IN THE SUPREME COURT OF FLORIDA

JOHN EVANDER COUEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-1636
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

In this brief, the symbol "R" will designate page numbers of the pleadings in the record on appeal, and the symbol "T" will designate the pages of the transcripts (numbered separately from the pleadings), as renumbered (in certain instances) by the clerk's office. Volumes will be referenced according to the sequential numbers assigned by the clerk's office for the entire record on appeal, and not by the concurrent numbering of the court reporters.[1]

[1] Some transcripts appear twice, either in their entirety or in partial form, in the record on appeal. For this brief, Appellant has chosen to cite to the complete transcripts as they are grouped together at the end of the appellate record.

STATEMENT OF THE CASE

The State charged the Appellant, John Evander Couey, by indictment with the first-degree murder by asphyxiation of Jessica Lunsford, burglary of a dwelling with a battery, kidnapping of a child under 13 with intent to commit a sexual battery, and sexual battery on a child under 12. (Vol. 1, R 17-18) The state filed its Notice to Seek the Death Penalty (Vol. 1, R 21), and the defendant entered a plea of not guilty to the charges. (Vol. 1, R 22)

The defense unsuccessfully contested the legality of Florida's death penalty under *Ring v. Arizona,* 536 U.S. 584 (2002), contending among other things that it is unconstitutionally imposed by a judge rather than by jury, that it fails to require fact-finding by the jury, and that it fails to require jury unanimity on the recommendation and on each aggravator. (Vol. 9, R 1621-1623, 1624-1628; Vol. 10, R 1924-1927; Vol. 11, R 2007-2038, 2039-2043; Vol. 61, T 35-38, 48-49) The defendant also moved unsuccessfully to bar victim impact evidence from the penalty phase of the trial, contending that under Florida's death penalty scheme, such evidence is irrelevant (and hence unconstitutional) to any statutory aggravating circumstances, that the prejudice of the victim impact evidence would outweigh its probative value and allow for imposition of the death penalty based on sympathy, that the evidence should be presented before the judge only, and that the

evidence should be limited. (Vol. 9, R 1569-1586, 1629-1642, 1643-1649, 1650-60, 1661-1665; Vol. 44, R 8301-8302) The court denied the motions and permitted the victim impact evidence. (Vol. 61, T 27, 35-37; Vol. 117, T 5873-5883)

The defendant filed a motion to suppress his statement given to Citrus County Detectives Atkinson and Grace in Georgia where Couey was detained and questioned regarding these charges (given after the detectives failed to cease questioning and honor Couey's request for an attorney), as well as evidence obtained as a direct result of the unlawful questioning (evidence and testimony concerning the recovery of the victim's body and further evidence discovered as a result thereof). (Vol. 11, R 2153-2160; Vol. 21, R 3892-3909; Vol. 58, T 196-198) The trial court suppressed the statement to police, but ruled that the location and recovery of the victim's body would have eventually been inevitably discovered even without the unlawful interrogation. (Vol. 21, R 3917-3943; Vol. 61, T 12-18) The trial court also denied defendant's motion to suppress statements made by Couey, again to Detective Atkinson, on October 11, 2005, as Atkinson accompanied an evidence technician to the Citrus County Jail to obtain hair samples from Couey (and even though obtaining the samples would only take a

few moments, Atkinson conversed with the defendant for close to two hours). (Vol. 61, T 19-20)

The defendant also sought the suppression of two more sets of statements to authorities: one to two Orange County detectives, who, despite a written invocation of rights form on file with the jail, questioned the defendant about a 1985 unrelated murder and in the course thereof, discussed the instant case as well, in violation of the defendant's exercise of his right to remain silent and to have an attorney present; and a second oral motion regarding statements made to corrections officers guarding Couey prior to trial, in which it was alleged that the officers obtained the statements through coercion. (Vol. 26, R 4961-4972) The trial court granted the motion regarding the statements to Orange County detectives, but denied the motion as to the statements given to corrections officers. (Vol. 26, R 5020-5027; Vol. 40, R 7520) The defendant had also objected to the late notification of the jail guards statements, allegedly made to the guards and thus in possession of the state over a year previously. (Vol. 26, R 5029-5033; Vol. 28, R 5243-5255; Vol. 40, R 7520) The defendant moved to continue on the grounds that more time was needed to prepare for trial in light of the 960 pages of discovery that the State turned over only a month before. (Vol. 28, R 5243-5255) The trial court denied the motion and instead appointed private counsel to assist the

defense. (T 70; T 140-143) Defense counsel repeatedly and unsuccessfully moved to continue the trial arguing that time remaining before trial was inadequate to properly prepare the case and that the appoint of private counsel had actually impeded their progress. (Vol. 27; R 5243-5255; Vol. 75; T 8-17; Vol. 78; T 433-434)

Due to the extensive publicity of this high profile case, the defense sought a change of venue out of Citrus County. (Vol. 5, R 829-966) The trial court, after having difficulty in selecting a jury in Citrus County, and upon acquiescence of the state, ordered the trial removed to neighboring Lake County, which also proved unsuccessful in obtaining a jury, hence sparking another venue change. (Vol. 24, R 4586-4588) Despite repeated requests from the defense for the trial court to follow the requirement of Section 910.03(2), Florida Statutes, and attempt to locate the trial to a venue with similar demographics (with suggestions for similar communities), the court ignored this request, indicating it was totally within his discretion to do so, and simply contacted Miami-Dade County, to which venue was changed over the defendant's repeated objections. (Vol. 24, R 4592-4632; Vol. 25, R 4633-4677, 4815-4827, 4828-4833; Vol. 26, R 4858-4863; Vol. 63, T 3-13, 43-48, 84-93)

Prior to trial, the state filed a motion in limine seeking to prevent the defense from questioning Mark Lunsford, the victim's father and an initial suspect in his daughter's disappearance, as to child pornography (viewed the night of Jessica's disappearance) which the police had discovered on his seized laptop computer and for which he was not charged, and about financial details and irregularities in spending concerning the Jessica Lunsford Foundation, which he had established. (Vol. 21, R 3915-16) The state claimed such examination was irrelevant, while the defense countered that such matters were relevant to show any bias or motivation for Mark Lunsford's testimony, as he was shown favorable treatment by Citrus County authorities and unaccountably not charged with the child pornography and that he was now dependent on the Jessica Lunsford Foundation for his complete support, and that its future cash flow was dependent on his testimony and the outcome of this trial. (Vol. 62, T 15-16)

A jury trial commenced before the Honorable Richard A. Howard, Judge of the Fifth Judicial Circuit of Florida, in and for Citrus County, sitting in Miami-Dade County, on February 12, 2007. (Vol. 8, T 264) During jury selection, the trial court denied appellant's cause challenges to jurors 0002, 2699, 0865, 1496, and 1553. (Vol. 102, T 3983; Vol. 105, T 4425; Vol. 106, 4581; Vol. 106, T 4581) Both jurors 2699 and 1496 had knowledge which may have come from suppressed

statements that Couey had made to law enforcement officers. (Vol. 81, T 966-967; Vol.92, T 2550-2522) Jurors 0865 and 1553 intimated that they would automatically impose the death penalty and juror 0002 stated that she would have difficulty imposing a life sentence. (Vol. 105, T 4419-4421; Vol. 106, T 4515-4516; Vol. 102, T 3968-3969). The defendant exercised peremptory challenges to strike jurors 0002, 2699, and 0865. (Vol 105, T 4427; Vol.106; T4582) The defendant subsequently exhausted all of his peremptory challenges, requested an additional challenges in order strike jurors 1496, 1553, and juror 0114, whose daughter had been molested as a child by juror 0114's ex-husband. (Vol.106, T 4582-4583) The trial court denied the request and the objectionable jurors ultimately sat on the jury.(Vol. 106, T 4582-4583) The defendant later renewed all objections, did not accept the jury, and renewed his request for additional peremptory challenges. (Vol.106, T 458)

With regard to Corrections Officer John Read, the state moved in limine to preclude the defendant from cross-examining the officer about his prior termination as a guard after it was discovered that he falsified his corrections officer employment application, failing to disclose a prior marijuana conviction. (The officer was later rehired as a guard upon re-application with full disclosure of the crime, prior to his involvement in this case guarding Couey.) (Vol. 43, R 8011;

Vol. 114, T 5435-5438) The court granted the state's motion in limine, ruling that the crime which the officer failed to disclose in his corrections officer's application was not a crime involving dishonesty and, thus, the defense was precluded from questioning the officer about the matter. (Vol. 43, R 8035; Vol. 114, T 5440-5441)

Prior to the testimonies of the corrections officers, discussion was had on the record (during the hearing on the state's motions in limine) that, should the defense question the jail guards as to the year's delay in disclosing alleged admissions by Couey to them, that would open the door for the state to bring up the fact that the court had suppressed Couey's original confession. (Vol. 114, T 5448-5452) The court cautioned the state to be certain that such testimony not be elicited without a prior ruling by the court on its admissibility (should the defense open the door), warning the state about any officers "volunteering" any testimony about the prior confession and the court's suppression ruling. (Vol. 114, T 5449-5451) The state assured the court that it would not elicit such testimony, and that its witnesses would not "blurt it out" either, as they had been instructed only to answer the questions as asked. (Vol. 114, T 5451-5452)

During cross-examination, then, of Corrections Officer Read, the defense steered clear of the subject regarding the officers' delay in reporting their conversations with the defendant. However, in response to the defense questioning

about the officer failing to note in the required jail log any record of the defendant's alleged inculpatory conversation with him (even though other minor conversations were indeed recorded in the log), Officer Read audaciously volunteered that "Well, there were other *testimonies* out there at the time that I thought would have covered whatever I might have heard." (Vol. 114, T 5572-5573) After the witness was excused, the defense moved for a mistrial based on this gratuitous non-responsive comment to the jury, contending that the officer implied to the jury that "there was a confession out there." (Vol. 114, T 5577, 5578-5579) The trial court denied the mistrial, stating that the officer used the word "testimonies" rather than "confession," and opining that there was a big difference between the two words such that the jury would not infer any such thing from the officer's testimony. (Vol. 114, T 5578-5579)

The court denied the defendant's motions for judgment of acquittal, particularly the requested JOA regarding burglary with a battery wherein the defense argued that there existed absolutely no evidence that the defendant touched or struck the victim against her will while in or leaving the Lunsford dwelling, the state's evidence indicating that Jessica voluntarily left the trailer with the defendant. (Vol. 115, T 5619-5623) In arguing against the motion for judgment of acquittal on this charge, the state contended that the jury could "reasonably infer"

that some kind of a touching must have taken place in the act of the defendant waking her, giving her a stuffed animal, and exiting the house. (Vol. 115, T 5621) The court agreed with the state, ruling that the mere evidence of the defendant's going into the trailer and approaching her was sufficient for the jury to weigh as to the battery element of the enhanced burglary charge. (Vol. 115, T 5622-5623) The jury returned verdicts of guilty for first degree murder, burglary of a dwelling with a battery, kidnapping of a child, and sexual battery on a child. (Vol. 43, R 8040-8043; Vol. 116, T 5794-5796)

Penalty phase of the trial commenced on March 13, 2007. (Vol. 117) The defense renewed all of its prior motions and objections, with the court noting the same ruling. (Vol. 117, T 5860) During its opening penalty phase statements, the state urged the jury to consider, as an aggravating circumstance, the prior "violent criminal offense, that being sexual battery of a child for Jessie." (Vol. 117, T 5861-5862) The state also highlighted to the jury the victim impact testimony it would hear, including the impact on the small rural community, the outpouring of emotions, and the impact on school children in the small town. (Vol. 117, T 5864-5865)

The defendant moved again to preclude victim impact testimony in general, and specifically with regard to the content of two letters read to the jury by

Jessica's guidance counselor and third grade teacher, wherein they noted that children in the community were now afraid to sleep alone (and were sleeping with their parents) and that they had "lost a sense of security." (Vol. 117, T 5873-5874, 5879- 5880) The court overruled the objections, indicating that all of the contents of both of the letters comported with the caselaw, as each letter "does not call for a public apology." (Vol. 117, T 5874, 5879-5880)

The next morning of the penalty phase, during an initial bench conference, the trial court itself expressed concern about the fact that a contemporaneous violent felony on the same murder victim could not be used to support the aggravating circumstance of a prior violent felony. (Vol. 119, T 6071-6074) The court noted that the dates for the other contemporaneous crimes are the same dates as for the murder. (Vol. 119, T 6073-6074) Later that day, during the penalty phase charge conference, the court again questioned whether the contemporaneous convictions of sexual battery or burglary with a battery on the same victim as the murder could suffice for the prior violent felony aggravator. (Vol. 119, T 6118) The court indicated that it understood the state's rationale for their use, articulating that, although they were on the same victim, the burglary with a battery occurred first, followed by the kidnapping and sexual battery, "and the murder had to be the

last thing." (Vol. 119, T 6118)[2] At the end of the charge conference, the defense, objecting to the applicability of the prior violent felony aggravator for the contemporaneous crimes on the same victim maintained, "This was the same victim, same incident, same transaction, and that would be improper to give that one." (Vol. 119, T 6128) The trial court responded that it understood (just as it had understood the state's theory), but, "With that having been said, I'm still going to allow the State to argue that aggravator," overruling the objection, and listing both the burglary with a battery and the sexual battery on the victim as the prior violent felonies in the jury instructions on this aggravating circumstance. (Vol. 119, T 6128-6129)

The state then claimed in its penalty phase closing argument to the jury that it should find the prior violent felony aggravator because of the contemporaneous burglary with a battery conviction. (Vol. 119, T 6149) The jury was instructed by the court that they could consider the contemporaneous convictions of the burglary with a battery or the sexual battery on Jessica Lunsford to fulfill the requirements of the prior violent felony aggravator. (Vol. 119, T 6174)

[2] During his guilt phase closing argument, however, the prosecutor had maintained a completely contradictory view: To counter defense questions about Jessica not crying out to alert the searching police or any of the defendant's trailermates in the single-wide, thin-walled trailer, the state vouched that the burglary, kidnapping, and murder all occurred in one quick episode, the first night she went missing. (Vol. 116, T 5750-5751)

The jury returned a recommendation of death, by a vote of 10 to 2. (Vol. 119, T 6189) The defendant filed a motion for new trial, arguing *inter alia* that the trial court erred in its denial of its challenges for cause, specifically noting that the court had denied motions to strike for cause several jurors who had heard via the media coverage of the defendant's confession which was suppressed and some who would hold the defendant to a higher burden of proof (the defense reminding the court that it had listed those jurors during the selection process), and its denials of additional peremptory challenges to compensate for these denials of cause challenges (again observing that it had identified those jurors it felt it needed to strike due to their bias or prejudice). The defendant also renewed his motion for judgment of acquittal. (Vol. 44, R 8337-8340; Vol. 71, T 149-150) The court denied the motion, agreeing with the state that no juror who served should have been stricken for cause and (contrary to what had actually transpired at jury selection) that the defendant had failed to point to any specific objectionable juror it had been forced to keep. (Vol. 44, R 8370-8372; Vol. 71, T 152)

A mental retardation/*Spencer*[3] hearing was held on July 17, 2007. (Vols. 72-73) The court denied defendant's motion to declare Section 921.137, Florida Statutes, unconstitutional for requiring an incorrect legal standard of clear and

convincing evidence instead of the proper "preponderance of evidence" standard, citing to cases from this Court. (Vol. 47, R 8727-8729; Vol. 72, T 4-6) The court took judicial notice (per the defense request) of prior testimony from the guilt and penalty phase trial regarding mental retardation and the state presented its own expert witness on the issue as well as additional victim impact evidence from father Mark Lunsford. (Vol. 72, T 10-45, 271-274)

The state filed a notice and motions to have the defendant declared a habitual offender and a sexual predator. (Vol. 47, R 8802-8803, 8806-8807)

The trial court denied defendant's motion to preclude the death penalty (Vol. 40, R 7505-7514), finding that the defendant was not mentally retarded. (Vol. 49, R 9200-9215) and sentenced the defendant to death for the first degree murder. (Vol. 50, R 9285-9302) In its sentencing order, the court, despite allowing it to have been presented and argued to the jury by the state, followed its earlier predilection and rejected the aggravating circumstance of a prior violent felony, finding it inapplicable since it was committed contemporaneously on the same victim as the murder, and noting that the state had conceded it in its sentencing memorandum. (Vol. 50, R 9291)

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

Th court found that the state had proven five aggravating circumstances: that the killing was committed during the commission of burglary, kidnapping and sexual battery [§921.141(5)(d)]; the victim was a child under age 12 [§921.141(5)(l)]; to avoid arrest [§921.141(5)(e)]; cold, calculated, and premeditated [§921.141(5)(i)]; and heinous, atrocious, or cruel [§921.141(5)(h)], finding them all to have great weight. (Vol. 50, R 9291-9295)

The trial court found as a statutory mitigating circumstance that the defendant had no significant criminal history [§921.141 (7)(a)], giving it little weight; but rejected the statutory mitigators that the crime was committed while the defendant was under the influence of extreme mental and emotional disturbance [§921.141 (7)(b)] (rejecting it but still somehow giving it slight weight); and that the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired. [§921.141(7)(e)], finding the "greater weight of the evidence does not establish this statutory mitigating circumstance." (Vol. 50, R 9296-9298)

As to non-statutory mitigation, the trial court found: the defendant was a non-violent prisoner (assigning it moderate weight); that he had been born prematurely to a 16-year-old immature and uncaring mother ("very minimal weight"); that he had been born with a birth defect (misshapened ears) (very

minimal weight); abandonment by his mother (moderate weight); his father was an abusive alcoholic (very minimal weight); his history of drug abuse (very little weight); his good behavior at trial (very little weight); the defendant suffers from a learning disability (very minimal weight); the defendant suffered from physical, mental, and emotional abuse as a child (moderate weight); his speech impediment as a child (very minimal weight); his cooperation with the police, although only after his initial denial (very little weight); that the defendant, while in prison previously in 1991, had sought treatment as a mentally disordered sex offender, which had never been provided (moderate weight); that he adapts well to a controlled environment and is a model prisoner (very little weight); and that Couey suffers from certain intellectual limitations, but that he was not retarded and has no mental illness (very little weight). (Vol 50, R 9296-9301)

The court concluded that the five aggravating circumstances "vastly outweighed" the mitigating factors and sentenced Couey to death for the first-degree murder. (Vol. 50, R 9301) The court further sentenced him to three consecutive terms of life imprisonment for the remaining three counts. (Vol. 50, R 9301, 9321-9336)

Notice of appeal was timely filed. (Vol. 50, R 9306) This appeal follows.

