IN THE SUPREME COURT OF FLORIDA

JAMES BELCHER,

Appellant,

CASE NO. SC01-1414

v.

STATE OF FLORIDA,

Appellee.

_____
/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JAMES BELCHER, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Belcher was indicted by grand jury. (R. I 14-16). The two count indictment charged Belcher with the first-degree murder of Jennifer Embry by strangling and drowning her and sexual battery with actual physical force likely to cause serious personal injury. The crime occurred on January 8th or 9th, 1996. The jury trial began on March 26, 2001 with the Honorable Peter Dearing presiding. At trial, the evidence showed:

The victim's older brother, Ricky Embry, went to his sister's townhouse to check on her.(XIII 572-573). He found her died in the bathtub.(XIII 582). The chief medical examiner, Dr. Floro, testified that the victim was strangled and drowned.(T. XIV 640, 643,656). The victim's neck was bruised.(T. XIV 651). Her shoulder was lacerated.(T. XIV 651). Her right eyebrow had bruising and abrasions.(T. XIV 652). The victim's hyoid bone and Adam's apple had hemorrhages which indicted that she was alive when these injuries were inflicted and which are typical of manual strangulation. (T. XIV 653-655). The foam on the victim's mouth is caused by drowning. (T. XIV 656). The victim had bruising in her vaginal area in the hymen and the labia minora. (T. XIV 658,660). The medical examiner recovered semen from the victim. (T. XIV 662,664,665). He testified that the sperm had heads and tails suggesting the freshness of the specimen. (T. XIV 665). Many had tails but some did not. (T. XIV 669). The sperm could have been deposited three to six days earlier. (T. XIV 6709) The medical examiner's expert opinion was that the victim had been raped. (T. XIV 666).

A pair of green bathroom slippers were recovered from the victim's bathroom near the bathtub. (XIV 718,723;XV 823). The semen stain on the bathroom slippers was a DNA match of Belcher. The semen recovered from the victim's body was a DNA match of Belcher. Using the FBI African-American database, "one in two trillon males" has the same DNA profile. (T. XVII 1134).

Detective Robert Hinson was the lead detective and he interviewed Belcher on August 4, 1998 (T. XV 808, 896). Belcher denied knowing the victim. (T. XV 902). Detective Hinson showed Belcher a photograph of the victim. (T. XV 902). He denied knowing the victim or ever having met her. (T. XV 902). Detective Hinson showed Belcher a photograph of the victim's home and he denied ever being there. (T. XV 903). The Detective showed Belcher two different photographs of the victim. (T. XV 906). Belcher denied ever having sex with the victim. (T. XV 909). Belcher lived in close proximity to the technical college the victim attended. (XV 839).

In his motion for judgment of acquittal, defense counsel argued that the defendant could have had consensual sex with the victim within six days prior to the murder which dripped on her bathroom slipper and someone else killed the victim. (T. XVII 1232). The trial court denied the motion. (T. XVII 1241). The defense did not call any witnesses and the defendant waived the right to testify. (XVII 1245-1246). The theory of defense was that there was reasonable doubt as to the identity of the perpetrator because the DNA may have come from a sexual

encounter three days prior to the murder because the tails of the sperm were degraded. (XVIII 1309).

The jury convicted Belcher of first degree murder. (R. III 459). By special verdict form, the jury determined that Belcher was guilty of both premeditated and felony murder with sexual battery being the underlying felony. The jury also convicted Belcher of sexual battery as charged in Count II. (R. III 460).

The penalty phase was conducted on April 11, 2001. (XX 1420). During the penalty phase, the State presented four witnesses. Three of the four witness were victim impact witnesses. Jennifer's father, Martin Embry, Sr., her best friend, Carol Thomas and her brother, Ricky Embry, who all testified as to their loss. (T. XX 1545-1547, 1548-1549, 1550-1553). Her brother also testified regarding the emotional trauma of finding the body of his dead sister. (T. XX 1552). Wanda White, the victim of the 1989 armed burglary and aggravated assault testified. (T. XX 1522-1544). She testified that she was living in Jacksonville in October of 1988. (T. XX 1523). She lived in a townhome. On October 30, 1988, she was at home asleep in bed with her niece. (T. XX 1524-1525). She had a gun underneath the bed. (T. XX 1527). A man entered the bedroom and put a gun to her head. (T. XX 1528). He made her go into the bathroom at gun point. (T. XX 1528). In the bathroom, he laid her on the floor face down, gagged her, tied her hands behind her back and pulled her shirt over her face so she could not see him. (T. XX 1528). He was wearing gloves and skull cap covering his face.

(T. XX 1528). He pulled her underwear down to her ankles. (T. XX 1529). Her underwear had a sanitary napkin on them because she was menstruating. (T. XX 1529). She felt a warm substance on her back. (T. XX 1530). She realized that he had ejaculated on her. She was afraid for her life. (T. XX 1531). After located the phone in the closet where it had been moved, she called the police. There was no evidence of forced entry. The man took her gun. (T. XX 1532). While she could not see face, she identified him in a photo line-up. She previously had met Belcher outside the courthouse, who was using the name of Marshall Evans, and he offered her a job opportunity. (T. XX 1533-1534). At a later meeting, he had her fill out a job application which included her home address. (T. XX 1535). He never obtained a job for her. The prosecutor asked if she could identified the defendant and she identified Belcher. (T. XX 1537,1543-1544). The prosecutor introduced the three prior convictions including a 1976 robbery with the police report and the 1981 New York attempted robbery with police report. (T. XX 1553-1555).

Defense counsel presented eleven witnesses during the penalty phase. Belcher's mother, Earline Floyd, his sister, Lashawn Cason, and two aunts, Betty Burney & Priscilla Jenkins, testified. (T. XX 1559-1589,1599-1611; 1589-1599; 1612-XXI 1627). Stephanie Cook, who was a literacy coordinator at Appalachee Correctional Institution testified that Belcher was her educational aide and encouraged other inmates to participate. (T. XXI 1627-1663). Laura Flowers, who employed at

the Duval County Jail, testified that Belcher was not a discipline problem. (T. XXI 1664-1666). Five inmates or former inmates, Robert Hiers, Michael Suggs, Alfonzo Smalls, Dwayne Hayes and Destin Turner, testified that Belcher helped him in various ways, such as being a tutor and coach while they were in prison. (T. XXI 1666-1762). Belcher waived the right to testify at the penalty phase. (T. XXI 1765-1766). The jury recommended death by 9 to 3. (R. III 582 ; T. XXII 1840).

The trial court ordered both sides to submit written sentencing memorandums. (T. XXII 1846). Both the State and the defense submitted written sentencing memoranda. (R. III 598-606; R. IV 616-624).[1] The State argued in favor of three statutory aggravators: (1) prior violent felonies including a 1989 armed burglary/aggravated assault which the State noted was "very similar" to this murder, a 1981 attempted robbery and a 1976 robbery; (2) the capital felony was committed while the defendant was engaged in the commission of the crime of sexual battery and (3) the murder was heinous, atrocious and cruel. The State's position was that the HAC aggravator applied even if the victim was rendered unconscious quickly and that Dr. Floro's testimony established that the victim "would, at a minimum, have been conscious for 30 seconds to a minute". The State's memo conceded that the evidence established all eight proposed mitigators but agrued that they should be given very little weight because the defendant siblings also grew up in a high

[1] The record contains two memorandum in favor of life both have a April 24, 2001 certificate of service date and the second seems to be a verbatim copy of the first.

crime area, the defendant had a good mother, and the inmates witnesses were not credible. The defense sentencing memo admitted that the State proved the three prior violent felonies aggravator. (R. III 599). Defense counsel argued that Dr. Floro's testimony that "he only takes a few second to put somebody into unconsciousness while you are being strangled" precluded a finding of the heinous, atrocious or cruel aggravator. The defense memo proposed eight non-statutory mitigators, some with subparts. (R. III 602-604).[2] The defense memo asserted that the death sentence was not proportionate in this case relying on *Larkins v. State*, 739 So.2d 90, 95 (Fla.1999). (R. III 605).

The *Spencer*[3] hearing was conducted on May 3, 2001. (R. XXII 1848). The State presented no additional evidence, and relied mainly on its sentencing memo, but argued in favor of a guidelines departure sentence on count II. (T. XXII 1858). The defense presented three letters from relatives and a college transcript. (T. XXII 1848, 1855; R. IV 607-613)[4] Defense counsel

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[2] The trial court found all eight proposed mitigators. Indeed, the trial court turned the subparts into separate mitigators and independently found those as well for a total of fifteen.

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

[4] One letter is from a cousin, Wanda Graham, who recounted the defendant's emotional support through her difficult pregnancy. (R. IV 607). The second letter is from Belcher's father pleading for mercy. (IV 608). The third letter is from Belcher's grandmother asserting the the defendant was getting his life on track. (R. IV 609). The college transcript is from Marist College in New York showing the defendant making a C+ in Algebra in summer of 1979 but withdrawing failing in Fall of 1979. (R. IV 613).

made a motion for new penalty phase. The trial court denied the motion. (T. XXII 1852). The defendant addressed the court expressing his remorse. (T. XXII 1856).

