IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1636

JOHN EVANDER COUEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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

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STATEMENT OF THE CASE AND FACTS

In February 2005, Ruth and Archie Lunsford lived with their son Mark, his daughter Jessica ("Jessie"), and her pet Dachshund Corky, on South Sonata Avenue, Homosassa, Florida. (V108, R4774-75). Jessie occasionally played with Corky in the yard. (V108, R4781-82). On February 23, Jessie attended school, ran errands with her grandparents, and went to church with Sharon Armstrong. (V108, R4776-77). Armstrong brought Jessie to church every Wednesday night and also tutored her in her studies. (V108, R4767, 4775). After Armstrong brought Jessie home at 9:00 p.m., Jessie prepared for bed. Ruth tucked Jessie into bed "as she had always done" at about 10:00 p.m. (V108, R4778-79). Jessie slept with her favorite stuffed animal, a purple dolphin. (V108, R4780). She never left home at night. Jessie had never been in Couey's trailer on Snowbird Court.[1] (V108, R4781, V109, R4860-62). The next morning, Mark Lunsford woke Ruth and said Jessie was not in her bed. Ruth called 911. (V108, R4780).

Ruth noticed the screen room door had been cut. (V108, R4782). Although Jessie and her stuffed purple dolphin were

[1] The distance between the two residences was 65 yards. (V119, R4842-4844).

missing, nothing else had been disturbed. (V108, R4782). Ruth gave police a copy of Jessie's fingerprints.[2] (V108, R4785).

Mark Lunsford was raising Jessica while living with his parents. (V108, R4787-88). On February 23, Lunsford went home after working a 15 hour shift. Jessie was already home from church. He watched television as Jessie "jumped around on the couch." (V108, R4788). Mark left to spend the night at his girlfriend's house. After arriving home at 5:45 a.m., he heard the sound of Jessie's alarm. (V108, R4789-90). He got ready for work but still heard the alarm going off. He opened Jessie's bedroom door and saw that Jessie and her dolphin toy were missing. She had never been gone at that hour of the morning. (V108, R4790-91).

Deputy Juan Santiago, Citrus County Sheriff's Office, responded to the Lunsford home. (V108, R4794, 4798). Santiago searched the inside and outside area. (V108, 4800, 4806). A helicopter, K-9 unit, and numerous agencies assisted in the search for Jessie. (V108, R4800). Volunteers and several law enforcement agencies searched in a nearby forest and the surrounding area around her home. (V108, R4812, 4815). Santiago

[2] As a safety precaution, Ruth Lunsford had Jessica fingerprinted when she was younger. (V108, R4784; V110, R5057-58, State Exh. 27).

did not go to any neighboring residences to search for Jessie. (V108, R4818).

On February 24, Detective Daniel Holder processed the Lunsford home. (V109, R4838, 4841, 4848). He noted a six inch by six inch L-shaped cut in the screen door by the door handle. (V109, 4846). The home was vacuumed and latent prints were taken. (V109, R4851). The area around the residence was searched, including three outbuildings and the underside of the mobile home. Detectives looked for any signs of hiding places or disturbed dirt. (V109, R4848, 4850).

Dorothy Dixon, Couey's sister, lived with Couey, her boyfriend, Matt Dittrich, her daughter and son-in-law, Madie and Gene Secord, and two-year-old grandson, Joshua, on Snowbird Court, in Homosassa, 65 yards from Jessica's home. (V109, R4860-62). On February 23, Dixon, Dittrich, and Couey went to "The Yard," an area where Dittrich and friend Bobby Thompson worked on diesel rigs. The group stayed at the yard until dark.[3] (V109, R4867-68). After returning home, Dixon, Dittrich, and Couey left again at 10:00 p.m. They returned to Thompson's and checked on Marti, Thompson's girlfriend, who was experiencing problems with her pregnancy. Dixon checked on her while Dittrich and Couey

[3] Dixon admitted she, Dittrich, and Couey smoked crack that night. (V109, R4883). Couey drank alcohol while at the yard. (V109, R4884).

charged her car battery. (V109, R4869). Dixon's car broke down on the drive home. Marti's son Matt brought them home at 1:00 a.m. (V109, R4870). Dittrich and Dixon went into their room, locked the door, and turned on the television, which routinely stayed on all night. (V109, R4870-71). Dixon was not aware of anyone leaving the house during the night. (V109, R4872).

On February 24, Dixon noticed police activity in the neighborhood. (V109, R4866, 4872). Dittrich ate lunch with his mother and then retrieved Dixon's car. Dixon and Dittrich went to Thompson's place while Couey stayed behind. (V109, R4875-76). They went to Thompson's daily. Occasionally, Couey went with them. (V109, R4876). With the exception of lunchtime, Dittrich was with Dixon all day. (V109, R4876).

During the time period between February 23 to March 7, Dixon never noticed any unusual activity coming from Couey's room. (V109, R4881). On March 14, Dixon gave permission to police to search her home and take her car. Couey had left a week earlier. Dixon gave Couey 200.00 dollars to buy a bus ticket. (V109, R4883). Couey called Dixon and told her he was living in Savannah, Georgia. (V109, R4877-78). No one stayed in Couey's bedroom after he left. (V109, R4879). Dixon said Jessie had never been in her home. (V109, R4879).

Dixon noticed a ladder outside Couey's window. (V109, R4872). There was no cable television service into the trailer nor was she aware of Couey installing an antenna to his room. (V109, R4881).[4]

Matthew Dittrich was living with Dixon, Couey, and the Secords in February 2005. (V112, R5214-15). On February 23, Dittrich, Dixon and Couey went to Bobby Thompson's ("The Yard") to work on a truck. (V112, R5215-16). They drank and smoked crack cocaine. (V112, R5220). They spent the day at Thompson's, returned home for a short time, and later returned to Thompson's. (V112, R5216-17). After Dixon's car broke down on the way home, Matt Jay gave them a ride home. (V112, R5217). Dittrich and Dixon went to their room, turned on the television, and went to bed. (V112, R5218). Dittrich was not aware of anyone leaving the home that night. (V112, R5219).

On February 24, Dittrich saw "cops everywhere" in his neighborhood. (V112, V5215). He ate lunch with his mother and retrieved Dixon's car. (V112, R5218). Over the next few days, he worked on trucks then went home and drank alcohol. (V112, R5221-22). He was not in Couey's room during that time. (V112,

[4] The ligatures wrapped around Jessica's wrists matched the antenna/speaker wire found in Couey's home. (V113, R5325-26, State Exhs. 26, 47).

R5222). Dittrich said Jessica had never been in his home. (V112, R5219).

Gene Secord, his wife Madie, and two-year old stepson Joshua, had been living with Dittrich and Dixon for two weeks in February 2005. (V112, R5224). On February 23, the Secords stayed home watching television and went to bed about 9:00 p.m. Secord was not aware of anyone leaving the trailer during the night. (V112, R5226-27). The next day, Secord learned of Jessica's disappearance on the news. (V112, R5227, 5233). When police came to the trailer several days later, Couey stepped out the back door. (V112, R5228, 5233). Secord never saw Jessica in the Snowbird residence. (v1112, R5229).

The Secords moved to Crystal River a few weeks later. On March 4, the family went to DisneyWorld while Couey stayed at their home. (V112, R5228). Couey left for Georgia a few days later. (V112, R5229).

Madie Secord saw police activity early on February 24. (V109, R4888). A deputy asked her if she had seen Jessie and asked to search the property. (V109, R4889-90). She gave consent and he searched the outside area. (V109, R4890, 4895). Secord spent most of her time resting as she was in the midst of a high-risk pregnancy. (V109, R4890). The previous night, she and husband Gene rested in their room. Gene did not leave her during the night. (V109, R4891).

Madie Secord bought Couey a bus ticket in her name on March 4th. (V109, R4893). The Secords went to DisneyWorld for the next few days. Upon returning, Couey asked her to take him to the bus for his trip to Georgia. (V109, R4893-94).

On March 12, the Citrus County Sheriff's Office requested Savannah Police locate and interview Couey.[5] (V109, R4900-02). Couey presented a Georgia ID card to Detective Michael Love. (V109, R4909). Love read Couey his *Miranda* rights.[6] (V109, R4902, 4906-07). During the interview, (State Exh. 11), Couey told Love he arrived in Georgia on March 10th. (V109, R4913). He had previously been living with his sister and then his niece. (V109, R4915-16). Couey did not know anything about a missing girl in Citrus County. He only saw it on the news. (V109, R4920, 4922, 4923, 4927). He had been in Lunsford's neighborhood only when he was picking up trailer parts. (V109, R4923, 4925).

Couey was interviewed a second time.[7] (V109, R4904, State Exh. 12). Couey told Detective Love he had spoken to his sister since his arrival in Georgia. He did not know Jessica Lunsford or anything about her being missing. (V109, R4929, 4931, 4933). He was not in the habit of "snatching up kids." (V109, R4934).

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[5] The interview was videotaped and published for the jury. (V109, R4902, 4911-27, State Exh. 11).

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

[7] This interview was audiotaped only. (V109, R4904, State Exh. 12).

He had never worked in a school and moved to Georgia to find a job. (V109, R4932). Prior to arriving in Georgia, he stayed at his niece's trailer and did side jobs for work. (V109, R4937, 4938). Couey was released after the second interview. (V109, R4944). On March 14th, Detective Love was unsuccessful in an attempt to locate Couey a third time. (V109, R4944-45).

On March 14th, Detective Martin Cannaday photographed and processed Couey's trailer on Snowbird Court. (V110, R4971-72, 4975-76, 4981). He collected several items which included a blood-stained mattress (V110, R5001, State Exh. 19); bloodstained green pillows (V110, R4985, 4987, State Exh. 17); a blue pillow (V110, R4988, 4990, State Exh.18); a pair of jeans from the floor; a shirt from the closet; and a letter located inside a briefcase. (V110, R4981, 4983).

Kristen Lehman, forensic analyst, examined the mattress and pillows. (V110, R5005-06, 5011, 5016, 5017). She requested her colleague Roshale Gaytmenn perform DNA testing on these items. (V110, R5014-15, 5017-18, 5021).

On March 18th, Holder and other personnel[8] processed the area around Couey's trailer for "a possible recovery of ... Jessica Lunsford." (V109, R4861-62; V110, 5024). The team worked

[8] Sergeant Tim Martin, Detective Brian Spiddle, Crime Scene Technician Dave Cannady, Evidence Custodian Patty Chatkiewicz, and Supervisor Dave Strickland assisted in the search. (V110, R5025, 5123).

for five hours excavating an area of dirt on the east side of the trailer. (V110, R5026, 5027). Early on March 19th, Jessica's body was found buried in the ground next to Couey's trailer. (V110, R5028-29, 5035).[9]

Jessica's body was covered with two black garbage bags.[10] (V110, R5030-31, 5060, State Exh. 28). The bags were tied closed in a knotted fashion. (V110, R5033). Jessica's right index and middle fingers were poking through the bags. (V110, R5034, 5062). There were ligatures made of speaker wire wrapped and knotted around her wrists. Her stuffed toy purple dolphin was in her arms.[11] (V110, R5035; 5065-66, State Exh. 29). Holder was present when the medical examiner cut the ligatures from Jessica's wrists which were submitted to FDLE for analysis. (V110, R5046-47). The medical examiner took Jessica's

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[9] The prints from Jessica's Missing Children Information Card (State Exh. 27) matched the prints of the victim (State Exh. 30) found buried on Couey's property. (V111, R5083-84).

[10] An empty trash bag box was located on top of the refrigerator in Couey's kitchen. (V112, R5265, 5267, Exh. 50). The State submitted Exh. 51, a purchased, sealed box of garbage bags identical to State Exh. 50, the empty trash box found on the top of Couey's refrigerator. (V111, R5178; V112, R5268-5270). In addition, Couey's prints were found on four trash bags collected at his home. (V111, R5170-72, V112, R5304, State Exh. 57).

[11] Two photographs depicting Jessica's body as found were admitted into evidence. (V110, R5041, 5046, State Exhs. 23 and 24). Due to the original dolphin toy being saturated with decomposition fluids, an exact replica of the dolphin toy was admitted as State Exh. 68 at trial. (V114, R5544, 5546).

fingerprints (V111, R5082-83, State Exh. 30) as well as oral, vaginal, and anal swabs. (V110, R5051-52).

Detective Cannady has conducted thousands of fingerprint comparisons. (V111, R5075-76). Jessica's known fingerprints (State Exh. 27) matched the fingerprints (State Exh. 30) obtained by the medical examiner.[12] (V111, R5083-84).

Law enforcement removed the closet wall from Couey's bedroom. (V111, R5094-95, 5101-02, State Exh. 34). Cannady did not know if the closet door had a lock. (V111, R5112). He developed photographs of latent prints found on the closet wall. (V111, R5098, State Exh. 33). A comparison of Jessica's known prints (State Exh. 27) to the photographs of the prints located in the closet (State Exh. 33) were a match. (V111, R5099, 5100-01, 5104). In addition, Cannady rolled a set of prints from Couey. (V111, R5108-09, State Exh. 35).

Sergeant Tim Martin, Citrus County Sheriff's Office, has conducted thousands of fingerprint comparisons. (V111, R5114-15, 5116). He explored numerous leads regarding Jessica's disappearance. (V111, R5118-5120). On March 19th, Martin was present when Jessica's body was discovered buried next to Couey's trailer. (V111, R5123). The next day, Martin and Cannady

[12] Jessica's known prints (State Exh. 27) matched those of an additional set of rolled prints taken at the medical examiner's office. (V111, R5087-88, State Exh. 31).

returned to Couey's trailer and removed the closet[13] from Couey's bedroom. (V111, R5124-25). He did not recall if there was a lock on the closet door. (V111, R133). Martin obtained buccal swabs from Couey. (V111, R5129-30).

On February 24th, crime scene technician Brian Spiddle reported to the Lunsford home and assisted in the investigation of Jessica's disappearance. (V111, R5137, 5139-40). Photographs were taken and the home was searched and vacuumed. (V111, R5139-40). Law enforcement checked all locations where Mark Lunsford drove his work truck. (V111, R5143). On March 2nd, Spiddle photographed Couey's trailer from the roadway in front of the Lunsford home. (V111, R5144). He noted a ladder was beneath a bedroom window. (V111, R5147-48). On March 18th, Spiddle reported to Couey's trailer. (V111, R5148). He again noted the ladder at the side of the porch area along with a long-handled shovel lying on the ground. (V111, R5149-50, 5156-57, State Exh. 42).[14]

On March 18th, after Spiddle and his team removed the wood porch from Couey's trailer, the excavation team carefully began

[13] The closet interior measured one-foot, eleven inches deep by four-foot, ten and three quarter inches wide. (V111, R5127).

[14] Spiddle also collected a short shovel and a rake. (V111, R5158-60, State Exhs. 43 and 44). State Exhibits 42, 43, and 44, all located outdoors, were not processed for fingerprints. (V111, R5178, 5182).

the recovery process of Jessica's body from the ground. (V111, R5161-67). The recovery process was not completed until March 19th at 4:00 a.m. (V111, R5168). Later on March 19th, Spiddle returned to the Snowbird Court crime scene where the makeshift grave was further processed. (V111, R5169).

Gene Secord and Couey were both jailed at the Citrus County jail in late March 2005.[15] (V1112, R5229-30). Couey, housed in the cell next to Secord, talked to Secord about religion. (V112, R5230). Secord asked Couey, "[I]f he believed in God so much how could he have done something as he did?" Couey responded, "[I]t was in the past ... he can't live in the past, and to forget about it." Further, Couey said, "[I]f his sister would have loved him more he wouldn't have done this." (V112, R5232).

Stephen Stark, FDLE analyst, assisted in processing the Snowbird Court crime scene on March 18th. (V112, R5239, 5242). Stark collected speaker wire and transported it to the FDLE crime lab in Tampa. (V112, R5248, 5251, State Exh. 47). He identified an area in Couey's closet that contained a stain consistent with blood. He collected a sample from the stain. (V112, R52543, 5378, State Exh. 66). In addition, he collected

[15] Secord was jailed for nonpayment of child support. He was not arrested in relation to this case. (V112, R5235-36).

two boxes[16] from Couey's closet and a large glass tabletop[17] found in Couey's bedroom. The boxes and tabletop were transported to the Tampa crime lab for latent fingerprint processing. (V112, R5256, 5259, 5260, 5263, 5287, State Exhs. 48, 53). In addition, Stark processed another glass tabletop found in Couey's room which contained Couey's prints. (V112, R5262, 5264, Exh. 49).

