IN THE SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Appellant stands by his Statement of Case and Facts contained in the Initial Brief of Appellant, as an accurate and complete statement of the facts. The Appellee's Statement of Facts contains material omissions and out of context and incomplete statements, which, as a result, are misleading.

Specifically, the Appellee claims that "Dr. Cogswell [the medical examiner] opined that Jessica 'was already in the ground attempting to push through the bags while she was being buried . . .'(V114, R5495-96)," purportedly quoting accurately from the doctor's testimony. (Answer Brief, pp. 17-18) However, this statement is completely taken out of context to change its entire meaning, leaving out the crucial last part of that sentence (and replacing it with ellipses),"but I can't say that

definitively," and the crucial first sentence of his answer that it was impossible for him to say. What the whole text of the medical examiner reveals is that, although the dirt under the victim's fingernails *could* be indicative that she was in the ground, it was impossible to tell this since the dirt may have been there only because of the decomposition of the body and the resultant loss of the nails:

> A: *Well, it's not possible to say definitively whether she was already in the ground when she pushed her fingers through the bag or not.* Certainly we know that she was alive when she was in the bags, at some point while she was in the bags she had to push her fingers through there. There's a lot of sandy dirt around the fingers and under the nails, but, again, decomposition is such that her nails is – her nails are starting to actually come off of the skin. So while there is dirt under her fingernails that would be indicative that she was already in the ground and attempting to push through the bags while she was being buried, or had been buried, I can't say that definitively, that is, I can't say that to a hundred percent, because the degree of decomposition is such that her fingernails are no longer attached to her fingers completely. (Vol. 114, T 5495-5496)

Similarly, the state makes the over-simplified statement that "there was not enough information to determine if anything had been placed over her mouth or not." (Answer Brief, p. 17) In doing so, the appellee omits the basic part of the doctor's answer that, there being no injuries to the mouth or neck, there was thus "no evidence" of any gagging, covering of her mouth, or strangulation (but that it was still *possible* that there *could* have been some covering but wholly without any

force to cause injuries to the area. (Vol. 114, T 5488-5489, 5501)

Next, the appellee also over-simplifies the medical examiner's discussion about the amount of time for the victim to lose consciousness, again incorrectly implying as fact that the victim was buried while alive and conscious and that she "would have taken shallow breaths" from being compacted by the dirt. (Appellee's brief, pp. 24-25) The state omits from its innuendo that the doctor testified that unconsciousness would have occurred within a minute and a half *of her being placed in the bags* and that she could have died or been unconscious before even being placed in the ground and before any consequences of being buried. (Vol.117, T 5890-5894)

The appellee, in an attempt to counter expert testimony regarding the fact that Couey experienced hallucinations, cites in footnote 35 to a 1995 psychological screening "result" that there were no hallucinations present. (Appellee's brief, p. 28) However, the state omits the fact that these "screening results" were not scientifically accepted tests, with the doctor and even the state attorney referring to them as "quick and dirty tests." (Vol. 118, T 6029, 6035-6036) Also, it is clear from testing during that 1995 time frame, that Couey was attempting to hide any evidence of his mental illness, hence he would not have admitted to any hallucinations during the "dirty" screening. (Vol. 118, T 5990)

SUMMARY OF ARGUMENTS

Point I. The court erred in denying the defendant's motion to suppress fruits of the illegally obtained confession. The state has the burden to establish that the evidence would have been inevitably discovered and has not adequately shown that it would have been.

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

Point III. The trial court erred in denying Appellant's cause challenges of potential jurors 002, 2699, 0865, 1496, and 1553. Appellant was forced to exhaust his peremptory challenges on strike several of these jurors. When the trial court denied his request for additional peremptory challenges, several objectionable jurors were seated on the jury.

Point IV. By forcing the defendant to proceed with counsel that was unprepared, after the State's late discovery of 960 pages and 12 witnesses, the trial court denied the defendant's constitutional rights to a fair trial, to due process, and to effective assistance of counsel.

Point V. The trial court erred by unconstitutionally limiting his cross-

examination of state's witnesses to show bias, motive, and lack of credibility.

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

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

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

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

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

ARGUMENT

POINT I.