The sentencing hearing was held on May 17, 2001. (T. XXII 1862). Defense counsel explained that while the defendant suffering from AIDS which was potentially mitigating, the defendant, for privacy reasons, did not want his medical records and condition submitted to the court. (T. XXII 1864-1866). The trial court found three statutory aggravators: (1) prior violent felonies including a 1989 armed burglary/aggravated assault, a 1981 attempted robbery and a 1976 robbery which he gave great weight; (2) the capital felony was committed while the defendant was engaged in the commission of the crime of sexual battery which he give great weight; (3) the murder was heinous, atrocious and cruel which the trial court gave great weight. (XXII 1868-1876). The trial court noted the “eerie similarities” between the instant offense and the 1989 armed burglary. (T. XXII 1871). While the trial court found no statutory mitigators, it found fifteen non-statutory mitigators: (1) Belcher is considerate, generous and concerned; (2) the defendant loves his family and they love him; (3) the defendant has not lured anyone else in his family into trouble with the law; (4) the defendant has done many kinds things for his family; (5) the defendant has encouraged his cousins to do well; (6) the defendant often has been thought of by his family as a mentor and role model; (7) defendant has maintained contact with his relatives while in prison; (8) the defendant was raised in

a high crime area and evidently unable to resist the temptation of crime; (9) the defendant was sent to an adult prison at an early age and it affected his development; (10) the defendant never abused alcohol or drugs; (11) the defendant has shown concern for the younger inmates and has had a positive effect on their lives; (12) the defendant can continue to to make positive contribution to society by helping younger inmates; (13) the defendant has not been a disciplinary problem; (14) the defendant displayed proper behavior during trial and (15) the defendant displayed remorse and genuine concern for the distress caused to his family and to the family of the victim. The trial court assigned "some weight to each with greater weight being assigned" to the defendant continuing to benefit society in prison by providing useful advice to other inmates and his family. (T. XXII 1880-1881). The trial court found that the three statutory aggravators "far outweigh" the non-statutory mitigators. (T. XXII 1882). The trial court sentenced the defendant to death for the murder and to 25 years' incarceration for the sexual battery. (T. XXII 1882-1883).

SUMMARY OF ARGUMENT

ISSUE I

Belcher asserts that the prosecutor improperly argued the avoid arrest aggravator in closing argument of the penalty phase. The State respectfully disagrees. The prosecutor arguments were designed to prove the prior violent felony aggravator, not the avoid arrest aggravator. The prosecutor was arguing the escalating nature of Belcher's prior violent felonies. Moreover, even if the comments are viewed as non-statutory aggravation, they do not amount to a violation of the Eighth Amendment. Non-statutory aggravation is constitutionally permissible. Hence, the is no constitutional violation regardless of how the prosecutor comments are viewed. Furthermore, the error, if any, was harmless. The jury was instructed The jury was instructed to consider only statutory aggravating circumstances and given only three aggravators to consider. The jury would have used this argument as support for two identified aggravators or would have considered them meaningless because those were the only options before it. Thus, the trial court properly overruled the objection and properly denied the motion for mistrial.

ISSUE II

Appellant asserts that the trial court abused its discretion in giving the heinous, atrocious and cruel aggravating instruction and in finding the murder to be heinous, atrocious and cruel. Belcher contends that because the victim was

rendered unconscious within a minute, there was no prolonged suffering. The State respectfully disagrees. Strangulation murders are nearly *per se* HAC. The victim was strangled and drowned in her own bathtub. She was conscious at the beginning of the attack and was aware of her impending death prior to being rendered unconscious. Furthermore, the victim was raped prior to being strangled. The fear and emotional strain during the rape contributes to the heinous nature of the murder. Thus, the trial court properly instructed the jury and properly found the murder to be heinous, atrocious and cruel.

ISSUE III

Belcher contends that the trial court abused its discretion by giving the standard "catch-all" jury instruction on mitigation rather than the requested special jury instructions on mitigating circumstances. The State respectfully disagrees. First, the list contained directed verdicts, not special jury instructions. Moreover, this Court has held repeatedly that the standard "catch-all" instruction is sufficient and proper. The error, if any, was harmless. Defense counsel argued to the jury the content of all the requested special instructions. Additionally, the prosecutor did not argue that any of the proposed mitigation on the list should not be considered as mitigating. Thus, the trial court properly instructed the jury on mitigation.

ISSUE IV

Belcher asserts that his death sentence violates the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The requirements of *Apprendi* and *Ring* were met in this case. *Apprendi* requires a jury rather than a judge make the determination of certain facts and that those facts be proven beyond a reasonable doubt rather than by the preponderance standard. Both requirements were met. The jury recommended a death sentence and the aggravators were proven beyond a reasonable doubt. Belcher cannot present a valid *Apprendi* challenge to Florida's death penalty statutes. Belcher had a jury at sentencing. A jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Belcher's jury then recommended death by a 9 to 3 vote. In Florida, only a defendant in a jury override case has any basis to raise an *Apprendi* challenge to Florida's death penalty statute. A capital defendant who has had a jury recommend death simply cannot claim that his right to a jury trial was violated. There can be no violation of the right to a jury trial under these facts. Thus, the death penalty imposed in this case does not violate *Apprendi* or *Ring*.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION BY ALLOWING THE PROSECUTOR TO ARGUE THE ESCALATING NATURE OF BELCHER'S PRIOR VIOLENT FELONIES IN CLOSING ARGUMENT OF THE PENALTY PHASE? (Restated)

Belcher asserts that the prosecutor improperly argued the avoid arrest aggravator in closing argument of the penalty phase. The State respectfully disagrees. The prosecutor arguments were designed to prove the prior violent felony aggravator, not the avoid arrest aggravator. The prosecutor was arguing the escalating nature of Belcher's prior violent felonies. Moreover, even if the comments are viewed as non-statutory aggravation, they do not amount to a violation of the Eighth Amendment. Non-statutory aggravation is constitutionally permissible. Hence, the is no constitutional violation regardless of how the prosecutor comments are viewed. Furthermore, the error, if any, was harmless. The jury was instructed The jury was instructed to consider only statutory aggravating circumstances and given only three aggravators to consider. The jury would have used this argument as support for two identified aggravators or would have considered them meaningless because those were the only options before it. Thus, the trial court properly overruled the objection and properly denied the motion for mistrial.

The standard of review

The standard of review for prosecutorial comments in argument is abuse of discretion. *McArthur v. State*, 801 So.2d 1037, 1040 (5th DCA 2001)(noting the standard of review of a trial court's decision overruling objections to comments made during closing arguments is abuse of discretion citing *Moore v. State*, 701 So.2d 545, 551 (Fla.1997). A trial court has wide discretion in controlling the comments made during closing argument and appellate courts will generally not interfere unless an abuse of discretion is shown. *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997); *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990). Both the prosecutor and defense counsel are granted wide latitude in closing argument. *Ford v. State*, 802 So.2d 1121, 1129 (Fla. 2001);*Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982)(observing wide latitude is permitted in arguing to a jury). Appellant improperly identifies the standard of review as *de novo*. IB at 22. Belcher cannot change the standard of review by wrapping a claim of due process around this issue. Cf. *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir.1988)(holding that a state law issue "couched in terms of equal protection and due process" remains a state law issue that is not cognizable in federal habeas). The standard of review is abuse of discretion.

The trial court's ruling

During closing argument of the penalty phase, the prosecutor was discussing the three aggravators the State sought. (T. XXI 1782-1792). The prosecutor stated:

Let’s talk about the first aggravator, prior violence. Now, you heard testimony today that this defendant was previously convicted of armed burglary and aggravated assault. You heard that on October 30th of 1988, here in Jacksonville, he come into contact with the victim, Wanda White. She was a female 21 years old and what happened? She was in her townhome minding her own business, asleep, when this defendant broke in, and, as you recall her testimony, there was no signs of forced entry. He was wearing gloves, didn’t leave any fingerprints, and he had his face concealed. And at gunpoint, using her own gun, he forced her where? Into the bathroom. And while there in the bathroom, he forced her to lie face down on the floor, he gagged her, put something in her mouth, he tied her hands up, he covered her face and then he pulled her panties and then he masturbated on her.

In spite of all that, she was able to identify him because she recognized his voice and his body build and you recall that testimony that she provided today to you, that she had met him. In fact, met him outside the courthouse when he was claiming he had a job for her, which, in fact, he did not.

The other thing that’s important about that aggravator is that he was convicted on February 27th of 1989 and he was sentences to prison. He got seven years and he got five years concurrent. So after he served his time in

prison, what did he do? He got out and he committed this murder.

You also heard about another prior violent crime, a robbery, New York, on January 21 of 1976 when the defendant was 15 years old. What did he do? He came into contact with the lady by the name of Ellen Schnur - I believe is how you pronounce her name - 31 years old, minding her own business. He approached her told her he had a gun, placed his hand in his pocket and robbed her. On September 29th, 1976, he was sentenced to five years in prison in New York. Did he learn by that action?

You heard about an attempted robbery in December of 1980, New York again. He come again into contact with a female, Patrick Miles, 27 years old, and forcibly took a pocketbook from her, knocked her to the ground, again another crime of violence on his part. And on May 1st 1981, he was sentenced to a term of one and a half to three years.