Wesley Zackery, FDLE analyst, has conducted thousands of latent fingerprint examinations and comparisons. (V112, R5277, 5279-80). Zackery identified both Couey's and Jessica's fingerprints on the broken glass tabletop and other items found in Couey's room.[18] (V111, R5111, State Exh. 36 (print card-Couey); V112, R5261, 5283, State Exh. 52, V112, R5285-87, State Exh. 53; V112, R5290, State Exh. 54, V112, R5295-96). After a fingerprint comparison was conducted on the boxes removed from Couey's closet (wine box and pizza box), Zackery identified Jessica's left thumb print on the pizza box. (V112, R5298-99). He also identified Couey's right index and left index fingers on

[16] The boxes were identified as a wine box and a Domino's pizza box. (V112, R5296-97, State Exh. 48).

[17] Upon initial receipt, the glass tabletop was in one solid piece. However, it was stepped on accidentally in the evidence section at the FDLE lab. (V112, R5260, 5273, 5287, 5280, State Exh. 53).

[18] There were 15 unidentified prints found on the broken glass tabletop. (V112, R5311-12). Only Couey's print was identified. (V112, R5287).

the pizza box.[19] (V112, R5302). No latent prints were developed on the wine box. (V112, R5312). Although Zackery examined the two garbage bags (State's Exh. 28) that covered Jessica's body, the bags had an oily substance on the exterior and interior - - he could not identify any latent prints. (V112, R5307). Four other garbage bags collected from Couey's home contained his prints. (V111, R5170-72, V112, 5304, 5306 State Exh. 57).

Jerry Cirino, an expert in fracture match analysis,[20] compared the ligature (State Exh. 26) from Jessica's wrists to the antenna/speaker (State Exh. 47) wire obtained from Couey's home. (V113, R5320, 5323). Cirino compared the class characteristics as well as the number of wires and plastic insulation covering the wires of each exhibit. (V113, R5326). These two exhibits had corresponding fracture contours so that Cirino was able to "physically fit the two items back together." (V113, R5326). Cirino did not match up each wire as "the metallic wiring had a tendency to become distorted." (V113,

[19] Six additional prints were present on the pizza box but were not examined or identified. (V112, 5310, 5311).

[20] Fracture match analysis is the examination of different materials (wood, glass, metal, paper) to determine if an object has been cut, torn, or broken, which, at one time, was a single item. (V113, R5322).

R5331-32). The ligatures and speaker wire were, at one time, a single piece.[21] (V113, R5325-26).

Roshale Gaytmenn, FDLE analyst, biology section, examined cuttings and swabbings (State Exhs. 64, 65)[22] from Couey's mattress (State Exh. 19) for traces of body fluids.[23] (V113, R5334-35, 5357-58, 5363, 5366). Both Couey's and Jessica's DNA were present on Couey's mattress. (V113, R5367, 5368). Couey's blood and semen were on the mattress. (V113, R5368). One stain contained a DNA mixture belonging to both Lunsford and Couey. (V113, R5369-70). Gaytmenn could not determine which of the major or minor contributors happened first. (V113, R5418). She could not determine when the stains were made, either. (V113, R5419). An examination of the green pillows (State Exh. 17) from Couey's bedroom indicated both Jessica's blood and Couey's DNA were present on one of the pillows (pillow "A"). (V113, R5371-72). There were eight areas that contained blood. (V113, R5421). A mixture stain on the blue pillow (State Exh. 18) from Couey's bedroom contained Jessica's blood. Couey could not be excluded as a minor contributor to the mixture stain. (V113, R5374-75,

[21] The medical examiner testified Jessica's wrists were wrapped together with speaker wire. (V114, R5482).

[22] Gaytmenn could not determine if the stains were made at the same time. (V113, R5408, 5414-15).

[23] Gaytmenn had conducted thousands of analyses on skin cells, blood cells, sperm samples, bone, teeth, and tissue. (V113, R5336).

5376, 5424-25). There were four stains on the blue pillow that contained blood. (V113, R5423). Couey's DNA was present on one of the stains on the blue pillow. (V113, R5376-77). Swabs (State Exh. 66) taken from stains in Couey's closet contained Jessica's blood. (V113, R5378-79).

Dr. Stephen Cogswell, medical examiner, performed the autopsy of Jessica Lunsford. (V114, R5459, 5462, 5471). Cogswell noted that Jessica's body had two garbage bags tied around her. The bags were arranged around her body "as though she stepped into one open bag, squatted down, and it was knotted above her; the outside bag was pulled down over her head and knotted not quite underneath her buttocks, but in a lower area." (V114 R5469, 5471, 5482). Based upon the state of decomposition that Jessica's body showed, Cogswell determined she had been dead approximately three weeks before her body was found.[24] (V114, R5475-76). Due to the mild climate at the time, Jessica's body was not as decomposed as it would have been in other areas of Florida. (V114, R5472-75). Jessica's body was "at the stage of decomposition going from bloat into decay." She did not have signs of external injuries or bruising. There was a considerable amount of decomposition fluid in the trash bags. (V114, R5480).

[24] Jessica was last seen alive on February 23, 2005. Her body was discovered on March 18, 2005. The autopsy was performed over a two-day period on March 19-20, 2005. (V114, R5471, 5476).

Jessica's soft tissues liquefied and drained away from her body and the skin itself. Everything inside the trash bags "was saturated with these decompositional fluids. Her body was essentially within a semi-liquid environment." (V114, R5480-81). As a result, trace evidence from her body settled in the bottom of the trash bag. (V114, R5481).

Dr. Cogswell noted Jessica's wrists were wrapped together with speaker wire. (V114, R5482). The sexual assault examination indicated Jessica had shallow lacerations and abrasions to her vagina, indicative of a sexual assault. (V114, R5483-84). These injuries occurred within a few hours of her death. (V114, R5493). She would have had "a fair amount of bleeding" from these injuries. (V114, R5493). Jessica's gastrointestinal tract was empty, indicating she had not had a meal in quite a while.[25] (V114, R5487). There was no evidence of bruising on her lips, no torn skin, and no broken teeth. There were no bite marks on her tongue. There was not enough information to determine if anything had been placed over her mouth or not. (V114, R5488-89). There was no indication of internal injuries. (V114, R5490).

Two of Jessica's fingers were poking through both trash bags. (V114, R5494-95). Dr. Cogswell opined that Jessica "was

[25] Dr. Cogswell gave a time frame of twelve hours to four days. (V114, R5488).

already in the ground attempting to push through the bags while she was being buried ..." (V114, R5495-96). Dr. Cogwell concluded Jessica's death was a homicide. Her cause of death was suffocation. (V114, R5497, 5499).

On March 15, 2005, Detective Gary Atchison, Citrus County Sheriff's Office, located Couey in Augusta, Georgia. (V114, R5508-09). On March 17, 2005, Atchison and Detective Scott Grace interviewed Couey.[26] (V114, R5510, 5513). The audiotaped interview was published for the jury. (V114, R5513-5538).

Couey was read his *Miranda*[27] rights. (V114, R5514). Prior to moving to Georgia on March 7, 2005, Couey had been living with his sister, her boyfriend, and her family. They lived in a trailer on Snowbird Court. (V114, R5515, 5516, 5517, 5526). Couey's bedroom was in the middle of the trailer. (V114, R5519). Eventually, Couey's sister told him he had to move out. (V114, R5526). Couey said he did not know Jessica Lunsford. (V114, R5521). Although Couey never met her, he "might have seen a glance, or something. There's kids running up and down the street all the time up there." (V114, R5522). Jessica might have gone in the front yard to play. (V114, R5523). Couey said he had

[26] The interview was audiotaped. (V114, R5510, 5512, State Exh. 67).

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

used a ladder outside his bedroom window in the trailer to hang a television antenna on the trailer's roof. (V114, R5524). He remembered when detectives came by the trailer but he stepped out the back door. (V114, R5528). Couey said his mattress in the trailer had blood on it when he got it from a friend. Other blood stains belonged to him. (V114, R5529-30). Couey insisted he did not know where Jessica Lunsford was. He did not have anything to do with her disappearance. (V114, R5531, 5533, 5536). He knew she was missing because he saw a report on television. (V114, R5533, 5537-38). Couey did not know Jessica Lunsford. (V114, R5537).

Couey was arrested after the March 17, 2005, interview, charged with Jessica Lunsford's murder, and transported to the Citrus County, Florida, jail. (V114, R5538). In October 2005, Atchison, along with Detective Daniel Holder, collected hair samples from Couey.[28] (V114, R5539, 5551-52). At that time, Couey told Atchison and Holder, "[I]f his sister loved him more this would have never happened." (V114, R5540; V115, R5609.) Further, "[H]e didn't know why he did what he - - what he did, and that he wished he could take it back but he couldn't." (V114, R5540-41; V115, R5609). Couey said he "had been doing a lot of drugs at that time - – that was a reason he did what he did." (V115,

[28] The hair samples were collected to compare with hair found at Couey's residence. Atchison did not read Couey his *Miranda* rights. (V114, R5550).

R5609). Couey told Atchison that Jessica was in his closet. (V114, R5541). At one point, Couey saw Matt Dittrich (Dorothy Dixon's boyfriend) sitting in his room while Jessica was in his closet. (V114, R5541). Couey did not know if Dittrich knew Jessica was in the closet. (V114, R5542).

Corrections officer John Read was responsible for Couey's care in the Citrus County jail. (V114, R5553,5554-55). Couey discussed his case with Read several times. Couey "never professed to be innocent." (V114, R5558). Couey told Read he saw Jessica playing in her yard. He thought she was about six years old. On the night Couey took Jessica, he went to burglarize her home. He saw Jessica, "acted on impulse and he took her." He told Jessica "I'm going to take you to your father - - she went with him." (V114, R5559-60). Couey said he kept Jessica in his home for three days. She was either lying on the bed with him or was in the closet. (V114, R5561). When law enforcement came by or was in the vicinity, Jessica "had kept quiet." Couey told Read that Jessica knew when law enforcement were present. (V114, R5561). Couey told Read that nobody else in the trailer knew Jessica was there. (V114, R5562). On the first day Jessica was with him, Couey told Read he "engaged in sexual activity with her" and that Jessica bled. (V114, R5562-63). Couey told Read "he could not bring himself to directly kill her - - by his own hands." Couey panicked when police came by with dogs on the

third day of her captivity. He tied her hands and feet. (V114, R5563). Jessica stepped into one bag, and then Couey covered her with the other. He had previously dug a hole on his property. He took Jessica out of his room through a window, placed her in the hole, and covered her with dirt. She was still alive at this point. (V114, R5564).

Read documented Couey's daily activities while he was in jail. He did not log any of Couey's statements nor did he notate any conversations Couey had with other people. (V114, R5571).

Corrections officer Nathalia Windham was assigned to supervise Couey in the Citrus County jail. (V115, R5585, 5587). Couey told her he was guilty of the charges. (V115, R5589). He had seen Jessica riding a bicycle in the neighborhood or playing in her front yard. (V115, R5589, 5594-95/8).

On the night Couey took Jessica, he told Windham he had entered the Lunsford home through a screen door and went into Jessica's bedroom. Before he took her, Jessica asked to take a stuffed animal with her. (V115, R5589). There was a small dog in the home but it did not bark. (V115, R5590). Couey kept Jessica in his trailer for three days. He told Windham he and Jessica had "intercourse" and Jessica "played with him sexually." (V115, R5589-90). After police came to the trailer, Couey was afraid they would find her. He told Windham that "he had to get rid of her." Jessica was aware when police were at the trailer. (V115,

R5591). Couey said his sister knew Jessica was in their home. At one point, Matt Dittrich was in Couey's bedroom when Jessica was there. (V115, R5592). Couey told Jessica he was going to take her home. She climbed out his window. He told her to get into the garbage bags "because he didn't want people seeing her going across the street." (V115, R5592). He put her in the hole while she was still alive. (V115, R5593). Windham did not record Couey's statements to her in the jail's logbook. (V115, R5599).

Corrections Officer Kenneth Slanker cared for Couey while he was at the Citrus County jail. (V115, R5613). In March 2006, Slanker and Corrections Officer Sherry Johnson discussed child care in Couey's presence. Johnson said, "she couldn't see putting [her child] in child care because she wouldn't want something like that [gesturing at Couey] to happen to her child." (V115, R5614-15). Couey told Slanker, "I don't appreciate people talking about me like, this, I didn't mean to do what I did, and I didn't mean to kill her." (V115, R5615-16). Couey said "his biggest regret was that he lost everything." (V115, R5617).

Dr. Robert Berland, psychologist, evaluated Couey to determine whether or not he is mentally retarded. (V115, R5626, 5630). Couey was given the Wechsler Adult Intelligence Scale,

Third Edition, test ("WAIS").[29] (V115, R5631). Couey had a full scale IQ of 65. His verbal IQ, which reflects left hemisphere functioning, was 68. His performance IQ was 65. (V115, R5631). Dr. Berland was unable to confirm a deficit in Couey's adaptive functioning prior to age 18, which is a requirement to meet the criteria for a diagnosis of mental retardation. (V115, R5632). Berland did not utilize any published materials to measure Couey's adaptive functioning. (V115, R5640). However, Dr. Berland believed Couey met the criteria to be diagnosed as mentally retarded. (V115, R5632).

Dr. Berland testified there are different levels of mental retardation. Couey falls in the "mildly mentally retarded range," which is "the highest functioning among the officially retarded." (V115, R5633). Berland opined Couey "does not understand things as well as others." "Like most retarded people," Couey is unable to make full use of resources available to him in the community. His judgment is impaired. (V115, R5633). Retarded people have a "much greater propensity toward impulsiveness." (V115, R5634). Due to Couey's mental illness and retardation, and subsequent separation from other inmates while incarcerated at the Citrus County jail, he was more likely to

[29] This test was administered on February 8, 2007, four days before the start of trial. (V115, R5640).

make statements involuntarily than he normally would. (V115, R5637-38, 5639, 5643).

Couey told Berland he experiences hallucinations. (V115, R5645). Berland did not believe that Couey gave a false confession. (V115, R5646).

On March 7, 2007, the jury returned its verdict finding Couey guilty as charged in the indictment of Murder in the First Degree, Burglary of a Dwelling, Kidnapping, and Sexual Battery on a Child Under 12 Years of Age. (V116, R5795-96).

The penalty phase of this trial began on March 13, 2007. (V117, R5818).

Teachers from Jessica's elementary school read letters to the Court. (V117, R5875-5878; 5879, 5881-83).

Dr. Cogswell, medical examiner, testified that due to the fact that Jessica was placed inside two garbage bags before her death, it "pretty much guarantees that [she] was not going to have any air except for what's inside those bags already." (V117, R5890). Loss of consciousness would have occurred one to three minutes before actual brain death would have occurred. (V117, R5891). Jessica would have taken shallow breaths when she was compacted "within the grave with the dirt around her." (V117, R5892). Dr. Cogswell concluded Jessica would have lost consciousness within a minute and a half. She would have died within one to five minutes after losing consciousness. (V117,

R5892).[30] He did not know if Jessica was alive or dead when placed in the hole. (V117, R5893).

Sammy Heston Harris, Couey's uncle, testified by videotape. (V117, R5896). Harris said Couey lived with him when Couey was five years old due to physical abuse he suffered by his stepfather. (V117, R5899, 5900-01). School children teased and bullied him. (C117, R5902-03). Couey and his sister Marie lived with Harris for two years. (V117, R5905-06). When Couey was seven years old, he and his sister went to live with their biological father. (V117, R5907).

Dr. Richard Carpenter, psychologist, administered an IQ[31] test to Couey. (V117, R5911). Couey scored a 68 on the verbal section, 65 on the performance section, and a full scale IQ of 64. (V117, R5914). This score is below the cut-off for mental retardation that is commonly accepted by the American Psychiatric Association. (V117, R5915). That cut-off score is 70. (V117, R5916). Various factors can affect the IQ score including: physical health, tiredness, motivation, depression, anxiety, and distractions. (V117, R5916). In addition, there are

[30] Dr. Cogswell opined that if Jessica took shallow breaths, "trying to pace herself, she's going to be alive for much longer. If she breathed rapidly and very deeply, her life would end more quickly." (V117, R5893).

[31] The Wechsler Adult Intelligence Test, Version III ("WAIS III") was administered to Couey on February 8, 2007. (V117, 5911, 5914).

specific tests which can be administered to detect malingering. (V117, R5917).

