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IN THE SUPREME COURT OF FLORIDA

BILL PAUL MARQUARDT,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC12-555
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

BILL MARQUARDT,	)	
	)	
Appellant,	)	
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STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

STATEMENT OF THE CASE

On December 15, 2006, the Grand Jury in and for Sumter County returned an indictment charging Appellant with the first degree murder of Margarita Ruiz and the first degree murder of Esperanza Wells in violation of Sections 782.04(1)(a)1 and 775.087(2)(a)1, Florida Statutes (2000) and one count of burglary of a dwelling with a firearm in violation of Sections 810.02(2)(b) and 775.087(2)(a)1, Florida Statutes (2000). (Vol. I, 1-2) Over the course of the next six years, Appellant requested to represent himself at trial; the trial court conducted no less than 12 hearings and determined each time that Appellant was competent to represent himself and allowed him to proceed pro se. (Vol. XI,

2024-2029; Vol. XII, 2301; Vol. XII, 2235; Vol. XII, 2406; Vol. XIII, 2436-2450, Vol. XIII, 2478-2521; Vol. XIII, 2567-2592; Vol. XIV, 2634 et seq; Vol. XIV, 2680 et seq; Vol. XIV, 2721 et seq; Vol. XVI, 6-11; Vol. XVIII, 250 et seq) On 11 occasions, Appellant filed motions to suppress evidence seized from searches of his cabin and automobile. (Vol. I, 101-102; Vol. I, 115; Vol. II, 209-213; Vol. II 241-255; Vol. II, 259-274; Vol. II, 311-326; Vol. II, 382-389, 390-519; Vol. III, 547-554; Vol. III, 558-566; Vol. IV, 668-707; Vol. VII, 1293-1406) Appellant additionally filed numerous motions requesting that a suppression hearing be scheduled and that he be allowed to present evidence with regard to the motions. (Vol. I, 172; Vol. I, 199; Vol. II, 209-213; Vol. II, 218; Vol. II 233; Vol. III, 520-521) The state filed responses to the motions on four occasions, each time arguing either that the motion was legally insufficient or in the alternative that Appellant was collaterally estopped from challenging the searches of his cabin and car. (Vol. II, 214-217; Vol. II, 336-338; Vol. IV, 744-745; Vol. VIII, 1408-1409) Without ever holding an evidentiary hearing, the trial court denied each of Appellant's motions as either legally insufficient, moot, or collaterally estopped. (Vol. II, 221-225; Vol. II, 292-293; Vol. II, 362-363; Vol. II, 375-377; Vol. II, 380-381; Vol. IV, 629-633; Vol. IV, 746-747; Vol. IV, 787-788; Vol. IV, 789-790; Vol. IV, 791-792; Vol. VIII, 1433-1434)

Appellant proceeded to jury trial on October 3-12, 2011, with the Honorable William Hallman, Circuit Court Judge, presiding. (Vols. XVI-XXVII, 1-1378) After deliberations, the jury returned verdicts finding Appellant guilty as charged on all three counts. (Vol. XXVII, 1377-1378; Vol. IX, 1757-1758, 1759-1760, 1761) After the verdict was returned, Appellant waived the penalty phase portion of his trial. (Vol. XXVII, 1382-1396) Over Appellant's objection, the Court appointed Appellant's stand-by counsel, Appellant's two investigators, and Dr. Harry Krop to prepare mitigation for him. (Vol. XXVII, 1401-1402) On February 1, 2012, Appellant appeared before Judge Hallman for the *Spencer* Hearing. (Vol. XI, 2019-2100) On February 28, 2012, Appellant again appeared before Judge Hallman for sentencing. (Vol. XIII, 2525-2565) After discussing the aggravating factors and the mitigating factors, Judge Hallman concluded that the appropriate sentence was the death penalty for each of the murders and life imprisonment for the burglary charge. (Vol. XIII, 2554; Vol. X, 1994-2007; Vol. XI, 2011-2017)

Appellant filed a timely notice of appeal on February 28, 2012. (Vol. XI, 2102) On March 7, 2012, Appellant appeared before Judge Hallman and requested to proceed pro se on appeal and following a *Faretta* Hearing, Judge Hallman granted Appellant's request. (Vol. XV, 2849-2868) However, on April 30, 2012, pursuant to an order relinquishing jurisdiction, Judge Hallman appointed the

Office of the Public Defender to represent him on appeal. (Vol. XV, 2836-3845)

STATEMENT OF THE FACTS

Pamela Ruiz is married to Ruki Ruiz. (Vol. XVIII, 288) Ruki's sister-in-law was Esperanza (Hope) Wells and his mother was Marguerite Ruiz. (Vol. XVIII, 289) In March, 2000, Pamela and Ruki and two children - - Paige, age 3, and Trevor, age 1. (Vol. XVIII, 290) In 2000 when Pamela and her husband went to work, Pamela took the children to Marguerite's and Hope's for them to watch the children. (Vol. XVIII, 291) Marguerite and Hope lived in Webster in Sumter County. (Vol. XVIII, 291) On March 15, 2000, Pamela dropped the children off at approximately 6:50 AM and went inside to talk to Marguerite about the children's party that weekend. (Vol. XVIII, 294-295) Pamela observed no damage to Marguerite's refrigerator which faced the back door as you entered the house. (Vol. XVIII, 293-295) When Pamela left, Marguerite followed and latched the door behind her. (Vol. XVIII, 295) Later that day, the Sumter County Sheriff's Department was called to the home. (Vol. XVIII, 306, 321; Vol. XIX, 374) Upon his arrival at the house, Detective Elmer Havens observed a toddler looking out through the living room window. (Vol. XIX, 374) When the officers entered, they found two small children under the table in the dining room and the proceeded to escort them from the house. (Vol. XVIII, 309, 311; Vol. XIX, 375) The officers then searched the remainder of the house and found the bodies of Marguerite Ruiz

