr. Graves moved for a mistrial, noting that his office had been out of the case for seven months, that 600 pages of discovery had been disclosed by the State since February, and that his assistants had not by any means yet worked up a complete case in mitigation at the time they were relieved of their duties. (XXVI 1537, 1540) He further said that because Mr. Carranza and Mr. Grossenbacher had been listed as witnesses, no one from the Public Defender's Office had sat in on the first six days of trial. (XXVI 1538) Noting that in the eyes of the appellate courts "death is different," he argued that his office could not provide effective assistance of counsel, or present meaningful mitigation in the penalty phase, if required to go forward. (XXVI 1542)

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[2] The court reporter's transcript reflects that court reconvened, after Dr. Cibula's testimony, on August 22. However, the record shows that court in fact reconvened on the 21st. (IX 1733)

Mr. Gross, for the State, responded as follows:

> STATE: Judge, the argument that "death is different" is rather tired and rather vague. As a matter of fact, we hear it all the time and what it really means is let's just ignore the rules because death is different, so we just suspend the rules. Well, that's not the case.

(XXVI 1542-43)

> STATE: I've talked to the Attorney General's Office...it seems to be the consensus...that a short continuance to give the defendant and his attorneys an opportunity to consult, to give the attorneys an opportunity to familiarize themselves with what they've missed, is sufficient to allow them to then come in and represent the defendant to the extent that they can.

(XXVI 1544)

> STATE: [T]o the extent that the attorneys are not as prepared as they would have been had they been working on this case for the last six months, that is to be put exclusively at the defendant's feet. And so I think that he would be estopped from complaining that his attorneys aren't prepared. He's the one who's put us in this position.

(XXVI 1544-45)

> STATE: I can't tell you in good conscience that [the Public Defender's Office] will do as good a job as had they been working on this case diligently for the last six months. I'm saying that if they are not as effective as they would have been, it's the defendant's fault, and I do believe that he would be estopped from complaining on appeal that his attorneys had not done as good a job as

perhaps Mr. Graves would have done on his best day.

(XXVI 1549)

The court denied the motion for mistrial, ruling that a continuance until the following Monday would suffice since the Public Defender's Office was in the case for two years and had been dismissed on the eve of trial. (XXVI 1558) The court, at defense counsel's request, directed court personnel to provide counsel with audio recordings of the first six days of trial. (XXVI 1559)

The parties and court reconvened for a status hearing two days later on Friday, August 23. (XXVI 1570-85) Mr. Grossenbacher reported that he was "trying to struggle through listening to the tape the court reporter has furnished us...I can say with some assurance that we will not be...finished on Monday." (XXVI 1577-78) He renewed the defense motion for mistrial, seeking in the alternative a further continuance of the remainder of the guilt phase, and the court denied the motions. (XXVI 1578-79, 1580-81)

The guilt phase reconvened on Monday, August 26. (XXVI 1586) Mr. Grossenbacher renewed the motions he had made the previous Friday, noting that he had "attempt[ed] to listen to the bulk of the trial, but...some of the most important things are not recoverable from the tape." (XXVI 1590) He specified that he had been unable to listen to the DNA expert's testimony. (XXVI 1590) The

court again denied the motions. (XXVI 1592-93) Defense counsel called a witness whose proposed testimony was rejected as based on hearsay, and sought to clarify some earlier testimony through two additional witnesses. (XXVI 1619-23, 1629-43) The defendant did not testify.

GUILT PHASE: REBUTTAL

The State, in rebuttal, called psychologist Dr. Ava Land, who had evaluated the defendant before trial. (XXVII 1755-59) During her testimony, the following took place:

> STATE: Did you...review some records going back to 2001, when the defendant was at a place where he was looked at closely for about eight years, from 2001 to 2009?
>
> DR. LAND: Yes, I did.
>
> STATE: And that was not a mental institution, was it?
>
> DR. LAND: No, it was not.
>
> STATE: But it was a place where records were kept of observations of him?
>
> DR. LAND: Yes.
>
> STATE: And at that place, did he have access to free medical care?
>
> DR. LAND: I believe it's free. I'm not really sure. They might have to pay a small amount.

STATE: They do have medical staff on the facility?

DR. LAND: There is medical staff available.

STATE: Where he was living there, for about eight years from '01 to '09, right?

DR. LAND: Correct.

(XXVII 1759-60)

STATE: In 2001 when he went to this place where he was being observed closely, and they had this medical care available for him, did he refuse to take the meds?

DR. LAND: Yes, several times.

STATE: And were the medications then discontinued?

DR. LAND: They were discontinued for a long period.

STATE: And did he continue to behave normally, as far as you can tell from those records, for the entire time, until 2009?

DR. LAND: Well, according to those records, he actually improved.

(XXVII 1766)

Dr. Land further testified that she disagreed with the diagnosis of bipolar disorder in this case, although she acknowledged that Drs. Gold and Berns, and an additional psychiatrist and two additional neuropsychologists, had found that disorder present in this case. (XXVII 1764-66, 1787-90) Dr. Land also disagreed

with Dr. Gold that post-traumatic stress disorder was present, and testified that her primary diagnosis in this case is anti-social personality disorder. (XXVII 1767-71) She described that disorder as follows:

> DR. LAND: [The diagnosis] means going against societal norms, not following rules, not conforming to what is expected in society...there's a lot of rule-breaking, a lot of doing your own thing, a lot of working by feeling without thinking. There's a lack of moral judgment. You do it because it feels good, not because it's right or wrong, or you shouldn't, or what the consequences are. Some other characteristics of that are lack of empathy, inability to feel compassion for victims or for people who are hurt by the individual's actions, that sort of thing.... It's a pervasive disorder, lasts throughout a person's lifetime.
>
> STATE: Deceitfulness?
>
> DR. LAND: Oh, yes, forgot that one. That's a big one.
>
> STATE: That's a big one?
>
> DR. LAND: Yeah. Manipulative, you know, you get what you need, do what you need to get it, is pretty much the persona that's...characterized as that disorder.

(XXVII 1769-70) Defending her rejection of the post-traumatic stress diagnosis, she testified as follows:

> DR. LAND: [To support that diagnosis] you need evidence that the individual has an avoidance reaction to anything that reminds them of the [foregoing] trauma..... There's no evidence of this anywhere in the record, these

> records. He's currently incarcerated in the jail. He's in a closed space, controlled by people, people carrying guns, there are inmates there that I'm sure are threatening, I'm sure have been physically abusive and sexually abusive to other people, and that's a very threatening environment and there are absolutely no symptoms of PTSD.
>
> STATE: And was that a similar environment, without going into detail, were there similar types of people in the environment within which he lived from 2001 until 2009?
>
> DR. LAND: Absolutely, even possibly worse.
>
> STATE: Based on what you know of this place?
>
> DR. LAND: Yes.

(XXVII 1804-06) Dr. Land also testified that the defendant admitted to her that the statement he made to the press after being arrested was untrue. (XXVII 1773)

The State also called Howard Lawrence, a licensed mental-health practitioner employed at the Lake County Jail. (XXVII 1835-50) The following took place during his testimony:

> STATE: We understand from [prior testimony] that the defendant was placed on Depakene and Sinequan [at the jail]. Are you familiar with those two medications?
>
> WITNESS: Yes, I am.
>
> STATE: What is Depakene prescribed for, or what was it prescribed for in the defendant's situation?

WITNESS: ...in his case it was used as a mood stabilizer, just to regulate your mood. Inmates are by nature irritable, dysphoric.

STATE: What's "dysphoric" mean?

WITNESS: They're prone to being irritable and disgruntled and just -

STATE: Not happy campers?

WITNESS: Not happy campers. In an effort to just sort of regulate their mood. Sinequan is a[n] anti-depressant which is typically...given at night to regulate sleep.

STATE: So if I came to you, as an inmate in your jail, and said "I'm having problems sleeping, I'm angry all the time, I'm not quite sure why, might be my charges, the fact that I'm separated from my family, whatever," are those the two types of meds that I would typically receive?

WITNESS: They're pretty standard procedure for inmates, yes.

STATE: ...Is maintaining [the inmates'] equilibrium important as a goal within corrections?

WITNESS: Yes, sir...just so there's not any, you know, impulsive acting out, fighting, that kind of thing.

(XXVII 1837-38)

STATE: Did the defendant indicate that he wasn't sleeping good and was having nightmares?

WITNESS: I believe he said...his sleep [was] poor.

> STATE: ...What did you document?
>
> WITNESS: I put that his mood was neutral...not manic, it was not agitated, it was not particularly depressed.... And down here I put "there were no gross manifestations of any mental disorder observed by this writer, sociopathy and alcohol dependence notwithstanding."
>
> STATE: What's "sociopathy"?
>
> WITNESS: Well, it's another [way] of depicting antisocial personality disorder in a person that's got a lengthy criminal history who looks like he's probably vying for some medicine because he's, you know, irritable and disgruntled and probably not sleeping too well.
>
> STATE: Did you also indicate that he has no history of suicidal acting-out behavior?
>
> WITNESS: There is no history of suicidal acting-out behaviors or Baker Act admissions. I did reference that as well.

(XXVII 1845-47) The defense at that juncture moved for a mistrial based on the reference to the defendant's "lengthy criminal history," whereupon the following took place:

> STATE: I didn't hear the part about the lengthy criminal history.
>
> DEFENSE COUNSEL: Didn't you? Perhaps we can read it back.
>
> STATE: No, I'm not saying you're wrong. I'm just

> saying I didn't hear it. The court should instruct the jury to disregard his lengthy criminal history...I certainly wasn't asking about his prior criminal record.
>
> DEFENSE COUNSEL: He doesn't even have a lengthy criminal history.
>
> STATE: It's a big one.
>
> DEFENSE COUNSEL: One felony conviction?
>
> STATE: It's a big one, but you're right - he has a bunch of misdemeanors, I think, going back in the '90's and '80's.
>
> DEFENSE COUNSEL: Very few of which resulted in convictions.
>
> THE COURT: I'll deny the motion for mistrial. Getting into all this...the longer we do this, it seems like the closer we get to getting something out that is not admissible, and it's starting to add up.
>
> STATE: I think you're right. I'm done with the witness.

