

IN THE SUPREME COURT OF FLORIDA

MICHAEL S. STOLL,

Appellant,

v.

CASE NO. 93,276

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF FONT

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STATEMENT OF THE CASE AND FACTS

The State corrects and supplements the Statement of the Case and Facts filed by Appellant, Michael Stoll [hereinafter "Stoll"], as follows:

GUILT PHASE

Stewart's Trial Testimony:

The opening witness at the guilt phase of the trial was Stoll's co-perpetrator, Christopher Stewart. (R 535).¹ Stewart, who was 19 years old at the time of the murder, said that he met Stoll and his wife, victim, Julie Stoll, through his aunt, who was "a friend of Julie Stoll" when he was 17 years old. (R 535, 536, 537). He inquired about a job "[i]nstalling carpet and vinyl and tile" with Stoll. (R 537, 538). Stewart moved into the Stolls' "house in Sanford." (R 538). Julie and Michael Stoll fed Stewart, and Michael paid him. (R 540). That employment lasted for "two to three months." (R 540). Stewart was discharged from the Air Force after "about a year-and-a-half," and "came to Florida, [and] moved in with my mother and my uncle." (R 541). He again secured employment with Michael Stoll, and when he had problems with his family members,² he moved in with the Stolls. (R 542, 543). Stoll paid him "[f]ive dollars an hour" for doing the same work as

¹"R" refers to the transcript of the guilt phase.

²Stewart's "mother didn't want me to drink around my younger brother." (R 597).

before. (R 543, 544). He earned enough to pay his rent, "and cover my car payment and insurance." (R 545).

Four persons lived at the residence: "Me, Julie, Mike and little Mikey." (R 544). Sometimes, Stewart helped Little Mikey get ready for school, but usually Julie helped him. (R 545). Julie cooked the meals and "did laundry and cleaning," including Stewart's laundry and the cleaning of his room. (R 545). He never had any fights with Julie, and they got along "fine;" (R 589, 591, 605); indeed, he called her "Mom," and he called Stoll, "Dad."³ (R 1053). He paid "fifty dollars a week" as rent to the Stolls. (R 545). Stewart said he was "grateful" to Julie for the many things she did for him, and he had no hatred or animosity towards her. (R 590, 591). He had lived with the Stolls "a little less than three months" the second time he moved in with them. (R 605. See 591).

Stewart had no friends here "until I met Michael Stoll," and he had no other source of income. (R 546). Neither did he have any other place to live. (R 546). Stoll was his boss and told him what to do. (R 546).

Stewart observed that Stoll and Julie "would have severe arguments quite often." (R 546). Eventually, Stoll began to talk about killing Julie. (R 547). "The first time it started out as a joke . . . he had made it into a joke." (R 547). "[H]e would

³He regarded his relationship with Stoll "like a father/son relationship" and considered Julie "[l]ike a mother." (R 593-594, 605).

say it as "kill her." (R 547). Stewart did not take it seriously at first, but eventually, he realized that "he was not joking anymore." (R 547). Then, Stoll "started taking action on what he was saying." (R 548).

Julie was taking medication for "multiple sclerosis."⁴ (R 548). The men discussed Stoll's plan "that he was going to put the medication into the coffee," for "over an hour." (R 609). Stewart "saw him [Stoll] take medication and crush it on the kitchen counter and pour it inside of a little vial" ⁵ (R 549, 615, 616). Stoll "said that he was going to put it into her coffee in the morning." (R 548).

The next morning, "[t]he morning that Julie Stoll was murdered," Stoll "dumped the contents of the vial into her coffee and added Kahula, . . . [a]n alcoholic drink." (R 550, 609, 617-618). Stewart did not "actually think he was going to do anything until then." (R 609). Stoll then gave the coffee to Julie. (R 550, 618). This was done in connection with the discussion Stewart and Stoll had "in the garage behind the house," (R 551), "[t]he night before Julie's murder," where Stoll "talked about trying to poison her with the medication" by putting "the medication in the coffee."

⁴Otherwise, she was in "[g]ood health," although she "would have times where she was extremely run down" and "would sleep a lot" during those times. (R 548).

⁵Stewart could not remember - some three and one-half years later - whether this occurred the night before or the morning of the murder. (R 615. See R 611).

(R 550, 617). "Michael said that he had come up with a way to kill his wife." (R 551). He explained that he would "try to make it look like she had overdosed with her medication." (R 551, 615).

The men "sat down and watched the news for a while . . . [a]nd she drank . . . the coffee." (R 618). Although Julie "drank . . . about half of it," it had no effect that Stewart noticed. (R 551). Stewart and Stoll "went out into the garage," where "Mike said that that wasn't working." (R 551, 617, 618). There, the men "talked for probably ten or fifteen minutes." (R 619). Stoll brought up the idea of "making it look like a robbery that happened at the house." (R 552). "He said that we should make it look like the house had been robbed and that Julie had been murdered during the robbery." (R 552, 618). Stewart "agreed."⁶ (R 553).

The men agreed on a plan, suggested by Stoll. (R 553, 648). "Mike said . . . for me to come in behind Julie while he was giving her a hug . . . [a]nd to try and break her neck."⁷ (R 619). They went back in the house and waited "until little Michael left for school." (R 553). After the boy left, the men "went back out to the garage." (R 553, 554). There, Stoll gave Stewart "the pair of rubber gloves that we had discussed that I would wear." (R 554). The plan called for the use of the "Latex" gloves "[s]o that we

⁶Stewart said that he did not know why he agreed to the plan. (R 553). He was not upset with Julie, had had no confrontation with her, and she had not told him to leave. (R 634).

⁷He had never tried to break anyone's neck before. (R 621).

wouldn't leave any fingerprints."⁸ (R 554). Stewart put the gloves on, and Stoll

told me to wait outside for three to five minutes, long enough for him to be in the house and giving Julie a hug, and that I would come into the house and come up behind her, try to snap her neck.

(R 555). After so instructing, Stoll "went inside." (R 555).

Stewart waited "[t]hree to five minutes," and then "walked into the back of the house . . ." (R 555-556). He saw "Julie and Michael were hugging each other." (R 556). Julie "was facing me," and "I walked past both of them and turned around and came up behind Julie Stoll." (R 556). He "attempted to break her neck, . . . [b]y placing my left arm over her shoulder, using my right hand to push her head over my arm."⁹ (R 557).

Stewart used as much force as he could, but he did not succeed in killing Julie. (R 558). She "fell to the floor," with Stewart and Stoll "standing over her." (R 558). Julie

asked Mike why he was letting me do that to her. She asked him that a few times. And then she also said, one of the last things she said before she got up and ran was that he [Stoll] won't get any money.

(R 558). Julie got up and ran "[t]o the front door." (R 559). She "opened it, trying to get out." (R 559). She was not able to get out because "[m]e and Michael ran after her and grabbed her,"

⁸Stewart said that he did not use a knife "[b]ecause that's not what I was told to do." (R 623).

⁹The witness demonstrated this action. (R 557).

and "[p]ulled her back towards the bed."¹⁰ (R 559). "Mike said that if we stop now that we would be going to jail. That it was too late to stop now." (R 568).

The two men "[p]ushed her down onto . . . [a] large water bed . . . filled with water." (R 562). Stewart

grabbed her arm . . . and her shoulder area, to hold her down, and Michael grabbed the lower part of like her legs to hold her still long enough that I could get my knee on the small of her back.

(R 562). Julie was lying "[f]ace down," and Stewart "pushed her head down into the bed." (R 562). Stoll was "[s]tanding at the corner of the bed." (R 562).

Stewart held Julie's head face-down into the waterbed "for a while . . . [t]o try to suffocate her." (R 563). He was not successful. (R 563). Julie "was still struggling," and "[s]he ended up working her way around to where her legs were over the left side of the bed." (R 563). At that point, Stewart again "attempted to break her neck," while Stoll stood "at the corner of the bed." (R 563).

With his "knee in the small of her back," Stewart turned her head around "clockwise, far enough that I could see her face." (R 563). Stewart believed that he had broken her neck, as "[s]he stopped struggling," although she was still alive. (R 563-564).

Stoll "said that that didn't work, that's not working," and

¹⁰"[A]bout four or five feet from the door." (R 560).

"[h]e left the room and came back with a large black trash bag." (R 564). Stoll told Stewart "to put it over the top of her head," and handed the bag to Stewart, who did as Stoll instructed him. (R 564, 647). They were unsuccessful in suffocating Julie because "she chewed the holes" in the bag. (R 565).

Again, Stoll said

that isn't working, and I pulled the bag off of her head. And Michael came around past me on the left side of the bed, and he grabbed one end of the pad on the . . . the cushion on the side of the bed, and I grabbed the other, and we lifted it off of the bed.

(R 565). The pad was removed to expose "[s]olid wood" which made a railing for the water bed. (R 565). "Michael told me to lay her head across the rail so that her neck was where the rail is on the bed." (R 566). Julie was not struggling at this point. (R 566). Julie was placed "[f]acing down" across the rail, and "Michael told me to place my knee on . . . the top of her neck." (R 566). He did so. (R 566).

With "one foot on the floor and . . . my knee on the back of her neck," Stewart applied force with his knee. (R 566). He used "[a]ll of my body weight." (R 567). He weighed "[a]bout a hundred and seventy-five pounds." (R 567).

At that point, "Michael left the room and went around the house collecting the different things to make it look like a robbery," in accordance with the plan. (R 567). Stewart kept his knee at the back of Julie's neck "until he returned and told me

let's go." (R 567). When Stewart removed his knee, he believed that Julie was dead. (R 567).

On their way out of the house, Stoll "got some coffee out of the coffee maker, and we left going out the back of the house." (R 569). Stoll "knocked the trash can over and used a pry bar to pry the outside of the rear door to make it look like it had been broken into." Then, the men "got into the truck and went in route to our job." (R 569). "[W]e stopped at various dumpsters and dropped off the things that he had collected throughout the house."¹¹ (R 569). Stoll "seemed upbeat, happy." (R 571). They had conversations regarding the murder. (R 594). "After the murder, driving to and from our job, he [Stoll] was thanking me. And we talked about how things were going to be better." (R 594).

Stewart said that he killed Julie: "Because he [Stoll] told me to." (R 594, 606). When pressed on cross as to why he was willing to do whatever Stoll told him to do, Stewart replied: "I didn't have anywhere else to go." (R 623).

The men reported to the job site, finished the job, and headed back to the Stoll home. (R 571). They "stopped off like at a Burger King or McDonald's and got something to eat, and we stopped at a post office so I could send off my car payment." (R 571). It was "around three o'clock" when they arrived at the home. (R 571).

¹¹These items included a "[c]ouple of VCRs, items from her purse, a couple of CDS." (R 570).

The men entered "through the rear door," and Stewart went to "the rear restroom back by my bedroom. And Mike went on into the living room." (R 572). When Stewart "came out," he found "Mike was on the telephone." (R 572). He had called "911." (R 572).

Stewart identified his and Stoll's voices on a tape of the 911 call. (R 573). Thereon, Stoll reported: "Something's wrong, my house has been robbed. And I think something is wrong with my wife." (R 574). Apparently, Stewart then took the phone, reporting: "Somebody robbed the house and something is really wrong with his wife." (R 574). He added: "She ain't moving. . . . She's cold and clammy. . . . Yes, she's laying on her bed." (R 573). He added that the victim was not breathing. (R 573). He then identified himself as "Chris." (R 575). He refused to touch Julie and reported that "Mike, her husband" was there with her. (R 575). He was told to put Stoll back on the phone. (R 575).

Stoll was given instructions to try to help his wife. (R 575-576). He refused, stating that he did not want to do CPR because "she's dead." (R 576). When the dispatcher insisted that Stoll check Julie to see if she was breathing, he refused, stating "[h]er tongue is sticking out. She's dead."¹² (R 577). the dispatcher asked: "Okay. So you don't want to try any CPR on her?" (R 577). Stoll replied: "No, man, there's no way she's alive." (R 577).

At the home, Stewart told Officer Barnes "that we had . . .

¹²Stoll had "turned her over during the 911 call." (R 583).

found the house robbed and Julie Stoll dead." (R 584). It was "around three thirty or four" when the men arrived at the police station. (R 584). They were separately interviewed. (R 584).

Stewart's "first statement," was to Officer Barnes, and he "told them what we had agreed upon, about the house being robbed and Julie dying in the struggle." (R 585). Later that evening, he "spoke with Officer Mullins," and "told part of the truth." (R 585). He said "[t]hat Michael had something to do with the murder," but did not admit his own guilt. (R 585).

Later, he gave a statement to "Officer Smith." (R 586). Therein, he told him "[a]s close to the truth as I remembered it." (R 586). Still later that night, he again spoke with Officer Barnes, "telling him basically the same thing . . ." (R 589).

Stewart admitted that the first two statements he gave "were lies." (R 624). However, "[t]he third and the fourth, . . . was the truth, though there were things that were left out." (R 624, 625, 629, 646). In statements three and four, Stewart said that he and Stoll "both had murdered Julie." (R 646). These statements included that Stoll had told him to kill Julie. (R 647).

In June, 1997, Stewart gave a fifth statement; this one was to the prosecutor. (R 591-592). Stewart pled guilty to second degree murder with a sentence of fifty years. (R 592). He entered the agreement because he "wanted to plea and . . . to tell the truth." (R 593). Prior to the deal, which required him to testify against

Stoll "in accordance with your proffer of June the 4th of 1997," Stewart was facing the death penalty. (R 634, 635, 637). Stewart said: "If . . . I understand it correctly, if I was to stay out of trouble for the entire time that I'm in prison, I can do thirty years. That's with no types of reprimand or getting in any type of trouble." (R 637). Stewart's sentence "was more than double the [sentencing guidelines] time." (R 637). Stewart felt that he had made "a pretty good deal." (R 640). On cross, when asked:

[Y]ou're a murderer and you're a liar, you got out of the death penalty because of the deal you cut with the State, and you're telling us to believe what you say here today. Why?

(R 641). Stewart replied: "Because it's the truth." (R 641).

Tape of Stewart's Statement #4:

The State recalled Stewart to rebut a defense claim of recent fabrication made in regard to Stewart's trial testimony. (R 940-947). The tape of Stewart's fourth statement, given at "ten minutes to twelve on November 3rd, 1994" was played. (R 951).

Stoll had been talking about killing Julie "for weeks." (R 952). Then,

[a] few days ago he came up with the idea that give her Kahlua with her coffee . . . [a]nd put Demerol in it. So he crushed up some Demerol and tried to put it in her coffee. But . . . she wouldn't drink it.

And this morning he tried it again with really crushing up Demerol, tried to put it in, she didn't drink it.

This morning he said that this isn't going to work, so he said something about trying to make it look like a robbery and look like the house got robbed.

(R 952-953). Stewart said that he and Stoll

went out and got loaded," and "[h]e told me to wait . . . maybe five minutes, and he . . . would be standing there, and that I was to come in the back door. . . .

And he told me to come in . . . [a]nd he was standing there holding her, just hugging her . . . in the kitchen

And . . . I came up behind her and I tried to break her neck. I put my arm on her left shoulder pressing her head over my arm, but that didn't, . . . she just . . . she started yelling at Mike, you know, make him stop. And why are you doing this, and everything. She kept on trying for the front door and started to open up the front door, and I shut it. . . .

And then we put her on the bed and I tried to push her down into the bed. It's a water bed, so I tried to suffocate her And that wasn't working. So Mike had brought in a . . . a plastic bag, a trash bag He told me to put it over her head. I put it over her head, and she like ate through it or something. And so I took the plastic bag off of her head and she had like . . . somehow started struggling. . . .