Now, we go back to the aggravating circumstances. Has the State proven number one? We have done it three times. Is that entitled to great weight? Yes. You just don't have one incident, you don't have two incidents, you have three separate incidents. When? In January of 1976, got a robbery. Got five years. Got out of prison. What does he do? Goes back. Does another robbery. Violent crime. This time he got one and half to three years. What happens? He gets out of prison. What does he do?

Commits an armed burglary, and then an aggravated assault the same time. And what happens then? He does five years, seven years concurrent. He gets out and he commits this murder.

Don't those violent crimes show his true character? Doesn't it show that he is a person who refuses to learn from prior experience? You might restate that. You might say he actually learned from one of those experiences. What did he learn regarding Ms. White? She was able to identify him. Ms. Embry wasn't able to come into this court and identify him.

DEFENSE COUNSEL: Your Honor, excuse me. May I make an objection at side-bar.

THE COURT: All right. Your Honor, I think that is objectionable. It's a thinly veiled argument about elimination of a witness. Elimination of a witness is not an aggravator that the State proved, nor can they do it but that is what the argument is all about. It's not an argument about anything but that. Has nothing to do with any of the aggravators.

THE COURT: For the State.

THE PROSECUTOR: With all due respect, I'm not arguing that as an aggravator. That's not one of the enumerated ones. I haven't said anything about elimination of a witness. I'm talking about the prior violent crime which I'm allowed to do that. That is a prior aggravator.

THE COURT: The objection is overruled.

THE PROSECUTOR: May I proceed?

THE COURT: Yes, sir

THE PROSECUTOR: So we have three prior crimes of violence involving Ms. White, Ms. Schnur, and Ms. Miles. And what happens next? We talk again about what he did to Jennifer Embry because one of the aggravators that has been proven in this case is that he committed the murder while he was engaged in the commission of a sexual battery.

Did the evidence not prove that there was a struggle inside that home? Did the evidence not prove that there - pardon my language - were injuries to her vagina? Did the evidence not prove that he left his DNA inside Ms. Embry and on the slipper? What does this aggravator prove? That the defendant is willing to kill to cover his tracks. That he chose to kill in addition to committing a dangerous violent felony, sexual battery.

DEFENSE COUNSEL: Your honor, excuse me. I renew the objection. I have to renew the objection I just made at the bench.

THE COURT: It's overruled.

DEFENSE COUNSEL: On the same grounds.

(T. XXI 1782-1787). At no point in his discussion of the three aggravators, did the prosecutor actually use the phase "avoid arrest" or "witness elimination." (T. XXI 1782-1792). Defense counsel, after the jury had retired, renewed his objection made during closing argument and moved for a mistrial based "the cumulative effect of those errors." (T. XXII 1838).

Preservation

This issue is preserved. Counsel objected to the comments twice and obtained a ruling from the trial court. While not necessary because the objections were overruled, defense counsel also moved for a mistrial.[5] Thus, the issue is preserved.

Merits

To require a new trial, the prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise reached. *Voorhees v. State*, 699 So.2d 602, 614 (Fla. 1997). Moreover, with comments that are susceptible of differing interpretations, Court should not assume that the jury took the comment in the most sinister of the two interpretations. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)(observing that a court

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[5] *Taylor v. State*, 583 So.2d 323,330, n.4 (Fla. 1991)(explaining that when the trial court overrules the objection to the prosecutor's closing argument rather than sustaining it, there is no requirement that defense counsel request a curative instruction or move for a mistrial to preserve the issue for appellate review citing *Holton v. State*, 573 So.2d 284, 288 (Fla. 1990)); Compare *Simpson v. State*, 418 So.2d 984 (Fla.1982)(concluding when trial court overrules contemporaneous objection, defendant need do nothing further to preserve issue for appeal),with *Wilson v. State*, 436 So.2d 908 (Fla.1983)(concluding when trial court sustains contemporaneous objection, defendant must take further action, including requesting curative instruction or mistrial, to preserve issue for appeal).

should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations). Also, the challenged remarks must be considered in context.[6] Unintentional remarks should be viewed with tolerance in light of the realities of closing arguments. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)(noting that summations are seldom carefully constructed in toto before the event and improvisation frequently results in imperfect syntax and meanings that are less than crystal clear).

The prosecutor's arguments were designed to prove the prior violent felony aggravator. The prosecutor was arguing the escalating nature of Belcher's prior violent felonies. A prosecutor may properly argue the nature of the prior convictions in the penalty phase and, consequently, the escalating nature of those prior violent felonies. *Carpenter v. State*,785 So.2d 1182, 1208 (Fla. 2001)(noting that the details of the prior violent felony convictions are admissible in the penalty phase of a capital trial because the jury should be informed of the nature of the prior crimes to be able to engage in a character analysis necessary to determine whether the death penalty is appropriate). The prosecutor was arguing the "eerie

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[6] *United States v. Delgado*, 56 F.3d 1357, 1363 (11th Cir. 1995)(noting that prosecutor's improper vouching argument must be viewed in context, assessing the probable jury impact); *Johnson v. Wainwright*, 778 F.2d 623, 631 (11th Cir.1985)(evaluating challenged comments in light of the rest of the prosecutor's speech).

similarities" between the instant offense and the prior armed burglary which also had a sexual aspect but noting that they differed in one important aspect - Belcher killed his victim this time. The prosecutor next was arguing in support of the sexual battery aggravator that the defendant chose to kill in addition to committing sexual battery. So, the prosecutor's argument, in context, was proper.

Appellant contends that the introduction of a non-statutory constitutionally taints his death sentence. Consideration of non-statutory aggravating factors is not a violation of the Eighth Amendment. A jury constitutionally may consider non-statutory aggravators.[7] Indeed, the Federal Death Penalty Act explicitly allows consideration of non-statutory aggravation. *United States v. Allen*, 247 F.3d 741, 758 (8th Cir. 2001), petition for cert. filed, (U.S. Oct. 22, 2001)(No. 01-7310)(finding no Eighth Amendment infirmity with the provision

[7] *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)(noting that the trial judge's consideration of a non-statutory aggravating circumstance was improper as a matter of state law because Florida law prohibits consideration of nonstatutory aggravating circumstances but noting "nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record"); *Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983) (holding that the trial court's reliance on an extra-statutory aggravating factor did not violate the Eighth Amendment); *Fox v. Coyle*, 271 F.3d 658, 666 n. 3 (6th Cir. 2001)(noting that it is Ohio's capital punishment scheme that prohibits consideration of the nature and circumstances of the crime as aggravating factors, not the federal constitution); *Babbitt v. Calderon*, 151 F.3d 1170, 1178 (9th Cir. 1998)(concluding to the extent that the defendant is arguing that the prosecutor's comments misled the jury into considering his background as aggravating, his argument fails because nothing in the Constitution limits the consideration of nonstatutory aggravating factors).

of the Federal Death Penalty Act (FDPA) which allows consideration of non-statutory aggravation once one statutory aggravator is found). It is solely Florida law that prohibits consideration of non-statutory aggravating circumstances, not the federal constitution. The comments, even if they are viewed as non-statutory aggravation, do not amount to a violation of the Eighth Amendment. Thus, the trial court properly overruled the objection and properly denied the motion for mistrial.

Harmless Error

The error, if any, was harmless. The jury was instructed to consider only statutory aggravating circumstances and given only three aggravators to consider. (T. XXII 1829-1830). The jury would have used this argument as support for two identified aggravators or would have considered them meaningless because those were the only options before it. The jury would not know that there is a statutory aggravator dealing with witness elimination. The jury would not interpret the remark as anything other than support for the identified aggravators. Hence, any error was harmless.

ISSUE II

THE TRIAL COURT ABUSE ITS DISCRETION IN GIVING THE HAC INSTRUCTIONS AND IN FINDING THE HOMICIDE TO BE HAC? (Restated)

Appellant asserts that the trial court abused its discretion in giving the heinous, atrocious and cruel aggravating instruction and in finding the murder to be heinous, atrocious and cruel. Belcher contends that because the victim was rendered unconscious within a minute, there was no prolonged suffering. The State respectfully disagrees. Strangulation murders are nearly *per se* HAC. The victim was strangled and drowned in her own bathtub. She was conscious at the beginning of the attack and was aware of her impending death prior to being rendered unconscious. Furthermore, the victim was raped prior to being strangled. The fear and emotional strain during the rape contributes to the heinous nature of the murder. Thus, the trial court properly instructed the jury and properly found the murder to be heinous, atrocious and cruel.