STATEMENT OF THE FACTS

During the evening of February 23, 2005, nine-year-old Jessica Lunsford returned home about 9:00 p.m. from a church function to the trailer on South Sonata Avenue, in Homosassa, rural Citrus County that she shared with her father, Mark Lunsford, and her paternal grandparents. (Vol. 108, T 4770-4772, 4774-4775, 4778) Her father had not yet returned home from work and she got ready for bed, watching some television in her room while having a snack, according to her grandmother. (Vol. 108, T 4779) Her father apparently got home at some time before her bedtime, testifying that he watched television in the living room while Jessica jumped on the couch, but left again to stay at his girlfriend's home for the night. (Vol. 108, T 4788-4789) Jessica's grandmother put her to bed along with her purple stuffed dolphin toy at about 10:00 p.m. and then went to bed herself. (Vol. 108, T 4779-4780) The family dog, Corky, who slept in the grandmother's room, did not awaken her that night. (Vol. 108, T 4780)

Mark Lunsford testified he returned home from his girlfriend's at 5:45 the next morning, entering through the back door, opening the knob with his key (and thus not knowing if it had been locked or not), to hear Jessica's alarm clock sounding. (Vol. 108, T 4789-4790) Not thinking anything about it, he went to his room to get ready for work, after which he still heard the alarm ringing. (Vol. 108,

T 4790) Opening her bedroom door, he discovered his daughter and her stuffed dolphin missing. (Vol. 108, T 4790-4791) He informed his mother of Jessica's disappearance and she called 911. (Vol. 108, T 4780) Nothing was found disturbed in the trailer, with the exception of an L-shaped cut in the screen door of the back screen porch. (Vol. 108, T 4782; Vol. 109, T 4845-4846)

Police and the media arrived en masse to the Lunsford trailer and a massive search effort for the girl began, including K-9 police dogs, helicopters, ATV's, and searchers on horseback. (Vol. 108, T 4797-4815, 4821-4822, 4844, 4848) Meanwhile in a trailer 65 yards diagonally across the street from the Lunsford trailer on Snowbird Court, lived the defendant John Evander Couey, his sister Dorothy Dixon, her boyfriend at the time Matt Dittrich, Dixon's daughter Madie Secord, Madie's husband Gene Secord, and their 2-year-old son Joshua.[4] (Vol. 109, T 4843-4844, 4860-4866, Vol. 112, T 5214-5215, 5224) That morning, they all watched with curiosity the police activity out their window, the defendant having left his middle bedroom during the morning to join them in their observation. (Vol. 109, T 4874; Vol. 112, T 5215, 5225) At some time during the

[4] Dorothy Dixon and Madie Secord were later arrested due to their involvement in this case, and Madie's two children were taken away from her. (Vol. 109, T 4882-4883, 4894) Gene and Madie Secord no longer live together, and (given the past tense used to describe their relationship) Dixon and Dittrich no longer appear to be together. (Vol. 109, T 4861; Vol. 112, T 5202, 5219)

day, police approached Madie Secord on the porch of the Dixon trailer and asked for and received permission to search around the outside of the trailer. (Vol. 109, T 4889-4890) While this was occurring, the defendant went and stood outside their back door. (Vol. 112, T 5227-5228, 5233) They all watched the news about the disappearance of Jessica Lunsford that day. (Vol. 112, T 5225)

The day and evening before, Dixon, Dittrich, and Couey had been in and out of their trailer, going to a junk yard where the men worked on a truck throughout the day, returning home for the final time between midnight and 1:00 a.m. on February 24th. (Vol. 109, T 4867-4870; Vol. 112, T 5216-5218) Dixon, Dittrich, and the defendant smoked a rock of crack cocaine that night, and the defendant drank some beers. (Vol. 109, T 4883-4884; Vol. 112, T 5218, 5220) After returning home, Dixon and Dittrich retired to their bedroom where the television was routinely left on all night long. (Vol. 109, T 4867-4870) They were not aware of anyone leaving or entering the trailer that night. (Vol. 112, T 5219, 5227)

Later on February 24th and for the next 3-4 days, Dixon and Dittrich continued to go to the junk yard while the defendant stayed home as he often did, not having been asked to join them. (Vol. 109, T 4874-4876) Gene and Madie Secord spent most of those days inside their room, Madie suffering from a difficult pregnancy. (Vol. 109, T 4890-4891; Vol. 112, T 5226) During that time, the

police and K-9 dogs continued to search the area around the two trailers and elsewhere in Citrus County, especially looking for any possible burial sites. (Vol. 111, T 5141-5143) Also during that time frame, no one living in the Dixon trailer detected any noise coming from the defendant's bedroom (even though they had to pass by it all the time), nor did they notice anything unusual in the thin-walled trailer. (Vol. 109, T 4880-4882; Vol. 112, T 5221, 5229) Matt Dittrich denied ever being in the defendant's bedroom during this time frame. (Vol. 112, T 5222)

Sometime prior to March 4, 2005, Madie, Gene, and Josh Secord moved to Crystal River and the defendant stayed there with them. (Vol. 112, T 5228-5229) On March 4th, Madie drove the defendant to the bus station where she purchased a bus ticket for the defendant in her name (he having no identification required to purchase the ticket), returning home with him. (Vol. 109, T 4892) Madie, Gene, Josh, and Gene's mother visited Disney World for the weekend while Couey stayed behind. (Vol. 109, T 4892-4893; Vol. 112, T 5228-5229) Shortly after their return, on March 7th, she drove the defendant to the bus station, where he boarded a bus for Savannah, Georgia. (Vol. 109, T 4893-4894, 4919-4920)

On March 12, 2005, Couey was located by the Savannah Police at the request of Citrus County authorities and questioned by Officer Michael Love of that department; he was not under arrest at this time. (Vol. 112, T 4900-4902)

Couey denied any knowledge of the missing Jessica except for what he had heard on the news, and told police that he had lived with his niece for the previous three weeks immediately prior to coming to Savannah, and that, before that, he had lived with his sister (at their former address, rather than the Snowbird Court one), about two miles from the Lunsford trailer. (Vol. 112, T 4915-4921)

Officer Martin Cannady of the Citrus County I.D. Section testified that on March 14, 2005, he returned to the Dixon trailer and got Dorothy's permission to search it. (Vol. 109, T 4877; Vol. 110, T 4975) However, on cross-examination, Cannady testified that he was attending a class at the FBI Academy in Quantico, Virginia, and did not return to Citrus County until after the class's completion on March 28th. (Vol. 110, T 5003) Dixon testified that nobody had lived in the defendant's middle bedroom since he had left. (Vol. 109, T 4879) According to Cannady's testimony, he seized the mattress and three throw pillows that appeared to have blood stains on them, from Couey's bedroom, initially indicating that he turned the mattress over to the Evidence Section and forwarded the pillows to the FDLE lab in Tampa, but later stating that both the mattress and the pillow were transported by him to the lab the following day. (Vol. 110, T 4975-5002)[5]

[5] However, later testimony and a photograph taken by an FDLE analyst reveal that the mattress was still in the trailer on March 18, 2005, after Couey's suppressed statements to police

Also on March 14, 2005, Officer Love of the Savannah, Georgia police department was asked again to locate the defendant but was unable to do so. (Vol. 109, T 4944-4945) Authorities, however, were able to locate Couey in Augusta, Georgia, where he was arrested on a warrant from Citrus County, and Citrus County Detectives Gary Atchison and Scott Grace interviewed him on March 17, 2005, in Augusta. (Vol. 59, T 107-113) It was during this interrogation that, after the defendant requested to speak with an attorney, which request the detectives ignored, that the defendant told police where to find Jessica Lunsford's body. (Vol. 61, T 12-16)[6] Prior to his request for an attorney (and thus admitted into evidence), the defendant admitted to living on Snowbird Court with his sister, and admitted to maybe having seen her outside playing with other children, but denied knowing anything about Jessica's disappearance or where she may be located. (Vol. 114, T 5315-5523, 5331-5338) He told police that a ladder found outside his bedroom window had been there for a while (verified by testimony of Dorothy Dixon [Vol. 109, T 4872]), and he had used it to fashion an antenna for his television on the roof of the trailer. (Vol. 114, T 5524)

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and the FDLE report indicates that it was not received at FDLE until July 19, 2005, when it was submitted by Detective Dan Holder, rather than Officer Cannady. (Vol. 55, R 8; Vol. 112, T 5242-5245, and Initial Brief of Appellant, *infra* at p. 25-26.)

Acting on Couey's statements (the portions of which came after his request for an attorney and hence suppressed), Citrus County sheriffs were able to obtain a search warrant for the Dixon trailer and its surrounding area, and located the site where Couey had told them they could find the victim's body, buried beside the steps to the back porch of the Snowbird Court trailer.[7] (Vol. 59, T 43, 54; Vol. 110, T 5024-5026) Sheriff's officers excavated the site, uncovering the victim's body buried inside two plastic garbage bags, along with the stuffed dolphin toy. (Vol. 110, T 5027-5032, 5035) The victim's wrists were bound loosely with speaker wire[8] and two fingers of her right hand were protruding from the garbage bags. (Vol. 110, T 5033-5035; Vol. 114, T 5470, 5482) No fingerprints could be developed from the garbage bags. (Vol. 112, T 5307-5308)[9] The outer garbage bag was knotted at the bottom, near the victim's buttocks, while the inner bag was knotted above the victim's head. (Vol. 114, T 5471)

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[6] As recounted in the Statement of the Case, these statements were suppressed by the trial court and the jury did not hear about the police interrogation on that date. (Vol. 21, R 3917-3938; Vol. 61, T 12-16)

[7] The police had already combed the entire area, including that surrounding the Snowbird Court trailer, with police dogs and were unable, prior to the defendant's pinpointing the location, to locate the burial site. (Vol. 59, T 50-51, 64-65)

[8] Later determined to have come from wire that the defendant had utilized to form a television antenna on the trailer's roof by his bedroom window, which had been seized on March 20, 2005. (Vol. 112, T 5245-5246; Vol. 113, T 5320-5332)

[9] Fifteen similar garbage bags containing household garbage were found on the porch outside the trailer, one of which was later found to contain two fingerprints belonging to the defendant. (Vol. 111, T 5170-5171; Vol. 112, T 5302-5306)

Cause of death was determined to be from suffocation inside the bag, and the medical examiner opined that the victim was alive when placed in the bag (because of her fingers poking out of the bag), but that it was impossible to tell if she was alive when put in the ground. (Vol. 114, T 5495-5497) A small tear was discovered on the victim's vaginal opening (although what caused the tear, the doctor could not say), but no other injuries whatsoever were observed, including no injuries to her head, on her mouth (no indication of a gag being used), neck (no evidence of strangulation), or wrists (indicating the ligature to the wrists was not bound tightly), nor was there any evidence of internal trauma. (Vol. 114, T 5483-5484, 5488, 5490, 5501) No signs of food were found in the victim's intestinal tract, indicating to the medical examiner that the victim had not eaten within the range of twelve hours to four days prior to her death. (Vol. 114, T 5488) The doctor indicated that, based on the decomposition of the body (taking into account environmental factors), the victim had been dead for approximately three weeks (sometime from the end of February to the first week of March). (Vol. 114, T 5476-5477)

Between March 18th and the 20th, 2005, the police searched for further evidence inside the middle bedroom of the Snowbird Court trailer, including fingerprint collection. During this search, police removed the bedroom closet wall,

as well as a pizza box. (Vol. 111, T 5090-5095, 5125) Later analysis reveals that the victim's fingerprints were on the closet wall and both the victim's and the defendant's prints were discovered on a table top in the bedroom and on the pizza box, along with six other unidentified prints on the box. (Vol. 111, T 5097-5099; Vol. 112, T 5295-5298, 5300, 5302, 5309-5312) No additional known prints, including those of Matt Dittrich and Gene Secord, were submitted for comparison. (Vol. 112, T 5309-5312) A blood stain was also observed on the closet door, which blood matched that of the victim. (Vol. 112, T 5253-5255, T 5378; Vol. 113, T 5378) The police did not observe whether there was a lock on the closet door. (Vol. 111, T 5112, 5133)

Photographs taken inside the defendant's bedroom on March **18**th by FDLE Analyst Stephen Starke and his testimony concerning those photographs, show the corner of the mattress and pillows, still in the bedroom of the trailer, despite Citrus County Sheriff's Officer Cannady's assertions that they had already been removed from the bedroom, and had been transported and submitted for testing by the FDLE. (Vol. 112, T 5242-5246; State's Exhibit #46) The FDLE Lab Report regarding the mattress indicates that the mattress was not received until July 19, 2005, from Detective Dan Holder (rather than by Officer Cannady on March 15th as Cannady claimed). (Vol. 55, R 8) A stain on the mattress revealed a mixture of

the victim's and the defendant's DNA[10] (blood from the victim, semen from the defendant), although it cannot be determined when those deposits were made, whether made at the same time or at different times. (Vol. 113, T 5366-5370, 5414, 5414, 5418-5419) The victim's DNA was found to be present on two of the throw pillows, along with DNA of the defendant and one stain that could not be determined whose DNA it was. (Vol. 113, 5371-5377, 5424-5425) Several other areas of stains were not tested. (Vol. 113, T 5421-5424) The known DNA of Gene Secord and Matt Dittrich was never submitted for testing against these stains. (Vol. 5426-5427)

While Couey was incarcerated awaiting trial, he was housed in a separate wing by himself, either in "C-pod" or in "Medical." (Vol. 114, T 5567-5568; Vol. 115, T 5593, 5495-5496, 5597-5598; *see also* Vol. 59, T 251) Despite this, somehow Gene Secord, his niece's husband with whom he lived during the time frame of this crime, was apparently housed next to Couey for six months while Secord was jailed on a failure to pay child support. (Vol. 112, T 5229-5230) Secord testified that he discussed religion with Couey, and he asked the defendant how he could do something like this if he believed in God so much. (Vol. 112, T

[10] The victim's known DNA was obtained from buccal swabs of the victim's mouth after her body was recovered. (Vol. 113, T 5349-5355)

5232) Secord maintained that Couey told him that it was something that had happened in the past, and since one cannot dwell in the past, he has to forget about it. (Vol. 112, T 5232) Couey also reportedly stated that if his sister (Dorothy Dixon) had loved him more, he wouldn't have done this. (Vol. 112, T 5232)

Although never submitted to any lab for testing, Detective Atchison, armed with a court order, accompanied an evidence technician to the jail (claiming he had to attend since it was he who had obtained the order) to obtain hair samples from the defendant on October 11, 2005, a procedure which ordinarily would have taken no more than 20-30 minutes. (Vol. 114, T 5539-5540, 5550-5551, 5552; Vol. 115, T 5607-5608, 5610-5611) Since the defendant, at their last meeting (when Atchison was obtaining handwriting samples from Couey – even though there is no evidence anywhere in the record about any questioned handwriting), had inquired about his sister and niece, Detective Atkinson had spoken to them the day prior to his visit to Couey, and so informed the defendant, which prompted a lengthy conversation of over two hours with the defendant. (Vol. 59, T 246, 252) During that conversation while talking religion, Detectives Atchison and Holder testified, the defendant blamed the crime on drugs and informed them that this crime would not have happened if his sister loved him and had paid him more attention and that he felt that the media was blowing the case out of proportion. (Vol. 114, T 5540,

5542; Vol. 115, T 5608-5609) According to the detectives, Couey expressed regret, saying he did not understand how this crime happened, since he is not a murderer, and he wished he could take it back. (Vol. 114, T 5540-5541; Vol. 115, T 5609) He admitted to them that the victim had been in his closet. (Vol. 114, T 5541) Finally, the defendant told police that he had to forgive himself before God would forgive him, and that he would apologize one day in Heaven to Jessica. (Vol. 114, T 5541; Vol. 115, T 5608-5609) Atchison stated the defendant claimed that his sister's boyfriend, Matt Dittrich, had been in his bedroom while Jessica was in the closet and that he knew she was there, but later claimed he may not have known. (Vol. 5541-5542)

Corrections Officers John Read and Nathalia Windham, who guarded Couey in the Citrus County jail while he was awaiting trial, came forward just prior to the defendant's trial (and after a year had passed) to claim that Couey had volunteered statements to them concerning the crimes. (Vol. 114, T 5553-5558; Vol. 115, T 5585-5588) Although they did log other conversations with the defendant regarding religion (the book of Revelations) or the defendant grumbling or humming or what he was watching on television, they did not note in the log these "admissions" of the defendant, saying that that was not their job, nor the purpose of the logbook. (Vol. 114, T 5566, 5572-5575; Vol. 115, T 5599) Officer Read,

realizing that the defendant "had this great need to unload," dubbed himself "Father Confessor" to Couey and wrote his name and address in Couey's bible so they could correspond once Couey was in prison. (Vol. 114, T 5570, 5575)