And he didn't know what to do. So he said that if I didn't, you know, if it didn't get finished, that they would find out that I had did it and I would go to jail and everything. So he pulled the cushion off the edge of the waterbed. And it's like the padding . . . so that it the wood was showing, and he told me to --

(R 953-955). Officer Barnes interrupted to ask: "Was she conscious all this time?" (R 955). Stewart replied: "Yes." (R 955).

And he told me to lay her so that her neck was on the wooden part of the bed. . . . The front, so she would be laying face down. . . . And he told me to put my knee up on her neck to crush her in the back of her neck . . . so she wouldn't breathe. And I did that.

And once he saw I was doing that, he took off around the house picking up different things like jewelry

And she had stopped moving and then we went back out the

back door. . . .[H]e used the pry bar and pried the door, trying to make it look like the door had been pried open.

(R 956). Stoll took the items from the house to the truck. (R 956). Then, "he got his cup of coffee, we went out the back door." (R 956-957).

When asked why he wanted to kill Julie, Stewart replied: "I didn't want to." (R 958). When asked: "Why did you do it?" Stewart said: "I don't know. I honestly don't know. I'm sorry about killing her. Very. . . ." (R 958). The tape ended. (R 958).

Testimony of Officer Barnes:

The next witness was Officer Barnes, who testified that he spoke with Stoll "three times." (R 656). A tape of one of those interviews was played to the jury. (R 657).

Stoll's Statement #1:

Stoll said that Julie "had never really done anything to hurt anybody." (R 663). He claimed that Julie "had diagnosed (sic) of MS," and that "she wanted a divorce" right after they married because she was involved in a "self-help group" that claimed spouses left the ill, and Julie "thought that I would leave her because I'd have to take care of her." (R 663-665). He added: "[N]ow she has a brain tumor, she's been wanting a divorce again . . . [b]ecause she . . . wants to go away somewhere, away from everybody."¹³ (R 664).

¹³Stoll admitted that he sent Julie's older son away. (R 664).

Stoll said that the morning of the murder, he poured Julie some coffee. (R 665, 666). Julie did not "even finish her coffee this morning . . ." (R 667). Stoll volunteered that he "loaded up the dishwasher" that morning, washing her coffee cup along with the "clean plates" which were already in the dishwasher. (R 667).

Stoll was the last one out of the house that morning, and claimed that Julie, "was laying down" and was alive. (R 668, 693, 694). Little Mikey had gone to school before Stoll left that morning. (R 670). He said he rubbed Julie's back with alcohol and hugged and kissed her before leaving her to "go back to sleep." (R 668-669, 671). He "went out to the job, . . . [s]topped and got gas," and dropped off a check. (R 676, 677). He returned home "about one thirty, two o'clock." (R 684).

Stoll claimed that when he got home, "the door wasn't shut," and he "saw a piece of wood laying on the floor . . . and a can laying over . . ." (R 681, 682). He entered the house first and said "that's weird." (R 682). He

went to the bathroom. Julie was laying on the bed. And, I thought, damn, she must be blacked out again. So I went to the bathroom, came out, and I touched her. And I mean she was like touching this table . . . she was hard.

(R 682). Stoll said he "yelled to Chris, I said, Chris, I said, something's wrong." (R 682). He began to look around and said, "holy shit. I said, someone's been in the house. So I immediately . . . called 911 and, you know, the rest is history." (R 683).

Stoll said that he noticed that "her jewelry boxes and my jewelry boxes were gone." (R 665).

Stoll denied battering Julie: "No, I never jumped on her. She's attacked me a few times, but she's got, she's got problems . . ." ¹⁴ (R 686). He denied having had an argument with Julie the morning that she was murdered. (R 686). He said that Julie "was scared of me," but blamed her fear on the alleged abuse she suffered from her previous husband. (R 686).

Stoll said that Julie and Stewart got along "[a]ll right." (R 687). He added that Julie was "jealous" and "since I've had Chris working with me she's been real jealous . . . [b]ecause she thinks me and Chris are off doing this and that . . . off gallivanting, doing something, anything but work." (R 687).

Stoll then recounted his version of the battery charge Julie had previously made against him and to which he had pled and been sentenced. He said that Julie

had hit her head . . . on the corner of the bed, she had fallen down and blacked out . . . about six weeks ago Chris has (sic) been drinking. . . . And she got really pissed off about it. She said, I'm going to call the cops and tell them that you hit me. She says I got a knot right here. She said I'm going to tell them that you hit me and I'm going to tell them that you are contributing to the delinquency of a minor and you're going to go to jail. And from that moment when she said that, Chris hasn't liked her.

(R 688). Nonetheless, he continued to insist that Stewart and

¹⁴He said that Julie had been battered by her previous husband, and "every time that we get in an argument she . . . just flips out. I mean she just really flips out." (R 686).

Julie "get along fine." (R 689).

Stoll added: "That was the only incident we ever had." (R 688). He specifically denied that he and Julie were having "problems." (R 690). When Officer Barnes confronted him with the knowledge that Julie was trying to leave him, Stoll explained: "Yeah, she wanted to leave and get out of the relationship, that she was ill." (R 690). He continued to deny that he killed Julie, stating: "No . . . I love my wife." (R 692).

He added: "I think I know who did it. . . . Jerry Burk killed my wife." (R 692). When later confronted with the officer's belief that he killed Julie, Stoll asked: "What about Jerry? Where is Jerry at?" (R 697). The officer then informed Stoll that Jerry was in jail and had been since October 12th. (R 698). Stoll reluctantly admitted: "Well, then it wasn't him" (R 698). He added: "I can't even think straight right now." (R 699). The interview ended at "approximately seven p.m." (R 701).

Officer Barnes believed that the door had been pried "from the inside, . . . most of the wood fell on the inside." (R 701, 708). "[T]here was a crowbar by the back door." (R 707). It appeared that "the door was open when it was pried." (R 708).

On cross, Officer Barnes said that he decided that Stoll was involved in the homicide "[n]ot at first, . . . [a]s we went along with the interview." (R 712, 724). The officer had talked with Stewart before interviewing Stoll. (R 713).

Testimony of Officer Smith:

Officer Smith interviewed Stoll at 9:55 p.m., the evening of Julie's murder, November 3, 1994. (R 737-738). A tape of that interview was played to the jury. (R 657).

Stoll's Statement #2:

Stoll said that "Chris had been upset with Julie . . . since September." (R 740). He said that Stewart "feels like he knows for a fact Julie is trying to divorce me and trying to take everything she can from me." (R 740). He added:

And Julie has told several people, including her family members, that she was planning on divorcing me and taking the new car that I bought her, the living room furniture, and she was keeping everything that was put on the charge cards separate so she could take everything that was put on the charge away from me for herself. . . . For her and her boys.

(R 740-741).

He claimed that Stewart "for the last . . . two days has tried to eliminate Julie one way or another. And his first two attempts had failed him." (R 741). He said Stewart tried to "make her O.D. on her medicine" twice, on "Wednesday morning" and "again on Wednesday night." (R 741). He claimed Stewart said he "would make her just go to sleep. . . . And . . . if he laid her down face first, she would suffocate." (R 742). Stoll said he "didn't want no part of it. And I've been trying to work things out with Julie to try to just, you know, get a divorce admirably." (R 742).

He claimed that he "went out to load the truck . . . right after my mother called, right after eight o'clock." (R 742). He "heard some screaming from the front of the house." (R 743). He

heard, 'Chris, don't. Chris, no. Stop.' And then I heard her yell, 'Michael,' real loud, and then I didn't hear anything else. . . . That's all I heard. I didn't run in the house. I didn't . . . think nothing of it. I stayed right there.

(R 743). He added: "It played through my mind and I didn't react to it." (R 743).

Stoll claimed that he gathered his tools for work, and headed for the door to the house. (R 743-744). As he approached, "the door flew open . . . got broke" and "Chris was standing there with a bag of jewelry boxes and stuff." (R 744). Stewart

. . . was a ball of sweat. And he says, 'It's done. I took care of it.' . . . And I said, 'What?' He said, 'We got to go. We got to go now.' I was like, 'What did you do?' And he said, 'I took care of it.' And, you know, I'm thinking . . . I don't know what.

(R 744). Stoll claimed not to know that Stewart had killed Julie and to be "too scared to ask." (R 744). Stoll admitted that Stewart "said that he hoped, he said he thought he did. He said blood was coming out of her nose . . . and he thought she was dead." (R 744-745).

Stoll claimed that Stewart said he had "twisted" Julie's head and "that's how he broke the neck." (R 745). He added that Stewart told him that "he had his knee or something on her back." (R 745).

Stoll said that Stewart "threw the stuff in behind the truck" and the men went to work. (R 745). On the way, Stoll said: "I can't believe this. . . . I guess there was no other way." (R 745-746). Stoll threw the jewelry and other items taken from the home away: "Not him, I did. I disposed of it." (R 746). This was done "on the way to work." (R 750). He explained his motive in so doing as: "[I]t was already done, and . . . I didn't want to get charged for it or anything." (R 746).

Stoll "guessed" that the jewelry and other items were taken "to make it look like a robbery." (R 746). He added that as Stewart exited the door of the home, he said "we got to make this look like a robbery." (R 747). Stoll stressed: "He said that. And that was after the fact." (R 748).

Stoll claimed that he "did not know it was going to happen this morning," although he "knew that he [Stewart] wanted to." (R 751). He said he "felt it was just a matter of time," and claimed to have "tried talking him out of it." (R 751). Stoll denied any participation in Julie's murder. (R 752).

Stoll said when he entered the house, "the rug had been moved, it looked like they had been struggling in the living room." (R 751). He made the 911 call. (R 750). Stoll concluded with: "I just wish it hadn't happened." (R 773).

Testimony of Officer Barnes:

Officer Barnes was recalled. (R 762). He testified to a

second statement Stoll made to him - Stoll's third overall. It was given in the early hours of November 4th. (R 762, 765).

Stoll's Statement #3:

Stoll said that he "made my wife some coffee . . ." (R 766). He and Stewart "went out to the shed." (R 766). He claimed Stewart went back into the home and "went around into the dining room and I guess that's where he did whatever he did to her." (R 766). Stoll heard Julie scream "for me and I went inside" to "the kitchen." (R 766). When he walked in, he was aware that Stewart

grabbed a hold of her and she struggled . . . they struggled in the dining room. And it sounded to me like they went in the front room.¹⁵ Someone had mentioned that there were (sic) blood or something in the hallway.

(R 767)(footnote added). Stoll claimed to have gone outside at that point "[b]ecause I didn't want no part of that. When she screamed for me I went outside. I knew it was coming . . . [b]ecause he had been talking about it." (R 766).

Stoll said that Stewart took the items from the house. (R 768). He repeated that he, himself, "disposed of them. I was the one that was driving, it was my vehicle . . ." (R 768).

Stoll claimed to "love her." (R 769). He said he was "an accessory" because Stewart had told him he was going to kill Julie and he "heard her screaming" and "could have come and helped her, but I didn't." (R 769). He said: "According to her mother, she

¹⁵"[T]he bedroom" where Julie was murdered. (R 767).

was probably dying in four months anyway." (R 771). He said Julie was killed

because she was trying and succeeding in discrediting me to make me look bad, to make me appear to be something I wasn't, and she was doing a damn good job of it. And she was one by one trying to turn people against me, A, and discrediting me, B, and making me look like something I wasn't.

(R 771). He added: "I was the bad guy, that's right." He continued:

. . . I tried to get her to change her statement, tried to, when she called the cops and she used her oldest boy, she used her oldest boy against me to try to say that I hit the youngest boy and Julie to try to say I battered both of them.

And I went to court on it, and . . . she swore up and down that she never pressed charges and she never did anything . . .

But then she turned right around and went to my ex-wife and said, hey, look, I understand that you had a problem with Michael and would you be willing to come and testify with me, because . . . you were too easy on him. You didn't take enough. Because when . . . me and my ex-wife split up, Linda, . . . we had a good divorce. I mean . . . she got what she wanted, I got what I wanted.

(R 772). Still, he continued:

And this broad, since -- I never had credit cards, ever, ever, she takes these credits (sic) cards. Now supposedly she done tore these credit cards up two or three different times. She's got over five thousand dollars charged on my credit card on one card. And she tried to keep getting more cards. And she lives in this world of, I don't want to say make believe, because it's a real world, but it's everything she's doing is for her own gain and her children, her two boys. . . .

I was definitely a victim.

(R 773). Stoll testified that Julie was going to take what money

she could get, clean him out, and leave him, "[a]nd she was going to make me look bad in the process." (R 773).

Officer Barnes asked: "Okay. . . . When was the first time that it would come to your mind to kill her?" (R 773). Stoll replied: "Uhm, no, I can't tell you exactly. About, uhm, after having a conversation with her on October 31st." (R 774). He explained:

I tried to sit down and talk. I went to talk to my probation officer, . . . and I told him that I felt like I was being a victim. . . . [A]nd I says, this isn't right. . . . And he says, . . . you pleaded . . . no contest to something. . . . And he said, now did you do this or didn't you? And I said no. He said, then what you should do is . . . get yourself an attorney. . . .

. . . I said, I'm going to get an attorney. She flips out -- This was Monday morning, October 31st. She completely flips out, starts wailing.

And she's bouncing off the wall she's yelling and screaming and hollering, we might as well get a divorce right now, our marriage is over with right now. I might as well pack my bags. I'll call my mom and I'm moving out. . . . [B]ecause I want to fight this thing, the marriage is over, just like that, boom. The marriage is over.

Then she tells . . . Chris, she says, you better do whatever it takes to make him change his mind. . . .

. . . I looked at Chris, I said, man, I said, I can't believe this. I says, you know, I'm trying to be civil to this lady, I'm trying to be nice to this lady, I'm trying to reason with this lady, and there's just no fucking reasoning. And **I said**, the only thing that I see possible, I said, that's it, **the bitch has to die**. There is no other way around it. And I didn't say to kill her, but then he started talking about all this other stuff . . . [a]nd one thing led to another and it happened, it just happened. There wasn't anything that was really, you know, set down and drawn out for the last three,

four, months or nothing like that.

(R 776-777)(emphasis added).

Stoll brought up the gloves: "The plastic gloves I had, he had on?" (R 777). Stoll admitted telling Stewart that he had "better get rid of them." (R 778). However, Stoll put them in "the trunk of the car." (R 778).

When asked why his story kept changing, Stoll replied: "You don't know how it is. You tell one story, it's cover thine own ass, is the reality of life. I mean, I'm being frank with you." (R 780). He admitted: ". . . Chris' story sounds a hell of a lot more believable. . . . What's his story again?" (R 781-782). Stoll began laughing, and the officer said: "There ain't nothing funny here . . ." (R 782). "[Y]ou want to sit and say . . . I ran out of the house when he was killing my wife. But you also say that you love her. Come on, man, nobody [is] going to buy that story. All we [are] asking for [is] the truth here." (R 783). The interview ended at 2:50 a.m., November 4th. (R 784).

Testimony of Medical Examiner, Shashi Gore:

Chief Medical Examiner, Shashi Gore, first viewed Julie's body "in the bedroom . . . on . . . a water bed . . ." at the crime scene. (R 796, 797, 798). "[T]he body was cool to touch . . ., [and] that told me that death had occurred some time ago." (R 798-799). The doctor observed "trauma or injuries on the face and the neck areas. I saw some bleeding as well." (R 799). Julie's body

was taken to "the mortuary for complete evaluation." (R 799).

Julie's "death occurred . . . early morning . . . six to eight" (R 804). She had suffered

considerable trauma or injuries to the neck and the head region, and I found . . . petechial hemorrhages behind the conjunctiva, that is the thin membrane of the eyeball. Now these petechial hemorrhages tell you . . . that probably this person suffered from hypoxia, that is the lack of oxygen.