and Hope Wells in the south-west bedroom. (Vol. XVIII, 309; Vol. XIX, 376) Fired shell casings were found on the back porch and the screen door and several bullet holes in it. (Vol. XVIII, 323; Vol. XIX, 395) Additionally, the upper door of the freezer had a bullet hole in it and there was blood splatter on the front of the refrigerator. (Vol. XIX, 395) The police determined that Marguerite had been standing in front of the screen door when she got shot twice through her lung and also received a graze shot wound of the thumb. (Vol. XIX, 403-404) With the first two gun shots entering her chest, Marguerite's internal jugular vein was severed. (Vol. XIX, 420-421) Apparently Ruiz then ran to the bedroom where Hope was still in bed. (Vol. XIX, ??) The perpetrator apparently followed Ruiz and shot her again through the back which severed the spine, spinal cord and aorta. (Vol. XIX, 416-417) Most probably, Marguerite immediately dropped when she was shot due to the severing of the spinal cord. (Vol. XIX, 418) Ruiz had three stab wounds to the left side of her neck. (Vol. XIX, 395) Marguerite Ruiz died from multiple gunshot wounds with a contributing factor of sharp force injuries to her neck. (Vol. XIX, 422) Inside the bedroom next to the body of Marguerite Ruiz, the police found the body of Hope Wells. (Vol. XIX, 376) Hope had a single gunshot wound to the left portion of her face which was inflicted from a distance of 10 to 18 inches. (Vol. XIX, 425-428) The gunshot perforated Hope's jaw bone and

severed both the carotid and jugular veins. (Vol. XIX, 429) It is doubtful that Hope could have survived more that 10 seconds before lapsing into unconsciousness. (Vol. XIX, 429) Paige also had eight stab wounds to the left side of her neck which severed the same two arteries as the gunshot did. (Vol. XIX, 395, 429-430) The cause of death of Hope Wells was a gunshot wound to the face with contributing factor of stab wounds. (Vol. XIX, 431) Neither victim suffered scratches or punch marks and there was no sign of sexual assault. (Vol. XIX, 431-432) Both Marguerite and Hope would have died even without any stab wounds. (Vol. XIX, 445)

The officers processed the scene and lifted several latent prints none of which matched Appellant's. (Vol. XVIII, 342) One unidentified palm print was found on the kitchen counter top near the back door and although it was of comparative value, it was never identified. (Vol. XVIII, 342; Vol. XVIIII, 365, 371) The officers interviewed Paige Ruiz and on the basis of what she told them issued a BOLO and prepared an affidavit for a search warrant based on the fact that Paige told them there was a black man in a green car. (Vol. XVIIII, 380, 465) The Florida Department of Law Enforcement put out a state bulletin concerning unsolved crimes and in that bulletin it stated that a four year old child witness [Paige] indicated that a black male driving a green car was responsible for the

murders. (Vol. XVIIII, 466) Some four years later, however, Paige changed her story and said that she saw a man in dark clothes in a green car. (Vol. XVIIII, 469-470) Based on his investigation, Detective Havens prepared a map of the area and indicated on the map certain houses that were known as drug houses. (Vol. XVIIII, 384-385) Detective Havens also reviewed the Highway 50 video surveillance of March 15, 2000, and neither Appellant nor his 1995 green T-Bird is on the tape. (Vol. XVIIII, 385) Blood was collected from several areas in the home and analyzed at the crime lab and identified as belonging to the victims. (Vol. XX, 488-502) Although the samples were later re-tested, the original analyst never tested Appellant for the DNA samples. (Vol. XX, 504-506) From March 2000, to June 2006 Detective Havens conducted numerous interviews none of which was fruitful. (Vol. XVIIII, 378) Subsequent DNA testing determined that Appellant could not be excluded as a possible contributor to the DNA found at the scene. (Vol. XX, 526) However, at least one of the blood samples tested included an allele that was not present in either Appellant, Marguerite, or Hope, indicating that someone else was present. (Vol. XX, 537) All of the bullets and casings recovered at the scene were examined and determined that those that could be identified all came from the same firearm, a semi-automatic 9mm luger. (Vol. XX, 547-549)

On March 18, 2000, members of the Eau Clair, Wisconsin Sheriff's Department and the Chippewa County, Wisconsin Sheriff's Department converged on a cabin in Fairchild, Wisconsin for the purpose of arresting Appellant and conducting a search of the cabin. (Vol. XXI, 659, 612-615, 635, 659; Vol. XXII, 719, 720) Appellant was placed under arrest at approximately 9:30 AM. (Vol. XXI, 625) Appellant was wearing denim pants, a denim coat, and tennis shoes. (Vol. XXI, 635, 614) Several items were seized from Appellant's pockets including cash, a brass key, plastic key card and folding knife. (Vol. XXI, 615, 636) The police took Appellant's fingerprints and palm prints for comparison to a latent print. (Vol. XXI, 618) The tactical arrest team removed the cabin's kitchen window. (Vol. XXI, 627, 655) Appellant's clothes were seized by the officers and blood was also drawn from Appellant. (Vol. XXI, 663-667) Later that afternoon, Appellant's green T-Bird was towed from the cabin to the county law enforcement building in Madison. (Vol. XXI, 668-669; Vol. XXII, 720) A search of the vehicle revealed a map a Florida and a receipt from the Fiesta Key Resort in Long Boat Key, Florida, which recorded a license plate of a vehicle belonging to Appellant. (Vol. XXII, 722-724) Although the receipt for the Fiesta Kay Resort had Appellant's name on it, the name on the registration record shows Dan Marquardt, not Appellant. (Vol. XXII, 742) A receipt from the Masters Inn in

Tifton, Georgia was found in Appellant's cabin. (Vol. XXI, 670-673) Although the receipt was found on March 15, 2000, Investigator Vogler testified that the receipt was dated March 16, 2000. (Vol. XXI, 673) Later, however, Vogler "corrected" himself and stated the receipt was not listed on the inventory of items seized on March 15, 2000. (Vol. XXI, 704)

On the March 18, 2000, search warrant for Appellant's cabin, the first item listed is any and all ammunition and firearms. (Vol. XXII, 763) However, no firearm or bullets were found during that search. (Vol. XXII, 758, 758) Despite specifically looking for firearms and ammunition, the officers did not move any of the appliances. (Vol. XXII, 763) However, a photo taken on March 18, 2000, reveals a bullet found in front of the refrigerator. (Vol. XXII, 771) Although Officer Christopher testified that on the date of the first search, there was a pile of clothing in front of the refrigerator (Vol. XXII, 760), photos taken that day do not show such a pile of clothing. (Vol. XXII, 774)