(XXVII 1847-49) The court instructed the jury "You're to disregard the witness's last answer as any evidence in this case whatsoever." (XXVII 1849)

Outside the jury's presence, the State sought a ruling permitting it to establish that in 2001, when the defendant went to prison, he had refused medication on arrival. The State's expressed goal was to establish a pattern of false claims of mental-health problems on the defendant's part. (XXVII 1853-54)

Counsel for the State acknowledged "I think it's relevant for that purpose, but I understand that we're on thin ice here suggesting that he had other charges pending." (XXVII 1854) The defense pointed out that the proposed testimony would not so much *suggest pending charges* as it would *conclusively show a prior felony conviction*, and argued it would be more prejudicial than probative of any fact at issue. (XXVII 1854-55) The court sustained the objection. (XXVII 1855)

The State's final rebuttal witness was Dr. Rafael Perez, the treating psychiatrist for Lake County Jail inmates. Dr. Perez testified that in his view Appellant does not suffer from bipolar disorder (XXVII 1861), whereupon the following took place:

> STATE: Have you had a chance to review the records from 2001 until 2009, while the defendant was staying in a location where he was observed closely and where he had access to medical and psychiatric care if he needed it?
>
> DR. PEREZ: Yes.
>
> STATE: Did you determine whether or not he refused to take medications once he got to this facility in late November of 2001?
>
> DR. PEREZ: ...he was offered medications and...refused to take them.

(XXVII 1861-62)

STATE: If I came to you and told you "Doctor, I'm having these mood swings, these terrible mood swings, I can't sleep, I stay up for weeks at a time, I'm hallucinating," in a forensic setting, in a jail as an inmate...would you prescribe me some medications?

DR. PEREZ: I'm sure, yes.

STATE: And would I then be given some sort of a diagnosis to go along with the medication?

DR. PEREZ: You have to, since otherwise it would be kind of, you know, medically unsound....

STATE: Now, once I've got that label as the inmate, right, who said those things, regardless of whether they're true or not, would that diagnosis, would that label live on?

DEFENSE COUNSEL: Your Honor, that's speculation.

STATE: Based upon your experience, and upon your knowledge of these types of circumstances.

THE COURT: Overruled.

STATE: Do you see that those diagnoses live on?

DR. PEREZ: They do. And as a matter of fact, if I may elaborate a little bit -

STATE: Yes, sir.

DR. PEREZ: By looking at the initial interview done in the Department of Corrections -

STATE: Well, we don't want to go into the location.

DEFENSE COUNSEL: Your Honor, may we approach? I'd move for a mistrial.

THE COURT: Yes.

DEFENSE COUNSEL [at sidebar]: At this point we definitely have the defendant in prison...I don't know why all this needed to be gone into...I ask for a mistrial.

STATE: There is a comment that records from the Department of Corrections were reviewed by this witness. However, I don't know that that requires a mistrial. You'll recall that the defendant, when he questioned one of his family members, the family member said "Do you mean when he got out of prison?" That was already before the jury last week....[3] I would think that under the circumstances the appropriate thing, rather than throwing this whole case out and starting all over, would be to go ahead and give the jury an instruction to disregard that comment.

DEFENSE COUNSEL: The fact that someone has been to prison is one thing, but now that we have talked about this eight-year period when he's under close supervision ...and now that we've talked about the fact that Mr. Williams was in the Department of Corrections in connection with that, we now have an eight-year prison sentence...which is very different from...a year and a day.

STATE: I know that they heard the letters "DOC," I don't know that they even know what that means.... Unfortunately this witness did use the three letters that I wish he hadn't used, but the word prison was already in front of the jury, thanks to the defendant's question of

[3] During the defense case, one of the defendant's witnesses did in fact make that non-responsive interjection. (XXIV 1146)

> his own family member. I think, under the circumstances, there is absolutely no prejudice to the letters "DOC," although I didn't want to bring it up. But I don't see any additional prejudice to the defendant whatsoever. I would ask the jury be instructed to disregard those letters.

(XXVII 1863-66) The court denied the requested mistrial, and instructed the jury "You are to disregard the last comment and not consider it as any evidence in the case." (XXVII 1866-67) The State continued to refer to records from "this place where he was staying in 2001 through 2009" (XXVII 1868), and eventually expressly referred the witness to a document headed "inmate's assessment of his functioning." (XXVII 1872) Defense counsel again asked to approach the bench, where the following took place:

> DEFENSE COUNSEL: I don't want to beat a dead horse here, and I understand Your Honor's previous ruling about the remark about DOC...but he used the word "inmate." Now as far as I know "inmates" are used for two things, psychiatric or medical facilities and prisons or jails, the one having been excluded by Dr. Land's testimony, yet again we have informed the jury that Mr. Williams was in prison for eight years...I would ask for a mistrial.
>
> STATE: I don't remember - did I say the word "inmate"?
>
> THE COURT: Yes.
>
> STATE: ...I certainly don't remember either one of us saying it, but if we did, then obviously you need to deal

with that.... I think in the context of this case, as overwhelming as the evidence is, I don't think the status of the defendant - if in fact the word inmate was used - is going to affect the verdict in any way...especially in light of the word "prison" having been used by the family member. But if I used the word "inmate" - did I?

THE COURT: Yes.

STATE: I certainly won't do it again.

(XXVII 1872-73)

DEFENSE COUNSEL: My motion stands...why are we continuing to skate in this direction, giving the jury more and more ammunition to decide on a prejudicial basis rather than the basis they ought to decide on?

STATE: I think that's where curative instructions come in, if you want one.

DEFENSE COUNSEL: How can we cure with an instruction? Disregard the word "inmate"? I don't think that works.

THE COURT: I'm going to deny the motion for mistrial.

STATE: If the defense doesn't want the bell re-rung, I understand that.

THE COURT: ...reason is because the defendant himself, I believe it was his brother, mentioned "when he got out of prison" or something to that effect, so that...doesn't prejudice the defendant, but we need to stay away from this issue.

STATE: I agree with what you're saying, Judge.

> DEFENSE COUNSEL: ...yes, the "prison" term has been interjected before, but given the evidence adduced by the prosecution in this rebuttal phase, it's not just "prison," it's eight years in prison, and I think that makes a difference.
>
> THE COURT: All right. My ruling still stands.

(XXVII 1874-75)

MOTIONS FOR JUDGMENT OF ACQUITTAL

At the close of the State's case in chief, counsel for the State announced "procedurally, I think the court should examine the State's case and just make sure that we have presented a prima facie case as to all three counts." (XXIII 1009) The court found the State had presented a prima facie case. (XXIII 1009)

After defense counsel was reappointed, at the close of the defense case, counsel sought a judgment of acquittal on the murder count, "on the grounds that there's been no showing in the record of the cause of death, or that my client contributed to the death of Ms. Patrick." (XXVII 1711) The court announced that its previous ruling would stand. (XXVII 1712)

At the close of the rebuttal case, the defense renewed its motion "for the reasons previously stated." (XXVII 1901) The court again announced its ruling would remain the same. (XXVII 1901)

GUILT PHASE: CLOSING ARGUMENTS AND VERDICT

Before the parties proceeded to closing, counsel agreed that neither party wanted the court to give a further curative instruction directing the jury to disregard evidence of prior bad acts. (XXVII 1903-06) The defense renewed its motions for mistrial, and the court again denied the motions. (XXVIII 1912)

The State argued in closing that it had proved a kidnapping, in that the other charged crimes were facilitated when "[t]his lady was taken from her home, 65 miles, and tossed like trash in the brush." (XXVIII 1918)

The State in closing also referred to printed versions of various jury instructions that had been blown up and were on display for the jury. (XXVIII 1916, 1918, 1919-20) Referring to the instruction regarding felony-murder, the State argued as follows:

> STATE: Obviously we've determined, I think beyond every reasonable doubt that Janet Patrick is dead.
>
> The death occurred *as [a] consequence of and while the defendant was engaged in the commission of* kidnapping or robbery or both. ...the instruction goes on to say "or the death occurred as a consequence [of] or while Mr. Williams was escaping from the immediate scene of the kidnapping or robbery or both."
>
> And, three, Mr. Williams was the person who actually killed Janet Patrick.

> ...The law, as written in Tallahassee by our legislators, says that if a killer is engaged in one of [the enumerated underlying offenses], and the death occurs *during the crime to the victim by the act of the killer*, makes no difference what his intentions were, could be by accident, as Dr. Wolf talked about, placing somebody in the trunk of a car bleeding and then asphyxiating that person by accident, she would classify as a homicide, and the law would classify it as first-degree felony-murder. So the fact that this lady laid out in the woods for eight days, decomposed, exact cause of death cannot be determined is unfortunate but not fatally defective to the charge of first-degree murder if you find that the victim died *during one of those two, or both of those two crimes*, robbery, kidnapping.

(XXVIII 1918-20)

> STATE: In the eyes of the law, if Janet Patrick was killed *during either [a robbery or a kidnapping]*, she is the victim of first-degree felony-murder.

(XXVIII 1921)

> STATE: Dr. Wolf...said that based upon her review of the background information, the medical records that she...was able to obtain from Ms. Patrick's physician, there was no sign of any heart disease...nothing life-threatening. In relatively good shape for her age. She said that based upon all the information, the location of the body, the fact that she was in the woods covered by tires with only socks on, that they found blood matched up to her in the trunk of her own car, the circumstance of her disappearance, she says that the death is homicide and the cause of death is homicidal violence of unknown means.... She's quite confident that this, in fact, is homicide.

(XXVIII 1944-45)

Defense counsel argued in closing that a verdict of guilty of second-degree murder was possible, given the lack of proof how the victim died and the resulting possibility it had been "a matter of momentary rage." (XXVIII 1961) Counsel further argued that the victim could have died of natural causes, and that the defendant could have kept her car as a place to live based on an opportunistic urge that arose after her death. (XXVIII 1962, 1966) As to the DNA evidence, counsel argued that given the fact the defendant appeared to have lived in the victim's car for some days, it was unsurprising that a hair of hers, and some skin cells of hers, had transferred from the cloth car seats visible in the photos to the clothing he had scattered around the car. (XXVIII 1970-72)

In its final closing the State dismissed the defense position, arguing that "a momentary rage during a kidnapping, a momentary rage during a robbery is by definition murder in the first degree in this state." (XXVIII 1974) It further argued as follows:

> STATE: Mr. Grossenbacher suggests she could have died of some natural cause. Well, if you want to analyze that for a minute, you can conclude that she died of natural causes. [In a photo of the remains *in situ*], you can just barely see her body under these tires. These are the two pair of [the defendant's] underwear...with their DNA, the numbers were 1 in 2.8 million, inside the

> crotch of one of the two pair of underwear.... Directly north of that particular spot where that DNA was found is his semen.... It's his semen above, towards the fly there, DNA. Her blood inside her trunk.... Under those tires she's wearing a pair of...kneehighs.... That's all she's wearing. She's found 65 miles away from her home with two tires lying on top of her, naked, with her blood in her trunk, and the last phone call she made or attempted to make was to 911. You can conclude she died of natural causes by just some strange, strange coincidence, but the only way to do that, ladies and gentlemen of the jury, is to take this evidence, all of this evidence, and throw it in the trash.