Then I also noted . . . injuries to the neck, these are pattern type of markings . . . Then I dissected the neck to find . . . areas of bleeding underneath . . .

[T]he cervical spine . . . fourth vertebra . . . was fractured. Considering all these findings, I made up my mind as to the cause and manner of death.

(R 804-805). "[I]n laymen's term[s], . . . the neck was broken."

(R 816). Within a reasonable degree of medical certainty, the cause of death was "strangulation due to severe head and neck trauma." (R 805). The type of injury was consistent with "someone placing her neck over . . . the wooden slat . . . then placing his knee on the back of the neck and pressing down." (R 805).

Using Exhibit C, Dr. Gore identified Julie Stoll as the person on whom he performed the autopsy and about whose death he had testified. (R 806). Exhibit C was entered into evidence.¹⁶ (R 807). The picture was taken during the autopsy and was "need[ed] . . . to complete my report." (R 812). The trial court admitted the picture for "conclusive identification." (R 815).

¹⁶Dr. Gore indicated that the primary need for the photograph was "identification." (R 807).

Dr. Gore could not say exactly how long it took for death to occur; however, he could "give you a window of timing . . . about fifteen to thirty minutes." (R 817). The time would vary depending on whether there was "complete and continuous compression of the neck, or whether it is intermittent" (R 817).

The trauma done to the neck was forceful. (R 818). Indeed, it took "severe force." (R 824). Julie was alive at the time the injuries were inflicted. (R 821-822).

Once the fracture of the fourth cervical vertebra occurs "that person goes into a shock without knowing what's happening." (R 822). In Julie, the fracture did not result "from a twisting or a back and forth motion." (R 823). Rather, it was "a compression fracture, where "you put the neck there, press down so you get a flexion of the neck." (R 824).

Testimony of Officer Randy Smith:

Officer Smith testified that he transported Stoll "to several different scenes in Winter Park and Orlando." (R 825). Stoll directed the officers to "dumpster locations." (R 826, 827). The property from the Stoll home was recovered from the dumpsters. (R 826-827).

Testimony of Victim's Mother, Vivian Parker:

The State called Julie Stoll's mother, Vivian Parker. (R 828). Ms. Parker saw her only child "once or twice a week." (R 828). Julie was thirty-five when she was killed. (R 833).

Stoll called Ms. Parker about "a month" prior to Julie's murder. (R 838). "He told me I better come and get my daughter before he killed her. At two o'clock in the morning." (R 838). Ms. Parker feared for Julie's safety. (R 838). She spoke with Julie, who told her not to come . . ." (R 838-839). Ms. Parker was still concerned and called her the following morning.¹⁷ (R 839).

The judge refused to permit Julie's mother to read the handwritten report filed in the domestic battery case against Stoll in May, 1994. (R 836). Judge Benson had taken judicial notice of the document, along with Stoll's plea and sentence, and ordered same published to the jury after Ms. Parker's testimony. (R 837). In Julie's handwritten, sworn statement, she wrote:

. . . Michael Stoll physically hit me . . . and verbally abused my son and myself. I am very fearful of my life and my children's lives. Michael Stoll has a 357 and I fear he may use it on me or my children. I have no other place to go . . . I was physically abused with Michael's fists and the phone. . . . He hung up on his mother, because he was hitting me and didn't want her to know. His mother Linda called back and I let her go when the police arrived. I am not physically able or mentally able to deal with the stress. . . . I have MS Michael insists on hitting me in the head and face. . . . I am afraid and fear for my life

(Appendix A).

Testimony of Ex-Wife, Linda Wise:

Linda Wise was married to Michael Stoll prior to Stoll's marriage to Julie. (R 844). Mrs. Wise and Stoll had a daughter,

¹⁷Defense Counsel declined to question Ms. Parker. (R 840).

and Mrs. Wise had contact with Stoll and Julie in connection with visitation of that child. (R 844). Stoll last visited with his daughter "[t]he weekend before, Halloween weekend," 1994. (R 845).

Stoll returned his daughter to Mrs. Wise on Sunday, October 30, 1994. (R 845). He had a discussion with Mrs. Wise at that time. (R 846). Stoll said:

[T]hat cunt, that cunt, she's really causing me a lot of troubles. She's costing me a lot of money. She had me in court and she's cost me over five hundred dollars.

(R 846). Stoll "was very angry He was pacing, his face was tight, uhm, he was very aggravated." (R 846).

Mrs. Wise had known Stoll "since 1982," and during that time she heard him use "cunt" and knows what he means by that. (R 846). "It meant that he was enraged, to me. I was always scared if I heard that word." (R 847). Julie was murdered "[f]our days later, on Thursday." (R 848).

Subsequent to the murder, Stoll called Mrs. Wise from jail. (R 848, 849). He said it "really sucked being there." (R 850). He told her that he had been charged with Julie's murder. (R 850). "I asked him if he was there; and I meant was he there during her death." (R 850). He answered: "Yes." (R 850). "I asked him why he didn't stop it." (R 851). He answered: "[S]he was sick and gonna die anyway." (R 851).

Testimony of Probation Officer, Jim Riley:

Officer Riley was assigned to Stoll's domestic battery case -

"a first degree misdemeanor." (R 852, 860). He saw Stoll "[o]n or about October 31st, 1994." (R 852). Stoll told Mr. Riley that "he wanted to withdraw his plea. I explained how . . ." (R 854). "I told him . . . he only had a thirty day window for him to readdress the issue . . ., and he needed to do it immediately." (R 855).

Mr. Riley described Stoll: "I observed an individual that was there for battery, domestic violence, who placed the blame everywhere but himself. He had no remorse . . ." (R 855). Stoll "said that it was a stupid offense. He said . . . he was gonna go . . . speak with her of a withdrawal of the plea." (R 858).

Testimony of Former Inmate, Randy Myers:

The defense stipulated that Stoll wrote the document introduced into evidence during Randy Myers' testimony and referred to as "the Script." (R 867, 873, 874). The Script was admitted via stipulation and was published to the jury. (R 868, 874).

Randy Myers met Stoll in jail in Seminole County. (R 876-877). He had previously been housed "with Christopher Stewart. . . . [T]hey transferred me . . ., and that's when I met Mr. Stoll." (R 877). While he was housed with Stewart, "he discussed the case a lot." (R 877). Likewise, when housed with Stoll, he discussed Stoll's case with Stoll. (R 878). "Once he learned where I came from, . . . where Stewart was, ninety percent of the time he came in, that's all he wanted to talk about." (R 878).

Stoll told Mr. Myers that he "could be his meal ticket out of

here." (R 879). Stoll urged him to "say that he [Stewart] admitted to everything . . ." (R 880). Stoll would give him "[t]wo to three thousand" dollars if he would testify for him. (R 880). Mr. Myers had lost "fifty, sixty percent" of his vending business while in jail, and he badly needed money. (R 880-881). He "had very bad financial problem[s] . . ." (R 905).

Stoll "tried to explain what to say, what not to say. . . . I told him I can't remember everything" and to "write anything you want me to say down." (R 881). Mr. Myers then identified "the Script," a document handwritten by Stoll and given to Mr. Myers while in jail. (R 881-882). The purpose of the Script was "[b]ecause I was getting out and he wanted to make sure I knew what to say on his behalf." (R 882). Mr. Myers used the Script to give an affidavit to a defense investigator after he got out of jail. (R 883-884). The affidavit largely tracked the Script. (R 884). *Compare* State's Exhibit T with State's Exhibit U.

At trial, Mr. Myers testified regarding the truth or falsity of each statement on the affidavit. The true statements were:

- (1) "I met Christopher Stewart . . . in . . . jail."
- (2) "[H]e said he killed Julie Stoll by snapping her neck."
- (3) "There was a joke in the jail that Chris was a chiropractor and would massage your neck for you."
- (4) "He [Stewart] said he would get the death penalty, but laughed because it would be ten or more years before that happened."
- (5) "I was later transferred to Michael Stoll's cell block."

(R 885-895). The remainder of the document was not true. *Id.*

Among the false statements, Stoll wanted Mr. Myers to say that he and Stewart were homosexual lovers "to try to make it a crime of passion and say he was my lover, so we had to kill her because she found out." (R 891). He also wanted Mr. Myers to say that Stewart told him that he had "fucked Julie, when I was down . . . with the Stolls in '93," and [s]he was in love with me, but her husband was in the way." (R 892). Further, that "[s]he wanted to see me again and wanted to keep me. She needed time, but would get rid of Mike one way or the other." (R 891-892).

Subsequent to giving the affidavit, Mr. Myers had "a change of heart." (R 895). "Right after . . . the private investigator came to my house, I was having very much second thoughts" (R 895). He took the Script to the State. (R 896). Mr. Myers did so because "that's not right what I did." (R 896). Later, he met with the prosecutor, told "what I knew," and prepared an affidavit for the State. (R 897).

Mr. Myers testified that while in jail together, Stoll "[t]wice" told him that **he** "[k]illed Julie." (R 899, 900). He killed her by helping "hold her down." (R 900). Stewart also told Mr. Myers that Stoll helped him kill Julie. (R 911-912).

Mr. Myers received no benefit from the State for his testimony. (R 899). He came forward "[t]o clear my conscience." (R 899, 923). The affidavit he gave "the State of Florida" was the

truth. (R 912). He reiterated: "I just wanted to clear my conscience and tell the truth, the whole truth, and nothing but the truth. And the one, the other one [the defense affidavit] was not nearly the truth."¹⁸ (R 923).

Mr. Myers said that in February of 1998, he met Stoll "[a]ccidentally" when he had a near collision with him, and the two talked briefly. (R 902, 927, 931). Stoll brought his case up, and asked Mr. Myers why he went to the State. (R 934). Mr. Myers told him: "I got to tell them, you know, the truth." (R 934). "My conscience was tearing me up and I wanted to come clean . . ."¹⁹ (R 937). Stoll responded: "When we get you to that stand we're going to tear you inside out." (R 937).

Mr. Myers did not tell Stoll that he had to get out of his case or lose his business. (R 903). Neither did he tell him that the prosecutor had been calling him, telling him not to move, and threatening a violation of probation. (R 903). Mr. Myers did not tell Stoll that his family told him not to get involved in Stoll's case. (R 917). Neither did he tell Stoll that he had taken the Script from Stoll's belongings in jail. (R 917). Rather, Stoll was "[b]asically just chewing me out inside and out . . ."¹⁹ (R 936).

Stoll's Trial Testimony:

¹⁸Later, Mr. Myers commented: "If I died today, you know, at least I know I got a clear conscience . . ."¹⁹ (R 934). He added: "Trust me, this is no fun being here." (R 934).

¹⁹He said that part of his counseling therapy was "to come clean on everything, and that's what I've been doing." (R 939).

Stoll testified during the guilt phase. (R 986). He said that he was released on bond on February 12, 1997, and it was subsequently revoked. (R 987). The revocation coincided with Stewart entering his plea. (R 987). During the "[t]hirteen months" he was out of jail, he met Randy Myers. (R 988, 991).

Stoll testified that he wrote the document referred to as "the script," but claimed that the "information came . . . from . . . Randy Myers" (R 990). He said he copied what Myers had written out for him. (R 990). Although he denied giving the information to Myers and asking him to use it against Stewart, he admitted having had conversation with Myers. (R 1006, 1012).

Stoll claimed that when he met Myers, on February 28, 1997, and Myers told him that the prosecutor "has been sweating me, and he has told me not to move my residence." (R 994). Stoll said he asked if the prosecutor had threatened to revoke Myers' probation. (R 994-995). Myers indicated the prosecutor said something like "it would be a shame if your fifteen year probation would be violated." (R 995). Stoll claimed that Myers also said that Stoll had to get him out of the case or he would "lose my business." (R 995). According to Stoll, Myers said that the script was found in his personal effects when he was leaving jail. (R 995). He claimed Myers told him that he had spoken with his "family and they told me to stay out of your case." (R 996-997). Stoll said that "Randy Myers has other motivations" to testify as he did. (R 1112).

According to Stoll, Julie had four months to live "if not a little less time than that." (R 1025). He said that breaking someone's neck "would seem to be very difficult." (R 1031).

The night before the murder, Stoll took Julie out to dinner. (R 1061-1062, 1096). They were out together for "three to four hours." (R 1062). The Stolls left Little Mikey in Stewart's care, although they had never done so before. (R 1062).

Stoll admitting knowing that "there was a plastic bag and two rubber gloves and I believe some clothes" in a towel at the murder scene. (R 1029-1030). He denied giving the bag to Stewart and telling him to put over Julie's head. (R 1030). He said the clothes were "[b]loody clothes. Christopher's clothes." (R 1030).

Stoll admitting having an argument with Julie on October 31st regarding the "domestic violence charge she had brought." (R 1037). He claimed he only entered a plea to the charge because Julie wanted him to. (R 1039). He said that the incident giving rise to the charge occurred "a week or week-and-a-half before" October 31st. (R 1040).

Stoll claimed that when he told Julie that he "was going to get the attorney, she become (sic) outraged." (R 1044). She said he "couldn't do that" and that "it would cause a lot of problems for . . . her son" (R 1044). He said: "She said that if I was gonna have her children all inconvenienced, she would just pack her bags and leave and the marriage was over." (R 1045). According

to Stoll, he "just turned around and walked away." (R 1045). However, before he left, "Julie turned to Chris and said that he had better straighten me out." (R 1048).

Stoll said that he and Stewart went to the garage where Stoll told Stewart he was going "to get an attorney and get this stuff straightened out." (R 1049). Stoll said: "I can't believe . . . she's doing this, when you know -- I said something like, when the bitch is gonna die." (R 1050). Upon further questioning, Stoll admitted that he said "the bitch has to die." (R 1051). However, he claimed: "[B]ut that isn't what I meant. . . . What I meant was I couldn't believe I was going through all this when she didn't have that much time to live." (R 1051).

Stoll said he discussed "things of this intimacy, like killing somebody, with Stewart" because "Stewart never referred to me as like Michael, he always used to call me dad, and called Julie mom. And . . . he was like a son to us. And he was concerned about Julie being upset, and he was only coming out as a friend to lend, you know, a supportive ear" (R 1053-1054). He claimed that Stewart "started talking about different ways to eliminate people . . . you can poison people, or you can, you know, --." (R 1054).

Stoll admitted that contrary to his interview statement, he did not buy Julie's car. (R 1058). She bought it with her own money. (R 1058).

Stoll denied having "ever said to Mrs. Parker, I'm going to

kill her." (R 1059). However, he admitted that he and Julie had a serious argument in "around October or September of '93" (sic) at which time he told Mrs. Parker to come and get Julie and the kids because "the safest thing for the two of us would be not to be around each other." (R 1060). Mrs. Parker picked them up, but Julie returned to Stoll shortly thereafter. (R 1060-1061).

Stoll said that on October 30, 1994, he returned his daughter to his ex-wife, Linda Wise. (R 1066). He was in a mood of "[h]appiness." (R 1066). He discussed with Mrs. Wise the problems that Julie was causing. (R 1066).

After he was incarcerated, he spoke with Mrs. Wise by phone. (R 1066). He told her that he did not stop Julie's murder because "she was going to die anyway." (R 1066-1067). He said that because: "I did not feel . . . she would ever be a threat to me . . ." (R 1068). He said he believes Mrs. Wise "is mentally incompetent." (R 1112).

Stoll said he waited "ten to fifteen minute[s]" before following Stewart into his house. (R 1069). Regarding what he had heard while outside of the home, Stoll said: "I made a statement that I heard something, but I don't think I did." (R 1069). He added: "I didn't hear anything." (R 1070).

Stoll admitted that he took Julie a cup of coffee on the morning of her murder. (R 1070). He said that when Julie came inside after seeing Little Mikey off to school, "[s]he seemed very

upset." (R 1071). "She wanted to know where Chris was." (R 1071). Stoll claimed that he went outside and told Stewart that Julie wanted to see him, and Stewart went inside. (R 1071-1072).