Officers Read and Windham testified that Couey never professed his innocence and told them that he had previously noticed Jessica from his window and, in the middle of the night, went to the victim's trailer (entering by the screen door, according to Windham) and, on an impulse, told the awakened girl he was taking her to see her father, and that she left voluntarily with him (asking to be permitted to take her stuffed dolphin with her) and went to his trailer (not recounting, to their recollection, how they entered his trailer). (Vol. 114, T 5559-5560; Vol. 115, T 5590) Windham claimed that Couey told her the Lunsfords had a small dog in their trailer, but that the dog did not bark. (Vol. 115, T 5590) The corrections officers further recounted that Couey had the victim in his trailer for three days, engaging in sex with her on the first day, and claiming that they would just lie on the bed, "hanging out" conversing or playing "with him sexually" (something she knew a lot more about than a nine-year-old should have). (Vol. 114, T 5561-5562; Vol. 115, T 5590-5591) Couey told them that the victim had bled and that after sex, she had to urinate. (Vol. 114, T 5563; Vol. 115, T 5591) Couey claimed that Jessica was in the house and knew when the police came to the

trailer, but that she hid in the closet and was quiet. (Vol. 114, T 5561-5562; Vol. 115, T 5591) Couey claimed to Windham that his sister and Dittrich knew that Jessica was there and that Dittrich had even spent some time with her in the defendant's bedroom. (Vol. 115, T 5592)

According to the corrections officers, after the police came to the trailer, the defendant panicked. Not being able to kill her with his own hands, he dug a hole on the third day, had her step into one garbage bag (according to Windham, telling her he would take her home but did not want anyone to see her crossing the street) and placed a second bag over her head, and buried her. (Vol. 114, T 5563-5564; Vol. 115, T 5591, 5592-5593)

Corrections Officer Kenneth Slanker also testified to a statement of Couey's while Slanker was guarding him on March 5, 2006. (Vol. 115, T 5613-5614) As with the other guards, Slanker never recorded the conversation in the log books either. (Vol. 115, T 5617) When another guard, Sherry Johnson, was conversing with Slanker in front of Couey, she had commented that she, having just had a child, was concerned about child care because of something like what Couey did could happen to her child. After Johnson left the area, Slanker testified, Couey told him that he did not appreciate Johnson's comment and that he had not meant to kill the victim and did not see himself as one who could do that. (Vol. 115, T

5614-5616) Couey expressed his biggest regret was losing everything. (Vol. 115, T 5617)

At the guilt phase of the trial, the defense presented the testimony of Dr. Robert Berland, Forsensic Psychologist, in an effort to show the jury that the statements given by Couey to jail guards were involuntary and coercive. (Vol. 115, T 5626ff.) Dr. Berland, who evaluated the defendant and reviewed test results and information from people who knew him over the years, found that Couey was affected by a mental illness. (Vol. 115, T 5629) Couey suffers from a psychotic disturbance; although he can walk and talk, he has delusions (false beliefs which he cannot be talked out of), suffers from hallucinations (tactile, auditory, and visual), and has biologically-caused changes in his mood (mood disturbance). (Vol. 115, T 5630) His mental illness had an effect on all of his thinking and judgment, wherein he would misperceive things around him, would misunderstand the meaning of things, and would be impulsive, all of which would cause problems with him making reasonable judgments and with his interaction with people and environment. (Vol. 115, T 5630, 5634) The conditions of his confinement, including substantial isolation (with the exception of the guards) and total dependence on the guards, whether intentional or unintentional, when coupled with his mental illness and paranoid thinking broke down Couey's inhibitions and

became circumstantially coercive, propelling him to talk to the guards about the crimes. (Vol. 115, T 5634-5639) At the guilt phase, Dr. Berland also testified that the defendant had a full-scale I.Q. of 64, a verbal I.Q. of 68, and a performance I.Q. of 65, according to the WAIS-III test administered four days prior to trial. (Vol. 115, T 5631) Based on testing, historical information obtained about the defendant, and his interview with him, Dr. Berland found that the defendant was mentally retarded, having an I.Q. below the threshold for retardation, having deficits in his adaptive functioning, and having had the onset of these deficits before the age of 18. (Vol. 115, T 5631-5634)

During the penalty phase of the trial, the state, in addition to the victim impact evidence, presented the further testimony of the medical examiner, Dr. Cogswell, who opined that there would be a better seal because of the double garbage bags surrounding the victim causing a loss of oxygen quicker. She would have lost consciousness in as little as one minute, with death probably a minute or two later, up to five minutes. (Vol. 117, T 5889-5892) The weight of the dirt upon her would have further compressed her chest, causing loss of consciousness and death even sooner. (Vol. 117, T 5891-5892) However, based on the autopsy and his scientific findings, the doctor could not say whether she was alive or dead when

placed in the ground. (Vol. 117, T 5893)

During the defendant's penalty phase, he presented the testimony of three of Couey's relatives, his 15-year-older uncle Sammy Harris, his 2-year-older cousin Linda "Suzie" Arnett, and his aunt Virginia Koester ("Aunt Jean," Linda Arnett's mother) who had lived with him or helped raised him throughout his young troubled life.[11]

The defendant was born prematurely to a teen mother, who delivered him shortly after the defendant's father pushed her from a moving automobile (possibly causing his brain damage). (Vol. 118, T 6110-6111) He had a deformity of his ears upon birth and through his young childhood, until sometime around the age of eight or nine, when his Aunt Jean had them fixed for him, he having been ruthlessly teased by other children, in part, because of his floppy ears. (Vol. 117, T 5902-5903, 5921-5923; Vol. 118, T 6052)

His mother did not know how to take care of him and refused to learn, not cradling his head when holding him, allowing it to loll around (laughing upon being corrected by relatives), and feeding him sugar water, rather than milk or formula. (Vol. 117, T 5906-5907; Vol. 118, T 6014-6015, 6054) He and his sister,

[11] The state even admitted to the jury that Couey suffered from a horrible childhood worthy of mitigation ("I cannot refute that his childhood was one that no child should have to go

Dorothy, lived with his uncaring mother and his alcoholic and abusive step-father, Bobby Lindsey, until Couey reached the age of five or six, were neglected (except for the abuse), and Couey was constantly and quite violently abused by Lindsey, relatives observing bruising all over his body. (Vol. 117, T 5901; Vol. 118, T 6016-6018) The abuse included Lindsey holding Couey's head under water in a swimming pond at age seven, saying he "needed to teach him a lesson," (Vol. 117, T 5904-5905) tying Couey at age three to the bed for wetting it (and upon finding that Couey's mother had untied him, slamming his head repeatedly between the door and door jamb (potentially causing his temporal lobe damage), (Vol. 118, T 6006-6007, 6057-6058), hanging him from a door knob by his pajamas (again for bed-wetting), and upon releasing him, throwing him up in the air and allowing him to fall to the floor, then kicking him violently under the bed, causing Couey's head to hit the bed frame, and resulting in his mother crawling under the bed to prevent further injury. (Vol. 118, T 6007-6008)[12]

At age seven or eight, when Couey and his sister were passed off the Aunt Jean (Virginia Kloetzer) and cousin "Suzie" Arnett. (Vol. 117, T 5919; Vol. 118, T

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through. That's established, it's a mitigating circumstance, you should consider it.") (Vol. 119, T 6153)

[12] Testimony indicated that people in the local courthouse were aware of the injuries inflicted to the defendant's head. (Vol. 118, T 6007) Although nobody admitted to observing the actual acts of abuse, all of the family knew about it and many witnessed first-hand the injuries inflicted on Couey. (Vol. 118, T 6037, 6058, 6060)

6049) At this age, Couey was still unable to speak plainly, others being unable to understand him at all until Aunt Jean worked with him for hours on end to teach him to speak. (Vol. 117, T 5920-5921; Vol. 118, T 6053) He was quite small for his age, reserved, and had no social skills. (Vol. 117, T 5922) Most other children were mean to the defendant, beating him up, and harassing him until his cousins could intervene. (Vol. 117, T 5923-5924) Despite the father's abuse and beatings and harassment from other children, Couey was never aggressive or mean, a quiet, reserved little boy. (Vol. 117, T 5925, 5928) He was shy and always cowed back, especially around adults. (Vol. 117, T 5926-5926) In fact, even as an adult, while incarcerated for this offense and visited by his cousin and aunt, Couey still acted the same, as if still a child, still cowering back, unsure of how to react. (Vol. 117, T 5929)

Couey and his sister were both placed in special education classes at school (the defendant's cause being his mental defects and brain injuries, while his sister's cause simply being her poor treatment), where Couey still could not learn well and fell behind. (Vol. 117, T 5923-5925; Vol. 118, T 6053) Aunt Jean unsuccessfully attempted to get help for Couey, taking him to HRS (but being turned down) and to a juvenile judge (who also declined to help unless the defendant committed a crime

or was a danger to himself). (Vol. 117, T 5929-5930; Vol. 118, T 6056)

During this time frame, it later became known, that Uncle John and Couey's maternal grandfather would sexually abuse both Couey and his sister at a young age. (Vol. 118, T 6019) Couey witnessed the assaults on his sister and felt guilty, powerless to stop them. (Vol. 118, T 6019)

One time while living with Aunt Jean and cousin Suzie, Couey was found in a fetal position at his Aunt Jean's bed, with his aunt's nightgown cut into small pieces. (Vol. 118, T 6030) Couey told Aunt Jean that his "mind" had told him to do it, evidence of auditory hallucinations at a young age, and Aunt Jean attempted to teach him to resist those things. (Vol. 118, T 6030-6031, 6055)

When the defendant was ten years old, he climbed on top of his sleeping cousin Suzie, and was caught trying to remove her underwear. (Vol. 118, T 5927) Despite this incident Suzie was not afraid of the defendant, understanding that Couey's thought patterns were different and that he would always be a child mentally. (Vol. 117, T 5928) But because of this incident, Couey was again moved, this time to live with another aunt, Glynell, who placed Couey in a boys' ranch. (Vol. 117, T 5927; Vol. 118, T 6058-6059)

Prominent PET-Scan Doctor Joseph Wu, Clinical Director of the University

of California Irvine College of Medicine, Brain Imaging Center, Associate Professor, Department of Psychiatry and Human Behavior, and well-published author on the topic of PET-Scans, reviewed Couey's PET-Scan administered by the also noted Neuropsychologist Dr. Frank Wood, Ph.D. (Vol. 118, T 5940-5956)[13] As there are recognized correlations between neuropsychological testing and brain imaging, Dr. Wu utilized the PET-Scans in conjunction with clinical information and the defendant's I.Q. test in forming his opinions regarding John Couey. (Vol. 118, T 5955-5956) On the PET-Scan, Dr. Wu observed asymmetry in Couey's temporal lobe area, with less activity at the base, and that the right side of the brain showed significantly much lower activity than the left side. (Vol. 118, T 5956-5962) The damage to the frontal lobe area shows an abnormality of the nervous system and is consistent with psychoses and auditory hallucinations (such as defendant experiences) as well as consistent with his history of head injuries and I.Q. of 64. (Vol. 118, T 5962-5964) This type of brain damage (especially when coupled with the defendant's abusive or deviant rearing environment and alcohol or drug abuse) is a significant factor in impulse control, Dr. Wu referring to

[13] Professor Emeritus, Wake Forest University Baptist Medical Center, Winston-Salem, North Carolina, and author or co-author of over 30 publications. *See* http://www1.wfubmc.edu/neurology/Faculty/Wood.htm

Couey's as a "*catastrophic* failure of the brain's ability to regulate impulses" and aggression. (Vol. 118, T 5966, 5968, 5977)

Couey's damage to the right side of the brain strongly affects the regulation of sexual behavior, including causing a change of preference in sex, e.g., from adults to children, with "inappropriate object choice" known as Klüver-Bucy Syndrome, studies of late-life pedophilia showing the same type of metabolic asymmetrical abnormalities present in the defendant. (Vol. 118, T 5968-5971) Dr. Wu's conclusion, consistent throughout the PET-Scan, all the evidence, history, and intelligence and neuropsychological testing, was that Couey showed a "significant" defect in his PET-Scan, causing him to become hypersexual, develop inappropriate object choices, and "a *profound* inability" to regulate or control his brain's behavior. (Vol. 118, T 5970-5972)

In addition to the extensive testimony of Dr. Berland at the guilt phase of the trial concerning Couey's retardation,[14] mental infirmities and deficiencies, including Couey's suffering from a mental illness, psychotic disturbance, hallucinations, impulsivity, low I.Q., and a mental illness that affects all of his

[14] Based on interviews with two additional witnesses during the recess between his testimony in the guilt phase and the penalty phase, Berland receded from his firm diagnosis of retardation in the defendant, finding that his adaptive functioning deficit, at least in the short term, was now unresolved and hence the question of defendant's retardation "was still an open question." (Vol. 118, 6024-6025)

thinking and judgment (Vol. 115, T 5629-5631, 5634-5639), Dr. Berland testified further at the penalty phase of the trial to the defendant's mental mitigation. (Vol. 118, T 5983ff.) Dr. Berland diagnosed the defendant as suffering from "extreme mental or emotional disturbance at the time of the crime." (Vol. 118, T 5985-5986) Defendant's MMPI scores indicate a biological mental illness, psychoses, delusional thinking (problems with his thinking and judgment), a brain malfunction causing hallucinations, and disturbance of mood, caused by biological changes in his brain (rather than mere situational problems). (Vol. 118, T 5986-5994) Further testing showed that these results were absolutely valid; the defendant was not faking. (Vol. 118, T 5995)

The defendant suffered from auditory hallucinations since at least his 20's (or earlier as evidenced by earlier recounted testimony from his Aunt Jean), with drug usage (common among those who suffer these maladies as they try to self-medicate) increasing the intensity of these symptoms. (Vol. 118, T 5997, 5999, 6004) As in the Aunt Jean incident at age 8 or 9, Couey continues to suffer from "thought insertion," feeling like others putting thoughts into his brain. (Vol. 118, T 5996-5999) He was frequently seen (including by his jail guards) mumbling and seemingly communicating with someone else. (Vol. 118, T 6000)

Couey suffered from manic episodes, depriving him of sleep, which became more increased, more continuous and enhanced during the months *leading up to the crimes*. (Vol. 118, T 5999-6000) Couey suffered the onset of these mental problems early, with the brain injuries contributing to the psychotic symptoms. (Vol. 118, T 6000-6002) This disorder, while not making the defendant totally bizarre, affected all of his thinking and judgment, causing him a poor ability to reason. (Vol. 118, T 6004)

Dr. Berland also diagnosed Couey as having a "substantial impairment in his capacity to conform his conduct, to control his behavior, within the requirements of the law," because his biological mental illness impairs his ability to conform his conduct, affecting him involuntarily, with Couey not being able to control its effect on him. (Vol. 118, T 6004-6005) While the defendant does not appear completely out of control, his mental illness and biological brain injury has this involuntary adverse influence that affects all his actions. (Vol. 228, T 6004-6006) Dr. Berland concluded that Couey's PET-Scan was significant and consistent with his head trauma and, coupled with his neglectful and abusive childhood, chronic drug and alcohol abuse (in an attempt to self-medicate), especially his heavy use of crack cocaine leading up to and including the time of the incident (frequent daily use), all

contributed to this inability to conform his actions. (Vol. 118, T 6012-6020, 6043)

The state presented rebuttal witness Dr. Harry McClaren, a forensic psychologist, who determined that the defendant did not have the required adaptive deficit for mental retardation based on interviews with people who had known the defendant. (Vol. 119, T 6077-6089)[15]

Finally, the state called physician and clinician Eric Cotton, director of a PET-Scan clinic in Pinellas County (who does not do research and has never published anything), who supervised his own PET-Scan on the defendant. (Vol. 118, T 6108-6109, 6112-6113) Opining that brain imaging is subjective, he spent 10-15 minutes on this case, and (not being a neuropsychologist or psychiatrist) he only reviewed the PET-Scan he took, rather than also looking at the defendant's history and neuropsychological testing, to conclude that his PET-Scan of the defendant showed no anomalies in the defendant's brain, as Dr. Wu had seen. (Vol. 118, T 6111)[16]

[15] At least one of Dr. McClaren's interview subjects, Dorothy Dixon, hostile to the defendant since her grandchildren were taken from their mother, did not tell him the truth during the interview, lying about their use of crack cocaine the night of Jessica's disappearance. (Vol. 118, T 6090-6091) Also, many of Dixon's responses were speculation, the witness not knowing the answer to many of the questions, which speculative answers were scored anyway. (Vol. 119, T 6093-6097, 6100-6104)

[16] Dr. Cotten reviewed Dr. Wu's deposition and re-examined his own findings, still insisting on his same conclusion that the defendant's brain scan was normal. (Vol. 118, T 6111)

At the Mental Retardation/*Spencer* hearing, the defense relied on previous testimony of experts and lay witnesses as presented at trial and the penalty phase, while the state presented the testimony of Dr. Gregory Pritchard, clinical psychologist (who has contracted with the state to testify in *Jimmy Ryce* cases), to rebut the claim of mental retardation. (Vol. 72, T 13-26) He administered the Stanford-binet test to the defendant, resulting in an I.Q. full-scale score of 78, above the mental retardation range, but still borderline to low average. (Vol. 72, T 13-26, 33-35) Pritchard also reviewed old DOC screening tests which he was not at all familiar with. (Vol. 72, T 26-28) Pritchard also determined that the defendant was not deficient in his adaptive functioning and thus opined that he was not mentally retarded. (Vol. 72, T 35-45)

SUMMARY OF ARGUMENTS

Point I. The court erred in denying the defendant's motion to suppress fruits of the illegally obtained confession. There was an inadequate showing that the evidence would have been inevitably discovered.

Point II. When ordering a change of venue, the trial court is required by statute and by the federal and Florida constitutions to seek a change to a demographically similar county in order to preserve the defendant's right to a representative cross-section of the community in which the crime occurred.

Point III. The trial court erred in denying Appellant's cause challenges of potential jurors 002, 2699, 0865, 1496, and 1553. Both jurors 2699 and 1496 stated that they had heard that Appellant had buried the victim alive, information which could have come from Appellant's suppressed statements to law enforcement officers. Jurors 002, 0865, and 1553 would impose the death penalty automatically upon a guilty verdict. Appellant was forced to exhaust his peremptory challenges on strike several of these jurors. When the trial court denied his request for additional peremptory challenges several objectionable jurors were seated on the jury.