Linda "Susie" Arnett, Couey's cousin, said Couey and his sister lived with Arnett when they were young. (V117, R5919). Couey was quiet, withdrawn, and could not speak properly. He was six years old at the time. (V117, R5920). Her mother made life good for them. She had Couey's ears fixed as they were deformed. (V117, R5921). Arnett's parents were very loving and supportive. (V117, R5922). Couey attended special education classes and speech therapy. Most of the students were mean to him, "he just didn't fit in." (V117, R5923). Couey was never aggressive, he never fought with other children. (V117, R5925). At age eleven, Couey was removed from the home after he tried to sexually assault Arnett. He had attempted to take her underwear off while she slept. (V117, R5927, 5931). He went to live with another relative. (V117, R5927). Arnett was not involved much in Couey's life after that. (V117, R5928). Arnett's mother (Virginia "Jean" Kloetzer) tried to get mental help for Couey several times. (V117, R5929, 5930).

Dr. Joseph Wu, M.D., studies neuropsychological disorders[32] with the use of PET scans. (V118, R5940-41). Couey's PET scan

[32] The PET scans, a form of "brain imaging," are used to evaluate disorders that include: Alzheimer's/dementia, Parkinson's disease, epilepsy, tumors, traumatic brain injury, and

was performed under the supervision of Dr. Frank Wood, a psychologist. The information was given to Dr. Wu for a review and analysis. (V118, R5956). In addition, Wu reviewed clinical information from Dr. Berland and an IQ test report administered by Dr. Carpenter. (V118, R5956). Dr. Wu concluded that Couey has "an asymmetry in the temporal lobe area ... and some decrease in the very base of the brain." (V118, R5956-57). There were minor asymmetries in other regions of the brain. (V118, R5973). These are examples of clinical abnormalities. (V118, R5958). However, "the PET scan finding is not specifically diagnostic of any one thing, because you could see abnormalities in temporal lobe areas with head injuries, you could see abnormalities in temporal lobe areas with people who had some kind of auditory hallucinations, you could see abnormalities in a couple of areas, people that have a mood disorder." Couey had a history of a combination of all these factors. (V118, R5964). People with temporal lobe abnormalities show "a profound inability, or change their ability to regulate or control their brain's behavior." (V118, R5971-72).

Couey's PET scan showed indications of psychosis. (V118, R5975). Couey's PET scan is indicative of people who have poor impulse control of a sexual nature, as well as "aggression in

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neuropsychiatric disorders such as strokes. (V118, R5941-42, 5943).

general." (V118, R5977). In all the murder cases in which Dr. Wu has testified,[33] there appears to be some type of temporal lobe abnormality. (V118, R5980). People with the same PET scan as Couey's do not necessarily commit murder. (V118, R5980).

Dr. Robert Berland[34] testified that Couey suffered from extreme mental or emotional disturbance at the time of the crime, based on results from the MMPI and interviews with Couey and several other witnesses. (V118, V5983, 5985-86). Couey tried to hide his mental illness as evidenced by his scores on the "K" and "L" scales on the MMPI. (V118, R5992). Couey self-reported that he had experienced a number of auditory hallucinations over the years. (V118, R5996; 6031; 6035).[35] There was no evidence (and no claim by Couey) that he experienced hallucinations or commands at the time he murdered Jessica Lunsford. (V118, R6042). Couey admitted to "thought insertion," that someone put thoughts in his head. He said he experienced

[33] Dr. Wu has only testified on behalf of the defense. (V118, R5979).

[34] 90% of Dr. Berland's work is done on behalf of defendants. (V118, R6042).

[35] Two relatives recalled one instance, when Couey was six years old, telling them that "voices in his mind" told him to destroy property. (V118, R6030-31; 6055). However, results from a 1995 psychological screening indicated hallucinations were "within normal limits, not present or within normal limits." (V118, R6035-36).

manic-type episodes. (V118, R5999). Couey has a long-standing psychotic disorder which is mild to moderate in nature. (V118, R6003). He was suffering from an extreme mental or emotional disturbance at the time of the crime according to Berland. (V118, R6004-05). A history of head trauma as recounted by several witnesses indicated there was evidence of a brain injury. Couey was physically abused by his stepfather. (V118, R6005-06; 6007; 6008; 6037; 6057-58). When he was younger, he self-reported abusing drugs and "huffing glue and gasoline." (V118, R6009; 6038). He self-reported physically abusing himself. (V118, R6012). As an adult, he frequently abused crack cocaine. (V118, R6014). Couey and his sister were victims of sexual abuse. (V118, R6019).

Couey was a slow learner. Although there were no school records containing of official IQ testing, one document indicated Couey was "EMR," educably mentally retarded.[36] (V118, R6021-22). Berland administered the WAIS IQ test to Couey which resulted in an IQ score of 85. Dr. Carpenter administered the WAIS III which resulted in an IQ score of 64. (V118, R6023-24). Dr. Berland interviewed witnesses[37] to determine Couey's

[36] Dr. Berland reviewed several documents which reported IQ scores of 71, 78, and 89. (V118, R6023, 6029-30).

[37] Dr. Berland interviewed Tom Copp, Couey's supervisor for a three month period in 2003, and Brenda Webb, Couey's niece. (V118, R6026-29).

"adaptive functioning before the age of 18." Several witnesses said Couey did not have an adaptive functioning deficit, "so there's now some question as to whether he qualifies for retardation." (V118, R6024-25). Tom Copp, former supervisor, said Couey could operate difficult machinery and also lived with him and his family for a short time. Couey eventually bought his own car and moved out on his own. (V118, R6026-28). Dr. Berland concluded, "So we know he's stupid, 'cause he's got the low IQ on a valid IQ test. Whether he can get along well enough in life to not qualify as retarded is still an open question in my opinion." (V118, R6025). Berland could not say what controlled Couey's behavior when he raped and murdered Jessica Lunsford. (V118, R6043).

Virginia Kloetzer's videotaped testimony was published for the jury. (V118, R6045). Couey lived with Kloetzer (his aunt) when he was in elementary school. (V118, R6048-49; 6052). She had his deformed ears fixed and got him circumcised. (V118, R6053). He attended speech therapy in school. (V118, R6053). Couey's mother did not give him proper nourishment. (V118, R6054-55). Couey was a shy, polite boy. (V118, R6055).

The State called Dr. Harry McClaren, psychologist. (V119, R6077). McClaren interviewed several people[38] who were in Couey's

[38] Dr. McClaren interviewed several relatives: Marie Dixon, Madie Secord, Virginia Kloetzer, and parents Irene and Bobby

life at or around the time of the offense, as well as Couey himself.[39] In addition, he used the "Scale of Independent Behavior-Revised" test in order to determine Couey's adaptive behavior. McClaren used Couey's sister, Marie Dixon, as a respondent. (V119, R6081; 6087). McClaren used this test to ask Dixon several questions about Couey's behavior and how well he was able to complete a number of tasks. (V119, R6087). The test is designed to allow for estimates on many skills. (V119, R6100). McClaren asked "the questions ... in the standardized instrument that can be used from infants to people up to the age of 80." (V119, R6104). Dixon rated her brother as "average." (V119, R6088). Former supervisor Giles Cannon told McClaren that Couey was "an upper scale laborer." He was "creative in figuring out how to do things." (V119, R6084). Couey could read, fill out applications, and when he borrowed money, paid Cannon back. (V119, R6085). Restaurant owner George Kanaris told McClaren that Couey was "a good worker, organized, [did] a good job as ... far as a worker, organized speech." (V119, R6085). He used tools, caustic chemicals, and followed directions well. (V119, R6086). Officer Tucker told McClaren that Couey would read

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Lindsey; several work supervisors: Giles Cannon, Thomas Copp, and George Kanaris; and several correctional officers. (V119, R6082-83).

[39] Dr. McClaren noted cut marks on Couey's wrists when he interviewed him. (V119, R6098-99).

statute books in the jail law library and ask to read western novels. (V119, R6086). Dr. McClaren concluded Couey "was able to function at a level higher than would be expected of a person with mental retardation ... by description from people that had known him, worked with him, lived with him ... together with the results of this one instrument with a person that I believe probably knew him the best of anyone that I know of." (V119, R6089).

Dr. Eric Cotton, M.D., specializes in radiology. (V119, R6108-09). As medical director of National PET Scan, a center specializing in PET scans in St. Petersburg, Florida, he reviews 500-600 PET scans every month. (V119, R6109-10). After a PET scan was conducted on Couey in June 2006, Dr. Cotton concluded the scan was "normal." (V119, R6110-11). There were no anomalies. Dr. Cotton did not agree with Dr. Wu's impressions of anomalies in Couey's PET scan. (V119, R6111).

On March 14, 2007, the jury returned a recommended sentence of death by a vote of ten to two. (V119, R6189). A combined *Atkins*/*Spencer*[40] hearing was conducted on July 17, 2007. (V48, R8893-9092, V49, R9093-9176).

At the *Atkins* portion of the combined *Atkins/Spencer* hearing, the State called Dr. Gregory Prichard, clinical

[40] *Atkins v. Virginia*, 536 U.S. 304 (2002); *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

psychologist. (V48, R8906). In Prichard's private practice, he conducts competency and sanity assessments, sexually violent predator assessments, and mental retardation assessments for the courts and the Agency for Persons with Disabilities. He has conducted approximately one thousand mental retardation evaluations for the courts and an additional 500 mental retardation evaluations for the Agency for Persons with Disabilities. (V48, R8908-09). In addition, he has testified about the issue of mental retardation a few dozen times in death penalty cases. (V48, R8909). Prichard explained the difference between the two commonly-used intelligence tests, the WAIS-III and the Stanford-Binet, Fifth Edition. The WAIS-III is "more academically oriented," containing tests and tasks required of the individual that are generally learned in the academic environment. The Stanford-Binet, Fifth Edition, "is more applied, more real-life, commonsense, practical application and problem-solving information." (V48, R8910). Education can affect a score on the WIAS-III, but not significantly. (V48, R8911). One study regarding the administration of both tests to the same individuals yielded similar full scale IQ scores.[41] (V48, R8912). Fatigue, stress, anxiety, depression, substance use or withdrawal, motivation or malingering can affect an optimal

[41] In 87 persons, the WAIS-III score was six points higher than the Stanford-Binet. (V48, R8913).

score or "artificially deflate a person's score." (V48, R8913-14). If the same test is administered in close proximity, within six months, the "practice effect" may artificially inflate the score. (V48, R8914).

In April 2007, Dr. Prichard met with Couey and conducted an assessment. (V48, R8915). After establishing a rapport with Couey, he spoke with him at length regarding his history, where he was born and raised, drug and alcohol use, criminal history and psychiatric history. (V48, R8915). Prichard administered the Stanford-Binet, Fifth Edition, in order to assess Couey's intelligence. (V48, R8915). He also administered the Test of Memory Malingering, to see if Couey was "putting forth maximum effort" and the Rotter Incomplete Sentence Blank test. (V48, R8916). The Stanford-Binet is scored the same as the WAIS-III, with 100 being an average score and 15 as a standard deviation. (V48, R8917). Couey score an 82 on the non-verbal, a 76 on the verbal, with a full scale IQ score of 76. (V48, R8017-8918). In all, there were 7 IQ tests administered to Couey since he was age 15, including the recent test given by Dr. Prichard at age 48.[42] A person's IQ should not change over time unless it is due to some kind of brain trauma. (V48, R8921; V49, R9126). The

[42] The full scale IQ scores, in chronological order, are as follows: 68, 71, 78, 89, 85 (Dr. Berland's), 64 (Dr. Carpenter's), and 78 (Dr. Prichard's). (V48, R8918-20). The variations in the scores were attributed to Couey not functioning "optimally." (V49, R9127).

range of scores in Couey's case is attributable to not producing an optimal score on each occasion. Several variables were likely present and deflated Couey's score. (V48, R8922). Due to the disparity in scores, Prichard explained that the scores reflect either a mildly to moderately mentally retarded person, or a person with borderline to low average intelligence. Dr. Prichard explained that one of these interpretations is false. (V48, R8926). Since a person cannot do better than they are capable of doing, *i.e*, "can't fake smart," Dr. Prichard opined that Couey's lowest IQ scores were invalid. The score from the Stanford-Binet administered by Prichard was most representative of Couey's optimal function. (V48, R8927). A person with an IQ in the 50's or 60's would not have been able to function as well as Couey has been able to do his entire life. (V48, R8928). Dr. Prichard concluded Couey is not mentally retarded. His actual IQ, within a reasonable degree of psychological certainty, is between 80 and 90.[43] (V48, R8929). Dr. Prichard also assessed Couey's adaptive functioning. (V48, R8930). After interviewing at least ten witnesses, Prichard administered the Vineland Adaptive Behavior Scale, Second Edition,[44] to Dorothy Dixon, Couey's

[43] An "average" IQ score is 100. (V49, R9131).

[44] The Vineland assesses a person's skills in three areas: communication, daily living, and socialization. (V48, R8947).

sister, and to Couey's former supervisor, Thomas Copp.[45] (V48, R8931; V49, R9106-07). The results from these tests indicated Couey's adaptive functioning skills are "much too high for consideration of mental retardation." (V48, R8937).

Dr. Prichard saw no documentation that Couey was diagnosed as mentally retarded prior to age 18. (V48, R8938). Couey's aunt (Virginia Kloetzer) told Prichard she was able to teach Couey many things that he had deficits in. "He made a lot of progress with her." (V48, R8939). Couey's sister described him "as a very good conversationalist." (V48, R8949). Further, "A lot of times I thought he was a lot smarter than me." (V48, R8961). Dixon relied on Couey to take care of household chores when her husband was ill. (V48, R9000). Copp said Couey was quite capable of completing several tasks on his own. (V48, R8968). He was able to manage his own money, purchase groceries, and pay Copp rent. (V48, R9046). Dixon said he was "shrewd, careful, [and] smart" with his money. (V49, R9102). He was "very good" at keeping secrets. Dixon trusted Couey - - he would never "tell her secrets." Copp trusted Couey "completely." Couey did not divulge any information about Copp's family life to other people at work. (V49, R9103). Dixon said Couey occasionally made impulsive decisions that "had potentially very serious

[45] Copp's wife, who spent time with Couey, worked with mentally retarded people for 20 years "and never suspected that there was anything wrong with Mr. Couey, not even close." (V48, R8998-99).

consequences." For example, he would leave the house for several months and nobody knew where he was. On the other hand, Copp's experiences with Couey did not show impulsiveness at all. He was "kind of slow and meticulous and careful in all the things he did." (V49, R9104). Couey was respectful on the job and was "liked by pretty much everybody." (V49, R9109). Dixon said Couey was respectful and kind to everyone he came in contact with. (V49, R9110).

The composite score for Dixon's responses regarding her brother's adaptive skills was 79. The composite score reached from Copp's responses was 77. (V48, R8971). All of the individuals Prichard interviewed gave consistent answers regarding Couey's adaptive skills. (V48, R8969). There was no variation in Couey's adaptive skills according to Dixon and Copp.[46] (V48, R8987). Prichard did not test Couey for a mental illness. (V48, R8988). The witnesses he spoke to never suggested that "he had any type of peculiar symptoms that would be suggestive of mental illness," including information from Couey himself. (V48, R8989; V49, 9099). Dr. Prichard concluded that Couey is not mentally retarded. (V49, R9134).

[46] Dixon told Prichard that Couey's adaptive functions were affected when he was using drugs or alcohol, which Prichard said is "common." (V48, R8987). His level of drug and alcohol abuse varied. (V48, R9097). Copp had no experience with Couey's alcohol or drug abuse. (V48, R9099).

During the *Spencer* portion of the combined *Atkins/Spencer* hearing, Mark Lunsford, Jessica's father, read a statement to the court. (V49, R9163-66).