Asked if he told Stewart "to break her neck," Stoll responded: "I had no knowledge that that was going to happen."²⁰ (R 1072). He denied being present when Stewart killed Julie, claiming that he was not aware that "this was going on." (R 1072-1074).

Stoll described Stewart as "six foot two and two hundred twenty pounds" at the time of the murder. (R 1077). He said Stewart "kicked the door open" and exited with the items from the home. (R 1076-1077). He said that he

just had this cold, empty feeling come over me, I had like this sick (sic) sense, like something was wrong. Like . . . a mother will know that her child is being injured, while that child is being injured. I had this sickening feeling that made me go back to the house, and when I went back to that house when the door swung open and he stepped through it I felt this evil force, this aura around him.

(R 1077-1078). Stoll described Stewart's eyes as "big . . . and . . . hollow. Like he was . . . an empty person." (R 1078). He added that Stewart "just didn't seem himself." (R 1078). Stoll said that the powerful, evil aura or force surrounding Stewart "consumed me." (R 1106).

He described Stewart as "tense . . . pumped . . . sweat on his

²⁰At trial he also denied having prior knowledge that Stewart had been trying to poison Julie "days before" the murder. (R 1075).

forehead . . . seemed to be perspiring . . ." (R 1079). Stoll claimed the men eyed each other, and Stewart said "I took care of it." (R 1079). Stoll denied knowing "what he meant." (R 1080). However, he claimed to have "this feeling over me like something was wrong . . ." (R 1080). Stoll said he "just froze." (R 1080).

Stoll described himself as "about a hundred eighty pounds, and I was . . . not a very physically fit guy." (R 1080). He "had broken this arm a half inch above the elbow, I have a steel rod in it, it's got seven screws in it." (R 1080-1081). He admitted that he did not fear Stewart physically. (R 1114). Later, however, he claimed that while in the truck "Chris threatened my life," and "[h]e could easily overpower me. . . . he could easily grab a hold of me and snap my neck as the same he did my wife." (R 1117). When asked why he did not call the police from the job, Stoll replied: "That was not my agenda." (R 1120).

Stoll denied getting something to eat after the job, but admitted stopping at the post office. (R 1121). He said that he went inside the building with Stewart because Stewart "asked me to." (R 1121). When asked if Stewart had a weapon with him, Stoll replied: "His physical being." (R 1121). He described himself as a coward: ". . . I would have to say that the man who did this and did not defend his wife is nothing more than a coward." (R 1124).

Stoll admitted that he told Stewart "if you don't finish it, you're going to go to jail." (R 1093). He claimed he told him this

after they left the scene, not when Julie was being killed. (R 1093). He admitted participating "after the fact," and said he "didn't assist at all in killing her" (R 1095).

Stoll claimed that Stewart lived with him and Julie for only "[t]wo weeks" in 1993 and "[s]ix weeks" in 1994. (R 1096). He said that Stewart drank "excessively" and would hide alcohol in the "toilet tank, things like that." (R 1097).

Stoll said that Julie's medical condition was terminal. (R 1100). He added that "it was a near thing." (R 1100).

Trying to reconcile his various conflicting statements to the law enforcement officers and the jury, Stoll said:

Uhm, when I went in the house to get a cup of coffee, the TV was still on, I did hear noise from that. And I turned the dish washer on, and in my mind, because I was in the house and I later found out that . . . that my wife was actually being murdered **at the time** I, you know, from the delay of time **I imagined I heard things.**"

(R 1082)(emphasis added). Stoll said he "felt responsible." (R 1082). He said that he "didn't know what I was doing, I was confused" when talking to the officers. (R 1083). He told them he heard screaming because he was "[j]ust confused." (R 1083).

Stoll proceeded to repeatedly state that he "was just diminish capacity" and claimed he was "under extreme duress." (R 1085, 1104, 1108). He said Chris told him they had to dispose of the items from the house. (R 1087). When Stoll asked "why?"

He said that, uhm, that he had, uhm, that he had thought that he had murdered my wife, and that he thought she was dead, and he had planned on making it a robbery and he

needed me as his alibi.

(R 1087). Stoll said he did not take Stewart to the police and turn him in because he "was in fear" and "just withdrew." (R 1089). Later, he added:

I was told by Christopher Stewart that if I tried to tell on him . . . he would implicate me and make me a part of the murder. He would say that I planned it with him, conspired with him and helped him carry this out. And blame me for it.

(R 1089-1090). He clarified he feared "being implicated." (R 1090).

Stoll claimed that he refused to call 911, so Stewart did. (R 1105). He said that he did not kill Stewart with his .357 which was within reach of the bed on which his wife was killed because: "I guess I don't have the killer instinct." (R 1091, 1092).

Stoll said that he thought he "had a happy marriage, you know, was fine until October 31st, when she just flipped out." (R 1109). When asked about the domestic violence papers served on him on October 13th, he replied:

She told me that the paperwork had said there was a battery charge on her and Michael, and I asked her why it would say that, and she said she didn't know. And she said that the State prosecutors had it in for me, and they wanted to get me, and that I had this long lengthy supposedly criminal history in Seminole County, and they chose to prosecute me because they were afraid of a situation. . . . [T]hey were afraid for her.

(R 1109-1110).

Stoll opined that Stewart is "going to go home one day, in about seventeen to twenty years." (R 1115). He said he "read it on

that sheet right there," and asked his attorney to "circulate that to the jury." (R 1115). Stoll cried during his testimony and said that he has "nightmares" and "can't sleep at night. Because I have to relive this over, and over, and over again." (R 1116).

The defense rested. (R 1126). The State called Dana Martin in rebuttal. (R 1126-1128).

Testimony of Dana Martin:

Ms. Martin testified that she and Julie "were just like sisters." (R 1129). They had a conversation in August, 1994. (R 1130). She recounted:

Julie made me promise her in August when she came to my house one Saturday morning and was upset and shaken and crying, and they had been fighting all night the night before, that if anything ever happened to her I would go to the police and tell them that Michael did it or had it done. That he had threatened to kill her more than once and she . . . she knew he would do it.

(R 1131).

Ms. Martin had talked to Julie "from ten to twelve times before August" and "lots of times it was about her and Michael and the problems they were having." (R 1132). On cross, she testified that "Julie had made up her mind to divorce Michael," but she waited too long and "it cost her her life." (R 1140, 1141). Julie "loved him." (R 1142).

About "three weeks" before "the first or second Saturday" in August, 1994, Ms. Martin saw a bruise on Julie and "asked her what was going on." (R 1133-1134). Julie replied: "Michael did it. And

that she was afraid that he was going to kill her." (R 1134). Julie had expressed this same fear "[o]ne other time before that, . . . early in the summer." (R 1134). Julie appeared to be afraid: "She was very distraught and crying and shaking. And then she would calm down for a minute and then she'd just fall apart again." (R 1134). Julie "wanted to go to her house to pick up some stuff, and I went with her because she was afraid to go alone." (R 1134).

Julie told Mrs. Martin "that she had spoke (sic) to a lawyer about divorcing Michael." (R 1135). She gave certain valuable documents to Ms. Martin to keep safe for her. (R 1135).

On cross, Ms. Martin testified that she also "saw her in a cast . . . [o]r an arm brace." (R 1136). That was during the "summer before August." (R 1136). Julie told her that "Michael did this." (R 1136). Ms. Martin asked Julie to leave Stoll, but Julie replied "that it was as much her house as it was his." (R 1137). The Stolls had lived in the house since before they were married, and "Julie put money into the house . . . to redecorate." (R 1138). Counsel asked Ms. Martin if the Stolls appeared to be happy when she saw them together; Ms. Martin answered: "No." (R 1144).

The State rested its rebuttal. (R 1145).

PENALTY PHASE

Testimony of Dr. Gore:

State's Exhibit 8 - the autopsy picture used at the guilt phase - was used during the penalty phase testimony of Dr. Gore

without objection. (PP 26).²¹ Again, Dr. Gore identified the person on whom he performed the autopsy as Julie Stoll. (PP 26).

Using the autopsy photograph, Dr. Gore testified:

I found . . . injuries and hemorrhages in the deeper tissues of the neck, in the strap muscles and larger muscles of the neck. I also noted upon further dissection that there is a fracture of the cervical fourth vertebra. The spinal cord . . . was compressed because of the hemorrhage in the vertebral canal as a result of this fracture.

. . . [T]he top of the neck, the upper portion, there is irregular pattern contusions and some minor abrasions. If you come downward, you can see . . . two more patterns of contusion . . .

(PP 27-28). Such injuries are caused by "compression of the neck by means of ligature, hand, or any other object." (PP 28). They are consistent with the neck being placed over a hard, wood railing and body weight applied via a knee placed over the neck. (PP 28). The abrasions beneath the chin were consistent with "compression or banging it against a hard object." (PP 29).

In addition to the neck injuries, Julie suffered "a skin split" over her "left eye." (PP 28). This was the "result of blunt force injury to the region" (PP 28-29).

From the "onset of strangulation" there is "a wide window" of time before a person loses consciousness. (P 30).

[I]t can occur within a few minutes depending on how firm is the pressure applied and how often. . . . If it's a continuous firm pressure applied, it's . . . up to six and eight minutes. . . . It can last . . . to even 20

²¹"PP" refers to the transcript of the penalty phase.

minutes depending on the pressure.

(PP 30-31). While conscious, the person is aware that they are being strangled. (PP 31]). They "will feel the pain, the . . . sensation of dying because of lack of oxygen and this will . . . have a frightening effect . . . of impending death. Somebody is strangling me." (PP 31). The pain is "considerable." (PP 32). Dr. Gore testified that "to a reasonable degree of medical certainty," these events occurred to Julie. (PP 33).

Testimony of Ms. Parker:

Ms. Parker testified to the loss sustained as a result of Julie's murder. (PP 45-52). "Julie wanted to be cremated when she died . . . but we couldn't even do that for her because Michael Stoll . . . wouldn't sign the papers . . ." (PP 51). On cross, she testified that Julie's illness was **not** terminal. (PP 53). She said that although "she and Michael Stoll told me that she had a brain tumor . . . that was false." (PP 53).

Testimony of Michael Stoll:

Stoll claimed that he refused to permit Julie's body to be cremated because his attorney advised him not to. (PP 57-58).

Testimony of Stoll's Mother, Linda Stoll:

Mrs. Stoll and Stoll's father lived together from the time Stoll was born until the hearing. (PP 60). He "was born with a cleft palate and harelip." (PP 61). Stoll had successful surgery, but he continued to think he looked different. (PP 61). As a

child, he was attacked by a dog which left his face somewhat scared. Stoll "handled it real well" because he was able to explain his "different" appearance by the attack. (PP 61-62).

Mrs. Stoll felt that her son was "well-adjusted" and "did very well as far as growing up." (PP 63). Although he "disliked school very much," and dropped out before graduation, he and his mother completed high school requirements together at Seminole Community College. (PP 62-63).

Stoll worked with his father in his carpet laying business and left home when he was 18. (PP 59-60). "[H]e learned the trade . . ." and "made good money." (PP 64). The parents "tried to teach him responsibility" (PP 64). "[H]e went in business on his own after he married Linda, his first wife." (PP 64). Stoll made "a very good living for his family" (PP 65). "He did real well on his own." (PP 66).

Stoll divorced Linda, but later remarried her. (PP 66). "[S]ix or seven years ago," there was "correspondence . . . between Michael and Linda that resulted in his being ordered away from Linda." (PP 67, 86). Nonetheless, they had contact with each other at some point thereafter. (PP 67-71).

When Stoll's daughter visited Stoll, he took her to church. (PP 72). Stoll treated Julie's two sons "like they were his own. He wanted to adopt them." (PP 72-73). When Julie went to Chicago for medical treatments, "Michael was the sole caretaker of those

boys." (PP 73). "[T]he longest time that she was gone was three weeks," and "[t]he shortest . . . probably ten days." (PP 75-76). This happened "six or seven times during the 23 months" Stoll and Julie were married. (PP 76).

Stoll told his mother "that Julie was terminal with this tumor and that also with the MS . . . [S]he only had a short time to live." (PP 77). Julie indicated that she believed that her condition was terminal. (PP 78).

Mrs. Stoll claimed to have called at 8:20 a.m. on the morning of Julie's murder. (PP 79). "Julie answered the phone," and they discussed Christmas gifts and talked for about "ten minutes, 15 minutes." (PP 79-80, 82). Then, Stoll "got on the phone." (PP 80).

Mrs. Stoll testified about an altercation between Stoll and Julie in May of 1994 which resulted in the misdemeanor battery charge. (PP 83). She said that "Julie called and she said Michael is leaving . . . I'm going to call the police because he's leaving. . . ." (PP 83). Stoll got on the phone and said "she's all upset . . . out of control." (PP 83). Stoll went to his mother's house after Julie called the police. (PP 84). Mrs. Stoll "told his dad . . . if Michael goes back to Julie that one day he's going to be in jail. . . . [A]ll that Summer I had nightmares and I could see my son in jail and I knew it was because of Julie . . ." (PP 85).

Testimony of Mrs. Wise:

Mrs. Wise was with Stoll "from 1983 to 1991." (PP 89). During

that time, "[h]e struck me in my face, my nose, and I needed medical attention" in February, 1991. (PP 90). It "really, really hurt. It stunned me. . . . [T]he pain was tremendous." (PP 90-91). She "went to the emergency room," and learned that she "suffered soft tissue trauma to my entire facial bones" (PP 91). She was also diagnosed with "a broken nose." (PP 94). She was given "anti-inflammatory medication, a narcotic pain medication, and was told to stay out of work and rest. . . . I couldn't really move my neck. I still suffer from headaches from that" (PP 91).

Mrs. Wise explained: "He struck me with the back of his right hand . . . Most of the time, he struck me with the other one because he was left-handed and stronger with that one." (PP 91). She was so "in fear" of him that she "decided at that time to . . . divorce him" (PP 91-92).

Stoll also struck her when she was seven months pregnant with their daughter. (PP 92). He "struck me hard enough that I . . . went across the room and dribbled down the corner of the wall to the floor where I cowered until he left and I was pretty scared" (PP 92). She did not report this incident to the police because she was "too afraid of Michael." (PP 92-93).

Another incident occurred in 1986, or "'88." (PP 93). "[H]e took . . . the back of his left hand, . . . struck me with one blow out in the yard and I fell to the ground and he picked me up and held me by my head and smashed the back of my head into the fender

of the car and . . . [i]t just was real scary." (PP 93).

"Michael beat me on and off from '83 to '91. There were too many incidents to even recall." (PP 93). These occurred during both marriages to Stoll. (PP 97). On cross, Mrs. Wise testified: "If I ever filed anything in a criminal nature against Michael I would probably be in the same place Julie is right now." (PP 98). She was afraid of that happening to her during the time that she was married to Stoll. (PP 98-99). She stayed with him only until she could get her nursing degree and "could take care of my daughter myself." (PP 99).

When she filed for divorce the second time, "in February or March of 1991, . . . he wouldn't leave," and [h]e was keeping me up to 4:00 in the morning arguing." (PP 98). She had to get the police involved to get him away from her. (PP 98).

The jury returned a recommendation of the death penalty by a vote of seven to five. (PP 157).

SENTENCING

On May 12, 1998, Judge Benson permitted Stoll to present evidence relevant to sentencing. (P 944).²²

Testimony of Rev. Amar Rambisoon:

Rev. Rambisoon had known Stoll "[a]bout two years" and was "his pastor in the church, spiritual advisor, brother and friend."

²²"P" refers to the transcript of the sentencing hearing and the sentencing order.