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

The appellee claims in its brief on Point I that "Couey's argument re-writes the evidence;" contains "misleading claims;" and "is not what the testimony was." (Appellee's brief, p. 48, 53) The Appellant stands by his brief and the facts contained therein; all recitation of facts therein cite to the specific pages of the record. To the contrary, it is the state who misreads the facts.

The state complains that the Appellant has omitted any reference to hearsay testimony regarding an alleged preliminary match of the victim's DNA on Couey's mattress, ignoring Appellant's reference to that testimony on page 49 of the Initial Brief. Instead, the state cites to Vol. 59, R 44-45 as further evidence of that oral, preliminary result; yet that report indicates a DNA test done in November 2005.

Moreover, the state claims that the photographs reviewed by FDLE Technician Stephen Starke at trial were those taken by Police Detective Cannady on March 14, 2005 (before the illegally obtained confession). The state says:

> That witness did not testify that he took any photoraphs, and, while there is a matteress 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. [FN 47]
>
> > [FN47] 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.

(Appelle's Brief, pp. 53-54) However, the testimony appellee refers to conerns a different set of photos (State's Exhibits 14 and 15), *not* the ones taken by Stephen Starke on March 18, 2005 (State's Exhibit 46), wherein he notes a mattress and pillows still present in the bedroom. (Vol. 112, T 5242-5246 [wherein Starke tells the state attorney that the photographs "truly and accurately depict the scene" as he saw it on the evening of March 18th]) Further, the assistant state attorney in his closing argument to the jury references the photos as those taken by Starke on March 18th. (Vol. 116, T 5716 [Prosecutor: "Forensic Technician Stephen Stark from the Florida Department of Law Enforcement . . . told you these were his photographs that he took on State's 46 back on March the 18th of 2005 when the Florida Department of Law Enforcement went up to Citrus County to aid and assist

the Sheriff's Office there with the processing."])[1]

The state (claiming a different argument by Appellant on appeal as was made below) also fails to note that the defense made specific argument to the trial court below about the November 2005 DNA report from FDLE that the state had entered into evidence at the suppression hearing, contending that this showed the DNA testing on the mattress was completed after the illegality. (Vol. 61, T 8)

Further, the state totally ignores the remainder of Appellant's argument against a finding of inevitable discovery contained at pp. 50-53 of the Initial Brief of Appellant, that, "even if the police testimony can be believed about when they received some word on the victim's DNA, that fact does not show that the police would have found the dig site." As urged there in the Initial Brief, the investigation was *not* in such a posture that facts already in police possession would assuredly have led to the evidence notwithstanding the police misconduct. The State has failed to show the lawful means which made discovery inevitable were being "actively pursued prior to the occurrence" of any illegal conduct; no ongoing ground search was being actively pursued in the area, it already having been completed.

[1] Further, the state's claim in its footnote 54 (Answer Brief, p. 54) that "it does appear that the mattress made several trips" to the FDLE lab contains no record citations and there was no evidence or testimony presented below to support this bare assertion.

(*See* Initial Brief, pp. 50-53, and the cases cited therein) The police investigation here, the competent evidence demonstrates, was not in the required posture to be able to prove inevitable discovery; all that exists is mere speculation and bald assertions by the police. The evidence must be suppressed and a new trial ordered.

POINT II.

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

First, the state cites to several unpublished federal cases (without noting to this Court that they are unpublished and hence of no precedential value) from the 1990's and early 2000's to claim that the exists no federal constitutional claim here.[2] First, the appellee cites to *Wallace v. Price*, 2002 WL 31180963 (W.D. Pa. Oct. 1, 2002), claiming it to be "a federal district court in Pennsylvania" decision. However, this citation is merely to the unpublished findings and recommendations

[2] *See* Fed. Rules of App. P. 32.1 (2007); 13 Fed. Prac. & Proc. Juris.3d § 3506; *Sharrieff v. Cathel*, 2009 WL 2257268, 4 (3rd Cir. N.J. 2009); and *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001), indicating that unpublished opinions (especially those prior to 2007, when the rule was amended) are of little or no precedential value (partly because they are not afforded the same care and detail in their preparation).

of the magistrate, *not* of the court itself. Additionally, the issue which the magistrate was considering was not the substance of the claim, but merely a federal procedural default by the habeas petitioner who did not argue the issue in his direct appeal to the state supreme court, as well as being procedurally barred by *Teague v. Lane*, 489 U.S. 288 (1989) (federal courts should not grant habeas relief when a petitioner relies on a new rule of constitutional law not recognized at the time of his state court conviction (which for *Wallace* was in 1985). The federal magistrate also notes in his recommendations that outrage over the infamous Rodney King trial (a 1992 case involving the beating of black man by white police officers, where venue had been changed to a mostly-white community and the officers were acquitted) brought about changes in the law in this area.

