IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-698

ANTHONY WELCH

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

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STATEMENT OF THE CASE

Rufus Johnson, 69, and Kyoko Johnson, 66, were found murdered in their residence on December 19, 2000. (V1, R122)[1] Investigative documents showed that the last known contact with the Johnsons was December 14, 2000, at approximately 8:00 p.m. when Nancy Johnson spoke to Kyoko on the phone. (V1, R122). When Rufus and Kyoko did not answer subsequent calls, Melvin and Nancy Johnson, Teresa and Dennis Askins went to the home in Melbourne where they found the bodies. (V1, R122).

During the autopsy, the medical examiner found a handwritten note in Kyoko's front shirt pocket. The note stated:

> Don't think that this is a joke. My employer paid me 5000.00 dollars to take your life. Now I don't want to kill you Jon. I owe you for tring [sic] to save my brothers life. For that I'll spare your life, but only if you do what I say exactly as I say it. First, you need to go to your bank and close your account and get cash "no check." Know one other thing my employer will have another employee then at your bank. Please Jon don't talk to any cops or give any hints to the bank tellers. If I get a call on my cell phone from my employer your wife will die because of you. You will have one hour to do this. (Try to be happy like you got a 2nd chance at life.) When you get back I'll tell what you have to do so that my employer will think you are dead.

(V5, R704).

[1] Cites to the record are by volume number followed by page number. Cites to the pleadings and hearings are "R," and cites to the penalty phase are "P." Cites to the supplemental record are "SR" and to the second supplemental record are "2ndSR."

Following the lead of the note, investigators discovered that Ricky Welch committed suicide in 1995 at the residence next door to the Johnsons. (V1, R122). Anthony Welch came home to find his brother. Rufus went to help Anthony perform CPR. (V1, R122). During the crime scene investigation on December 19, 2000, Agent Terry Laufenberg recovered a latent fingerprint from the lid of a toilet at the victims' residence. Agent Casey identified the fingerprint as the right thumb print of Anthony Welch. (V1, R122). Detectives next learned that Welch pawned a 25-inch RCA television in Melbourne at Paradise Pawn on December 15. (V1, R123).

Welch was arrested on December 21, 2000, at 7:15 a.m. (V1, R112). He signed a waiver of rights form at 1:46 p.m. that same day (V5, R703; State Exh. 1) after which he confessed to killing the Johnsons and stealing property from the residence. (V1, R123). Welch told the deputies that more stolen items could be found in his apartment, and a search warrant issued. (V1, R123, 124). Seized from the apartment were an RCA video recorder, Sharp microwave oven, and Sony Trinitron, two remote controls, a handwritten note, a roll of duct tape, a long-sleeve white "No Fear" t-shirt, a red ball cap, a black t-shirt, a Paradise Pawn ticket, blood-stained tissues, clothing, and lint from the clothes dryer. (V1, R126-128).

Welch's 1991 silver Chevrolet truck was searched pursuant to a search warrant. (V1, R131). Inside the truck were found four oriental swords. Two swords measured 2 feet, 3½ inches; one measured 1 foot, 11½ inches; and the fourth measured 3 feet 6 inches. (V1, R138). A second search warrant was issued for the truck, and various bags, clothing, and a cordless phone seized. (V1, R149).

Welch was indicted January 9, 2001 on charges of:

(1) First Degree Premeditated Murder (Rufus Johnson);
(2) First Degree Premeditated Murder (Kyoko Johnson);
(3) Robbery with a Deadly Weapon;
(4) Dealing in Stolen Property; and
(5) Grand Theft Motor Vehicle.

(V1, 151-153).

Trial was scheduled to begin on November 7, 2005. Before jury selection, defense counsel advised the judge Welch wanted to enter a plea. (V6, P48). Two weeks earlier, on October 25, 2005, Welch had filed an Offer to Enter Plea of Guilty as Charged. The offer was made in exchange for consecutive life sentences. (V5 R534-35). Welch pled guilty to two counts of first degree murder, robbery with a deadly weapon, dealing in stolen property, and grand theft of a motor vehicle. (V7, R73-80). The trial judge conducted a plea colloquy, and Welch signed the plea agreement form. (V7, R73-85; V3, 551-52).

Welch filed multiple pre-trial motions *in limine* and motions regarding the constitutionality of the death penalty.

(V2, R391-400; V3, R401-460). The motions were heard on October 4, 2004. (V1, R1-70; V3, R522-24).

Welch filed a motion to suppress statements or admissions. (V3, R494-95). After a lengthy hearing, the trial judge held that Welch was in custody at the time sheriffs officers stopped the vehicle in which he was a passenger. (V3, R529). The trial judge found that the reason the vehicle was stopped was so the sheriff's agents could bring Welch in for questioning. (V3, R529). Because *Miranda* warnings were not given at the time of the traffic stop, any statements made on the way to the police station were inadmissible. (V3, R530).

The trial judge next found that Welch was in custody at the police station, but because he was read his *Miranda* warnings before the interview and agreed to speak with law enforcement, any statements were admissible up to the time Welch said he no longer wanted to speak to the police. (V3, R530). The trial judge found the officers stopped questioning Welch after he said he no longer wanted to talk.

As to the second interview at the police station, the court found that Welch again waived his right to remain silent and voluntarily submitted to further interrogation. (V3, R530). The trial court found that Welch at no time requested an attorney, that Welch reinitiated further communication with law enforcement by asking Agent Harrell what was going to happen

now, and that no further questioning took place until after Welch was re-advised of his *Miranda* rights. (V3, R531-32).

After Welch pled, the parties discussed whether to start the penalty phase immediately, and decided to begin jury selection that day, November 7, 2005. (V7, P90). During jury selection, there were numerous challenges to jurors. The defense requested an additional peremptory challenge in order to strike juror Fontaine after a cause challenge to juror Trevillian was denied. (V14, P1045-46. The court initially denied the request, but later granted the request. (V14, P1046, 1048; V15, P1208-09).

During the State's opening statement, Welch objected when the State told the jury that the male victim, Rufus Johnson, had heart by-pass surgery, claiming the statement was non-statutory aggravation. The court overruled the objection. (V16, P1236, 1237).

Welch moved for a mistrial when Nancy Johnson stated December 14, 2000, was "her birthday." Welch had filed a motion *in limine* stating that December 14, 2000, the day of Kyoko Johnson's death, should not be referenced as her birthday. (V17, P1342). After the witness referred to Kyoko's birthday, the court ruled that the State did not elicit the testimony in violation of the order granting the motion *in limine.* The court denied the motion for mistrial. (V17, P1348).

The parties entered into seven stipulations:

(1) That Welch pawned an RCA color television and boat motor at Paradise Pawn, and that Welch had stolen the property from the Johnsons (V4, 606-607);

(2) That a golf club/putter was found in a pond near Welch's apartment, that there were chemical indications of the possible presence of blood on the putter head, and that attempts to extract DNA were unsuccessful (V4, 608-09);

(3) That a handwritten note was examined by an FBI handwriting expert who determined Welch wrote the note, and that an FBI fingerprint expert determined that 21 fingerprints on the note were identified as Welch's (V4, 610);

(4) That Welch wore clothing on December 14, 2000, which was subsequently seized from his apartment and tested for DNA, that a sample from the black T-shirt matched the DNA profile of Rufus Johnson, and that the DNA profile from a white tank top could not exclude Rufus Johnson, Kyoko Johnson, or Welch (V3, R616-17);

(5) That four decorative oriental-type swords, a black wood display stand, and a cordless phone were seized from Welch's 1991 grey pick up, and that these items were unlawfully removed from the Johnson residence (V4, R618-19);

(6) That a VCR, microwave, television, remote control, and black lacquer display rack were seized from Welch's apartment, and that these items were unlawfully removed from the Johnson residence (V4, R620-21);

(7) That records and photos of the Brevard Sheriff's investigation into the suicide of Ricky Welch were true and accurate copies (V4, R622).

On November 21, 2005, the jury unanimously recommended a sentence of death for each of the two murders. (V4, R644, 645).

Spencer Hearing. At the *Spencer* hearing held January 6, 2006, Cleveland Johnson, Nissa Askins, Mara Arvin, and Nancy Johnson presented testimony or read statements regarding victim impact. (2nd SR). Defense counsel had prepared a sentencing memorandum, and asked to rely on that and the arguments from trial. (2nd SR 502).

Sentencing took place March 7, 2006 (V1, R71-109). Welch was sentenced to death for each of the two murders. The trial judge entered a comprehensive sentencing order finding as to both Kyoko and Rufus Johnson:

> Aggravating Circumstances
>
> (a) Prior violent felony (contemporaneous murder) – great weight;
>
> (b) Committed during a robbery – great weight;
>
> (c) Heinous, atrocious and cruel – great weight;
>
> Statutory Mitigating Circumstances
>
> (a) Extreme mental or emotional disturbance – little weight;
>
> (b) Unable to appreciation criminality or substantially impaired - little weight;
>
> (c) Age – some weight.
>
> Non-statutory Mitigating Circumstances
>
> (a) Alcohol and drug abuse - little weight;
>
> (b) Suicides of brother and uncle – some weight;
>
> (c) Post Traumatic Stress Syndrome - some weight;

(d) Bipolar disorder - some weight;

(e) Received no psychological treatment - little weight;

(f) Neuro-psychological abnormalities, including abnormal brain scan - little weight;

(g) Dissociative symptoms - little weight;

(h) Mental, emotional and abstract reasoning age of 15 years - little weight in addition to that already given under “statutory mitigation” category;

(i) Admitted guilt and pled guilty – very little weight.

(V4, R666-680).

STATEMENT OF THE FACTS

On the morning of December 14, 2000, Robert Pruett, a neighbor of Rufus and Kyoko Johnson, saw a young blond man walk in front of his driveway, cross the road, and walk into the Johnsons’ home. (V16, P1279, 1283, 1284). There was no indication the man was impaired by alcohol or drugs, or was disoriented in any manner. (V16, P1282, 1283). The young man emerged from the Johnsons’ home twenty minutes later and stood in the driveway. (V16, P1285, 1286). The Johnsons’ garage door opened, and the man got into Kyoko’s car. (V16, P1286). Kyoko drove a gray Camry and always parked in the garage. (V16, P1276). Rufus drove a red pickup and always parked in the driveway. (V16, P1275).

Pruett did not see the young man again, nor did he see the Johnsons or their car again. That week, Pruett noticed newspapers piling up at the Johnsons' house. (V16, P1287). He collected the newspapers and the Johnsons' garbage cans and deposited them by their garage. (V16, P1288). Pruett never entered the Johnsons' home. (V16, P1292). Pruett and Rufus were friends and had both undergone heart by-pass surgery. They both had veins removed from their legs for the surgery. (V16, P1273).

Dennis and Teresa Askins lived in Orange County. Teresa is the Johnsons' daughter. (V16, P1293). Dennis spent a lot of time with Rufus and was aware the latter had a 24-inch scar on his leg as a result of heart by-pass surgery. (V16, P1292-93, 1296). The Askins spoke to the Johnsons on the phone and visited them at least every other month. (V16, P1296-97). Nancy Johnson and her husband, Melvin, the youngest son of the Johnsons, saw Rufus and Kyoko every few months and spoke with them frequently. (V17, P1339-40). On December 14, 2000, Nancy spoke with Kyoko at 6:00 p.m. (V17, P1341-42). Nancy did not attempt to contact her in-laws over the next few days. The Askins could not reach the Johnsons after December 14, 2000. (V17, P1297).

On December 18 around midnight, Dennis and Teresa Askins, together with Melvin and Nancy Johnson, went to Rufus and Kyoko's home. (V16, P1298; V17, P1357, 1361). Mr. Johnson's truck was in the driveway. (V16, P1302). They could not see

through the windows because of hurricane shutters, but they found the front door open. (V16, P1300-01). Teresa and Nancy went in, but did not go any further than a few steps. (V17, P1361). They called to Dennis and Melvin and left. (V17, P1362). The first thing Dennis noticed when he entered was a spot on the tile that looked like blood. (V16, P1305-06).

The two men found Kyoko's body in the master bedroom. (V16, P1307). Her feet were on the ground, and her body was lying across the bed. (V16, P1308). Dennis could not recognize her. (V16, P1308). The two men exited the home and called 911. Law enforcement arrived shortly thereafter. (V16, P1311).

The men noticed the television missing from the entertainment center, and two pair of swords missing from racks. (V16, P1316-17). After Welch was arrested, Dennis identified items that belonged to the Johnsons, including a VCR, two television sets, an outboard motor, the ornamental swords, and a microwave. (V16, P1316-17). Rufus was an avid golfer and owned quality-brand clubs, including a Big Bertha and an Odyssey putter. (V16, P1319-20). Rufus had golf clubs inside his home so he could putt golf balls. (V16, P1321).

Dennis had known Anthony Welch as one of the Johnsons' neighbors. Dennis knew about the brother's suicide and that Rufus tried to help. (V16, P1318).

Terry Laufenberg, Brevard County Sheriff's Office (BCSO) Crime Scene Agent, was the lead investigator. (V17, P1368). He responded to the scene at 12:45 a.m. on December 19. (V17, P1371). Sgt. Armstrong videotaped the crime scene, and Laufenberg walked behind him taking notes. (V17, P1373). Laufenberg diagramed the interior of the home and location of the bodies. (V17, P1376; State Exh. 1-3). Kyoko was on the bed in the master bedroom, and Rufus was on the floor in front of the family room couch. (V17, P1376). Laufenberg located spots of blood and a "Chemlawn" receipt dated December 15, 2000, in the foyer area. (V17, P1387, 1389). The bathroom was processed for evidence. (V17, P1389). The toilet lid was raised, and there was urine in it. (V17, P1389). Laufenberg lifted a fingerprint from the toilet lid. (V18, P1459). It was later determined the latent fingerprint lifted from the toilet belonged to Welch. (V18, P1459-60; State Exh. 31). There were bloodstains in the sink. (V17, P1391).

Agent Laufenberg noticed golf clubs in the home, but did not remember their location. He observed a *Florida Today* newspaper dated December 14, 2000, in the master bedroom near the bed. (V17, P1394). He found Kyoko's wallet with her identification.[2] (V17, P1394).

[2] The State moved to enter Kyoko Johnson's driver's license into evidence (State Exh. 5). Initially, Welch did not object. (V17,

Rufus' wrists appeared to have been bound.[3] (V17, P1397, 1404). Transfer stains on the couch showed Rufus' body moved from the couch to the floor. (V17, P1407). There was impact spatter on the right side of the couch. (V17, P1407). Agent Laufenberg collected a gold tooth found on the family room floor near Mr. Johnson's head. (V18, P1464-66; State Exh. 38). Nancy identified State's Exhibit EF as a gold-capped tooth that belonged to Rufus Johnson. (V17, R1367-68). Agent Laufenberg collected pieces of shoestrings (State Exh. 39) that were found below the collar of Rufus' shirt. (V18, P1468, 1470).