(P 952-953). He said he agreed with Stoll's parents "that this boy could not have done what he was accused of." (P 954). He "beg[ged] this court for some clemency, some mercy . . ." for Stoll. (P 954).

Testimony of Becky Dicerio:

Stoll's older sister, Ms. Dicerio, testified regarding Stoll's childhood. (P 955-958). She referenced the "harelip and cliff (sic) pallet" and reported that "[h]e was teased through most of his childhood." (P 956).

Ms. Dicerio described Stoll as one who helped others, including "Julie and her children." (P 956-957). She said Julie wanted Stoll to "adopt Mickey." (P 957). She described some of Stoll's interaction with Julie's sons. (P 957-958). She opined that Stoll "loved Julie very much." (P 958).

Testimony of Stoll:

Stoll continued to deny his responsibility for Julie's murder. (P 959). He said he is "sorry for my mother-in-law and . . . my step-boys . . ." whom he claimed to "love . . . dearly." (P 959-960). He expressed "hope" that his "mother-in-law can forgive me for my wrongful judgment on that day," and said that he "wish[ed] he] could change it" (P 960).

On June 9, 1998, Judge Benson held the final sentencing hearing. He stated:

Julie Stoll was murdered, her life was taken away from her. It was taken away from her in such a way that she knew she was being murdered. She knew she was being betrayed. Being hugged that morning was a terrible

crime.

. . .

I went through all the facts. There was (sic) six attempts. The final attempt ultimately killed Julie.

So I find that the aggravating factors are heinous, atrocious and cruel . . . [and] cold, calculated and premeditated . . .

The killing kept on and on and on. She had a plastic bag put over her head. She chewed and struggled to get through that plastic bag until she finally suffocated to death on that waterbed.

I reviewed the mitigating factors. And a couple of them I find at least some moderate amount, church attendance, having Julie go to Chicago for medical treatment . . .

(P 981-982). The trial court then sentenced Stoll to death. (P 983). The judge filed a 10 page sentencing order regarding his findings and conclusions. (P 605-614).

SUMMARY OF THE ARGUMENTS

Point I: The victim's prior statements were relevant and admissible rebuttal evidence. The statements rebutted many claims Appellant made in his pre-trial statements and his trial testimony. They were also admissible as an excited utterance, and included Appellant's repeated threat to kill the victim. Finally, the statements were relevant to establish Appellant's state-of-mind. Moreover, even if the victim's statements were erroneously admitted, the error was harmless.

Point II: The prior statement of Appellant's co-defendant was properly admitted to rebut the claim of recent fabrication. The defense contended that the witness's trial testimony was dictated by a 1997 plea bargain he entered into with the State. The trial court permitted the witness's 1994 statement to be played to the jury to rebut the claim that the witness's trial testimony was changed to secure the plea agreement. Moreover, even if the 1994 statement was erroneously admitted, the error was harmless.

Point III: An autopsy photograph was properly admitted into evidence. It was relevant to assist the medical examiner in explaining the nature and manner of infliction of the wounds, the manner of death, and, during the penalty phase, to the HAC aggravator. The photo was also admissible for identification -- to show that the person that the medical examiner was testifying about

was Julie Stoll.

Point IV: A misdemeanor battery report, written by the victim, was properly admitted at trial. The document rebutted numerous claims made by Stoll in his pre-trial statements. Further, the issue is procedurally barred because no objection was made to publication of the document to the jury. Moreover, even if it was erroneously admitted, the error is harmless.

Point V: The plea agreement entered into with the co-defendant, calling for a second degree murder conviction and a sentence of 50 years, does not render Appellant's death sentence disproportionate. The degree of Appellant's culpability exceeds that of the co-defendant. Moreover, the testimony of the co-defendant was necessary, as only he and the Appellant witnessed the murder. That the State was forced to "make a deal with the devil" does not render Appellant's death sentence disproportionate. Appellant meets the statutory criteria for the death penalty, and his sentence should be upheld.

Point VI: Appellant coldly and carefully planned the murder of his victim. Heightened premeditation abounds in this case where Appellant made at least six attempts before succeeding. Appellant's brutal murder of his wife well qualifies for the heinous, atrocious, and cruel aggravator.

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY OF PRIOR STATEMENTS OF THE VICTIM WHICH WERE RELEVANT AND ADMISSIBLE REBUTTAL EVIDENCE, WERE EXCITED UTTERANCES, AND WERE RELEVANT TO APPELLANT'S STATE-OF-MIND.

Stoll complains that the trial judge should not have admitted the testimony of Dana Martin which recounted statements made by the murder victim, Stoll's wife, Julie. (IB 22). Specifically, Stoll complains of the following rebuttal testimony:

[S]ome three months prior to the date on which she was killed, Julie Stoll came to her house very upset and crying and told her that she and appellant had been fighting all night. Julie further told Martin that if anything should happen to her, Martin should tell the police that appellant did it. . . . Julie also told Martin that appellant had threatened to kill her on more than one occasion and that she knew that appellant would do it eventually. . . . [S]he had seen bruises on Julie Stoll some four months before the incident and Julie told her that appellant had caused them.

Id. at 22-23. The State contends that the subject testimony was relevant, admissible rebuttal evidence. Further, most of it was relevant and admissible under the excited utterance exception and may have been appropriate under the state-of-mind exception.

The state-of-mind hearsay exception set out in § 90.803(3), allows into evidence:

(a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind

2. Prove or explain acts of subsequent conduct of the declarant.

§ 90.803(3)(a)(1),(2), Fla. Stat. (1997). "[A]n excited utterance is a statement made while the declarant is under the stress of the excitement caused by the event." *State v. Skolar*, 692 So. 2d 309, 310 (Fla. 5th DCA 1997). See § 90.803 (2), Fla. Stat. (1997).

"The admissibility of evidence is within the trial court's discretion, and a reviewing court will not disturb a trial court's ruling unless an abuse of discretion is shown." *King v. State*, 514 So. 2d 354, 357 (Fla. 1987), *cert. denied*, 487 U.S. 1241 (1988). Whether to permit rebuttal testimony is a matter within the discretion of the trial judge. See *Clark v. State*, 613 So. 2d 412, 415 (Fla. 1992), *cert. denied*, 114 S.Ct. 114 (1993); *Johnson v. State*, 608 So. 2d 4, 10 (Fla. 1992), *cert. denied* 113 S.Ct. 2366 (1993); *Duest v. State*, 462 So. 2d 446, 448 (Fla. 1985). Judge Perry carefully considered the admissibility of the evidence, deciding to permit it only in rebuttal. (R 960-962, 1126-1127). Stoll has not carried his burden to show that no reasonable trial judge would have admitted the evidence on rebuttal.

Statement A:

The first statement relating to Ms. Martin's testimony is:

[S]ome three months prior to the date on which she was killed, Julie Stoll came to her house very upset and crying and told her that she and appellant had been fighting all night. Julie further told Martin that if anything should happen to her, Martin should tell the police that appellant did it. . . . Julie also told Martin that appellant had threatened to kill her on more than one

occasion and that she knew that appellant would do it eventually. . . .

(IB 22)(citations omitted). This statement was made to Ms. Martin in August, 1994. (R 1130). When the statement was made, Julie "was very distraught and crying and shaking. . . . [S]he would calm down for a minute and then she'd just fall apart again." *Id.* at 1134.

The State contends that Statement A was relevant and admissible rebuttal evidence. It rebuts the following:

(1) Stoll's trial testimony that he thought he had a happy marriage until October 31, 1994. (R 1109).

(2) Stoll's claim in his Statement #1 that the May, 1994 battery incident was the only incident he and Julie ever had, and they were not having problems. (R 688, 690).

(3) Stoll's claim in his Statement #1 that Julie was afraid of him because of abuse she received from her ex-husband. (R 686).

(4) Stoll's claim in Statement #1 that the reason Julie wanted a divorce was because "she has a brain tumor [and] wants to go away . . . from everybody." (R 664).

(5) Stoll's claim in Statement #2 that he had "been trying to work things out with Julie to . . . get a divorce admirably." (R 742).

That Stoll and Julie had been "fighting all night," that Stoll had threatened to kill her during that fight, and that Julie believed that he was serious -- would do it, or have it done -- rebutted

Stoll's claim that her fear of him was grounded on old abuse from another man. That evidence also showed that prior to October, 1994, Stoll well knew that he and Julie did not have a happy marriage, that the couple had had serious problems between them other than the battery in May, 1994, that Julie had good reason to want a divorce that had nothing to do with her alleged brain tumor, and that Stoll was not trying to work out an amicable divorce. Thus, the evidence was admissible to rebut Stoll's various, "cover thine own ass" statements. Stoll has not shown that the trial judge abused his discretion in admitting the evidence.

Further, the State submits that Statement A was admissible as an excited utterance. Julie made the statement, right after an all night fight with Stoll. (R 1131). Julie was still "upset and shaken and crying" *id.* when she stated to Ms. Martin:

that if anything ever happened to her I would go to the police and tell them that Michael did it or had it done. That he had threatened to kill her more than once and she . . . she knew he would do it.

Id. Thus, Statement A was a statement made while the declarant, Julie Stoll, was under the stress of the excitement caused by the event -- the all night fight with Stoll.²³ This statement was admissible as an excited utterance. *State v. Skolar*, 692 So. 2d at 310. See § 90.803(2), Fla. Stat. (1997).

²³The threat to kill made by Stoll to his victim was an admission or statement against interest, and the victim's report of it was an excited utterance.

Moreover, the State submits that the evidence was admissible under the state-of-mind exception to the hearsay statute. Stoll claims that *Correll v. State*, 523 So. 2d 562 (Fla. 1988), cert. denied, 488 U.S. 871 (1988) supports his position that his victim's statements cannot be used to prove his state of mind. However, he misses the point. Statement A includes Stoll's own statement - his threat to kill Mrs. Stoll. That he made the statement to his victim, does not render it inadmissible.

In *Correll*, the witness statement at issue was testimony that the victim was afraid of the defendant and had displayed some "in language." 523 So. 2d at 565. The State submits that there is a significant difference in the *Correll* testimony and that of the instant case. The instant case includes the victim's report of an actual threat to kill her made by Stoll two to three months prior to her murder. The instant statements were admissions against interest -- relevant to rebut the defense contention that co-perpetrator, Stewart, was the sole killer and Stoll was only involved after-the-fact. Thus, Statement A was admissible to rebut the contention that someone else solicited the murder. *Cf. Davis v. State*, 698 So. 2d 1182, 1189 (Fla. 1997), cert. denied, 118 S.Ct. 1076 (1998)[Statements of witness accused of soliciting the murder admissible to show witness's state of mind rebutting defendant's contention].

Stoll contends that his threat to kill Julie was inadmissible

because a victim's statements cannot establish the defendant's state-of-mind. The State submits that he is mistaken. Because Stoll was charged with premeditated murder, his state of mind at the time of the murder was in issue. See *Downs v. State*, 574 So. 2d 1095, 1098 (Fla. 1991).

The general rule is that a victim's statement of fear of the defendant cannot be used to prove the defendant's state-of-mind. However, Stoll identifies three exceptions:

[T]he defendant: (1) claims it was self-defense, or (2) claims the victim committed suicide, or (3) claims the death was accidental. Then the hearsay statements are admissible to rebut the defendant's claim as to how the murder happened.

(IB 23-24). In *Peterka v. State*, 640 So. 2d 59, 69 (Fla. 1994), *cert. denied*, 115 S.Ct. 940 (1995), this Court listed the above three instances as exceptions to the general rule. The State contends that same was not an exhaustive, or all-inclusive, list and that the instant situation constitutes a fourth exception thereto.

In *Monlyn v. State*, 705 So. 2d 1, 5 (Fla. 1997), *cert. denied*, 118 S.Ct. 2378 (1998), this Court rejected a hearsay complaint regarding admission of a statement made by Monlyn to a fellow inmate. The witness testified:

[T]he day before Monlyn escaped, Monlyn told him he was going to escape from jail, get a shotgun, and kill the first person he saw who had a car. . . . This is exactly the kind of evidence contemplated by section 90.803(3)(a)2, Florida Statutes (1995), as satisfying the state of mind exception to explain subsequent conduct.

(footnote omitted). Likewise, in *Ferrell v. State*, 653 So. 2d 367, 369 (Fla. 1995), during the trial, "Ferrell's neighbor testified that approximately one week before the murder Ferrell told her that he had 'killed one bitch and he will do it again' and 'that if he went back to prison he's sure he wouldn't be coming back this time.'" This Court found that the statement was admissible under the state-of-mind exception to the hearsay rule. *Id.* at 369. See § 90.803(3), Fla. Stat. (1997).

Shortly before her murder, Stoll told the victim that he was going to kill her. Subsequently, the victim was killed at a time and place where Stoll was physically present. Stoll claims that the only other person physically present was solely responsible for the victim's death. The other person claims that Stoll ordered the murder and participated in it. Stoll claimed that he heard the victim calling to him for help and admitted that he did not help her. The state-of-mind evidence of the victim's fear of Stoll was admissible to explain his subsequent conduct. *Monlyni; Ferrell*.

In *Escobar v. State*, 699 So. 2d 988, 998 (Fla. 1997), *cert. denied*, 118 S.Ct. 1512 (1998), this Court rejected the claim that the murderer's statement that "he carried a gun and he would kill a police officer before he would go back to jail" was inadmissible hearsay. Finding the statement admissible under § 90.803(3)(a)(1), (2), this Court held:

The statement is relevant to appellant's motive for the murder of Estefan, and it is a statement of a plan

establishing appellant's then existing state of mind and explaining his subsequent conduct. We held a similar statement to be admissible in *Jones v. State*, 440 So. 2d 570, 577 (Fla. 1983). We here hold that appellant's statement to Bonilla is a relevant exception to the hearsay rule and may properly be admitted against appellant in his new trial.

699 So. 2d at 998 (footnotes omitted). Likewise, Stoll's statements to the victim threatening to kill her, made a few months prior to the murder, were an admissible statement of a plan²⁴ establishing Stoll's state-of-mind and explaining his subsequent conduct. The evidence of Stoll's threat to kill Julie is distinguishable from an expression of the victim's fear of the defendant. Thus, at least the threat portion of Statement A was relevant and admissible to prove Stoll's state-of-mind.

Finally, assuming *arguendo* that it was error to admit some, or all, of Statement A, the error was harmless. Harmless error analysis is applicable to this issue. See *Downs*, 574 So. 2d at 1098-1099; *Correll*, 523 So. 2d at 565-566.

At trial, at least six attempts to kill Julie were proved:²⁵

(1) Stoll put medication and alcohol in Julie's coffee in an attempt to overdose her;

(2) While Stoll hugged Julie, Stewart "attempted to break her neck;"

²⁴During the all-night argument, Stoll "had threatened to kill her more than once." (R 1131).

²⁵There may have been a seventh. See, *infra*, 89 n.32.

(3) While Stoll and Stewart held Julie down, Stewart tried to suffocate her by pressing her face into the bed;

(4) Stewart again "attempted to break her neck," by turning her head around "clockwise, far enough that I could see her face;"

(5) At Stoll's direction, Stewart put a plastic bag over Julie's head to suffocate her;

(6) At Stoll's direction, Stewart laid Julie across the wooden rail of the bed and pressed all of his weight onto the back of her neck with his knee.

(R 550, 556-557, 563, 564, 565-566, 617-618). Stoll was present at, and directed, each attempt. The last of which was successful.