The trial court's ruling

At trial, Dr. Floro testified it only takes a few seconds of being strangled before the victim is rendered unconscious. (XIV 655-656). In his deposition that was introduced into evidence, Dr. Floro averred that the victim was probably only conscious 30 seconds before she inhaled water. (R. III 531-532). At trial, defense counsel argued that the jury should not be instructed on HAC based on Dr. Floro's trial testimony citing ***Elam v. State***, 636 So.2d 1312 (Fla.1994). (T. XX 1453-1473). The trial court

inquired if there were any Florida Supreme Court question quantifying "prolonged" suffering. (T. XX 1462). The prosecutor argued that strangulation cases are *per se* HAC quoting *Orme v. State*, 677 So.2d 258, 263 (Fla.1996) and that evidence, *i.e.* the broken shower rod, the shower curtain under the victim and the victim's internal and external bruises, showed that there was a struggle and that the victim was also conscious during this time. (T. XX 1464-1466). Defense counsel attempted to distinguish the strangulation case by noting that drowning was the primary cause of death with strangulation being the secondary cause. (T. XX 1467). Defense counsel noted that a shower curtain can be pulled down in an instant. (T. XX 1468). The trial court ruled that this argument is "probably one that is better presented to the jury because it will depend on how the jury views that evidence." (T. XX 1468). The trial court ruled that there was sufficient evidence and that the jury should be instructed on the HAC aggravator. (T. XX 1468). He explained that the fact that the victim may only have been conscious 30 seconds was a prima facie showing of HAC and that the drowning increase, rather than lessened, the heinousness. (T. XX 1469). The trial court agreed to add language to the HAC instruction that the actions of the defendant after the victim was unconscious cannot be considered in determining HAC based on Judge Schaeffer's manual on capital cases. (T. XX 1490-1496,1505-1512). The trial court instructed the jury on HAC including the statement that events occurring after the victim lost consciousness should not be considered. (T. XXII 1830;R.

III 576). In his sentencing memorandum and at the *Spencer* hearing, defense counsel repeated this argument. The trial court found the murder to be heinous, atrocious or cruel. (XXII 1875-1876). The trial court explained:

> The evidence established at trial beyond a reasonable doubt that the victim, Jennifer Embry, was strangled and drowned in her own bathtub. The evidence most favorable to the defendant is that the process of strangulation and drowning would have taken upwards of 30 seconds and could have taken several minutes. Strangulation of a victim creates a prima facie case for the aggravating factor of heinous, atrocious or cruel, with the citations. When coupled with the additionally tortuous act of drowning a victim at the same time that she was being strangled, there can be no question that the aggravating factor has been proven beyond a reasonable doubt. The evidence does not support the defendant's argument that the victim was rendered immediately unconscious by the acts of the murderer. On the contrary, the evidence in the bathroom indicates a struggle in which the victim fought against her attacker. She sustained injuries to her head and shoulders as well as to the her neck in the process of being strangled and drowned. The Medical Examiner testified that all of the injuries he observed on the victim occurred while she was still alive. The only conclusion from the evidence is that Jennifer Embry knew what was happening to her as she was being manually

strangled and drowned even if only for a matter of 30 seconds to a minute.

(XXII 1875-1876; R. IV 632d-e).

Preservation

This issue is preserved for appellate review. Belcher made the same argument in the trial court he asserts as error on appeal. He asserted that the jury should not be instructed on HAC and argued in this sentencing memo and at the *Spencer* hearing that the trial court should not find this aggravator. Thus, the issue is preserved.

Standard of Review

Appellant incorrectly asserts that the standard of review is *de novo* albeit in the next sentence he seems to admit that the competent and substantial standard governs.[8] The correct

[8] While the standard of review for the sufficiency of the evidence for a conviction is *de novo*, this is because the appellate court is not actually reviewing the jury's verdict; rather, the appellate court is reviewing the trial court's decision to send the case to the jury. *Pagan v. State*, 27 Fla. L. Weekly S299, 2002 WL 500315, *5 (Fla. April 4, 2002)(stating that the *de novo* standard of review applies to appellate review for a motion for judgment of acquittal);*Jones v. State*, 790 So.2d 1194 (Fla. 1st DCA 2001)(en banc)(holding that the standard of review of a motion for a judgment of acquittal is *de novo* and receding from prior cases which had held that the standard was abuse of discretion). The court is reviewing the legal decision to send the case to the jury, not the jury's verdict as fact finder. Florida appellate courts do not review the jury's verdict; they merely review the judge's decision to send the case to the jury. *Tibbs v. State*, 397 So.2d 1120, 1123 & n.10 (1981)(*Tibbs II*)(explaining that appellate court's only function is to determine sufficiency as a matter of law; legal sufficiency alone, as opposed to evidentiary weight, is the

standard of review is competent and substantial evidence. *Willacy v. State*, 696 So.2d 693, 696 (Fla.1997)(noting that it is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt; rather, that is the trial court's job). Florida's "competent, substantial evidence" standard of review is akin to the federal "clearly erroneous" standard of review. Under this standard of review, the trial court's decision cannot merely be arguably wrong; rather, the trial court decision's must be wrong "with the force of a five-week-old, unrefrigerated dead fish". *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988); *Fisher v. Roe*,263 F.3d 906,912 (9th Cir. 2001)(discussing the clearly erroneous standard of review and noting that unfortunately, many lawyers do not fully appreciate the height of the hurdle they must clear when attempting to convince us that a fact found by the trial court was clearly erroneous). Appellant does not even begin to met this hurdle.

Merits

Strangulation creates a prima facie case of HAC. *Overton v. State*, 801 So.2d 877, 901 (Fla. 2001)(citing *Orme v. State*, 677 So.2d 258, 263 (Fla.1996) and quoting *Hitchcock v. State*, 578 So.2d 685, 692 (Fla.1990)(observing that "strangulations are

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appropriate concern of an appellate tribunal). However, when this Court is reviewing a trial court's order finding HAC, this court is reviewing the trial court's findings of facts and the standard of review for all factual findings is the competent, substantial standard.

nearly *per se* heinous."). Strangulation of a conscious victim involves the foreknowledge of death, extreme anxiety and fear, and is a method of killing to which the factor of heinousness is applicable.[9] This Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled.[10]

Belcher basically argues that because the victim was not conscious for long, this precludes a finding of HAC. The victim was conscious during the rape, the strangulation and the drowning. *Francis v. State*, 808 So.2d 110, 135 (Fla. 2001)(noting this Court has repeatedly upheld findings of HAC where the medical examiner has determined that the victim was conscious even though only for seconds); *Mansfield v. State*, 758 So.2d 636, 645 (Fla. 2000)(rejecting argument that where the medical examiner could not state to a degree of medical certainty exactly how long it took for the victim to lose consciousness while being strangled that the heinous, atrocious, or cruel aggravator cannot be established as "without merit" and

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[9] *Overton v. State*, 801 So.2d 877, 901 (Fla. 2001); *Bowles v. State*, 804 So.2d 1173, 1178 (Fla. 2001)(observing that strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture).

[10] *Bowles v. State*, 804 So.2d 1173, 1178 (Fla. 2001)(citing *Mansfield v. State*, 758 So.2d 636, 645 (Fla.2000), *cert. denied*, 532 U.S. 998, 121 S.Ct. 1663, 149 L.Ed.2d 644 (2001); *Hildwin v. State*, 727 So.2d 193, 196 (Fla.1998) and *Orme v. State*, 677 So.2d 258, 263 (Fla.1996)); *Robertson v. State*, 699 So.2d 1343, 1347 (1997)(noting that this Court consistently has found this aggravator to apply where a conscious victim is strangled).

affirming trial court's finding of HAC). The caselaw requires consciousness and acute awareness, not prolonged suffering.

Appellant attempts to distinguish strangulation case where this Court affirmed a finding of HAC because those cases "were premised on conscious victims suffering for a period of time". None of the cited cases are premised on time. They are all premised on the fact of strangulation combined with the victim being conscious and therefore, are indistinguishable from the instant case. Indeed, one of the cases appellant cites, *James v. State*, 695 So.2d 1229, 1235 (Fla. 1997), specifically notes that the victim "died quickly" but explains because she was conscious prior to being strangled, the murder was HAC.

Furthermore, this victim was raped prior to being strangled and drowned. The fear and emotional strain preceding a victim's death contributes to the heinous nature of the murder. This Court has repeatedly affirmed findings that the murder was heinous, atrocious, or cruel even where the victim's death was almost instantaneous in cases where the defendant committed a sexual battery against the victim preceding the killing due to the fear and emotional strain during the rape. *Banks v. State*, 700 So.2d 363, 366 (Fla. 1997)(affirming finding of HAC where victim was sexually battered for approximately twenty minutes before finally being shot citing *Swafford v. State*, 533 So.2d 270, 277 (Fla.1988) and *Lightbourne v. State*, 438 So.2d 380, 391 (Fla.1983)).

Belcher's reliance on *Zakrzewski v. State*, 717 So.2d 488, 493 (Fla. 1998), is misplaced. The *Zakrzewski* Court reversing a

finding of HAC as to the one victim who had been rendered unconscious upon receiving the first blow from the crowbar because she was unaware of her impending death and awareness is a component of the HAC aggravator. However, *Zakrzewski* Court affirmed the finding of HAC as to the children because the defensive wounds showed that both children were aware of their impending deaths. *Zakrzewski*, 717 So.2d at 493. Here, the victim was not rendered unconscious immediately. Jennifer was aware of her impending death during the time she was being strangled and drowned until she lost consciousness. Moreover, she was raped prior to be killed unlike the victims in *Zakrzewski*.