(XXVIII 1984-85)

> STATE: [S]omehow, some way, her DNA and his DNA become mixed on the inside of the crotch of one of those pairs of underwear.... Mr. Grossenbacher would love it if the DNA just floated through the air and just sprinkled all over everything. Then it wouldn't mean anything. In the real world, that DNA is quite significant.

(XXVIIII 1982)

> STATE: Is it a coincidence that she's naked and a mixture of his and her DNA is found on the inside of the crotch of his briefs, just below a semen stain that happens to be his? ...Probably not.

(XXVIII 1990)

> STATE: [I]t's clear from the evidence that [the defendant], after he's won over [the victim's] trust, he took advantage or her, I would suggest to you, in more ways than one.

(XXVIII 1991)

> STATE: Janet Patrick's nightmare...ended...when the defendant pulled her car into the woods...and he walked around to the back, and he opened the trunk, and he lifted her bleeding body out and dragged it across the dirt, and...he took her clothes off that last time in the darkness.... And then he went and got two old tires, threw them on top of her naked body, and then Mr. Williams got back in the car and drove away. Because, you see, his day, at that point, was done. Ladies and gentlemen, for that, there is no defense, and that's why we're here.

(XXVIII 1991-92)

The jury was instructed in accordance with the standard jury instructions for use in criminal cases (XXVIII 1994-2016; IX 1748-80), including the standard instructions on both premeditated first-degree murder and first-degree felony-murder. (XXVIII 1999-2001; IX 1759-60) The jury returned verdicts of guilty as charged on all three counts. (XXVIII 2033; IX 1781-83) As to the murder charge, the verdict specified that the defendant is guilty of first-degree felony-murder. (XXVIII 2033; IX 1783)

MOTIONS PRECEDING PENALTY PHASE

After the guilt-phase verdict, the defense moved to preclude any evidence, any further argument, and even any allusion directed to the possibility that Janet Patrick had been sexually battered. (IX 1785-86) The motion argued both that that

possibility "is not an aggravator," and that any mention of it would be more unfairly prejudicial than probative. (IX 1785-86) In the motion the defense acknowledged the State could prove the defendant's 2000 carjacking conviction, but sought to exclude evidence of a sexual battery committed during that incident on the ground that that proof would be more unfairly prejudicial than probative. (IX 1786) The motion further sought to exclude proof or argument offered in support of the "especially heinous, atrocious or cruel" factor, since the cause of death was unknown and that aggravating factor therefore could not be supported by any proof available to the State. (IX 1784-85)

The court heard argument on the limine motion just before the penalty phase began. (XXVIII 2045-55) The State agreed not to say "heinous," "atrocious," or "cruel" until the court ruled, but asked to introduce proof supporting that aggravator. (XXVIII 2045-46) The defense agreed it would object to any evidence of EHAC it considered improper, and deferred argument about what the State should mention in its closing until after the evidence was in. (XXVIII 2049)

As to evidence of the 2000 sexual battery, the defense acknowledged that this court generally holds the *res gestae* of prior violent felonies can be proved even if discrete felonies are proved in the process, but argued that on the facts of this case any mention of a sexual battery would be excessively prejudicial in light

of the State's closing argument in the guilt phase. (XXVIII 2049-50) The State responded "[w]e have [to] prove that it was a violent carjacking. And...the jury is allowed to evaluate the defendant's character." (XXVIII 2052) The State assured the court "it certainly will not become a feature." (XXVIII 2053) The defense argued that in light of the guilt-phase closing, any evidence of a sexual battery would inevitably become a feature of the penalty phase. (XXVIII 2053) The court denied the motion to the extent it sought to limit proof regarding the circumstances of the prior carjacking. (XXVIII 2054)

At that juncture the defense renewed its pretrial motions directed to the death penalty. (XXVIII 2056) They included a motion precluding death unless the jury unanimously recommends it, and a motion to have each nonstatutory mitigating factor relied on by the defense set out in the jury instructions, rather than referred to collectively in a "catchall" instruction. (I 170-74; II 212-14) The trial court had denied those motions in a hearing held in 2012, and again denied them as the penalty phase began. (XI 2109-10, 2106-07; XXVIII 2056-57)

PENALTY PHASE: EVIDENCE

In its opening statement in the penalty phase, the State outlined the proof it would introduce regarding the 2000 carjacking incident, and told the jury "you will hear those facts because that is something for you to consider when

determining the defendant's character or lack thereof, when determining what is a fair punishment for the murder of an 81-year-old woman." (XXVIII 2065-67)

The State's first witness in the penalty phase, Darla Blackwell, testified that in 2000, when she was 21 years old, a man forced his way into her car, covered her face, and asked if she wanted to live. (XXVIII 2089-92) He told her he had a gun, demanded all the money she had, and ordered her to remove her clothes. (XXVIII 2093-96) She delayed and he removed her pants and underpants, then put his finger inside her. (XXVIII 2097-98) He then put the car in motion; she jumped out half-naked into a rocky area while the car was moving, and took shelter in a nearby church. (XXVIII 2098-99)

Ms. Blackwell identified a photos of her bleeding injuries taken after the incident, and over a defense objection to its inflammatory nature it came into evidence. (XXVIII 2101-05; XXXII 15) She testified that she had approved a plea bargain that called for the defendant to be convicted solely for carjacking, rather than the additional sexual battery and kidnapping he had also been charged with. (XXVIII 2100) The State elaborated on that testimony as follows:

> STATE: And the reason that you agreed to that is because you didn't want to come in here and talk about it?
>
> WITNESS: Yes, sir.

STATE: In the same room with that individual?

WITNESS: Yes, sir.

STATE: Do you see that individual here today?

WITNESS: Yes, sir.

(XXVIII 2101) The judgment entered in the 2000 case came into evidence without objection. (XXVIII 2104-05; XXXIII 240-41) The defense did not cross-examine Ms. Blackwell. (XXVIII 2110)

The State proffered as victim impact evidence a printed poem the victim did not write, but that she carried with her, "to show her uniqueness." (XXVIII 2115) The defense objected, and argued the poem was "just meant for sympathy purposes." (XXVIII 2114-15) The court overruled the objection, and the poem came into evidence after a neighbor and friend of the victim's testified that it had been important to Janet, who carried it in a handbag. (XXVIII 2115-16) A copy of the poem has been made part of the record on appeal; it reads, in part,

> I do not know how long I will live
> But while I live, LORD, let me give
> Some comfort to someone in need,
> By smile or nod, kind word or deed....
> And I'll not care how long I live
> If I can give and give and give.

(XXXII 58)

The State called Jim Vachon, the media liaison for the local Sheriff's Office, who testified that he had listened to the entire statement the defendant made to the press after his arrest; the jury had heard a redacted version of that statement in the guilt phase. (XXVIII 2118; see XX 543, 546-70) As noted above, the defendant told the press at that time that he and the victim were kidnapped together. Mr. Vachon testified that in a portion of the audio, the defendant talked about how the victim had prayed with him and confided in him during their mutual ordeal. (XXVIII 2118-19) The defense objected to any further testimony about the press conference, arguing it "has become abundantly clear that he's retracted those statements and that's not what actually happened." (XXVIII 2120) The State argued the statement was relevant to show the murder was especially heinous, atrocious, or cruel,

> because it does shed light on how she emotionally suffered before she died. Yes, he does blame those things on somebody else, but [the defense] argument goes to the weight the jury gives that evidence, not its admissibility. It's more than a coincidence that he happens to know that she's a Christian, that she's worried about being raped, that she'd never been married, that she's never had kids, that she's worried about her dog, all of those things I would suggest are things she told him at the time he was fixing to kill her.... Sometimes the very best lies have a kernel of truth to it.

(XXVIII 2119-20) The defense argued that aggravating factors must be proved

beyond a reasonable doubt, and that the State was relying on "pure and utter speculation" to establish the EHAC aggravator. (XXVIII 2120-21) The court overruled the objection (XXVIII 2121-22) and Mr. Vachon went on to testify as follows:

> STATE: What did the defendant say with regard to - first of all, where was Ms. Patrick, and what was she and he talking about?
>
> WITNESS: He claimed that they were in the trunk of the car, that he was holding her hand. She was very scared. Said that she had a dog at home that she was very worried about....
>
> STATE: ...Did he say anything about what she might have been worried about?
>
> WITNESS: She was worried quite a bit about her dog...
>
> STATE: Did he say that there was something that he couldn't discuss with the press?
>
> WITNESS: Yes, sir.
>
> STATE: Because it was just too personal, that she was worried about him, the kidnapper, doing something to her?
>
> WITNESS: Yes, sir, that she was - that there was something she was worried was going to happen, but it was too personal for him to discuss with the media.
>
> STATE: Did she tell him, according to Mr. Williams, whether she was married, whether she'd ever had any

children?

WITNESS: That she was not, she had never married and did not have any children.