Moreover, Stoll tried to accomplish the deed himself -- placing poison into Julie's coffee and giving it to her to drink. When that did not work, Stoll came up with another plan. However, since he had a bad arm and could not apply the force needed to break Julie's neck, he had to procure a "weapon," as Stoll described him -- Stewart. (See R 1121). Not only did Stoll personally procure the weapon (Stewart), he provided props such as the plastic gloves and the plastic bag, and gave instructions as to their use. (R 777, 564, 647). He repeatedly grabbed and/or held his victim so that his weapon could be best positioned to kill. Then, he brought two weapons together, Stewart and the wooden railing, and gave the explicit directions which finally accomplished his goal. The facts of this terrible murder show that

Stoll wielded his weapon unmercifully, and eventually successfully. As the attempts repeatedly failed, Director Stoll made it clear to Stewart that there was no stopping; Julie must die. (R 568). And, die she did; a horrible, lingering death. This, to a sick and weakened woman, who, **as Stoll** said, "had never really done anything to hurt anybody." (R 663).

Stoll had battered Julie in May, 1994, causing her to "fear for my life." (Appendix A). During the summer of 1994, Julie's arm was in a cast, and she said that Stoll "did this." (R 1136). When Ms. Martin saw Julie in August, 1994, she was bruised and said "Michael did it." (R 1133-1134). Stoll had repeatedly threatened to kill her one night in August, 1994. (R 1131). Then, in early October, 1994, he even threatened her life to a third person; he ordered Ms. Parker to "come and get my daughter before he killed her." (R 838). Unfortunately, a month later, on November 3, 1994, Stoll made good on his threats.

In his Statement #3, Stoll admitted, at least by implication, that he had decided to kill Julie. "When was the first time that it would come to your mind to kill her?" (R 773). "Uhm, no, I can't tell you exactly. About, uhm after having a conversation with her on October 31st." (R 774).

Randy Myers testified that Stoll told him that he "[k]illed Julie." (R 899, 900). He told him so "[t]wice." (R 899). Stewart also told Mr. Myers that Stoll helped him kill Julie. (R

911-912).

At trial, Stoll admitted having an argument with Julie on October 31st regarding the "domestic violence charge she had brought." (R 1037). He also admitted that immediately thereafter, he told Stewart "the bitch has to die." (R 1051). At trial, Stoll explained that he discussed "things of this intimacy, like killing somebody, with Stewart" because "Stewart . . . was like a son to us." (R 1053-1054). Julie did die, after a brutal murder, three days later, on November 3, 1994.

Thus, the evidence of Stoll's guilt is overwhelming, and therefore, any error in admission of Statement A was harmless beyond a reasonable doubt. Stoll is entitled to no relief.

Statement B:

[S]he had seen bruises on Julie Stoll some four months before the incident and Julie told her that appellant had caused them.

The objection below was to hearsay. That Ms. Martin had personally seen bruises on Julie approximately four months before her murder was not hearsay because it recounted a personal observation made by the witness. Thus, the first part of Statement B was not preserved by proper objection below, and therefore, is procedurally barred on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)[only the specific issues preserved by objection at trial may be raised on appeal].

Assuming *arguendo* that the remainder of the evidence, i.e.,

that Julie told Ms. Martin that Stoll caused the bruises, was improperly admitted, the error is harmless beyond a reasonable doubt. Stoll does not mention the testimony elicited on **cross-**examination that Ms. Martin saw Julie "in a cast . . . [o]r an arm brace" during the "summer before August" and that Julie told the witness that Michael Stoll caused the injuries which resulted in the wearing of the cast or brace. (R 1136). Neither does he reveal that defense counsel specifically asked Ms. Martin if Stoll injured the victim's arm and elicited from the witness that Julie told her that Stoll had so injured her. *Id.* That more damaging evidence, which goes well beyond the direct testimony about "bruises," renders any error regarding the "bruises" testimony harmless. Of course, it is also harmless due to the overwhelming evidence of Stoll's guilt independent of the subject statement as set-out hereinabove.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING A PRIOR STATEMENT OF APPELLANT'S CO-DEFENDANT TO REBUT A CLAIM OF RECENT FABRICATION.

Stoll complains that the fourth statement given by his co-perpetrator, Christopher Stewart, should not have been admitted into evidence. (IB 25). He claims that it was not admissible to rebut a claim of recent fabrication because his attorney "had not argued that there was recent fabrication of the witness' trial testimony." *Id.* at 26, 27. Indeed, he claims to have "acknowledged the prior statement of Stewart whereby he substantially implicated appellant in the same way that he did at trial." *Id.* at 27.

The State submits that this issue is not properly before this Court because it was not preserved below. In the lower court, defense counsel objected "on the grounds it's not covered under 90.614, Florida Statutes." (R 947). The recent fabrication statute is § 90.801(2)(b). See § 90.801(2)(b), Fla. Stat. (1997). "It is well settled that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal. *Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992), *cert. denied*, 114 S.Ct. 99 (1993).

Assuming *arguendo* that the issue is properly before this Court, it is without merit. Because prior consistent statements are hearsay, they are not ordinarily admissible to "corroborate or bolster a witness' trial testimony." *Rodriguez*, 609 So. 2d at 499;

Jackson v. State, 498 So. 2d 906, 909 (Fla. 1986). Such statements may not be admitted as "substantive evidence unless they qualify under an exception to the rule excluding hearsay." *Rodriguez*, 609 So. 2d at 500(citing Charles W. Ehrhardt, Florida Evidence, § 801.8 (1992 ed.)). However, where the declarant testifies, is subject to cross-examination, and the prior consistent statement is offered to "rebut an express or implied charge ... of improper influence, motive, or recent fabrication, are admissible." *Id.* at 500(quotting Sec. 90.801(2)(b), Florida Statutes (1989)).

In *Rodriguez*, on cross-examination, the defense made references to plea agreements that had been entered with co-defendants. *Id.* at 500. The prior, consistent statements were made before the plea negotiations began. *Id.* This Court held that because the statements were made "prior to the plea negotiations and therefore prior to the existence of both witnesses' motive to fabricate they were properly admitted." *Id.*

In *Chandler v. State*, 702 So. 2d 186, 197-198 (Fla. 1997), *cert. denied*, 118 S.Ct. 1535 (1998), the State's witness testified that Chandler told her he committed the crimes. 702 So. 2d at 198. On cross-examination, defense counsel elicited evidence which supported a motive for the witness to testify falsely. *Id.* The State sought to introduce the witness's prior statement made before one of the alleged motives to falsify arose. *Id.* In the earlier statement, the witness said that Chandler told her "that he could

not come back to Florida, the police were looking for him, that he had murdered the women." *Id.* This Court held:

[T]he statement was properly admitted as rebuttal regarding the suggestion that Mays' 1994 Hard Copy appearance motivated her trial testimony, since Mays testified and was subject to cross-examination, and the statement pre-dated the existence of her motive to fabricate, i.e., the Hard Copy appearance. See § 90.801(2)(b), Fla. Stat. (1993). The October 1992 statement was undisputedly made after the October 1990 drug money incident. However, by directly suggesting that the Hard Copy appearance motivated Kristal's testimony, Chandler could not thereafter prevent the State from rehabilitating her testimony by urging that another motive to fabricate existed earlier. That was a choice that the defendant made in urging more than one reason to fabricate at trial. Having made this choice, he must suffer its natural consequences.

Id.

Moreover, a claim of improper admission of such statements is subject to harmless error analysis. *Id.*; *Anderson v. State*, 574 So. 2d 87, 93 (Fla. 1991), *cert. denied*, 112 S.Ct. 114 (1991). In *Chandler*, this Court held in the alternative that any error was harmless, stating:

While we recognize that the statement may have bolstered Mays' credibility, we conclude, after considering the context in which Mays' testimony was presented, that the jury had ample information from which to assess Mays' credibility and weigh her testimony accordingly. Therefore, we also find that any error is harmless beyond a reasonable doubt. *DiGuilio*, 491 So.2d at 1135.

Id. at 198-199.

In the instant case, the defense claimed that State witness Christopher Stewart had at least one motive to testify falsely against Stoll. On June 4, 1997, Stewart entered into a plea

bargain for second degree murder with a sentence of 50 years. (R 592; P 1165, 1166). The statement at issue was made by Stewart on November 3, 1994, (R 951), and was consistent with Stewart's trial testimony. Stewart was strenuously cross-examined, and the plea agreement was emphasized.²⁶ (R 635-640). That agreement called for Stewart "to testify in accordance with [his] proffer of June the 4th of 1997." (R 635). The following occurred:

[Defense Counsel]: [Y]ou're supposed to give the same testimony in this courtroom today that you gave the State Attorney back on June 4th, 1997?

[Stewart]: Yes.

[Defense Counsel]: Okay. They don't care about the first four statements, they just want statement number five; correct?

[Stewart]: Statement number five is the same thing as three and four, it's just things that were left out.

[Defense Counsel]: The point is, your plea agreement clearly calls for you to make the statement, give the same testimony here today that you gave on June 4th?

[Stewart]: Yes, sir.

[Defense Counsel]: And if there's something you recall any different, that doesn't matter, you're supposed to say what you had said on June 4th, whether your memory is better, something refreshed, whatever, you're still tied to this plea agreement; correct?

[Stewart]: Yes, sir. . . .

[Defense Counsel]: Mr. Stewart, you're a murderer and you're a liar, you got out of the death penalty because of the deal you cut with the State, and you're telling us

²⁶Defense Counsel declined to cross examine Stewart after the prior, consistent statement was played. (R 958).

to believe what you say here today. Why? Why should we believe you? Why should anybody believe you here today?

(R 635-636, 641). Clearly, this constitutes a claim of improper motive and/or recent fabrication. The defense wanted it to appear that Stewart's trial testimony was tailored by the State and memorialized in the June 4, 1997 statement. The State introduced Stewart's fourth statement -- made just before midnight on November 3, 1994 -- to rebut the charge of improper motive and/or recent fabrication. This is precisely what the rule of law applied in *Rodriguez* and *Chandler* is directed to. The instant statement was properly admitted as rebuttal regarding the charge that the 1997 plea bargain motivated Stewart's trial testimony which was alleged to have differed from the prior statements he had given. Since Stewart testified, was cross-examined, and the statement pre-dated the existence of his motive to fabricate, i.e., the 1997 plea bargain, the trial judge properly admitted the prior consistent statement. See § 90.801(2)(b), Fla. Stat. (1993).

Certainly, it can not be said that no reasonable judge could have concluded that a charge of improper motive or recent fabrication had been made, rendering the evidence admissible. Thus, Stoll has not proved that the lower court abused his discretion in admitting the prior consistent statement.

Moreover, any error is harmless due to the overwhelming evidence of guilt. See *Argument, supra*, at 59 - 61. Stoll is entitled to no relief.

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING THE ALLEGEDLY GRUESOME PHOTOGRAPHS INTO EVIDENCE.

Stoll complains that a photograph "taken at the morgue during the autopsy" was improperly admitted into evidence. (IB 28). He claims that admission of the photograph was error because the medical examiner "testified that the picture in question was not necessary to his determination of the cause of death or his testimony at trial." (IB 29). He adds that "[t]herefore, the photograph simply had no relevance."²⁷ (IB 29).

Admission of photographic evidence is a matter within the discretion of the trial court. *Wilson v. State*, 436 So. 2d 908 (Fla. 1983). The trial judge's ruling will not be disturbed on appeal absent a clear abuse of discretion. *Pangburn v. State*, 661 So. 2d 1182 (Fla. 1995); *Wilson*.

A photograph is admissible if it is relevant to a material issue, either independently or by corroborating other evidence. *Straight v. State*, 397 So. 2d 903, 906 (Fla. 1981). The "test for admissibility of photographic evidence is relevancy rather than necessity." *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996), *cert. denied*, 117 S.Ct. 975 (1997). "In admitting photographs, the primary focus should be relevancy." *Larkins v. State*, 655 So. 2d

²⁷The objection in the lower court was the boilerplate "unnecessary, immaterial and irrelevant" (R 815) and was marginally sufficient to preserve the instant issue for review.

95, 98 (Fla. 1995)(*quoting Wyatt v. State*, 641 So. 2d 355 (Fla. 1994), *cert. denied*, 115 S.Ct. 1372 (1995)).

Photographs are also admissible if they assist the medical examiner in explaining the nature and manner in which the wounds were inflicted. *Bush v. State*, 461 So. 2d 936, 939 (Fla. 1984), *cert. denied*, 475 U.S. 1031 (1986). Moreover, they are admissible where they "show the manner of death, the location of wounds, and the identity of the victim." *Larkins v. State*, 655 So. 2d at 98. Merely because a photograph is "gruesome" does not render its admission into evidence an abuse of discretion. *Thompson v. State*, 565 So. 2d 1311, 1315 (Fla. 1990).

Such photographs are also properly admitted during the penalty phase to aid the jury "in understanding the facts of the case in order that it may render an appropriate advisory sentence." *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986). Moreover,

Section 921.142(2), Florida Statutes (1995), which describes the procedure for the penalty phase of a capital case, states "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence...."

Zakrzewski v. State, 717 So. 2d 488, 494-495 (Fla. 1998), *cert. denied*, 119 S.Ct. 911 (1999).

In *Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997), *cert. denied*, 118 S.Ct. 345 (1997), the defendant objected to the introduction "of six slides of the victim's body in the alley as

gruesome and cumulative."²⁸ The trial court overruled the objections and admitted the evidence. On appeal to this Court, Gudinas complained that "even if the slides were relevant, they were not necessary." 693 So. 2d at 963. He also complained that their sole purpose "during the penalty phase was to arouse overwhelming sympathy for the victim." *Id.* This Court disagreed, finding the slides relevant and admissible during the guilt phase. *Id.* The slides had been preliminarily screened by the trial court, and they were relevant to the medical examiner's testimony and "necessary in order for the location and extent of those wounds to be accurately explained to the jury." *Id.*

Similarly, in *Pope v. State*, this Court found "[t]he autopsy photographs were relevant to illustrate the medical examiner's testimony and the injuries he noted on Alice." 679 So. 2d 710, 713-714 (Fla. 1996). Noting that the trial judge had viewed the photographs before admission, and having also viewed the photographs, this Court could not "say the trial court abused her discretion." *Id.* See *Jones v. State*, 648 So.2d 669, 679 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995).

In the instant case, during the guilt phase, the autopsy photograph was relevant to the medical examiner's testimony as he explained the injuries depicted in the photo and gave his expert

²⁸Two slides were of the victim's vagina with a stick protruding from it, and there were "several slides of the body in the morgue." 693 So. 2d at 963.

opinion regarding the horrific trauma the victim suffered. As in *Gudinas*, the photo was preliminarily screened by the trial court. (R 806-815). It was relevant and necessary to help the jury understand the expert's testimony. The photo showed the multiple injuries inflicted on Julie Stoll, depicting the location and extent of the wounds. Thus, the instant photo was clearly admissible. *Gudinas*. See *Straight v. State*, 397 So. 2d at 903 (photograph of victim's decomposed body admissible where relevant to corroborate testimony as to how death was inflicted).

The autopsy photograph was also relevant to the aggravating circumstance of heinous, atrocious, and cruel. It assisted the medical examiner in explaining how and why he determined that Julie was alive and suffered extensively before the last of the oxygen in her body was exhausted and she suffocated. Clearly, this was relevant to the HAC aggravator.

Moreover, as the trial judge held, the photograph at issue was also relevant and necessary to identify Julie Stoll as the person on whom the medical examiner performed the autopsy testified about at trial. (R 815). Dr. Gore testified that the photo was needed "for identification." (R 807). Although Stewart had identified the deceased as Julie Stoll, (R 582), he could not identify the person on whom the autopsy testified about at trial had been performed; only one present could supply that identification. Dr. Gore did so, using the subject autopsy photograph. This is a

sufficient basis on which to uphold the lower court's admission of the photo. *Larkins*. See *Jackson v. State*, 545 So. 2d 260 (Fla. 1989)(photographs of victims' charred remains properly admitted where it was relevant to prove identity); *Wilson v. State*, 436 So. 2d at 910(autopsy photographs admissible where relevant to prove identity,²⁹ nature and force of the violence, and to show premeditation); *Foster v. State*, 369 So. 2d 928 (Fla. 1979), *cert. denied*, 444 U.S. (1979)(gruesome photographs were admissible in the guilt phase to establish identity and cause of death).