Kyoko's face indicated trauma and there was bruising on her arms. There was a significant amount of blood stain on and around Kyoko. (V17, P1416). In addition, there was impact blood staining on the headboard, bedroom walls, chest of drawers, south side of the bed, and the ceiling. (V17, P1419-20). There was a void in the staining on her ankles as if an object had been removed from her ankles after the blood staining. (V17, P1416-17, State Exh. 8, 9, 10).

R1395). However, Welch renewed his earlier motion for mistrial because the driver's license showed Kyoko Johnson's birthday. The court withdrew the driver's license from evidence and denied the motion for mistrial. (V17, R1396).

[3] Welch objected to photographs of the victims being entered as exhibits. (V17, R1397-1415). The court sustained the objection to State's T and U as cumulative. (V17, R1401). State Exhibits 3, 5, 6, 7, 8, 9, 10, 11, 12 were admitted. (V17, R1402, 1414-16).

A knife was missing from a wood butcher block in the kitchen. (V17, R1427, State Exh. 16). Laufenberg retrieved duct tape and electrical tape from the garage. (V17, R1429). There were boxes for a Lucent cordless phone in the closet. (V18, P1455). A Lucent cordless phone was found in Welch's truck. (V18, P1457). Four swords were also found in the truck and sent to FDLE for processing. (V17, P1438-39).

Heather Bartczak lived with Anthony Welch and her boyfriend, Joie Estevez. The three were very good friends and shared the rent. (V18, P1475-76, 1479-80). Welch was not able to pay his portion of the November rent. (V18, P1480). Heather confronted him about not paying his share (V18, P1480-81). On the evening of December 14, 2000, Welch brought a television and a microwave that Bartczak has not seen before into the apartment. (V18, P1481-83).

Bartczak and Estevez used cocaine[4] but Welch declined on four or five occasions when they offered it to him. (V18, P1502-03). Welch did, however, smoke marijuana and drank alcohol. He may have taken Ecstasy, too. (V18, P1504, 1511-13). Bartczak never felt uncomfortable or unsafe around Welch. (V18, P1513).

[4] Heather had several felony drug possession, possession of drug paraphernalia, and manufacture of methamphetamine charges pending against her. (V18, P1505, 1506). Some of the charges were in Osceola County and some in Brevard County. Heather did not change her testimony in exchange for a plea deal. (V18, P1580).

Lisa Hedley and Welch had a movie date at 9:00 p.m. on December 14, 2000, but Welch never showed up. (V18, P1515-17). At 11:30 that evening, Welch called Hedley and told her he had been in a car accident. (V18, P1519-20). He asked to meet her later, and they met at 12:30 a.m. at a local Wal-Mart. Welch was "very pale. He was sweating and shaking, trembling." He said it was because of the accident. (V18, P1521-22). Welch was wearing a white tank top and jeans. There were no bloodstains on his clothing. (V18, P1522). He told Hedley he thought two people involved in the other car involved in the "accident" might have gotten hurt. (V18, P1520, 1522). Welch did not appear to be under the influence of drugs or alcohol. (V18, P1523). Hedley never observed Welch use drugs or alcohol, nor did she observe any bizarre behavior. (V18, P1523).

Lisa and Welch spent an hour together, making "small talk." (V18, P1523-24). Before she went home, they walked over to his truck, a "red one," that Welch said he used for work. (V18, P1524). Lisa did not know the Johnsons. She did not know why anyone would call her from their house the evening of December 14, 2000. (V18, P1527). Subsequent to the December 15 early morning meeting, Welch and Hedley saw each other every day until his arrest a week and a half later. (V18, P1516, 1529). During one date, Lisa saw two Samurai swords on the seat of Welch's silver truck. (V18, P15-30). She thought the swords were longer

than the ones admitted into evidence. They were curved and maroon in color. (V18, P1530-31). Welch told Hedley he had owned the swords for quite some time. (V18, P1532).

Dr. Sajid Quasir, medical examiner, performed the autopsies on Rufus and Kyoko. (V18, P1535-36, 1539). He first observed the bodies at the crime scene the afternoon of December 19. Rufus displayed multiple injuries, including large, gaping lacerations to the face and head and multiple incised wounds to the face, and front and back of the head. His body and clothing were covered in blood. (V18, P1541-42). Kyoko's clothing was also soaked with blood. She exhibited multiple lacerations, gaping cut wounds or incised wounds to the face and neck and multiple contusions to the extremities. (V18, P1541).

Dr. Quasir found a handwritten note in the pocket of Kyoko's blouse and gave it to Virginia Casey. (V18, P1544-46). After Kyoko's body was washed, Dr. Quasir noted signs of compressions to the neck with internal wounds. (V18, P1566).[5] Her larynx was fractured. (V18, P1567). This indicates strangulation. There were blows and incised wounds to the face, and deep incised wounds to the neck. There were wounds on her

[5] Defense counsel objected to autopsy photos of Kyoko. (V18, P1549-50). The judge examined each photo, after which some were withdrawn. (V18, P1440-62). As each photo was offered, defense counsel renewed the objection. (V18, P1564). State Exhibits 45-60 were admitted. (V18, P1564).

palms, back of her hands, forearms, arms, ankles, feet and shins. (V18, P1566). In Dr. Quasir's opinion, Kyoko was alive when all her wounds were inflicted as the wounds showed "sign[s] of vital reaction." (V18, P1569). The multiple incised wounds to the face were made when Kyoko was alive. (V18, P1575). The wounds to the extremities were indicative of defensive wounds. (V18, P1572, 1577). The gaping slash wound on the neck cut all the way through to the larynx. (V18, P1470). It did not cut the carotid artery or other major vessel. (V18, P1470). There were seven contusions to the hands and arms, five to the ankle or foot, and multiple bruises on the legs and shins.[6] (V18, P1473). Cause of death was blunt and sharp force injuries with strangulation. (V18, P1589).

Dr. Quasir conducted the autopsy on Rufus Johnson. (V19, P1624).[7] Mr. Johnson's body had multiple contusions,

[6] Dr. Quasir described each injury, using the photographs. State Exhibit 47 showed the large gaping wound to the forehead. (V18, P1581). The wound was caused by a sharp instrument such as a knife or sword. The photo also showed a deep incised wound close to the eye. (V18, P1481-82). There was a deeply incised wound to the upper lip. (V18, P1582). Exhibit 48 photo showed cuts to the face by a sharp instrument and abraded contusions to the cheek. (V18, P1584). Exhibit 53 showed bruising to the arm and hand. (V18, P1585). Exhibit 54 showed injuries to the right side of the head and ear. (V18, P1486). Exhibit 55 showed the wound to the throat area. (V18, P1586). Exhibit 60 showed the clutched right hand. (V18, P1588), Exhibit 59 was duct tape removed from Kyoko's hand. (V18, P1589).

[7] Defense counsel objected to autopsy photos of Rufus Johnson (V19, P1601). The trial judge examined each photo, and allowed

lacerations, and incisions to the body as well as fractured bones. There were lacerations, gaping wounds, and multiple incisions to the face and skin, which included the nose, cheeks, eyes, ear, and back of the head. The injuries to the face were caused by a blunt, heavy or solid object. The cuts on the face could have been caused by a sharp instrument. (V19, P1629). Mr. Johnson's wrists had ligature marks, possibly caused by a shoelace or string less than a 1/4 inch in width. A shoelace, embedded in Mr. Johnson's neck, was also attached to his shirt. (V19, P1631). There were four separate deep incised wounds on Johnson's neck caused by "a very severe force." (V19, P1632). A number of wounds could have caused unconsciousness and then could have been fatal. (V19, P1667, 1670). Cause of death was multiple blunt and sharp force injuries. (V19, P1649).

There were so many wounds to the victims, it would have taken several minutes to inflict them. (V19, P1650). By "several minutes" Dr. Quasir meant "seven minutes, 15 minutes, 20

State Exhibits 61-71. (V19, P1602-13, 1626). Exhibit 71 showed the left side of Rufus' head with deep incised wounds made by a sharp object. (V19, P1637). Exhibit 70 showed eleven piercing wounds to the face, eyelids, forehead and chin. (V19, P1638-39). Exhibit 67 showed cut wounds behind the ear. (V19, P1642). Exhibit 40 indicated the shoestring around the neck. (V19, P1643). Exhibit 63 shows the front of the shirt with three cuts through it. (V19, P1644-45). These cuts may have corresponded to throat wounds and could be defensive wounds. (V19, P1646). Rufus may have assumed a defensive posture by dropping his chin to keep his throat from being cut. The shirt was cut in the process. (V19, P1647-49).

minutes, 30 minutes, even beyond that." (V19, P1677). Most of the wounds to both victims "came before the death." (V19, P16652). The victims could have been conscious, semi-conscious, or "concussion." (V19, P1662). If the person were dead, the wounds would not appear like the wounds to Kyoko and Rufus. (V19, P1664). Dr. Quasir did not "grossly" notice anything on Kyoko's body to indicate her ankles were bound. (V19, P1667, 1672). Decomposition had set in and the body was covered with blood. (V19, P1672).

Agent Debbie Demers, BCSO, is an expert in blood stain pattern analysis. (V20, P1690, 1691). She arrived at the scene at 8:35 a.m. on December 19 and examined the crime scene for blood stain patterns. (V20, P1694-95). There was blood flow in a drip pattern on the seat and pillow on the couch where Rufus's body was located. (V20, P1697). Rufus sustained several blows while he was seated on the couch before he slid onto the floor. (V20, P1701). The perpetrator was standing to the side of Rufus when he was hit. (V19, P1704). Swipe patterns on the couch indicated Rufus slid down or was pulled down from the couch. (V20, P1697, 1699). After his body slid down into a prone position, multiple forceful blows were administered to Rufus. There were impact spatter patterns of blood at least ten feet from the body. (V20, P1698).

Kyoko's body was located in the master bedroom. The blood stains had not been disturbed. (V20, P1704-05). The blood stains came from her head, neck and face area. There was a "spilling and splashing" on top of her thighs with the flow pattern going in a downward position, which indicated she was sitting up when hit. (V20, P1707, 1709). The major wounds to Kyoko were on her neck area. There was a large volume of blood on her chest. The blood had a downward flow pattern which fell on her legs and calves. (V20, P1708-09). A castoff pattern on a chest of drawers located near Kyoko indicated she was in a seated position when she was hit from the side. (V20, P1713). There was a void of blood on her left ankle (and a slight void on her right) but a large accumulation of blood was in the lower portion of her legs as well as her feet. (V20, P1709, 1717). The void of blood indicated something was lying across Kyoko's ankles. Agent Demers said duct tape was "the right circumference and the linear line of this void is consistent with that." (V20, P1710). At some point, Kyoko's body was "laid back" on the bed. (V20, P1712). A second impact spatter pattern indicated Kyoko was hit in a swinging pattern while in a prone position with her head on the mattress. (V20, P1713, 1714). Agent Demers tested for fingerprints on Kyoko's ankles. Other than a visual test, she did not perform any tests to check for adhesive markings. (V20, P1718, 1719).

Agent Virginia Casey, BCSO crime scene investigator and latent print examiner, compared unknown latent prints recovered from the Johnsons' home with known prints of Welch. (V20, P1721, 1725). Agent Casey also processed Kyoko's car which was located in the garage. (V20, P1726). A latent print from the passenger side window matched Welch. (V20, P1727). At Kyoko autopsy, Agent Casey retrieved a one-page handwritten note located inside Kyoko's blouse pocket. (V20, P1727).

Casey also retrieved items from Welch's apartment that belonged to the Johnsons, including a microwave oven, VCR, and 27-inch television. (V20, P1731-33). She collected pawn shop tickets from Welch's residence showing Welch took the Johnsons' television and boat motor to the pawn shop and received $150.00. (V20, P1737-38, 1782, 1822). Casey collected a black T-shirt, white tank top, and a long-sleeve "No Fear" brand shirt from the apartment. (V20, P1738).

In July 2003, Commander Steve Salvo, BCSO dive team, searched a retention pond located 50 feet from Welch's apartment. (V20, P1740, 1742). The dive team was searching for anything that could have been used as a murder weapon. (V20, P1746). Salvo was able to locate a golf club near the middle of the pond. (V20, P1746; State Exh. 80).

Welch's statement was published to the jury. (V20, P1767-1844). Defense counsel renewed his objection to the confession.

(V20, P1752). Welch said he had gone to the Johnsons' home on December 14, 2000. After he spoke with them, Kyoko drove him home around 10:30 a.m. (V20, P1767-68). He walked back to their home around 6:00 p.m. "to rob them." (V20, P1767-68).[8] Welch knocked on their door and Kyoko let him in. Welch said initially, "I couldn't do it ... I went out--I was walking around the neighborhood." He went back to the Johnson's house. Rufus answered the door, and "gave me a hug." (V20, P1769-70). Welch and Rufus made small talk. Welch had a note with him that he had written at home. The note said he was going to rob them. The note said, "Please don't talk to any cops or give any hints to bank tellers. If I get a call on my cell phone from my employer your wife will die because of you." Welch did not have a cell phone. (V20, P1815-16). He wanted to scare them with the note. (V20, P1770-71, 1815).

[8] Welch said that during the time he was thinking about going to the Johnsons, another man was with him. Welch saw him in the industrial area nearby. The man "wanted a cigarette ... and I gave him one. I didn't plan on telling him. We started talking about money; and I told him--$1000 to rob these people. He walked up to the house with me." (V20, P1808-09). This man, "Jason," was a white male, about twenty-five years old, shoulder-length blond hair, with moderate facial hair. (V20, P1809-10, 1811). Welch spent 1½ hours with Jason, during which time he did not do any cocaine with him. (V20, P1812). Welch and Jason talked about "stuff ... what we were going to say. I told him to walk over to see the house." (V20, P1812). Jason circled around the Johnsons' house while Welch waited in the front. (V20, P1814). Welch said Jason "got scared." (V20, P1810). Jason did not go in the Johnsons' house. "He didn't do nothing." (V20, P1813).

Welch handed the note to Rufus, who was sitting on the couch. (V20, P1771). Welch did not want to kill them, he only wanted to scare them. (V20, P1815). The reason he did not want to kill them was because Rufus helped him try to save his brother, Ricky, who committed suicide. (V20, P1840). Rufus administered CPR when Ricky committed suicide by hanging. (V20, P1840).

Rufus told Welch he could not give him any money because he did not have any. (V20, P1807). The Johnsons tried to convince Welch they did not have any money to give him. (V20, P1824). Kyoko started praying. Welch retrieved duct tape from the garage and put it over her mouth. (V20, P1823-25, 1827). Rufus asked Welch to take the duct tape off Kyoko's mouth. She was allowed to take the tape off, and Welch got them something to drink. (V20, P1835-36). He then hit Rufus in the head with "something that was close, and I picked it up." (V20, P1772-73). He found the object when he was walking around. (V20, P1776). He was:

> [j]ust looking for stuff. When I found it, I picked it up and walked behind them, and I picked it up and I behind them and I like got over them and hit them.