Further, the state cites to a later, also unpublished opinion, *Wallace v. Price*, 243 Fed. Appx. 710 (3rd Cir. Pa. 2007) (again, without noting to the Court that it is unpublished). However, nowhere in this decision is the venue issue addressed.

Next, the state cites to *Rogers. v. Director, TDCJ-ID*, 864 F. Supp. 584 (E.D. Tex. 1994). However, this decision turns merely on the fact that the defendant never objected at trial to the issue of demographics of the county to which venue was changed, and no evidence was presented that indicated that the venue change would possibly affect his constitutional rights. The court there ruled simply that,

absent an objection and presentation of such evidence, a trial court is not required "to consider the demographic composition *sua sponte* every time a venue change is requested." 864 F. Supp. at 598.[3] Thus, this case does not apply to the situation where, as here, there was such an objection (repeatedly) and evidence of the disparity in demographics of urban Hispanic Miami-Dade County as compared to rural white Citrus County was presented.

Next, the state's case of *United States v. Patton*, 2006 WL 2038628 (N.D. Miss. July 19, 2006) is also an unpublished federal trial court decision which has no applicability here. There, the federal district court rejected a defendant's claim regarding the demographic composition of the district's division, ruling that (a) under federal rules there is no "divisional venue" within a district, the only requirement under the rule being consideration of "the convenience of the defendant and the witnesses, and the prompt administration of justice," and (b) that the demographic statistics presented in the case showed little difference between the one division whereto venue was changed and the whole of the district, hence there was a "reasonable representation" of the community and no constitutional violation. In Couey's case, however, the demographic statistics presented by trial counsel

[3] Additionally, the Fifth Circuit appeal from this case, cited by appellee, does not address at all the venue change issue.

below show urban Miami-Dade County could not be more different that rural Citrus County. (*See* Initial Brief, pp. 59-60; Vol. 25, R 4815-4827; Vol. 69, T 84-86)

The state also cites to *State v. Timmendequas*, 737 A.2d 55 (N.J. 1999). (Appellee's brief, pp. 61-65) That case, however, dealt solely with racial demographics, ruling that racial demographics, while "a particularly weighing factor" should not be the *sole* factor in a change of venue decision. Here, we are dealing with more than simply racial disparities, instead adding just about every other disparity there is between the two counties: population, urbanization, language and culture, and age. The *Timmendequas* court also started with the proposition that New Jersey did not have any specific requirements about the demographics of a venue change, but merely relied on persuasive guidelines from the ABA (whereas Florida has a specific statutory requirement regarding demographic composition). Further, *Timmendequas* merely holds that it is not improper for a trial judge to take account of the inconvenience that a change of venue would pose to the crime victim, "provided that the constitutional rights of the defendant are not denied or infringed on by [the judge's] decision." *Timmendequas*, 737 A.2d at 76. *See Cooper v. District Court*, 133 P.3d 692, 701_702 (Alaska App. 2006).

Further, regarding the unequivocal requirement regarding venue changes of Section 910.03, Florida Statutes, the state admits that priority must be given to a

county with a similar demographic composition to that of the original venue. (Appellee's brief, pp. 58, 60) However, the appellee attempts to slough off this mandate by saying that, since no Florida cases have addressed this provision, "it is impossible to say anything against the claim except that there is nothing to be said for it." (Appellee's brief, p. 58) However, the Appellant claims that nothing more needs to be said for it – the statute says it all, requiring under Florida law that the court must give priority to any county with a similar demographic composition, upon motion of any party. Here, the trial court specifically declared he was not going to do so, settling on Miami-Dade without consideration or priority to counties similar to Citrus. The state baldly and erroneously claims that trial court recognized the requirement of the statute. (Appellee's brief, pp. 58-60) However, this is not true – the trial court clearly indicated orally that the statute gave him absolute discretion in this matter (Vol. 69, T 45, 46, 48, 92-93), and ruled in its written order that the statute in its entirety did not apply to the instant situation (but only to situations where the county in which the crime occurred was unknown). (Vol. 25, R 4830)

The trial court is required under this statute and the constitution to be the gate-keeper, protecting the defendant's rights to a jury venire made up of a representative cross-section of his community during a venue change. The court absolutely renounced this function. The discriminatory results shown by the vast

differences between Citrus and Miami-Dade Counties establishes a prima facie case of a violation of Couey's federal and Florida constitutional and statutory rights, which the state is not able to overcome.