The photograph was also admissible to corroborate other evidence. *Straight*, 397 So. 2d at 906. Dr. Gore testified that the photo "is a part of my report" and was needed "to complete my report. (R 812). He also said that it was required for "identification," and "to authenticate my findings."³⁰ (R 807, 808).

The autopsy pictures showed the depth of the horrible injury Julie Stoll suffered and showed the considerable force used on her. Considering the probative value of the photograph in supporting the State's charge of premeditated murder on Julie Stoll and the existence of the HAC aggravator, the trial judge did not abuse his discretion in admitting the autopsy photograph. There was no error, muchless prejudicial error, in its admission into evidence.

²⁹The photographs were admissible even though identity had been established with other photographs. *Wilson*, 436 So. 2d at 910.

³⁰The photo was taken "at the time when I was conducting the autopsy." (R 812).

Moreover, any error is harmless due to the overwhelming evidence of guilt. See Argument, *supra*, at 59 - 61. Stoll is entitled to no relief.

POINT IV

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE A MISDEMEANOR BATTERY REPORT WITH STATEMENT WRITTEN BY THE VICTIM TOGETHER WITH APPELLANT'S PLEA AND SENTENCE TO THAT CHARGE.

Stoll complains that the trial judge took judicial notice of court documents reflecting his conviction for misdemeanor battery on the victim, Julie Stoll. (IB 30). The only documents admitted into evidence at trial were the incident report, which included Julie's handwritten statement of the basis for the charge, and the plea and sentence. *Id.* Defense Counsel objected, claiming that the documents were inadmissible hearsay. *Id.*

Later, when the State sought to have the victim's mother read the documents to the jury, defense counsel objected, citing an insufficient predicate and "inflammatory." (R 836). The trial judge did not permit the witness to read the documents, but merely had them published to the jury. Counsel did not object to the publication, indicating that he was satisfied with the disposition of his objection. (R 836-837). Thus, this issue is not preserved for appellate review.

On appeal, counsel asserts that before a court may take judicial notice of court records, the evidence must be relevant. (IB 31). The problem is, there was no objection on that basis at trial. "[T]he specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised

below will not be heard on appeal." *Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992). See *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1983). Thus, this issue is procedurally barred. *Id.*

Assuming *arguendo* that the matter is not procedurally barred, it is without merit. "The admissibility of evidence is within the trial court's discretion, and a reviewing court will not disturb a trial court's ruling unless an abuse of discretion is shown." *King v. State*, 514 So. 2d 354, 357 (Fla. 1987), *cert. denied*, 487 U.S. 1241 (1988). Whether to permit rebuttal testimony is a matter within the discretion of the trial judge. See *Clark v. State*, 613 So. 2d 412, 415 (Fla. 1992); *Johnson v. State*, 608 So. 2d 4, 10 (Fla. 1992); *Duest v. State*, 462 So. 2d 446, 448 (Fla. 1985). Stoll has not carried his burden to show that no reasonable trial judge would have taken judicial notice of the documents.

Julie's statement was relevant and admissible rebuttal evidence. In her statement, she wrote:

. . . Michael Stoll physically hit me . . . and verbally abused my son and myself. I am very fearful of my life and my children's lives. Michael Stoll has a 357 and I fear he may use it on me or my children. I have no other place to go . . . I was physically abused with Michael's fists and the phone. . . . He hung up on his mother, because he was hitting me and didn't want her to know. His mother Linda called back and I let her go when the police arrived. I am not physically able or mentally able to deal with the stress. . . . I have MS Michael insists on hitting me in the head and face. . . . I am afraid and fear for my life

(Appendix A). The statement sworn to on May 9, 1994. *Id.*

That statement was admissible to rebut:

(1) Stoll's version of the events that resulted in the battery charge, and his claim that he never battered Julie. (R 686, 688).

(2) Stoll's claim that he and Julie were not having problems. (R 690).

(3) Stoll's claim in his Statement #1 that Julie was afraid of him because of abuse she received from her ex-husband. (R 686).

(4) Stoll's claim in Statement #1 that the reason Julie wanted a divorce was because "she has a brain tumor [and] wants to go away . . . from everybody." (R 664).

That Stoll had hit Julie with his "fists and the phone," that he "insists on hitting me in the head and face," and that she was "afraid and fear for my life," rebutted Stoll's claim that Julie's fear of him was grounded on old abuse from an ex-husband. That evidence also showed that prior to October, 1994, Stoll well knew that he and Julie did not have a happy marriage, that they had had serious problems between them, and that Julie had good reason to want a divorce that had nothing to do with her alleged brain tumor. Perhaps most importantly, it rebutted Stoll's account of the incident that resulted in the battery charge. Thus, the evidence was admissible to rebut Stoll's various, "cover thine own ass" statements. Stoll has not shown that the trial judge abused his discretion in admitting same.

Moreover, any error in admission of the statement is harmless due to the overwhelming evidence of Stoll's guilt. See Argument, *supra*, at 59 - 61. Stoll is entitled to no relief.

POINT V

**THE TRIAL COURT DID NOT ERR IN FINDING
APPELLANT'S DEATH SENTENCE PROPORTIONATE;
APPELLANT'S CULPABILITY EXCEEDED THAT OF HIS
CO-DEFENDANT.**

Stoll complains that his death sentence is disproportionate "since the actual murderer had received a deal to plead to second degree murder in exchange for 50 years." (IB 33). He complains that the trial court did not give the "plea bargain given to Christopher Stewart" any weight in mitigation. (IB 33). He alleges that "Stewart's culpability is every bit as equal to if not greater than appellant's culpability." (IB 34). The State disagrees.

At the time of the murder, Christopher Stewart was 19 years old, and he had a long history of alcohol abuse. (R 535). His mother had driven him out of her home because of it. (R 542, 543, 597).

At the time of the murder, Stoll was 33. (P 60). He grew up "well-adjusted" and "did very well." (P 63). He worked with his father, "learned the trade," and "made good money." (P 64).

Stewart was employed by Stoll, housed by Stoll, and fed by Stoll. (R 538, 540, 543). Stoll paid him just enough to pay his meager rent, car payment, and insurance. (R 545). Stewart had no friends "until I met Michael Stoll," and he had no other source of income or any other place to live. (R 546). He regarded Stoll "like a father/son relationship," and recognized Stoll as his boss

who told him what to do. (R 546, 593-594).

Stoll made "a very good living" and "did real well on his own." (P 66). He owned his own house and had other assets. (P 66). Stoll's parents taught him "responsibility." (P 64). He had his own business and was his own boss. (P 64).

Stewart was "grateful" to Julie for the many things she did for him, and he had no hatred or animosity towards her. (R 590, 591). He considered her "[l]ike a mother." (R 593-594, 605).

Stoll often had "severe arguments" with Julie. (R 546). A domestic battery conviction was entered against Stoll for hitting Julie with "his fists and a phone" in May, 1994. (Appendix A). She stated therein that she was afraid and feared for her life at his hands. *Id.* During that summer, Julie was seen with an arm cast and with bruises from injuries Stoll had inflicted on her. (R 1134-1136). In August, 1994, she fled to her friend's house after an all night fight with Stoll in which he repeatedly threatened to kill her. (R 1130-1131). About a month prior to her murder, Stoll called Julie's mother and told her to come and get Julie before he killed her. (R 838). Clearly, Stoll had a long-standing criminal intent to harm Julie, whereas Stewart had none.

What Stoll did have, however, was a bad arm. (R 1080-1081). As a result, he could not have applied the force to break Julie's neck himself, so when his attempt to poison Julie failed, he had to recruit Stewart. That Michael used Stewart as his hands to break

Julie's neck and suffocate her should in no way immunize him from the death penalty. Under these circumstances, Stewart's hands were merely a stronger extension of Stoll's own hands. They were just like a ligature or a knife, the instrument of death chosen by the killer, Stoll. Thus, under the instant circumstances, Stoll was just as much the **actual** murderer as was Stewart.

Actual murderer, or not, Stoll was far more culpable than Stewart. Stoll, not Stewart, proclaimed "the bitch has to die." (R 777). Stewart thought that Stoll was joking when he first began talking about killing Julie. (R 547). He did not really believe that Stoll was going to kill her until he saw Stoll put the medication and alcohol in Julie's coffee and serve it to her. (R 609). Even then, Stewart was to have no role in the murder.

Only when the poison did not work did Stoll decide to recruit Stewart. The men went out to the garage where Stoll conceived and explained his plan to "make it look like the house had been robbed and that Julie had been murdered during the robbery." (R 552, 618). Stoll continued to develop his plan while he waited for Julie's son to go to school. (R 553, 554). When the boy left, Stoll took Stewart back to the garage where he gave him the "rubber gloves that we had discussed that I would wear . . . [s]o that I wouldn't leave any fingerprints." (R 554). Stewart did exactly what Stoll told him to do, but was unable to break Julie's neck. (R 555-558).

Julie fell to the floor asking Stoll why he was letting Stewart "do that to her." (R 558). Then, she tried to run out the door. (R 559). The men grabbed her and pulled her back inside. (R 559). Stoll said "that if we stop now that we would be going to jail. That it was too late to stop now." (R 568).

Stoll revised the murder plan to one of suffocation. He helped and directed Stewart as he tried to subdue the struggling Julie and hold her face against the waterbed. (R 563). When that did not work, Stoll again revised the plan, and he "left the room and came back with a large black trash bag." (R 564). He told Stewart "to put it over the top of her head." (R 564). Stewart did as Stoll instructed him. (R 564, 647). When that did not work, Stoll again revised the murder plan. This time, he removed the pad from the wooden bed railing and told Stewart to put Julie's neck "across the rail." (R 565-566). Then, Stoll told Stewart to "place my knee on . . . the top of her neck." (R 566). Stewart did what Stoll told him to do. (R 566).

While Stewart kept the pressure on Julie's neck, Stoll went about the house, "collecting the different things to make it look like a robbery," in accordance with his plan. (R 567). Stewart did not let the pressure off of Julie's neck until Stoll returned and told him to. (R 567). Stoll stopped for a cup of coffee on the way out, and then turned over a trash can and pried the back door in furtherance of his plan to make the murder look like it

occurred during a home invasion. (R 569). After the murder, on the drive to the job, Stoll thanked Stewart and told him how much better things would be for them now that Julie was dead. (R 594). Stoll, not Stewart, disposed of the items from the house, and he was "upbeat, happy." (R 571).

Neither were the men's motives for Julie's murder equal. Stewart participated in the murder "[b]ecause he [Stoll] told me to." (R 594, 606). When pressed on cross as to why he was willing to do whatever Stoll told him to do, Stewart replied: "I didn't have anywhere else to go." (R 623).

Stoll's motives, on the other hand, were much deeper and darker. With his own mouth, Stoll revealed reason after reason. Clearly, his main motive for killing Julie was because she refused to withdraw her domestic battery charge against him. (See R 772). He also knew that Julie was thinking of divorcing him, and he felt "she was trying and succeeding in discrediting me to make me look bad" and was "trying to turn people against me." (R 771). He was angry with her for charging \$5,000 on his credit cards, (R 773), and for talking to his ex-wife about testifying against him regarding his abuse of the women to whom he was married. (R 772). As Stoll himself admitted, "I was the bad guy, that's right." (R 744).

Director Stoll called all the shots. Indeed, Julie died because she refused to let him call the shots in regard to the

domestic battery conviction. Director Stoll was the key figure in the murder and was far more culpable than the young, high school dropout, who had been kicked out of the military and his mother's home, who had no where to go and who was totally dependent on Stoll. Should this man walk away from this awful crime with anything less than a death sentence, he will indeed have received the highest award for his production!

"When a codefendant . . . is equally as culpable . . . , disparate treatment of the codefendant **may** render the defendant's punishment disproportionate." *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996), *cert. denied*, 117 S.Ct. 615 (1996) (emphasis added). However, where the defendant is the more culpable, disparate treatment "is justified." *Id.* at 407. In *Larzelere*, the trial judge stated:

. . . [A]lthough [the appellant] was not the triggerman, she was present for the murder actively participating in carrying out the murder which she planned in a cold and calculated manner. Her participation was not relatively minor. Rather, she instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder and behind the involvement and actions of the co-participants before and after the murder. Her primary motive . . . was in her full control.

Id.

In the instant case, the trial judge stated:

The culpability between Stewart and Stoll was not equal. Michael Stoll planned and caused the death of Julie Stoll utilizing Christopher Stewart as the means for this purpose. Christopher Stewart had no reason to kill Julie Stoll other than of his reliance upon and direction from Michael Stoll. Christopher Stewart was the club used by

Michael Stoll to effectuate the death of Julie Stoll.

(P 613). It is clear that Stoll was present for the murder, actively participated in it, planned it in a cold and calculated manner, and his participation was not relatively minor. Rather, he instigated, or masterminded, the murder, was the dominant force behind the planning and execution of it and the subsequent cover-up, and was behind the involvement and actions of Stewart before and after the murder. The primary motive - to kill Julie because she would not withdraw the battery charge - was well within his own control. All he had to do was accept the conviction for the crime he had committed instead of placing "the blame everywhere but himself." (R 855). Stoll's death sentence is not disproportionate. See *Larzelere; Cardona v. State*, 641 So. 2d 361 (Fla. 1994); *Hoffman v. State*, 474 So. 2d 1178 (Fla. 1985)(different sentences may be imposed on capital defendants whose degrees of participation and culpability are different from one another).

Moreover, Stewart's testimony was necessary, as only he and Stoll witnessed the murder. In order to secure Stewart's testimony, he was given a plea bargain. As the prosecutor said:

Nobody likes to cut a deal. We don't like to cut a deal with the devil, but very frequently it's necessary. It's necessary to get the person who is really the mass mind behind this, to get the person who is responsible. . . who planned it, . . . who had the motive, who wanted to get it done. And that's clearly . . . Stoll . . . not Mr. Stewart.

(R 1194). That the State was forced to "cut a deal with the devil"

does nothing to undercut Stoll's responsibility for this most aggravated murder. It would be ironic indeed, if by carefully planning and executing Julie's murder so that only he and Stewart would be present (thereby necessitating Stewart's testimony at trial), Stoll, who well meets the statutory criteria for the death penalty, avoids the just punishment for his horrible crime. Although disparate treatment of equally culpable defendants may result in equal sentences, it does not necessarily do so. The State submits that even were Stewart as culpable as Stoll, this Honorable Court should still uphold Stoll's death sentence because deals are sometimes necessary and Stoll well meets the statutory criteria.

POINT VI

THE TRIAL COURT'S FINDING OF THE COLD,
CALCULATED, AND PREMEDITATED AGGRAVATOR AND
THE HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATOR
ARE SUPPORTED BY COMPETENT, SUBSTANTIAL
EVIDENCE, AND WERE NOT FOUND IN ERROR.

Cold, Calculated, and Premeditated:

Stoll complains about the trial judge's finding that Julie's murder was cold, calculated, and premeditated [hereinafter "CCP"]. (IB 36). He claims that the murder "was nothing more than a frenzied attempt to effect the death of Julie Stoll." (IB 37). According to him, "no motive for the murder of Julie Stoll" was proved, and therefore, a finding of CCP was inappropriate.³¹ (IB 38). He demands that this factor "be stricken." (IB 38).