(V20, P1791-92). Welch denied cutting the Johnsons. (V20, P1805). Welch hit Rufus four or five times. He did not fight back. He "was shocked." (V20, P1774). Welch described the Johnsons' reaction as:

> "They were just sitting there; and I was just walking and just kept walking in circles. **They were just scared**."

(V20, P1786). Kyoko was sitting "right next to" her husband on the couch and Welch hit them both several times. (V20, P1775). He hit Kyoko three times in the head. (V20, P1775). Welch said he did not know how Kyoko ended up on the bed in the master bedroom, but "she moved and laid there." (V20, P1776, 1785). At another point, Welch said Kyoko was on the couch and John was on the living room floor when he left. (V20, P1785).

Welch knew the Johnsons were dead when they weren't moving. (V20, P1778). Welch denied tying either victim. (V20, P1786). He admitted urinating in the bathroom by the living room. (V20, P1801). Welch insisted the Johnsons were on the floor when he left, and he did not enter the home a second time. (V20, P1816-17). He also said he did not tape anyone with black electrical tape; however, he did use duct tape to tape Kyoko's mouth when she started praying. (V20, P1823-24). He asked John whether he had any tape, and John pointed to the garage. (V20, P1827). Welch got the duct tape from the garage before he hit anyone. (V20, P1825). Welch had the phone so that the Johnsons could not call. (V20, P1826).

After he finished hitting them, Welch dropped the weapon by the television. Then, "I walked and grabbed it - - and walked to my house." (V20, P1794). Welch took two televisions, a black

phone, a VCR, and a boat engine. (V20, P1778-80). Welch also took four samurai swords which were either in his truck or Rufus's truck. (V20, P1818-19, 1829). He called Lisa from the Johnson's house to tell her he had been in an accident. (V20, P1795). He had a date with Lisa and was going to be late, so he said he would meet her at Wal-Mart. (V20, P1796).

Welch put the stolen items across the street in a house under construction, walked home to get his truck, and came back to get the items around midnight. (V20, P1780-81). After he picked up the stolen items, he met Lisa at the Wal-Mart on Sarno. (V20, P1781-82). He drove Rufus's red truck. (V20, P1796). He returned the truck the next morning, walked home, then went to the pawn shop. (V20, P1798).

Welch pawned the small television and boat motor at Paradise Pawn. He took the larger television, microwave, and VCR to his house. (V20, P1783). He told his roommates, Heather and Joie, that he robbed someone that owed him money. (V20, P1799). He did not take any money or jewelry. (V20, P1783). John had said they did not have any money because they were retired and paid for bills. Welch didn't even look in his wallet. (V20, P1790).

Welch said he was wearing white pants, a black shirt and white tennis shoes the night he killed the Johnsons. (V20, P1788). He washed his clothes when he got back to his apartment.

(V20, P1789). Welch did not remember having any blood on his clothing. He washed his hands at the Johnsons home because "I didn't want to get [it] on the stuff I was picking up." (V20, P1834).

Welch said he was using cocaine the night he killed the Johnsons, "half an eight ball, about 120 bucks." (V20, P1804).

At the end of the State's case, the seven stipulations were read to the jury. (V21, P1860-66).

Welch presented testimony from ten witnesses. Richard Welch, Anthony's father, called Welch "Andy." Andy was a happy kid and got along well with others. (V21, P1868-69). When he was seven years old, he contracted "Kawasaki's disease." He would wake up in a cold sweat, crying. He would not know where he was. Richard and his wife took Welch to Holmes Regional Medical Center. (V20, P1869, 1879-80). After he was diagnosed with Kawasaki's disease, he went to Shands hospital in Gainesville, Florida, and remained there for several weeks. (V20, P1870). After going home, Andy was withdrawn. He suffered a lot of pain in his joints, and it was difficult for him to walk. Andy's mother worked with him on exercising his legs. His chest did not form properly and was concave. It was a few months before he was well enough to get around and play. (V21, P1871). Andy suffered many fevers. However, children who contract Kawasaki's disease, "once they get through and they live through it, they never get

it again." (V21, P1872, 1881). This disease did not cause Andy to suffer from any neurological dysfunction. (V21, P1881). Andy was an average student, and got along well with others. (V21, P1872).

In February 1995, the Welch's oldest child, Ricky, took his own life. At the time, Ricky was nineteen, Anthony was sixteen, and their sister, Sandra, was thirteen. (V21, P1874). The suicide devastated the entire family. (V21, P1874, 1876). Andy idolized his older brother and became withdrawn. He became defiant over issues that normally did not bother him. (V21, P1876). Andy's grades suffered, and he was expelled from school. He attended adult education classes but was picked on and beat by other students. Eventually, he got a high school diploma through an adult education program in Melbourne. After Andy turned 18 years old, he moved in and out of the Welch's home. (V21, P1877, 1882, 1885). In the year 2000, Andy's aunt and uncle committed suicide. These deaths affected the entire family. (V21, P1878-79).

The Welches would check on Andy after he started living on his own but he was distant with his parents. He was with friends, working on their vehicles. (V21, P1886-87). Mr. Welch would have given his son money if he needed it. (V21, P1887). Mr. Welch was always close with Andy, especially after Ricky's death. However, the harder he tried to retain a relationship

with Andy, “the further away he got.” (V21, P1888). After Ricky’s death, Andy’s temper was short with his mother. He alienated his friends and was accused of stealing money from them. (V21, P1889). Mr. Welch discovered Andy started consuming alcohol after Ricky’s death. (V21, P1891-92).

Gina Catucci, a nurse at Holmes Regional Medical Center, dated Anthony Welch for two years. (V21, P1897, 1898). They had a good relationship. Welch never discussed his brother’s suicide. (V21, P1898). Welch’s relationship with his parents “was rough on him. He was getting kicked out constantly, living wherever he could.” Welch was never violent with her. “He was a happy person.” (V21, P1899). Holidays were spent at Catucci’s house. Her parents adored Welch. (V21, P1900, 1906). Welch was always doing things for other people, “he was a good person.” (V21, P1905).

Ms. Catucci knew Welch was depressed, but did not see anything medically wrong with him. (V21, P1901). Welch did not do anything that led her to believe he was suffering from any emotional or mental illness. (V21, P1904). He lied to her quite often. (V21, P1904-05).

Jose Marlasca, supervisor for adult education in Melbourne, knew Anthony Welch as a student at Satellite High School. Welch was having problems in school after his brother died. Marlasca “had to deal with him and orient him to get back to focus into

his schoolwork." (V21, P1909-10). Andy "was very cordial, and he was a normal teenager." (V21, P1912, 1914). After Andy left high school, he pursued his education by attending adult education courses. Welch was very successful and graduated in 1999. (V21, P1913). Marlasca was very surprised to hear Welch had been charged with murder. (V21, P1913). Welch did not appear to be mentally unstable. (V21, P1915).

Brian Manchester and Anthony Welch had been friends for ten years. (V21, P1917). Welch was quiet but became quick-tempered after his brother's suicide. (V21, P1918). Welch talked about his brother's death when he was very upset. (V21, P1920). There were times when Welch "would be doing bad things, but it was always fun Andy." He never saw Welch's life going downhill. (V21, P1921). Welch lived with the Manchesters when he moved out of his parents' home. (V21, P1922-23). At one point, Manchester and Welch shared an apartment. (V21, P1924). Manchester never saw Welch acting incoherently; only when Welch was drunk. (V21, P1927, 1929). He never saw Welch abuse drugs. (V21, P1928). Welch kept things "bottled up." He never acted crazy. (V21, P1929). Welch had a reputation for fighting when he was teased about Ricky's death. (V21, P1931).

Doctor Joseph Wu, medical director for the Brain Imaging Center, University of California, conducted a PET scan on Welch on June 30, 2004, in Boca Raton. (V22, P1946, 2006). PET scans

are used in determining Alzheimer's disease, brain tumors, and Parkinson's disease. (V22, P1956). Dr. Wu said he reviewed Welch's jail medical records to ensure that Welch was not taking medication that might adversely affect the interpretation of the PET scan. (V22, P1947). Although Welch was taking psychotropic medication both prior to and after the PET scan, no medication was prescribed with a certain period of time "to insure the PET scan would be reliable." (V22, P1948).

In Dr. Wu's opinion, Welch's PET scan exhibited several areas of abnormalities. (V22, P1957). There was a "significant asymmetry" in the parietal cortex. (V22, P1959). This type of asymmetry would be consistent with brain trauma or Kawasaki's disease. (V22, P1968). Dr. Wu based his belief that Welch had head trauma on Dr. Riebsame's report. (V22, P1999). Dr. Wu thought Welch had been hit in the head with a bat. (V22, P2001). He could not recall who told him that, and he could not find it in Dr. Riebsame's report. (V22, P2001). Dr. Wu actually spoke to Dr. Riebsame about several patients at the same time. (V22, P2005). There was also asymmetry in the temporal lobe, occipital lobe and frontal lobe area. (V22, P1960). The frontal lobe controls language, judgment, behavior and "executive function." (V22, P1963). An impaired frontal lobe results in impulses getting out of control. (V22, P1963).

Welch's PET scan is consistent with Bipolar disorder, which "runs in families." (V22, P1964). There were two suicides in Welch's family, his brother and his uncle. In Dr. Wu's opinion, Welch's family might have a genetic predisposition for "depressive affective disorder." (V22, P1965). In a manic state, some people can become irritable and aggressive and do things they later regret. Someone in a manic state can be very violent or aggressive. (V22, P1965). Stimulants can trigger a manic episode. (V22, P1966). People with head injuries can be more prone to disassociative syndrome. (V22, P1967). There is a significant likelihood of developing neurological and behavioral problems after having Kawasaki's disease. (V22, P1969). In Dr. Wu's opinion, the abnormality in Welch's brain limits his ability to both regulate aggression and to judge properly. (V22, P1970).

Welch's PET scan was conducted by a nuclear medicine technician, but Dr. Wu interpreted the scans. (V22, P1977). Dr. Wu did not compare Welch's PET scan to any others. (V22, P1999). Dr. Wu is a psychiatrist, but he did not evaluate Welch or conduct a psychiatric examination. (V22, P2984-85). Wu was hired only to review the PET scan. (V22, P1985). From the short time he spent with Welch, Wu did not observe any abnormal behavior. (V22, P1996). He said he just has a "feeling" for abnormalities. (V22, P1998). Abnormalities in the brain may

appear as a result of pharmacological effects. (V22, P2002). Unless there had been a significant change in Welch's behavior, cognition, or emotions between the years 2000 and 2004, there would have been no difference in PET scans, had one been conducted in 2000. (V22, P2006).

Dr. Wu said a PET scan can give false results if a patient's chemical imbalances are not normal, such as a diabetic patient or a patient who had eaten within a few hours of the scan. (V22, P2013). Welch's jail medical records indicated "low blood sugar," with the possibility of a diabetic condition. (V22, P2015).

Dr. William Riebsame, psychologist, met with Welch a total of eight times and spent approximately 35 hours on this case. He spent 9 to 12 hours talking to Welch. (V23, P2089). Dr. Riebsame conducted psychological and neuropsychological testing, reviewed medical records, the videotaped confession, school records, jail records, and conducted interviews with Welch's parents. (V23, P2022, 2028, 2029). There was an indication that Welch suffered from low blood sugar in 2001 (in jail) but no indication of any medical treatment for any kind of diabetes or low blood sugar condition. (V23, P2030). While in jail, Welch was consistently administered psychotropic medications such as anti-depressant medication (Prozac) and anti-anxiety medication (Vistaril). (V23, P2031).

Welch told Dr. Riebsame that Mr. Johnson tried to assist Welch when Ricky, Welch's older brother, committed suicide by hanging. (V23, P2041-41). Subsequent to the suicide, Welch became apathetic and began to "significantly abuse a variety of alcohol and drugs." (V23, P2041). On occasion, law enforcement went to Welch's parents telling them their son was drinking out in the woods. Although Welch was not in trouble with police, he was in trouble with his parents. (V23, P2042). While the drinking and drug use continued for the next seven years, no psychological treatment was sought by Welch. Welch did not stay in contact with his family.

Welch received a $5000.00 bonus for enlisting in the Navy but his enlistment only lasted for one month. (V23, P2042, 2092). The Navy administratively discharged Welch after determining Welch consumed "12 to 24 beers daily," was in fights, and was diagnosed with depression and alcohol abuse by the Navy psychiatrist. (V23, P2043). Dr. Riebsame opined that the Navy psychologist thought Welch was minimizing his problems. (V23, P2119). Welch told Dr. Riebsame he was in several fights during his short enlistment. (V23, P2097).

Welch has consistently admitted to his involvement in the deaths of Mr. and Mrs. Johnson. He did not give Dr. Riebsame specific details as to how the murders occurred. (V23, P2043). Welch recalled going to the Johnsons' house with the intent to

rob them. He entered the home without a weapon. He recalled striking them with an object. He stole a number of items from them and went to work the next day. (V23, P2044). He admitted to drinking heavily and abusing cocaine the week before the murders. (V23, P2044).

At times Welch kept to himself; at other times he was very loud and aggressive. (V23, P2047-48). Testing indicated Welch met the criteria for post traumatic stress disorder. (V23, P2048). Welch may have had "some psychotic-like thoughts" in the past, but he denied any occurrences of hallucinations. (V23, P2051). Due to the extent of their injuries, Dr. Riebsame hypothesized that Welch became "explosively angry" with the Johnsons. (V23, P2054). Substance abuse made Welch's judgment worse. (V23, P2055-56). His feelings "come out very rapidly and out of control." (V23, P2056). However, there was no "obvious or gross neuropsychological impairment." (V23, P2056). In Dr. Riebsame's opinion, there is impairment in Welch's frontal lobe, which involves executive decision making, "impulsive" acts. (V23, P2057, 2059).

Welch's IQ score is 100, "right about at average." (V23, P2062). Welch did not exhibit any bizarre psychotic symptoms when given the ink blot test. (V23, P2063). The neuropsychological testing included the Trail Making test, the Wisconsin Card Sorting test, the Neuropsychological Screening

Algorithm Note test, and the executive functioning test. There was no indication of malingering. (V23, P2063).

According to Dr. Riebsame, Welch's "mental age" is about 15 years old,[9] "mid-adolescent." Emotionally and mentally, Welch's development stopped at the time of his brother's suicide. (V23, P2067). Welch's "abstract reasoning ability," known as "executive functioning," is about 13 years and 6 months. (V23, P2068-69). Dr. Riebsame's psychological diagnosis for Welch was post traumatic stress disorder, which could be traced back to his brother's suicide. Additionally, Welch's condition was influenced by bipolar disorder reflected by periods of depression, anxiousness, and irritability. (V23, P2072). Welch's substance abuse diminished the symptoms of his psychological problems. (V23, P2074).