As urged in the Initial Brief of Appellant, pp. 54-63, the trial court violated state and federal constitutional law as well as Florida statutory law by refusing to give priority to a venue change to a demographically similar county, fairly representative of the community in which the crime occurred. As recounted there, this was the whole purpose behind Article III, section 2 of the United States Constitution, and a specific protest to the British practice of transporting American colonists to England or other colonies contained in the Declaration of Independence. (Initial Brief, pp. 57-58) The trial court's refusal to comply with the statutory and constitutional requirements of the right to trial by an impartial jury drawn from a representative cross-section of the community requires reversal here. A new trial must be held.

POINT III.

THE TRIAL COURT ERRED IN REFUSING TO STRIKE TWO JURORS FOR CAUSE, WHO, POSSIBLY HAD KNOWLEDGE OF APPELLANT'S SUPPRESSED STATEMENTS AND ERRED IN REFUSING TO STRIKE THREE JURORS WHO EXPRESSED DEEP_ROOTED PERSONAL BELIEFS IN FAVOR OF THE DEATH PENALTY, GIVING RISE TO DOUBTS ABOUT THEIR IMPARTIALITY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

In the Answer Brief, the state claims that according to the Initial Brief, Juror 0114 was the one "objectionable juror" who served on the jury. (Answer Brief, p. 69). However, in the Initial Brief, Appellant clearly stated that defense counsel "identified several jurors that he would have exercised the additional peremptory challenges against, namely jurors 1496, 1553, and 0114." (Initial Brief, p.76) The objection to these specific jurors was properly preserved, where these three sat on the jury after defense counsel either attempted to challenge the juror for cause (jurors 1496 and 1553) or otherwise objected to the juror after peremptory challenges had been exhausted (juror 0114). *See Trotter v. State,* 576 So.2d 691 (Fla. 1990).

The state also argued that knowledge that the victim had allegedly been buried alive was not sufficient to disqualify jurors 1496 and 2699, because "being buried alive" was nonspecific, general knowledge. (Answer Brief, pp.70-71) While mere general knowledge is not a sufficient basis for a cause challenge, a little girl having been killed by being "buried alive" is, fortunately, exceedingly rare, is rather non_specific information, and became the focus of the State's case at trial even though the medical examiner was unable to determine for certain whether

she was being buried alive, or was already unconscious or dead.

The state argued that cause challenges to juror 002 and 865 were properly denied. (Answer Brief, p.71) Appellant had argued that these two jurors should have been excused, because of their inability or reluctance to consider recommending a life sentence. (Initial Brief, pp.74-76) In the Answer Brief, the state asserted that juror 002 and juror 865 were both qualified to serve on the jury and in support of this contention the state cited to the jurors' responses to the prosecutor's general questions about the death penalty. (Answer Brief, p.71) As argued in the Initial Brief, when later specifically questioned by defense counsel about the death penalty juror 002 expressed reluctance to sentence Couey to life and juror 865 flatly stated that he would recommend death. (Initial Brief, pp.75-76) While it is possible for a juror who expressed a general reluctance to give a life sentence to be rehabilitated if they later agree to follow the law, the reverse is not true. Here jurors who initially seemed willing to follow the law, later, under close questioning, revealed their biases. Since the purpose of voir dire is to uncover such biases and prejudices, to permit earlier general sentiments to trump later specific statements would entirely subvert the process of voir dire. Both of these jurors should have been excused for cause as neither was capable of being a fair and impartial juror.

POINT IV.