Point IV. By forcing the defendant to proceed with counsel that was

unprepared, after the State's late discovery of 960 pages and 12 witnesses, the trial court denied the defendant's constitutional rights to a fair trial, to due process, and to effective assistance of counsel. The denial of a motion for continuance is reviewed under the abuse of discretion standard of review and will not be disturbed on appeal absent "a 'palpable' abuse of discretion to the disadvantage of the accused, or, unless the rights of the accused might have been jeopardized by the continuance determination." *Trocola v. State*, 867 So.2d 1229, 1231-1232 (Fla. 5th DCA 2004).

Point V. The trial court erred by unconstitutionally limiting his cross-examination of state's witnesses to show bias, motive, and lack of credibility.

Point VI. A new trial is constitutionally required where a state's witness informs the jury about a confession which had been suppressed by the court.

Point VII. The voluntariness of statements is a mixed question of law and fact which may be presented to the jury, despite the trial court's prior ruling of voluntariness

Point VIII. Speculation or conjecture cannot supply a missing element of the crime. The evidence was insufficient as a matter of law to prove the battery enhancement to the burglary statute.

Point IX. In a capital case, neither sentencing authority (advisory jury or trial judge) may weigh an invalid aggravator. Allowing instruction and argument of the aggravating factor of a prior violent felony to be presented to the jury where, as a matter of law, the aggravator is not applicable renders the resultant death sentence unconstitutional and constitutes reversible error.

Point X. The trial court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider appropriate mitigating factors, where the court erroneously found an inappropriate aggravating circumstance, and where a comparison to other capital cases reveals that the only appropriate sentence in the instant case is a life sentence.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE DISCOVERED AS A DIRECT RESULT OF THE DEFENDANT'S SUPPRESSED CONFESSION, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As determined correctly by the trial court, Couey's confession given to Citrus County detectives in Augusta, Georgia, were obtained after the detectives failed to honor his unequivocal request for an attorney and were suppressed by the court. (Vol. 21, R 3917-3943; Vol. 61, T 12-18) Couey also had moved to suppress the fruits obtained as a result of that illegality – all evidence discovered based on what the defendant had told them during that confession, including the victim's body and evidence and testimony obtained therefrom. (Vol. 11, R 2153-2160; Vol. 21, R 3892-3909; Vol. 58, T 196-198) The trial court erred in denying the suppression of these fruits of the confession; the state failed to prove that the evidence would have been discovered inevitably regardless of the illegality. Without the improper interrogation and confession, there would not have been any inevitable discovery. All the fruits of the illegal confession must be suppressed

and a new trial ordered. *Wong Sun v. United States*, 371 U.S. 471 (1963).

A trial court's ruling on a motion to suppress is a mixed question of law and fact. A trial court's factual findings must be supported by competent, substantial evidence; while the trial court's application of the law to those facts is reviewed *de novo*. *Wheeler v. State* 956 So.2d 517 (Fla. 2nd DCA 2007).

The core rationale of the exclusionary rule is to deter police misconduct by ensuring the prosecution is not placed in a better position than it would have been in had no illegality occurred. *See Nix v. Williams*, 467 U.S. 431, 442-443 (1984). However, it is also recognized that the prosecution should not be placed in a worse position than it would have if the constitutional violation not occurred, *Nix v. Williams*, 467 U.S. at 443, hence the formulation of the inevitable discovery doctrine.

The purpose of the "inevitable discovery exception" to the exclusionary rule is to protect evidence obtained illegally where a concurrent legal investigation would "assuredly" have procured the identical evidence. *State v. LeCroy*, 435 So.2d 354, 357 (Fla. 4th DCA 1983). In *Bowen v. State*, 685 So.2d 942, 944 (Fla. 5th DCA 1996), the court discussed the inevitable discovery exception to the exclusionary rule:

> This rule, also known as the independent source doctrine, is an

> exception to the exclusionary rule. Importantly, the rule requires that the evidence discovered by illegal means be "ultimately or inevitably" discovered by lawful means. That is, the court must find that it would have been discovered independent of the constitutional violation. In such cases, the state must prove some official entity would have found the illegal evidence absent the illegal search and seizure. *Nix v. Williams*, 467 U.S. 431, 448-50, 104 S.Ct. 2501,2511-12, 81 L.Ed.2d 377, 390-91 (1984); *State v. Walton*, 565 So.2d 381, 384 (Fla. 5th DCA 1990).

The state bears a heavy burden of proof to clearly and convincingly demonstrate that the evidence obtained following the illegality would have ultimately been discovered from sources independent of that illegality. *Grant v. State,* 978 So.2d 862, 864 (Fla. 2nd DCA 2008), *citing Wong Sun* at 488.

Speculation may not play a part in the inevitable discovery rule; the focus must be on demonstrated fact, capable of verification. *Nix v. Williams*, 467 U.S. at 444 n. 5 (Stevens, J., concurring); *Moody v. State*, 842 So.2d 754, 759 (Fla. 2003). *See also United States v. Ford*, 22 F.3d 374 (1st Cir.), *cert. denied*, 513 U.S. 900 (1994); *United States v. Owens*, 785 F.2d 146 (10th Cir. 1986). In *United States v. Brookens*, 614 F.2d 1037 (5th Cir. 1980), the court, in discussing the inevitable discovery exception, squarely placed the burden of proof upon the prosecution. The police cannot simply rely on their claims that the evidence would have been discovered.

This approach does not mean that any illegally obtained evidence

> can be admitted simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail.

Rather, for the inevitable discovery exception to the "fruit of the poisonous tree" doctrine to apply, the state must demonstrate that ***at the time*** *of the constitutional violation* the police *already* possessed facts which would have led to the evidence notwithstanding the police misconduct. *Kessler v. State,* 991 So.2d 1015, 1020 (Fla. 4th DCA 2008). *See also Fitzpatrick v. State*, 900 So.2d 495, 514 (Fla. 2005).

Here, the state failed in that showing. The police testified that they had already obtained possession of the defendant's mattress consensually from his sister and that, through DNA testing on blood stains on the mattress that they accomplished within the two days since it was purportedly transported to the FDLE lab in Tampa, they had already determined that the victim had been in the defendant's bedroom (through unsubstantiated hearsay testimony). To this end, the state produced an FDLE lab report described by the detective as "indicating that there was DNA found on the mattress which was identified as Jessica Lunsford's." (Vol. 59, T 44) However, that lab report, introduced into evidence at the motion to suppress hearing, directly contradicts the hearsay testimony, as the report was not prepared until November 2005 and categorically states that the

mattress was not received at the FDLE lab until July 19, 2005, long after the illegality and resultant discovery.(Vol. 55, R 8-10)[17] Further, testimony of and a photograph taken by FDLE Analyst Stephen Starke, show the mattress and pillows still present in the bedroom of the trailer on March 18th, despite Citrus County Sheriff's Officer Cannady's assertions that they had already been removed from the bedroom, and had been transported and submitted for testing by the FDLE. (Vol. 112, T 5242-5246; State's Exhibit #46) The FDLE Lab Report regarding the mattress also indicates that the mattress was received from Detective Dan Holder (rather than by Officer Cannady on March 15th as Cannady claimed). (Vol. 55, R 8) Hence the physical evidence conclusively contradicts the claims of the police. Thus the state has not met its burden of proof by competent, substantial evidence.

Even if the police testimony can be believed about when they received some word on the victim's DNA, that fact does not show that the police would have found the dig site. The police had already thoroughly combed the area with police dogs, including specifically the grounds surrounding the Dixon trailer, looking for fresh dig sites. Yet they had not noted this particular site as suspicious. The

[17] The lab report also says the DNA comparison was accomplished from the buccal swab from the victim's mouth, obtained after the body was discovered as a result of the illegality. (Vol. 55, R 8-10)

ground search had already moved to other areas of the county.[18] The bare speculation of the police that they would have discovered this site and excavated it, without the location being given by the defendant, is totally insufficient. *United States v. Brookens*, *supra*; *Moody v. State*, *supra*. "Mere assumptions are not enough to meet the reasonable probability standard." *Jeffries v. State*, 797 So.2d 573, 577-578 (Fla. 2001).

Thus, the investigation was *not* in such a posture that facts already in police possession would assuredly have led to the evidence notwithstanding the police misconduct. *Moody v. State*, *supra* at 759; *Fitzpatrick v. State*, *supra* at 514. There was no longer an ongoing ground search around the Dixon trailer and case law indicates that the State cannot simply argue that some possible further investigation would have revealed the evidence; it must be a current investigation underway at the time of illegality which led to the discovery. As held by the court in *State v. LeCroy*, *supra* at 357-358, it matters not that that the police *could* eventually have found the evidence, there must be a reasonable evidentiary indication that they *would* have done so with evidence in their possession at the time of the illegal discovery.

[18] Thus, the posture of the concurrent investigation was different from the case of *Craig v. State*, 510 So.2d 857, 862-863 (Fla. 1987); and *Nix v. Williams*, *supra*, where the police were

in the process conducting searches in the area but simply had not reached the specific site yet, but clearly would have in the near future.

> In the instant case, while it is possible that the police could eventually have found the guns there is no evidentiary indication that they would have done so. Elliot's name was obtained only through the "involuntary" confession of Cleo and the location of the .38 caliber pistol was shown by Jon only subsequent to his request for an attorney. Application of the inevitable discovery exception to these situations is simply too attenuated. There was no showing here that when the illegality occurred the police possessed or were actively pursuing other evidence or leads which would have led to the discovery of the challenged evidence and that there was a reasonable probability that such evidence would have thereby been discovered as required under United States v. Brookins, 614 F.2d 1037 (5th Cir.1980).

State v. LeCroy, *supra* at 357-358.

The State has failed to show the lawful means which made discovery inevitable were being "actively pursued prior to the occurrence" of any illegal conduct; no ongoing ground search was being actively pursued in the area, it already having been completed. *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984). *See also United States v. Terzado-Madruga*, 897 F.2d 1099, 1114-1115 (11th Cir. 1990); *Jefferson v. Fountain*, 382 F.3d 1286, 1296 (11th Cir.2004); *U.S. v. Virden*, 488 F.3d 1317, 1322-1323 (11th Cir.2007). "The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim it should be admitted because its discovery was inevitable." *Satterfield*, 743 F.2d at 846.

Thus, compliance with the requirements of the inevitable discovery doctrine dictate that only the knowledge law enforcement possessed *at the time* and only the actions law enforcement took *prior* to any illegal conduct can be considered by the trial court when determining the applicability of the inevitable discovery doctrine. As the Eleventh Circuit observed, '[a]ny other rule would effectively eviscerate the exclusionary rule." *Virden*, 488 F.3d at 1322. The police investigation here, the competent evidence demonstrates, were not in the required posture to be able to prove inevitable discovery; all that exists is mere speculation and bald assertions. The evidence must be suppressed and a new trial ordered.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST TO SELECT A DEMOGRAPHICALLY SIMILAR COUNTY FOR THE CHANGE OF VENUE, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL BY A JURY OF HIS PEERS AS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Due to the extensive pre-trial publicity and notoriety of the case, including press about the defendant's suppressed confession a venue change was necessary, being unable to select an impartial jury in rural Citrus County. After another unsuccessful attempt at selecting a jury in neighboring Lake County (served by the same media market),[19] the trial court moved the trial to highly urbanized Miami-Dade County. The defendant had sought a change to a venue more akin to Citrus County's demographics, as required by Section 910.03(2), Florida Statutes, strenuously objected to the change to Miami-Dade as the least demographically similar to Citrus County, and repeatedly listed to the court several counties that fit the demographic criteria. (Vol. 69, T 10-11, 44-50, 84-86) The court noted it had only contacted Jacksonville and Ft. Lauderdale, before settling on Miami-Dade. (Vol. 69, T 43-44) The court indicated that since it could not seat a jury in the smaller county of Lake, then it would not consider those smaller counties with similar demographics, despite the requirements of the statute (the court failing to

note the obvious that they were unsuccessful in neighboring Lake County, not because of the demographics, but solely because it was infected with the same media coverage as Citrus County). (Vol. 69, T 44-50) Despite the requirement in the statute to consider demographics, the court rejected the defendant's suggestions of counties similar in population and racial composition, stating orally that Section 910.03 gives the judge total discretion. (Vol. 69, T 45, 46, 48, 92-93) In its written order, however, the trial court ruled Section 910.03, in its entirety, inapplicable to the instant case, contending it only applied in situations where the county in which the crime occurred was unknown.

Decisions on a motion for a change of venue are firmly within the trial court's discretion and will not be overturned on appeal absent a palpable abuse of discretion. *Overton v. State*, 976 So. 2d 536 (Fla. 2007)*; State v. Knight*, 866 So. 2d 1195 (Fla. 2003). However, while a decision on a motion for a change of venue is reviewed under an abuse of discretion standard, a trial court's discretion is limited by the rules and statutes governing those actions. *See Castaneda v. Redlands Christian Migrant Ass'n.*, 884 So.2d 1087, 1090 (Fla. 4th DCA 2004); *Petit-Dos v. School Bd. of Broward County*, ___ So.2d ___, 2009 WL 30046, 3 (Fla. 4th DCA 2009). Florida does not allow such discretion on the part of the trial

[19] which included a public threat to a prospective juror. (Vol. 69, T 92)

courts to ignore the law, statutes, or rules. Failure to follow the statutory requirement constitutes an error of law, not an abuse of discretion. *Castaneda*. *supra* at 1093. Such an error of law (or, at minimum, a palpable abuse of discretion) occurred here by the trial court's adamant refusal to contact or even consider similar demographic venues, as required by law in violation of the defendant's rights to due process, and a trial by jury of his peers as guaranteed by the Article I, Sections 9, 16, and 22, of the Florida Constitution, and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

As a consequence of the notoriety associated with moving a criminal trial to another county, the Florida Legislature in 1993 amended the law relating to venue in criminal cases. The amendment requires that a court, after ordering a change of venue, must give priority to any county which closely resembles the demographic composition of the original venue:

> **Place of trial generally**
>
> (2) After a court orders a change of venue and in order to protect the defendant's due process rights, the court, upon a motion of any party, shall give priority to any county which closely resembles the demographic composition of the county wherein the original venue would lie.

§ 910.03(2), Florida Statutes (2005). The plain language of the statute, contrary to

the trial court's ruling, applies in every situation where venue is changed, not in situations where the county of the crime is unknown, as per a separate subsection of the statute.[20] The trial court's refusal to comply with the statute is an error of law, mandating reversal.

Such a requirement of demographic consideration, in addition to our specific Florida Statute, is rooted in the founding of our country and the federal constitution. Article III section 2, of the United States Constitution was a response to the detested English practice of transporting American colonists to England or to other colonies for trial, and the Declaration of Independence protested against the British practice of "transporting us beyond Seas to be tried for pretended offences." *The Declaration of Independence*, para. 21 (U.S. 1776).

> Not only was this enormously inconvenient for the defendant, it made it likely that the jury pool would be hostile, or at least unsympathetic, to the defense. [footnote omitted] But even the Article III provision was eventually considered inadequate: restricting venue to the state wherein the crime occurred still failed to fix with precision the location of the trial. Particularly in eighteenth century America, setting venue in a remote part of a state, while certainly not as drastic as removal to England, might still cause great inconvenience to the accused; and allowing the government *carte blanche* in selecting the venue might still enable it to produce a jury likely to be hostile to the defense. As one

[20] Subsection (1) of §910.03 does contain a provision allowing the defendant to choose venue among the two or more counties charged where the actual site of the crime is unknown. That subsection, by its very language (and by the rationale behind the amendment to the statute itself), is separate and distinct from the rest of the statute.

> contemporary argued, "where the governing power possesses an unlimited control over the venue, no man's life is in safety." [FN51]
>
> *[FN51]. Francis H. Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 26 (1951) (quoting William Grayson, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution III* at 568 (Jonathon Elliot ed., 1835)).
>
> All of these are concerns of fairness to the defense; but James Madison expressed concern, on the other hand, that restricting the place of trial too severely might prejudice the government. In cases of local insurrection, for instance, it might be impossible to try the offenders at the location of the crime. [footnote omitted] These competing concerns of fairness to the defense and fairness to the government were balanced ultimately in the language of the Sixth Amendment, which provides for trial by "an impartial jury of the State and district wherein the crime shall have been committed."

Peter M. Kougasian, *Should Judges Consider the Demographics of the Jury Pool in Deciding Change of Venue Applications?*, 20 Fordham Urb. L. J. 531, 549 -550 (1993).

A defendant's Sixth Amendment right to a trial by jury applies to the states via the Fourteenth Amendment Due Process Clause. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The United States Supreme Court has held that the defendant also has a Sixth Amendment right to a "representative jury." *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975). The Court has defined 'representative jury' as a jury

selected from a jury pool that represents a cross-section of the community in which the crime occurred. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (statutory scheme that diminished the representation of women in the jury pool held unconstitutional). Although every jury need not mirror the exact demographic composition of the community, the jury selection system must provide a fair possibility of obtaining a representative jury pool. *Taylor*, 419 U.S. at 538. This Court has ruled similarly. *Spencer v. State*, 545 So.2d 1352 (Fla. 1989) (holding that the unequal minority representation in the two judicial districts of Palm Beach County violated the Florida Constitution's jury trial right to a representative jury pool which reflects a cross-section of the community in which the crime occurred).