(XXVIII 2122-23)

For the defense, the defendant's brothers testified to their difficult upbringing with a violent and unpredictable father. (XXIX 2157-2232) The defendant's son R.J., and R.J.'s mother Kay Harvey, testified that the defendant was a good and generous father, provider, and companion. (XXX 2372-89) Dr. Gold again testified, and gave his opinion that the defendant had acted under the influence of extreme mental or emotional disturbance, and that his capacity to conform his conduct to the requirements of law is diminished by his mental-health difficulties. (XXIX 2276-77; see 2265, 2271) Dr. Berns also again testified, and gave his opinion that the defendant has diminished capacity to conform his conduct to the requirements of law, in that his bipolar disorder and brain injuries cause him to have difficulty regulating aggression, impulses, and emotion. (XXX 2321) A third expert, neuropsychologist Dr. Eric Mings, testified similarly to Dr. Berns. (XXX 2329-31, 2351-52) Drs. Berns and Mings recited Dr. Cibula's findings based on her reading of the PET and MRI scans she had ordered. (XXX 2315-19, 2323-25, 2335-39, 2357)

PENALTY PHASE: CLOSINGS, DELIBERATIONS, AND VERDICT

After all the penalty-phase evidence was in, the court ruled there was no basis for the State to argue the EHAC factor. (XXX 2396) As to argument alluding to a sexual battery on Janet Patrick, the State argued "the fact that she was terrorized, and how she was terrorized, is very relevant to the weight they give [the prior violent felony] aggravator, especially since the HAC aggravator is not going to be in front of them." (XXX 2397) The court responded "I rule that there is evidence, that the State can argue the evidence that's been admitted." (XXX 2397) The State argued as follows:

> [One] aggravating factor that the judge will tell you about is that the defendant has been previously convicted of a felony involving the use or threat of violence to a person. You met that person, Darla Blackwell. She was on her way to work when her nightmare began on October the 28th of 2000. I suggest to you, ladies and gentlemen, that the defendant didn't do those things to her because he was mentally ill. He did them [because] he was morally corrupt. You see, this gentleman over here [indicating] wanted to have sex with a cute 21-year-old girl, so he kidnapped her and raped her. He had complete control over her, didn't he? ...Darla Blackwell was so terrified that she was willing, anxious, to jump out of a moving car half naked. Even a year later she was still so terrified that she did not want to testify against the defendant in this same courtroom, and so a plea bargain was struck.... How much does that...aggravating factor weigh? You get to make that call.

(XXX 2418-19)

> The next [aggravator] the judge is going to tell you about is pretty weighty. He's going to tell you that the capital felony was committed while the defendant was engaged in the commission of a kidnapping. By your decision last week, it's pretty obvious that you've already concluded this happened during the commission of a kidnapping. The question is not whether that's been proved, but how much it deserves on your scale.
>
> You know, Mr. Williams over here would have done Janet Patrick a favor if he'd just done what he did there at her house, but he didn't. He had other plans for Ms. Patrick. He wanted to have complete control over her. So he took her 65 miles, at night, to facilitate the crimes that he really wanted to commit, and at the same time to terrorize her. Didn't he?

(XXX 2420)

> DEFENSE [at sidebar]: He's arguing EHAC through this kidnapping.
>
> STATE: Precisely, that's precisely what I'm allowed to do. Those are the facts that the jury has heard.
>
> DEFENSE: During the commission of a felony this murder occurred. It's been proven. It's time to move on. I don't believe he is allowed to go into basically every element of EHAC through this one...Your Honor said that that wasn't proven and it cannot be argued.
>
> STATE: I thought you'd already ruled that I could talk about the facts and how they establish the weight of this aggravating factor.

(XXX 2421)

> THE COURT: ...I'm going to sustain the objection. Let's move on to, like I said, just the facts - not, you know, that "obviously the incident rises to the level of sexual battery," because it would have been charged if it had. You have the facts but we don't know that these facts were sufficient enough to lead to sexual battery.

(XXX 2422)

> STATE: I'm not talking about the sexual battery, I think you've made it clear I can't. I am going to talk about how he terrorized her. Certainly that's appropriate. Obviously I think part of the component of her terror was the fact that she was worried about being sexually battered. The evidence is before the jury that she said that's what she was worried about.
>
> THE COURT: ...That's what the defendant said in his statement.
>
> STATE: Yes, sir. As long as I can confine it to the evidence, am I okay?
>
> THE COURT: Yes.

(XXX 2423-24) The State went on as follows:

> The lady was alarmed enough at her home to try to dial 911. Imagine the helplessness that she must have felt when that call wasn't completed.... As she was backing out it was starting to get dark. By now the defendant had complete control over her.

(XXX 2424)

> Remember Mohammed Amer, the DNA expert. It's a shame that he and his colleagues at the Florida Department of Law Enforcement lab don't have an instrument that can measure the helplessness that any woman, any woman of any age would feel in that circumstance, because those numbers would be astronomical.
>
> And it would be really cool if Dr. Mings had a test to measure the fear that any woman of any age would feel in that darkened car that night. Ladies and gentlemen, that score would be off the chart.
>
> What else did Janet Patrick tell the defendant? Well, she was worried that something too personal for him to discuss was about to happen to her. Do you think that panic was starting to set in then? Me too.
>
> ...If you conclude that this aggravator, "during the course of a kidnapping," has been established, I suggest you try to lift it. You can't.

(XXX 2426)

> You'll recall the Publix video...you can see this little person, stooped over in a plaid blouse, and you can see how clearly she never had a chance.

(XXX 2427)

> Ladies and gentlemen, I'm here to tell you that our system of justice does work because of people who have the courage of their convictions, who are willing to do the right thing, even when it's not the easy thing.... Now justice is in your hands.

(XXX 2428) The State had also argued in closing that

> [O]nly if you all return the appropriate recommendation to Judge Nacke can he sentence the defendant to the sentence he so justly deserves.

(XXX 2404)

Defense counsel in his closing argued the expert testimony supported both mental-health-related statutory mitigating factors, and listed and relied on 24 non-statutory mitigating factors. He argued that the jury could do justice by following the law, considering those mitigators, and exercising mercy. (XXX 2447-50)

The court instructed the jury in accordance with the standard jury instructions. (XXX 2451-60; X 1822-28) The statutory aggravating circumstances covered in the instructions were that the defendant was on felony probation; that he had been convicted of a prior felony involving the use or threat of violence, and that "carjacking is a felony involving the use or threat of violence;" that the capital felony had been committed while the defendant was engaged in committing a kidnapping; that it was committed for financial gain; and that its victim was particularly vulnerable due to advanced age. (XXX 2453-54; X 1824-25) The court also instructed on the two mental-health-related statutory mitigating factors, and on the "catchall" additional mitigating factor, "any other factors in the defendant's character, background, or life or the circumstances of the offense that

would mitigate against the imposition of the death penalty." (XXX 2455-56; X 1826)

Neither party objected to the verdict forms. The "advisory sentence" form called for the jury to record either a life recommendation or else a death recommendation "by a vote of ___ to ___." (X 1829) A second form set out each of the aggravating factors the judge had instructed on, and called for the jurors to record as to "all appropriate" that "a majority of the jury, by a vote of ___ to ___, finds the following aggravating circumstance has been established beyond a reasonable doubt." (X 1830) A third form set out each of the mitigating factors instructed on, and called for the jury to record as to "all appropriate" that "a majority of the jury, by a vote of ___ to ___, finds the following mitigating circumstance has been established by the greater weight of the evidence." (X 1831)

During deliberations, the jury foreman asked, regarding the mitigation form, "do we only fill out a line if it's a majority?" (XXX 2463) With the parties' agreement, the court answered "that's correct." (XXX 2463-64) The jury ultimately recommended a death sentence by a 9-3 vote. (X 1829) It found each of the aggravating factors instructed on were present, "financial gain" by a 9-3 vote and the others by a 12-0 vote. (X 1830) Nothing was checked on the "mitigating

factors" form, which was signed and dated by the foreman. (X 1831)

SPENCER HEARING, SENTENCING ORDER, AND THIS COURT'S JURISDICTION

At the Spencer hearing, the defendant gave a statement in which he repeated his earlier explanation that he had not intentionally caused harm to the victim, and that she died at 5:30 on Monday, October 18, in her car. (XVI 3102-03)

In its sentencing memorandum, the State argued as follows:

> All Darla Blackwood wanted to do that Saturday morning was to go to work. All Mr. Williams wanted to do was to kidnap and rape a 21-year-old girl. He told her he had a gun, then he physically overpowered her, struck her in the face, sexually violated her and terrorized her to the point where she willingly jumped out of her moving car half-naked. Mr. Williams did ten years in prison, and learned nothing. Darla Blackwell's testimony was compelling. This factor must weigh heavily against the defendant.

(X 1860)

> By Mr. Williams's own admission, Janet Patrick was terrorized during her last hours. She was injured, as the blood in her trunk makes clear.... [She] told Mr. Williams she was worried that something very personal was about to happen to her, something too personal for Mr. Williams to tell to the press.... Somehow Miss Patrick's DNA ended up mixed in with the defendant's on the inside of the crotch of his underwear, and semen was located on the inside of that same garment. By anyone's definition, Janet Patrick was terrorized during her kidnapping. This factor should weigh heavily against the defendant.

(X 1860-61)

In its sentencing memo, the defense argued that the aggravating factor "in the course of a kidnapping" should not be given great weight, since the same factor underlies his conviction for felony-murder. (X 1891-92)

In its sentencing order, the court noted that Dr. Wolf had testified "to a reasonable degree of medical certainty" that the victim's death had a been a homicide after "reviewing the circumstances and the scene where her body was found." (X 1916) The court gave great weight to the fact the defendant was on felony probation at the time Ms. Patrick died, great weight to the victim's vulnerability, and some weight to the fact she appeared to have been killed for her car and other possessions. (X 1918-21) The court also gave great weight to the defendant's prior violent felony, noting that Darla Blackwell was sexually assaulted and was reluctant to testify. (X 1918) The court also gave great weight to the fifth aggravating factor, that the death took place in the course of a kidnapping. (X 1919-20) In finding that factor present, the court took note of the mix of DNA found on the inside crotch of the defendant's jeans and in his underwear. (X 1920)

The judge found the defense proved, by the greater weight of the evidence, that Appellant's ability to conform his conduct to the requirements of law was substantially impaired, but that no other statutory mitigation had been proved. (X

1921-30) The judge found the following nonstatutory mitigation: the defendant behaved well in the courtroom (slight weight), he abused drugs and alcohol from an early age (some weight), he would be a model prisoner (some weight), (X 1930-39) he suffered physical and emotional abuse as a child (some weight), he was involved in a serious collision which changed him (little weight), his father was an abusive alcoholic (some weight), his father abused his mother in his presence (some weight), he suffered head injuries whose consequences were not made clear by the proof (some weight), he was a good father (slight weight), he was a good companion to the mother of his child (slight weight), he was a hard worker (slight weight), and he helped others (some weight). (X 1930-39)

The judge concluded the aggravating circumstances far outweigh the mitigating circumstances, and on February 28, 2014 he sentenced Mr. Williams to death. (X 1940; XVI 3157) The defendant was adjudicated guilty on all counts, and sentenced to life for the kidnapping and to fifteen consecutive years in prison for the robbery. (XVI 3155-57; IX 1788; X 1946-55) The sentencing guidelines scoresheet prepared by Mr. Gross lists no prior misdemeanor convictions. (X 1942-43) Timely notice of appeal was filed from the orders of judgment and sentence on March 28, 2014. (X 1959)

SUMMARY OF ARGUMENTS

Point one. Adequate time to prepare a defense is inherent in due process, as well as in the right to counsel. Those rights were denied when the court refused counsel an adequate continuance after he was reappointed midtrial, and this court should reverse the judgments appealed from and remand for a new trial on all counts.