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

Defense counsel repeatedly moved for a continuance after the state turned over 960 pages of discovery and listed 12 additional witnesses only a month before Couey's trial was to begin. (Initial Brief, pp. 78-83) In the Answer Brief, the state argued that the trial court did not abuse its discretion in denying the motion, because, in the state's opinion, the belated discovery did not merit a continuance since: 1) the state had announced its intention to only call two of the newly listed witnesses and the others were listed out of an abundance of caution, 2) the vast majority of the documents were personnel records, 3) defense counsel had previously prepared to address other incriminatory statements from Couey, which were ultimately suppressed, therefore preparing to address these new statements would require "little effort." (Answer Brief, pp. 72-74) Appellant asserts that, given the amount of discovery, the short time remaining before trial, and the other logistical circumstances facing defense counsel, it was an abuse of the trial court's discretion to deny the motion for continuance, especially where the trial court's own

actions exacerbated the situation and cost defense counsel precious man-hours.

Although the state did announce its intention to only call two of the twelve newly listed witnesses, this did not relieve defense counsel of their obligation to investigate *all* of the new evidence in order to prepare for trial. Florida Bar Rule 4-1.1 sets forth the standard of competent representation that all attorney have sworn to provide:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The obligation to fully investigate the aspects of a client's case is more fully explained in the comments to Fla. Bar Rule 4_1.1, a portion of which provides:

> **Thoroughness and preparation**
> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake;... (emphasis in original)

All of the new evidence pertained to incriminating statements made by Couey, so in order to prepare for trial, defense counsel had to investigate the circumstances surrounding the statements in order to determine the next step in trial preparation, e.g. whether to move to suppress the statements as involuntary, attack the credibility

of the witnesses, or alter trial strategy should the statements prove to be especially damaging. Defense counsel could not fulfill his ethical and constitutional obligation to Couey, by merely relying on the State's assurances.

This duty to investigate extends to a thorough review of the 960 pages of discovery. In the Answer Brief, the state is dismissive of the onerous task, because the documents are mostly personnel records. (Answer Brief, pp.72-74) But Appellant asserts that where the newly discovered evidence is incriminatory statements that are being offered through the testimony of jail guards, there can be no more important documents to consider than the personnel records of said jail guards. Here, that was especially true, since Officer John Read, one of the newly listed witnesses who testified at trial about the incriminatory statements, had previously been fired as a guard when it was discovered he had lied on his employment application. (Initial Brief, pp. 90-92)

The state also argued that defense counsel did not need additional time to work the statements into trial strategy, because defense counsel had previously been prepared to address other incriminatory statements from Couey, which were ultimately suppressed. (Answer Brief, pp. 72-74) As argued above, Appellant asserts that defense counsel has an ethical obligation to adequate prepare for trial. Although the statements may have been similar to an earlier ones, the statements

were not identical. The statements were made under different circumstances that may have affected the voluntariness of the statements, and, most importantly, the witnesses were not the same, so it was necessary to fully investigate the credibility of the new witnesses.

Furthermore, though the state describes the statements as being less detailed than the suppressed statements, they still contained a great deal of detail about the offense. Corrections Officers John Read and Nathalia Windham, two of the newly listed witnesses, testified as to Couey's incriminating statements. The officers testified that Couey told them that he had previously noticed Jessica from his window and, in the middle of the night, went to the victim's trailer (entering by the screen door, according to Windham) and, on an impulse, told the awakened girl he was taking her to see her father, and that she left voluntarily with him (asking to be permitted to take her stuffed dolphin with her) and went to his trailer (not recounting, to their recollection, how they entered his trailer). (Vol. 114, T 5559-5560; Vol. 115, T 5590) Windham claimed that Couey told her the Lunsfords had a small dog in their trailer, but that the dog did not bark. (Vol. 115, T 5590) The corrections officers further recounted that Couey had the victim in his trailer for three days, engaging in sex with her on the first day, and claiming that they would just lie on the bed, "hanging out" conversing or playing "with him sexually"