Here, the defendant was denied his right to a representative jury by the court's refusal to comply with the statute and these constitutional principles and to consider demographically similar venues, instead moving the trial to large, urban Miami-Dade County. The defense demonstrated to the court the vast differences which would make the Miami-Dade jury violative of the statute and the defendant's rights to a representative jury. Using *U.S. Census Bureau Statistics* (rev. 2006), the defense substantiated the demographic disparity between Citrus

County where the crime occurred and Miami-Dade, further comparing favorably other venues' demographics such as Indian River County (which the trial court had refused to contact and consider). For example, the following demographics were presented and argued:

County:	**Citrus**	**Dade**	**Indian River**
Population:	118,000	2,253,000 (approx. 20x larger)	129,000
Age:	31% above 65	13.6% above 65	27.1% above 65
Language: *English-speaking:*	93.4%	32%	90%
Race:	92% White 3.2% Hispanic	19% White 60% Hispanic	82% White 8% Hispanic

(Vol. 25, R 4815-4827; Vol. 69, T 84-86) Defense counsel noted that other counties he had listed have similar demographics to Citrus/Indian River counties, filing census data also for Leon, Martin, and Monroe Counties, any of which were acceptable demographically to the defense. (Vol. 25, R 4815-4827; Vol. 69, T 86) Yet the court still refused to consider smaller demographically similar counties.[21]

[21] Further, as noted in the defendant's Motion for Reconsideration, Chief Judge of the Fifth Circuit Victor Musleh, who arranged the relocation, was quoted in a St. Petersburg Times article as saying demographically similar smaller counties were rejected out of hand solely because of their feeling (totally unsubstantiated) that there would be a problem because of the high publicity surrounding the case. (Vol. 24, R 4594; Vol. 25, R 4675-4677) *Miami-Dade Gets Couey Trial*, St. Petersburg Times (September 13, 2006). Such a sentiment and basis for the

The court's adamant refusal to consider the vast demographic differences between Citrus and Miami-Dade and comply with the law warrants reversal. In *State v. Harris*, 660 A.2d 539 (N.J. Super. A.D. 1995), the appellate court ruled on precisely this issue, granting the defendant a new trial in a county with similar demographics as the county in which the crime occurred. There, the court held that, upon a change of venue, the defendant is constitutionally entitled "to a jury that is reasonably comparable to one drawn from a representative cross-section of the community in which the crime was committed," stating:

> the "principal rationale" for the requirement that a jury be drawn from a representative cross-section of the community is that "in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; . . . [therefore] it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence . . . the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out." . . . [quoting *People v. Wheeler*, 583 P.2d 748, 755 (1978)].

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relocation venue is totally inconsistent with the plain language mandate of the statute and the entire basis for its inception.

Also quoted in the same St. Petersburg article, former federal prosecutor and University of Florida law professor Mike Seigel, commenting on Miami-Dade's demographics, expressed the common knowledge that Miami's Hispanic population leans conservative which "works in the prosecution's favor." (Vol. 25, R 4675)

> We conclude that the same state constitutional policies which underlie the limitations . . . imposed upon a prosecutor's use of peremptory challenges to exclude members of a particular race from a jury also require a trial court to consider racial demographics in exercising its authority . . . to change the venue of a criminal trial or to impanel a foreign jury. *See Mallett v. Missouri*, 494 U.S. 1009, 110 S.Ct. 1308, 108 L.Ed.2d 484 (1990) (Marshall J., dissenting from denial of certiorari) ("Just as state prosecutors may not use peremptory challenges to exclude members of the defendant's race from the jury, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), state trial courts may not transfer venue of the trial to accomplish the same result by another means."); *State v. Williams*, supra, 93 N.J. at 67 n. 12, 459 A.2d 641 ("[T]he use of foreign jurors in certain circumstances arguably may implicate the right of a defendant to be tried by a jury of peers.").

State v. Harris, 660 A.2d at 542-543. Courts, then, must be obligated to adhere to the underlying constitutional mandate of fairness, and in doing so should be required to make certain that the community to which a trial is transferred reflects the character of the county where the crime was allegedly committed; otherwise, abuses of discretion are bound to occur. *See United States v. Johnson*, 323 U.S. 273, 275-276 (1944).

The trial court's refusal to comply with the statutory and constitutional requirements of the right to trial by an impartial jury drawn from a representative cross-section of the community may not be considered under a harmless error

analysis, instead requiring automatic reversal as the violation "pervade[s] the entire proceeding." *Satterwhite v. Texas*, 486 U.S. 249, at 256 (1988); *see also Coleman v. Kemp*, 778 F.2d 1487, 1541, n. 24 (11th Cir. 1985). The failure to fulfill the Sixth Amendment right to a jury empaneled from a cross-section of the community can thus never be considered harmless.

The trial court violated the law (and, in doing so, certainly abused any discretion he may have had) in moving the trial to Miami-Dade County and failing to consider the requirements of Section 910.03(2), Florida Statues, and the constitutional rights of the defendant to a jury of his peers drawn from a pool resembling the demographic composition of the original venue. A new trial must be held.

POINT III.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE TWO JURORS FOR CAUSE, WHO, POSSIBLY HAD KNOWLEDGE OF APPELLANT'S SUPPRESSED STATEMENTS AND ERRED IN REFUSING TO STRIKE THREE JURORS WHO EXPRESSED DEEP-ROOTED PERSONAL BELIEFS IN FAVOR OF THE DEATH PENALTY, GIVING RISE TO DOUBTS ABOUT THEIR IMPARTIALITY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

The standard for reviewing a trial judge's decision on a challenge for cause is abuse of discretion. *Fernandez v. State***,** 730 So.2d 277 (Fla. 1999) and *Castro v. State*, 644 So.2d 987, 990 (Fla.1994). Trial judges must settle the query as to "whether the juror can lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court." *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.1984). "When making this determination, the court must acknowledge that a 'juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes.'" *Rodas v. State*, 821 So.2d 1150, 1153 (Fla. 4th DCA 2002), *review denied*, 839 So.2d 700 (Fla.2003). "Because impartiality of the finders of fact is an absolute prerequisite to our system

of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality." *Williams v. State*, 638 So.2d 976, 979 (Fla. 4th DCA 1994), *review denied*, 654 So.2d 920 (Fla.1995). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See Bryant v. State*, 656 So.2d. 426, 428(Fla. 1995).

In the instant case, the trial court denied cause challenges against five jurors, three of whom would impose the death penalty automatically upon a finding of guilt and two of whom may have been aware of Couey's suppressed confession. The defendant exhausted his peremptory challenges striking three of the five jurors, the other two sat on the jury. (Vol.106, T 4582-4583) The defendant requested additional peremptory challenges and identified the two remaining jurors as well as Juror 114 as the jurors he would use the additional peremptory challenges to strike. (Vol. 106, T 4582-4583) Here, the denial of the cause challenges and the refusal to grant additional peremptories was error and reversal is required.

A. Trial Court erred in denying challenges for cause regarding knowledge of suppressed confession

A juror knowledge of a case due to pre-trial publicity, does not automatically raise the presumption of unfairness. *Bundy v. State*, 471 So.2d 9, 19 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). "It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court." *Id.* at 20. This Court has held, however, that it is reversible error to not excuse juror who has knowledge of a defendant's confession that was suppressed as involuntary, regardless of whether the juror states that he can be impartial. *Reilly v. State*, 557 So.2d 1365, 1367 (Fla.1990). (Although a juror subsequently gave the right answers with respect to whether or not he could be impartial, it was unrealistic to expect him to entirely disregard his knowledge of a confession no matter how hard he tried.) In the instant case, the trial court faced the unusual situation where, thanks to pre-trial publicity, several jurors had knowledge that *may* have come from an innocuous source or *may* have come from a confession suppressed for involuntariness. Rather than exercise caution and excuse all such jurors, the trial court decided only to excuse those jurors whom the defense could show had obtained their knowledge from the suppressed confession.

The trial judge denied Couey's challenges for cause on jurors 2699 and 1496, both of whom had prior knowledge of the case, specifically, that Couey had

allegedly buried the victim alive. (Vol. 105, T4425; Vol. 106, T 4581). The allegation that the victim was buried alive was significant, because one of the sources for this information was statements made by the Couey, which had been suppressed as involuntary. (Vol.81, T 806-807) Couey had confessed this information on several occasions, two of the confessions were suppressed prior to jury selection, but the most recent confession, made to jail guards, was ruled admissible during jury selection[22]. (Vol. 80, T605-612) The day after the trial court ruled the latest confession was admissible, the court held that it would no longer excuse jurors based on mere knowledge that the defendant had confessed. (Vol. 80, T671-673) The court held, rather, that knowledge of a "confession" would only trigger an inquiry into whether the juror was referring to the statements made to jail guards or was referring to previously suppressed statements. (Vol. 80, T672-673) The court stated that it would consider the time when the jurors said they learned about the confession as indicative of whether the jurors had knowledge of the earlier suppressed confessions or the more recent admissible confession. (Vol.80, T 671) Defense counsel countered that all the recent news stories he had

[22]The State also posited that the jurors may have learned that the victim was allegedly buried alive from the medical examiner's opinion. Vol.81, T 806-807 However, medical examiner opined that the victim was alive when placed in the bag (because of her fingers poking out of the bag), but that it was impossible to tell if she was alive when put in the ground. (Vol. 114, T 5495-5497)

seen mentioned the original suppressed confession, before recapping the trial court's recent denial of the motion to suppress Couey's statements to the jail guards (Vol.80, T 672) The trial court's decision was a Catch-22 for defense counsel who was forced to either run the risk that a juror with knowledge of the suppressed statements would be seated on the jury or to closely question that juror regarding the statements and implicitly reveal that there were other inadmissible statements made by Couey.

Juror 2699, a full time college student and part-time cashier supervisor, stated that she had heard about the instant case on the television news. Vol.81, T 857. She heard that Couey "was accused of killing a little girl" and when asked if she heard how he allegedly killed her, she said, "I think he buried her alive, or something like that." (Vol.81, T 858-859) Juror 2699 assured the State she could set aside her knowledge of the case and render a verdict based only on evidence heard in the courtroom. (Vol. 81, T 862)

Defense counsel then tried to ascertain the source of the information without revealing that Couey had made statements, but was ultimately unsuccessful in learning where the information came from:

> MR. LEWAN: Now, you said you've heard some things on the television news about this case; right?

JUROR NO. 2699: Yeah.

MR. LEWAN: It's kind of vague?

JUROR NO. 2699: Yes.
MR. LEWAN: Approximately what time period are we talking about that you've heard things about this case?

JUROR NO. 2699: Probably within like the last week or two, maybe the last two weeks.

MR. LEWAN: Can you tell me what you remember that you heard.

JUROR NO. 2699: Just that the trial was coming, and that he was accused of murdering –

* * *

MR. LEWAN: Any reasons that you recall why he's accused, why they think he did it?

JUROR NO. 2699: No, I don't know why they think he did it.

MR. LEWAN: Do you remember hearing the name Jessica Lunsford before?

JUROR NO. 2699: Yes. When I heard about the case on the news, yeah.

MR. LEWAN: And that's just recently?

JUROR NO. 2699: Uh-huh.

MR. LEWAN: Now, this case is slightly under two years old. Do you remember hearing anything about it for the last roughly two years?

JUROR NO. 2699: Not really.

MR. LEWAN: Anything last year, or in 2005?

JUROR NO. 2699: No.
MR. LEWAN: And the name John Couey, does that ring a bell with you other than what you just recently heard?

JUROR NO. 2699: No.

MR. LEWAN: Now, you, I think, recall the statement that Jessica Lunsford may be buried alive?

JUROR NO. 2699: Yes.

MR. LEWAN: Where do you recall hearing that?

JUROR NO. 2699: When I heard about the case two weeks -- like two weeks ago when I first heard about it.

MR. LEWAN: And who was saying that, those words?

JUROR NO. 2699: On the news?

MR. LEWAN: Yes.

JUROR NO. 2699: The newscasters, they were just giving a run-down of the case and everything, and that's who I heard it from.

MR. LEWAN: Okay. Now, but did the news then say anything about what facts or what evidence or what statements may have been made to prove that she was buried alive?

JUROR NO. 2699: No.

MR. LEWAN: Do you recall hearing anything that John Evander

Couey may have said about this case?

JUROR NO. 2699: No.

(Vol.81, T 866-869) Defense counsel moved to excuse the juror pursuant to *Reilly*; the trial court denied the motion. (Vol. 81, T 869)

Juror 1496 also had heard the allegation that the victim was buried alive. (Vol. 92, T 2537) The trial court questioned the juror and tried to narrow down the time frame of when he learned of this allegation:

> THE COURT: Okay. Give us a time reference, if you would, when you first began knowing something about this case. And just let me help you out. This case is alleged to have happened about two years ago.
>
> JUROR NO. 1496: I think probably initially when it first happened, you just see it.
>
> * * *
>
> PROSPECTIVE JUROR NO. 1496: I don't really know anything other than what they kind of just glossed over on the T.V.
>
> THE COURT: What's the last thing that you remember them glossing over on T.V.?
>
> JUROR NO. 1496: The last thing I remember was that she may have been buried alive.
>
> THE COURT: Okay. Did you hear that around about the time that you got your jury summons, about two weeks ago?
>
> JUROR NO. 1496: Yes.

THE COURT: Okay. So there has been some coverage that you've seen on T.V. in the last couple weeks; right?

JUROR NO. 1496: Right.

(Vol.92, T 2537-2539) Defense counsel also attempted to narrow down the window of time and discover what source the information had come from:

MR. LEWAN: Now, you -- you said you believed you did see some of this on television; is that right?

JUROR NO. 1496: Uh-huh.

* * *

MR. LEWAN: Going to what you may have heard on T.V., I think you said you might have heard something when it first happened, or when this started, about two years ago?

JUROR NO. 1496: Probably.

***

MR. LEWAN: But if you could take your time and just think back as to any facts or feelings or anything that you recall from those newscasts about this case.

JUROR NO. 1496: Probably just that it was a child abduction, and, you know, the whole Amber Alert thing goes out, and so when that happens they just automatically just broadcast it everywhere. But I can't say that I remember any specific details about it, other than I can just, you know, remember them flashing pictures across saying that the girl has been missing.

***

MR. LEWAN: You used the phrase "buried alive." Do you know where that came from?

JUROR NO. 1496: I think it was on T.V.

MR. LEWAN: And would that have been some time ago?

JUROR NO. 1496: Probably within -- right before they said they were -- at the same time they were saying that they were ready to go to trial and they were going to -- they were requesting to move it out of the county and they were looking to come down, I think, to Miami-Dade.
MR. LEWAN: So that would have been more recently here, now?

JUROR NO. 1496: Yes.

MR. LEWAN: Is it -- What kind of time frame, if you can tell us?

JUROR NO. 1496: Right before I got the summons.

MR. LEWAN: So a couple of weeks?

JUROR NO. 1496: Yes.

MR. LEWAN: Okay. Thinking back to that, I guess that was a news report you saw?

JUROR NO. 1496: Yes, I think so.

MR. LEWAN: Okay.

JUROR NO. 1496: I don't think I read it.

MR. LEWAN: Do you recall seeing the picture of John Couey on that report?

JUROR NO. 1496: I don't remember.

MR. LEWAN: Do you recall where the phrase “buried alive" came from?

JUROR NO. 1496: No.

(Vol. 92, T 2550-2552)

During jury selection, defense counsel moved to excuse Juror 1496 for cause because of his statement that he heard the victim had been buried alive and also moved to excuse Juror 2699 for cause based on her earlier statements. (Vol.105, T4425, Vol. 106, 4581) The trial court denied the motions, defense counsel exercised a peremptory strike on Juror 2699, but Juror 1496 served on the jury. (Vol.105; T 4427) The above transcript excerpts illustrate the impossible task that was set before defense counsel. In order to ensure the defendant had an impartial jury he had to determine whether the jurors who knew of the confession gained that information from the admissible confessions and not from the ones that had been suppressed. Since case law holds that any reasonable doubt as to a juror' impartiality must be resolved in favor of the defendant, the doubt as to juror 2699 and 1496 should have been resolved by excusing them from the panel.

B. Trial Court erred in denying challenges for cause regarding the death penalty

"A juror should be dismissed for cause if the juror's view regarding the death penalty would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath."

Davis v. State, 859 So.2d 465, 473 (Fla.,2003) citing *Hertz v. State*, 803 So.2d 629, 638 (Fla.2001), cert. denied, 536 U.S. 963, 122 S.Ct. 2673, 153 L.Ed.2d 846 (2002).

Here, three jurors expressed their inability or reluctance to consider recommending a life sentence. When asked by the State how he felt about the death penalty, although Juror 1553 initially responded that "I don't favor it at all, I'm not opposed at all, you know, I'm like in the middle," he concluded by saying that, "It depends on the -- on the crime itself." (Vol. 106, T4515-4516) His response demonstrated that he considered the death penalty to be automatically warranted depending on the crime, regardless of any mitigating factors. Juror 0002 was asked by defense counsel if he could imagine figuring out a way to recommend life, if Couey was found guilty and he replied, "It would be kind of hard. It would be very hard." (Vol. 102,T 3968-3969) When asked "Can you think of a reason why you would recommend a life sentence in this case?" Juror 0002 again said that "it would very difficult, but I think psychological would be the only thing that I would really weigh real heavy." (Vol. 102; T 3978-3979) Juror 0865 stated that he would recommend the death penalty automatically if Couey was found guilty:

MR. FANTER: Sure. You and all your fellow jurors have found unanimously that he is guilty of first degree murder.

JUROR NO. 0865: Of all four elements?

MR. FANTER: Of all four elements of first degree murder, as many elements there are.

JUROR NO. 0865: Okay.
MR. FANTER: You've also found him guilty of burglary, kidnapping, sexual battery on a child under 12. Okay. You collectively, as a jury, have found that beyond a reasonable doubt, and the Judge tells you, go into this penalty phase and decide whether or not you could recommend life or death.

JUROR NO. 0865: Death, I would recommend death.
(Vol. 105, T 4419-4421)

There has been "manifest error" committed by the trial court in denying the challenges for cause and requests for additional peremptories. The statements made by these three jurors created more than a reasonable doubt about their ability to be fair and impartial. These jurors should have been struck for cause, and the court erred in denying the appellant's challenge for cause. *Busby v. State*, 894 So.2d 88(Fla. 2005).