Point two. Dr. Wolf's testimony invaded the province of the jury on an ultimate question, and dealt with matters beyond her medical expertise. The State was unable to prove the cause of the victim's death, and it is not clear from the record that a verdict of guilty of murder could have been obtained without the doctor's opinion testimony; the State therefore fundamentally erred in relying on it. The verdict on the murder count was thoroughly tainted by the fundamental error, and this court should reverse and remand for a new trial on that count.

Point three. The jury heard, during the guilt phase, that the defendant spent eight years in prison, and further heard that he has an unspecified, but extensive, criminal past. This court holds that such assertions create a risk that the jury will give undue weight to that information in recommending death; Appellant's sentence should therefore be reversed. A new guilt phase should also be ordered as to all counts, since the State cannot show beyond a reasonable doubt that the

presumption of harm created by such disclosures was overcome.

Point four. The prosecutor, in arguing to the jurors below, promised them early on that if the case proceeded to a penalty phase, it would then present "additional evidence... possibly going to additional factors in the crime itself...things that you may not be allowed to hear in the first phase of the trial." Later he conjectured that an uncharged sexual battery took place, praised jurors who "do the right thing, even when it's not the easy thing," evoked the victim's final moments in a touching manner, and suggested that the jury's duty was to provide "justice for a little old lady." The combined effect of those appeals to emotion amounted to fundamental error that affected both phases of the trial.

Point five. The repeated suggestion in the penalty phase that the defendant sexually humiliated the victim rested only on proof of a recanted statement and proof of the circumstances of a prior violent felony; the latter was introduced over objection. On the facts of this case, introducing the specter of sexual battery was not only more unfairly prejudicial than probative, but also amounted to an aggravating factor that was not instructed on and was supported only by innuendo. This court should remand for a new penalty phase.

Point six. The defense unsuccessfully sought a penalty-phase instruction which would have set out each of the mitigating circumstances listed by the

defense. Special jury instructions are constitutionally necessary when a jury cannot otherwise give meaningful effect to mitigating evidence. The instruction sought by the defense, and a verdict form that comprehensibly reflected that instruction, should have been provided so that the jurors could set out what mitigation they believed was present, and what strength they believed that evidence had.

Point seven. The State may introduce victim impact evidence only if it "demonstrate[s] the victim's uniqueness as an individual human being and the resultant loss to the community's members." The poem that was introduced below as victim impact evidence demonstrated neither, and constituted part of the State's effort to obtain a verdict on emotional grounds. Combined with the rest of that effort, admission of the poem amounted to a violation of due process.

Point eight. In this felony-murder case, the aggravating factor "in the course of committing an enumerated felony" was given great weight. Here, also, the court gave great weight to both the "convicted of a prior violent felony" aggravator, and the factor that the defendant was on probation for the same felony. Appellant urges this court to reconsider whether its caselaw appropriately narrows the field of persons eligible for the death penalty.

Point nine. The United States Supreme Court has not to date clarified how Ring v. Arizona, 536 U.S. 584 (2002), should be applied to Florida's sentencing

scheme. Appellant acknowledges that this court has rejected this argument, but urges this court to remand for a new penalty phase where the jury is instructed that any recommendation it makes of a death sentence must be unanimous.

ARGUMENT

POINT ONE

DENYING AN ADEQUATE CONTINUANCE WHEN COUNSEL WAS REAPPOINTED MIDWAY THROUGH THE GUILT PHASE DEPRIVED THE APPELLANT OF THE RIGHTS TO COUNSEL AND DUE PROCESS.

Standard of review. Granting or denying a motion to continue is within the trial court's discretion. Wike v. State, 596 So. 2d 1020, 1025 (Fla. 1992).

Argument. When the Office of the Public Defender was reappointed on the second Wednesday of the guilt phase, the elected public defender sought a continuance, noting that since Mr. Williams had subpoenaed the Assistant Public Defenders assigned to the case as witnesses, no-one from the office had been in the courtroom for the previous six days' testimony. The court granted the motion, but only until the following Monday, and ordered court personnel to provide counsel with audio recordings of the proceedings to date. Two days later, on Friday, the attorney assigned to handle the guilt phase unsuccessfully sought additional time, since he was having difficulties with the audio recordings and would not be able to hear all the tapes in the time allotted. On Monday, counsel again sought additional time, specifying that he had not been able to hear the DNA analyst's testimony. The motion was denied, and the trial went forward.

The court abused its discretion in denying counsel sufficient time to familiarize himself with the State's case in chief. In Wike, this court reversed when the trial court denied counsel a week's recess between the guilt and penalty phases to allow a key witness to recover from illness, and to allow counsel to interview a second potentially significant witness who had just been located. 596 So. 2d at 1024-25. This court noted that the continuance counsel sought had been "for a short period of time and for a particular purpose." Id. at 1025. Here, counsel reasonably sought enough time to review what had gone on during the guilt phase before launching into closing argument in a first-degree murder case with the death penalty on the table, and the court abused its discretion by instead going forward. Prejudice ensued: in its final closing, the State relied on the DNA analyst's testimony to support its theory that the defendant had sexually battered the 81-year-old victim, and defense counsel - who had not heard that witness's testimony - did not object that the evidence in no way supported the inference.

"It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." Powell v. Alabama, 287 U.S. 45, 59 (1932). The right to counsel, guaranteed by the federal and Florida constitutions, is denied by "an unreasoning and arbitrary insistence upon

expeditiousness in the face of a justifiable request for delay." See United States v. Sellers, 645 F. 3rd 830, 834 (7th Cir. 2011). Adequate time to prepare a defense is inherent in due process, as well as in the right to counsel. E.g., Taylor v. State, 958 So. 2d 1069 (Fla. 4th DCA 2007). Those rights were denied when the court refused counsel an adequate continuance, and this court should reverse the judgements appealed from and remand for a new trial on all counts.

POINT TWO

THE STATE'S RELIANCE ON OPINION TESTIMONY OUTSIDE THE SCOPE OF THE MEDICAL EXAMINER'S EXPERTISE AMOUNTED TO FUNDAMENTAL ERROR AND TO DENIAL OF DUE PROCESS OF LAW.

Standard of review. Fundamental errors are those which reach down into the validity of the trial itself, to the extent that a verdict of guilty could not have been obtained without the assistance of the error. E.g., Jaimes v. State, 51 So. 3rd 445, 448 (Fla. 2010). In other words, the fundamental error doctrine applies when an error affects the proceedings to such an extent that it amounts to a denial of due process. Id.

Argument. This court should reverse the murder conviction and remand for a new trial on that count, on the ground that the State's reliance on the medical examiner's opinion testimony amounted to fundamental error. Dr. Wolf conceded that because the victim's remains were so meager by the time she saw them, she could not discern the cause of death. Her additional views - that the defendant's statements were inconsistent with accidental death, and that she was confident homicidal violence had taken place - amounted to nothing more than a foray into armchair detection. The doctor conceded that those opinions were based solely on how the body was disposed of, the fact traces of the victim's blood were found in

the trunk of her car, and the defendant's explanation of events. Where, as here, an expert's opinion "is...not arrived at by a recognized methodology, it should not be admitted." Daniels v. State, 4 So. 3rd 745, 748 (Fla. 2d DCA 2009). See Mt. Sinai Medical Center of Greater Miami, Inc. v. Gonzalez, 98 So. 3rd 1198, 1202 (Fla. 3rd DCA 2012), *cert. den.*, 115 So. 3rd 1000 (Fla. 2013), where the court rejected expert testimony which was "not only well beyond the witness's...expertise but totally conclusory in nature [and] unsupported by any discernible, factually-based chain of underlying reasoning."

When a pathologist testifies beyond the scope of his or her professional expertise, or based on speculation and conjecture, the courts hold that that testimony does not amount to competent proof. In Wright v. State, 348 So. 2d 26 (Fla. 1st DCA), *cert. den.*, 353 So. 2d 679 (Fla. 1977), the defendant was charged with, and convicted of, premeditated murder after he buried his wife with a bulldozer on the family farm. There were no witnesses to the incident, and the defendant claimed the burial was accidental. 348 So. 2d at 27, 31. The only proof offered to show premeditation was the medical examiner's testimony that some of the victim's injuries must have pre-existed her contact with the bulldozer, because the pattern of injury was inconsistent with the defendant's version of events and inconsistent with the doctor's understanding of how pressure from the treads

would have been dispersed. Id. at 27, 29-31. Although no objection was made to the doctor's testimony, the DCA reversed Wright's conviction, holding that the testimony was beyond the scope of medical expertise.

In Hawkins v. State, 933 So. 2d 1186 (Fla. 4th DCA 2006), *rev. dism.,* 950 So. 2d 414 (Fla. 2007). Vera Lawrence died within hours after receiving cosmetic silicone injections, and Hawkins, who had given the shots, was charged with unauthorized practice of medicine causing death. Dr. Price, the pathologist who conducted the autopsy, testified that Vera died of a silicone embolism; over objection, she testified that the injections Vera had just received, although they were made into fatty tissue rather than blood vessels, could have migrated into her bloodstream and caused her death. 933 So. 2d at 1187-88. A defense expert testified that Vera's death had instead been caused by previous injections. Id. at 1189. Dr. Price admitted that she had never handled a case that involved silicone emboli before, that she did not know how - or how fast - silicone travels through the body, and that she did not consult professional literature on the subject before testifying. Id. at 1188. The DCA held her testimony was inadmissible, since it exceeded the scope of her medical expertise. Since inadmissible testimony was the only proof that tended to show causation, the DCA reversed and remanded for a new trial where that testimony would be excluded. 933 So. 2d at 1190-91.

In Fisher v. State, 361 So. 2d 203 (Fla. 1st DCA 1978), the defendant and her husband were charged with a stabbing murder, and he testified against her. The medical examiner, over objection, testified that the knife wounds were more characteristic of those made by a woman than those made by a man; later he admitted that testimony was not based on any scientific method. 361 So. 2d at 204. The DCA reversed Mrs. Fisher's third-degree murder conviction because the witness was not qualified to express the opinion, and because there were no facts adduced to support the opinion. Id.