Appellant's reliance on *Elam v. State*, 636 So.2d 1312, 1314 (Fla. 1994), is also misplaced. The *Elam* Court found the heinous, atrocious, or cruel aggravator inapplicable because there was no prolonged suffering or anticipation of death. The victim had defensive wounds and the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute") rendering the victim unconscious. Here, however, unlike *Elam*, the victim was raped prior to the murder. Thus, *Elam* is readily distinguishable from the instant case. Belcher's reliance on *Rhodes v. State*,547 So.2d 1201, 1208 (Fla. 1989), is equally misplaced. The victim in *Rhodes* was only semiconscious due to alcohol during the strangulation. Thus, the trial court properly instructed the jury and properly found the murder to be HAC.

Harmless error

The error, if any, in instructing the jury on HAC or finding HAC was harmless. The jury heard the defense counsel's argument against the HAC aggravator in which he argued that it did not apply because the State did not prove that the murder, in which the victim was render unconsciousness with a "few seconds", was pitiless and unnecessarily torturous or involved a high degree of pain. (T. XXI 1807-1808). Defense counsel argued that there was insufficient scientific evidence and insufficient facts to support this aggravator. (T. XXI 1808). If a jury finds that the evidence does not support the aggravator, the jury simply declines to find that aggavator. A jury can, by common sense alone, recognize insufficient evidence. Cf. ***Griffin v. United States***, 502 U.S. 46, 49-50, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). So, even if there is insufficient evidence to support this aggravator and the trial court should not have instructed the jury on it because of that, the jury would simply not find that aggravator. The jury also heard defense counsel admit that the State proved the other two aggravators, ***i.e.***, prior violent felony and felony murder aggravator, existed beyond a reasonable doubt. (T. XXI 1804-1805). Furthermore, any error in the trial court's finding of HAC is also harmless because two other aggravators exist including the prior violent felony aggravator which involved three prior convictions including one that, in the trial court's own words, had "eerie similarities" to the instant murder. (T. XXII 1871). This is not a single aggravator case even if the HAC aggravator is stricken. Moreover, one of

the remaining aggravators, the prior violent felony aggravator is a serious aggravator. Violent recidivism is a serious aggravator.[11] Moreover, appellant's criminal history shows an escalating pattern of violence. Thus, the trial court would have imposed death regardless of its finding in regard to the HAC aggravator based on the two other valid aggravators. Hence, any error was harmless.

[11] Florida's death penalty statute, like most other death penalty statutes, is modeled on the Model Penal Code and its aggravators. The commentary to the Model Penal Code explains that "the strongest popular demand for capital punishment arises where the defendant has a history of violence." The reasoning is that "the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and the defendant is likely to prove dangerous to life on some future occasion." MODEL PENAL CODE § 210.6 cmt. at 136. Based on this commentary, it is clear that violent recidivism is viewed as one of the most serious aggravators.

Sufficiency of the evidence & Proportionality

While the appellant does not argue the sufficiency of the evidence to support the convictions or the proportionality of the death sentence, this Court has stated that it has an independent duty to review both issues even if they are not raised.[12] Therefore, the State will address both issues.

The evidence is sufficient to support the convictions. This is a DNA case. DNA evidence has been called the "single greatest advance in the search for the truth . . . since the advent of cross-examination." *People v. Wesley*, 140 Misc.2d 306, 533 N.Y.S.2d 643, 644 (N.Y.Sup.Ct.1988). DNA, alone, is sufficient to support a conviction. *Roberson v. State*, 16 S.W.3d 156, 169 (Tx. App. Ct. 2000)(holding testimony of even one DNA expert that there is a genetic match and the statistical probability that anyone else was the source of that semen are 1 in 500 million is legally sufficient to support a guilty verdict). Here, the State's D.N.A. expert, Dr. Tracy, testified that only one in two trillion African-Americans has this DNA profile. (T. XVII 1134). Basically, numbers of this magnitude conclusively and scientifically establish that appellant was the perpetrator. Under the logic of this Court's

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[12] *Overton v. State*, 801 So.2d 877,905 (Fla. 2001)(finding evidence sufficient and the death sentence proportionate althoug not rasied by the capital defendant because of the Court's "independent obligation to review the record") *Jennings v. State*,718 So.2d 144, 154 (Fla. 1998)(noting the Court was required to independently review of the sufficiency of the evidence as well as the proportionality although not raised on appeal by a capital defendant)

new rule governing postconviction D.N.A. testing, if new D.N.A. evidence alone warrants a new trial, then D.N.A. alone is sufficient to sustain a conviction. Fla.R.Crim.P. 3.853, § 925.11, Fla. Stat. (2001). Belcher's defense that he could have had sex with the victim a few days earlier is belied both by the victim's vaginal injuries and the fact that his DNA was also found on the slippers in the bathroom of a very neat housekeeper.[13] Moreover, the defendant denied ever having sex with the victim or being in her home. The evidence is sufficient.

The death sentence is proportionate. There are three aggravators in this case: (1) HAC; (2) prior violent felony and (3) murder committed in the course of a sexual battery. This case involves one of the most serious aggravators, HAC. *Larkins v. State*, 739 So.2d 90, 95 (Fla.1999)(observing that CCP and HAC are two of the "most serious aggravators set out in the statutory sentencing scheme,"). Additionally, because of the "eerie similarities" of the prior armed burglary with the instant murder, the prior violent felony aggravator is equally serious. Violent recidivism is also serious aggravator. Moreover, there are no statutory mitigators in this case. The non-statutory mitigators, while numerous, are not of a significant nature such a being abused as a child or mental illness. Furthermore, this Court has affirmed the death

[13] The semen could not have dripped out of the victim's body as she was being removed from the tub by the medical examiner personnel because a plastic sheet was placed on the bathroom floor (XIV 631; XV 816)

sentence in factually similar cases where the victim was strangled after being raped and in cases that involve similar aggravators and mitigators.[14] Belcher relied on *Larkins v. State*, 739 So.2d 90, 95 (Fla.1999) in his sentencing memo to argue that death was not proportionate. *Larkins*, however, is readily distinguishable. The HAC aggravator was not present in *Larkins*. *Larkins* involved extensive mitigation, including two statutory mental mitigators and eleven nonstatutory mitigators including a low I.Q.. The *Larkins* Court observed that the killing appeared "to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces." Thus, the death sentence is proportionate.

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[14] *Reese v. State*, 768 So.2d 1057,1060 (Fla.2000)(affirming death sentence where victim was strangled to death following rape and the trial court found three aggravators: HAC, CCP and during the course of a sexual battery but no statutory mitigators and seven nonstatutory mitigators); *Branch v. State*, 685 So.2d 1250,1253, n.1 & n.2 (Fla.1996)(affirming death where the victim was beaten, stomped, sexually assaulted, and strangled and the trial court found three aggravators: HAC, prior violent felony, murder committed in the course of a sexual battery, and four nonstatutory mitigators: remorse; unstable childhood; positive personality traits; acceptable conduct at trial); *Holton v. State*, 573 So.2d 284, 292 (Fla. 1991)(affirming death sentence for strangulation murder following a rape where the remaining three valid aggravators were HAC, prior violent felony and engaged in the commission of a sexual battery and the two non-statutory mitigators found were being a drug addict and a father); *Mansfield v. State*, 758 So.2d 636 (Fla. 2000)(affirming death sentence where victim was strangled to death and the trial court found two aggravators, HAC and during the course of a sexual battery, no statutory mitigation and five nonstatutory mitigators, good conduct during trial, defendant was an alcoholic, defendant's mother was alcoholic during childhood, poor upbringing, dysfunctional family, and brain injury due to head trauma and alcoholism).

ISSUE III

DID THE TRIAL COURT ABUSE ITS DISCRETION BY GIVING THE STANDARD INSTRUCTION ON MITIGATING CIRCUMSTANCES AND REFUSING TO GIVE A SPECIAL SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES INSTRUCTION? (Restated)

Belcher contends that the trial court abused its discretion by giving the standard "catch-all" jury instruction on mitigation rather than the requested special jury instructions on mitigating circumstances. The State respectfully disagrees. First, the list contained directed verdicts, not special jury instructions. Moreover, this Court has held repeatedly that the standard "catch-all" instruction is sufficient and proper. The error, if any, was harmless. Defense counsel argued to the jury the content of all the requested special instructions. Additionally, the prosecutor did not argue that any of the proposed mitigation on the list should not be considered as mitigating. Thus, the trial court properly instructed the jury on mitigation.

The trial court's ruling

During the penalty phase motion hearings, defense counsel stated that he would submit a list of non-statutory mitigating circumstances that he wanted the trial court to instruct on, which he admitted are usually denied. (T. XX 1475). The prosecutor objected to the list because it emphasized the mitigation. (T. XX 1480-1481). Defense counsel acknowledged that every mitigator that he was going to argue fit within the catch-all. (T. XX 1478). The trial court expressed concern that

if he separately listed the mitigation, the jury might have seen or heard something that he did not articulate. (T. XX 1478,1483). The trial court denied the requested instructions but noted that “the defense can certainly provide those details in argument.” (T. XX 1483). The trial court agreed, without objection from the prosecutor, to add “that would mitigate against the imposition of the death penalty” to the standard catch-all instruction (T. XX 1478). Defense counsel submitted a “list of mitigating circumstances” and requested that the list be read to the jury as part of the jury instructions. (R. III 572). The list included such statements as “James Bernard Belcher is considerate, generous and concerned”, “he has done kind things for his family”, Belcher has had a “positive effect” on the younger inmates and Belcher “was unable to resist the temptation of crime”. (R. III 573). At the start of penalty phase, defense counsel submitted his written list and renewed the request to instruct on the listed mitigation. (T XX 1513). The trial court again denied the request but again informed counsel he was welcome to argue the list to the jury. (T XX 1514). The trial court gave a slightly modified version of the standard "catch-all" jury instructions on mitigation. (R. III 577; T. XXII 1831). The instruction provided:

> Among the mitigating circumstances you may consider if established by the evidence are:
>
> Any aspects of the defendant's character or record, and any other circumstances of the offense that would mitigate against the imposition of the death penalty.