Appellant preserved this issue for review pursuant to *Trotter v. State*, 576 So.2d 691 (Fla. 1990). Once appellant had exhausted all his peremptory challenges, appellant unsuccessfully requested additional peremptory challenges. Appellant did not accept the jury and identified several jurors that he would have

exercised the additional peremptory challenges against, namely jurors 1496, 1553, and 0114. Juror 0114 was a retired schoolteacher elementary school teacher, an assistant principal, and a school librarian. (Vol. 104, T 4423) Thirty years ago, juror 0114's then husband molested their daughter. (Vol. 104, T 4423-4424) He was never prosecuted for the crime. (Vol.104, T 4424). Juror 0114 is now divorced and said her daughter has since recovered from the trauma, but they never mention her father by name, but refer to him instead as, "Michael's father." (Vol.104. T 4424) Given the similarity between Couey's case and the abuse suffered by Juror 0114's daughter, Juror 0114 was far from an ideal juror for the defense. Because an objectionable juror served on appellant's jury, and a cause challenge was erroneously denied, Appellant is entitled to a new trial. *Amends. V, VI, VIII and XIV, U. S. Const.; Art. I, §§9, 16, and 17, Fla. Const.*

POINT IV.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR CONTINUANCE, WHERE THE STATE PROVIDED 960 PAGES OF DISCOVERY AND DISCLOSED SEVERAL NEW WITNESSES A MONTH FROM THE START OF THE TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

A trial court's denial of a motion for continuance is reviewed under the abuse of discretion standard of review and will not be disturbed on appeal absent "a 'palpable' abuse of discretion to the disadvantage of the accused, or, unless the rights of the accused might have been jeopardized by the continuance determination." *Trocola v. State*, 867 So.2d 1229, 1231-1232 (Fla. 5th DCA 2004). Courts have recognized that, "The common thread running through those cases in which a palpable abuse of discretion has been found is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense."*Weible v. State*, 761 So.2d 469, 472 (Fla. 4th DCA 2000) (quoting *Smith v. State*, 525 So.2d 477, 479 (Fla. 1st DCA 1988)). In the instant case, the trial court abused it's discretion in denying a continuance requested when the State violated the rules of discovery. The trial court's remedy for the violation, the *sua sponte* appointment of private counsel to assist the defense, aggravated, rather than militated the procedural prejudice created by the State's violation.

On January 11, 2007, only a month before trial was scheduled to start in Miami-Dade County, the State informed defense counsel that there was new evidence in the case. (Vol. 26, R 5029-5031) Over the next week, the State turned over approximately 960 of discovery and listed twelve additional witnesses, all of which was related to the State's belated discovery that Couey had made in criminatory statements to jail guards employed by Corrections Corporation of America (CCA) while housed at the Citrus County Jail (Vol. 70,T94-95, Vol. 26, R 5031)

On January 18, 2007, defense counsel moved for sanctions and to compel the discovery of CCA's policy manual, personnel files, etc. (Vol.26, R 5029-5033) On January 24, 2007, a hearing was held on the motion and the trial court found, after conducting a *Richardson*[23] hearing, that there was a violation, but that it was inadvertent. (Vol. 70, T 136) The trial court denied defense counsel's motion to continue and instead decided to " level the playing field," since the State had "a manpower advantage and they [didn't] carry the same level of case loads" as compared to defense counsel. (T 70; T 140-143). *Sua sponte*, the trial court appointed Charles Vaughn to assist defense counsel. (T 70; T 140-143). Defense

[23] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

counsel attempted to explain to the trial court that time was what they needed, not new attorneys who are unfamiliar with the case:

> MR. LEWAN: I don't think you can
> give us enough lawyers to do it by February 12.
> They'd have to get up to speed on the whole case.
> This case is ten boxes worth of files right now.
> They can't possibly go through that and get ready
> and assist me in three weeks. (Vol. 70, T 112)

On January 30, 2007, defense counsel again moved to continue. (Vol. 28, R5243-5255) Defense counsel stated that he needed additional time to complete his investigation of the new material provided by the State. (Vol. 28, R5243-5255) He also explained that the appointment of Mr. Vaughn had actually cost the defense time, because it was taking additional time to attempt to bring him up to speed on the case. (Vol.28, R5243-5255)The trial court denied the continuance (Vol.71, T50)

On February 12, 2007, the first day of voir dire, defense counsel again asked for additional time. (Vol. 75, T 8-17) Although they had been able to complete the depositions of the jail guards, defense counsel needed additional time to go through the depositions and work the information into his trial strategy. (Vol. 75, T 8-17) The trial court denied the motion. (Vol. 75, T 24)

In *McKay v. State*, 504 So.2d 1280 (Fla. 1st DCA), the First District Court of Appeal listed seven factors to consider in order to determine whether a court's denial of a motion for continuance, based on a lack of adequate time to prepare, constituted a palpable abuse of discretion. The factors are:

> 1) the time available for preparation,
> 2) the likelihood of prejudice from the denial,
> 3) the defendant's role in shortening preparation time,
> 4) the complexity of the case,
> 5) the availability of discovery,
> 6) the adequacy of counsel actually provided, and
> 7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.
> *Id*. at 1282.

The denial of the motion for continuance not only constituted a palpable abuse of discretion, the trial court's decision denied Couey's constitutional rights to a fair trial, to due process, and to effective assistance of counsel. Defense counsel only had a limited time to prepare for trial after receiving almost 1000 pages of discovery. Defendant's case was very complex and he had no role in shortening the preparation time. Given that the State's disclosure was of incriminatory statements, the likelihood of prejudice was great. As defense counsel explained to the court:

> This does change our trial strategy. There will be additional witnesses necessary. We are going to have the go back to redepose

> some of the old witnesses. Certainly our deposition of the medical examiner is impacted by this new evidence. This -- we don't think it is consistent with the evidence, but it wasn't covered because we didn't have it before.
> It opens many new areas of investigation for us including CCA, their rules, regulations and procedures. Other witnesses with information about contacts with my client, there must be literally who knows how many who may be out there.
> Not only that but we need to get into the psychological effects of the methods employed by CCA. From the statements of the guards that have been given to us by the State -- and remember we haven't done any depositions --

(Vol. 70, T107-108)

By denying the motion to continue the trial court jeopardized Couey's constitutional right to effective assistance of counsel and consequently his right to due process and a fair trial. The right to counsel is guaranteed by both the Sixth Amendment to the United States Constitution and by Article One, Section Sixteen of the Florida Constitution. This right to effective counsel necessarily implies that counsel will be given adequate time to prepare to represent the defendant. The Florida Supreme Court has set forth this basic premise:

> Justice requires, and it is the universal rule, observed in all courts of this country, it is most sincerely to be hoped, that reasonable time is afforded to all persons accused of crime in which to prepare for their defense. A judicial trial becomes a farce, a mere burlesque, and in serious cases a most gruesome one at that, when a person is hurried into a trial upon an indictment charging him with a high crime, without permitting him the privilege of examining the charge and time for preparing his defense. It is

> unnecessary to dwell upon the seriousness of such an error; it strikes at the root and base of constitutional liberties; it makes for a deprivation of liberty or life without due process of law; it destroys confidence in the institutions of free America and brings our very government into disrepute.

Coker v. State, 82 Fla. 5, 7, 89 So. 222 (1921).

"Surely the Sixth Amendment right to counsel implies the right to prepared counsel." *Trocola v. State*, 867 So.2d 1229, 1231(Fla. 5th DCA 2004).

POINT V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY LIMITING DEFENDANT'S CROSS-EXAMINATION OF TWO STATE'S WITNESSES, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 16, OF THE FLORIDA CONSTITUTION.

In response to the state's Motions in Limine, and over defense objection, the trial court improperly limited the defendant's cross-examination of two state's witnesses, Mark Lunsford, the victim's father and an original suspect in the case, and Corrections Officer John Read, who testified to admissions to and details of the crime allegedly made to him by the defendant. Such limitations violated the defendant's constitutional rights to due process and to confront his accusers through impeachment of the witnesses, and necessitates a reversal for a new trial.

Limitation of cross-examination is subject to an abuse of discretion standard. *McCoy v. State*, 853 So.2d 396, 406 (Fla. 2003). If a ruling consists of a pure question of law, the ruling is subject to de novo review. *State v. Glatzmayer*, 789 So.2d 297, 301 (Fla. 2001).

"In all criminal prosecutions the accused . . . shall have the right . . . to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to

have a speedy and public trial by impartial jury in the county where the crime was committed." Art. I § 16(a), Fla. Const.; Amends. VI and XIV, U.S. Const.

> Cross-examination is at once an important incentive for, and the adversary system's great engine for testing for, truthful testimony. Eschewing the rack and screw, we count on cross-examination after direct examination or, where redirect examination yields new matter, recross-examination after redirect examination, to ferret out the truth from any and all witnesses, and to gain a fuller understanding of the import of their testimony. *See Sanders v. State*, 707 So.2d 664, 667 (Fla. 1998) ("[L]imiting cross-examination in a manner that precludes relevant and important facts bearing on the trustworthiness of testimony constitutes error, *especially when the cross-examination is directed at a witness for the prosecution*.").

Bordelon v. State, 908 So.2d 543, 545-546 (Fla. 1st DCA 2005) (emphasis added).

The fundamental right to confrontation includes the opportunity to cross-examine witnesses, affording the jury the occasion to weigh the credibility, demeanor, ability, and veracity of the witness. *Davis v. Alaska*, 415 U.S. 308 (1974); *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *Coco v. State*, 62 So.2d 892 (Fla. 1953); *Baker v. State*, 150 So.2d 729 (Fla. 3d DCA 1963).

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. at 316. The cross-examiner is not only permitted "to delve into the witness' story to test

the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Id*.

Whenever any witness takes the stand, he *ipso facto* places his credibility in issue. *Mendez v. State*, 412 So.2d 965 (Fla. 2d DCA 1982); *Baxter v. State*, 294 So.2d 392 (Fla. 4th DCA 1974). A full and fair cross-examination of a witness upon the subjects opened by the direct examination is an absolute right. *Coco v. State*, *supra*. Limiting the scope of cross-examination in a manner which keeps from the fact-finder relevant and important facts bearing on the trustworthiness of crucial prosecution testimony constitutes "error of the first magnitude." *Davis v. Alaska*, 415 U.S. at 318; *Truman v. State*, 514 F, 514 F.2d 150 (5th Cir. 1975); *Williams v. State*, 472 So.2d 1350, 1352 (Fla. 2d DCA 1985); *Mendez v. State*, *supra*.

With regard to state's witness, Mark Lunsford, the father of the victim and an original suspect in the case, the defense wished to cross-examine him regarding two matters: the discovery by the police of child pornography (viewed the night of Jessica's disappearance) on Lunsford's seized laptop computer, for which he was not charged by Citrus County authorities, and about financial details and irregularities in spending concerning the Jessica Lunsford Foundation, which he had established and on which he was now dependent for support. (Vol. 21, R 3915-

16) Defense counsel contended that both matters were relevant areas of cross-examination to show the witness's bias and possible motivation for testimony:

> MR. LEWAN [Defense Counsel]: As to paragraph 2, Judge, we feel any witness who takes the stand, their financial interest and their gains or losses are relevant to the jury's consideration of their testimony. And what the State is saying is that in this case Mr. Lunsford's financial situation isn't relevant.
>
> But we'll be able to show that after the death of his daughter he's quit working, yet all his expenses are paid. He bought new vehicles. He has $40,000 in the bank. They have this Lunsford Foundation but it is not a not-for-profit organization.
>
> I think the future cash flows that he's enjoying right now do depend largely on how he comes across in this trial. And I think it is fair for the jury to know about them.
>
> THE COURT: Paragraph 2?
>
> MR. LEWAN: Paragraph 2, Judge, the evidence is that child pornography sites were accessed in the Lunsford home the night before Jessica Lunsford turned up missing.
>
> I think that on its face is relevant but also, in spite of the State's arguments to the contrary, these type of downloaded files that are then later trashed have been the basis for child pornography charges in front of this Court in cases we have worked together.
>
> I think it shows favorable treatment of this witness. And I think this is very relevant if he takes the stand.

(Vol. 62, T 15-16)

Both of these matters are relevant for cross-examination to reveal to the jury, the fact-finders, any areas of possible bias, prejudice, motive, or credibility of the witness:

> That a defendant has the right to fully cross-examine an adverse witness to reveal any bias, prejudice, or improper motive the witness may have in testifying against the defendant is a fundamental tenant of due process. . . .
>
> Evidence of bias, prejudice or interest is admissible as long as it tends to establish that a witness is appearing for any reason other than just to tell the truth. A defendant, as a matter of right, may cross-examine a State witness with respect to his motive, interest, or animus, which is connected to the cause or to the parties to the cause.

Tomengo v. State, 864 So. 2d 525, 530 (Fla. 5th DCA 2004) (citations omitted). "The trial court does not have the discretion to exclude questions which touch upon interest, motive, or animus." *Id*. Further, a trial court must give wide latitude in cross examination when counsel attempts to establish a lack of credibility of a witness. *See Livingston v. State*, 678 So. 2d 895, 897-98 (Fla. 4th DCA 1996).

Relevant to the determination of Mark Lunsford's credibility, motivation, and bias, the jury was entitled to hear of financial irregularities in the Jessica Lunsford Foundation, the witness's total dependence on the Foundation for his complete support. Its future cash flow was dependent on how he came across during his testimony and the outcome of this trial. As the above cases hold it is indeed proper and necessary for a cross-examiner to inquire of a witness as to any interest, including a financial or monetary one, the witness may have in the outcome. *See also State v. Johnson*, 285 So.2d 53, 56 (Fla. 2nd DCA 1973) (and

cases cited at n. 5 of that opinion) (a witness's financial interest in a case is a proper subject for cross-examination, clearly affecting the bias and credibility of the witness); *Stradtman v. State*, 334 So.2d 100, 101 (Fla. 3rd DCA 1976) (trial court erred in refusing to allow defendant to cross-examine the victim in regard to her financial interests in the criminal case, to-wit: a pending civil lawsuit against him).

The defendant also had the right to show further motivation for Lunsford's testimony by establishing that he had not been prosecuted for possessing child pornography on his computer, which child pornography was viewed the night of Jessica's disappearance. Again, Lunsford was an initial suspect in the case. Questions were raised by the defense at trial as to how Couey was able to allegedly enter the Lunsford trailer without rousing the dog or waking Jessica's grandparents. "It is clear that if a witness for the State were presently or recently under actual or *threatened* criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination," even if they relate to a different offense. *Breedlove v. State*, 580 So.2d 605, 608 (Fla. 1991); *Fulton v. State*, 335 So.2d 280 (Fla. 1976).

The defense has an absolute right to cross-examine a prosecution witness on threatened *or potential* criminal charges resolved in his favor so that the jury will be fully apprised as to his possible motive or self-interest with respect to the testimony he gave. *Adkins v. State,* 963 So.2d 737, 744 (Fla. 3rd DCA 2007); *Morrell v. State,* 297 So.2d 579, 580 (Fla. 1st DCA 1974).

> The constitutional right to confront one's accuser is meaningless if a person charged with wrongdoing is not afforded the opportunity to make a record from which he could argue to the jury that the evidence against him comes from witnesses whose credibility is suspect because they themselves may be subjected to criminal charges if they fail to cooperate with the authorities.

Adkins v. State, supra.

Regarding the testimony of Corrections Officer John Read, the defense sought to question him about his prior termination as a guard after it was discovered that he falsified his corrections officer employment application, having failed to disclose a prior marijuana conviction. Such testimony is relevant cross-examination as to the witness's credibility. *See Livingston v. State*, *supra*; *Mendez v. State, supra*. The court and prosecutor focused on the fact that the crime which the Officer failed to disclose was a misdemeanor marijuana conviction and was not a crime involving dishonesty. The proposed cross examination of Read was proper not under a Section 90.610, Florida Statutes (impeachment with prior crimes)

analysis as erroneously considered by the court, but instead as evidence of the bias and credibility of the witness. *Livingston v. State*, *supra* at 897. While the crime indeed did not involve dishonesty, the failure to divulge it on the employment application does. Any adverse circumstances involving his employment as a corrections officer should clearly be relevant to the credibility of his testimony regarding matters he attributes to Couey during the performance of those duties as a guard, including his honesty with regard to his employment. Defense attempted to discredit the guard by questioning him regarding his failure to report these conversations with the defendant in the jail log book, despite the logging of such mundane conversations and occurrences as a religious discussion regarding the Book of Revelation and the defendant watching Dr. Phil on television. The elicitation of testimony regarding Officer Read's dishonesty on his corrections officer employment application would further place his credibility in question regarding the truthfulness of his account of Couey's alleged admissions. *See Mendez v. State, supra* (exclusion of evidence of police officer's prior suspensions without pay for use of excessive force); *Ivester v. State*, 398 So.2d 926 (Fla. 1st DCA 1981) (evidence that a police officer had been disciplined or sued for use of excessive force while on duty is relevant in a case questioning the exercise of those duties).

> Whenever a witness takes the stand, he *ipso facto* places his credibility in issue. *Baxter v. State*, 294 So.2d 392 (Fla. 4th DCA). Cross-examination of such a witness in matters relevant to credibility ought to be given a wide scope in order to delve into a witness's story, to test a witness's perceptions and memory, and to impeach that witness. *United States v. Williams*, 592 F.2d 1277 (5th Cir. 1979). Limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on trustworthiness of crucial prosecution testimony is improper, especially where the cross-examination is directed at a key prosecution witness. *Truman v. Wainwright*, 514 F.2d 150 (5th Cir. 1975); *Stripling v. State*, 349 So.2d 187 (Fla. 3d DCA 1977). The right of full cross-examination is absolute, and the denial of that right may easily constitute reversible error. *Coxwell v. State*, 361 So.2d 148 (Fla.1978).

Mendez v. State, supra at 966. Precluding the jury from hearing this evidence about Read deprived the jury of the tools necessary for them to judge his credibility and bias with regard to his testimony about Couey.