On March 29, 2000, the police arrived at the cabin to execute a second search warrant. (Vol. XXII, 787) Detective Price found something under the refrigerator and called the investigating officer to look at it. (Vol. XXII, 789) Investigator Rehrauer laid down on the floor and shined his flashlight under the refrigerator where he found a 9mm semi-automatic weapon and two yellow boxes

of shells. (Vol. XXII, 789-792) Rehrauer allowed it was easy for the bullets to be pushed under the refrigerator and that he had no problem seeing them on March 29, 2000. (Vol. XXII, 797, 802-803) An analysis of the arm rest of Appellant's green T-Bird revealed blood stains on the arm rest. (Vol. XXIII, 856) The lesser contributor to this blood could have been Appellant, but the major contributor was that of an unknown female. (Vol. XXIII, 858) In 2006, the blood stain was compared to a known sample from Marguerite Ruiz and did not match, but did match a known sample from Hope Wells. (Vol. XXIII, 860-861) A blood stain found on the jean jacket that Appellant was wearing when he was arrested was tested and it was determined that Appellant, Wells, and Ruiz could all be contributors. (Vol. XXIII, 863) The white tennis shoes that were seized from Appellant on the day he was arrested had blood on them and the major contributor was the same as the sample found on the arm rest - - Hope Wells. (Vol. XXIII, 869-870) The folding knife that was found at Appellant's cabin was tested and was found to have blood traces. (Vol. XXIII, 872) An examination of the knife revealed that it contained DNA from Appellant, Ruiz, and Wells, but the major source of the blood was from Appellant's mother, Mary Marquardt. (Vol. XXIII, 873, 881) There was also some areas that were tested on the knife that were negative for human blood. (Vol. XXIII, 884) Although some blood was found on

the socks that Appellant was wearing it was determined that the source of this was not from Ruiz or Wells. (Vol. XXIII, 879-880) Although the stain that was found in the living room of Marguerite, was analyzed and matched Appellant's DNA, although the analyst who examined it examined the extract and not the actual swab. (Vol. XXIII, 903) That analyst found some DNA that was neither Appellant's nor the victims. (Vol. XXIII, 904) The boxes of bullets that were found in Appellant's cabin were never submitted from fingerprinting. (Vol. XXIII, 923) Eventually it was determined that Appellant had four motor vehicles registered in his name, including a green T-Bird, and Chevy Blazer, and a GEO Metro. (Vol. XXIII, 930-936) A forensic scientist from Wisconsin examined the evidence that was seized from Appellant's cabin. (Vol. XXIV, 1020-1027) He found no identifiable fingerprints on the gun or the boxes of ammunition. (Vol. XXIV, 1021) The "old timer" knife was examined and revealed no usable prints. (Vol. XXIV, 1022-1023) However, a usable palm print was found on the carton which contained the knife and when compared to Appellant did not reveal a match. (Vol. XXIV, 1023-1024)

Michael Conner, the manager of a self-storage facility in Valdosta, Georgia, has various sized storage units, some of which can fit cars into them. (Vol. XXIV, 1029) In February, 2000, there was a 1995 green T-Bird driven to the storage unit

and placed in a rental unit. (Vol. XXIV, 1030) Conner then drove the person to the Greyhound Bus station. (Vol. XXIV, 1030) The computer keeps track of anyone who accesses the unit because each person receives a code for the unit rented. (Vol. XXIV, 1030-1031) After February, 2000, the next time that code was used was March 15, 2000, at 8:08 PM, with the person leaving at 8:28 PM. (Vol. XXIV, 1031-1033) Conner admitted that the date could have been March 16th if he had not recalibrated the computer to account for a leap year. (Vol. XXIV, 1033) The storage facility is located 45 - 50 miles from Tifton, Georgia. (Vol. XXIV, 1037) On the Tifton, Georgia motel receipt, the date of arrival is March 16, 2000, and the date of departure is March 17, 2000. (Vol. XXIV, 1038) Approximately one month later police came to the storage unit and had Conner cut the lock off the unit that had been rented to Appellant. (Vol. XXIV, 1038) There was a red Tracer in the unit which shocked Conner since that was not the car originally placed in the unit. (Vol. XXIV, 1038)

On March 18, 2000, Appellant's father received a call telling him that his son's cabin needed to be secured. (Vol. XXIV, 1054-1055, 1050) When he arrived at the cabin, Appellant's father observed the window behind the refrigerator had been removed. (Vol. XXIV, 1055) In order to fix the window and to reach the electrical box which was also behind the refrigerator, Appellant's

father moved the refrigerator out. (Vol. XXIV, 1055) At the bottom of the refrigerator there is a pan and a screen that is very low to the floor. (Vol. XXIV, 1063) These would cause anything that was under the refrigerator to be moved. (Vol. XXIV, 1063) Appellant's father never saw a gun or the two yellow boxes of bullets. (Vol. XXIV, 1055) Appellant was in jail from March 18, 2000, before the first search of his cabin. (Vol. XXIV, 1067) Because the kitchen window swings upward on hinges, one would have to move the refrigerator in order to remove the window. (Vol. XXIV, 1068) The hinges on the window were not broken. (Vol. XXIV, 1068) Appellant's mother, Mary Marquardt, was killed on March 15, 2000. (Vol. XXIV, 1070, 1051)

Cathy Buchanan drove past the Ruiz/Well's home around 8:00 AM on March 15, 2000. (Vol. XXIV, 1099-1101) When she drove past the house, Buchanan saw a green, two-tone Cutlass parked on the side of the house. (Vol. XXIV, 1102) The car was a late '70's model with darker green on top and lighter green on the bottom. (Vol. XXIV, 1102) The evening before the murders, Buchanan observed a gold station wagon in the driveway and a black man standing at the porch. (Vol. XXIV, 1103) Also on that morning, Wayne Wright drove past the house where the homicides occurred on his way to work. (Vol. XXIV, 1107) Across from the house, Wright observed a green car with the

driver's door open. (Vol. XXIV, 1108) The car was a small car, either a Saturn or an Escort. (Vol. XXIV, 1109) Wisconsin investigator Richard Price contacted Michael Overheart in Aurora, Illinois and seized a black Thunderbird registered to Appellant from him. (Vol. XXIV, 1116) Overheart told Price that he was not working during the week of March 15, 2000. (Vol. XXIV, 1118) When Wright interviewed Overheart, Overheart said he had not seen Appellant since the fall of 1999. (Vol. XXIV, 1128)

Jerry Cirino, a senior crime lab analyst with FDLE, examined fibers found on the bodies of Marguerite and Hope and also three green nylon fibers found next to the bodies. (Vol. XXIV, 1141-1142) Cirino was unable to find the source of these fibers. (Vol. XXIV, 1143) However, he compared them to the material in the 1995 green Thunderbird and they did not match. (Vol. XXIV, 1143) Investigator Scott Lange measured the distance between Webster, Florida and Osseo, Wisconsin to be between 1404 and 1458 miles which would take a driving between 23 hours and 43 minutes and 24 hours. (Vol. XXV, 1152, 1155) The distance between Osseo, Wisconsin and Valdosta, Georgia is between 1211 and 1260 miles and would take between 20 hours and 31 minutes and 21 hours and 40 minutes to drive. (Vol. XXV, 1155) These times do not include food, sleep or comfort breaks. (Vol. XXV, 1156)