On August 24, 2007, the court followed the jury's advisory sentence and imposed a sentence of death on John Evander Couey, for the first degree murder of Jessica Lunsford. (V50, R9386-9433). The trial judge made detailed findings in an eighteen page sentencing order. (V50, R9285-9302). The following aggravating circumstances were considered:

(1) Previously convicted of a felony involving the use of violence: the burglary of a dwelling was a contemporaneous conviction. The battery was on Jessica Lunsford, the murder victim. The State conceded the court should not find this aggravator – this aggravator has not been established – no weight. (V50, R9291);

(2) The death occurred during the commission of a felony: The defendant unlawfully entered the dwelling of Archie and Ruth Lunsford, with the intent to commit an offense therein, and after making entry he then committed a battery on Jessica Lunsford by removing her from her bed and thereafter kidnapped Jessica Lunsford. Thereafter, the Defendant committed a sexual battery on Jessica Lunsford, a person under the age of twelve (12). He then buried her alive, causing her death – great weight. (V50, R9291);

(3) The victim of the capital felony was a child under the age of 12: The State presented evidence that the victim, Jessica Lunsford, was under the age of 12. Jessica was nine years old, attending Homosassa Elementary School; she had not yet completed the third grade when she was kidnapped, sexually battered, and murdered. The Defendant, in his sentencing memorandum, conceded that the State proved this aggravator - great weight. (V50, R9291-92).

(4) The murder was committed to avoid or prevent a lawful arrest: The State presented evidence that the defendant committed the murder to avoid or prevent a lawful arrest. The defendant admitted to two corrections officers that he became increasingly scared when law enforcement officers continued to investigate Jessica's disappearance. By his own statements, he panicked after having Jessica for three days in captivity, and lied to her telling her he could bring her back to her father, undetected. Instead, he buried her alive, causing her death by suffocation. A few days later he asked his niece to buy him a bus ticket. He left Florida as the search for Jessica continued and intensified. If the victim is not a law enforcement officer, there must be "clear proof" that the only motive for the murder was the elimination of a witness. There is no other motive for the defendant to have killed the victim in this case. There was no financial gain, she posed no threat to the Defendant, other

than as a witness to his other crimes against her, and there was no evidence of ill-will or hatred toward her. By concealing her remains, by burial, he attempted to gain the advantage of both time and distance, by fleeing to Georgia. The only purpose served by killing Jessica was to prevent her discovery by the police and report his crimes against her - great weight. (V50, R9292).

(5) The murder was committed in a cold, calculated, and premeditated (CCP) manner without any pretense of moral or legal justification: The State proved this aggravator beyond a reasonable doubt. The Defendant observed Jessica playing outside her home; he went to Jessica's home and burglarized it, and entered her room. He found her in her bed, told her he'd take her to her father, took her to his trailer, where he kept her for three days. He admitted to having "intercourse" with her, and hid her in his closet when police were searching for her. He dug a hole in which to bury her. He told her he would take her back to her house, but did not want anyone to see them. He told her to climb into a plastic bag, and tied it around her. He buried her alive with her purple dolphin in the hole he has previously dug. The kidnapping and the murder were planned. He successfully hid her in his trailer without his family detecting her presence. He dug the hole to a depth of in excess of twelve (12) inches of soil found to be covering her body. He avoided

detection in his labors. He obtained the necessary garbage bags. He convinced her to step into the first bag. He secured her fate with a second bag. He put Jessica in the hole and then filled the grave with dirt. The Defendant, by his unique thought processes, planned a purposeful murder. This was a determined, albeit savage, manner of a planned murder with absolutely no pretense of any moral or legal justification – great weight. (V50, R9293-94).

(6) The capital felony was especially heinous, atrocious, or cruel (HAC): The court finds that this aggravator was proven beyond a reasonable doubt. **The method of Jessica's murder, chosen and performed by the defendant, more than qualifies as especially heinous, atrocious and cruel. The cause of death in the instant case was suffocation. Jessica was placed not in one, but two plastic trash bags. She was conscious at the time of her entombment.** The method of killing in the instant case, burying a conscious child alive, as well as the evidence of her fear, emotional strain, physical distress as she struggled to breathe, establishes HAC beyond a reasonable doubt – great weight. (V50, R9294-95).

The following mitigating circumstances were considered:

(1) No significant criminal history: there was no record evidence presented that the Defendant had any prior criminal history - little weight. (V50, R9296).

(2) Extreme emotional or mental disturbance: The Defendant called several witnesses to testify he suffers from a sub-average IQ and suffers from brain damage. Defense experts, Dr. Carpenter and Dr. Berland tested Defendant and found he had a combined full scale IQ of 64, which falls within the mental retardation range. Dr. Wu, a medical doctor who specializes in brain imaging, testified Defendant has an asymmetry in his right temporal lobe, indicating an abnormal nervous system. According to Dr. Wu, Defendant's brain has problems regulating impulses, which is consistent with pedophilia. The State called an expert who testified the brain scan does not indicate brain damage. Co-workers testified as to Defendant's abilities. He exhibited adaptive functioning while employed and was a good worker. Pursuant to *Atkins v Virginia*, 536 U.S. 304 (2002), the court held an *Atkins* hearing and found Defendant was not mentally retarded. The court found Defendant's IQ was 78. Defendant does not suffer from brain damage. The court found that Defendant's condition did not rise to the level of extreme mental or emotional disturbance at the time of the crime – very slight weight. (V50, R9296-97).

(3) Capacity to Appreciate Criminality/Conform Conduct: The Defendant's actions contradicted this mitigating circumstance; Defendant, after murdering Jessica, had the forethought to have a family member buy a bus ticket for him, as

he was unable to legally obtain one for himself, without identification – the greater weight of the evidence did not establish this mitigating factor. (V50, R9298).

(4) Existence of other factors:

(a) Defendant has been a non-violent prisoner; poses no threat of harm to staff or other inmates if given a life sentence - moderate weight. (V50, R9298);

(b) Defendant born prematurely – very minimal weight. (V50, R9298);

(c) Defendant born with a birth defect – very little weight (V50, R9298);

(d) Defendant given to various family members to be cared for and was abandoned by his mother - moderate weight. (V50, R9299);

(e) Defendant's father was an abusive alcoholic – very minimal weight. (V50, R9299);

(f) History of drug use – very little weight. (V50, R9299);

(g) Defendant behaved appropriately during trial – very minimal weight. (V50, R9299);

(h) Defendant suffers from a learning disability – very minimal weight. (V50, R9299);

(i) Defendant was physically, mentally, and emotionally abused as a child - moderate weight. (V50, R9300);

(j) Defendant had a speech impediment as a child – very minimal weight. (V50, R9300);

(k) Defendant cooperated with law enforcement and led law enforcement to victim's location – very little weight. (V50, R9300);

(l) Defendant sought treatment as a mentally disordered sex offender while incarcerated in the Department of Corrections in 1991 and it was never provided – moderate weight. (V50, R9300);

(m) Defendant adapts well to a controlled environment and has been a well-behaved inmate while his case has been pending – very little weight. (V50, R9300-01);

(n) Defendant suffers from a mental illness – very little weight. (V50, R9301).

The court found that the five (5) aggravating factors outweighed the mitigation, and imposed a sentence of death. (V50, R9285-9302).

This appeal follows.

SUMMARY OF THE ARGUMENT

The motion to suppress the victim's body was properly denied. The trial court's factual findings are supported by competent substantial evidence, and should not be disturbed, particularly in the situation presented here, when Couey's claim is based upon an incorrect view of the actual evidence.

The trial court did not abuse its discretion when it changed venue for this trial to Miami-Dade County. The previous attempt to select a jury in Lake County had failed, and there was no basis for believing that a second attempt would turn out differently. There is no constitutional issue, nor is there any basis for reversal.

The "cause challenge" issue is not a basis for relief because none of the jurors about which Couey complains were properly subject to a challenge for cause. There was no abuse of discretion in denying those cause challenges, and there is no basis for relief.

The trial court did not abuse its discretion in denying Couey's motion to continue the trial based on the "late disclosure" of evidence that came to light after the second failed attempt to empanel a jury. The evidence at issue is simply a less detailed version of Couey's statements which were suppressed shortly before jury selection was attempted. And, the actual testimony was limited, and was not a surprise to Couey, nor did it disadvantage him. There is no basis for reversal because there was no abuse of discretion.

The trial court did not abuse its discretion when it excluded certain "impeachment evidence" that was irrelevant, and was merely an attempt to elicit improper and inadmissible "bad character" evidence.

The trial court did not abuse its discretion when it denied the motion for mistrial based upon Couey's claim that a statement by a witness referred to Couey's previously-suppressed confessions. The testimony at issue was vague and limited, and did not use the word "statement" or "confession," but rather referred to "other testimonies," a phrase that can mean anything. There was no abuse of discretion in denying the motion for mistrial.

The "preclusion of evidence" claim is based on the exclusion of an "invocation of rights" form that Couey wanted to use to challenge certain statements that he made to correctional personnel prior to trial. Couey's argument fails because there was no interrogation -- Couey volunteered various things to correctional personnel, and, because there was no interrogation, the "rights form" is irrelevant to the statements. There was no abuse of discretion because the rights form was not relevant to any fact in issue.

The trial court properly denied the motion for judgment of acquittal on the burglary with a battery charge. The conviction for that offense is supported by competent substantial evidence, and, viewing the evidence in the light most favorable to the State, there was sufficient evidence to allow the charge to go to the jury.

There was no error in instructing the jury on the prior violent felony aggravator even though that aggravator was ultimately not found by the court. The trial court did not abuse its discretion in instructing the jury on that aggravating factor because there was competent substantial evidence to support it.

Couey's death sentence was properly imposed, and is not disproportionate. The cold, calculated and premeditated aggravator was not improperly "doubled" with the "avoiding arrest" aggravator (because those aggravators do not double as a matter of law), and the mitigation does not outweigh the five aggravating factors.

ARGUMENT

I. THE DENIAL OF THE MOTION TO SUPPRESS

On pages 46-53 of his brief, Couey argues that the trial court should have suppressed the victim's body, which was buried in the back yard of the trailer in which Couey resided. Review of a motion to suppress in Florida is a mixed question of law and fact. *Hojan v. State*, 34 Fla. L. Weekly S256 (Fla. Feb. 27, 2009); *Perez v. State*, 620 So. 2d 1256 (Fla. 1993). The trial court's application of the law to the factual findings is reviewed *de novo. See Ornelas v. United States*, 517 U.S. 690, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996); *Connor v. State*, 803 So. 2d 598 (Fla. 2001); *Harris v. State*, 761 So. 2d 1186 (Fla.

4th DCA 2000). The standard of review applied to the **factual findings** of the trial court is whether competent, substantial evidence supports those findings. *See Hines v. State*, 737 So. 2d 1182 (Fla. 1st DCA 1999). In applying that standard to the facts, the evidence, and the reasonable inferences from it, must be construed in the manner most favorable to upholding the trial court's decision. *San Martin v. State*, 717 So. 2d 462, 469 (Fla. 1998), *cert. denied*, 526 U.S. 1071, 119 S. Ct. 1468, 143 L. Ed. 2d 553 (1999)). Couey's argument re-writes the evidence, and leaves out significant testimony which, when properly considered, demonstrates that there is no error.

Following the hearing on Couey's motion to suppress, the trial court entered a lengthy order which is set out in pertinent part below:

> The first witness, Brian Spiddle, a detective with the Citrus County Sheriff's Office, was one of the first detectives at the scene of the abduction as well as at the suspect's residence. He testified that he examined the surrounding soil for evidence of digging and potential burial sites.
>
> The second witness, the Defendant's sister, Dorothy Dixon, testified that the Defendant was staying in her home with her, as well as with several other occupants. She further testified that the Defendant was staying in the middle bedroom. On cross examination she testified that she gave consent to the detectives to both search the middle bedroom as well as remove the mattress therein.
>
> The third witness was Martin Cannaday, a detective with the Citrus County Sheriff's Office, who testified

that he recovered clothing items from the middle bedroom as well as the mattress. He further testified that the mattress appeared to him to have a 4 x 1 $^{1/2}$ inch reddish brown stain approximately which tested positive for blood. He testified that he transported the mattress to the Florida Department of Law Enforcement (FDLE) lab the next day for serology testing as well as microscopic examination.

The fourth witness was David Strickland, the supervisor of the crime scene section of the Citrus County Sheriff's Office, who testified that the case was viewed as a child abduction and that law enforcement officers were already concentrating on searching the immediate area of the suspect's home for recent digging and disturbed soil. He testified that the Defendant's home was approximately one hundred yards from the victim's home; that he had previously secured known DNA standards from the victim's clothes before the victim's body was found; and that he had received information from Georgia about the location of the victim's body. As the recovery efforts were commencing, he received further information from analyst Lance Newman of the FDLE confirming that the DNA found on the mattress from the middle bedroom matched the known samples from the victim's clothing.

Detective Strickland further testified that, prior to receiving the information from Georgia, he had participated in the ground search and had noticed a small pile of disturbed soil and leaves by the rear entrance to the suspect's home. The fresh dirt on top of oak leaves indicated to him that the dirt had been deposited on the leaves after the leaves had fallen from the surrounding trees. He testified that, based upon the DNA match from the victim's clothing and the Defendant's mattress, as well as the recent digging behind the suspect's home, he would have applied for a search warrant. The detective's sworn testimony was that the victim's body would have been found even without the statement from the Defendant.

The fifth witness was Tim Martin, a detective with the Citrus County Sheriff's Office with twenty-five (25) years experience in law enforcement, who testified

that he examined the exterior of the Defendant's home for possible burial sites. He also saw the fresh dirt on top of oak leaves, as well as a shovel with fresh dirt on the blade under the rear steps of the Defendant's home, indicating recent digging. Additionally, he used a rake to gauge the relative compaction of the older, undisturbed leaves from those covering a small, raised area. He also testified that, based upon the intensive searching of the area around the Defendant's home, the victim's body would have been found.

(V21, R3918-19).

The court went on to find:

(**B) The Doctrine of Inevitable Discovery**

The next issues is whether, based upon the foregoing question, if the Defendant's request is determined to be unequivocal and unqualified and his confession suppressed, is the body of the decedent and all of the physical evidence attendant to it, likewise suppressible as fruits of the unlawful police interrogation.

Regarding the potential future issue of "inevitable discovery doctrine" as an exception to the "fruit of the poisonous tree" doctrine, recent Florida law is explained by the Fifth DCA as follows:

> The inevitable discovery doctrine was adopted by the United States Supreme Court in *Nix v. Williams* 467 U.S. 431 (1984), as an exception to the fruit of the poisonous tree doctrine. *Maulden v. State*, 617 So.2d 298 (Fla. 1993). The inevitable discovery doctrine allows evidence obtained as the result of unconstitutional police procedure to be admitted if the evidence would ultimately have been discovered by legal means. [FN5] The Court reasoned that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a

> criminal trial." *Nix*, 467 U.S. at 446. The Florida Supreme Court and this court have embraced the doctrine. *Jeffries v. Stan*, 797 So.2d 573 (Fla.2001); (internal citations omitted)
>
> [FN5] "The inevitable discovery doctrine is properly applied regardless of whether the ground of suppression of the statement is violation of the fourth amendment, fifth amendment, or sixth amendment." *Craig v. State*, 510 So. 2d 857, 863 (Fla. 1987) (*citing Nix*).
>
> The inevitable discovery doctrine requires the state to establish by a preponderance of the evidence that the police ultimately would have discovered the evidence independently of the improper police conduct by "means of normal investigative measures that inevitably would have been set in motion as a matter of routine police procedure." *Craig,* 510 So. 2d at 863 (citations omitted). "In order to apply this doctrine, there does not have to be an absolute certainty of discovery, but rather, just a reasonable probability." *State v. Ruiz* 502 So.2d 87, 87 (Fla. 4th DCA 1987) (*citing United States v. Brookins*, 614 F.2d 1037 (5th Cir.1980)); *see also Jeffries*, 797 So.2d at 578 (*quoting Ruiz).*

Hatcher v. State, 834 So.2d 314 (2003), 317-18 (Fla. 5th DCA 2003); *see also Fitzpatrick v. State*, 900 So.2d 495, 512 (Fla. 2005) (stating the State must demonstrate "that at the time of the constitutional violation an investigation was already under way" and "the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct.").

In this case, the Defendant was already a person of interest based on his criminal history, relative location of his residence to the victim, and his flight to Georgia. The Detectives also had the statements of the Defendant's sister, had already

> seized the mattress with the blood stain from the Defendant's bedroom, already suspected that some of the areas in the back yard of the Defendant's residence were potential burial sites, and had verbal confirmation for the FDLE that the DNA analysis from the mattress matched the victims. Thus it is clear, based upon the preponderance of the evidence, that the detectives would have ineveitably (sic) discovered the body of the victim buried in the back yard of the Defendant's residence.
>
> In allowing the State to use the physical evidence recovered at the Defendant's home, this Court's ruling is consistent with the holding by the United States Supreme Court in *Hudson v. Michigan*, 126 S.Ct. 2159, decided June 15, 2006, in which the Court held, "[s]uppression of evidence, however, has always been our last resort, not our first impulse. . . [t]he exclusionary rule generates substantial social costs... [we] have therefore been cautious against expanding it". Accordingly, this Court will allow the State to present the body of the victim other physical evidence in its case in chief.