The court unconstitutionally limited defendant's cross-examination of these two witnesses.

> [T]o make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, 415 U.S. at 318. A new trial is required.

POINT VI.

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER A STATE'S WITNESS TESTIFIED TO STATEMENTS OF THE DEFENDANT WHICH HAD BEEN SUPPRESSED IN VIOLATION OF THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION.

Corrections Officer John Read testified at trial that the defendant had made certain admissions to him about the crime. During cross-examination of Corrections Officer John Read pertaining to his failure to record such an important conversation in the jail's logbook (when mundane, everyday conversations had been logged), the officer made a non-responsive answer, referencing Couey's suppressed confession:

> Q. Now, what type of things are you supposed to put in the logbooks?
>
> A. In my opinion, who's there. He was on a half-hour watch, so I would put down, Inmate Couey is sleeping, Inmate Couey has awakened, he's eating, he's reading, he's drawing, he's watching T.V., whatever activity was going on.
>
> Q. And you never put down anything he said?
>
> A. No.
>
> Q. Did you ever put any notations about conversations he was having with other people?

A. No, not to my recollection.

Q. Okay. How about on April 26, '06, at 7:55, did you ever put an entry in the logbook that says quote, "Dr. Phil saves the day," end quote?

A. Yes, I did.

Q. So you did put things he said in there, didn't you?

A. No, I was just saying that Dr. Phil saves the day, it was just a sarcastic reference.

Q. All right. And on May 6th do you recall putting an entry in there where you put in Mr. Osmund is quizzing him on relations -- or Revelations, I'm sorry?

A. Revelations, the Book of Revelations.

Q. Do you remember putting that in there?

A. I suppose.

Q. How about June 3rd, do you remember putting in there that the defendant was grumbling about something?

A. Grumbling? No, I don't remember what that was about. He grumbled about things, he complained about things frequently.

Q. Okay. How about on September 9th, do you recall putting in there that he was standing by the door talking?

A. That would be in Medical, and he was probably talking to myself or whoever was in earshot.

Q. So, again, you made notations sometimes when he was talking, didn't you?

A. But I didn't go into what he was talking about.

Q. And none of these conversations that you had with him where he admits to one of the worst crimes you've ever heard of you thought was important enough to jot down in this book?

A. Well, there were *other testimonies out there at the time* that I thought would have covered whatever I might have heard.

(Vol. 114, T 5571-5573)

The court denied the defendant's motion for mistrial, ruling that the witness used the word "testimonies" rather than "confession" intimating, as such, the comment could not be susceptible of being interpreted by the jury that there was a confession by the defendant that they were not being permitted to hear. The court erred in denying the motion for mistrial. Reversal is required.

Questions concerning the denial of a motion for mistrial are generally reviewed under an abuse of discretion standard. *Salazar v. State*, 991 So.2d 364, 371 (Fla. 2008); *Munroe v. State,* 983 So.2d 637, 641 (Fla. 4th DCA 2008). However, a mistrial request on a matter implicating the defendant's exercise of his constitutional right to remain silent is reviewed instead under the harmless error test. *Munroe v. State*, *supra*; *see also Poole v. State,* ___ So.2d ___, 2008 WL 5170547, 33 Fla. L. Weekly S957 (Fla. December 11, 2008).

Permitting a jury to hear of a suppressed statement obtained in violation of a defendant's constitutional rights is constitutional error requiring a mistrial. In *Thomas v. State*, 851 So.2d 876, 877 -878 (Fla. 1st DCA 2003), the jury had heard from two witnesses concerning inadmissable statements of the defendant, one a privileged communication and the other a statement, as here, obtained in violation of the appellant's right to counsel. The trial court denied the appellant's motion for mistrial, instead simply giving a curative instruction. On appeal, the first district held that the effect of the jury hearing of these inadmissible statements was highly prejudicial, warranted a mistrial, and constituted reversible error.

Similarly, in the instant case, just as in *Thomas v. State*, *supra*, by Officer's Read's gratuitous comment concerning "other testimonies out there at the time" that covered the same subject clearly left the jury with the impression that there were statements which others knew of, but they did not.[24]

The presentation of this testimony about the suppressed confession thus warranted a mistrial. Comments such as this are high risk errors because there is a substantial likelihood that they will vitiate the right to a fair trial." *Munroe v. State*,

[24] The error is exacerbated by the court's admonition to the state that its witnesses not volunteer any evidence concerning the suppressed confession, and the state's assurance that it had so instructed the witnesses. (Vol. 114, T 5449-5452) If the prosecution had, as it said, instructed the witnesses not to mention the defendant's suppressed confession, then Officer Read's tender of such testimony appears intentional.

supra at 641; *State v. DiGuilio*, 491 So.2d 1129, 1136 (Fla.1986). Because of this error of constitutional magnitude, Couey's convictions and sentences must be reversed and the case remanded for a new trial.

POINT VII.

THE DEFENDANT WAS ERRONEOUSLY PRECLUDED FROM PRESENTING EVIDENCE TO THE JURY RELATING TO THE INVOLUNTARINESS OF HIS STATEMENTS, IN VIOLATION OF HIS FEDERAL AND FLORIDA RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL.

Prior to trial, the court determined that statements given by the defendant to corrections officers were voluntary and not given in violation of the defendant's constitutional rights. (Vol. 40, R 7520) When the defense sought to produce evidence relating to the voluntariness of the statements (defendant's invocation of his right to silence and an attorney on file with the county jail) and to argue the issue to the jury, the court, acting on a state's motion in limine, refused to allow it. This limitation on the presentation of evidence and argument to the jury violates the defendant's rights to a fair trial and due process of law. A new trial is required.

Issues of the exclusion of evidence or the limitation of argument are reviewed under the abuse of discretion standard. *San Martin v. State*, 717 So.2d 462 (Fla. 1998); *Moore v. State*, 701 So.2d 845 (Fla. 1997). Here, by failing to follow the law that the jury may consider the issue of voluntariness of statements in determining what weight, if any, to give the statements, the trial court abused its discretion.

The voluntariness of a confession "is a mixed question of fact and law to be determined initially by the trial court in ruling on admissibility of the statement and ultimately by the jury." *Donovan v. State*, 417 So.2d 674, 676 (Fla.1982); *Stephenson v. State*, 645 So.2d 161, 163 (Fla. 4th DCA 1994). Florida Standard Jury Instruction (Crim.) 2.04(e) admonishes the jury that a confession is to be considered "with caution and be weighed with great care to make certain it was freely and voluntarily made." The jury is instructed that if, in the totality of circumstances, it determines that the statement was not freely and voluntarily made, it should disregard the statement. A jury may find a confession to be involuntary and disregard it, despite a judge's finding that it was voluntary. *Houck v. State*, 421 So.2d 1113, 1116 n. 2 (Fla. 1st DCA 1982). Thus, a criminal defendant is given two opportunities to attack a confession and the jury is entitled to hear evidence and argument concerning the alleged involuntariness of the statements. *Stephenson v. State*, *supra*. *See also Lewis v. State*, 780 So.2d 125, 128 (Fla. 3rd DCA 2001), as an example of the broad extent of evidence introduced to show involuntariness of a statement for the jury's consideration.

Here, the state complained that in opening statements the defense had contended that the statements to corrections officers were obtained in violation of the defendant's constitutional rights whereas the court had already made the

determination that they did not, and urged the court to prohibit further argument and evidence on the subject. (Vol. 43, R 8010) The defense argued that it was permitted to present to the jury the issue of voluntariness, regardless of the court's ruling to the contrary, as per the above-cited authorities, and further asserted its right to introduce the invocation of rights form that had been served on the jail in an attempt to show involuntariness of the statements. (Vol. 114, T 5442-5448) The trial court recognized the above-referenced jury instruction which permits the jury to consider the voluntariness of any statements, but, inexplicably, ruled that the instruction did not apply in this situation since the statements were not to law enforcement officers interrogating the defendant. (Vol. 114, T 5443-5444)[25] Defense counsel then contended that the state was arguing over semantics and that it should be permitted to introduce evidence and argument concerning the voluntariness of the statements, specifically with regard to the invocation of rights form on file with the corrections department at the county jail. (Vol. 114, T 5442, 5444-5448) The court again specifically reiterated its ruling, precluding the defense from presenting evidence of the defendant's invocation of his rights form.

[25] The corrections officers were employed by the private company, CCA, contracted to run the jail in Citrus County. By definition, though, these officers are considered "law enforcement." *See* §784.07(1)(a), Florida Statutes.

> THE COURT: I've already made a ruling on the voluntariness and the admissibility of these issues, so I'm going to grant the State's motion, defense is precluded from arguing those issues.
>
> * * *
>
> THE COURT: [H]e voluntarily made some statements in that regard, and they weren't as a result of interrogation. Interrogation, again, it's questions propounded to elicit a particular response, but not just in general conversation. So it's not interrogation.
>
> So the ruling stands. So you can't use that.
>
> MR. LEWAN: So I can't, I can't seek to admit them [the invocation of rights forms] into evidence --
>
> THE COURT: That's correct.
>
> MR. LEWAN: -- is what you're telling me?
>
> THE COURT: That's what I'm telling you. That's the Court's ruling. And your record is made.

(Vol. 114, T 5445, 5448)[26]

The court's ruling that the defense was precluded from making argument and introducing the invocation of rights form improperly prevented him from urging the jury to consider the statements to corrections officers involuntary. This

[26] While the defense was permitted to introduce testimony of Dr. Berland regarding the defendant's mental state at the time the statements were made, it was still precluded from introducing and arguing the invocation of rights form. (Vol. 114, T 5564)

is a proper matter for the jury to consider. *Donovan v. State*, *supra*; *Stephenson v. State*, *supra*; *Houck v. State*, *supra*. A reversal for a new trial is required.

POINT VIII.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE BURGLARY WITH A BATTERY CHARGE, THERE BEING NO EVIDENCE OF A BATTERY DURING THE COURSE OF THE BURGLARY.

"The rule is well established that the prosecution, in order to present a prima facie case, is required to prove each and every element of the offense charged beyond a reasonable doubt, and when the prosecution fails to meet this burden, the case should not be submitted to the jury, and a judgment of acquittal should be granted." *Baugh v. State*, 961 So.2d 198, 203-04 (Fla. 2007) (quoting *Williams v. State*, 560 So.2d 1304, 1306 (Fla. 1st DCA 1990)). An appellate court reviews de novo the denial of a motion for acquittal. *Pagan v. State*, 830 So.2d 792, 803 (Fla. 2002). *See also Baker v. State*, 959 So.2d 1250, 1251-1252 (Fla. 2nd DCA 2007).

Further, the Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. *In re: Winship*, 397 U. S. 358, 364 (1970). This Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. *Cox v. State*, 555 So. 2d 352 (Fla. 1989). Circumstantial evidence must lead "to a reasonable and moral certainty

that the accused and no one else committed the offense charged. *Hall v. State*, 90 Fla. 719, 720; 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. *Williams v. State*, 143 So. 2d 484 (Fla. 1962). Circumstantial evidence is not sufficient when it requires the pyramiding of inferences. *Chaudoin v. State*, 362 So. 2d 398, 402 (Fla. 2d DCA 1978). When the State relies upon purely circumstantial evidence to convict an accused, the courts have always required that such evidence must not only be consistent with the defendant's guilty but it must also be inconsistent with any reasonable hypothesis of innocense. *McArthur v. State*, 351 So. 2d 972 (Fla. 1977).

A battery committed in the course of a burglary elevates the crime from a second degree felony to a first degree felony punishable by life:

> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person . . . .

§ 810.02, Fla. Stat.

The defendant moved for a judgment of acquittal on the battery enhancement of the burglary with a battery charge (Count II of the Indictment),

contending that the state had not presented any evidence that a battery had occurred in the course of committing the burglary, the state's evidence indicating that the victim voluntarily left the trailer with the defendant. (Vol. 115, T 5619-5623) As such, the state has failed to prove the battery enhancement. The state countered with the assertion that the jury could "reasonably infer" that some kind of a touching must have taken place in the act of the defendant waking her (even though there was no testimony that Couey actually woke the victim up or whether she was already awake [Vol. 114, T 5559-5560; Vol. 115, T 5590]), giving her a stuffed animal, and exiting the house. (Vol. 115, T 5621) The court agreed with the state, ruling that the mere evidence of the defendant's going into the trailer and approaching her was sufficient for the jury to weigh as to the battery element of the enhanced burglary charge. (Vol. 115, T 5622-5623)

However, criminal convictions cannot be based upon mere speculation or conjecture, as the court did here. *See, e.g., Staley v. State* 851 So.2d 805, 808 (Fla. 2nd DCA 2003) (court reverses probation revocation based on speculation, stating "The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."); *Chaudoin v. State*, *supra*; *Collins v. State*, 438 So.2d 1036 (Fla. 2d DCA 1983). *See also Weeks v. State*, 492 So.2d 719 (Fla. 1st DCA 1986)(circumstantial evidence is not sufficient when it

requires pyramiding of inferences to arrive at a conclusion of guilt.). Florida courts have long adhered to the rule proscribing the fact-finder from basing an inference upon an inference in order to arrive at a conclusion of fact. *See, e.g.*, *Chestnut v. Robinson*, 85 Fla. 87, 95 So. 428 (1923); *Voelker v. Combined Ins. Co. of America*, 73 So.2d 403 (Fla.1954). The purpose of this rule is to protect against verdicts or judgments based upon speculation. *Voelker v. Combined Ins. Co. of America*, *supra* at 407.

Here, the state would have us speculate not only to an inference of a touching occurring in the course of the burglary, they also would have us infer that any touching, if it occurred at all, was non-consensual. Simple battery requires a non-consensual touching. The crime of battery is defined in section 784.03(1)(a), Florida Statutes (2005), and occurs when a person: "(1) actually and intentionally touches or strikes another person against the will of the other; or (2) intentionally causes bodily harm to another person."

In *Baker v. State*, *supra* at 1251-1252, the court reversed a felony battery conviction upon a lack of sufficient proof. While there was evidence of a biting (touching) the state was unable to prove a non-consensual biting, resulting in reversal of the conviction. Here, too, the state was unable to prove that "in the course of committing the offense" of burglary, the defendant actually touched the

victim and that said touching was non-consensual. As discussed previously, the state's evidence showed that the defendant entered the Lunsford trailer and that Jessica left voluntarily. There was no evidence or testimony of a battery in the course of the burglary, the remaining counts of the indictment occurring elsewhere, separated by time and space.

The conviction for burglary with a battery must fall and the case remanded for imposition of a judgment and sentence for the lesser offense of burglary of a dwelling.

POINT IX.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, OVER TIMELY AND SPECIFIC OBJECTION, ON THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE WHERE IT WAS TOTALLY INAPPLICABLE HERE.

A trial court may give a requested jury instruction on a aggravating circumstance if the evidence adduced at trial is legally sufficient to support a finding of that circumstance. *Diaz v. State*, 860 So.2d 960 (Fla. 2003). Aggravating circumstances must be proven beyond a reasonable doubt. *Fla. Std. Jury Instr. Crim.* 7.11. Additionally, incomplete and misleading jury instructions on elements of the crime, similar to the aggravating factors in a capital case, is reviewed as fundamental error. *See, e.g., Hubbard v. State*, 751 So.2d 771 (Fla. 5th DCA 2000).

In *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) the Supreme Court held that in a capital case neither sentencing authority (advisory jury or trial judge) may weigh an invalid aggravator. It is abundantly clear that the jury here considered an invalid aggravating factor. The trial court instructed the jury on this particular circumstance. The prosecutor argued that the aggravating factor was present in this case to the jury. Nevertheless, as recognized by the trial court as early as the preliminary charge conference, the aggravating circumstance of prior violent

felony was not applicable here since the contemporaneous crime was committed on the same victim of the murder during the same criminal episode. *See Wasko v. State*, 505 So.2d 1314, 1317 -1318 (Fla. 1987); *Elledge v. State*, 613 So.2d 434, 436 (Fla. 1993); *Bruno v. State*, 574 So.2d 76, 81 (Fla. 1991).

The trial court began challenging the prosecutor on this particular aggravating circumstance at a preliminary penalty phase charge conference. The state insisted during the trial that the factor was applicable here, but, almost immediately afterwards, after it had gotten the benefit of the instruction and the opportunity to argue it to the jury, it admitted the factor was inapplicable here in its sentencing memorandum. As such, this is not a case where there was some question of the evidentiary value to prove this factor, as in *Floyd v. State*, 850 So.2d 383, 405 (Fla. 2002); or *Hunter v. State*, 660 So.2d 244, 252 (Fla. 1995). In those cases, this Court found that, although ultimately rejected by the trial court in its sentencing order, there was some evidence that supported the factor and thus an instruction on the factor was proper. Here, however, it was clear that the factor was simply inapplicable and thus an improper consideration to place before the jury.

The defendant's death sentence must be vacated and the case remanded for a new penalty phase.

POINT X.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

Couey's sentence of death must be vacated. The trial court found an improper aggravating circumstance and improper doubled two of them, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render the defendant's death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. I, §17 of the Florida Constitution.

Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *See Cole v. State*, 701 So.2d 845, 852 (Fla. 1997). It is submitted that this Court's proportionality review, being a question of law, is a *de novo* review.

A. The Trial Court Considered Inappropriate Aggravating Circumstances

Aggravating circumstances must be proven beyond a reasonable doubt by competent, substantial evidence. *Martin v. State*, 420 So.2d 583 (Fla. 1982); *State v. Dixon*, *supra* at 9. The state has failed in this burden with regard to one of the aggravating circumstances found by the trial court, that of CCP; and the court inappropriately doubled the circumstances of avoid arrest and CCP, utilizing the same aspect of the crime to support both aggravators in this case. The court's findings of fact, based in part on matters not proven by substantial, competent evidence beyond a reasonable doubt, and on erroneous findings, do not support these circumstances and cannot provide the bases for the death sentence.