The trial court did not read the requested list of mitigators to the jury.

Preservation

This issue is not preserved. Appellant properly submitted his special jury instruction requests in writing.[15] However, the submitted list is not actually a list of special jury instructions. The requested list is more akin to directed verdicts of mitigation. The list is not worded as permissive instructions; rather, they are worded as mandatory. For example, the statement that Belcher displayed proper behavior during trial should have been worded, if you find that Belcher displayed proper behavior during trial, you may consider this as a mitigating circumstance. The statement that Belcher "was unable to resist the temptation of crime" is a conclusion, not a jury instruction. Counsel cannot frame the requests regarding mitigation in this manner. This list simply does not contain proposed jury instructions. This issue is not preserved because no "special jury instructions" were submitted to the trial court.

The standard of review

[15] *Gavlick v. State*, 740 So.2d 1212,1213 (Fla. 2d DCA 1999)(holding the failure to file a written request for a special instruction precludes appellate review); *Watkins v. State*, 519 So.2d 760, 761 (Fla. 1st DCA 1988)(noting special jury instructions must be in writing if the issue is to be preserved for appellate review); *Brown v. State*, 206 So.2d 377, 384 (Fla. 1968)(observing that ordinarily a special jury instruction should be drafted and submitted to the trial judge).

The standard of review for declining to give a special jury instruction is abuse of discretion. *Darling v. State*, 808 So.2d 145, 160 (Fla. 2002)(concluding that the trial court did not abuse its discretion by refusing to give a requested special jury instruction regarding circumstantial evidence); *Card v. State*, 803 So.2d 613, 624 (Fla. 2001)(stating that the decision on whether to give a particular jury instruction is within the trial court's discretion). Belcher incorrectly asserts that the standard of review is *de novo*. IB at 37. Belcher cannot change the standard of review by wrapping a claim of due process around this issue. Cf. *Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir.1988)(holding that a state law issue "couched in terms of equal protection and due process" remains a state law issue that is not cognizable in federal habeas). The standard of review is abuse of discretion.

Merits

These special jury instructions are not proper statements of the law. Special jury instructions must be correct statements of the law or a trial court may properly refuse to give them. *Stephens v. State*, 787 So.2d 747, 756 (Fla. 2001)(noting that to be entitled to a special jury instruction, the special instruction must be a correct statement of the law). The list contains a series of improper directed verdicts on mitigation. The list does not inform the jury that they may properly consider such things on the list as mitigating; rather, it makes factual findings in mitigation and then informs the jury that

they must agree with these findings. Whether Belcher has ever abused alcohol or drugs is a question of fact for the jury to determine. Mitigating instructions framed in this manner are not correct statements of the law.

This Court has held repeatedly that the "catch-all" standard jury instruction on nonstatutory mitigation when coupled with counsel's right to argue mitigation is sufficient.[16] Justice Anstead has expressed concern with the adequacy of the "catch-all" jury instruction. *Downs v. Moore*, 801 So.2d 906, 918 (Fla. 2001)(Anstead, J., concurring). Justice Anstead thinks that the "brief" instruction did not sufficiently inform the jury that they could properly consider anything as nonstatutory mitigation. However, this concern ignores the ability of defense counsel to argue specific mitigation and tie that argument to the catch-all instruction. Indeed, the language of the catch-all, "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" is from *Lockett*. *Lockett* 438 U.S. at 604, 98 S.Ct. 2954. Through the combination of counsel's arguments and the catch-all instruction, the jury would know that it could consider anything to be mitigating. The due process right to inform the jury may be satisfied either through a jury instruction or argument of counsel. *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct.

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[16] *Booker v. State*, 773 So.2d 1079, 1091 (Fla.2000); *Zakrzewski v. State*, 717 So.2d 488, 495 (Fla.1998); *Elledge v. State*, 706 So.2d 1340, 1346 (Fla.1997); *James v. State*, 695 So.2d 1229, 1238 (Fla.1997).

2187, 129 L.Ed.2d 133 (1994)(O'Connor, J., concurring)(holding that due process entitles the defendant to inform the jury of his parole ineligibility, either by a jury instruction or by counsel's argument). A capital defendant receives both a general jury instruction on mitigation and the right to present specific argument by counsel.

In *Boyde v. California*, 494 U.S. 370, 381, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990), the United States Supreme Court upheld a catch-all mitigating jury instruction. California's general mitigating instruction, referred to as factor (k), allowed the jury to consider: "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Boyde argued that this jury instruction violated the Eighth Amendment because it did not allow the jury to consider his background and character as mitigating evidence because the language "extenuates the gravity of the crime" limited mitigating circumstances to those related to the crime. The *Boyde* Court reasoned that there was no reasonable likelihood that the jury interpreted the catch-all instruction as preventing consideration of mitigating background and character evidence. The Supreme Court noted defense counsel had stressed a broad reading of the instruction in his argument to the jury: "[I]t is almost a catchall phrase. Any other circumstance, and it means just that, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse." The Supreme Court also noted the prosecutor never suggested that Boyde's mitigation evidence

could not be considered. The Supreme Court noted that the jury was unlikely to engage in "technical hairsplitting"; rather, the jury was likely to engage in “commonsense understanding” of the instruction. The Supreme Court found that the instruction language "any other circumstance" certainly included a defendant’s background and character.

California’s catch-all instruction at issue in *Boyde* was more narrow than Florida’s catch-all instruction which contains no “extenuates the gravity of the crime” limiting language. Florida’s catch-all instruction allows the jury to consider “any other aspects of the defendant’s character or record” as mitigating evidence. Belcher attempts to distinguish *Boyde* by arguing that the catch-all instruction in *Boyde* stated that the jury shall consider; whereas, here, Florida’s catch-all instruction states that the jury may consider. However, the shall language was not part of the *Boyde* Court’s reasoning; rather, the Supreme Court focused on the fact that there was no reasonable likelihood that the jury interpreted the catch-all instruction as preventing consideration of mitigating evidence. Likewise, under Florida’s catch-all instruction, there is no reasonable likelihood that the jury would interpret the catch-all instruction as preventing consideration of mitigating evidence merely because they were instructed that they “may” consider any aspect of the defendant’s character as mitigating rather than “shall” consider. The common-sense understanding of “may” means can if you want to, which is exactly what the constitution requires. The constitution requires that the jury

be free to consider any mitigating evidence, not that the jury must find the evidence to be mitigating.

Many other jurisdictions also have catch-all mitigating jury instructions using “may” language. North Carolina’s general statutory catch-all mitigating instruction, N.C.G.S. § 15A-2000(f)(9), provides:

> Mitigating Circumstances.--Mitigating circumstances which may be considered shall include, but not be limited to, the following:
>
> Any other circumstance arising from the evidence which the jury deems to have mitigating value.

The North Carolina Supreme Court has rejected the contention that a catch-all jury instruction which states "may” rather than "must" consider mitigating circumstances violates the Eighth Amendment. *State v. Green*, 443 S.E.2d 14, 33 (N.C. 1994)(citing *State v. Lee*, 439 S.E.2d 547 (N.C. 1994).

The problem with giving special jury instructions listing specific mitigation is that the jury may consider something mitigating that was not listed nor argued by defense counsel. If this occurs, having the general instruction rather than special mitigating instruction is beneficial to the defendant. Furthermore, the wording of the special instructions will become problematic. Standard jury instructions were promulgated for exactly this reason, *i.e.*, to avoid appellate issues relating to idiosyncratic wording of jury instructions. This Court, to the extent it can, will have to formulate standard “special” instructions on prototypical mitigation. However, because some mitigation is unique or a matter of first impression, additional new special jury instructions will be required in every case and

no doubt raised as error on appeal. Accordingly, the trial court did not abuse its discretion by declining to give the requested "special jury instructions".

Harmless error

The error, if any, was harmless because defense counsel argued all of the listed mitigation in closing arguments of the penalty phase. (T. XXI 1811- T. XXII 1826). Indeed, counsel's practice was to use such a list as an outline for closing argument. Defense counsel referred to the catch-all instruction in his closing argument, explaining that "you're to consider as mitigating any aspect of the defendant's character." (T. XXI 1819). Furthermore, this is not a case where the prosecutor argued that the proffered mitigation did not count as mitigating evidence. *Payton v. Woodford*, 258 F.3d 905, 926 (9th Cir. 2001)(Hawkins, J., dissenting)(finding a due process violation based on prosecutor's argument that events that occurred after the murder, such as a religious conversion, were not proper mitigation); *Boyde*, 494 U.S. at 386 n. 6, 110 S.Ct. 1190 (noting that prosecutors in other cases may have pressed a construction of factor (k) that would cause the sentencing proceedings to violate the Eighth Amendment). The prosecutor said: "you heard he helped some other inmates. That's a mitigator. You can consider it. You can consider the fact his mother lives with him. That's great. That's a mitigator. You can consider the fact he loved his mother. That's a mitigator" (T. XXI 1779). The prosecutor argued that while he was sure the

defendant helped the inmates and that it was proper mitigation, it should be given little weight, if any. (T. XXI 1796). Thus, the trial court's refusal to give the requested special instructions on mitigation was harmless.