In March, 2000, Rojelio Estrada lived on State Road 50, in Tarrytown which was approximately 4-5 blocks from the victims' house. (Vol. XXVI, 1190) On the morning of March 15, 2000, Estrada drove past the house and saw a little green car parked there. (Vol. XXVI, 1190) The car was either a Beretta or a Cavalier. (Vol. XXVI, 1191) Estrada went home and met with some bikers and was outside when he heard several shots at about 9:30 - 10:00 AM. (Vol. XXVI, 1191) Estrada had seen the green car before and believed that it belonged to a black man, Pernell Williams. (Vol. XXVI, 1191-1192)

FACTS FROM *SPENCER* HEARING:

Dr. Thogmartin, the District 6 medical examiner, conducted autopsies on Marguerite Ruiz and Esperanza Wells. (Vol. XXVI, 2050-2052) Marguerite Ruiz had four gunshot wounds, three of which were significant and one was a grazing wound. (Vol. XXVI, 2054) Two of the wounds entered Marguerite from the front and went through her lungs. (Vol. XXVI, 2056) Although had she received immediate attention she might have survived, due to her age the lung would collapse. (Vol. XXVI, 2056) Dr. Thogmartin could not say how much pain Marguerite experienced. (Vol. XXVI, 2057) The bullet that penetrated Marguerite's back perforated the spinal cord immediately dropping her to the ground. (Vol. XXVI, 2057) Marguerite also suffered three stab wounds to the left

side of her neck, one of which perforated her jugular vein. (Vol. XXVI, 2054) The stabs wounds were less serious that the gunshot wound to the lungs. (XXVI, 2061) Esperanza suffered a gunshot wound to her face from close range which entered her chin and severed her left carotid artery. (Vol. XXVI, 2062) Esperanza also had eight stab wounds to the neck which wounds were more severe than Ruiz's wounds were. (Vol. XXVI, 2063) Esperanza lost consciousness immediately and died quickly. (Vol. XXVI, 2064)

Scott Lange, a private investigator, interviewed Appellant's high school teachers, none of whom remembered him. (Vol. XXVI, 2075) Appellant was an average student with grades in the 2.0 range. (Vol. XXVI, 2076) Appellant got his high school diploma and received several offers of scholarships to colleges for music, but Appellant never attended. (Vol XXVI, 2076, 2079) Appellant was brought up in a very close-knit family with two siblings and a father and a mother. (Vol. XXVI, 2076-2077) Appellant had 12 felony convictions from Wisconsin. (Vol. XXVI, 2080) Appellant was convicted of animal cruelty, armed burglary, and possession of a firearm by a convicted felon and was subsequently found incompetent and sentenced to a mental health facility as opposed to prison. (Vol XXVI, 2084) Appellant was sentenced to the mental health facility for 75 years. (Vol. XXVI, 2087)

SUMMARY OF THE ARGUMENTS

POINT I: When a criminal defendant filed a timely and legally sufficient motion to suppress a trial court is duty-bound to hold an evidentiary hearing prior to trial. Failure to hold a hearing on the basis of collateral estoppel is inappropriate where there is no mutuality of the parties between the prior case and the new case.

POINT II: A trial judge must at all times retain a cold neutrality in a trial setting. Any action on the part of the trial court which treats one party more favorably than the other is a violation of due process. A prosecutor may not convey to the jury directly or indirectly his personal opinion as to the guilt of the accused.

POINT III: On the basis of the facts presented during trial and the sentencing proceeding there was insufficient evidence to support a finding that the murders were heinous, atrocious or cruel or that the murders were committed in a cold, calculated and premeditated fashion.

POINT IV: It is error for a trial court to invade the attorney/client privilege by appointing an accused's counsel and his investigator to prepare mitigation reports for the court over the objection of the accused.

POINT I

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 21 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING.

Appellant filed numerous motions to suppress. (Vol. I, 101-102, 115; Vol. II, 209-213, 241-255, 259-274, 311-326, 382-519; Vol. III, 547-554, 558-566; Vol. IV, 668-707; Vol. VII, 1293-1406) Appellant also filed several requests for the court to set a hearing date for these motions to suppress. (Vol. I, 172, 199; Vol. II, 209-213, 218, 233; Vol. III, 520-521) The state filed responses to the motions to suppress on four occasions. (Vol. II, 214-217, 336-338; Vol. IV, 744-745; Vol. VIII, 1408-1409) The trial court denied the motions without a hearing. (Vol. II, 375-377; Vol. IV, 629-633, 746-747, 787-788) The trial court further denied several of the motions as moot. (Vol. II, 292-293, 362-364, 380-381; Vol. IV, 789-790, 791-792) Appellant contends that it was error to deny Appellant's motions to suppress without affording him an evidentiary hearing.

A. FAILURE TO HOLD AN EVIDENTIARY HEARING

Appellant filed several motions to suppress and further requested the court

to set a hearing time for the motions. The trial court denied the original motion as legally insufficient but then ruled on the merits and denied the motions without an evidentiary hearing. Florida Rules of Criminal Procedure 3.190(g) and (h), provide that motions to suppress shall be made prior to trial unless opportunity to do so does not exist. If the motion is timely filed and the trial court determines that the motion is legally sufficient, the court is required to hear it before proceeding to the trial. ***Williams v. State***, 548 So. 2d 898 (Fla. 4th DCA 1989); ***Ross v. State***, 779 So. 2d 300 (Fla. 2nd DCA 1999); ***Ferrazzoli v. State***, 442 So. 2d 1056 (Fla. 1st DCA 1983); ***Gadson v. State***, 600 So. 2d 1287 (Fla. 4th DCA 1992). It was clearly error for the trial court to deny the motion to suppress without a hearing.

B. COLLATERAL ESTOPPEL

The state responded to Appellant's motions by arguing that the issue had previously been decided by the Wisconsin Supreme Court and thus Appellant was collaterally estopped from raising the issue in Florida. The trial court, in denying the motions to suppress, also applied the collateral estoppel doctrine. Appellant contends that this was error.