In Dr. Riebsame's opinion, Welch exhibited an extreme emotional disturbance at the time of the murders and his ability to conform his conduct to the requirements of the law was substantially impaired. (V23, P2074-76).

During the interviews with Dr. Riebsame, Welch consistently told him he abused alcohol. Welch did not use drug or alcohol abuse as an excuse for the murders. (V23, P2100). Welch's parents told Dr. Riebsame that their son had a good childhood.

[9] Welch's date of birth is April 18, 1978. He was 22½ years old at the time of the murders on December 14, 2000.

(V23, P2103). After Ricky's suicide, Mrs. Welch said Andy would become angry and punch the wall. (V23, P2107). Welch reported that he has a sleep problem, as well. (V23, P2111). In Dr. Riebsame's opinion, Welch has been suffering from extreme emotional disturbance since early adolescence. (V23, P2113). Welch and his parents told Dr. Riebsame that he had been knocked unconscious in his life, although no medical records supported that. (V23, P2116).

Shane Dooley was good friends with Anthony Welch. (V23, P2126-27). He knew Ricky Welch, Anthony's older brother. Ricky was a role model for Anthony, "he kept him in line." (V23, P2127). Dooley did not see any changes in Welch's behavior until a few years after Ricky's suicide. Welch started getting into schoolyard fights and was rebellious with his parents. (V23, P2130, 2131). Dooley started noticing things missing around 1997, the time Welch started having problems. (V23, P2141). Dooley saw Welch a few days before his arrest. (V23, P2135). When Dooley spoke to him that night, Welch did not respond to him. (V23, P2134). It was like "talking to a brick wall." (V23, P2133).

Marie Bisson became involved with Welch when she was 13 years old and he was 17. (V24, P2220). She observed Welch become withdrawn after Ricky Welch's suicide. (V24, P2221). Other students teased Welch and his sister about their brother's

suicide. Welch was “playful ... very sweet” with her. He was like “an older brother” to her. (V24, P2222). Welch did not discuss Ricky’s suicide; “he just was very nonchalant about it.” He liked to make people laugh and found “the humor in life.” (V24, P2223). Welch got into fights after Ricky’s suicide. (V24, P2224). Welch taught Bisson how to surf. They spent a lot of time at the beach. (V24, P2224, 2225). Welch was very athletic. (V24, P2226).

Sandra Welch, Welch’s sister, said Welch “just loved life” prior to Ricky’s suicide. Ricky and Andy got along well together and always had fun. (V24, P2227). Sandra recounted the day that Ricky took his life. She sent her mother next door to get help from the Johnsons when they discovered Ricky’s body. The family’s lives changed “in every way possible” after Ricky’s death. (V24, P2229). Sandra and Andy’s relationships with their parents deteriorated. (V24, P2230). Andy fought in school and at one point, was knocked unconscious. Andy had been repeatedly kicked in the head. (V24, P2230-31). Andy and Sandra used cocaine together about three times “when we were into cocaine” in 1997 or 1998. (V23, P2244, 2247). Andy could never hold a job. He would be doing fine, and then he would stop going to work. (V24, P2236). He was physically and intellectually capable of holding a job, but Sandra thought depression interfered with his ability to do so. (V24, P2256-57). He and

Sandra moved in and out of their grandmother's house. (V23, P2251). At the time the Johnsons were killed, Welch and Sandra lived in apartments on the same golf course. (V23, P 2250). Sandra never saw Welch using cocaine when he lived with Heather. (V23, P2255). Welch denied abusing cocaine but admitted to smoking marijuana. (V24, P2255).

Lorna Welch, Anthony's mother, said he was a happy child, "normal like everybody's kids." (V24, P2259, 2260). When Welch was six years old, he spent a month in hospitals, ill with Kawasaki's disease. (V24, P2261, 2262, 2264). Welch was close to his brother, Ricky, and sister, Sandra. When Welch discovered Ricky's body after Ricky hanged himself, he sent his mother to the Johnsons for help. Ricky's suicide tore the family apart. (V24, P2267, 2268, 2269). Welch became quiet and didn't "have this energy anymore." (V23, P2271-72). He failed classes and was picked on by other students. (V24, P2273-74). Welch eventually earned his G.E.D. (V24, P2275). Lorna thinks Welch is very bright. (V24, P2279).

On November 21, 2005, the jury returned advisory sentences of death by a unanimous vote of twelve to zero (12-0) for the deaths of Rufus Johnson and Kyoko Johnson. (V25, P2387-88).

Motion to Supress. The motion to suppress the confession was heard July 29, 2005. The State called four officers to testify: Sgt. Brown, the patrol officer who stopped Lisa

Hedley's vehicle in which Welch was a passenger; Agent Harrell, the officer who transported Welch and sat in on the second interview; Agent Roberts, transport officer who sat in the first interview; and Agent Wells, the lead investigator in the case who conducted both the first and second interviews.

On December 19, 2000, Brevard County Sheriff Office (BCSO) Agents Harrell and Roberts requested Sgt. Brown stop the vehicle in which Welch was a passenger. (SR2, 82). After the stop, Harrell and Roberts approached Welch and Ms. Hedley, the driver. (SR2, 82-83). Brown's patrol car lights created significant lighting to see the occupants in the stopped vehicle. (SR2, 88). Sgt. Brown did not see Agents Harrell or Roberts draw their weapons not threaten Welch in any way. (SR2, 89-90). Sgt. Brown left the scene. (SR2, 90).

Sgt. Robert had contact with Welch in the early morning hours of December 21, 2000. (SR2, 97). Welch had been developed as a suspect, was placed under surveillance, and was stopped by a patrol unit. (SR2, 97). Sgt. Roberts and Agent Harrell approached the vehicle and asked Welch to come to the sheriff's office. (SR2, 101-02). Weapons were not drawn and there were no threats. (SR2, 102). Welch was not handcuffed or placed on the ground. (SR2, 102). He did not object to going with the officers. (SR2, 102). Welch was not placed under arrest. (SR2, 103). There was nothing about Welch's appearance or behavior

that indicated he was under the influence of drugs or alcohol. (SR2, 104). Neither Roberts nor Harrell put their hands on Welch to direct him to their car. (SR2, 105). Welch sat in the front seat of the unmarked car. (SR2, 106). There were no bars or cages in the car. (SR2, 107). Welch was never handcuffed or secured in any way. (SR2, 107). The only conversation on the way to the sheriff's office was about Welch's job at a transmission shop. (SR2, 109). The drive was approximately 20 minutes. No recordings were made on the drive. (SR2, 109). Welch did not ask for an attorney or indicate discomfort during the ride. (SR2, 110).

Welch's interview took place at the Merritt Island precinct. (SR3, 263). Entering the precinct requires two keypad codes. A person can leave the facility without using codes. (SR2, 111). All exits are clearly marked with exit signs. (SR2, 111). Welch was escorted to the interview room. There is audio and visual equipment in the room. (SR2, 115).

After the first reading of his *Miranda*[10] rights, Sgt. Roberts and Agent Wells, the lead investigator, spoke to Welch for about an hour. (SR2, 119). *Miranda* rights were given at 1:46 a.m. (SR2, 120). Welch signed and initialed the *Miranda* waiver form. (SR2, 123). The *Miranda* waiver was also on the videotape. (SR2, 124). During the interview, Welch stated he no longer

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

wanted to speak to the officers. (SR2, 124). Roberts and Wells placed Welch under arrest and ended the interview. (SR2, 124). Roberts left the sheriff's office and had no further contact with Welch. (SR2, 126).

Homicide Agent Wells attended the autopsy of Kyoko Johnson and was aware of the note in her shirt pocket. (SR2, 130-31, State Exh. 2). The note led investigators to believe Welch wrote the note because it referred to his brother's suicide. (SR2, 132). Wells was not involved in the stop of the vehicle in which Welch was a passenger. (SR2, 133).

Wells interviewed Welch. Wells does not wear a firearm in the interview room. (SR2, 134). Welch seemed concerned, but exhibited no unusual behavior or any indicator that he was under the influence of drugs or alcohol. (SR2, 135). No one threatened Welch or placed hands on him. (SR2, 135). There were actually two interviews conducted by Agent Wells. Both were videotaped. (SR2, 138, State Exh. 3).

Roberts read *Miranda* warnings to Welch, who executed a signed waiver. (SR2, 139, State Exh. 1). The first interview lasted just over an hour at which time Welch said, "I don't want to talk to you anymore." Agent Roberts became frustrated, told Wells to arrest Welch, and left. (SR2, 144).

Agent Harrell and Agent Wells began filling out the 923.01 form, Harrell went into the interview room to obtain booking

information from Welch. (SR2, 147-49). Harrell exited the room with Welch after 15–20 minutes. (SR2, 149). Harrell took Welch down one hallway and Wells went down another. (SR2, 151-52). As Welch was walking down the hallway, he started looking around. Harrell told him, “Don’t be thinking about running or trying to attempt to run, I’ll shoot you.” (SR2, 155). Welch did not seem to be bothered by this statement. (SR2, 156).

Harrell later told Wells that Welch wanted to talk to him and Wells went back into the interview room where Welch was waiting. (SR2, 153). Harrell asked Welch whether he agreed that he wanted to talk to the agents, and Welch said he did. Harrell asked Welch whether he understood the rights previously read, and Welch said, “Yes.” Harrell asked whether Welch still wanted to talk to them and Welch said, “Yes.” (SR2, 154). The second interview was approximately 1½-2 hours. Welch made incriminating statements. (SR2, 158, State Exh. 4). During the second interview, Welch did not ask for a lawyer or say he did not want to talk anymore. (SR2, 158).

Agent Harrell was present at the time Welch’s vehicle was stopped. (SR2, 162). Welch did not appear to be under the influence. (SR2, 164). Harrell told Welch he wanted to talk to him about the Johnsons. (SR2, 166). Welch said he had not seen the Johnsons for about six years. (SR2, 166). Welch “agreed to go with us without any problem or much discussion.” (SR2, 167).

Welch was not under arrest when he was asked to come for an interview. (SR2, 171). Three people are usually in the interview room: two interviewers and one interviewee. (SR2, 172). Harrell was not in the interview room during the first interview. Agent Roberts came out and said the interview was over. Harrell then started on the arrest paperwork. He went into the interview room to obtain information from Welch. (SR2, 175). Welch had been arrested and his hands were cuffed behind him. (SR2, 176). Harrell was aware Welch was the prime suspect in the Johnsons' murders. (SR2, 177).

Welch complained about the tightening of the handcuffs, and Harrell moved the handcuffs to the front. (SR2, 178). He asked for a drink of water, so Harrell took him to a water fountain. (SR2, 179). Harrell noticed Welch looking around and told him, "Don't run, because if you run, I will kill you." (SR2, 182). Harrell was older and explained to Welch that he would not chase Welch but that he was a good shot. (SR2, 182). After he got a cup of water from the water fountain, Welch asked, "What is going to happen to me now?" Harrell told him he was under arrest for the Johnsons' murders and would be taken to county jail in Sharpes. (SR2, 183). Welch then asked, "What happens next," and Harrell told him, "that he would eventually go to trial on the murders and was facing life in prison with the death penalty." (SR2, 184). Welch said, "wow, then what?" Harrell told Welch "We

did not have his side of the story, only what the evidence indicated." Welch said he wanted to talk to Harrell and give his side of the story. Harrell told Welch that Agent Wells would need to be present. (SR2, 184).

Harrell and Welch went back to the interview room and Wells joined them. Harrell made it clear that Welch wanted to speak to them and that he understood his *Miranda* rights. (SR2, 184). Harrell never told Welch he would not get the death penalty if he talked to the agents. (SR2, 185). Harrell did not threaten Welch or promise anything. (SR2, 185-86).

The videos of Welch's interviews were played for the trial court. (SR3, 189-223).[11] Welch said he lived on Wild Cinnamon Drive six years ago. (SR3, 192). When his brother died in 1995, the family moved. (SR3, 196).

Kyoko Johnson had given Welch a ride home a week earlier after his car broke down. He knew that Rufus ("John") Johnson had previously had open heart surgery. (SR3, 196). John was at the hospital when Kyoko gave Welch a ride the previous week, on a Wednesday. (SR3, 199). Agent Roberts[12] told Welch that the

[11] The second tape was not transcribed during this hearing due to the poor quality of the tape. The tape was 2 hours, 10 minutes long. (SR3, 223). The second interview contained the inculpatory statements. It was published and transcribed at trial. (V20, PP1767-1844).

[12] Although the court reporter identified this speaker as Agent Harrell, the testimony and videotape show this speaker was Agent

Johnsons were murdered. (SR3, 201). The police had talked to defendant's friends and knew he had killed the Johnsons. (SR3, 203). Welch denied killing the Johnsons. (SR3, 206).

Welch said, "I'm done talking to you right now." (SR3, 207). Agent Roberts said, "I'm just asking you a simple question." Welch said, "I'm telling you, I'm done talking to you guys." Welch was arrested. (SR3, 207).

Agent Harrell entered the interview room and asked Welch booking questions. (SR3, 209). Welch asked Harrell to loosen the handcuffs. (SR3, 211).

The trial judge noted the following times for the trial record:

- 29 minutes from the beginning of the tape to the time Welch said he did not want to talk any further;

- 8 minutes Welch sat alone in the interview room;

- 8 to 10 minutes of booking questions;

- 45 to 48 minutes Welch sat alone in the interview room.

(SR3, 213). Welch then knocked on the door and asked for a drink of water. (SR3, 218). Agent Harrell escorted Welch from the room, and said something on the tape. (SR3, 221).

Agent Wells testified that Welch was a key suspect at the time of the interview. (SR3, 226). The interview started at 1:46

Roberts who was in the room with Agent Wells. Agent Harrell conducted the second interview.

a.m., and Welch was arrested at 2:15 a.m. Welch had been in the interview room for 1 ½ hours before asking for a drink of water. (SR3, 238). The second interview lasted approximately 2 hours and 10 minutes. (SR3, 223, State Exh. 4). Welch's second statement ended at 5:50 a.m. (SR3, 241).

Welch testified during the motion to suppress hearing. He said law enforcement officers never said why they wanted him to come to the police station. (SR4, 393). They never told him he could not leave. (SR4, 394). Agent Harrell got him water and cigarettes, and he went to the bathroom. (SR4, 397). Welch said he never initiated conversation. (SR4, 398). Welch said Harrell said he would get the death penalty if he did not tell his side. (SR4, 400).

SUMMARY OF ARGUMENTS

Point I. The trial judge did not abuse his discretion by allowing testimony that Welch refused cocaine from his roommates on numerous occasions. The testimony was relevant to Welch's claim he was under the influence of cocaine at the time of the murders and confession. Both mental health experts testified drug abuse exacerbates mental conditions. Error, if any, was harmless.

Point II. The trial judge did not commit manifest error in denying a defense cause challenge on Juror Trevillion. The juror was not unduly biased toward the death penalty. Error, if any, was harmless because the judge gave defense counsel an additional peremptory challenge.