(V21, 3930-31).

The trial court's findings of fact, contrary to Couey's misleading claims, are supported by competent substantial evidence, and there is no basis for reversal.

Couey's brief sets out the facts he relies on to support his claim on pages 49-50. By its selective omission of portions of the testimony, Couey's brief changes what the evidence at the suppression hearing actually was. Citrus County Sheriff's Investigator David Strickland testified that, during the late evening of March 18, 2005, (and extending into the early morning of March 19, 2005), he received information from the Florida Department of Law Enforcement that preliminary results had been

obtained indicating that the DNA of Jessica Lunsford had been located on the mattress that had been taken from Couey's residence on March 14, 2005. (V59, R43-44). A standard of Jessica's DNA had been obtained from samples taken from Jessica's parents as well as from some of her clothing and personal items. (V59, R46). The FDLE lab report, which was received subsequent to the verbal notification, was introduced into evidence. (V59, R44-45). Couey has omitted any reference to the verbal notification that took place on March 18, 2005. Likewise, in footnote 17 on page 49 of his brief, Couey has omitted how DNA standards for the victim were developed, preferring instead to claim that those standards were not taken until long after the victim's body was found. Those assertions are simply not true.

Couey also says that the "testimony of and a photograph taken by" an FDLE analyst shows that the mattress was still present in Couey's bedroom on March 18, 2005. (Initial Brief at 49-50). That testimony was not given during the motion to suppress hearing, and it makes no sense to claim that it should properly even play into the suppression ruling. Moreover, and most significantly, that is simply not what the testimony was. That witness did not testify that he took any photographs, and, while there is a mattress shown in one photograph, to conclude that it was present on March 18, 2005, when the unchallenged

testimony is that the mattress was taken into evidence on March 14 is, to say the least, a stretch.[47] Detective Cannady's testimony that he took the mattress into custody on March 14, 2005, and transported it to the FDLE lab the next day (V59, R31-32) is wholly consistent with Detective Strickland's testimony that preliminary DNA results were communicated to him on March 18, 2005. Couey's claim that the evidence contradicts the testimony is simply without any factual basis.[48]

Moreover, none of the "claims" contained in Couey's brief were argued below as a basis for the suppression of the victim's body. That is hardly surprising given that there is no support in the evidence for the interpretation Couey has given it. The trial court's ruling is supported by competent substantial evidence, and should not be disturbed. *United States v. Patane*, 542 U.S. 630 (2004).

II. THE CHANGE OF VENUE CLAIM

On pages 54-63 of his brief, Couey argues that the trial court erred in changing the venue of his capital trial to Miami-

[47] Later testimony established that Detective Cannady took the photograph showing the mattress on March 14, 2005. (V110, R4974-4981). While this testimony came at trial, it demonstrates the incorrectness of Couey's view of the suppression hearing evidence.

[48] It does appear that the mattress made several trips between the Citrus County Sheriff's Department evidence section and FDLE's Tampa lab facility. This makes absolutely no difference to any issue contained in Couey's brief.

Dade County. Couey's claim is not that venue should not have been changed (and he had sought such a change), but rather that the trial court should have "considered" changing the location of the trial to a county more "demographically similar" to Citrus County. The basis of this claim is an alleged violation of Section 910.03(2) of the *Florida Statutes*.[49] In the context of a typical change of venue claim (where the claim is that it was error not to grant the motion), the defendant must establish that the trial court "palpabl[y] abuse[d] . . . [its] discretion." *Davis v. State*, 461 So. 2d 67, 69 (Fla. 1984); *Rolling v. State*, 695 So. 2d 278 (Fla. 1997). Couey says that this is the proper standard of review, and the State agrees.

THERE IS NO CONSTITUTIONAL CLAIM

In addressing a virtually identical claim, a federal district court in Pennsylvania said:

> Even today, thirteen years after Wallace's conviction became final, most courts continue to deny Sixth Amendment claims like the one brought by Wallace. *See, e.g., Ross v. Arkansas*, 300 Ark. 369, 779 S.W.2d 161, 163-64 (Ark. 1989) (rejecting claim that defendant was entitled to have venue changed to county with similar racial composition because defendant "failed to cite any authority to support his argument."); *Epps v. Iowa*, 901 F.2d 1481, 1483 (8th Cir. 1990) (noting that it was "troubled by the state trial court's decision . . . to change venue to a county with such a small black population," but holding that "we are unaware of any authority to

[49] Couey attempts to plead this claim as a constitutional one -- however, for the reasons set forth above, there is no constitutional issue.

> support a conclusion that [defendant's] constitutional rights were thereby violated."); *Mallett v. Bowersox*, 160 F.3d 456 (8th Cir. 1998) (rejecting Sixth Amendment fair cross-section claim when change of venue resulted in defendant being tried in county with smaller percentage of blacks than where crime was committed, but explaining that "no authority exists for the proposition that the term 'community' . . . means any place other than . . . the county from which Mallett's venire ultimately was drawn."); *Commonwealth v. Rankins,* 429 Mass. 470, 476, 709 N.E.2d 405 (Ma. 1999) (rejecting claim and noting that attempts to challenge change of venue decisions "have been notably unsuccessful.").

Wallace v. Price, 2002 U.S. Dist. LEXIS 19973, 170-171 (W.D. Pa. Oct. 1, 2002), *Wallace v. Price*, 243 Fed. Appx. 710 (3d Cir. Pa. 2007); *Rogers v. Director*, TDCJ-ID, 864 F. Supp. 584, 597-98 (E.D. Tex. 1994) ("Rogers alleges the transfer of venue from Lamar County to Collin County resulted in a denial of equal protection because Collin County has fewer blacks as a percentage of the population than Lamar County. . . There was no evidence presented before trial that indicated the change of venue would adversely affect Rogers' equal protection or due process rights. There is no outstanding precedent for requiring a trial court to consider demographic composition *sua sponte* every time a venue change is requested. The Equal Protection Clause does not require exactitude of this nature."), *affirmed*, *Rogers v. Scott*, 70 F.3d 340, 344 (5th Cir. 1995). Finally, the law is settled that:

> A defendant is not entitled to a jury of any particular composition, any racial composition, or to

> a jury composed, wholly or in part of persons of the defendant's own group or race. *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980); *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965); *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). In *United States v. McKinney*, a Fifth Circuit case addressing the issue presented herein, the appellate court found that the defendant was not entitled to an intra-district transfer even though the alleged crime occurred in another division, the defendant and witnesses lived in another division and the jury pool in another division would have provided a more racially balanced jury. *United States v. McKinney*, 53 F.3d 664, 673 (5th Cir. 1995).

United States v. Patton, 2006 U.S. Dist. LEXIS 49413, 7-8 (N.D. Miss. July 19, 2006).

The overriding objective in ruling on a change of venue motion is to secure a fair trial for the accused:

> It is a well-settled principle under our caselaw that a criminal trial may be held in a county other than that designated by the constitution or by statute if prejudice in the proper county makes it impossible for a defendant, like Danny Rolling, to secure a fair trial by an impartial jury there. Such prejudice may warrant a change of venue when widespread public knowledge of the case in the proper county causes prospective jurors there to judge the defendant with great disfavor because of his character or the nature of the alleged offense. **When this occurs, the defendant's right, under the United States and Florida Constitutions, to a fair trial by an impartial jury is protected by moving the trial from the proper, but partial county, to an impartial one.** *Manning v. State*, 378 So. 2d 274, 276 (Fla. 1979).

Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997) (emphasis added). There is no assertion that Miami-Dade was not impartial, nor is there any other claimed deficiency with the jury. Because

that is so, the constitutional component of Couey's claim collapses.

THE STATE LAW COMPONENT

The remaining part of Couey's claim is that the trial court did not "consider" moving the trial to a county with "similar demographics" to those of Citrus County. This claim is based on the following statutory language:

> 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, *Fla. Stat.*[50] Contrary to Couey's assertions, the trial court (which considered these issues several times from July to November of 2006) was well aware of this provision; made specific reference to it in the record (V69, R91); stated that, in light of the intense media presence when an attempt to select a jury in Lake County took place, there was no reason to believe that such intense and obvious media presence would not pervade any smaller county (V69, R93); and stated that it was exercising its discretion to move the trial to Miami-Dade County. (V69, R93). The court specifically discussed the presence of

[50] There are no reported Florida cases addressing this specific provision of the statutes. *See, McKoy v. North Carolina*, 494 U.S. 433, 466-67 (1990) (". . . it [is] impossible to say anything against the claim except that there is nothing to be said for it.") (Scalia, J., dissenting).

approximately 10 television satellite trucks when an attempt to empanel a jury took place in Lake County, in addition to what was described as a "phalanx" of reporters that the jurors were compelled to pass through in order to enter the courthouse. (V69, R91-2).

The trial court noted that such media presence (and the attendant exposure of the venire to it) could reasonably be expected in any of the smaller counties such as Escambia County,[51] Duval County, Bay County, Monroe County, and Indian River County. (V69, R31, 45-46).[52] In view of that explicit recognition of these counties as possible venues for this trial, and in light of the trial court's considered (and wholly rational) concern that the media presence encountered during the previous attempt to seat a jury could be expected in these locations as well, the trial court simply did not abuse its discretion in moving the trial to Miami-Dade County where the media presence would not be nearly so noticeable. The trial court did not abuse its discretion, nor did it fail to follow the statutory provisions governing changes of venue. Rather than committing error of some sort, the court acted at all times in a

[51] The Escambia County Courthouse was heavily damaged in a hurricane in 2004. (V69, R11).

[52] Fort Lauderdale was also discussed, but after consultation with personnel in that courthouse, it was deemed unsuitable from the standpoint of available facilities. (V69, 44).

manner calculated to preserve and protect Couey's right to a fair trial before an impartial jury. That is what he received, and there is no basis for reversal.

To the extent that further discussion is necessary, the §910.03(2) does not mandate that venue be changed -- it requires only that "**priority**" be given to a county with similar demographics. Under the particular facts of this case (which are horrible, to say the least), the trial court recognized the reality of attempting to select a jury in a small county in a case which had received nationwide media attention, and which was intensely covered by the media. The issues that arose in Lake County could reasonably be expected to arise in any other county of similar size (not to mention the logistical and physical plant issues associated with a case of this magnitude), and the trial court did not abuse its discretion is deciding not to confront those issues for a third time. That was not an abuse of discretion, but rather was a recognition of the facts. The statute does not require the court to engage in an exercise in futility, nor does it supply the defendant with a means to avoid going to trial. After the failed attempt to seat a jury, it was time to move the trial to a larger county.

Finally, Couey has no colorable claim that he did not receive a fair trial, nor does he have any colorable claim that any impartial jury would not have reached the same result. Given

that the object of §910.03(2) is to protect the defendant's due process rights, and because Couey cannot demonstrate any violation of those rights, there is no basis for relief, even assuming that the statute was not strictly followed. There is no basis for relief.

To the extent that Couey relies on a decision from New Jersey, his citation to that case reveals less than all of the law in that state. The New Jersey court, in addressing this issue, held:

> The Appellate Division, in *State v. Harris*, 282 N.J. Super. 409, 421, 660 A.2d 539 (App.Div.1995), *appeal after remand*, 156 N.J. 122, 716 A.2d 458 (1997), relying on the American Bar Association guidelines for venue and jury selection in choosing Hunterdon County, applied the following factors:
>
> > (1) The nature and extent of pretrial publicity, if any, in the proposed venue;
> >
> > (2) The relative burdens on the respective courts in changing to the proposed venue;
> >
> > (3) The hardships to prospective jurors in traveling from their home county to the site of the trial and the burden imposed upon the court in transporting the jurors; [FN6]
> >
> > (4) The racial, ethnic, religious and other relevant demographic characteristics of the proposed venue, insofar as they may affect the likelihood of a fair trial by an impartial jury;
> >
> > (5) Any other factor which may be required by the interests of justice. [*Id.* at 421, 660 A.2d 539 at 421, 660 A.2d 539,

(*quoting* Criminal Justice Standards: *Trial by Jury, ABA Crim. Just. Sec. Standard* 15-1.4 (3d. ed. 1993)).]

[FN6] This factor was inserted by the Appellate Division in lieu of the following third ABA factor: "[T]he relative hardships imposed on the parties, witnesses, and other interested persons with regard to the proposed venue;"

. . .

This Court has emphasized that a defendant has the "right to trial by an impartial jury drawn from a representative cross-section of the community." *State v. Gilmore*, 103 N.J. 508, 523, 511 A.2d 1150 (1986). Under Rule 3:14-2, a court must consider racial demographics in deciding whether to change the venue of a criminal trial or to empanel a foreign jury. *Harris, supra*, 282 N.J. Super. at 417, 660 A.2d 539, *supra*, 282 N.J. Super. at 417, 660 A.2d 539. **However, racial demographics should not be the sole factor in that decision. In selecting the county from which to draw a foreign jury, the court "should . . . consider racial demographics together with all other pertinent factors[,]" especially the ABA factors.** *Id.* at 419, 660 A.2d 539. at 419, 660 A.2d 539. **"Racial demographics should be a particularly weighing factor in selecting the source of a foreign jury when the victim and the defendant belong to different races."** *Id.* at 419-20, 660 A.2d 539 at 419-20, 660 A.2d 539. **In this case, defendant and the victim were of the same race.**

The Constitution does not guarantee a defendant a jury of any specific racial composition. *Taylor v. Louisiana,* 419 U.S. 522, 538, 95 S. Ct. 692, 702, 42 L. Ed. 2d 690, 703 (1975). What the Constitution guarantees is that every defendant will be tried by an impartial jury whose members are selected pursuant to "nondiscriminatory criteria." *Batson v. Kentucky*, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 1717, 90 L. Ed. 2d 69, 80 (1986) (challenging prosecutor's use of peremptory strikes in discriminatory manner); *Holland v. Illinois*, 493 U.S. 474, 480-481, 110 S. Ct. 803,

807, 107 L. Ed. 2d 905, 916-17, *reh'g den.* 494 U.S. 1050, 110 S. Ct. 1514, 108 L. Ed. 2d 650 (1990).

To establish an Equal Protection violation, defendant must show purposeful discrimination in the decision making process, *Whitus v. Georgia*, 385 U.S. 545, 87 S. Ct. 643, 646, 17 L. Ed. 2d 599, 603-04 (1967), that had a discriminatory effect on the outcome. *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547, 556 (1985). Purposeful discrimination implies that the decisionmaker selected a particular course of action "at least in part 'because of,' not merely 'in spite of its adverse effects . . .'" *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L. Ed. 2d 870, 887-88 (1979). **Thus, to prevail on this claim, defendant would have to show that the trial court's decision to empanel a jury from Hunterdon was motivated by a racially discriminatory purpose or because the court anticipated a racially discriminatory effect.** Defendant has not proven such intent or effect.

The record is devoid of evidence remotely hinting that the trial court's decision to empanel a jury from Hunterdon County was animated by a discriminatory purpose. . . .

Defendant also has failed to show he was deprived of rights under the Sixth Amendment. The Sixth Amendment, in pertinent part, provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const. amend. VI. "The fair cross-section venire requirement is obviously not explicit in this text, but is derived from the traditional understanding of how an 'impartial jury' is assembled." *Holland, supra*, 493 U.S. at 480, 110 S. Ct. at 807, 107 L. Ed. 2d at 916. The Constitution does not require that petit juries actually mirror the community or reflect the various groups in the population. *Holland*, 493 U.S. at 483, 110 S. Ct. at 808, 107 L. Ed. 2d at 918; *Taylor, supra,* 419 U.S. at 538, 95 S. Ct. at 702, 42 L. Ed. 2d at 703. It does not guarantee that every discrete group will be represented proportionally in the jury venire or on the petit jury. *Gilmore, supra*, 103 N.J.

at 525, 511 A.2d 1150. The purpose of the cross-section requirement is to assure that defendant is tried before an impartial jury, which the Constitution demands. *Holland, supra*, 493 U.S. at 480, 110 S. Ct. at 807, 107 L. Ed. 2d at 916.