The doctrine of collateral estoppel - which is also known as issue preclusion and estoppel by judgment - "bars relitigation of the same issues between the same parties in connection with a different cause of action." ***Topps v. State***, 865 So. 2d

1253, 1255 (Fla. 2004). For the doctrine of collateral estoppel to apply to bar relitigation of an issue, five factors must be present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated. ***Cook v. State***, 921 So. 2d 631 (Fla. 2nd DCA 2005). Florida has adhered to the requirement of mutuality of parties. ***Id.*** at 634. The general rule in Florida has been - with limited exceptions - that collateral estoppel only "applies when 'the identical issue has been litigated between the same parties or their privies,'". ***Id.*** at 635; ***State v. McBride***, 848 So. 2d 287, 291 (Fla. 2003). Appellant contends that because there was no mutuality of parties, it was improper for the trial court to apply the collateral estoppel doctrine. The previous decision relied upon by the court in Wisconsin involved Appellant and the State of Wisconsin. The instant case involves Appellant and the State of Florida. The United States Supreme Court has held that each state is a separate sovereign with respect to the federal government because each state's power to prosecute is derived from its own "inherent sovereignty," and not from the federal government. ***Heath v. Alabama***, 474 U.S. 82 (1985); ***United States v. Wheeler***, 435 U.S. 313 (1978). The states are no less

sovereign with respect to each other than they are with respect to the federal government. Their powers to undertake criminal prosecutions derived from separate and independent sources of power and authority originally belonging to them before admission to the union and preserved to them by the Tenth Amendment. ***Heath v. Alabama***, ***supra*** at 438; ***United State v. Lanza***, 260 U.S. 377, 382 (1922) Thus, because there was no mutuality of parties in the previous determination, the trial court was in error in applying the collateral estoppel doctrine to deny Appellant's motions to suppress. Additionally, while recognizing the general rule that all points of law which have been adjudicated become the "law of the case," ***Greene v. Massey***, 384 So. 2d 24, 28 (Fla. 1980), a court nevertheless has the power to reconsider and correct erroneous rulings. This is true especially in capital litigation. ***Preston v. State***, 444 So. 2d 939 (Fla. 1984).

In summary, the trial court erred in applying the collateral estoppel doctrine where there was no mutuality of parties in the two proceedings and further erred in refusing to grant an evidentiary hearing on the motions to suppress. This Court must vacate Appellant's judgment and sentence and remand the cause with instructions to conduct a full evidentiary hearing.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 22 OF THE FLORIDA CONSTITUTION APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT PLACED UNREASONABLE RESTRICTIONS ON APPELLANT AND WHERE THE PROSECUTOR IMPROPERLY COMMENTED IN FRONT OF THE JURY REGARDING THE ISSUE OF APPELLANT'S GUILT.

Appellant represented himself at trial. The record reflects no fewer than 12 ***Faretta***[1] inquiries by the trial court. During these inquiries, the trial court informed Appellant of the pitfalls of representing himself. He further informed the Appellant that should he represent himself he would be held to the same standards as an attorney. No special treatment would be afforded him. Appellant accepted this and proceeded to trial. During the testimony of John Thogmartin, the medical examiner, Appellant objected to the admission of the several of the photos as being too explicit. Upon objecting to an autopsy photo being entered into evidence, the state responded:

> MR. MAGRINO: Judge, if he's got a legal objection, that's fine. That's evidence involved in this case **as a result of what he did**, and that's something that I have to prove to these members of the jury.

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[1] ***Faretta v. California***, 422 U.S. 806 (1975)

(Vol. XIX, 396, *emphasis added*) Later, after the jury had been excused for lunch, the trial court required Appellant to go through his witness list and indicate what each of the witnesses would testify to. (Vol. XX, 563-580) The court concluded with the following admonition:

> THE COURT: Well, by concern with these folks is it looks like, and I hate to do this, and I'm not trying - - and I'll do it outside the presence of the jury, but each one of them will have to be informed of the penalties for perjury, that they fully understand, because there's too many people that I've dealt with in the court system that do not understand. And well, I'm going to ask them just because I believe it was before you came to Hernando County, Mr. Magrino, that your office got so aggressive on perjury cases in the court, but at one point there was - - witnesses were getting arrested right and left that were committing perjury, which is what I think should happen. I mean, if they lie in a court, they should be arrested. And in fact, I would have no problem, they could say maybe someone with a greater mind than mine on legal knowledge may say, that's not right to have them arrested right there when they lie, but I think it is. If they want to lie on this stand, they should be arrested on this stand.
>
> And I'm not doing that threatening, but we're naming a lot of people here that, at least they're risking it, and that's five years. And just for knowledge here in Sumter County, somebody lied twice in this court and they got ten years because that's two charges. So they're now serving a ten-year sentence. And it happened to be in a case where they probably hadn't lied, they wouldn't have gotten but about the same so it ended up working out, I guess.

(Vol. XX, 580-581) The record does not reflect that the trial court made any similar statements with regard to state witnesses and further reflects that the state was not required to inform the court what its witnesses were going to testify to. Appellant contends that the actions of the trial court were indeed threatening so as to violate his constitutional rights to due process. Additionally, Appellant contends that the gratuitous statement by the prosecutor was clearly improper and again served to violate Appellant's due process rights.

A. THE ACTIONS OF THE TRIAL COURT.

More often than not the criminal defendant will not possess the skill to conduct a trial as neatly and competently as appointed counsel. ***Bowen v. State***, 677 So. 2d 863 (Fla. 2nd DCA 1996) ***approved*** 698 So. 2d 248 (Fla. 1997). Indeed under ***Faretta***, an accused has a Sixth Amendment right to conduct his own defense provided he is able and willing to abide by rules of procedure and courtroom protocol. ***McKaskle v. Wiggins***, 465 U.S. 168, 172-173 (1984). It is important to remember that a trial is a formal proceeding where "every litigant is entitled to nothing less that the cold neutrality of an impartial judge" charged with the duty to ensure that every grievance is fairly resolved in accordance with the rules of evidence and trial procedure. ***State ex rel. Davis v. Parks***, 141 Fla. 516, 194 So. 613, 615 (Fla. 1939) The requirement of neutrality helps to guarantee that

life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done. ***Vaughn v. Progressive Casualty Insurance Company***, 907 So. 2d 1248 (Fla. 5th DCA 2005) A judge's neutrality should be such that even the defendant will feel that his trial was fair. ***Williams v. State***, 143 So. 2d 484, 488 (Fla. 1962). It is clear that the trial court departed from its neutrality and imposed certain requirements of Appellant that were not required of the prosecutor. The prosecutor was not required to inform the court what each of his witnesses were going to testify to; the defendant was. The trial court did not threaten any of the state witnesses with perjury prosecution; he did so of the defense witnesses. While Appellant was already suffering under certain handicaps by proceeding pro se, the trial court exacerbated these by putting additional requirements on him.