Point III. The trial judge did not abuse her discretion in admitting Welch's confession in the penalty phase. Welch was given his *Miranda* rights. When Welch invoked his right to remain silent during the questioning, law enforcement officers immediately stopped questioning. Welch re-initiated contact with Agent Harrell by asking "What happens next." Welch then said he wanted to make a statement. The officers ensured Welch understood his *Miranda* rights still applied and that Welch was making the statement voluntarily. Error, if any, was harmless.

Point IV. The trial judge did not abuse her discretion in his evidentiary rulings regarding the birthday of Kyoko Johnson

and the fact Rufus Johnson was a cardiac patient. The witness' comment on Kyoko's birthday was inadvertent and did not require a mistrial. The comment regarding Rufus as a cardiac patient was an isolated reference among allowable testimony regarding the 24-inch leg scar from the surgery which was used to identify Rufus' remains. Error, if any, was harmless.

Point V. The trial judge did not commit manifest error in ruling on the gender-neutral reason for peremptorily striking a female juror. Defense counsel did not allege that discrimination took place in the prosecutor's very first peremptory challenge. If *Melbourne* does not require a *prima facie* showing of a discriminatory purpose, this Court should revisit that case in order to be consistent with the vast majority of state and federal case law, including *Batson*. This issue is pending in two other cases before this Court.

Point VI. The trial judge did not abuse her discretion in overruling an objection to the prosecutor's comment regarding "justice." The comment was appropriate under the circumstances and fair rebuttal to the defense argument. Error, if any, was harmless.

Point VII. The trial judge did not abuse her discretion by instructing the jury on the cold, calculated, and premeditated aggravating circumstance where there was ample evidence of this aggravating factor. Error, if any, was harmless.

Point VIII. This claim is insufficiently specific to state a claim. The trial judge did not abuse her discretion in admitting photographs. He examined each photo proffered and excluded those that were gruesome or duplicative. The photos were used by the medical examiner to describe the injuries and cause of death. The photos were relevant to the aggravating circumstance of heinous, atrocious, and cruel, which was hotly contested. Error, if any, was harmless.

Point IX. Considering the totality of circumstances, Welch's two sentences of death are proportional to other death-sentenced defendants. The trial court did not err in weighing mitigating circumstances.

Point X. Florida's death penalty statute is not unconstitutional per *Ring v. Arizona*. Welch pled to robbery, establishing that aggravating circumstance.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE WELCH DECLINED COCAINE OFFERED BY HIS ROOMMATES

Welch argues that evidence that Welch's roommates offered him cocaine but he declined it, is not relevant to any aggravating or mitigating circumstance. (Initial Brief at 26-27).[13] He argues that there may be many reasons to decline an offer of cocaine. (Initial Brief at 28). Welch claims that:

> The admission of the objectionable evidence had the effect of negating appellant's claim the he was on a week-long drug and alcohol bender at the time of the murders.

(Initial Brief at 29). In other words, the testimony was relevant to rebut mitigating evidence. Welch invokes Section 90.403 and argues the evidence was more prejudicial than probative. (Initial Brief at 29).

Last, Welch claims the State managed to exclude hearsay, elicited information that contradicted Welch's claims of cocaine

[13] Before it was admitted, the State proffered the testimony of Heather Bartczak, Welch's roommate, that she and her boyfriend, Joie Estevez, had access to cocaine and used the drug. (V18, P1484-85). They offered drugs to Welch on "numerous occasions," but he was not interested. (V18, P1485). Bartczak knew "for sure he did not do cocaine." (V18, P1487). Defense counsel objected to the testimony on the basis of relevance. (V18, P1486, 1495). The prosecutor argued that, because Welch told police he used half an eight-ball of cocaine prior to the event, the testimony was relevant. (V18, P1495). The trial judge ruled that since the defense was presenting evidence of drug use, the testimony was relevant. (V18, P1497).

usage, and presented testimony of observations from persons who saw Welch near the time of the murders. (Initial Brief at 30). The prosecutor then supposedly "exacerbated" the problem in closing argument by arguing the evidence. (Initial Brief at 30-31).

It is not clear whether Welch is arguing error in admitting evidence rebutting drug usage, prosecutorial misconduct, or that the prosecutor presented adverse evidence. Welch argues that:

> It is abundantly clear that the trial court erroneously allowed the jury to hearing objectionable evidence that tended to refute appellant's best mitigation, specifically that he was high on cocaine.

(Initial Brief at 32). Welch then states that impairment was a critical issue.

First, Welch did not object to testimony elicited by the prosecutor regarding Welch's lack of cocaine use. There was no objection to the testimony of Brian Manchester. (V21, P1927). There was no objection to the testimony of Robert Pruett that when he saw Welch the morning of the murders he did not appear impaired. (V16, P1282-83). There was no objection to the testimony of Lisa Hedley that Welch did not appear impaired when he met her at midnight the night of the murders nor did he take drugs when he was with her. (V18, P1523, 1529). The prosecutor's objection to "rumors" was well-taken. (V23, P2142). Hearsay is inadmissible, particularly hearsay based on speculation.

§90.802, Fla. Stat. There were no objections to the complained-of comments in closing argument. (V25, 2315, 2316, 2318, 2323, 2326, 2338). The arguments regarding testimony and argument is not preserved for appellate review since there were no objections.

Second, Heather's testimony was relevant to whether Welch was impaired by cocaine at the time of the murders. Relevance was the basis of the trial court's ruling. In opening statement, defense counsel argued:

> He [Dr. Wu] will tell you that Mr. Welch's PET scan is consistent with bipolar disorder and post traumatic disorder and that the disorder is such that Andy can behave explosively and react out of all proportion to an event particularly under stress.
>
> Both Doctor Riebsame and Doctor Wu will tell you that these conditions are made worse or exacerbated by stimulating drug use; cocaine being a stimulant drug.

(V16, P1265). In closing, defense counsel argued Welch was "loaded up on cocaine." (V25, P2348).

Welch told Dr. Riebsame he was drinking heavily and abusing cocaine the week before the murders. (V23, P2044). He told the law enforcement he was using cocaine the night he killed the Johnsons, "half an eight ball, about 120 bucks." (V20, P1804). Sandra Welch, defense witness and Appellant's sister, was called to testify about cocaine use. (V24, P2233, 2244-45). Dr. Riebsame testified that Welch began a "lifestyle" of alcohol and cocaine abuse at age 15. (V23, P2041). Dr.

Riebsame also testified that Welch was using cocaine before the murders. (V23, P2044). Dr. Riebsame referred to "cocaine abuse" and that Welch's alcohol and drug abuse made his mental problems worse. (V23, P2073-74). In Dr. Riebsame's opinion, Welch was under the influence of extreme mental disturbance and substantially impaired, the two statutory mental mitigators. (V23, P2075-76). These findings were based in part on the fact Dr. Riebsame believed Welch was intoxicated by alcohol and drugs and the time of the murders. (V23, P2076).

Evidence that Welch may not have been consuming cocaine before the murders was certainly admissible to rebut the mental mitigating circumstances. Relevant evidence is defined as "evidence tending to prove or disprove a material fact." §90.401 Fla. Stat. Relevance was the basis of the trial court ruling on Heather's testimony. (V18, P1497). Welch's arguments on appeal establish the relevance of evidence he may *not* have been impaired at the time of the murders since, as he argues, impairment was a critical issue. Welch placed his mental state in issue, making evidence of that mental state relevant. *See Padilla v. State,* 618 So. 2d 165, 169 (Fla. 1993).

Third, regarding the argument that the evidence was more prejudicial than probative, as Professor Ehrhardt states:

> Most evidence that is admitted will be prejudicial or damaging to the party against whom it is offered.

C. Ehrhardt, Florida Evidence, §403.1 (2005 Edition). Section 403.1 precludes evidence that is "directed to an improper purpose," for instance, inflaming the jury or propensity. *Id.* There is nothing improper about the prosecutor presenting his case. The fact that the evidence is prejudicial to the defendant does not mean the evidence is not properly admitted. *See Wournos v. State*, 644 So. 2d 1000, 1007 (Fla. 1994)(all evidence of a crime prejudices the defense case); *Amoros v. State*, 531 So. 2d 1256, 1259 (Fla. 1988)("Almost all evidence introduced by the state in a criminal prosecution will be prejudicial to the defendant).

Error, if any, was harmless. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). The evidence of the aggravating circumstances was overwhelming. Welch pled to robbery, establishing the during-a-robbery aggravating circumstance beyond a reasonable doubt. The murders were overwhelmingly heinous and atrocious. Welch presented the testimony of two mental health experts, compared to the lay testimony of Heather, who had multiple drug charges pending.

POINT II

THE TRIAL COURT DID NOT COMMIT MANIFEST ERROR BY DENYING A CHALLENGE FOR CAUSE ON JUROR TREVILLION

Welch moved to strike Juror Trevillian for cause, and the motion was denied. (V9, P401; V12, P821). Juror Trevillian was

a squadron commander in charge of the 45th military unit. (V2, P334). He had authority over individuals pending court martial and judicial punishment. (V2, P335). He was in favor of the death penalty, but understood that a murder conviction does not in and of itself provide a basis for the death penalty. (V2, P336-37). His "gut feeling" was that he believed in the death penalty, but he "can go for life in prison. I'm not saying it would be a hard sell." (V2, P378). In his work, he cannot rush to judgment and makes sure he hears all the details and hears both sides of situations. (V2, P380). He stated his honest opinion as the attorneys asked, but he would comply with the law. (V2, P383). He would listen to the evidence and his personal feelings would not interfere with the process explained. (V2, P391).

Defense counsel's stated reason for the cause challenge was that he said Welch earned the death penalty by killing two people, that the victims' family needed closure, and that life in prison would be a hard sell. (V3, P401). Defense counsel also thought the juror said he could not put aside his personal opinions. (V3, P402).

The trial judge stated that:

> I think the record is very clear even when Mr. Parker was asking questions his first comment was "I will follow the law. I can the follow law. I've done it in hard cases. I've struggled with other cases in personal life." In his position, employment position.

> While I recognize that you didn’t like some of his answers, Mr. McCarthy, based on his answers that he gave and his assurances to the Court that he would follow the law and will follow the law, I will deny your request for cause challenge at this time.

(V3, P403).

A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror competency. *Barnhill v. State*, 834 So. 2d 836, 844 (Fla. 2002). This is because trial courts have a unique vantage point in their observation of jurors' voir dire responses. Therefore, this Court gives deference to a trial court's determination of a prospective juror's qualifications and will not overturn that determination absent manifest error. *Hertz v. State*, 803 So. 2d 629, 638 (Fla. 2001). Where a prospective juror is challenged for cause on the basis of his or her views on capital punishment, the standard that a trial court must apply in determining juror competency is whether those views would prevent or substantially impair the performance of a juror's duties in accordance with the court's instructions and the juror's oath. *Id*. (*citing Wainwright v. Witt*, 469 U.S. 412, 424, (1985)). "In a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty." *Barnhill*, 834 So. 2d at 844.

Florida Statute Section 913.03 provides:

Grounds for challenge to individual jurors for cause.

A challenge for cause to an individual juror may be made only on the following grounds:

(1) The juror does not have the qualifications required by law;

(2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;

(3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;

(4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;

(5) The juror served on a jury formerly sworn to try the defendant for the same offense;

(6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;

(7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;

(8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;

(9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;

(10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will

> prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;
>
> (11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;
>
> (12) The juror is a surety on defendant's bail bond in the case.

Juror Trevillian did not meet any of the criteria to be stricken for cause. His answers were honest and straight-forward. He showed no undue bias toward the death penalty. The trial judge correctly assessed the juror's responses. The mere fact that a juror gives equivocal responses does not disqualify that juror for service. "In evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." *Parker v. State*, 641 So. 2d 369, 373 (Fla. 1994).

If the trial judge erred, the error was harmless. After Welch moved to strike Juror Trevillian for cause, and the motion was denied, he requested an additional peremptory challenge and identified Juror Fontaine as a juror he would strike. (V14, P1044). The trial judge initially denied the additional peremptory. (V14, P1046). However, after defense counsel renewed the request for an additional peremptory challenge, the request

was granted. (V15, P1208-09). Defense counsel then struck Juror Fontaine. (V15, P1209).

Where a trial court has awarded additional peremptory challenges to a defendant, each such additional challenge is treated as having replaced one that was expended on a juror who should have been but was not struck for cause. *See Conde v. State*, 860 So. 2d 930, 938-942 (Fla. 2003); *Overton v. State*, 801 So. 2d 877, 889 (Fla. 2001); *Cook v. State*, 542 So. 2d 964, 969 (Fla. 1989). Here, the trial court awarded Welch an additional peremptory challenges in addition to those normally allotted. Error, if any, in denying the cause challenge against Juror Trevillian was harmless error.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION TO SUPPRESS WELCH'S CONFESSION

Welch claims the confession should have been suppressed because he invoked his right to remain silent and did not re-initiate the conversation with Agent Harrell. He claims Agent Harrell's statement that they don't have Welch's side of the story was "interrogation." (Initial Brief at 50).

Welch filed a motion to suppress statements or admissions. (V3, R494-95). After a lengthy hearing, the trial judge held that Welch was in custody at the time sheriff's officers stopped the vehicle in which he was a passenger. (V3, R529). The trial

judge found that the reason the vehicle was stopped was so the sheriff's agents could bring Welch in for questioning. (V3, R529). Because *Miranda* warnings were not given at the time of the traffic stop, any statements made on the way to the police station were inadmissible. (V3, R530).

The trial judge next found that Welch was in custody at the police station, but because he was read his *Miranda* warnings before the interview and agreed to speak with law enforcement, any statements were admissible up to the time Welch said he no longer wanted to speak to the police (V3, R530). The trial judge found the officers stopped questioning Welch after he said he no longer wanted to talk.

As to the second interview at the police station, the court found that Welch again waived his right to remain silent and voluntarily submitted to further interrogation. (V3, R530). The trial court found that Welch at no time requested an attorney, that Welch reinitiated further communication with law enforcement by asking Agent Harrell what was going to happen now, and that no further questioning took place until after Welch was re-advised of his *Miranda* rights. (V3, R531-32).

A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most

favorable to sustaining the trial court's ruling. *See Murray v. State*, 692 So. 2d 157 (Fla. 1997). The reviewing court is bound by the trial court's factual findings if they are supported by competent, substantial evidence. See *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002).[14]

Once *Miranda* warnings are given, the procedure is clear:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . Without the right to cut off questioning, the setting of an in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Miranda v. Arizona, 387 U.S. 436, 473-74 (1966).

In *Michigan v. Mosley*, 423 U.S. 96, 104 (1975), the United States Supreme Court held that resolution of the question of the admissibility of statements obtained after a person in custody has invoked his or her right to remain silent depends upon whether the person's decision to assert his or her "right to cut off questioning" was "scrupulously honored." In holding that no

[14] The State acknowledges *Rolling v. State*, 695 So. 2d 278, 288 (Fla. 1997), and that Welch may raise the suppression issue as it relates to the penalty phase even though he entered a plea.