Here, as in Wright, Hawkins, and Fisher, the expert's opinion testimony was inadmissible and unfairly prejudicial. Here the State was unable to show the cause of death, and its counsel plugged the gap with Dr. Wolf's criminological views. His strong reliance on the opinion testimony indicates he believed a verdict could not be obtained without it: in his opening, he told the jurors they would hear that "one thing the experts are certain of is this, what happened to Janet Patrick is homicide." In closing, he reminded them that Dr. Wolf is "quite confident that this, in fact, is homicide." In Wright, *supra*, the DCA reversed after noting that counsel for the State, in his opening, told the jurors the only witnesses they needed to listen to were the medical examiner and the defendant. Wright v. State, 348 So. 2d at 27.

Dr. Wolf's testimony also invaded the province of the jury on the ultimate question for the jury's determination. In Ruth v. State, 610 So. 2d 9 (Fla. 2d DCA 1992), the DCA reversed a conviction for maintaining an airplane used for keeping or selling drugs, because the State, in the absence of any proof showing the defendant actually transported drugs, relied on the testimony of a customs agent whom the court qualified as an expert in air smuggling. The agent, over objection, testified "I believe the [defendant's] aircraft was used and was set up to smuggle narcotics." 610 So. 2d at 10-11. The DCA reversed Ruth's conviction because the opinion testimony was "purely speculation," and because that testimony "directed the trier of fact to arrive at a conclusion which it should be free to determine independently from the facts presented." Id. at 11-12. Here, similarly, Dr. Wolf's opinion testimony was not only speculative, but invaded the province of the jury on the ultimate question for its determination. See Gurganus v. State, 451 So. 2d 817 (Fla. 1984), where this court held the trial court correctly ruled defense psychologists could not testify that the defendant's actions reflected a depraved mind rather than premeditation, because the degree of murder involved in the case was "an issue to be determined solely within the province of the jury." 451 So. 2d at 821-22.

Where the government relies on opinion testimony that invades the province

of the jury on an ultimate question, that reliance violates the federally-protected right to due process of law. In Picazo v. Alameida, 90 Fed. Appx. 512 (9th Cir. 2004) a deputy qualified by the court as a gang expert testified he believed the defendant intended to kill, and believed he intended to benefit his gang by doing so; the court reversed Picazo's conviction where that testimony "likely...had a substantial and injurious effect on the jury's verdict." 90 Fed. Appx. at 513-15. Since it is not clear in this case that a verdict of guilty of murder could have been obtained without the doctor's opinion testimony, the State fundamentally erred in relying on it. That verdict was thoroughly tainted by the fundamental error, and this court should reverse the murder conviction and remand for a new trial on that count.

POINT THREE

THE DEFENSE MOTIONS FOR MISTRIAL SHOULD HAVE BEEN GRANTED AFTER A STATE WITNESS TESTIFIED THE DEFENDANT HAS "A LENGTHY CRIMINAL HISTORY." THE EVIDENCE AMOUNTED TO A NON-STATUTORY AGGRAVATING FACTOR, AND RESULTED IN A DENIAL OF DUE PROCESS AT BOTH STAGES OF TRIAL.

Standard of review. This Court reviews a ruling on a motion for mistrial under an abuse of discretion standard. Salazar v. State, 991 So. 2d 364, 371 (Fla. 2008), *cert. den.*, 555 U.S. 1187 (2009).

Argument. On three occasions during the State's rebuttal case, defense counsel moved for a mistrial. The court abused its discretion in denying the motions; what the jury heard about Appellant's past was presumptively prejudicial, and the State cannot show beyond a reasonable doubt that what they heard did not have an effect on the verdicts in both phases of the trial.

The defense first moved for a mistrial in response to a jail employee's testimony that the defendant has a "lengthy criminal history." As the defense correctly argued at the time, the statement is *not even true*; the sentencing guidelines scoresheet prepared by the prosecutor showed the defendant has one prior conviction. Before introducing evidence of prior crimes, the State must show by clear and convincing evidence that the defendant actually committed them.

McLean v. State, 934 So. 2d 1248, 1256 (Fla. 2006).

Even if it had shown the defendant *did* have a significant criminal record, the State would not have been entitled to rely on that fact. In Geralds v. State, 601 So. 2d 1157 (Fla. 1992), this court remanded for a new penalty phase where the State gratuitously announced the defendant had eight prior felony convictions. This court held that "vague and unverified information regarding...prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury," further noting that "the entire line of questioning should never have occurred." 601 So. 2d at 1162-63. Accord Jones v. State, 128 So. 3rd 199, 201 (Fla. 1st DCA 2013) ("drastic remedy" of mistrial should have been granted after multiple references in murder trial to defendant's prior convictions and prison stays); Brooks v. State, 868 So. 2d 643 (Fla. 2d DCA 2004) (mistrial should have been granted where State witness referred to defendant's prior prison stays); Cornatezer v. State, 736 So. 2d 1217 (Fla. 5th DCA 1999) (mistrial should have been granted where police officer referred to defendant's convicted-felon status).

Here the second motion for mistrial was made after a second jail employee, while being questioned about documents that detailed the defendant's eight-year stay in an unnamed custodial facility, named that location as the Department of Corrections. The third motion was made after the State, while questioning the same

witness on the same topic, referred to the defendant's status during that time as that of "inmate." In response to those motions the State argued, and the court agreed, that any error was harmless because during the defense case, one of the defendant's family members had blurted out that the defendant had one occasion gone to prison. However, the jury, by the time the second and third motions were made, knew the defendant had spent eight years in prison, and had reason to believe he had had extensive further unspecified contacts with the criminal justice system; as defense counsel argued below, the sheer quantity of improper material before the jury had at that point become significant. See generally McDuffie v. State, 970 So. 2d 312, 328-29 (Fla. 2007) (cumulative effect of errors was such as to deny defendant a fair and impartial trial.)

Here, as in Geralds, *supra*, the entire line of inquiry that yielded the improper information never should have been pursued. Acknowledging that it was venturing onto thin ice, the State in argument to the court announced it was establishing a pattern, on the defendant's part, of falsely claiming mental illness then abandoning the charade after conviction. However, the State never made any showing that the defendant had relied on a mental-health-related defense in his previous felony case.

After denying the first motion for mistrial, the court instructed the jury to disregard the witness's last response; however, the last question and answer the

jury had heard did not involve the objected-to subject matter. After denying the second motion, the court gave the same instruction. After the court denied the third motion, the defense declined any further curative instructions, and counsel for the State announced he understood "if the defense doesn't want the bell re-rung." The curative instructions that were given below were inadequate to control the damage, and further similar instructions would not have done so either. This court has held that counsel does not waive review when he concludes that a curative instruction would place undue emphasis on inadmissible material, thereby causing more harm. Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994). As this court also holds, where the State tells the jury the defendant is a career felon, an instruction to disregard that fact is "of dubious value," since the bell indeed cannot be "unrung." Geralds v. State, *supra*, 601 So. 2d at 1162. Accord Jones v. State, *supra*, 128 So. 3rd at 200 (reversing where counsel rejected curative instruction, which he likened to "putting the fire out with gasoline"); Malcolm v. State, 415 So. 2d 891 n.1 (Fla. 3rd DCA 1982) (instructions to disregard disclosure of prior felonies are "of legendary ineffectiveness.")

The record shows the requested mistrial was needed to ensure Appellant would eventually receive a fair trial in this case. See Salazar v. State, *supra*, 991 So. 2d at 372. Here, as in Parle v. Runnels, 505 F. 3rd 922 (9th Cir. 2007), multiple

evidentiary errors considered together "so infected the trial with unfairness as to make the resulting conviction a denial of due process." 505 F. 3rd at 927. Accord Walker v. Engle, 703 F. 2d 959 (6th Cir.), *cert. den.*, 464 U.S. 951 (1983). Erroneous admission of evidence that a defendant has a criminal past is presumptively harmful, Castro v. State, 547 So. 2d 111, 115 (Fla. 1989), and the State cannot meet its burden of showing the "lengthy criminal history" testimony was harmless as to the verdicts reached in the guilt phase. See McDuffie v. State, *supra*, 970 So. 2d at 328. This court should therefore reverse the convictions appealed from.

If that relief is not ordered, this court should reverse the sentence and remand for a new penalty phase, because an unverified assertion that the defendant is a career felon of unspecified type "creates the risk that the jury will give undue weight to such information in recommending the penalty of death." Geralds v. State, *supra,* 601 So. 2d at 1163, *citing* Maggard v. State, 399 So. 2d 973 (Fla.), *cert. den.*, 454 U.S. 1059 (1981). Such testimony amounts to inadmissible evidence of a non-statutory aggravating circumstance. Geralds at 1162, *citing* Maggard at 977-78.

POINT FOUR

PROSECUTORIAL OVERREACH IN BOTH PHASES AMOUNTED TO FUNDAMENTAL ERROR, AND AMOUNTED TO A DENIAL OF THE RIGHT TO DUE PROCESS OF LAW.

Standard of review. As noted above, fundamental errors are those which reach down into the validity of the trial itself, to the extent that a verdict of guilty could not have been obtained without the assistance of the error. Jaimes v. State, 51 So. 3rd 445, 448 (Fla. 2010). For a prosecutor's comments to warrant a new trial, they "must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." Salazar v. State, 991 So. 2d 364, 372 (Fla. 2008), *cert. den.*, 555 U.S. 1187 (2009).

Argument. During the guilt phase, counsel for the State strongly suggested to the jury that the defendant committed an uncharged sexual battery; made other appeals to emotion; and promised that during the penalty phase, he would introduce proof regarding the crime itself that the jury had not previously heard. In the penalty phase, he argued for the death sentence "the defendant...so justly deserves," and explained the system only works when jurors "have the courage of their

convictions" and "are willing to do the right thing, even when it's not the easy thing." Those acts of prosecutorial overreaching, taken together, deprived Appellant of the fair trial and fair penalty proceeding guaranteed to him by the Florida and federal constitutions.