There is no evidence that the racial composition of the jury venire affected the jury's ability to be impartial. **This case does not involve any racial issue but rather involves human concerns that touch the hearts and minds of all people, regardless of their race, religion or gender.** Given the overwhelming evidence against defendant, it is highly doubtful that a jury from Camden would have reached a different verdict or sentence. Moreover, there is no assurance that the composition of the jury pool would have been radically different in Camden County. Because the case received basically the same amounts of press coverage in both Camden and Hunterdon Counties, and the victim and the defendant were of the same race, the trial court properly decided that the disparate racial composition of the counties was an important, but not the critical factor. Absent a showing of illegal discrimination, defendant had no constitutional right to a jury from Camden County simply because it might have increased his chances of having more minorities on his jury.

We find little merit in the dissent's assertion that racial demographics outweigh the other demographic characteristics enumerated in *Harris* factor four. *Post,* at 663-64, 737 A.2d at 137 (Handler, J., dissenting); *see Harris, supra,* 282 N.J. Super. at 421, 660 A.2d 539 *supra,* 282 N.J. Super. at 421, 660 A.2d 539. "[W]here . . . race is the demographic characteristic at issue, the change of venue must be to a county having the same racial demographics. . . ." *Pressler*, Current N.J. Court Rules, comment on R. 3:14-2 (1998) (citation omitted) (emphasis added). Unlike *Harris*, race is not the demographic characteristic at issue. In *Harris,* the defendant, a black man, was charged with the capital murder and rape of a young white girl. Id., at 411, 660 A.2d 539, at 411, 660 A.2d 539. **In this case, defendant and the victim were of the same race.**

> The dissent also asserts that the failure to empanel a jury from Camden constitutes a Sixth Amendment violation of such magnitude that it cannot be considered under the harmless error analysis. *Post*, at 666-67, 737 A.2d at 138-39 (Handler, J., dissenting). In *State v. Bey*, 112 N.J. 45, 94, 95, 548 A.2d 846 (1988) (*Bey I*), we held that in capital cases "we shall continue to determine the reversibility on the basis of a qualitative determination that considers, in the context of the entire case, whether the error was clearly capable of affecting either the verdict or the sentence." We noted, however, that the only exception where harmless error analysis would not apply involves "constitutional violations . . . [that] by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." (*quoting Satterwhite v. Texas,* 486 U.S. 249, 108 S. Ct. 1792, 1792, 100 L. Ed. 2d 284 (1988)). [FN8]
>
> > [FN8] Although *Satterwhite* involved a Sixth Amendment violation of a defendant's right to counsel, the Supreme Court applied a harmless error analysis in determining whether the defendant's capital conviction should be reversed.

State v. Timmendequas, 161 N.J. 515, 558, 561-564 (N.J. 1999) (emphasis added). The *Timmendequas* decision addresses Couey's claims, and decides them contrary to his position. Assuming without conceding that discussion beyond the fact-based rationale used by the trial court is necessary, there is no basis for relief.

III. THE CAUSE CHALLENGE ISSUE

On pages 64-77 of his brief, Couey claims that three members of the jury that tried his case should have been excused for cause, and that his request for additional peremptory

challenges was erroneously refused. The specific jurors at issue are juror numbers 114, 1496, and 1553. (V107, R4718).[53] The jurors that Couey says should have been but were not stricken for cause (and therefore required use of a peremptory challenge) are juror numbers 2, 990, 2699, and 865. Couey also argued that jurors 916 and 1052 should have been removed for cause -- the State exercised peremptory challenges as to those jurors. A trial court's decision on whether to strike a juror for cause is reviewed for abuse of discretion. *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000) (noting that a trial court has great discretion when deciding to grant or deny a challenge for cause, recognizing that the trial court has a unique vantage point because that court is able to see the jurors' *voir dire* responses and make observations which simply cannot be discerned from an appellate record, and concluding that it is the trial court's duty to determine whether a challenge for cause is proper); *Castro v. State*, 644 So. 2d 987 (Fla. 1994) (excusing a juror for cause is subject to abuse of discretion review because the trial court has the opportunity to observe and evaluate the prospective juror's demeanor and credibility); *United States v. Greer*, 223 F.3d 41, 52 (2d Cir. 2000) (observing that a district court's determination regarding whether actual bias exists to

[53] The jurors in this case were, at all times, referred to by number rather than by name.

establish a challenge for cause is reviewed for abuse of discretion); *United States v. Taylor*, 207 F.3d 452, 454 (8th Cir. 2000) (noting that decisions denying challenges for cause are reviewed for abuse of discretion); *United States v. Lowe*, 145 F.3d 45, 48 (1st Cir. 1998) (noting that a district court's ruling on for-cause challenges to prospective jurors is reviewed for clear abuse of discretion). This Court has stated that:

> Where a prospective juror is challenged for cause on the basis of his or her views on capital punishment, the standard that a trial court must apply in determining juror competency is whether those views would prevent or substantially impair the performance of a juror's duties in accordance with the court's instructions and the juror's oath. *Id.* (*citing Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985)). "In a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty." *Barnhill*, 834 So. 2d at 844.

Conde v. State, 860 So. 2d 930, 939 (Fla. 2003). Further,

> Where, as here, a prospective juror initially states that one who murders should be executed but **later states that he can follow the law upon court instruction, the trial court does not abuse its discretion in denying a cause challenge**. *Barnhill,* 834 So. 2d at 845.

Conde v. State, 860 So. 2d at 939. (emphasis added). *Gore v. State*, 706 So. 2d 1328, 1332 (Fla. 1997) ("Although they expressed certain biases and prejudices, each of them also stated that they could set aside their personal views and follow the law in light of the evidence presented. *Penn v. State*, 574

So. 2d 1079 (Fla. 1991); *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). The trial court was in a better position to assess the credibility of these venire members. Consequently, we will not substitute our judgment for that of the trial court.”). Florida law is settled that:

> "to show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State*, 545 So.2d 861, 863 n.1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.

Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990) (footnotes omitted). This Court has interpreted *Trotter* as follows:

> In *Busby*, a majority of the Court held: [E]xpenditure of a peremptory challenge to cure the trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror has served on the jury. *See Trotter v. State*, 576 So. 2d 691 (Fla. 1991). As explained in *Trotter*, "This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted." *Id.* at 693. A defendant cannot demonstrate prejudice if the trial court grants the same number of additional

> peremptories as cause challenges that were erroneously denied. *See Conde*, 860 So. 2d at 942.
>
> *Busby*, 894 So. 2d at 96-97, 894 So. 2d at 96-97. In the instant case, defense counsel challenged juror Mullinax for cause. The trial judge denied this challenge. Later, defense counsel used a peremptory challenge to strike Mullinax. After exhausting all remaining peremptory challenges, defense counsel requested an additional peremptory, noting that the additional peremptory would be used to strike potential juror Bellet. The trial judge denied the defense's request for an additional peremptory. Defense counsel objected to this denial and reiterated that the additional peremptory would have been used to strike juror Bellet because of his answers about premeditation. [footnote omitted] Bellet actually served on the jury. Accordingly, Kopsho has demonstrated that he was prejudiced by the trial court's erroneous denial of his challenge for cause against potential juror Mullinax.

Kopsho v. State, 959 So. 2d 168, 173 (Fla. 2007). *Aguirre-Jarquin v. State*, 34 Fla. L. Weekly S299 (Fla. Mar. 26, 2009) (same).

THE SPECIFIC JURORS

According to Couey's brief, Juror 0114 is the "objectionable juror" who served on the trial jury. Juror 0114 stated that her former husband had molested their daughter. (V104, R4123-24). She also stated that she would follow the law as instructed by the Court (V104, R4250-51)[54], that she could be

[54] In response to questioning about the capital sentencing process, this juror stated "I think the position that Florida takes is really an appropriate position. I think that there are some cases that are probably not appropriate, and some places it's appropriate ..." (V104, R4250).

fair after what had happened to her daughter (V104, R4258), and that she could recommend a life sentence. (V104, R4287). Couey's cause challenge to this juror was properly denied.

While Couey does not specifically claim that any other objectionable jurors served, he did assert that he would have exercised additional peremptory challenges against jurors 1496 and 1553. To the extent that discussion of those jurors is necessary, juror 1553's response to questioning about sentencing simply does not show that he would "automatically" recommend a sentence of death. (V106, R4581). The record does not support Couey's contrary claims. To the extent that Couey claims that juror 1496 should have been removed for cause, the fact that that juror had heard, from an unknown source, that Couey's victim was buried alive[55] does not rise to the level of a cause challenge. Such non-specific, general knowledge about the case, when the juror has shown no inability to decide the case based on the evidence, is an insufficient basis for a cause challenge. *Owen v. State*, 986 So. 2d 534, 549-50 (Fla. 2008); *Carratelli v. State*, 961 So. 2d 312, 325-27 (Fla. 2007); *Davis v. State*, 849 So. 2d 465, 474 (Fla. 2003); *Pietri v. State*, 644 So. 2d 1347,

[55] In any event, the evidence supported the conclusion that Jessica was, in fact, buried alive. (V50, R9291; V114, R5564; V114, R5494-96; V115, R5593).

1352 (Fla. 1994); *Singleton v. State,* 783 So. 2d 970, 973-976 (Fla. 2001).

Turning to the jurors that Couey did strike peremptorily, none of those jurors would have properly been removed for cause. Juror 2699 had heard that the victim was "buried alive" from an unknown media source. This was in fact the case, and, as with Juror 1496, a juror is not disqualified merely because he or she has some knowledge of the case. *Owen, supra; Carratelli, supra; Davis, supra; Pietri, supra; Singleton, supra.* The trial court properly denied a cause challenge as to Juror 2699. As to Jurors 002 and 0865, Couey claims that each of these jurors would "automatically" vote for a death sentence.[56] Juror 002 stated, unequivocally, that he recognized the responsibility of recommending a death sentence, stating "how would you live with it," and would be well-able to recommend a life sentence. (V102, R3890-91, 3903-4). Likewise, Juror 865 stated that she would be able to recommend either death or life, depending on what she felt was the appropriate sentence based on the case. (V105, R4374). As to both jurors, the trial court properly denied the challenges for cause because neither juror indicated that they would be unable to follow the law. (V102, R3983; V105, R4424-25).

[56] Couey also makes this claim as to Juror 1553, but that person served on the jury and is addressed separately above.

The trial court properly denied the challenges for cause, and there was no abuse of discretion -- the trial court was in the best position to observe the prospective jurors, and this court should not substitute its judgment for that of the trial court. Because no challenge for cause was erroneously denied, Couey cannot demonstrate any error under *Kopsho, Busby,* and *Trotter.*[57] Couey is not entitled to relief on this claim.

IV. THE DENIAL OF THE MOTION TO CONTINUE

On pages 78-83 of his brief, Couey argues that the trial court abused its discretion when it denied his motion to continue the trial based upon the "late" disclosure of certain evidence. In *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000), this Court held that the granting of a continuance is within the trial court's discretion, and the trial court's ruling will only be reversed when an abuse of discretion is shown. An abuse of discretion is generally not found unless the trial court's ruling on the continuance results in undue prejudice to the defendant, and it is an appellate court's obligation to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance. *Israel v. State*, 837 So. 2d 381, 388 (Fla. 2002); *Hunter v.* State, 660 So.

[57] Couey seems to argue only that Juror 0114 erroneously served on his jury. Regardless of whether his claim is limited to that juror or includes Jurors 1496 and 1553, he still loses. None of his challenges for cause were erroneously denied.

2d 244, 249 (Fla. 1995); *Cooper v. State*, 336 So. 2d 1133, 1138 (Fla. 1976).[58] Florida law is long settled that the trial court's ruling should be sustained unless no reasonable person would take the view adopted by the trial court. *Overton v. State*, 807 So. 2d 877, 895-96 (Fla. 2001); *Huff v. State*, 569 So. 2d 1247 (Fla. 1990). When the underlying facts are fairly considered, there is no basis for relief.

Couey's claim is based on the discovery of additional evidence by the State about a month before trial was scheduled to begin. While Couey describes this evidence as consisting of 960 pages of documents and 12 additional witnesses (*Initial Brief*, at 79), that is an overly dire description of the matter. In fact, at the hearing on Couey's motion, the State made it clear that only two (2) of the listed witnesses were going to be called at trial, and likewise made it very clear that the remaining witnesses were listed only in an abundance of caution. (V70, R120). That representation was borne out at trial, when John Read, Nathalia Windham, and Kenneth Slanker were called to testify about Couey's incriminatory statements to them. (V114, R5558-5564; V115, R5588-5593; V115, R5615-5617). Further, the vast majority of the documents were personnel records of county detention center personnel. (V70, R95). Finally, and perhaps of

[58] The capital sentencing aspect of *Cooper* was superseded by *Hitchcock v. Dugger*, 481 U.S. 393, 396 (1987). The law concerning continuances set out is *Cooper* is unchanged.

the greatest significance, is the fact that the testimony of these witnesses was about Couey's incriminatory statements to them, which is exactly what Couey would have had to confront had his earlier statements to law enforcement not been suppressed. (V70, R123). Given that these statements came to light after the abortive attempt to select a jury in Lake County (a trial date that Couey did not complain about), and given that these statements are merely **less** detailed versions of the suppressed statements (which Couey was apparently prepared to confront had they not been suppressed), it stands reason on its head to claim that there was an abuse of discretion.[59] There is no abuse of discretion, and no basis for relief. *Israel, supra*; *Hunter, supra*; *Gorby v. State*, 630 So. 2d 544, 546 (Fla. 1993); *Cooper, supra* ("While death penalty cases command our closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance."). Couey is not entitled to relief.

V. THE "EXCLUSION OF EVIDENCE" CLAIM

[59] The claim that additional time was needed to "work the statements into the trial strategy," proves too much. Couey (and his experts) were already well aware of his **other** statements to law enforcement -- it makes no sense to claim that these less detailed statements could not be "incorporated into the trial strategy" with little effort since that work had already been done before the highly detailed statements were suppressed on Couey's motion.

On pages 84-92 of his brief, Couey claims that he should have been able to cross-examine the victim's father and a correctional officer about certain matters that he calls "impeachment evidence." The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L.Ed.2d 508 (1997) (all evidentiary rulings are reviewed for abuse of discretion). A trial court has broad discretion in determining the relevance of evidence, and such determination will not be disturbed absent an abuse of discretion. *Sexton v. State*, 697 So. 2d 833, 837 (Fla. 1997); *Heath v. State*, 648 So. 2d 660, 664 (Fla. 1994).

With respect to the purported "impeachment" of Mark Lunsford, Couey says that he should have been allowed to inquire into the "financial details" of the Jessica Lunsford Foundation, and that he should have been allowed to inquire into the discovery of "child pornography" on a computer located in the Lunsford home. The State filed a *motion in limine* to foreclose inquiry into these matters, and the trial court granted that motion, finding that neither line of potential questioning was

relevant to prove or disprove a material fact. (V21, R16-17). The true facts are that Mark Lunsford's (the victim's father) guilt stage testimony is slightly more than 6 pages in length, and, in pertinent part, consists of a description of how he discovered his daughter missing and the identification of a stuffed purple dolphin that was also missing from Jessica's room. Mark Lunsford did not testify about any disputed facts (after all, it was undisputed that Jessica was missing, along with her purple dolphin), and Couey did not cross-examine him about the substance of any of his testimony. (V108, R4792-93).[60] Whatever questions could be asked about the Jessica Lunsford Foundation, and whatever could have been asked about the existence of "child pornography"[61] on a computer in the Lunsford home has nothing to do with any of Mr. Lunsford's testimony -- because that is so, those lines of cross-examination were irrelevant under §90.401, as the trial court found. (V62, R16). Further, the questions at issue would serve no purpose other

[60] The entire cross-examination consists of 13 lines of the transcript.

[61] The only information concerning the "child pornography" contained in the record is in the form of a description given by the State in connection with the *motion in limine*. (V62, R14-15). Included within that discussion is a statement that no charges were filed because there could be no criminal charges based on the known facts. (V62, R14). Couey did not attempt to proffer anything to rebut the State's assertions. If there was no chargeable offense to begin with, and that is the state of the record, there is no "impeachment" material available.

than to embarrass or harass Mr. Lunsford, and, for that additional reason, were properly disallowed. *See, Smith v. State*, 34 Fla. L. Weekly S276, 285 (Fla., Mar. 19, 2009); *Washington v. State*, 432 So. 2d 44, 47 (Fla. 1983); *Weatherford v. State*, 561 So. 2d 629, 634-35 (Fla. 1st DCA 1990).