As this Court stated in *Willacy v. State*, 696 So. 2d 693, (Fla. 1997), *cert. denied*, 118 S.Ct. 419 (1997):

[I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. Rather, our task . . . is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

The State contends that the trial court applied the right rule of

³¹There is no rule of law which so holds. The requirements for the CCP aggravator are clear and include no motive requirement. Certainly, there is no need for any motive to be proved to establish that a murder was cold, calculated, and premeditated. Moreover, Stoll's claim that the record "contains no motive" is false and frivolous. Stoll's statements, especially Statement #3, are replete with his motives for her murder. See Statement of the Case and Facts, *supra*, 21 - 23.

law regarding the CCP aggravator, and the evidence supporting the finding of the aggravator far exceeds the "competent substantial evidence" threshold.

Florida law makes the CCP aggravator applicable where the murder "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(5)(i), Fla. Stat. (1997). The elements of CCP were defined in *Jackson v. State*, 704 So. 2d 500, 504 (Fla. 1997):

(1) "Cold" - "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage;"

(2) "Calculated" - "a careful plan or prearranged design;"

(3) "Premeditated" - "the defendant exhibited heightened premeditation;" and,

(4) "No pretense of moral or legal justification."

Clearly, the undisputed facts of the instant case show that Stoll's murder of Julie met all elements of the CCP aggravator.

The State contends that this is one of the most clearly cold, calculated, and premeditated cases ever to come before this Court. Stoll made no less than six attempts to kill Julie before finding success on the last one.³² Stoll's murder plan existed over a

³²There may have been a seventh. In his fourth statement, Stewart said that Stoll tried to poison Julie on two separate occasions. (R 952-953). Stoll's own testimony lends some support to a seventh attempt. See R 741.

minimum of many hours, including at least one evening and the following morning. The attempts were: To overdose her, to break her neck, to suffocate her, a second attempt to break her neck, a second attempt to suffocate her, and a third, successful, attempt to break her neck and suffocate her. See Argument, *supra*, at 59 - 60. Stoll was present at, participated in, and directed, each attempt.

Moreover, not only did Stoll personally procure the "weapon," (as Stoll described him, Stewart, (See R 1121)), he provided the plastic gloves and bag, and instructed Stewart as to their use. (R 777, 564, 647). He repeatedly grabbed and/or held his victim so that his weapon could be best positioned to kill. He helped pull Julie back inside when she managed to open the front door, trying to escape. (R 559). As the attempts repeatedly failed, Director Stoll made it clear to Stewart that there was no stopping; Julie must die. (R 568). And, die she did; a horrible, lingering death. This, to a sick and weakened woman, who, **according to Stoll**, "had never really done anything to hurt anybody." (R 663).

These repeated attempts to murder Julie were not undertaken in a frenzy. Far from it! The first attempt was carefully planned, including an hour long discussion the night before it was made. (R 609). Thereafter, action was taken in accordance with the plan -- Stoll crushed up some of Julie's medication and placed it in a vial, telling Stewart that he would put it in Julie's coffee the

next morning. (R 548, 549, 615, 616). The next morning, he did precisely that, (R 550, 609, 617-618), and sat back comfortably watching T.V. while he waited for Julie to die. (R 618).

When Julie did not finish her coffee, and Stoll grew impatient waiting for the poison to work, he and Stewart went outside where Stoll conceived and explained another murderous plan. This took "ten or fifteen minutes." (R 619). They went back inside the house and waited until Julie's son left for school. (R 553). Then, "back out to the garage," where Stoll gave Stewart "the pair of rubber gloves that we had discussed that I would wear" to avoid leaving fingerprints. (R 553, 554). Stewart waited "three to five minutes," as directed by Stoll, and entered the house. He found Stoll "hugging" (more accurately holding) Julie so Stewart could reach her, and Stewart "attempted to break her neck" (R 557).

As Judge Benson wrote in his sentencing order:

Julie Stoll's murder was planned This is evidenced by the conversation between Stoll and Stewart the evening before, and even if that were not the case, then the conversation between them the morning of the killing.

(P 610). Stoll had "[a]mple time to reflect upon this decision" and could have abandoned the murderous plan "[e]ven after the attempted poisoning" (P 610). As the judge said at sentencing: "The killing kept on and on and on." (P 982). Unquestionably, the facts of this case demonstrate "a determined purpose to kill Julie Stoll." (P 610).

Stoll's determination to kill is apparent from the inception of his plan to poison Julie, however, his comments and actions when Julie opened the door and tried to escape are particularly telling. Stoll pulled her back inside and told Stewart that if they stopped short of killing Julie they "would be going to jail." (R 568). He said they could not stop and proceeded to attempt #3 - to suffocate her on the waterbed. The sequence of events in this case demonstrates the calculation and planning necessary for the heightened premeditation element of the CCP aggravator. See *Durocher v. State*, 596 So. 2d 997, 1001 (Fla. 1992). Clearly, the facts show that Stoll carried out a carefully thought out and predesigned plan to commit murder. See *Brown v. State*, 721 So. 2d 274, 280 (Fla. 1998).

Far from a frenzied murder, this carefully planned and directed event was thwarted only by the surprisingly determined will to live of a sick and weakened woman! That Julie struggled and fought far more successfully than her murders could have imagined, does not turn Stoll's cold, calculated, and premeditated plan into a frenzy. Sadly, Stoll continually revised his plan until his superior strength finally outlasted the exhausted victim. Having succeeded, he set about "[t]he cover-up," continuing "the cool and calm method of murder." (P 611).

In *Brown v. State*, the defendant took a weapon into the home of his victim. 721 So. 2d at 280. He "waited until the victim

went to bed before further discussing the plan to kill the victim." *Id.* He rejected his original weapon, found another one, and proceeded to attack the victim. *Id.* This Court found "sufficient time elapsed for Brown to form the necessary level of calculation and heightened premeditation to satisfy the CCP aggravator." *Id.*

Certainly, the facts of the instant case show far more planning and elapsed time than do those of *Brown*. Far more than in *Jackson*. See 704 So. 2d at 505[planned and done while an incident report was being prepared]. More than enough to reach the level of calculation and heightened premeditation required to satisfy the CCP aggravator.

It is clear from the trial judge's sentencing order that he applied the correct rule of law and found that the CCP aggravator had been proved beyond a reasonable doubt. (P 610-611). The evidence overwhelmingly supports that conclusion and far exceeds the "competent substantial evidence" threshold for appellate review. Stoll is entitled to no relief.

Heinous, Atrocious, or Cruel:

Incredibly, Stoll claims that the evidence was insufficient to support the heinous, atrocious, and cruel [hereinafter "HAC"] aggravator. He claims that Julie "certainly had no foreknowledge of the attack upon her," that Stoll intended that her neck be broken "in a very swift fashion," and that the "record is not clear as to how long the victim was actually conscious." (IB 40). He

says that "the evidence shows that appellant always intended the murder to be as swift and painless as possible." (IB 42). **None** of those claims have any basis whatsoever in the record.

In *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997), this Court articulated the HAC standard. This factor applies to:

torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain **or** utter indifference to **or** enjoyment of the suffering of another.

704 So. 2d at 441 (emphasis added). The lower court found HAC based upon the following facts:

It is certainly reasonable to infer that during this brutal and torturous attack, after being stabbed in the neck, in the side, and several times in the chest and abdomen, that Ms. Minas must have been aware of what was happening to her, and must have known she was going to die. The killing was not done quickly or painlessly. She lingered at least ten minutes while she bled to death. She suffered in pain and fear, all the while feeling helpless and alone, knowing help was outside her door, but could not get in and she could not even call out to them.

Id. This Court upheld the HAC aggravator, finding that "the court applied the right rule of law, and competent substantial evidence supports the court's finding . . ." *Id.*

In the instant case, the trial judge recounted the first unsuccessful attempt to break Julie's neck. As "Julie fell to the floor," she said to Stoll,

'Why are you letting Chris do this to me?' Michael did not respond. Julie was able to get up and run to the front door, which she was able to open. At that time,

Stewart and Stoll grabbed Julie, pulled her back into the

house Stoll said . . . of we stop now it is too late and they would go to jail. Thereafter, Julie was placed on the family waterbed with . . . Stoll, holding her lower body. . . . Stewart was told by . . . Stoll, to place his knee in the small of her back and hold her head down into the waterbed in order to suffocate Julie. . . . Stewart then tried to break Julie's neck . . . and Julie's head was turned so far around that she could see Stewart's face, however, her neck did not break. . . . Stoll, said, 'This is not working'. . . . Stoll, left the room and returned with a plastic trash bag, which Stewart placed over Julie's head in order to suffocate her. Julie struggled and chewed holes in the bag in order to prevent her death. . . .

Defendant asserts that Julie Stoll was incoherent early on during the murder. This assertion is not supported by the evidence . . . Julie Stoll struggled until the last attempt, disclosing an awareness of what was happening to her.

. . . Stoll, said, 'This is not working'. . . . [T]he cushion . . . was pulled from the waterbed, . . . Stoll, said to Stewart, 'Lay her head on the rail'. At this point Julie was not struggling. Defendant told Stewart to place his knee on the small of her back at which time Stewart's knee was applied to Julie's neck and she suffocated to death.

(PP 607-608). The judge then referenced the medical examiner's testimony that it took "between fifteen to thirty minutes" for Julie to suffocate. He wrote:

This murder was without conscience, reprehensible and . . . tortured the victim . . . Julie Stoll knew she was being murdered and questioned the betrayal by her husband and Stewart. Killing in this manner is heinous, atrocious or cruel.

(PP 608).

[I]t is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of

heinousness is applicable. . . . This Court has consistently upheld the HAC aggravator where a conscious victim was

strangled. . . .

Hildwin v. State, 727 So. 2d 193, 196 (Fla. 1998)(citations omitted). HAC is present in strangulation murders. See *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997), *cert. denied*, 118 S.Ct. 569 (1997); *Orme v. State*, 677 So. 2d 258, 263 (Fla. 1996), *cert. denied*, 117 S.Ct. 742 (1997); *Doyle v. State*, 460 So. 2d 353, 357 (Fla. 1984). A finding of HAC will be upheld where a conscious victim was strangled. *E.g.*, *Carroll v. State*, 636 So. 2d 1316 (Fla. 1994), *cert. denied*, 513 U.S. 973 (1994); *Tompkins v. State*, 502 So. 2d 415 (Fla. 1986), *cert. denied*, 483 U.S.1033 (1987).

In *James v. State*, the defendant claimed that HAC was not present because although he strangled his victim, "it was not accompanied by any other acts of torture and from all accounts rendered the victim immediately unconscious." 695 So. 2d at 1235. This Court rejected that contention, stating:

[W]hen a victim is choked to death, it 'can be inferred that 'strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable.'

(citations omitted) *Id.*

The record is repleat with evidence that Julie was conscious throughout this long, horrible ordeal. For example:

(1) When Stewart tried to break her neck as she stood in Stoll's "hug," she fell to the ground and "asked Mike why he was letting me do that to her. She asked him that a few times. And

then . . . that he [Stoll] won't get any money." (R 558).

(2) Julie got up and ran to the door, opened it, and tried "to get out." (R 559). She was dragged back inside by Stoll and Stewart, as Stoll said that "if we stop now that we would be going to jail. That it was too late to stop now." (R 568).

(3) As Julie's head, face-down into the waterbed, was held in an effort to suffocate her, she "was still struggling," and she managed to get her legs over the edge of the bed in an attempt to evade her attackers. (R 563).

(4) As Stewart turned her head around to where he could see her face, "[s]he stopped struggling," causing Stewart to think that he had succeeded in breaking her neck. (R 563-564). Then, when Stoll brought in the plastic trash bag and told Stewart "to put it over the top of her head" to suffocate her, Julie struggled and "chewed the holes" in the bag. (R 564, 565). When the bag was removed, she "started struggling." (R 955).

(5) Stoll admitted that Julie "struggled" with Stewart "in the dining room and in the "living room." (R 751, 767).

(6) The medical examiner, Dr. Gore, testified that Julie suffered "considerable trauma or injuries to the neck and the head region" (R 804). She had "petechial hemorrhages," indicating that she "suffered from . . . the lack of oxygen," as well as "pattern type" injuries to the neck with "areas of bleeding underneath" (R 804). "[T]he cervical spine . . . fourth vertebra . . . was fractured." (R 805). Her left eye was badly

contused and the skin was split. (PP 28). She died of "strangulation due to severe head and neck trauma." (R 805). Julie was alive at the time the injuries were inflicted. (R 821-822).

Dr. Gore indicated that once the neck fracture occurred, Julie probably went into "a shock without knowing what's happening" from that point on. (R 822). However, he said that the fracture did not result from Stewart's twisting or turning her head around. (R 823). Rather, it was "a compression fracture," where "you put the neck there, press down so you get a flexion of the neck." (R 824).

(7) Stewart testified that Julie was conscious all the time, at least until Stoll removed the padding from the wooden rail. (R 955).

Thus, Julie was not only alive, but conscious, when Stewart laid her neck over the exposed wooden railing and placed his weight, through his knee, onto her neck. At that point, Julie began to strangle **a third time**, and at some unknown point, her neck fractured. Dr. Gore testified that from the "onset of strangulation" there is "a wide window" of time before a person loses consciousness. (PP 30). "[I]t can occur within a few minutes" or last "to even 20 minutes depending on the pressure." (PP 31). While conscious, the person "will feel the pain, the . . . sensation of dying because of lack of oxygen and this will . . . have a frightening effect . . . of impending death. Somebody is

strangling me." (PP 31). The pain is "considerable." (PP 32). Dr. Gore testified that "to a reasonable degree of medical certainty," these events occurred to Julie. (PP 33).

The State contends that the circumstances of this case met the requirements for HAC long before the last event where Julie was strangled on her own bed railing. The terror this young woman felt as her husband, who had so recently been so loving toward her, alternately tried to break her neck and suffocate her was no less than tremendous. Unquestionably, Julie was conscious throughout the bulk, if not the entire, ordeal. Clearly, she had foreknowledge of the murderous attack, as she was painfully aware of at least five of the six attempts - the last of which resulted in her death.

The record likewise soundly refutes Stoll's claim that he intended the murder to be done "in a very swift fashion." (IB 40). He first attempted to poison Julie. After administering it to her, he sat down and watched T.V., waiting for her to die. Certainly, this was no plan for a "swift" murder. Neither were the suffocation attempts calculated to be "swift." Stoll told Stewart to place Julie's face into the waterbed and put his knee on "her back." This would certainly not bring about a quick or "swift" suffocation. Neither would suffocation in a plastic trash bag. Stoll's claim that he planned a "swift" murder applies to, at most, the second attempt, when he directed Stewart to try to break Julie's neck. There was nothing "swift" about the death Stoll planned for Julie during the other attempts.

Under no stretch of the record facts could this murder be anything but HAC. Certainly, Stoll has not carried his burden to prove either that the trial judge applied the incorrect rule of law or that there is no competent, substantial evidence supporting the HAC finding. Thus, he is entitled to no relief. *Willacy*.

Finally, the State submits that even if only one of the two aggravators found by the trial court is upheld, the remaining aggravator would, alone, support the death sentence in this case. CCP and HAC are two of the most serious aggravating circumstances, and truly define "the most aggravated, the most indefensible of crimes." See *Dixon v. State*, 283 So. 2d 1, 8 (Fla. 1973). The negligible non-statutory mitigation pales in comparison to either of the strong aggravators. Thus, Stoll's instant death sentence should still be upheld, even were only one of the two aggravators present. See *Cardona v. State*, 641 So. 2d 361 (Fla. 1994)(death penalty upheld although only one aggravating circumstance, HAC, and **statutory** mitigation).

CONCLUSION

Based upon the foregoing arguments and authorities, Stoll's conviction and sentence of death should be affirmed in all

respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this _____ day of July, 1999.

Of Counsel