In its final closing argument in the guilt phase, the State noted three times that hairs and skin cells traceable to the victim were found on the defendant's underwear, which police had found on the back seat of her car, and that traces of the defendant's semen were found on the same garment. On the third such occasion, the State rhetorically asked "[i]s it a coincidence that she's naked and a mixture of his and her DNA is found...just below a semen stain? ...Probably not." Abandoning innuendo, the State concluded that the defendant "took advantage of [the victim] in more way than one." Since the State's DNA analyst had readily admitted on cross-examination that skin cells and hairs readily transfer from one kind of cloth to another, and that he was unsurprised to find a trace of semen in a pair of briefs a man had worn, the State's conjecture that an uncharged sexual battery took place was altogether unsupported by the evidence.

In Huff v. State, 437 So. 2d 1087 (Fla. 1983), this court reversed the conviction in a capital case where the State, in its final closing, suggested that the defendant was guilty of an uncharged forgery which would have supplied a motive

for the charged murder. Citing Glassman v. State, 377 So. 2d 208 (Fla. 3rd DCA 1979), this court held that "the state attorney is prohibited from commenting on matters unsupported by the evidence." Huff, 437 So. 2d at 1090. In Glassman, the court wrote that

> no defendant can get a fair trial when the state's representative in the courtroom, based on no evidence, accuses the defendant before the jury of crimes for which he is not on trial. The jury is bound to be inflamed against the defendant, placing its trust as it should on the word of the state's officer in the courtroom. The jury is bound to conclude that there is other evidence of which the prosecutor is aware which shows that the defendant is guilty of other crimes. As such, the ensuing verdict is bound to rest on highly incriminating alleged 'facts' which are not a part of the record.

377 So. 2d 208 at 211. See also Gleason v. State, 591 So. 2d 278 (Fla. 5th DCA 1991) (reversing where prosecutor suggested defendant might have done away with a witness) and Jackson v. State, 690 So. 2d 714 (Fla. 4th DCA 1997) (reversing where prosecutor suggested defendant charged with possessing cocaine was probably dealing the substance). "Unsubstantiated statements [referring to uncharged] crimes...are particularly condemned by the Florida courts." Ryan v. State, 457 So. 2d 1084, 1090 (Fla. 4th DCA 1984), *rev. den.*, 462 So. 2d 1108 (Fla. 1985) (reversing on fundamental-error basis); accord Ford v. State, 50 So. 3rd 799, 800 (Fla. 2d DCA 2011)(reversing). Here, as in Huff, the statements were made

during the State's final closing, when the defense would have no opportunity to refute them. 437 So. 2d at 1091.

During voir dire of the sole panel the jury was chosen from, a venire member guaranteed he would give the case his full attention because the defendant's life would hang in the balance; the prosecutor responded "as well as justice for a little old lady." Asking for justice for the victim, or her survivors, is condemned by the courts as "unfair, intemperate, and unethical." Edwards v. State, 428 So. 2d 357, 359 (Fla. 3rd DCA 1983); accord Crew v. State, 146 So. 3rd 101, 110 (Fla. 5th DCA 2014).

Also during voir dire, the State promised the jury that if the case proceeded to a penalty phase, it would then present "additional evidence...possibly going to additional factors in the crime itself...things that you may not be allowed to hear in the first phase of the trial." In Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993), the court reversed a second-degree murder conviction where the State had sought the death penalty, and where the prosecutor told the guilt-phase jury that in the penalty phase "we'll get into more of the proof, the discussion of why he actually did it." 622 So. 2d at 56. The court in Stewart held that the suggestion the State had more proof it could have adduced amounted to "egregious" error, reversing on that ground and on other grounds. Id. Accord Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999)

(improper to suggest that evidence not presented provides additional grounds supporting guilty verdict); Landry v. State, 620 So. 2d 1099, 1102 (Fla. 4th DCA 1993) ("there are few errors which could fundamentally affect a jury verdict in a criminal trial more than...argument tantamount to 'trust me, there's more evidence here but I can't get it in.'")

During its closing in the guilt phase, the State described the victim's body as having been "tossed like trash in the brush." Returning to that theme in its final closing, the State elaborated "Janet Patrick's nightmare...ended...when the defendant...opened the trunk, and he lifted her bleeding body out and dragged it across the dirt, and..he took her clothes off that last time in the darkness." Such "embellishment" of the victim's final moments "without factual support in the record [is] an appeal to the emotions of the jurors. Such conduct is clearly prohibited." McDonald v. State, 743 So. 2d 501, 505 n.9 (Fla. 1999). "When comments in closing argument are intended to and do inject elements of emotion...into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988).

In the penalty phase, the State praised jurors who "have the courage of their convictions" and "do the right thing, even when it's not the easy thing." Removing any ambiguity, it further argued "only if you all return the appropriate

recommendation to Judge Nacke can he [impose on] the defendant the sentence he so justly deserves." As this court noted in Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998), characterizing a vote for a life sentence as "tak[ing] the easy way out" improperly suggests that such a vote would irresponsibly violate the juror's oath. Accord Ferrell v. State, 29 So. 3rd 959, 987 (Fla. 2010) (counsel prejudicially ineffective when he failed to object to similar "clearly impermissible" argument); Brooks v. State, 762 So. 2d 879, 903-04 (Fla. 2000) (remanding for a new penalty phase where improper arguments included "you may want to take the easy way out.")

The State's comments, taken together, deprived the defendant of an impartial trial, and may well have influenced the jury to reach a more severe verdict than it would have otherwise. In Delhall v. State, 95 So. 3d 134, 169 (Fla. 2012) this court remanded for a new penalty phase based on cumulative impermissible arguments, which included the suggestion that the defendant committed an uncharged crime, holding that such conduct "is especially egregious in a death case where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects." Id. Counsel for the State has "a duty to seek justice, not merely win a death recommendation." Delhall at 170. "His case must rest on evidence, not innuendo. If his case is a sound one, his evidence is enough. If

it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client." Peterson v. State, 376 So. 2d 1230, 1235 (Fla. 4th DCA 1979), *cert. den.*, 386 So. 2d 642 (Fla. 1980).

Here, as in Hanna v. Price, 245 Fed. Appx. 538 (6th Cir. 2007), repeated improper remarks in a murder trial amounted to both fundamental error and a violation of due process. See also Crew v. State, 146 So. 3rd 101, 110-11 (Fla. 5th DCA 2014) (improper closing, including appeal for justice for the victim, amounted to fundamental error); Caraballo v. State, 762 So. 2d 542 (Fla. 5th DCA 2000) (improper closing, including suggestion there was proof the State was precluded from introducing, amounted to fundamental error); Landry v. State, 620 So. 2d 1099, 1101-02 (Fla. 4th DCA 1993) (same as Caraballo); DeFreitas v. State, 701 So. 2d 593 (Fla. 4th DCA 1997) (improper closing, including suggestion defendant committed an uncharged offense, amounted to fundamental error). Combined with the evidentiary error argued above at Point Three, the improper argument denied Appellant a fair trial at both stages of the proceedings below.

POINT FIVE

SEXUAL BATTERY, A CRIME UNCHARGED AND UNPROVED IN THIS CASE, BECAME A CENTRAL FEATURE OF THE PENALTY PHASE OVER OBJECTION.

Standard of review. This court reviews rulings admitting evidence, and allowing argument, in the penalty phase for abuse of discretion. Delhall v. State, 95 So. 3d 134, 166 (Fla. 2012); Franklin v. State, 965 So. 2d 79, 96 (Fla. 2007).

Argument. As noted above, after the guilt-phase verdict the defense moved to preclude any argument, or suggestion, that Janet Patrick was sexually battered. The defense further sought to exclude proof of the circumstances of the 2000 carjacking, arguing that any mention of a sexual battery would be excessively prejudicial in light of the State's closing argument in the guilt phase. The court declined to limit proof of the circumstances of the prior carjacking. After the penalty-phase evidence was in, the court ruled there was no basis for the State to argue the EHAC factor, and that as to the motion to preclude allusions to a sexual battery on Janet Patrick, "the State can argue the evidence that's been admitted."

In its penalty-phase closing the State argued the defendant in 2000 had "had complete control over" Darla Blackwell, and that ten years later he "wanted to have complete control over" Janet Patrick "to facilitate the crimes that he really wanted

to commit." The court sustained a defense objection on the basis that the State had not charged a sexual battery in the murder case. The prosecutor asked whether he could still argue Ms. Patrick had *feared* a rape, and the court ruled that he could, since that argument was supported by the statement the defendant gave the press on being arrested. The State closed with the thoughts that Janet Patrick had told the jury, through the defendant, that she feared something too personal to discuss was about to happen, and that any woman of any age in her situation would have suffered fear and helplessness beyond measure.

The trial court abused its discretion when it allowed the State to prove the details of the 2000 carjacking, in light of the unwarranted suggestion of forced sexual acts the State had made in its guilt phase closing. Details of a prior violent felony may not become "a central feature of the penalty phase." Braddy v. State, 111 So. 3rd 810, 858 (Fla. 2012), *cert. den.*, 134 S. Ct. 275 (2013), *citing* Franklin v. State, 965 So. 2d 79, 96 (Fla. 2007). Here, as in Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989), what the jury heard "did not directly relate to the crime for which [the defendant] was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by [him.]" Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989). In Rhodes, as here, that testimony was "irrelevant and highly prejudicial." Id. Finney v. State, 660 So.

2d 674 (Fla. 1995), *cert. den.*, 516 U.S. 1096 (1996), and Duncan v. State, 619 So. 2d 279 (Fla.), *cert. den.*, 510 U.S. 969 (1993), are distinguishable; in those cases this court held that admission of unnecessarily detailed proof of the collateral victims' injuries and trauma was harmless where that proof was not ultimately made a focal point of the proceedings. 660 So. 2d at 683-84; 619 So. 2d at 282. Here, in contrast, Darla Blackwell's traumatizing experience was brought front and center as a vehicle for arguing that Janet Patrick, just like Darla, was brought under the defendant's "complete control" so that he could commit "the crimes that he really wanted to commit."

The court further abused its discretion in ruling that the State could rely on a statement the defendant repudiated both before and during trial to establish the victim had expressed fear of being sexually battered. After the defendant expressly foreswore reliance on his post-arrest statement during his guilt-phase opening, the State, through its rebuttal witness Dr. Ava Land, again established the defendant had admitted the statement was untrue. "Statements repudiated at trial may not be used as substantive evidence that the act occurred." L.E.W. v. State, 616 So. 2d 613 (Fla. 5th DCA 1993).