Miranda violation occurred in *Mosley*, the Court pointed to several factors, including the fact police immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings. *Mosley*, 423 U.S. at 105-06. In the present case, Welch was given his *Miranda* rights and signed a written waiver form. The police immediately ceased questioning when Welch said he did not want to talk. Welch then re-initiated a conversation with Agent Harrell and said he wanted to talk to him. Before the second interview, Welch was reminded of his *Miranda* rights and the officers ensured his statement was voluntary.

In *Henry v. State*, 574 So. 2d 66, 69 (Fla. 1991), this Court analyzed the presumption of questioning on the same offense after invocation of the right to silence and determined that variance as to one or more of the *Mosley* factors was not dispositive. This Court applied a "totality of the circumstances" approach.

In the present case, the trial judge considered the totality of the circumstances. The trial court's factual findings are supported by competent, substantial evidence and are entitled to a presumption of correctness. Applying the factors set out in *Mosley* and *Henry* and the totality of the circumstances, the confession was voluntary and admissible. This Court also follows the "totality of circumstances" standard in

considering whether a statement is voluntary and the *Miranda* waiver is knowing and voluntary. *See Schoenwetter v. State*, 931 So. 2d 857, 867 (Fla. 2006); *Jennings v. State*, 718 So. 2d 144 (Fla. 1998). As the trial judge found, there was no coercion. Welch signed a waiver form, the interview was videotaped, Welch acknowledged his *Miranda* rights before the second interview, and the statement was knowing and voluntary.

When Welch re-initiated contact with Harrell, the question asked he asked is similar to the question asked by the defendant in *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983). In *Bradshaw*, the defendant invoked his right to *counsel*, questioning ceased, and the defendant later asked: "Well, what is going to happen to me now?"[15] The Court found that "[t]here can be no doubt in this case that in asking, 'Well, what is going to happen to me now?', respondent 'initiated' further conversation in the ordinary

[15] The State recognizes the different levels of procedural safeguards that must be afforded when (1) a defendant invokes his right to remain silent; (2) a defendant invokes his Fifth Amendment right to counsel; and (3) a defendant invokes his Sixth Amendment right to counsel. Invocation of the right to counsel requires more onerous safeguards than invocation of the right to remain silent. *See Arizona v. Roberson*, 486 U.S. 675, 684 (1988)(a suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice); *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992). Bradshaw involved the Fifth Amendment right to *counsel*, not the right to remain silent. However, because the defendant's statement in *Bradshaw* is so similar to Welch's statement, *Bradshaw* is highly relevant.

dictionary sense of that word." *Bradshaw,* 462 U.S. at 1045. Furthermore,

> Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation.

Bradshaw, 462 U.S. at 1046-47. *See also Wyrick v. Fields*, 459 U.S. 42, 46 (1982) (per curiam), (before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the "suspect himself initiates dialogue with the authorities.") Given that the standard is more onerous when a defendant requests counsel than when he invokes his right to remain silent, and given the fact the United States Supreme Court has found the statement in *Bradshaw* is a re-initiation of conversation, Welch re-initiated conversation with Agent Harrell.

Welch's last claim is that Agent Harrell's statement that "we don't have your side of the story" was interrogation. An official "interrogation" refers to words or actions that are reasonably likely to elicit an incriminating response from the suspect. *Ibar v. State*, 938 So. 2d 451, 470 (Fla. 2006). The United Supreme Court conducted a lengthy analysis of

"interrogation" in *Rhode Island v. Innis*, 446 U.S. 291, 302-303 (U.S. 1980), after which it concluded:

> Turning to the facts of the present case, we conclude that the respondent was not "interrogated" within the meaning of *Miranda*. It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.
>
> Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.
>
> . . . .
>
> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

Agent Harrell's comments in the present case were much less evocative than the comments in *Innis.* In *Innis*, the officers commented to a defendant/shooter that there were many handicapped children in the area who might be in danger by finding the gun. In this case, Agent Harrell simply answered the questions posed by Welch. There was no interrogation and Welch was not coerced into making a statement. *See Davis v. State*, 698 So. 2d 1182, 1188 (Fla. 1997)(officer's expression of disappointment in defendant was not interrogation); *Christopher v. State*, 583 So. 2d 642, 645 (Fla. 1991)(defendant asked what would happen to "Norma," and officer responded). The record shows the officers repeating that Welch has *Miranda* rights, assuring that he wants to make a statement, and that there has been no coercion.

The trial court determined, based upon this substantial evidentiary record, that Welch voluntarily made his statements after validly waiving his *Miranda* rights. This determination is supported by the record. *See Lukehart v. State*, 776 So. 2d 906, 917-918 (Fla. 2000). As stated in *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987), "Miranda gives the defendant a right to choose between speech and silence, and [the defendant] chose to speak." *See Chavez v. State*, 832 So. 2d 730, 750 (Fla. 2002).

It cannot be assumed that simply because Welch decided to speak, that statement was anything less than voluntary.

Error, if any, was harmless. *Mansfield v. State*, 758 So. 2d 636, 644 (Fla. 2000); *Caso v. State*, 524 So. 2d 422, 425 (Fla. 1988). Even if the confession were excluded from the penalty phase, there was ample evidence to prove the aggravating circumstances beyond a reasonable doubt. Welch pawned items stolen items from the Johnson house and took some of them to his apartment, as witnessed by Heather Barczak. The injuries to Rufus and Kyoko Johnson spoke for themselves insofar and the heinous, atrocious aggravating circumstance.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE RUFUS JOHNSON WAS A CARDIAC PATIENT OR BY DENYING THE MOTION FOR MISTRIAL AFTER A WITNESS TESTIFIED KYOTO JOHNSON WAS KILLED ON HER BIRTHDAY

Prior to the penalty phase, Welch moved in limine to preclude the State from offering evidence that the day the Johnsons were murdered was Kyoko's birthday. (V3, R546). The State did not object to the motion (V6, 15-18). During the testimony on Nancy Johnson, the Johnsons' daughter-in-law, the witness inadvertently stated that she spoke to Kyoko ten or fifteen minutes. "It was her birthday, so I was---." (V17, P1342). Defense counsel objected, the objection was sustained, and defense counsel moved for a mistrial. (V17, P1342).

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *England v. State*, 940 So. 2d 389, 402 (Fla. 2006); *Perez v. State*, 919 So. 2d 347 (Fla. 2005). A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. *See Snipes v. State*, 733 So. 2d 1000 (Fla. 1999); *Buenoano v. State*, 527 So. 2d 194 (Fla. 1988). "It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999). In this case, there was no necessity for a mistrial. *See Pagan v. State*, 830 So. 2d 792, 814 (Fla. 2002).

The witness' comment was an isolated instance, was inadvertent, and was hardly prejudicial in light of the overwhelming evidence. As the trial judge ruled:

> First of all, it's clear that the State didn't elicit this information in violation of the order granted by the Court on the motion *in limine* regarding the deceased's birthday.
>
> Secondly, it's unclear whether or not the jurors had made the connection yet about the fact that it was her birthday and being the likely day that she was killed.
>
> Third, if I do a curative instruction, it is likely to bring more attention to that fact than if I give some sort of a curative instruction later.

(V17, P1348). The motion for mistrial was denied, and the prosecutor instructed to advise all witnesses not to mention Kyoko's birthday. (V17, P1348).

Defense counsel recognized the witness' answer was non-responsive when he said "I realize that was not responsive to the question" and "I'm not saying that it was Mr. Parker's fault." (V17, P1342, 1343). The one comment did not vitiate the entire trial, and error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

During the testimony of Dennis Askins, the Johnsons' son-in-law, the prosecutor asked whether Rufus Johnson "suffered from any internal or physical maladies, specifically his heart." (V16, P1294). Defense counsel objected, and the objection was sustained. (V16, P1294-95). Defense counsel did not move for a mistrial, and this issue is not preserved for appellate review. *See Reichmann v. State,* 581 So. 2d 133, 139 (Fla. 1991); *Holton v. State*, 573 So. 2d 284, 288 (Fla. 1990).

Welch complains that the witness was allowed to testify about the scars even after his objection was sustained. There was no objection to the subsequent comments, and this issue is not preserved. In fact, the testimony regarding Mr. Johnson's scars was relevant and necessary to prove identification. As such, it was not objectionable.

Welch had previously objected to the prosecutor's opening statement that the neighbor, Robert Pruett, "knew that Mr. Johnson had already had heart by-pass surgery." (V16, P1236). This objection was properly overruled, and Mr. Pruett later testified without objection about the fact he and Mr. Johnson both had by-pass surgery and had compared scars. (V16, P1272-73). Further, opening remarks are not "evidence," and the purpose of opening argument is to outline what the attorney expects to be established by evidence. *See Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990).

Error, if any, was harmless. The prosecutor advised the judge that the bypass scars on Mr. Johnson's legs and chest were a way to identify the victim who could not be identified from his face. (V16, P1295). The judge advised the prosecutor to "stay away" from that line of questioning and sustained the objection. (V16, P1295). The prosecutor then asked Mr. Askins about the specifics of the scars on Rufus' leg and chest. Defense counsel did not object to that line of questioning. (V16, P1296). In fact, the prior witness, Mr. Pruett, had also testified without objection that Rufus Johnson had bypass surgery and had scars on his leg. (V16, P1273). Also, prior to the question about "maladies" Dennis Askins had testified about Rufus' leg scar without objection. (V16, P1292-93). Defense counsel had no objection to the testimony about the scars, only

to the testimony of cardiac problems. Once the evidence of the scars came in, the reason for the scars was quite apparent. The additional mention of cardiac problems was harmless, if it was error at all. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT V

THE TRIAL COURT DID NOT COMMIT MANIFEST ERROR IN RULING ON THE GENDER-NEUTRAL REASON FOR STRIKING A FEMALE JUROR; THE *MELBOURNE* STANDARD SHOULD BE REVISED.

There are two cases pending before this Court regarding whether the procedure in *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), for preserving a race or gender-neutral peremptory strike is consistent with that in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Whitby v. State*, Case No. SC06-420 (oral argument held October 30, 2006); *Pickett v. State*, Case No. SC06-661. In *Whitby v. State*, 933 So. 2d 557, 564 (Fla. 3rd DCA 2006), the Third District Court of Appeal certified four questions to this Court:

> 1. Should the Florida Supreme Court reconsider the peremptory challenge issue in light of the serious problems with the current standard?
>
> 2. In light of the serious nature of the objection to a challenge (that opposing counsel is claiming that the proponent of the challenge is attempting to remove a juror based upon the juror's race, ethnicity, or gender in violation of the United States and Florida constitutions) and the seriousness of the consequences, should the objecting party be required to at least allege that the challenge was racially (or otherwise impermissibly motivated)?

> 3. Should Florida follow federal constitutional law and the standard employed in federal cases which requires the demonstration of a prima facie case of discrimination?
>
> 4. Should we continue to require reversals due to procedural errors regarding peremptory challenges when the record leaves no doubt that the challenges were not motivated by racial prejudice and where there is no indication that any such prejudice infected the jury which tried the defendant?

In *Pickett v. State,* 922 So. 2d 987, 994 (Fla. 3rd DCA 2006), the Third District Court acknowledged the certified questions in *Whitby* and certified two additional questions:

> 1. Whether an objection to a peremptory challenge under *Melbourne v. State*, 679 So. 2d 759 (Fla. 1996), is sufficient to mandate an inquiry when the objection fails to allege with specificity that the peremptory challenge is racially motivated.
>
> 2. Whether the Supreme Court should reconsider its decision in Melbourne in light of serious problems in Florida's trial courts regarding the application of Melbourne and in light of the recent decision of the Supreme Court of the United States in *Johnson v. California*, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005).

The question presented is whether *Melbourne* eliminated the need for a *prima facie* showing of discrimination as established in *Batson*. If *Melbourne* did not eliminate that requirement, the issue in the present case was not preserved by defense counsel because there was no allegation the prosecutor was discriminating with his very first peremptory challenge. If *Melbourne* did eliminate that requirement, the State’s position

is that *Melbourne* should be revisited to conform Florida law to that of the United States Supreme Court, the federal courts, and 47 states.[16] *Batson* requires the opponent of a strike to make

[16] *See Ex parte Travis*, 776 So. 2d 874, 880 (Ala. 2000); *Rock v. State*, 2001 Alas. App. LEXIS 51, 7-9 (Alaska Ct. App. 2001); *State v. Martinez*, 196 Ariz. 451, 456 (Ariz. 2000); *Weston v. State*, 2006 Ark. LEXIS 269 (Ark. May 4, 2006); *People v. Williams*, 40 Cal. 4th 287, 310-311 (Cal. 2006); *Valdez v. People*, 966 P.2d 587 (Colo. 1998); *Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 461 (Del. 2005); *Robinson v. United States*, 878 A.2d 1273, 1290-1291 (D.C. 2005); *Stewart v. State*, 277 Ga. 768, 770 (Ga. 2004); *State v. Daniels*, 109 Haw. 1 (Haw. 2005); *State v. Araiza*, 124 Idaho 82 (Idaho 1993); *People v. Heard*, 187 Ill. 2d 36, 53-54 (Ill. 1999); *Ashabraner v. Bowers*, 753 N.E.2d 662, 667-668 (Ind. 2001); *State v. Griffin*, 564 N.W.2d 370 (Iowa 1997); *State v. Bolton*, 271 Kan. 538, 543-545 (Kan. 2001); *Gray v. Commonwealth*, 203 S.W.3d 679, 69 (Ky. 2006). *State v. Snyder*, 942 So. 2d 484, 489-490 (La. 2006); *Commonwealth v. Maldonado*, 439 Mass. 460, 464 (Mass. 2003); *Smart v. Shakespeare*, 1997 Me. Super. LEXIS 148, 5-6 (Me. Super. Ct. 1997); *Edmonds v. State*, 372 Md. 314 (Md. 2002); *People v. Knight*, 473 Mich. 324, 335-339 (Mich. 2005); *State v. White*, 684 N.W.2d 500, 507-508 (Minn. 2004); *Brawner v. State*, 872 So. 2d 1, 9-10 (Miss. 2004); *State v. Barnaby*, 2006 MT 203, P47-P49 (Mont. 2006); *Jacox v. Pegler*, 266 Neb. 410, 415-416 (Neb. 2003); *State v. Taylor*, 142 N.H. 6 (N.H. 1997); *State v. Fuller*, 182 N.J. 174, 204 (N.J. 2004); *Grant v. State*, 117 Nev. 427, 434 (Nev. 2001); *State v. Martinez*, 131 N.M. 746, 749 (N.M. Ct. App. 2002); *People v. Brown*, 97 N.Y.2d 500 (N.Y. 2002); *State v. Bell*, 359 N.C. 1, 12 (N.C. 2004); *City of Mandan v. Fern*, 501 N.W.2d 739, 743 (N.D.1993); *State v. Curtis*, 2005 Ohio 120, P6 (Ohio Ct. App. 2005); *McElmurry v. State*, 2002 OKCr40, (Okla.Crim.App.2002); *State v. Longo*, 341 Ore. 580, 596-597 (Ore. 2006); *Commonwealth v. Edwards*, 588 Pa. 151, 179 (Pa. 2006); *State v. Price*, 820 A.2d 956 (R.I. 2003); *State v. Cochran*, 369 S.C. 308, 329 (S.C. Ct. App. 2006); *State v. Owen*, 2007 SD 21, P45-P46 (S.D. 2007); *State v. Hugueley*, 185 S.W.3d 356 (Tenn. 2006); *Wooten v. State*, 2006 Tex. App. LEXIS 10256, 3-4 (Tex. App. 2006); *State v. Valdez*, 2006 UT 39, P43 (Utah 2006); *Lightfoot v. Commonwealth*, 2007 Va. App. LEXIS 26, 3-4 (Va. Ct. App. 2007); *State v. Donaghy*, 171 Vt. 435, 436 (Vt. 2000); *State v. Napoli*, 2003 Wash. App. LEXIS 3059, 8-9 (Wash. Ct. App. 2003); *State v. Lamon*, 2003 WI 78 (Wis. 2003); *State ex rel. Ballard v. Painter*,

out a *prima facie* case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94). It appears Florida may have deviated from this standard or eliminated the defense burden altogether. Thus, in order to accuse a fellow attorney of discrimination, nothing more is required than an objection, since every person is of some gender or class.