Moreover, *Florida Statute* §90.608 sets out the means by which the credibility of a witness may be impeached. Nothing complained of in Couey's brief establishes or tends to establish that Mr. Lunsford is biased against Couey, who, after all, had confessed to killing his daughter. Likewise, nothing that Couey says should have been allowed on cross-examination is relevant to Mr. Lunsford's "credibility [and] motivation." Mr. Lunsford's testimony was wholly consistent with the testimony of his mother (V108, R4779-81), and, because that is so, his credibility about the discovery of Jessica's absence is simply not seriously at issue, especially since Couey did not even cross-examine Ms. Lunsford. (V108, R4785). Finally, to the extent that discussion is necessary, Mr. Lunsford's "motivation" in testifying is, to say the least, obvious and not subject to impeachment.[62]

[62] At various points in his brief, Couey makes much of the idea that Mr. Lunsford was an "initial suspect." It is well-known that family members are automatically "suspects" in a case such as this one, and it is obvious to anyone (with the possible exception of the most biased observer) that Mr. Lunsford had nothing at all to do with the abduction, sexual battery and murder of his daughter.

Even taking the most generous view possible of the claimed "impeachment" evidence, there is still no error. The most that Couey has alleged are "prior bad acts" which, when stripped of the pretensions of his brief, are nothing more than an attempt to elicit "character" evidence which is inadmissible under *Florida Statutes* §90.609 and §90.610. The trial court did not abuse its discretion when it did not allow Couey to further abuse Mr. Lunsford by cross-examining him about matters that were not admissible to begin with, and were wholly irrelevant to Mr. Lunsford's testimony.

With respect to the asserted "impeachment evidence" concerning John Read, the State's *motion in limine* is found at V43, R8011-12, and argument on that motion is found at V114, R5436-41. The matter at issue was a misdemeanor marijuana conviction that was between 30 and 40 years old, and a "failure" to disclose that conviction on his application for employment with the private contractor that operates the Citrus County detention facility. (V114, R5438-9). Mr. Read resigned from his position, reapplied disclosing the fact of the misdemeanor conviction, and was re-hired. (V114, R5439-40).[63] The only reason Couey could offer for the relevance of this conviction was his claim that Mr. Read was "less than candid" during a hearing on

[63] The fact that Mr. Read was re-hired tends to indicate that his employer did not perceive any intentional deception in completing the application for employment.

the motion to suppress statements Couey made to Mr. Read. (V114, R5440). Couey refused to identify any statements that were "less than candid," and no such "lack of candor" is identified in either the transcript or in Couey's brief. (V114, 5440). The trial court found that the conviction was so old as to be irrelevant, in addition to not being a crime of dishonesty, anyway. (V114, R5441). That ruling was correct, and should not be disturbed. *See, Fernandez v. State*, 730 So. 2d 277, 282 (Fla. 1999); *Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990); *Riechmann v. State*, 581 So. 2d 133, 144 (Fla. 1991); *Jackson v. State*, 545 So. 2d 260, 264 (Fla. 1989).

VI. THE DENIAL OF A MISTRIAL CLAIM

On pages 93-97 of his brief, Couey claims that the trial court should have granted a mistrial because a correctional officer made what Couey calls a reference to Couey's suppressed confessions during cross-examination. A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999); *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999) (explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); *Hamilton v. State*, 703 So. 2d 1038, 1041 (Fla. 1997) (ruling on motion for mistrial is within the trial court's discretion); *United States v. Puentes*, 50 F.3d

1567, 1577 (11th Cir. 1995 (district court's ruling on a motion for mistrial is reviewed for abuse of discretion); *United States v. Honer*, 225 F.3d 549, 555 (5th Cir. 2000) (denial of motion for mistrial reviewed for abuse of discretion).

Couey has accurately quoted the transcript at length -- the phrase that he bases his claim on reads as follows:

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

(V114, R5572-3). What Couey has not supplied is the motion for mistrial and the court's ruling, which reads as follows:

> Mr. Fanter: We would move for a mistrial based on his statement that "there were other testimonies out there," which was not responsive to my question about the logbooks, it was a volunteered statement, and we'd move for a mistrial.
>
> The Court: I'm going to deny the motion for mistrial, for the reasons stated plainly in the word, the word was "testimonies." So that having been said, any response by the State?
>
> Mr. Ridgway: No. The question was -- his answer was rather long and drawn out, and I was about to object to the answer because it was obvious where he was going, and Mr. Fanter had plenty of time to cut him off.
>
> Mr. Fanter: It's not my job to cut off a witness, a "yes" or "no" witness, it's not my fault he wanted to volunteer his testimony.
>
> The Court: I don't find that he volunteered, or he had any malevolent purpose, it didn't sound like

anything volunteered by Mr. Read. The motion is denied.[64]

Mr. Lewan: The malevolent part is the implication to the jury that there was a confession out there.

The Court: He didn't say that, he said testimony.

Mr. Lewan: Testimonies. What's the difference, Judge?

The Court: It's a big difference. It's sort of like interrogation and statement.

Mr. Fanter: But you know how intelligent jurors are.

The Court: He said "testimonies," he never said "confession." The motion is denied.

(V114, R5578-79). That ruling, which came after having observed the witness's testimony, is not an abuse of discretion. *See, England v. State*, 940 So. 2d 389, 398 (Fla. 2006); *Israel v. State*, 837 So. 2d 381, 389 (Fla. 2002); *Ponticelli v. State*, 593 So. 2d 483, 488 (Fla. 1991).

In his brief, Couey relies on *Thomas v. State*, 851 So. 2d 786, 877 (Fla. 1st DCA 2003), for the proposition that reversal is required when the jury learns of inadmissible statements by the defendant. That case does not help him for two reasons. First, the statement at issue did not inform the jury that Couey had previously confessed. As stated by the witness, and as found by the trial court that heard the testimony, the

[64] This finding is relevant to Couey's gratuitous and speculative assertions in footnote 24 that there was some improper motive on the part of Mr. Read.

word "testimonies" does not convey any improper information to the jury. Second, there was extensive testimony in *Thomas* about the suppressed confessions, including a lengthy curative instruction which arguably only served to make matters worse. *Thomas* simply is not the same situation as the one in Couey's case, and that case does not compel relief. This claim has no basis in fact, and no relief should be granted.

VII. THE "PRECLUSION OF EVIDENCE" CLAIM

On pages 98-102 of his brief, Couey argues that he is entitled to relief because he was not allowed to use an "invocation of rights" form that was "filed" with the detention facility to challenge the "voluntariness" of his statements to various correctional officers. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L.Ed.2d 508 (1997) (all evidentiary rulings are reviewed for abuse of discretion). Likewise, a trial court has broad discretion in determining the relevance of evidence, and such a determination will not be disturbed absent an abuse of discretion. *Sexton v. State*, 697

So. 2d 833, 837 (Fla. 1997); *Heath v. state*, 648 So. 2d 660, 664 (Fla. 1994).

It is true that:

> once the court decided the confession was voluntary, "the jury was entitled 'to hear **relevant** evidence on the issue of voluntariness and [the trial judge was to] instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.'" [*United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996)] at 1344, *quoting* 18 U.S.C. § 3501. Had Dr. Ofshe's testimony been admitted, it "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *Id.* at 1345. It is for the jury to determine the weight to give to Dr. Ofshe's testimony, and to decide whether they believed his theory or "the more commonplace explanation that the confession was true." *Id., citing* 18 U.S.C. § 3501.

Boyer v. State, 825 So. 2d 418, 419-420 (Fla. 1st DCA 2002). (emphasis added). However, this case does not involve a claimed "false confession," nor were the statements at issue the result of police interrogation. Because there was no interrogation, the "invocation of rights" form is not relevant to any issue, and was properly excluded. In ruling on the State's *motion in limine*, the trial court stated:[65]

> MR. RIDGWAY: Yes, sir. In opening statements the other day, Mr. Lewan, in referring to the statements allegedly made to the corrections officers, that they were taken in violation of his constitutional rights. This Court has heard a hearing and has determined otherwise.

[65] Couey has omitted a significant portion of the arguments of counsel and the trial court's ultimate ruling.

THE COURT: Um-hum.

MR. RIDGWAY: The question of a rights violation or not is a question of law, it's a question for the Court to decide, it's not something the jury is called upon to decide, and to suggest to them that they were taken in violation of it opens a whole can of worms. Well, we could also tell them this Court has held otherwise. I don't think it's proper — —

THE COURT: Well, then we have to get into the complete definition of a custodial interrogation, which people have spent their entire careers writing law treatises about. So, Mr. — — Which one? Are you going to field this one, Mr. Lewan?

MR. LEWAN: Yes, your Honor.

THE COURT: Okay. So go ahead.

MR. LEWAN: Judge, clearly it's custodial interrogation, these statements were all taken while he's in custody of the Corrections Corporation of America, in the jail, and not free to leave. It goes to the issue whether his statements were voluntarily made. I think that we're arguing a bit of semantics here. We certainly get to argue the same constitutional issues, the same violation of rights issues, to the jury that we argued to the Court in the motion to suppress. This is a determination of what weight they will give to these statements and whether they were voluntarily made.

THE COURT: Well, the Florida Standard Jury Instruction on that, which I don't have in front of me, but I pretty much, as you gentlemen can say, pretty much talk about it verbatim, basically says that if you find that the statement was not freely and voluntarily made that you may disregard it. But in this situation, when you throw out the two phrases, which is custodial interrogation, that's just the tip of the iceberg, because the interrogation must be by a law enforcement officer intending to elicit an incriminating response. He's in custody, I made that determination, there was no doubt about that, but just like I said from the beginning when we talked about these suppression issues, there's only two things,

one, was this person a plant by law enforcement, and I found that they were not plants, or designated agents with the purpose of trying to elicit an incriminating response; or, B, was it improper elicitation. And from what I've heard in the way of the proffers, it's general conversation, and finally turns to Mr. Couey making some incriminating statements. If I'm wrong on that, I'm counting on you guys to point me in a different direction. But isn't that pretty much what happened?

MR. RIDGWAY: I think, your Honor, that was the testimony, and this Court has held that as a matter of law the Fifth and Sixth Amendments were not violated by these statements.

THE COURT: Um-hum.

MR. RIDGWAY: To now suggest to the jury that they were is, not to put too fine a point on it, Judge, dishonest, because this Court was responsible for making that determination, and has determined they were not.

THE COURT: Mr. Lewan, final comment on State's motion in limine.

MR. LEWAN: Judge, it goes to the voluntariness, we think it comes in. There are the invocation of rights that were served on the CCA.

THE COURT: Tell them to quiet down, would you, please. I know they're anxious to come in here, but just tell them to... We're working out here. Thank you.

MR. LEWAN: We certainly should be able to show that those were invoked, and that this was not voluntarily done, it's going to be done through a series of interrogation techniques. Whether it was on purpose or not is not the point at this time, it's voluntariness.

THE COURT: Very good. I'm granting the State's motion in limine, specifically finding that to talk about the defendant's Sixth -- Fifth or Sixth Amendment rights, as contemplated by the defense,

would be to confuse the jury improperly, it would invade the province of the Court to tell them what the proper instructions are, 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.

MR. LEWAN: What about the --

THE COURT: Madam Clerk, here's --

MR. LEWAN: What about talking about the invocation of his constitutional rights?

THE COURT: Well, you know, you throw that out there and just expect me, you know, I'm supposed to say, okay, what do you mean by that, you know, in what context, can you say he invoked his rights. If you want to say he invoked his rights — —

MR. LEWAN: Well, this Court has already --

THE COURT: I'm just trying to figure out how you want to bring that up.

MR. LEWAN: This Court has already taken judicial notice of the written intent to invoke right to counsel and exercise right to remain silent — —

THE COURT: Um-hum.

MR. LEWAN: -- filed with this Court, and served on CCA on the 22nd day of March, 2005; also the notice of intent to invoke right of counsel and exercise right to remain silent filed with this Court and served on CCA.

THE COURT: Um-hum.

MR. LEWAN: Well, that's the same one.

THE COURT: Oh, I remember them, I remember them, I looked at them quite closely at the motion to suppress hearing.

MR. LEWAN: Right. And the Court found that this was done. I think it's certainly pertinent to his voluntariness that this was done on Mr. Couey's

behalf, invocation of constitutional rights, it's the second one, filed the 23rd of March, 2005. To prohibit us from arguing that now to the jury is to just keep the truth from them.

THE COURT: Well, I think - - I don't think it's too fine a point, as Mr. Ridgway pointed out, about the definition of interrogation, that if the conversations that were had between the corrections officers and Mr. Couey, if -- and, again, I'm not - - I remember what Mr. Slanker said at the motion - - that's that buzzer outside - - then, you know, again, I'm trying to - - I'm trying to fine tune what exactly you want to do. It's just you want to admit that into evidence and say my client invoked his rights to remain silent?

MR. LEWAN: Yes, sir.

THE COURT: And to --

MR. LEWAN: And to have an attorney present when any interrogation took place. Because we are— —

THE COURT: It wasn't interrogation, though.

MR. LEWAN: Judge, that's our argument, it is the functional equivalent of interrogation.

THE COURT: All right. Well, brief response, then, by Mr. Ridgway.

MR. RIDGWAY: Judge, the Court has held it wasn't interrogation as a matter of law.

THE COURT: That's my ruling. So, the fact of the matter is, you're precluded from arguing that particular item of -- that you're pleading in that regard, I don't know how else to say it, it wasn't interrogation, it was conversation, and it's not splitting hairs here; because from what I have heard, the detective — — or the corrections officers, were talking with him after they were giving him his hot water for coffee, and his coloring pens, and things like that, or Officer Slanker, which I have a good recollection of, he 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 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.

(V114, R5441-48).

That ruling is correct -- if there was no interrogation as a matter of law, and that is what the trial court held, the "invocation of rights" form has nothing to do with the voluntariness of Couey's statements to the correctional officers, and was properly excluded as irrelevant and potentially confusing to the jury.[66] In any event, the jury was properly instructed about its role in considering confessions. (V116, R5774-75). To have done what Couey would have the Court do would have placed evidence before the jury that was in no way relevant to the duty they were instructed to discharge, and would have done no more than inject confusion into the process

[66] Discussing an "invocation of rights form" in the context of statements that were volunteered outside of police questioning is an attempt to put a square peg in a round hole. The legal issues are wholly distinct, and, had they been blended as Couey would have had the court do, the result would have been potential confusion for the jury.

when it was not necessary. The trial court did not abuse its discretion, and its ruling should be affirmed in all respects.

VIII. THE "JUDGMENT OF ACQUITTAL" CLAIM

On pages 103-107 of his brief, Couey claims that the trial court should have granted his motion for judgment of acquittal as to the burglary with a battery charge. The standard of review for the denial of a motion for judgment of acquittal is whether the verdict is supported by competent substantial evidence. *See Crump v. State*, 622 So. 2d 963, 971 (Fla. 1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for the jury to determine, and if there is substantial, competent evidence to support the jury verdict, that verdict will not be reversed on appeal); *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1980), a*ff'd*, 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict of appeal, there is substantial, competent evidence to support the verdict and judgment). While Couey suggests that the "circumstantial evidence" standard applies, that is not the case. Couey's inculpatory statements take this case out of the circumstantial evidence realm. *Woodel v. State*, 804 So. 2d 316, 321 (Fla. 2001 ("A confession is direct, not circumstantial, evidence"); *Perry v. State*, 801 So. 2d 78, 84 (Fla. 2001); *Lamarca v. State*, 785 So. 2d 1209, 1215 (Fla.

2001); *Walls v. State*, 641 So. 2d 381, 390 (Fla. 1994); *Hardwick v. State*, 521 So. 2d 1071, 1075 (Fla. 1988). The circumstantial evidence standard has no application here.

In responding to Couey's motion for judgment of acquittal, the State said:

> Your Honor, the State is entitled not only to the testimony but all reasonable inferences in our favor at this point. I think there's a reasonable inference that the jury could determine that the time he awoke her, got her up, gave her the doll, got her out of the house, into his own house, that a touching had taken place.

(V115, R5621). That is a correct statement of the law, and accurately summarizes the state of the evidence. The trial court denied the motion for judgment of acquittal, stating that:

> Count Two, the burglary of a dwelling with battery, that the light most favorable to the State is the standard that must be used, at this point I'm going to deny the motion for directed verdict as it pertains to Count Two, based upon, again the statements of the -- of a number of witnesses about his approaching the child in the house and exiting her from the house, and also exiting her, and just the weight of the evidence is sufficient to go to the jury on that.