(something she knew a lot more about than a nine-year-old should have). (Vol. 114, T 5561-5562; Vol. 115, T 5590-5591) Couey told them that the victim had bled and that after sex, she had to urinate. (Vol. 114, T 5563; Vol. 115, T 5591) Couey claimed that Jessica was in the house and knew when the police came to the trailer, but that she hid in the closet and was quiet. (Vol. 114, T 5561-5562; Vol. 115, T 5591) Couey claimed to Windham that his sister and Dittrich knew that Jessica was there and that Dittrich had even spent some time with her in the defendant's bedroom. (Vol. 115, T 5592) According to the corrections officers, after the police came to the trailer, the defendant panicked. Not being able to kill her with his own hands, he dug a hole on the third day, had her step into one garbage bag (according to Windham, telling her he would take her home but did not want anyone to see her crossing the street) and placed a second bag over her head, and buried her. (Vol. 114, T 5563-5564; Vol. 115, T 5591, 5592-5593)

The state insinuates that defense counsel should have been able to quickly incorporate the additional information, but the state fails to consider that the discovery not only created additional work for defense counsel, it created the additional work at the worst possible time since counsel was busy preparing to go to Miami for the duration of the trial. Plus, not only did counsel have to cope with the additional work, but they also lost precious time trying to get Mr. Vaughn, the

private counsel appointed by the trial court in lieu of granting a motion for continuance, up to speed on the case. (Vol. 28, R5243-5255) The trial court abused its discretion in denying the motion for a continuance and Couey should be granted a new trial.

POINT V.

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

The state contends in its brief that the defendant's precluded cross-examination of state witness Mark Lunsford was irrelevant for any purpose other than "to embarrass or harass" him. (Appellee's brief, pp. 75-77) However, the state never addresses the defense counsel's contention that both areas of Lunsford's proposed impeachment were relevant areas of cross-examination to show the witness's bias and possible motivation for testimony:

> MR. LEWAN [Defense Counsel]: As to paragraph 2, Judge, we feel any witness who takes the stand, their financial interest and their gains or losses are relevant to the jury's consideration of their testimony. And what the State is saying is that in this case Mr. Lunsford's financial situation isn't relevant.
>
> But we'll be able to show that after the death of his daughter he's quit working, yet all his expenses are paid. He bought new

vehicles. He has $40,000 in the bank. They have this Lunsford Foundation but it is not a not_for_profit organization.

I think the future cash flows that he's enjoying right now do depend largely on how he comes across in this trial. And I think it is fair for the jury to know about them.

THE COURT: Paragraph 2?

MR. LEWAN: Paragraph 2, Judge, the evidence is that child pornography sites were accessed in the Lunsford home the night before Jessica Lunsford turned up missing.

I think that on its face is relevant but also, in spite of the State's arguments to the contrary, these type of downloaded files that are then later trashed have been the basis for child pornography charges in front of this Court in cases we have worked together.

I think it shows favorable treatment of this witness. And I think this is very relevant if he takes the stand.

(Vol. 62, T 15-16) Both of these matters are relevant for cross-examination to reveal to the jury, the fact-finders, any areas of possible bias, prejudice, motive, or credibility of the witness. (*See* Initial Brief of Appellant, pp. 86-90)

Regarding the testimony of Corrections Officer John Read, the state ignores the relevancy of the excluded cross-examination, claiming merely that the old crime for which he was convicted was simply a misdemeanor not involving dishonesty. The state misses the point: this witness was terminated from his employment as a corrections officer, the capacity in which his testimony was related for falsifying his corrections officer employment application, having failed to disclose the prior marijuana conviction. Such testimony is relevant cross-examination as to the

witness's credibility of his court testimony, stemming from his corrections officer employment. The proposed cross examination of Read, as argued below and in the Initial Brief was proper not under a Section 90.610, Florida Statutes (impeachment with prior crimes) analysis as erroneously considered by the court and the appellee, but instead as evidence of the bias and credibility of the witness. As discussed with case citations in the Initial Brief, pp. 90-92), while the crime indeed did not involve dishonesty, the failure to divulge it on the employment application does. Any adverse circumstances involving his employment as a corrections officer should clearly be relevant to the credibility of his testimony regarding matters he attributes to Couey during the performance of those duties as a guard, including his honesty with regard to his employment. Defense attempted to discredit the guard by questioning him regarding his failure to report these conversations with the defendant in the jail log book, despite the logging of such mundane conversations and occurrences as a religious discussion regarding the Book of Revelation and the defendant watching Dr. Phil on television. The elicitation of testimony regarding Officer Read's dishonesty on his corrections officer employment application would further place his credibility in question regarding the truthfulness of his account of Couey's alleged admissions. Precluding the jury from hearing this evidence about Read deprived the jury of the tools necessary for them to judge his credibility and

bias with regard to his testimony about Couey.[4]