Appellant recognizes that no objection was made to this line of inquiry by the trial court. However, Appellant argues that the atmosphere that was created by the trial court was in fact a threatening one which constitutes fundamental error.

B. STATEMENT BY THE PROSECUTOR

During the testimony by the medical examiner, the state sought to introduce

numerous autopsy photos. Appellant understandably objected to these photos as being too explicit and inflammatory. The prosecutor in response to Appellant's objection stated:

> Judge, if he's got a legal objection, that's fine. That's evidence involved in this case **as a result of what he did**, and that's something that I have to prove to these members of the jury.

Vol. XIX, 396) Appellant contends that this statement by the prosecutor represented a personal belief in the guilt of the accused and served to destroy all semblance of due process for Appellant.

A prosecutor may not directly or indirectly express a personal belief in the guilt of the accused. ***Martinez v. State***, 761 So. 2d 1074 (Fla. 2000); ***Gore v. State***, 719 So. 2d 1197 (Fla. 1998). It is improper for a prosecuting attorney to express his personal views as to the guilt of the defendant, and to urge his personal views upon the jury. ***State v. Ramos***, 579 So. 2d 360 (Fla. 4th DCA 1991)

In the instant case, Appellant properly made an objection to the admission of autopsy photos as being too explicit and inflammatory. In response to this objection, the prosecutor responded that the photos were evidence involved in the case, "as a result of what [the defendant] did." This was a highly improper comment. First, the photos themselves were autopsy photos taken by the medical

examiner and not the actual result of anything anyone did to the body. Second, the prosecutor clearly gave his personal opinion that the autopsy photos were a direct result of what Appellant did. While it is true that the prosecutor does have to prove to the jury that Appellant committed the crime, such proof is not permitted by the prosecutor giving his own personal opinion. Appellant recognizes that no objection was made to this comment but urges this Court to conclude that it is fundamental error. The evidence in the instant case was clearly not overwhelming. This comment by the prosecutor could have had the effect of destroying any semblance of due process in Appellant's trial. A new trial is warranted.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED AS AGGRAVATORS IN THE INSTANT CASE.[2]

In imposing the death penalty, the trial court found that each of the murders was especially heinous, atrocious and cruel and that the murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (Vol. X, 1998-2001) See Sections 921.141(5)(h) and (i), Florida Statutes (2000). In support of these aggravating factors the trial court made the following findings of fact:

> 1. The murders of Margarita Ruiz and Esperanza Wells were especially heinous, atrocious or cruel ("HAC"). Section 921.141(5)(h).
>
> The Florida Supreme Court has held that the heinous, atrocious or cruel (hereinafter "HAC") aggravator applies "only in torturous murders-those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or

[2] Appellant has informed undersigned counsel of his desire to forgo the presentation of any issues regarding the penalty. The following two points are submitted pursuant to ***Klokoc v. State***, 589 So. 2d 219 (Fla. 1991) wherein this Court denied a motion to dismiss the appeal and ordered counsel to proceed to prosecute the appeal "in a genuinely adversary manner, providing diligent advocacy of Appellant's interest."

utter indifference to or enjoyment of the suffering of another." Rose v. State, 787 So. 2d 786, 801 (Fla. 2001) (quoting Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998)). In Lynch v. State, 841 So. 2d 362, 369 (Fla. 2003), the Florida Supreme Court explained that in considering the HAC aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused to the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. See Farina v. State 801 So. 2d 44, 53 (Fla. 2001) (citation omitted); James v. State, 695 So. 2d 1229, 1235 (Fla. 1997) ("fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.") (citations omitted); Swafford v. State 533 So. 2d 270, 277 (Fla. 1988) ("the victim's mental state may be evaluated for purposes of such determination in accordance with the common-sense inference from the circumstances.") (citations omitted).

The evidence at trial proved beyond a reasonable doubt that both the victims were shot and stabbed multiple times while still conscious. The physical evidence and testimony of Dr. John Thogmartin established that Margarita Ruiz was initially shot in the kitchen of her own home. Victim Ruiz then fled through the dining room and living room leaving blood droplets on the floor. While attempting to flee from the Defendant, Ruiz was shot in the back while entering the southwest bedroom, where she fell and was stabbed three times by the Defendant in the neck and head. Victim Experanza Wells was shot in the face at the threshold doorway to the same bedroom and living room, where she fell and was stabbed eight times by the Defendant in the head and neck. Clearly the death of both victims was deliberate and extraordinarily painful and, thus, especially heinous, atrocious or

The Court finds that the evidence supports the conclusion that the Defendant's actions demonstrated a marked indifference to the suffering of both victims. In determining whether this aggravator applies, the victims' perceptions are the controlling criteria. The victims did not know the Defendant and where [sic] taken by surprise by the Defendant's shooting into their home. The evidence clearly established that the victims suffered extreme physical pain as well as severe emotional distress because of their wounds. It is not unreasonable to conclude that the victims knew they would die as a result of their wounds. They likewise were aware that the other was shot, stabbed, and dying, thus heightening their terror of the potential result. In addition, at the time of the shooting and stabbings, Ruiz's grandchildren and Esperanza Well's niece and nephew were present in the house and victims Ruiz and Wells must have been in tormented fear that the Defendant would also take the children's lives.

Based upon the foregoing, the Court finds that the State has proven beyond and reasonable doubt that the murders of Margarita Ruiz and Esperanza Wells were especially heinous, atrocious or cruel. This aggravating factor is given great weight by this Court.

2. The capital felony was a homicide and was committed in a cold, calculated, and premeditated ("CCP") manner without any pretense of moral or legal justification. 921.141(5)(I).

The Florida Supreme Court has held that to find the CCP aggravating factor: (1) the killing must be the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). "The focus of the CCP aggravator is the manner of the killing, not the target." Bell v. State, 699 So. 2d 674, 678 (Fla. 1997) (citations omitted). Deliberate ruthlessness is necessary to raise premeditation to the level of heightened premeditation required for the application of the cold, calculated, and premeditated death penalty aggravator. Buzia, 926 So. 2d at 1214 (citations omitted). The Florida Supreme Court has stated:

> While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of premeditation over and above what is required for unaggravated first-degree murder. The plan to kill cannot be inferred solely from a plan to commit, or the commission of another felony. However, CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course.