In *Johnson v. California*, 545 U.S. 162 (2005), the Court concluded that California's standard for reviewing whether a *prima facie* showing of discrimination was made, was inappropriate. *Johnson*, 545 U.S. at 168. *Batson* "explicitly stated that the defendant ultimately carries the 'burden of persuasion' to 'prove the existence of purposeful discrimination.'" *Johnson*, at 170-171. *Melbourne* appears to have eliminated that burden and allows a party to charge another with discrimination even if completely unfounded. As cautioned in *Plaza v. State*, 699 So. 2d 289, 294 (Fla.3d DCA 1997)(Sorondo, J, specially concurring).

> The practical use of this tool, however, is rapidly degenerating in a strategic way for attorneys to pollute the trial record with baseless objections,

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213 W. Va. 290 (W. Va. 2003); *Mattern v. State*, 2007 WY 24 (Wyo. 2007).

There appears to be only two states besides Florida that do not require a prima facie showing of discrimination. *State v. Parker*, 836 S.W.2d 930, 940-41 (Mo. 1992); *State v. Rigual*, 771 A.2d 939, 947 (Ct. 2001).

alleging racial, ethnic and gender discrimination, which are completely unsubstantiated by the record.

In the present case, the prosecutor's first peremptory strike was used on Juror Napolitano. Defense counsel objected as follows:

> THE COURT: Let's start with No. 1; does the State accept No. 1?
>
> MR. PARKER: We do.
>
> THE COURT: Defense?
>
> MR. MCCARTHY: Yes.
>
> THE COURT: Defense accept No. 2?
>
> MR. LANNING: Yes.
>
> THE COURT: State?
>
> MR. PARKER: Strike Ms. Napolitano.
>
> THE COURT: State accept No. 3?
>
> **MR. MCCARTHY: Judge, we would challenge -- just a second -- we would ask Neil, Slappy, and Melbourne for a nongender basis for that.**
>
> THE COURT: This is his very first challenge.
>
> MR. MCCARTHY: That's fine. Gender is a specific group. There has to be a nongender basis for a peremptory challenge.
>
> MR. PARKER: Does there have to be a pattern?
>
> MR. MCCARTHY: No, absolutely not. You don't need a pattern. The first one is as good as the last one.
>
> THE COURT: So if he exercised a challenge against a male that would be a gender based challenge?

MR. MCCARTHY: Actually, there is a case that says that.

THE COURT: Show me.

MR. MCCARTHY: Thompson v. State, 648 So. 2d. 323. Women are --

THE COURT: I need to see the case. I don't take summaries. I need to see the case.

MR. MCCARTHY: I don't have the case. Every group or every person is a -- peremptories are a joke -- every person is a group. Member of a group. There has to be a non-whatever base, basis for.

MR. PARKER: Wouldn't there have to be a basis for making the basis such as --

MR. MCCARTHY: She's a female. That is the basis.

MR. PARKER: Such as the defendant is a member of that particular group.

THE COURT: Or that she is the only female on the jury, which is not the case.

MR. MCCARTHY: With all due respect, both of those pronouncements are simply wrong under the case law.

THE COURT: You tell me -- wait until I get West Law up. Better to give me the case, Mr. McCarthy, not to cite the case and argue what the premise is because I need to read what the judges said in the case itself.

MCCARTHY: Judge, women being a class --

THE COURT: It doesn't help me until I get West Law up and you give me the case cite, and I get it up. It will take a few seconds here.

Okay. Give me the citation?

MR. MCCARTHY: 642 So. 2d 542 FS 1994.

THE COURT: 542?

> MR. MCCARTHY: Yes, ma'am. 642, 542.
>
> THE COURT: 642, 542?
>
> MR. MCCARTHY: 642, 542.
>
> THE COURT: Abshire, is that what it is?
>
> MR. MCCARTHY: Abshire was such that there was comments made during voir dire about girls and women, and there was comments there was several strikes before the judge required there to be any issues regarding the systematic challenge that you are raising.
>
> You had another one regarding the first challenge?
>
> MR. MCCARTHY: Judge, I don't have the case in front of me. It doesn't have the pattern that helps show if there has been a pattern of it, it helps whoever is objecting to the peremptories is in appropriate. It buttresses the challenge for the peremptory but it is not for --
>
> THE COURT: I'm not going to require that on the State's first strike.

(V12, P822-826).

This dialogue shows that defense counsel did not even try to make a *prima facie* showing of discrimination. The instant case illustrates the problem addressed in *Whitby* and *Pickett*: whether an objection to any gender, any nationality, any race, without any showing of discriminatory purpose requires the opposing party to give the reason for the peremptory strike. The instant case rapidly accelerates from the ridiculous to the sublime when both parties began asking for reasons for peremptory strikes:

State's second peremptory challenge: Ms. Riegel (V12, P826-27);

Defense second peremptory challenge: Ms. Kasten (V12, P830);

State's fourth peremptory challenge: Ms. Crawford (V14, P1032-34);

State's sixth peremptory challenge: Ms. Schaeffer (V14, P1035-36).[17]

Defense's sixth peremptory: Mr. Artz (V14, P1036-37);

Defense's seventh peremptory: Mr. Hamilton (V14, P1037-38);[18]

State's seventh peremptory challenge: Ms. Hanrahan (V14, P1039-40).

State's eighth peremptory challenge: Ms. Dorman (V14, P1032-44).

The purpose of *Melbourne* was to eliminate discrimination, not to bog down the trial judge in procedural mind games. As defense counsel told the judge, all a party needs to do is invoke *Melbourne* and a reason must be provided. No showing of discrimination, no *prima facie* burden. The import of this is, as the judge stated, that peremptories are not peremptories at all but have become more akin to cause challenges.

[17] At this point the prosecutor stated that the defense was "striking every male." The prosecutor then began asking for reasons for male peremptory strikes. (V12, P1035-37).

[18] At this point the trial judge said that because reasons were having to be given for every juror, it was as if every challenge had to be a cause challenge. (V12, P1038).

The evolution of the case law leading to *Melbourne,* and the dilemma facing this Court, was summarized in *Whitby v. State*, 933 So. 2d 557, 559-564 (Fla. 3rd DCA 2006)(Appendix A). This comprehensive summary shows that *Melbourne,* rather than streamlining the procedure, has become a technical quagmire:

> While the historical analysis of the peremptory challenge issue reflects the Florida Supreme Court's valiant attempt to eliminate the exclusion of jurors based upon their race, gender, or ethnic origin, and to create a workable, simplified standard for attorneys and judges to follow, we believe that a study of the nine years of its application, suggests that review and modification of the standard, is warranted.
>
> The application of this "simplified standard" has proven not to be so simple after all and has led to misuse by trial attorneys; lengthy, needless evaluations as to the genuineness of the proffered reason for the challenge; unnecessary reversals due to failures to make an inquiry; and errors made in performing a pretextural analysis. n1[19] While it is rather simple and hardly a hardship to inquire regarding a lawyer's motivation for a challenge, if the reason(s) given is/are race-neutral, then the trial court must examine the genuineness of the proffered reason(s). To do so requires a review of each and every prospective juror and every response given by each. This sometimes involves an evaluation of the various responses of over a hundred jurors and often involves that of at least thirty to forty jurors. It is not uncommon in first degree murder death penalty cases, that some 200 jurors may be questioned before a jury is selected. By examining the responses of so many jurors, it becomes obvious how difficult a process this can be both in time and accuracy, and how easy it is for a mistake to be made without having a record to review and an opportunity to review one. To require a reversal over an error

[19] This footnote cites to 42 cases which have been reversed in the courts of appeal.

> regarding a juror's response in an otherwise fair and impartial trial without so much as an allegation that the peremptory challenge appeared to be racially motivated, we believe is taking good intentions too far, and resulting in needless reversals.

Whitby, 933 So.2d 557, 563-64. The State urges this Court, if the *Batson* requirements have been eliminated by *Melbourne,* to recede from the *Melbourne* and hold, consistent with *Batson,* that a *"prima facie"* of discrimination must be alleged. The State requests this Court affirm the trial court's finding that a race or gender/neutral reason should not be required on the State's first peremptory challenge and that defense counsel did not properly preserve the issue. If this Court does interprets *Melbourne* as requiring nothing more than objection to a juror (and every juror has a gender and a race), the State requests this Court recede from *Melbourne.* If this Court interprets *Melbourne* as requiring no showing by the defense, the State requests the case be remanded to the trial court for a gender-neutral reason to be provided for the peremptory strike.

POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY OVERRULING THE OBJECTION TO THE PROSECUTOR'S COMMENT REGARDING "JUSTICE" IN CLOSING ARGUMENT

Welch argues that the prosecutor's arguments in closing regarding "justice" require a new penalty phase. (Initial Brief at 60). He points to the following comments:

> (1) Justice requires in this case the imposition of the death penalty. Defense counsel objected. The objection was overruled. (V25, 2304);
>
> (2) There is no requirement that you recommend death. The law doesn't require that, but I would argue that justice does. Justice demands it. Defense counsel objected. The objection was overruled. (V25, P2339-40);
>
> (3) Justice. . . . Don't forget what happened because if you do we won't have justice here. There was no objection to this comment. (V25, P2339-40).

The prosecutor's first comment was in anticipation of the defense argument that justice required a life sentence for Welch. The prosecutor clearly stated this:

> Defense Counsel will argue that justice in this case requires a life recommendation.
>
> Bear in mind that Defense Counsel and myself are advocates for various positions.
>
> That the law in this case, what will guide your deliberations will come from the Judge. It does not come from me. It does not come from [defense counsel]. The law comes from the Judge.

(V25, P2305).

The prosecutor's second comment was buttressed by his statement that "I would argue that. . ." which tells the jury this is argument. Defense counsel did not object to the third statement, and that statement is not preserved for review unless this Court finds it is fundamental error. ***Bonifay v. State***, 680 So. 2d 413, 418 n.9 (Fla. 1996).

The basis of the two objections was: (1) "improper closing;" "no requirement for the death penalty" (V25, P2304); and (2) "improper statement;" "no requirement" for the death penalty; expressing personal opinion (V25, P2339).

Welch cites to *Servis v. State*, 855 So. 2d 1190 (Fla. 5th DCA 2003); *Thornton v. State*, 767 So. 2d 1286 (Fla. 5th DCA 2000); *Blackburn v. State,* 447 So. 2d 424 (Fla. 5th DCA 1984). The present case does not compare to the cases cited by the defense.

In *Servis*, the prosecutor continuously disparaged the defense, ridiculed the theory of defense, gave a personal opinion, argued facts not in evidence, bolstered the credibility of the medical examiner and police officers, misstated the law, commented on the defendant's guilt, insinuated the defendant was lying, and displayed an autopsy photo in an attempt to inflame the passions of the jury. In *Thornton*, the court did *not* find error. *Thornton*, 767 So. 2d at 1288. If there was any error, it was harmless. *Id.* In *Blackburn*, the court found comments expressing personal opinion, vouching for a police officer who was the primary witness, appealing to jury sympathy, were improper but were not fundamental error. These cases hardly support a case for this Court reversing a capital conviction based on isolated comments on justice.

Attorneys are granted wide latitude in closing argument. *See Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999) ("The courts of this state allow attorneys wide latitude to argue to the jury during closing argument."). It is within the court's discretion to control the comments made to a jury, and a court's ruling will be sustained on review absent an abuse of discretion. *See Conde v. State*, 860 So. 2d 930, 950 (Fla. 2003); *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997). This Court has stated that "we respect the vantage point of the trial court, being present in the courtroom, over our reading of a cold record." *Smith v. State*, 866 So. 2d 51, 64 (Fla. 2004).

The prosecutor's arguments were not improper. They were a fair comment on anticipation of the defense argument that Welch deserves a life sentence. Defense counsel did, in fact, argue "justice" insofar as the role of the jury (V25, P2344), the jury needs to "do justice" (V25, P2345); a life sentence will "of course" do justice. (V25, P2345). Simply because the word "justice" is used, does not mean the argument is improper. The prosecutor did not say the law requires the jury to sentence Welch to death, he merely argued that justice would be served if Welch were sentenced to death. There is nothing wrong with this argument. *See Ford v. State*, 802 So. 2d 1121, 1132 (Fla. 2001) (prosecutor's statement that the "punishment must fit the crime," when viewed in the totality of the closing argument, was

a simple and fair representation of the law); *Pardo v. State*, 563 So. 2d 77, 79 (Fla. 1990)(trial court did not err in denying mistrial when prosecutor said Pardo was trying to "escape" justice or criminal liability).

In the present case, the prosecutor spoke of justice; but he made no improper argument to show the defendant as much mercy as he showed his victim. The prosecutor clearly argued the aggravators and mitigators and asked the jury to return a sentence of death. (V25, P2305-2338, 2339). His argument that justice required a death sentence was just that--argument. The prosecutor's remark was not designed to inflame or unnecessarily evoke the sympathies of the jury. *See Conahan v. State*, 844 So. 2d 629, 640-641 (Fla. 2003).

Error, if any, was harmless and in no way "affected the foundation of the case." *See Floyd v. State*, 850 So. 2d 383, 408 (Fla. 2002), quoting *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970); *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). In the present case, the evidence of the aggravating circumstances was overwhelming. The evidence of the mitigating circumstances was contradictory. Considering the argument in its entirety, two isolated comments in an argument spanning 37 pages did not create reversible error.