ISSUE IV

DOES *APPRENDI* APPLY TO CAPITAL CASES WHERE THE JURY RECOMMENDS DEATH? (Restated)

Belcher asserts that his death sentence violates the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The requirements of *Apprendi* and *Ring* were met in this case. *Apprendi* requires a jury rather than a judge make the determination of certain facts and that those facts be proven beyond a reasonable doubt rather than by the preponderance standard. Both requirements were met. The jury recommended a death sentence and the aggravators were proven beyond a reasonable doubt. Belcher cannot present a valid *Apprendi* challenge to Florida's death penalty statutes. Belcher had a jury at sentencing. A jury was present during the penalty phase; heard the evidence of aggravators and mitigators; was instructed on aggravating circumstances and the requirement that they be proven beyond a reasonable doubt. Belcher's jury then recommended death by a 9 to 3 vote. In Florida, only a defendant in a jury override case has any basis to raise an *Apprendi* challenge to Florida's death penalty statute. A capital defendant who has had a jury recommend death simply cannot claim that his right to a jury trial was violated. There can be no violation of the right to a jury trial under these facts. Thus, the death penalty imposed in this case does not violate *Apprendi*.

The standard of review

Whether the defendant's right to a jury trial has been violated is reviewed *de novo*. *United States v. Harris*, 244 F.3d 828, 829 (11th Cir. 2001)(holding that the applicability of *Apprendi* is a pure question of law reviewed *de novo*); *United States v. Arellano-Rivera,* 244 F.3d 1119, 1127 (9th Cir.2001)(concluding that whether the district court violated the constitutional rule expressed in *Apprendi* is a question of law reviewed *de novo*). Hence, the standard of review is *de novo*.

The trial court's ruling

The defendant filed a pre-trial motion attacking the death penalty statute on *Apprendi* grounds. (R.II 379-389). He claimed that *Apprendi* required notice of the aggravators in the indictment; that the jury must make written findings and the jury's recommendation must be unanimous. The trial court denied the motion. (R. II 390). Appellant also filed a motion for statement of particular aggravators arguing that due process required per-trial notification of aggravating circumstances citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). (R. I 192-195). The trial court also denied this motion. (R. I 196).

Preservation

This issue is preserved. *Apprendi* challenges, like other constitutional challenges to statutes, must be preserved. *Cf.*

McGregor v. State, 789 So.2d 976, 977 (Fla. 2001)(holding that petitioner did not properly preserve the *Apprendi* issue for appellate review); *Hertz v. State*, 803 So.2d 629, 647 (Fla. 2001)(holding that a constitutional challenge to the victim impact statute in a capital case was not preserved because Hertz did not file any motion concerning the constitutionality of the statute in the trial court). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (May 20, 2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). Plain error is akin to fundamental error.[17] If an *Apprendi* error is not plain error, it certainly is not fundamental error. However, appellant

[17] Actually, fundamental error is closer to structural error. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Structural errors are errors that affect the framework within which the trial proceeds and therefore are *per se* reversible error and not subject to harmless error analysis. Structural errors are defects that necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Plain error is a broader concept than Florida's fundamental error. The federal rules of criminal procedure allow federal courts to review unpreserved error. Fed. R. Crim. Pro. 52(b)(providing that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court). Florida has no such rule. The only unpreserved errors that Florida courts should address are fundamental errors. *Chandler v. State*, 702 So.2d 186, 191, n. 5 (Fla.1997)(describing fundamental error as error so prejudicial that it vitiates the entire trial).

raised the same issue in the trial court and obtained a ruling. Therefore, the issue is preserved.

Merits

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63. However, the *Apprendi* Court noted that its holding did not apply to capital cases because the statutory maximum in a capital case is death. The *Apprendi* Court explained that once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. *Apprendi*, 530 U.S. at 496, 120 S.Ct. at 2366. Thus, the *Apprendi* Court did not overrule *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), which upheld Arizona's death penalty statute providing for judge-only death sentencing.

The dissent, written by Justice O'Connor and joined by three other Justices, would allow the legislature to determine which facts may be determined by the judge. The dissent also

discussed *Walton*, noting that under Arizona law, the judge, not the jury, determines the penalty. *Apprendi*, 120 S.Ct at 2387. But the dissent, in contrast with the majority, concluded that the statutory maximum for first degree murder is actually life. The dissent reasoned that if a state can remove from the jury's province to determination of facts that make the difference between life and death, as *Walton* holds, then it is "inconceivable why a state cannot do the same with a determination of facts that increased the penalty by ten years". Thus, the dissent clearly rejected the assertion that there is anything constitutionally improper about having the judge determine facts that would increase the punishment beyond the statutory maximum.

In *Mills v. Moore*, 786 So.2d 532 (Fla. 2001), this Court held that *Apprendi* did not apply to capital cases. Mills argued that the statutory maximum was life, not death. Mills asserted that only after further proceedings was death a possible sentence and that unless and until the judge holds a separate hearing, life was the only possible sentence. This Court rejected this argument, noting that according to the plain language of the statutes, the statutory maximum was "clearly death." *Mills*, 786 So.2d at 538.

In *State v. Ring*, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 122 S.Ct. 865 (January 11, 2002), the Arizona Supreme Court held that the statutory maximum for first degree murder in Arizona is life. They explained that in Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict; rather, it is

only after a subsequent sentencing hearing, at which the judge alone acts as fact finder regarding aggravating circumstances, that a defendant may be sentenced to death. *Ring*, 25 P.3d at 1151.

In *Ring v. Arizona*, 2002 WL 1357257, No. 01-488 (June 24, 2002), the United State Supreme Court held that the Sixth Amendment right to a jury trial applied to capital cases and requires that the factfinding necessary to sentence a defendant to death be done by a jury. The *Ring* Court reasoned that because aggravating factors operate as the functional equivalent of an element, the Sixth Amendment requires that they be found by a jury. The *Ring* Court overruled *Walton* because it was "irreconcilable" with *Apprendi*. The *Ring* Court limited its holding to states that allow a judge, "sitting without a jury", to impose death.

The issue in *Ring* was limited to the constitutionality of state death penalty statutes where sentencing is limited to judges only and no jury is involved. *Ring* did not determine the constitutionality of Florida's death penalty statute. Arizona's and Florida's death penalty statutes differ. In Arizona, no jury is involved in the penalty phase; whereas, in Florida, a jury is involved in the penalty phase and makes a sentencing recommendation. As the United States Supreme Court has recognized, the jury is a co-sentencer in Florida. *Lambrix v. Singletary*, 520 U.S. 518, 528, 117 S.Ct. 1517, 1525, 137 L.Ed.2d 771 (1997)(citing *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct.

2926, 120 L.Ed.2d 854 (1992)). Florida's death penalty statute is jury plus judge sentencing, not judge only sentencing.[18]

Ring did not hold that only a jury may be involved in capital sentencing; rather, its holding was that the jury could not be totally excluded. *Ring* at n.4 (noting that Ring did not argue the jury had to be the ultimate sentencer). Thus, Florida's jury plus judge sentencing does not violate *Ring*.

RECIDIVIST AGGRAVATORS

Not only did Belcher have a jury that recommended death but one of the aggravators that the judge relied on is exempted from the holding in *Apprendi*. *Apprendi* explicitly exempted recidivist factual findings from its holding. *Apprendi*, 530 at 490, 120 S.Ct. at 2362-63 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).[19] Thus, a

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[18] Only the five states with judge-only sentencing, *i.e.,* Arizona, Colorado, Idaho, Montana and Nebraska, were being directly challenged in *Ring*. *Ring* at n.6 The four states with jury recommendations - Alabama, Delaware, Florida and Indiana - were not being directly challenged in *Ring*. *Ring* at n.6. Ring limited his attack on Florida's death penalty scheme to override cases. Ring Brief at n.16. The Indiana Supreme Court, like the Florida Supreme Court in *Mills*, held that the statutory maximum for murder is death in Indiana which has a very similar death penalty scheme and therefore, rejected an *Apprendi* challenge to their death penalty statute. *Saylor v. State*, 2002 WL 437963, *18 (Ind. 2002).

[19] The *Apprendi* majority noted that it is arguable that *Almendarez-Torres* was "incorrectly decided and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Apprendi* at 489, 120 S.Ct.

trial court may make factual findings regarding recidivism. *Walker v. State*, 790 So.2d 1200, 1201 (Fla. 5th DCA 2001)(noting that Florida courts, consistent with *Apprendi's* language excluding recidivism from its holding, have uniformly held that an habitual offender sentence is not subject to an *Apprendi*). Here, the trial court found the prior violent felony aggravator. This is a recidivist aggravators. Recidivist aggravators may be found by the judge even in the wake of *Ring*. *Ring*, at n.4 (noting that none of the aggravators at issue related to past convictions and that therefore the holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged). Therefore, the prior violent felony aggravator may be found by the judge even in the wake of *Ring*.