(V115, R5622). That conclusion is correct, and should not be disturbed.[67] *Deparvine v. State*, 995 So. 2d 351, 376 (Fla. 2008); *Reynolds v. State*, 934 So. 2d 1128, 1145 (Fla. 2006) ("In moving

[67] Alternatively and secondarily, without conceding error of any sort, even if this Court were to conclude that the battery element is insufficiently proven, that does not affect Couey's death sentence, nor does it require a remand for imposition of a sentence for burglary of a dwelling.

for a judgment of acquittal, a defendant admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. We have stated that courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.") (citations and internal quotation marks omitted).

IX. THE "INVALID AGGRAVATOR" CLAIM

On pages 108-109 of his brief, Couey argues that he is entitled to a new penalty phase proceeding because the jury was instructed on the § 921.141(5)(b) "prior violent felony" aggravator, but that aggravator was ultimately not found by the sentencing court. The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997) (noting that a trial court has wide discretion in instructing the jury). There is no error, and no basis for relief.

Florida law is well-settled that:

> Although an aggravating factor must be proven beyond a reasonable doubt, *Johnson v. State*, 438 So. 2d 774, 779 (Fla. 1983), a jury instruction on aggravators need only be supported by credible and competent evidence. *See Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995). The fact that the State does not prove an aggravating factor to the court's

> satisfaction does not require a conclusion that there was insufficient evidence to allow the jury to consider that factor. *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991). Indeed, where evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required. *Id.; Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990).

Welch v. State, 992 So. 2d 206, 215 (Fla. 2008); *Duest v. State*, 855 So. 2d 33, 44 (Fla. 2003) (same); *Aguirre-Jarquin v. State*, 34 Fla. L. Weekly S299 (Fla. Mar. 26, 2009) ("Even though the trial court did not ultimately find the existence of CCP beyond a reasonable doubt, there was competent, substantial evidence presented to give the jury an instruction on the aggravator. Therefore, it was not error to instruct the jury on the CCP aggravator.").

The aggravator at issue is the prior violent felony aggravator -- the underlying felony is Couey's contemporaneous conviction for burglary with a battery, and, as set out above, that conviction is well supported by the evidence, and there is competent substantial evidence to support submitting the aggravator to the jury. The peculiarity arising with respect to this aggravator was summarized by the State in its sentencing memorandum:

> The victims of the burglary of a dwelling committed by the defendant were Archie and Ruth Lunsford, whereas, the violence committed during the burglary was against Jessica Marie Lunsford, the homicide victim. Because of the possibility that this might result in 921(141)(5)(b) being considered

> subsumed into 921.141(5)(d), and to avoid it being considered a doubling of the same evidence, this circumstance should not be considered by the court, or if considered it should not be given any weight.

(V49, R9179). In its sentencing order, the trial court found that this aggravator was not applicable. (V50, R9291).

The trial court did, however, find the "during the commission of a felony aggravator," which was the aggravator that the state was concerned could be construed to "double" with the prior violent felony aggravator. Whether that concern is wholly justified is not at issue here -- under the facts of this case, it is **possible** that the two aggravators could rely on the same aspects of the offense. *See, Ray v. State*, 755 So. 2d 604, 611 (Fla. 2000). However, the "anti-doubling" jury instruction was given, (V119, R6176), and it is axiomatic that juries are presumed to follow their instructions. In any event, in finding the §921.141(5)(d) during the commission of a felony aggravator, the court found that the capital offense took place during the commission of a burglary with a battery, kidnapping and sexual battery. (V50, R9291). That finding clearly gives effect to the burglary with a battery, and, given that the jury was properly instructed and given that there is certainly substantial evidence to support the prior violent felony aggravator, there can be no error in instructing the jury on it. *Hunter, supra.* This claim is nor a basis for relief.

Finally, even if there is some arguable error (and no law requires that aggravators that "double" be removed from the jury's consideration), it is harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). In view of the facts of this case and the fact that there are 5 additional, weighty aggravators, it makes no sense to conclude that the jury would have recommended a life sentence if only it had not been instructed on the prior violent felony aggravator. If there was any error, it was harmless and is not a basis for relief.

X. THE "IMPERMISSIBLE DEATH SENTENCE" CLAIM

On pages 110-126 of his brief, Couey says that the cold, calculated and premeditated aggravator (CCP) should not have been found, and that the CCP aggravator improperly "doubled" with the avoiding arrest aggravator.[68] Couey also says that the mitigation outweighs the "appropriate" aggravators, which, for practical purposes, is a proportionality claim.

Whether an aggravating circumstance exists is a factual finding that is reviewed under the competent, substantial evidence standard. When reviewing aggravating factors on appeal, this Court has reiterated the standard of review, noting that it

> is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on

[68] Couey does not challenge any of the other aggravating factors found by the sentencing court.

> appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports it finding.

Alston v. State, 723 So. 2d 148, 160 (Fla. 1998) (*quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997)). With regard to mitigating circumstances, *Campbell v. State*, 571 So. 2d 415 (Fla. 1990) established the following standards of review: 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 is subject to the competent substantial evidence standard; and, 3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. *See also Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000) (observing that whether a particular mitigating circumstance exists and the weight to be given to that mitigator are matters within the discretion of the sentencing court); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000) (receding from *Campbell* and holding that, though a court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (explaining that the trial court may reject a claim that a

mitigating circumstance has been proven so long as the record contains competent substantial evidence to support that rejection).

The coldness aggravator was properly found.

In finding that Couey's murder of Jessica Lunsford was cold, calculated and premeditated, the trial court made the following findings:

> (5) §921.141 (5) (I), *Fla. Stat.*- The murder was committed in a cold, calculated and premeditated (CCP) manner without any pretense of moral or legal justification.
>
> The State proved this aggravator beyond a reasonable doubt. The Defendant had observed Jessica playing outside of her house. On the night in question, he went to Jessica's home to burglarize it; and entered her room. He found her in her bed, and told her that he would take her to see her father. The Defendant then took her to the trailer, where he reported to the correctional officers, that he kept her for three days. He admitted to having "intercourse" with her. He said that he hidden her in his closet when the police started looking around the neighborhood. Defendant was scared when law enforcement officers brought the canine unit to the areas surrounding the trailer. He then dug a hole in which to bury Jessica. He told Jessica that he would take her back to her house but, that he did not want anyone to see them so she should climb into a plastic bag. Then, he tied a second plastic bag around her, tying it at the bottom; opposite the first knot. He buried her alive with her purple dolphin in the hole that he had previously dug.
>
> The kidnapping and the murder were planned. The Defendant successfully hid Jessica in the trailer without Defendant's family detecting her presence. He dug the hole while law enforcement was searching for Jessica,' as he did not want to get caught with her. He dug this hole to a depth in excess of the twelve (12) inches of soil found to be covering her body. He

avoided detection in his labors. He obtained the necessary garbage bags. He convinced her to step into the first bag. He secured her fate with a second bag. He put Jessica in the garbage bags so that no one would see him with her. The Defendant put Jessica in the hole and then filled the grave with dirt.

The court specifically, finds that this aggravator is proven beyond a reasonable doubt. The Defendant, by his unique thought processes described above, planned a purposeful murder. He secured the victim, kept her secreted from detection, obtained the implements for her disposal: such as the bags, shovel and rake, he choose the burial location, he choose the burial time, and he dug the hole. This demonstrates a dedicated and purposeful thought process. This was a determined, albeit savage, manner of a planned murder with absolutely no pretense of any, moral or legal justification.

Doubling is a concept in Death Penalty litigation wherein the same facts could support more than one aggravator. Improper doubling is an area of Death Penalty litigation that is fraught with problems. To avoid this becoming a problem later on; sentencing judges must expressly analyze, and differentiate those facts which might lead to doubling and make separate factual assessments.

The pivotal moment that separates, CCP, considerations referenced above, from those discussed later in this order, in §921.141 (5) (h) Heinous, Atrocious, and Cruel, (HAC), is founded in the trial testimony of Officer Read. The defendant told him that he could not bring himself to kill Jessica with his own hands. This fact, standing alone, demonstrates the cold, calculated, and premeditated intent of the Defendant. He, John Evander Couey, had already made a conscious, informed, and reflective decision to kill Jessica. The only thing to be decided was the manner of her murder.

This court; by delineating and separating the Defendant's plan for the murder; apart from its actual implementation, is factually finding that there are sufficient, independent facts to support CCP alone.

The planning and preparation undertaken by the

> Defendant, can be seen, and is found by this court to be separate and distinct from the actual commission of Jessica's murder.
>
> The court finds that the State has proven this aggravator, §921.141 (5) (i), Fla. Stat., beyond a reasonable doubt and gives this aggravator great weight.

(V50, R9293-94).

As found by the trial court, this murder was planned in advance, and did not happen quickly. Whatever Couey's mental status may be, it did not prevent him from planning and carrying out this murder, and then fleeing the area. Those findings of fact establish the coldness aggravator beyond a reasonable doubt. *See, Owen v.* State, 862 So. 2d 687 (Fla. 2003) (emotional or mental disturbance does not mean that defendant cannot have the mental state to engage in "cool and calm reflection" and make a "careful plan or prearranged design to commit murder"); *Evans v. State,* 800 So. 2d 182 (Fla. 2001) (same); *Willacy v.* State, 696 So. 2d 693 (Fla. 1997); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Preston v. State*, 444 So. 2d 939 (Fla. 1984). Under Florida law, this aggravator is well established, and is more than sufficient to support Couey's death sentence.[69]

[69] In his argument that the coldness aggravator is inapplicable, Couey does not cite to the section of the sentencing order addressing that aggravator, but rather cites to other parts of the order that have no relevance to this aggravating factor. The only comment that deserves a response is Couey's claim that the trial court found the "wrong cause of death" when it said that Jessica was "smother[ed] which resulted

To the extent that Couey claims that the coldness aggravator and the avoiding arrest aggravator "double," that claim has no legal basis. While Couey does not mention it, Florida law is long-settled that these two aggravators do not "double." *Nelson v. State*, 850 So. 2d 514 (Fla. 2003); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994); *Cooper v. State*, 492 So. 2d 1059 (Fla. 1986). These aggravators focus on different aspects of Couey's crime, and there is no improper double counting. There is no basis for relief.

The aggravation outweighs the mitigation.

On pages 118-126 of his brief, Couey argues that the trial court improperly "rejected" the statutory mental mitigating factors, and that the trial court's sentencing order is insufficient under *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). That argument has no legal basis.

In giving the extreme mental or emotional disturbance aggravator very slight weight, the trial court held:

> 2. §921.141 (7) (1), *Fla. Stat.* - Extreme Emotional or Mental Disturbance.
>
> The defense called several experts to testify that he suffered from a subaverage IQ and that he suffers from

---

in death by asphyxiation." (V50, R9288). Couey incorrectly says that asphyxiation is different from suffocation -- according to the Microsoft Word thesaurus, those words are synonymous. *Stephens v. State*, 975 So. 2d 405, 412 n.4 (Fla. 2007) ("Asphyxiation can be either strangulation or suffocation.").

brain damage. Dr. Richard Carpenter testified that he is a licensed psychologist. He was contacted by Dr. Berland in early February to assist with the administration of an IQ test. Dr. Carpenter gave Defendant the Wexler Adult Intelligence Survey 3 (WAIS-3). Defendant scored a 68 on the verbal portion, a 65 on the performance portion, and had a combined full scale score of 64. This score of 64 falls into the mental retardation range.

Dr. Wu, a medical doctor who specializes in brain imaging, testified that Defendant has an asymmetry in his right temporal lobe. The front side is less active than the left side of the brain. According to Dr. Wu, this indicates an abnormal nervous system, which is consistent with Defendant's auditory hallucinations and history of head injuries and consistent with Defendant's WAIS-3 subtest results. According to Dr. Wu, Defendant's brain has problems regulating impulses, which is consistent with pedophilia.

Dr. Berland testified that he administered the Minnesota Multiphastic Personality Inventory (MMPI). He testified that he can detect mental illness through the MMPI that he can't find by other means. On the 1995 MMPI, Defendant had an elevated L scale, which indicated delusional paranoid thinking. It also indicated he had some character problems, such as anti-social personality disorder. In the 2005 MMPI, Defendant also had a high L scale. His F scale, which indicates chronic mental illness, was elevated. Defendant suffers from hallucinations. Dr. Berland opined that the statutory mitigator of extreme mental or emotional disorder was established.

The State presented evidence to contradict Defendant's experts. The State called a radiologist who testified that the scan does not indicate brain damage. Former coworkers testified as to the Defendant's abilities. He exhibited adaptive functioning while employed and was a good worker.

This court recognizes that the statutory mitigating circumstance of extreme mental or emotional disturbance does not require evidence of insanity or lack of legal responsibility. *Francis v. State,* 808 So. 2d 1140 (Fla.2002). This circumstance is established

> if there is evidence of a mental or emotional condition that interfered with, but did not obviate the Defendant's knowledge of right and wrong. *Ponticelli v. State,* 593 So. 2d 483 (Fla. 1991).
>
> This court finds that the Defendant is not mentally retarded: This court held an *Atkins* hearing, *Atkins v. Virginia*, *536* U.S. 304 (2002), and entered an order making detailed and specific factual findings based on the witnesses testimony. This court found that the Defendant's I.Q. score is 78.
>
> The Defendant does not suffer from brain damage. He does have a personality disorder with antisocial features and does suffer from paranoia, and has a history of substance abuse. The court also finds the greater weight of the evidence reflects that the Defendant's condition did not rise to the level of extreme mental or emotional disturbance at the time of the crime. The Defendant's thinking was not disturbed, as he was fully aware of his actions.
>
> He saw the victim playing in her yard and planned the burglary. In the darkness of the night he broke into Lunsford family trailer; stealthily, he located Jessica's bedroom and kidnapped her, and hid her in the closet for days. When he became fearful of being caught by the police, he dug a hole, he then convinced Jessica that he was going to take her to her father and told her to get into the garbage bags. He then buried her alive and had his niece buy him a bus ticket and he fled.
>
> While the court finds that the greater weight of the evidence herein does not establish this statutory mitigating factor, the court, however, will give this factor very slight weight.

(V50, R9296-97).

Those findings are correct, are supported by the evidence, and, in the final analysis, Couey's argument does no more than express his dissatisfaction with the result. With respect to the "appreciate and conform" mitigator, the trial court said:

> 3. §921.141(7)(e), *Fla. Stat.* - The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> Defendant contends that due to his brain damage he did not have the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law. This mitigator is substantially related to the mental disturbance mitigator. Both are based on the claim that Defendant suffers from a mental defect. As such, this court reincorporates its above findings: Further, the trial testimony revealed the Defendant, after murdering Jessica, had the forethought to have a family member obtain a bus ticket for him; as he was unable to legally obtain one for himself, since he had identification.
>
> The court finds that the greater weight of the evidence herein does not establish this statutory mitigating factor.

(V50, R9298).

Those findings are likewise correct, are supported by the evidence, and should not be disturbed. Finally, the trial court properly considered the offered non-statutory mitigation and found that it was entitled to little weight. *See*, V.50, R9298-9301.

Couey's death sentence is proportionate.

In his brief, Couey does not directly address the proportionality of his death sentence. In the interest of brevity, it is sufficient that five aggravating factors, including two of the most weighty ones (CCP and HAC) were found by the sentencing court. Either of those aggravators, standing

alone, is sufficient to support Couey's sentence.[70] In addition, the murder was committed during the course of a felony, the victim was a child under 12, and the murder was committed to avoid a lawful arrest. Against that aggravation, which was properly given great weight by the sentencing court, is mitigation that was properly given little weight. This case is similar to (though perhaps more aggravated than), *Huggins v. State,* 889 So. 2d 743 (Fla. 2004), *Hitchcock v. State,* 755 So. 2d 638 (Fla. 2000) and *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997). *See also*, *Singleton v. Thigpen*, 806 F. Supp. 936, 944 (S.D. Ala. 1992). The true facts of this case, where the victim was buried alive, stand out even among other horrific murders. Couey's sentence should not be disturbed.

CONCLUSION

Couey's conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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ATTORNEY GENERAL

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[70] Couey does not challenge the heinousness aggravator.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **James R. Wulchak**, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118on this _____ day of April, 2009.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
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