The state cites to *Smith v. State*, 7 So.3d 473 (Fla. 2009) for the proposition that this testimony is irrelevant. (Appellee's brief, p. 77) However, the ruling in that case was clear that a defendant *is* permitted to question witnesses regarding their veracity and bias, just not regarding details of prior convictions to which the witness had admitted. *Id*. at 500. Similarly, *Weatherford v. State*, 561 So.2d 629 (Fla. 1st DCA 1990), also cited by the state, is fact specific, ruling that the reason why the witness's children from a prior marriage were not currently living with her was totally collateral to the facts of Weatherford's case and did not serve to impeach that witness's credibility.

The court unconstitutionally limited defendant's cross-examination of these two witnesses. A new trial is required.

POINT VII.

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

[4] *See also* cases cited in the Initial Brief regarding the admissibility of evidence that a police officer involved in the arrest of the defendant had been suspended from the force, even though for conduct not involving this defendant. (Initial Brief of Appellant, pp. 92-93)

While the state recognizes that "the jury was entitled to hear relevant evidence on the issue of voluntariness," the state maintains that it somehow matters that there was no strict formal "interrogation" of the defendant by the jail guards in this case. Citing no caselaw, the state argues, then, that the "invocation of rights" form was thus irrelevant. (Appellee's brief, pp. 83-88) However, the appellee fails to note that the defense below was arguing that the statements were made under circumstances that were the functional equivalent of interrogation, the defendant totally isolated from all but his guards, who discussed with Couey religion and what he was alleged to have done. (Vol. 114, T 5442-5448)[5] The "invocation of rights" form under the defense's theory of involuntariness and his argument below, however, was relevant in that Couey signed a document filed with the jail facility saying that he did not wish to speak with law enforcement personnel. Such a statement of his intentions surely bears on the involuntariness of the statements he gave to the correctional officers under the arguably coercive circumstances of his confinement, matters a jury is entitled to hear under the law cited in the Initial Brief (Initial Brief, pp. 99-102) and acknowledged by the state.[6]

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[5] *See also* the testimony of Dr. Berland that the conditions of defendant's confinement, when coupled with his mental illness and paranoid thinking broke down Couey's inhibitions and became circumstantially coercive, propelling him to talk to the guards about the crimes. (Vol. 115, T 5634-5639)

[6] The appellee wrongly accuses counsel for Appellant of "omitt[ing] a significant portion of the arguments of counsel and the trial court's ultimate ruling." (Appellee's

The court's ruling that the defense was precluded from making argument and introducing the invocation of rights form improperly prevented him from urging the jury to consider the statements to corrections officers involuntary. This is a proper matter for the jury to consider. A reversal for a new trial is required.

POINT VIII.

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

Just as below, the state would have us speculate that there must have been an involuntary touching of Jessica inside the Lunsford trailer, despite the lack of any evidence whatsoever of any such touching. (Appellee's brief, pp. 89-90) The appellee maintains that Couey's confession provides direct evidence of a battery. As discussed in the Initial Brief, however, nowhere does Couey say he touched her while they were in her trailer. The state's evidence showed merely that the defendant entered the Lunsford trailer and that Jessica left voluntarily, the defendant, according to his statements, telling her he was taking her to her father and allowing her to retrieve her stuffed animal to bring along. (Initial Brief, pp. 29, 107; Vol. 114, T 5559-5560; Vol. 115, T 5590) There was no evidence or testimony of a battery in

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brief, p. 83) Rather than the verbatim six pages of direct quotation reproduced in the appellee's brief (Appellee's brief, pp. 83-88), the Appellant accurately summarized the counsels' argument and the trial court's ruling, concluding with a short, direct quote. (Initial Brief, pp. 100-101) Hence, nothing relevant was omitted.

the course of the burglary, the remaining counts of the indictment all occurring elsewhere, separated by time and space.

The conviction for burglary with a battery must fall and the case remanded for imposition of a judgment and sentence for the lesser offense of burglary of a dwelling.[7]

POINT IX.