POINT VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY ON THE COLD, CALCULATED AGGRAVATING CIRCUMSTANCE BECAUSE THERE WAS EVIDENCE OF THIS CIRCUMSTANCE

Welch argues the trial judge abused its discretion by instructing the jury on the cold, calculated and premeditated aggravating circumstance because, ultimately, the judge did not find the aggravator was established. (Initial Brief at 64). There was evidence presented to support the cold, calculated, and premeditated ("CCP") aggravator; therefore, it was not error for the trial court to have instructed the jury. *Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995). *See also Floyd v. State*, 850 So. 2d 383, 405 (Fla. 2002)(instructed jury on HAC, not found in sentencing order); *Raleigh v. State*, 706 So. 2d 1324, 1327-28 (Fla. 1997)(pecuniary gain). In *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991) this Court stated:

> The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.

Welch clearly contemplated his actions and the murder of the Johnsons. He wrote a note threatening to kill Kyoko if Mr. Johnson did not comply with his request for $5,000. He wavered for a moment before entering the house, then returned with

conscious resolve to carry out his morbid plan. After he disabled Mr. Johnson, he strangled him and slit his throat. He carried or procured the movement of Mrs. Johnson into the bedroom where he beat her, stabbed her repeatedly, and slit her throat. As Welch stated, the Johnsons did not provoke him: they just sat there in shock as he hit them. He could have left the residence at any point. Instead, he chose to murder them; step by torturous step. The CCP element has been found when a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder anyway. *See Alston v. State*, 723 So. 2d 148, 162 (Fla. 1998).

This Court set forth a thorough discussion of CCP in *Lynch v. State*, 841 So. 2d 362 (Fla. 2003), defining each element of CCP. The murders in the instant case meet the cold element of CCP, as set forth in *Lynch*, because they were carried out in stages with two different weapons. *See also Ibar v. State,* 938 So. 2d 451, 473-474 (Fla. 2006); *Walls v. State*, 641 So. 2d 381, 388 (Fla. 1994). Welch had ample opportunity to reflect on his actions. He had ample opportunity to abandon his plan. Instead he methodically beat and stabbed both victims. He tried to strangle Rufus. He set about his task with steadfast determination, using a blunt instrument on Rufus, a shoelace, and a sharp instrument. On Kyoko, he beat her with a blunt instrument and stabbed her. She moved or was moved to the

bedroom where she pummeled to death. Welch knew his victims, so he was committed to dispatching them both so they could not identify him. The medical examiner testified that the length of time required to accomplish both murders was “seven minutes, 15 minutes, 20 minutes, 30 minutes, even beyond that.” (V19, P1677).

The final element of CCP is a lack of legal or moral justification. "A pretense of legal or moral justification is 'any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.'" *Nelson v. State*, 748 So. 2d 237, 245 (Fla. 1999) (quoting *Walls v. State*, 641 So. 2d 381, 388 (Fla. 1994)). In this case, there is no legal or moral justification posited for these killings. Thus, the jury was properly instructed on the CCP aggravator.

POINT VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PHOTOGRAPHS.

Welch claims the trial judge abused its discretion in admitting “six photographs depicting the victim’s substantial and gruesome injuries.” (Initial Brief at 67). Welch then cites to State Exhibits 8-12, 45-49, and 61-71, a total of eighteen (18) photographs. This issue is insufficiently specific for the

State to respond to the allegations. *See Simmons v. State*, 934 So. 2d 1100, 1111 n.12 (Fla. 2006) *citing Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997); *Duest v. Dugger,* 555 So. 2d 849, 852 (Fla. 1990).

In attempt to address this issue, the State cites generally to the record excerpts during which photographs of the victims were admitted. Defense counsel objected to autopsy photos of Kyoko (V18, P1549-50). The judge examined each photo, after which some were withdrawn. (V18, P1440-62). As each photo was offered, defense counsel renewed the objection. (V18, P1564). State Exhibits 45-60 were admitted. (V18, P1564). Dr. Quasir described each injury, using the photographs. State Exhibit 47 showed the large gaping wound to the forehead. (V18, P1581). The wound was caused by a sharp instrument such as a knife or sword. The photo also showed a deep incised wound close to the eye. (V18, P1481-82). There was a deeply incised wound to the upper lip. (V18, P1582). Exhibit 48 photo showed cuts to the face by a sharp instrument and abraded contusions to the cheek. (V18, P1584). Exhibit 53 showed bruising to the arm and hand. (V18, P1585). Exhibit 54 showed injuries to the right side of the head and ear. (V18, P1486) Exhibit 55 showed the wound to the throat area.(V18, P1586). Exhibit 60 showed the clutched right hand. (V18, P1588). Exhibit 59 was duct tape removed from

Kyoko's hand. (V18, P1589). The duct tape contained a single fiber. (V18, P1588).

Defense counsel also objected to autopsy photos of Rufus Johnson (V19, P1601). The trial judge examined each photo, and allowed State Exhibits 61-71. (V19, P1602-13, 1626). Exhibit 71 showed the left side of Rufus' head with deep incised wounds made by a sharp object. (V19, P1637). Exhibit 70 showed eleven piercing wounds to the face, eyelids, forehead and chin. (V19, P1638-39). Exhibit 67 showed cut wounds behind the ear. (V19, P1642). Exhibit 40 indicated the shoestring around the neck. (V19, P1643). Exhibit 63 shows the front of the shirt with three cuts through it. (V19, P1644-45). These cuts may have corresponded to throat wounds and could be defensive wounds. (V19, P1646). Rufus may have assumed a defensive posture by dropping his chin to keep his throat from being cut. The shirt was cut in the process. (V19, P1647-49).

Photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. *See Bush v. State*, 461 So. 2d 936, 939-40 (Fla. 1984); *Williams v. State*, 228 So. 2d 377, 378 (Fla. 1969). Photographs are admissible if "they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted." *Brooks v. State*, 787 So. 2d 765, 781 (Fla. 2001) (quoting *Bush v. State*, 461 So. 2d at 939). The admission of

photographic evidence of a murder victim is within the sound discretion of the trial court, and absent abuse, the trial judge's ruling will not be disturbed on appeal. *Floyd v. State*, 808 So. 2d 175, 184 (Fla. 2002).

All of the photographs were relevant. The crime scene photographs were relevant to show the position of the bodies as found by the police and the manner of death. *See Looney v. State*, 803 So. 2d 656, 669 (Fla. 2001). The autopsy photographs were relevant to the HAC aggravator. They show the location and extent of wounds and the victims' efforts to defend themselves. *See Brooks*, 787 So. 2d at 781 (finding that autopsy photographs showing defensive wounds on victim's hands and arms and depicting bruises and hemorrhaging were relevant to the determination of the manner of the victim's death); *see also Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997) (finding photographic evidence relevant to show the circumstances of the crime and establish HAC aggravator admissible). Moreover, Dr. Quasir explained to the jury that the discoloration and condition of the skin were factors of decomposition, not results of the murder itself. All of the photographs were relevant and none were so shocking as to defeat the value of their relevance.

The trial judge followed this Court's instructions to scrutinize the photographs carefully. *Marshall v. State*, 604 So. 2d 799, 804 (Fla. 1992). She engaged in a preliminary screening

of the photographs, determined that the photographs were clearly relevant to both the manner of death and the HAC aggravator, and ensured they were nonduplicative. She did not abuse her discretion in admitting these photographs into evidence. See *England v. State*, 940 So. 2d 389 (Fla. 2006).

POINT IX

WELCH'S SENTENCE OF DEATH IS PROPORTIONATE.

Welch claims his death sentences are not proportional, comparing his case to *Knowles v. State*, 632 So. 2d 62 (Fla. 1993); *McKinney v. State*, 579 So. 2d 80 (Fla. 1991), *Besaraba v. State*, 656 So. 2d 441 (Fla. 1995), *Santos v. State*, 629 So. 2d 838 (Fla. 1994), *White v. State*, 616 So. 2d 21 (Fla. 1993), *Farinas v. State*, 569 So. 2d 425 (Fla. 1990), and *Kramer v. State*, 619 So. 2d 274 (Fla. 1993). These cases are distinguishable.

Knowles, McKinney, and *White* were one-aggravator cases. The others were two-aggravator cases. The common thread to all the cases was extreme mental problems and drug or alcohol abuse. *Santos, Farina* and *White* involved domestic situations, always a hot bed of emotional turmoil. *Kramer* involved a spontaneous drunken brawl between two homeless men. *Besaraba* also involved a psychotic and delirious homeless man.

In the present case Welch brutally murdered two victims during a robbery. The trial judge followed the 12-0 jury

recommendation. The trial court found the following aggravators and mitigators for each murder:

Aggravating Circumstances

(a) Prior violent felony (contemporaneous murder) – great weight;

(b) Committed during a robbery – great weight;

(c) Heinous, atrocious and cruel – great weight;

Statutory Mitigating Circumstances

(a) Extreme mental or emotional disturbance – little weight;

(b) Unable to appreciation criminality or substantially impaired - little weight;

(c) Age – some weight.

Non-statutory Mitigating Circumstances

(a) Alcohol and drug abuse - little weight;

(b) Suicides of brother and uncle – some weight;

(c) Post Traumatic Stress Syndrome - some weight;

(d) Bipolar disorder - some weight;

(e) Received no psychological treatment - little weight;

(f) Neuro-psychological abnormalities, including abnormal brain scan - little weight;

(g) Dissociative symptoms - little weight;

(h) Mental, emotional and abstract reasoning age of 15 years - little weight in addition to that already given under “statutory mitigation” category;

(i) Admitted guilt and pled guilty – very little weight.

(V4, R666-680). This case did not involve the mental illness and substance abuse usually found in non-proportional cases.

This Court's function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge. *See Bates v. State*, 750 So. 2d 6 (Fla. 1999). Rather, this Court's responsibility is to "consider the totality of circumstances in a case, and to compare it with other capital cases." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). *See also Reese v. State*, 768 So. 2d 1957, 1060 (Fla. 2000).

The trial court found three aggravators for the murder of both Kyoko and Rufus Johnson:

> Aggravating Circumstances
>
> (a) Prior violent felony (contemporaneous murder) – great weight;
>
> (b) Committed during a robbery – great weight;
>
> (c) Heinous, atrocious and cruel – great weight;
>
> Statutory Mitigating Circumstances
>
> (a) Extreme mental or emotional disturbance – little weight;
>
> (b) Unable to appreciation criminality or substantially impaired - little weight;
>
> (c) Age – some weight.
>
> Non-statutory Mitigating Circumstances

(a) Alcohol and drug abuse - little weight;

(b) Suicides of brother and uncle – some weight;

(c) Post Traumatic Stress Syndrome - some weight;

(d) Bipolar disorder - some weight;

(e) Received no psychological treatment - little weight;

(f) Neuro-psychological abnormalities, including abnormal brain scan - little weight;

(g) Dissociative symptoms - little weight;

(h) Mental, emotional and abstract reasoning age of 15 years - little weight in addition to that already given under “statutory mitigation” category;

(i) Admitted guilt and pled guilty – very little weight.

(V4, R666-680).

As part and parcel of this claim, Welch argues the trial judge erred in weighing the mitigating circumstances. The trial judge has discretion to determine the relative weight to give to each established mitigator, and that ruling will not be disturbed if supported by competent, substantial evidence in the record. *Barnhill v. State*, 834 So. 2d 836, 853 (Fla. 2002); *Spencer v. State*, 691 So. 2d 1062, 1064 (Fla. 1996).

This Court has affirmed death sentences where there existed similar aggravating circumstances and the same type of mitigating circumstances. *Ponticelli v. State*, 593 So. 2d 483, 486 (Fla. 1991) (two aggravating factors, CCP and pecuniary

applicable to both murders, a third factor, HAC, applicable to the murder of Nick Grandinetti; two statutory mitigating factors, no significant history of prior criminal activity and age of 20) ; *Buzia v. State*, 926 So. 2d 1203, 1208 (Fla. 2006)(four aggravators-prior violent felony, avoid-arrest, HAC, and CCP; non-statutory mitigation of interaction with the community, work record, mental or emotional disturbance, capacity to appreciate the criminality of his conduct impaired, gainful employment, appropriate courtroom behavior, cooperation with law enforcement, difficult childhood and remorse); *Barnhill v. State*, 834 So. 2d 836, 854-855 (Fla. 2002)(four aggravating factors: under sentence of imprisonment, during a robbery/pecuniary gain, CCP, and HAC; mitigation of age, 20, learning disability, frontal lobe impairment, cooperation with law enforcement, difficult childhood, entered a plea, eliminating the need for a guilt phase trial, appropriate courtroom behavior, psychiatric disorders, remorse, neglected by mother, poor student, shock and embarrassment when father was arrested in front of him, lived with his grandparents who provided him with a loving atmosphere); *Spencer v. State*, 691 So. 2d 1062 (Fla. 1996), (two aggravating circumstances: prior conviction for a violent felony and HAC, two mental heath mitigators, and a number of nonstatutory mitigators: drug and alcohol abuse, paranoid personality disorder, sexual abuse by

his father, honorable military record, good employment record, and the ability to function in a structured environment); *Foster v. State*, 654 So. 2d 112 (Fla. 1995), (three aggravating circumstances: HAC, CCP, and during the course of a robbery; fourteen nonstatutory mitigating circumstances, including mental or emotional disturbance that was not extreme and an impaired ability to conform his conduct to the requirements of law that was not substantial); *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997)(three aggravator: HAC, CCP, and under sentence of imprisonment; five nonstatutory mitigators: learning disability, low IQ, deprived childhood, influence of alcohol, and lack of a violent history); *See also Johnson v. State*, 660 So. 2d 637 (Fla. 1995) (aggravating circumstances of HAC, prior violent felony, murder committed for financial gain; fifteen mitigating circumstances including mental illness not sufficient to be a statutory mitigator).

POINT X

WELCH'S DEATH SENTENCE DOES NOT VIOLATE *RING v. ARIZONA*

Welch last asserts that Florida's capital sentencing scheme violates his Sixth Amendment right and his right to due process under the holding of *Ring v. Arizona*, 536 U.S. 584 (2002). This Court has previously addressed this claim. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143

(Fla. 2002), and denied relief. *See also Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003). Welch is likewise not entitled to relief on this claim. Furthermore, one of the aggravating circumstances found by the trial court was that the murders were committed during a robbery. *See Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (rejecting *Ring* claim where aggravating circumstances found by the trial judge were defendant's prior conviction for a violent felony and robbery).

CONCLUSION

Based on the foregoing authority and argument, Appellee respectfully requests this Honorable Court affirm the convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by HAND DELIVERY to Office of the **Christopher S. Quarles,** Assistant Public Defender, Office of the Public Defender, 444 Seabreeze Blvd., Suite 200, Daytona Beach, Florida 32118 this _____ day of March, 2007.

_____
BARBARA C. DAVIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

_____
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