Farina v. State, 801 So. 2d 44, 54 (Fla. 2001) (internal citations and quotation marks omitted).

The defendant armed himself with not just one deadly weapon prior to entering the victims's home, but two. This supports the finding that the murders were calculated and premeditated. The initial shots which struck Margarita Ruiz wre fired from outside the home while she faced the Defendant. This fact supports the Court's finding that the murders were cold and calculated. Defendant made certain the victims would die as a result of their wounds by stabbing them after shooting them. This supports the Court's finding that the

> murders were cold, calculated, and premeditated. There was no pretense of moral or legal justification of the murder of the two victims, whom were strangers to the Defendant.
>
> Based upon the foregoing, the Court finds that the State has proven beyond any reasonable doubt that the murders of Margarita Ruiz and Esperanza Wells were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This aggravating factor is given great weight by this Court.

Appellant contends that neither aggravating circumstance has been sufficiently proven.

A. STANDARD OF REVIEW

The state has the burden to prove beyond a reasonable doubt each and every aggravating circumstance that it alleges. ***William v. State***, 37 So. 3d 187 (Fla. 2010). "The standard of review this Court applies to a claim regarding the sufficiency of the evidence to support an aggravating circumstance is that of competent, substantial evidence." ***Guardado v. State***, 965 So. 2d 108, 115 (Fla. 2007). "When reviewing a trial court's finding of an aggravator, '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.'" ***Aguirre-Jarquin v. State***, 9 So. 3d 593, 608 (Fla. 2009) (*quoting* ***Willacy v.*** State, 696 So. 2d 693, 695 (Fla. 1997)) *cert denied*, ____U.S. ____, 130 S.Ct.

1505, 176 L.Ed.2nd 118 (2010). Rather it is this Court's task on appeal "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 its finding." ***Id.*** (*quoting* ***Willacy***, 696 So. 2d at 695).

B. HEINOUS, ATROCIOUS AND CRUEL (HAC)

This Court has explained the meaning of the HAC aggravator as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) The HAC aggravator applies in torturous murders - - those that evince extreme and outrageous depravity as exemplified either by a desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. ***Guzman v. State***, 721 So. 2d 1155, 1159 (Fla. 1998). This Court has also stated that "[u]nlike the cold, calculated and premeditated aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and

manner in which death is inflicted and the immediate circumstances surrounding the death." ***Brown v. State***, 721 So. 2d 274, 277 (Fla. 1998) (citing ***Stano v. State***, 460 So. 2d 890, 893 (Fla. 1984)). In determining whether the HAC factor is present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. ***Lynch v. State***, 841 So. 2d 362, 369 (Fla. 2003). "[F]ear, emotional strain, and terror of the victim during the event leading up to the murder may make an otherwise quick death especially heinous, atrocious or cruel. ***James v. State***, 695 So. 2d 1229, 1235 (Fla. 1997). Additionally, this Court has held that the actions of the defendant preceding the actual killing are also relevant. ***Gore v. State***, 706 So. 2d 1328, 1335 (Fla. 1997).

The trial court's findings of fact are conclusory and not based on any actual evidence. For example, the trial court states "the evidence clearly established that the victims suffered extreme physical pain as well as severe emotional distress because of their wounds. It is not unreasonable to conclude that the victims knew they would die as a result of their wounds." (Vol. X, 2000) This conclusion is simply not supported by the evidence. Dr. Thogmartin testified that victim Ruiz was initially shot through a screen door. These wounds went through her lungs and would have killed her. Dr. Thogmartin could not say how much pain Ruiz was in. (Vol. XI, 2057) Although the fourth bullet actually hit Ruiz when she was

at the door of the bedroom, this bullet perforated her spinal cord immediately dropping her to the ground. (Vol. XI, 2057) Although she did receive three stab wounds to the left side of her neck which sped up her death, Dr. Thogmartin said these stab wounds were less serious than the gun shot wound to the lung which would have killed her. (Vol. XI, 2061) Similarly, Dr. Thogmartin noted that victim Wells received a gun shot wound to the face at close range which entered her chin and severed her carotid artery. Wells died quickly within five to 11 seconds. He stated there was a very short period of consciousness. The instant case, while undoubtedly horrific, is not the type of murder that this Court has traditionally found to be heinous, atrocious and cruel. For example, in ***Hilton v. State***, 38 Fla.L.Weekly, S174 (Fla. March 21, 2013) this Court upheld a finding of HAC where the evidence showed that the victim was held anywhere from two days to a week prior to her murder, and that she was injured enough during that time to leave traces of her blood on several of Hilton's items. In ***Pham v. State***, 70 So. 3d 485 (Fla. 2011), this Court upheld a finding of HAC where the evidence showed that the victim was conscious during at least part of her attack and she was stabbed at least six times. Importantly, the medical examiner testified that the nature of her wounds would have caused her a high degree of pain. In ***Bogle v. State***, 655 So. 2d 1103 (Fla. 1995), this Court upheld HAC where the victim was

struck seven times in the head and was alive during the infliction of most of the wounds with the final blows causing death. In the instant case, the gun shot wounds were clearly the primary cause of death. While there were stabbing wounds, the medical examiner testified that while these may have sped up the death, death would have resulted anyway. Especially with the victim Wells, the testimony of the medical examiner showed that the victim, if she was conscious at all, was conscious for no more than 11 seconds. While victim Ruiz was conscious for a longer period of time, the evidence certainly supports the conclusion that the whole incident occurred in a very short period of time thus making the amount of time that she was conscious very short. Again, the medical examiner could not quantify the amount of pain that the victims suffered. The trial court's finding of HAC cannot be sustained.

C. COLD, CALCULATED AND PREMEDITATED (CCP)

To establish the CCP aggravator, the state must prove beyond a reasonable doubt that (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the murder was committed with no pretext of legal or moral justification.

Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007). CCP involves a much higher degree of premeditation than is required to prove first degree murder. ***Deparvine v. State***, 995 So. 2d 351, 381-82 (Fla. 2008). The facts supporting CCP must focus on the manner in which the crime was committed. ***Walker v. State***, 957 So. 2d 560 (Fla. 2007). This Court has also found the heightened premeditation required to support CCP where a defendant has a lengthy period of reflection and the opportunity to abandon the plan but, instead commits the murder. ***Alston v. State***, 723 So. 2d 148, 162 (Fla. 1998). The trial court's findings of fact in support of this aggravator consisted of the defendant arming himself with two weapons, firing the initial shots from outside the home and stabbing the victims after shooting them. These are not the type of facts that this Court has consistently applied to CCP. For example, in ***Hilton v. State***, 38 Fla.L.Weekly, S174 (Fla. March 21, 2013), this Court upheld the finding of CCP based in part on the defendant's own statements to law enforcement wherein he describes his actions as "hunting." Additionally, the defendant's own statements made on a self-made video and to a fellow inmate described being with the victim for a long enough time for careful reflection. In ***Pham v. State***, 70 So. 3d 485 (Fla. 2011), this Court upheld a finding CCP where the evidence showed that the defendant arrived at the scene with two knives and bound his daughter to prevent her escape. He hid

the daughter's phone to prevent her from calling for help and waited from approximately one hour before the victim returned home and then attacked her immediately. Additionally, the defendant set up the murder scene by hiding the knives while waiting for the victim to return and hiding behind the daughter's closet door once she arrived. In ***Deparvine v. State***, 995 So. 2d 351 (Fla. 2008) this Court upheld CCP where the defendant "executed a well-thought-out and time-consuming plan to acquire the [victim's] truck." In ***Diaz v. State***, 860 So. 2d 960 (Fla. 2003), this Court upheld CCP where the defendant "purchased and took possession of a firearm with ammunition several days before the murder," "outlined his plan in a letter to his brother the previous night," and "then took his gun and several rounds of replacement ammunition to [the victim's] house."

In the instant case, there simply is no evidence of any plan to kill the victims. Certainly no motive was advanced for the murders and there is no evidence that the victims knew their attacker. This was not a prolonged series of events but rather was a short period wherein the victims were killed almost immediately. There certainly were no statements by Appellant to indicate that he had planned the murders at all. Simply put, the trial court's conclusory statements regarding this aggravating factor are insufficient to support the finding. This Court must reverse.

POINT IV

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 6 OF THE FLORIDA CONSTITUTION APPELLANT WAS DENIED DUE PROCESS OF LAW WHERE THE COURT APPOINTED OVER OBJECTION OF APPELLANT HIS STANDBY COUNSEL AND HIS INVESTIGATORS TO PREPARE MITIGATION REPORTS FOR THE COURT.

Appellant acted as his own attorney at trial. However, the trial court appointed attorney Charles Vaughn to be Appellant's standby attorney and further appointed two investigators for Appellant to assist him in the preparation of his case. After the jury returned its verdicts of guilt, Appellant waived the penalty phase with the jury. (Vol. XXVII, 1382-1396) Thereafter, the trial court appointed Charles Vaughn and the two investigators as well as Doctor Harry Krop to prepare mitigation for him. (Vol. XXVII, 1401-1402) Appellant noted that he intended to waive the ***Spencer*** hearing and would instruct his investigators not to present any mitigation but the trial court overruled him and noted that he appointed them to assist him (the court). (Vol. XXVII, 1403-1404) Appellant argued that that was a conflict because they had originally represented him before but the Assistant State Attorney argued that under ***Hojan v. State***, 3 So. 2d 1204 (Fla. 2009) there was no conflict. Thereafter at the ***Spencer*** hearing, the trial court heard from Scott Lange,

the investigator who was appointed to assist Appellant at trial as well as Charles Vaughn and received evidence in support of mitigation. (Vol. XI, 2073-2094, 2135-37) Appellant maintains that this was error on the part of the trial court entitling him to a new sentencing proceeding.

The attorney/client privilege plays an essential role in our adversary system. The ability of a client and an attorney to communicate with one another in confidence is central to our system of administering justice. The attorney/client privilege is one of the oldest confidential communications privilege known in the common law. ***First Union National Bank v. Turney***, 824 So. 2d 172, 185 (Fla. 1st DCA 2002). Indeed, the attorney/client privilege is part of the established law of this state. Section 90.502, Florida Statutes (2011). The attorney/client privilege extends to an investigator who is appointed to assist an attorney in representation of a defendant. ***Delap v. State***, 440 So. 2d 442 (Fla. 1983). Therefore it is clear that by appointing Charles Vaughn to act as Appellant's standby counsel and further appointing investigator Scott Lange to assist Appellant in the preparation of his defense, attorney/client privileges were established. Appellant attempted to assert these privileges when he informed the court that he would specifically instruct these people not to present any mitigation on his behalf. The trial court overruled Appellant's objection and stated that he was appointing the individuals

to assist him (the court). Appellant pointed to the obvious conflict of interest since these individuals originally were working for him. The only justification for appointing these individuals came by way of the Assistant State Attorney's citation to the court of ***Hojan v. State***, 3 So. 2d 1204 (Fla. 2009). However, a close examination of that case reveals that it is inapposite to the instant case. In ***Hojan*** the defendant specifically instructed his appointed counsel not to proffer what mitigation evidence they had uncovered. Defense counsel proffered what general evidence they had in mitigation after which the trial court found that Appellant had waived his right to have his attorney present mitigation. The court then appointed special counsel, not his trial counsel, to present mitigation. Thus, there was no conflict of interest between the attorney who was appointed to represent the court and the attorney who represented Appellant. This Court cited as authority its previous decision in ***Klokoc v. State***, 589 So. 2d 219 (Fla. 1991). The public defender was appointed to represent Klokoc and after he entered a plea of guilty to the offense he waived his right to a jury for the penalty phase. Klokoc instructed his counsel not to participate in the penalty phase and refused to cooperate with counsel. As a result counsel moved to withdraw which motion was denied by the trial court. In view of Klokoc's lack of cooperation with his counsel, however, the court appointed special counsel to represent the public

interest in bring forth mitigating factors. Once again, special counsel had not established an attorney/client relationship with Appellant thus there was no conflict of interest. Thus it appears that there is no authority for the trial court to appoint Appellant's own counsel or investigators to assist the court against Appellant's specific instructions. While the trial court retains the discretion to appoint special counsel to assist in the presentation of mitigation for the court's benefit, this discretion is abused when the appointment serves to violate the attorney/client privilege. Appellant is entitled to a new proceeding before a new judge.

CONCLUSION

Based upon the foregoing reasons and authorities cited herein, Appellant respectfully requests this Honorable Court to vacate his judgment and sentence, and remand the cause for a new trial and/or sentencing.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered by email to the Office of the Attorney General, Daytona Beach, Florida, capapp@myfloridalegal.com and mailed to Bill Marquardt, DOC #U44139, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1000, on this 4th day of June, 2013.

Michael S Becker

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CERTIFICATE OF FONT

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

Michael S Becker

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