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

The appellee asserts that, even though ultimately rejected by the trial court, there was competent, substantial evidence of a prior violent felony to justify giving the jury an instruction on this aggravating circumstance, as the case law permits. (Appellee's brief, pp. 92-94) However, it must be remembered that case law clearly finds this aggravating factor inapplicable *as a matter of law* where the contemporaneous crime was committed on the same victim of the murder during the same criminal episode. *See Wasko v. State*, 505 So.2d 1314, 1317_1318 (Fla. 1987);

[7] The state incredibly contends, Appellee's brief, p. 90, n.67, that "even if this Court were to conclude that the battery element is insufficiently proven," it would not "require a remand for imposition of a sentence for burglary of a dwelling." Since a battery committed in the course of a burglary of a dwelling elevates the crime from a second degree felony to a first degree felony punishable by life (§ 810.02, Fla. Stat.), and since the court sentenced Couey to life imprisonment on this count, the case must be remanded for imposition of a sentence of no more than 15 years.

Elledge v. State, 613 So.2d 434, 436 (Fla. 1993); *Bruno v. State*, 574 So.2d 76, 81 (Fla. 1991). (Initial Brief, p. 108-109)

The only evidence of a violent felony in this case was the contemporaneous crimes on the murder victim – hence, this factor is *not* supported by competent, substantial evidence (or any evidence for that matter!) The assistant state attorney below ultimately admitted this in his sentencing memorandum wherein he correctly concedes that the only victim of a violent felony here was the homicide victim, hence the factor was inapplicable. (Vol. 49, R 9179) The appellee's brief confuses the issue by reciting some *additional* concerns the state's sentencing memo mentions about a possible doubling of this factor with another aggravator. However, that is not what is at issue here and is thus totally irrelevant to the argument.

This is not some case where there was some competent, substantial evidence of the prior violent felony aggravator which would allow for a jury instruction, even if ultimately rejected by the trial court. This is a case where an aggravating circumstance that is not present as a matter of law was presented to the jury for their consideration. The jury's recommendation was thus tainted by this improper aggravator; it was improper consideration to place before the jury.

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

POINT X.

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

A. The Trial Court Considered An Inappropriate Aggravating Circumstance

On appeal, the defendant claims that the court inappropriately doubled the circumstances of avoid arrest and CCP, utilizing the same aspect of the crime to support both aggravators in this case. The Initial Brief of Appellant concedes that *in some cases*, these two aggravating circumstances can coexist properly where they refer to separate distinct facts of the crime, but they cannot properly coexist if they refer to the same aspects of it. This is what the cases cited by the state say; **not** that these two factors can *never* improperly be doubled (as incorrectly argued by the appellee). *Stein v. State*, 632 So.2d 1361, 1366 (Fla. 1994) (holding that a trial court can properly find both the avoid arrest aggravator and CCP in the same case, "*so long as each aggravator is supported by such distinct facts*"); *Nelson v. State*, 850 So.2d 514, 529 (Fla. 2003) (quoting *Stein, supra*). *See also Morton v. State*, 995 So.2d 233, 246 (Fla. 2008), cited in the Initial Brief of Appellant.[8]

So, while in some cases subsections (e) and (i) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, these

[8] *Cooper v. State*, 492 So.2d 1059, 1062 (Fla. 1986), cited by the state (Appellee's brief, p. 99), is not applicable here as that case was not concerned with improper doubling, but rather Cooper was contending that these two aggravators were mutually exclusive, a claim not being made here.

two aggravators, *as recounted by the judge*, focus on the same facet of the crime. Both here attempt to focus on the alleged plan for the murder. (Vol. 50, R 9292-9294) As such, it is an improper doubling of the CCP and avoid arrest aggavators. Hence, one of these aggravating circumstances, either CCP or to avoid arrest, must be stricken as improper doubling under the facts of this case.

As urged in the Initial Brief, despite the remaining aggravating factors, all of the mitigating circumstances present here, combined with the powerful mental mitigation, call for a sentence of life imprisonment. This Court is asked to vacate the death sentence and remand for imposition of another life sentence.

CONCLUSION

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

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

_____
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and _____
MEGHAN ANN COLLINS

ASSISTANT PUBLIC DEFENDERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Hon. Bill McCollum, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to Mr. John Evander Couey, Inmate # 063425, Florida State Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, this 13th day of August, 2009.

CERTIFICATE OF FONT

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

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JAMES R. WULCHAK