The State may rely on the victim's presumed terror in cases where it can reasonably argue the EHAC aggravator is present. Salazar v. State, 991 So. 2d 364,

337-78 (Fla. 2008), *cert. den.,* 555 U.S. 1187 (2009); Fennie v. State, 855 So. 2d 597, 609-10 and n.15 (Fla. 2003), *cert. den.*, 541 U.S. 975 (2004). Here the State argued that *because the EHAC factor was not present*, it should be allowed to argue to the jury that the victim was presumably terrified of being sexually battered. The repeated suggestion that the defendant may have sexually humiliated an 81-year-old maiden lady rested only on proof of a recanted statement and proof of the circumstances of a prior violent felony. On the facts of this case, as the defense argued below, introducing the specter of sexual battery was not only more unfairly prejudicial than probative, but also amounted to an aggravating factor that was not instructed on and was supported only by innuendo. This court should reverse for a new penalty phase.

POINT SIX

THE JURY INSTRUCTION AND VERDICT FORM SET OUT NON-STATUTORY MITIGATION AS A SINGLE "CATCHALL" FACTOR.

Standard of review. This court reviews *de novo* the question whether a special jury instruction should have been given. Rockmore v. State, 140 So. 3rd 979, 983-84 (Fla. 2014).

Argument. The defense unsuccessfully sought a penalty-phase instruction which would have set out "each of the mitigating circumstances listed by the defense." The instructions given below instead contained the "catchall" reference to non-statutory mitigation that appears in the standard jury instructions, as amended by this court in 2009. The verdict form used below contained interrogatories regarding the aggravating and mitigating factors proposed by the parties and approved by the court for argument. The interrogatory as to non-statutory mitigation read as follows:

> A majority of the jury, by a vote of ___ to ___, finds the following mitigating circumstance has been established by the greater weight of the evidence:
>
> The existence of other factors in the defendant's character, background, or life, or the circumstances of the offense, that would mitigate against the imposition of the death penalty.

During deliberations the jurors asked, with regard to that verdict form, "do we only fill out a line if it's a majority?" The court, with the parties' agreement, answered "that's correct." The foreman signed and dated the mitigation verdict form, which had no boxes checked. The jury found that five aggravating factors applied, specifically finding four of them by a 12-0 vote, then recommended death by a 9-3 vote. The court imposed a death sentence, finding one statutory mitigating factor was present but assigning it no particular weight, and finding twelve non-statutory mitigating factors, giving each "little," "slight," or "some" weight.

The jury was generally instructed that "The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor." While it is clear that at least three of the jurors understood that instruction, it also affirmatively appears that the jurors were confused by the verdict form dedicated to mitigation. The paragraphs quoted above are ambiguous: they could be read to require a majority to agree that *some nonstatutory mitigation* was present, or else to require a majority to agree *that a specific mitigating fact* was present.

In 2009, when the penalty-phase instructions were last amended, three Justices of this court specially concurred, writing that an opportunity to clarify the

instructions and verdict forms that set out aggravating and mitigating factors had been missed. In that concurring opinion, those Justices quoted a sentencing order written by Judge O.H. Eaton with approval. In that sentencing order, the judge deplored the facts that

> [t]he jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote. This places the Court in the position of not knowing which aggravating and mitigating circumstances the jury considered to be proven and provides little, if any, guidance in determining a sentence.

In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17, 26 (Fla. 2009) (Pariente, J., specially concurring). The instructions and verdict form used in this case provided the trial court *no* guidance as to mitigation.

In Huggins v. State, 889 So. 2d 743 (Fla. 2004), *cert. den.*, 545 U.S. 1107 (2005), two dissenting Justices praised the interrogatories used in that case, which contained the following:

> ___ members of the jury find that [specific circumstance] is a mitigating factor.
>
> ___ members of the jury do not find that [specific circumstance] is a mitigating factor.

889 So. 2d at 777 (Pariente, J., dissenting). That verdict form, which reflects the instruction sought in this case, suffers from no ambiguity.

The eighth and fourteenth amendments to the federal constitution are violated when the defendant's evidence is placed before the jury, but the jury has no reliable means of giving mitigating effect to that evidence. Abdul-Kabir v. Quarterman, 550 U.S. 233, 260 (2007), *citing* Lockett v. Ohio, 438 U.S. 586 (1978). Special jury instructions are necessary when a jury could not otherwise give meaningful effect to a defendant's mitigating evidence. Abdul-Kabir at 253, n.14. The instruction sought by the defense, and a verdict form that comprehensibly reflected that instruction, should have been provided so that the jurors could communicate to the court their views on what mitigating evidence they believed to be present, and what strength they believed that evidence had.

POINT SEVEN

THE COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE WHICH SHOWED NEITHER THE VICTIM'S UNIQUENESS NOR LOSS TO THE COMMUNITY.

Standard of review. A trial court's decision to admit victim impact testimony is reviewed for abuse of discretion. Kalisz v. State, 124 So. 3d 185, 211 (Fla. 2013), *cert. den.*, 134 S. Ct. 1547 (2014).

Argument. As a matter of constitutional law, the State may introduce victim impact evidence which is relevant to the jury's life-or-death recommendation. See Kalisz, *supra,* at 211. In Florida, by statute, such evidence is only admissible if it "demonstrate[s] the victim's uniqueness as an individual human being and the resultant loss to the community's members." Id., *citing* Section 921.141(7), Fla. Stat. The poem that was introduced in this case, over a defense objection, as victim impact evidence demonstrated neither; it appears to have been cut or copied from the pages of a magazine devoted to spiritual uplift. The subject matter and tone are fully conveyed by this excerpt:

> I do not know how long I will live
> But while I live, LORD, let me give
> Some comfort to someone in need,
> By smile or nod, kind word or deed....
> And I'll not care how long I live
> If I can give and give and give.

Where victim impact evidence is excessively prejudicial, its admission can result in a violation of the right to due process of law. Wheeler v. State, 4 So. 3rd 599, 608 (Fla.), *cert. den.*, 558 U.S. 866 (2009). The poem admitted in evidence does not fit the parameters set out in Section 921.141(7); its admission was accordingly error. Combined with the other less-than-subtle nudges toward emotional decision-making that were made during the penalty phase below, its admission amounts to a violation of due process, and this court should order a new penalty phase.

POINT EIGHT

THE AGGRAVATING FACTORS IN THIS CASE FAIL TO NARROW THE FIELD OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Standard of review. Review of a purely legal question is *de novo.* Jackson v. State, 64 So. 3rd 90, 92 (Fla. 2011).

Argument. The United States Supreme Court holds that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, 462 U.S. 862, 874 (1983)**.** A capital sentencing scheme "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries." Id. at 866-87. Aggravating circumstances must therefore "genuinely narrow the class of persons eligible for the death penalty." Id. at 877.

Appellant acknowledges that this court has rejected the argument that the aggravator "in the course of committing a[n enumerated] felony," when applied in a case where the conviction was reached solely on a felony-murder theory, fails to narrow the class of eligible persons. E.g., Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997). Appellant further acknowledges this court has rejected the argument that the

"convicted of a prior violent felony" aggravator, when combined with the additional factor that the defendant is on probation for the same felony, similarly fails to narrow the field. E.g., Squires v. State, 450 So. 2d 208, 212 (Fla.), *cert. den.*, 469 U.S. 892 (1984). In this case, both situations are present.

The jury and court both found five aggravating factors in this case: the defendant had a prior violent felony conviction, he was on felony probation, the murder was committed in the course of a kidnapping, it was committed for pecuniary gain, and the victim was exceptionally vulnerable. The trial court assigned pecuniary gain "some weight," and each of the other factors "great weight." This court regularly refers to the "prior violent felony," "on probation," and "in the course of a felony" aggravators as warranting great weight in its proportionality analysis. See, e.g., Silvia v. State, 60 So. 3rd 959, 974 (Fla. 2011) (prior violent felony); Bailey v. State, 998 So. 2d 545, 551 (Fla. 2008), *cert. den*., 129 S. Ct. 2395 (2009) (on felony probation); Walker v. State, 957 So. 2d 560, 585 (Fla. 2007) (in the course of a felony). Giving each of those factors great weight in this felony-murder case reflects a body of caselaw that does not genuinely narrow the class of persons eligible for the death penalty, in contravention of the rule announced in Zant v. Stephens, *supra*. Appellant urges this court to remand for reweighing of the aggravating and mitigating factors in light of the concerns

expressed above.

POINT NINE

THE TRIAL COURT ERRED IN DENYING RELIEF BASED ON RING v. ARIZONA.

Standard of review. Review of a purely legal question is *de novo.* Jackson v. State, 64 So. 3rd 90, 92 (Fla. 2011).

Argument. Appellant acknowledges this court's rule that where, as here, the aggravating factor of a prior violent felony conviction is present, the defendant is entitled to no relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). E.g., Martin v. State, 107 So. 3rd 281, 322 (Fla. 2012), *cert. den.*, 133 S. Ct. 2832 (2013). The same is true as to the aggravating factors "on felony probation" and "committed in the course of a felony." Martin; Belcher v. State, 961 So. 2d 239, 253 (Fla. 2007), *cert. den.*, 552 U.S. 1026 (2007). Appellant also acknowledges that this court rejects the argument that Ring requires a death recommendation to be unanimous. E.g., Coday v. State, 946 So. 2d 988, 1006 (Fla. 2006), *cert. den.,* 551 U.S. 1106 (2007). The United States Supreme Court has not to date clarified how Ring should be applied to Florida's sentencing scheme. Appellant urges this court to reverse the order appealed from, and to remand for a new penalty phase where the jury is instructed that any recommendation of a death sentence it makes must be unanimous.

CONCLUSION

Appellant has shown that this court should reverse the orders of judgment and sentence appealed from, and remand for a new guilt-phase trial on all counts, on the bases argued as Points One, Three, and Four above.

If that relief is denied, this court should reverse the murder conviction and remand for a new guilt-phase trial on that count, on the basis argued on Point Two above.

If that relief is denied, this court should vacate the sentence imposed below and remand for a new penalty phase, on the grounds argued on Points Three through Seven and Nine above.

If that relief is denied, this court should vacate the sentence and remand for reweighing of the aggravating and mitigating factors on the basis urged on Point Eight above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, capapp@myfloridalegal.com, and campbell.leslie@myfloridalegal.com and mailed to Donald Otis Williams, DOC #U13479, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1000, on this 31st day of October, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

Nancy Ryan