Initially, it has to be noted that the trial court made some clear factual errors in its sentencing order: On page three of the order, the court incorrectly notes that Couey stayed behind at the Dixon trailer for the weekend of March 4, 2005, while the rest of the family went to Disney World, intimating that the defendant stayed behind to be with the victim and dispose of her body. (Vol. 50, R 9287) A correct reading of the testimony reveals instead that Couey had already moved from the trailer, moving with his niece and her husband to a trailer park in the different city of Crystal River. (Vol. 112, T 5228-5229) Further, the court's appears to state that Couey left for Georgia on March 4th immediately after his niece had purchased the bus ticket for him (Vol. 50, R 9287), while the correct facts are that Couey

remained in Florida at his niece's trailer until March 7th. (Vol. 109, T 4893-4894, 4919-4920) More critically, the court finds the wrong cause of death in the case: the judge finding the victim died of asphyxiation (strangulation, causing a loss of blood to the brain) (Vol. 50, R 9288), rather than suffocation (lack of oxygen), as the medical examiner testified. (Vol. 114, T 5495-5497)

In describing the medical examiner's findings, the court found, also without any evidentiary support, that the victim poked her fingers through the garbage bag in a "futile attempt to dig her way out of the grave" and that death would have occurred within 1-8 minutes "from placement in the hole until death." (Vol. 50, R 9288-9289) However, the doctor testified that, based on the medical evidence, he could not tell if she was alive when placed in the grave, and gave his time estimate of death from when she was placed in the bag, not the hole. (Vol. 117, T 5889-5893) Further, the court found that the defendant, upon entering the victim's room "awakened her," however, there was absolutely no testimony from Couey's confessors that he awakened her or whether she was already awake. (Vol. 114, T 5559-5560; Vol. 115, T 5590)[27]

Further, while Corrections Office Slanker did testify at trial, as recounted in the court's sentencing order (Vol. 50, R 9290), that the defendant expressed his

biggest regret as having lost everything, Slanker expounded on that answer more in the suppression hearing, clarifying it and giving the context of the statement as a discussion about religion, rather than some worldly loss, with discussion about being judged by God. (Vol. 60, T 288-289)

With regard to its finding of the aggravating circumstance of death occurring during the commission of a felony, the court indicates that in removing her from the Lunsford trailer, Couey committed a battery on her. (Vol. 50, R 9291) However, as revealed in Point VIII, *supra*, there was no evidence of a battery during the course of the burglary and such a finding is factually and legally incorrect.

The court erred in finding the aggravating circumstance of Cold, Calculated, and Premeditated. Four elements must be satisfied to support a finding of CCP. The murder must have been the product of cool and calm reflection and *not an act prompted by emotional frenzy or panic*. Furthermore, the murder must have been the product of a *careful* plan or *prearranged* design to commit murder before the fatal incident. The murder must also have resulted from *heightened* premeditation – i.e., premeditation over and above what is required for unaggravated first-degree

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[27] *See* Point VIII, *supra*.

murder. And finally, there must not have been any pretense of legal or moral justification for the murder. *See Walls v. State*, 641 So.2d 381, 388-89 (Fla.1994).

This test must thus evaluate the mental state of the perpetrator rather than looking merely at the manner of the killing. *Banda v. State*, 536 So.2d 221, 225 (Fla. 1988); *Johnson v. State*, 465 So.2d 499, 507 (Fla. 1985); *Mason v. State*, 438 So.2d 374 (Fla. 1983); *Cannady v. State*, 427 So.2d 723 (Fla. 1983). Thus, the evidence offered in support of the mental mitigating circumstances negates the CCP aggravator. In *Spencer v. State*, 645 So.2d 377 (Fla. 1994), this Court reversed a finding of CCP based upon the evidence of the defendant's mental mitigation, ruling that his mental impairments negated the necessary aspects of this aggravator:

> However, we find that the evidence does not support the trial court's finding of CCP. Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator. During the penalty phase, a clinical psychologist testified that Spencer thought that Karen was trying to steal the painting business, which was a recapitulation of a similar situation with his first wife. The psychologist also testified that Spencer's ability to handle his emotions is severely impaired when he is under such stress. A neuropharmocologist agreed that Spencer has "very limited coping capability," "manifests emotional instability when he is confronted with [sudden shocks and stresses]," and "is going to become paranoid when stressed." This expert opined that Spencer's personality structure and chronic alcoholism rendered him

> "impaired to an abnormal, intense degree." In light of this evidence, we find that the trial court erred in finding that the murder was CCP.

Spencer v. State, *supra* at 384 -385.

Even more so here does the evidence of Couey's biological mental impairment negate the finding of CCP. Looking to the facts of the instant case, we discover that the trial court, in finding heightened premeditation, totally ignored the evidence presented by the expert witnesses that the defendant was suffering from extreme mental or emotional disturbance and that he was unable to conform his conduct to the requirements of the law. (*See* Point IX, §B, *infra*) In fact, the doctors specifically negated the factor of cold, calculated, and premeditated by stating that the defendant, because of his mental illness, experienced a "*catastrophic* failure of the brain to regulate impulses" and aggression. (Vol. 118, T 5966, 5968, 5977) Dr. Wu testified that Couey's brain injuries caused him to become hypersexual, develop inappropriate object choices beyond his control, and caused a "*profound* inability" to regulate or control his brain's behavior. (Vol. 118, T 5970-5972)

Dr. Berland testified that the defendant suffered from a "brain malfunction," causing problems with his thinking and judgment. (Vol. 118, T 5986-5994) His biological mental illness caused him auditory hallucinations, including "thought

insertion," which told him to do things, from at least as early an age of 8 or 9 (when he had the incident where he was discovered in his Aunt Jean's bedroom curled in a fetal position, with his aunt's nightgown cut in pieces). (Vol. 118, T 5996-5999, 6004) This was consistent with testimony of jail guards, who constantly heard him muttering and grumbling, seemingly communicating with someone else. (Vol. 118, T 6000) His manic episodes deprived him of sleep, further exacerbating the situation, and becoming more continuous and enhanced leading up to the crimes. (Vol. 118, T 5999-6000) Couey's mental problems, also made worse by the common attempt of sufferers to self-medicate with drugs and alcohol, affected all his thinking and judgment, causing inability to reason. (Vol. 118, T 6004) And his illness affected him involuntarily, he being simply unable to conform his actions. (Vol. 118, 6012-6020, 6043)

This uncontroverted evidence[28] firmly establishes that Couey was suffering from a severe mental illness which would preclude him from the type of "careful plan or prearranged design" necessary for this aggravating circumstance. The trial

[28] The state's radiologist clinician, looking only at the PET-Scan imaging he took of the defendant and not having viewed any history of the defendant nor his neuropsychological or intelligence tests, was unable to rebut any of this testimony, simply stating that in his subjective view of his brain imaging of the defendant, he did not see the same injuries that expert Dr. Wu saw significant evidence of in his PET-Scan images. (Vol. 118, T 6111)

court's findings regarding the CCP aggravator do not address these important negators of cold, calculated and premeditated.

The murder in the instant case was not the product of a deliberate plan formed through calm and cool reflection. *See Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987) Rather, it was prompted by panic and by the defendant's impulsivity. Just as in *Spencer v. State*, *supra*, this aggravating circumstance must be stricken because of the extensive mental illness's effect on Couey's inability to form the requisite coldness and calculation necessary for this factor.

Further, looking at the factors listed in the court's sentencing order in this case, it appears that the court improperly doubled CCP and avoid arrest. *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976), and its progeny prohibit the same aspect and facts of the offense to support two separate aggravating circumstances. While in some cases subsections (e) and (i) refer to separate analytical concepts and can validly be considered to constitute two circumstances,[29] here, though, these two aggravators, as recounted by the judge, focus on the same facet of the crime. Both here attempt to focus on the alleged plan for the murder. (Vol. 50, R 9292-9294) As such, it is an improper doubling of CCP and avoid arrest.

Hence, one of the aggravators, either CCP or to avoid arrest, must be stricken as improper doubling.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

In *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant, reminding courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Rogers v. State*, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court *must* find it as mitigating. In *Trease v. State*, 768 So.2d 1050 (Fla. 2000), though, this Court recognized that there are some circumstances where a mitigating circumstance may be found to be supported by the record for additional reasons or circumstances unique to that case, but be entitled to no weight. However, it still must be considered by the sentencer.

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[29] *See, e.g., Morton v. State*, 995 So.2d 233, 246 (Fla. 2008), holding that "no improper doubling exists *so long as* independent facts support each aggravator," and "*in the instant case*, the two aggravators focus on different facets of the crime."

For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence. The trial judge should expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court *must* find as a mitigating circumstance each proposed factor that is mitigating in nature. This is a question of law. *Campbell v. State*, *supra*. This Court summarized the *Campbell* standards of review for mitigating circumstances:

> (1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court;
> (2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard;
> (3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, 706 So.2d 7 (Fla. 1997); *Cave v. State*, 727 So.2d 227 (Fla.1998).

The trial court's sentencing order here totally fails to meet this standard necessitated by the capital sentencing scheme. The trial court glossed over the statutory and non-statutory mitigating factors and improperly rejected them or abused its discretion in giving them little weight, with no explanations why.

Mitigating considerations that have consistently and historically been deemed to be "significant" clearly exist here. The mitigating circumstance of "under the influence of extreme mental or emotional disturbance" has been defined as "less than insanity, but more emotion than the average man, however, inflamed." *Foster v. State*, 679 So.2d 747, 756 (Fla. 1996) [quoting from *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973)]. The consideration of these mitigating circumstances is supposed to be entirely independent of a finding of sanity. *Ferguson v. State*, 417 So.2d 631 (Fla. 1982); *Mines v. State*, 390 So.2d 332, 337 (Fla. 1980); and is distinct from a finding of mental retardation, which, under §921.137, Fla. Stat., excludes the possibility of a death sentence. *See also Campbell v. State*, 571 So.2d 415 (Fla. 1990) (impaired capacity); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (error to consider as mitigating evidence only that which would tend to excuse criminal liability); *Knowles v. State*, 632 So.2d 62 (Fla. 1993) (rejection of insanity and voluntary intoxication defenses does not preclude finding this mitigator); *Morgan v. State*, 639 So.2d 6, 13-14 (Fla. 1994) (jury's rejection of insanity defense and voluntary intoxication and finding of premeditation does not preclude finding this factor). However, throughout the trial court's analysis rejecting this mitigating circumstance, it repeatedly relies on

criteria establishing simply that the defendant was not retarded, that he had adaptive functioning, that his I.Q. was above the retarded range. (Vol. 50, T 9297)

The court summarily rejects the conclusively established facts that Couey suffered multiple head trauma as a child at the hands of his abusive father, that Couey's neuropsychological testing was consistent with these reports, repeatedly showing he was not malingering, that he had severe problems to his impulse control, "a catastrophic failure" it was called, that his mental illness affected all of his thinking and judgment, that hallucinations plagued him, causing him the inability to reason. Couple this with his atrocious upbringing full of mental, physical and sexual abuse and neglect, his slow learning abilities, and attempts to self-medicate with drugs and alcohol which instead exacerbate the situation, and it is clear Couey clearly suffers quite involuntarily from extreme mental or emotional disturbance. The state presented no mental health expert to rebut the mental mitigating circumstance, providing only a radiologist clinician who testified merely that he saw no evidence on the picture he took of Couey's brain which would corroborate the eminent Dr. Wu's findings and demonstrations to the jury of an organic cause to the defendant's mental health problems. The radiologist considered no other facts of the case or of the defendant's history in his mere

reading of an image and had nothing to say about the clear findings and corroborations of brain damage from the mental health testing.

Similar facts in other cases have resulted in a strong finding of this mitigating factor. *See Crook v. State*, 908 So.2d 350 (Fla. 2005) (organic brain damage); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (incurable organic brain damage, extensive drug abuse, and possibility of substantial intoxication at time of the offense); *Amazon v. State*, 487 So.2d 8 (Fla. 1986) (long history of drug abuse and drug use on night of crime; "emotional cripple," emotional maturity of 13-year old); *Hawk v. State*, 718 So.2d 159, 162 (Fla.1998) (clinical and statistical evidence of brain damage, mental illness, and intoxication at the time of crime constituted strong mitigation requiring reversal of death sentence); *Kramer v. State*, 619 So.2d 274 (Fla. 1993) (death sentence disproportionate where suffered from alcoholism and under influence of mental or emotional stress); *Spencer v. State*, 645 So.2d 377 (Fla. 1994) (chronic alcohol and substance abuse, a paranoid personality disorder, and biochemical intoxication).

The trial court's rejection of this factor, when substantiated by uncontroverted evidence of the defendant's severe mental illness which affecting his actions, judgment and impulsivity, must be reversed. This mitigating

circumstance is clearly present, contributed to his actions in this murder, and cries out for a life sentence.

Similarly, despite the strong evidence of mental disabilities, low intelligence, lack of impulse control, deficits in rational thinking and his ability to reason, especially under stress, the trial court inappropriately rejected the mitigating factor of substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (Vol. 50, T 9298). The court in rejecting this mitigator, simply said "ditto" from its findings on extreme mental or emotional disturbance.

Like subsection (b), this circumstance is provided to protect that person who, *while legally answerable for his actions*, may be deserving of some mitigation of sentence because of his mental state. *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973).

Similar facts in other cases have resulted in a strong finding of this mitigating factor. *See Besaraba v. State*, 656 So.2d 441, 445-446 (Fla. 1995) (defendant experiencing a psychotic episode in which he was unaware of his actions, evidence of past emotional disturbances, and situational stress of confrontation with victim which triggered episode, all establish this mitigator and justify a life sentence); *Morgan v. State*, 639 So.2d 6 (Fla. 1994) (rage and mental infirmity; Court applied this circumstance to reduce to life, *despite finding by trial*

court that it did not play a major role in the crime); *Knowles v. State*, 632 So.2d 62, 67 (Fla. 1993) (organic brain damage, psychotic state, neurological deficiencies, coupled with intoxication caused this Court to reverse trial court's rejection of this factor and to reduce to life); *Rivera v. State*, 561 So.2d 536 (Fla. 1990) (borderline personality disorder, impulsiveness, lack of control of anger, affective instability); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (organic brain damage, increased impulsiveness, diminished ability to plan events, psychologist testified that defendant "probably" unable to appreciate criminality).

Here, the testimony clearly establishes this factor. The defendant had long suffered from auditory hallucinations and "thought insertion" compelling him to act (as evidenced by the incident with Aunt Jean's nightgown when he was 8 or 9 and continuing, according to all the mental health expert testimony). Again we note testimony of "catastrophic failure of the brain's ability to regulate impulses" and aggression, and a "profound inability" to regulate or control his brain's behavior, language certainly synonymous with the terminology of this mitigating factor. Yet the trial court fails to mention any of this testimony in its summary rejection of this factor.

Couey's mental illnesses as detailed by the mental health doctors show them to affect him involuntarily, Couey having no control over their effect on him. This

factor is certainly present and entitled to great weight as opposed to its rejection by the trial court. This factor must be found and factored into a sentence of life imprisonment.

Coupled with these strong mitigating factors, the defendant also presented powerful nonstatutory mitigation, which, in other cases has been found to be substantial. The defendant had an abusive and deprived childhood, including a premature birth, deformity, and learning disabilities, wherein his mother abandoned and neglected him. He is childlike; has diminished control over his actions; suffers from chronic alcohol and drug abuse in response to his mental illness; was a model prisoner; had previously and unsuccessfully sought treatment as a mentally disordered sex offender; and the defendant was remorseful. *See Almeida v. State*, 748 So.2d 922, 933 (Fla. 1999); *Livingston v. State*, 565 So.2d 1288 (Fla.1988) (severely beaten as a child by his mother's boyfriend; his mother neglected him); *Campbell v. State*, *supra*; *Nibert v. State*, 574 So.2d 1059 (Fla. 1990); *Cooper v. State*, 581 So.2d 49, 52 (Fla. 1991) (model prisoner, disadvantaged childhood); *Fitzpatrick v. State*, 527 So.2d 809 (Fla. 1988) (despite the five aggravating factors, this Court vacated the sentence of death because compared to other cases the killing in this case resulted more from the acts of an immature man-child than from a hard-blooded killer; a disadvantaged youth and an

abusive childhood); *Crook v. State*, 908 So.2d 350, 358 (Fla. 2005) (aggravating circumstances present here, though substantial, found not to outweigh the combination of unrefuted and overwhelming mitigation, that were determined in other cases requires a life sentence, including Crook's abusive childhood, diminished control over his actions, and a disadvantaged home life); *Songer v. State*, 544 So.2d 1010 (Fla. 1989) (chronic alcohol abuse, caused by and in response to mental illness); *Craig v. State*, 510 So.2d 857 (Fla. 1987) (model prisoner); *Skipper v. North Carolina*, 476 U.S. 1 (1986) (model prisoner); *Snipes v. State*, 733 So.2d 1000 (Fla. 1999) (remorse); *Morris v. State*, 557 So.2d 27 (Fla. 1990) (remorse); *Pope v. State*, 441 So.2d 1073 (Fla. 1984) (remorse).

Despite the powerful remaining aggravating factors, all of these mitigating circumstances, combined with the powerful mental mitigation call for a sentence of life imprisonment. This Court is asked to vacate the death sentence and remand for imposition of another life sentence.

CONCLUSION

BASED UPON the cases, authorities and policies herein, the Appellant requests that this Court reverse his judgments and sentences and, as to Points I-VII, remand for a new trial, as to Point VIII, remand for imposition of the lesser included offense, as to Point IX, remand for a new penalty phase, and as to Point X, vacate the death sentence and remand for the imposition of a life sentence.

Respectfully submitted,

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ASSISTANT PUBLIC DEFENDERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Hon. Bill McCollum, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to Mr. John Evander Couey, Inmate # 063425, Florida State Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, this 26th day of January, 2009.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

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JAMES R. WULCHAK