Furthermore, it is clear from the special verdict form that the jury determined that Belcher was guilty of felony murder with sexual battery being the underlying felony. (R. III 459). The jury necessarily found the sexual battery aggravator prior to the penalty phase and the judge could take judicial notice of

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2348. However, contrary to this observation, exempting recidivism from the holding in *Apprendi* is logical. The Sixth Amendment guarantees the right to a jury trial, not two. Any defendant, who is a recidivist, has already had a jury find the underlying facts of conviction at the higher standard of proof. The judge, in a recidivist sentencing situation, is merely taken judicial notice of the prior jury's verdict. A defendant is entitled to one jury trial, not two.

this conviction just as he could take judicial notice of other prior convictions. *Ring* at n.7 (declining the address Arizona's argument that the implied jury findings render any error harmless).

NOTICE OF AGGRAVATORS, WRITTEN FINDINGS & UNANIMITY

Belcher presents a list of alleged *Apprendi* requirements such as notice of the aggravators, specific written jury findings and jury unanimity. *Apprendi* did not mention any of these concerns. Neither notice of aggravators, nor written findings nor jury unanimity was discussed in *Apprendi*. No view of *Apprendi* supports this laundry list. This Court has rejected this list. *Cox v. State*, 2002 WL 1027308, *15 (Fla. May 23, 2002)(rejecting argument that *Apprendi* requires notice of aggravator or that the jury make specific written findings or that the jury's recommendation must be unanimous).

As to notice of the aggravators in the indictment, Belcher asserts that *Apprendi* requires that a capital defendant be given notice of the particular aggravating circumstances that the State intends to prove at the penalty phase. However, the particular aggravators do not have to be pled in the indictment. The *Apprendi* Court specifically declined to address the omission in the indictment of biased purpose because it was not asserted. *Apprendi*, 530 U.S. at 477, n.3, 120 S.Ct. at 2355, n.3. More importantly, the Grand Jury Clause of the Fifth Amendment does not apply to the States. *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884)(holding, in a capital case,

that States are not required to indict). States do not have to charge by indictment. They may charge by information even in a capital case. The federal Constitution is silent on what must be in an indictment because the federal Constitution does not require any indictment in a state prosecution. Only the Due Process Clause's notice requirements apply to the States.

A defendant in a capital case has notice that the State is seeking the death penalty, and that is all the due process clause requires.[20] Charging documents were critical at common law because that was the sole limit on trial by surprise. The charging document was the sole notice of or information about the case a criminal defendant had. In modern times, charging documents are of marginal importance. With modern discovery practices, it is impossible for a criminal defendant to lack the notice required by due process. A defendant has extensive notice of the prosecution's case. Defendants know the name of every witness the State may call to testify and may depose those witnesses. A defendant knows every piece of evidence the State intends to use at trial. Florida has the most extensive criminal discovery in the nation. *O'Callaghan v. State,* 429 So.2d 691, 695 (Fla.1983)(holding defendant is not prejudiced from State proceeding under felony murder theory where

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[20] Florida's rule of criminal procedure governing expert Testimony Of Mental Mitigation During Penalty Phase Of Capital Trial, Rule 3.202(a), requires that the State give the defendant notice of its intent to seek the death penalty within 45 days from the date of arraignment. Here, the State give notice of intent to seek the death penalty on March 12, 1999, which was over a year prior to the April 2001 penalty phase. (R. Vol. I 17).

indictment charged only premeditated murder because of the reciprocal discovery rules, the defendant had full knowledge of both the charges and the evidence that the state would submit at trial and noting that this "is much more information than he would have received in almost any other jurisdiction, federal or state"). Florida, and most states with modern discovery practices, more than comply with the due process notice requirement. Due process notice is simply not an issue in a state with our type of discovery.

Moreover, because aggravators are akin to alternative theories of liability, notice of particular aggravators is not required. Just as charging first degree murder in the indictment is sufficient notice of a felony murder theory, that the State is seeking death is sufficient notice of aggravators. *Gudinas v. State*, 693 So.2d 953, 964 (Fla. 1997)(rejecting the claim that the State may not pursue a felony murder theory when the indictment charged premeditated murder citing *Bush v. State*, 461 So.2d 936, 940 (Fla.1984)(explaining that the defendant was not prejudiced by not knowing the specific theory upon which the state would proceed).

This Court has previously rejected a claim that *Apprendi* requires aggravating circumstances be pled in the indictment.[21]

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[21] *Brown v. Moore*, 800 So.2d 223 (Fla. 2001)(rejecting claims that aggravating circumstances are required to be charged in indictment); *Mann v. Moore*, 794 So.2d 595, 599 (Fla. 2001)(rejecting an ineffective assistance of appellate counsel claim for failing to argue that aggravating circumstances must be pled in the indictment citing *Medina v. State*, 466 So.2d 1046, 1048 n. 2 (Fla.1985)(concluding that the State need not provide notice concerning aggravators)).

The North Carolina Supreme Court also has rejected a similar claim. *State v. Golphin*, 533 S.E.2d 168, 193-94 (N.C. 2000)(concluding that *Apprendi* does not affect prior holdings that an indictment need not contain the aggravating circumstances the State will use), *cert. denied*, 523 U.S. 931, 121 S.Ct. 1379, 149 L.Ed.2d 305 (2001). Thus, *Apprendi* has no import for State's charging practices in capital cases and States need only give notice through some document that it intends to seek the death penalty to satisfy due process, not which particular aggravators it intends to rely on.

It is solely state law that requires capital cases be charged by indictment. Art. I § 15(a); Fla.R.Crim.P. 3.140(a)(1); *Lowe v. Stack*, 326 So.2d 1 (Fla. 1974)(noting that first degree murder requires an indictment rather than an information).[22] Belcher makes no state law based argument in his brief. This Court has consistently held that the particular aggravating circumstances do not have to be included in the indictment or

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[22] Article I, Section 15(a) of the Florida Constitution, provides:

> No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by court martial.

The rule of criminal procedure governing indictments and informations of capital crimes, Rule 3.140(a)(1), provides:

> An offense that may be punished by death shall be prosecuted by indictment.

provided in a statement of particulars. *Tafero v. State*, 403 So.2d 355 (Fla. 1981)(holding that the State is not required to inform the defendant, prior to trial, as to the specific aggravating circumstances which the State intends to prove, citing *Menendez v. State*, 368 So.2d 1278 (Fla. 1979) and *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978)).[23]

As to written findings, the *Apprendi* Court did not require that the jury make a written finding of biased purpose. *Apprendi* merely required that the fact of "biased purpose" be submitted to the jury like any other element. *Apprendi* did not hold or imply that each element of a crime requires a written finding by the jury. Moreover, the judge, who is a co-sentencer, made written findings. As to jury unanimity, this Court has rejected a claim that *Apprendi* requires an unanimous jury recommendation.[24] *Apprendi* is simply inapposite to the issue of whether a jury recommendation should be unanimous. *Apprendi* involved what facts a jury must decide, not the question of what constitutes a "jury". *Apprendi* requires that a fact that is

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[23] Belcher should have had actual notice of the aggravators in this case. As noted previously, the trial court granted Belcher's motion for a statement of aggravating circumstances (IV 599). See footnote 3 and companion text.

[24] *Card v. State*, 803 So.2d 613, 628, n. 13 (Fla. 2001)(rejecting an argument that *Apprendi* requires an unanimous jury verdict because "this Court consistently had held that a capital jury may recommend a death sentence by a bare majority vote."); *Brown v. Moore*, 800 So.2d 223 (Fla. 2001)(rejecting claim that aggravating circumstances are required to be found by unanimous jury verdict); *Mann v. Moore*, 794 So.2d 595, 599 (Fla. 2001)(rejecting an ineffective assistance of appellate counsel claim for failing to argue that jury verdict recommending death must be unanimous).

used to increase the statutory maximum be treated as an element of the crime; it did not change the jurisprudence of unanimity. *Apprendi* concerned who should be the decision-maker, not whether a jury of seven is a jury. *Apprendi* simply has nothing to say regarding either the number of jurors required or the unanimity required of a jury.

The sentence of death statute, § 921.141(3), provides:

> Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .

The legislature has determined that a jury recommendation of death may rest on a majority vote, *i.e.* seven of the twelve jurors. *Way v. State*, 760 So.2d 903, 924 (Fla. 2000)(Pariente, J., concurring)(noting that it is a statute that allows the jury to recommend the imposition of the death penalty based on a non-unanimous vote). This Court has consistently held that a jury may recommend a death sentence on simple majority vote.[25] The United States Supreme Court has also held that even a finding of guilt does not need to be unanimous.[26] Nor do jurors have to

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[25] *Thompson v. State*, 648 So.2d 692,698 (Fla. 1994)(holding that it is constitutional for a jury to recommend death based on a simple majority and reaffirming *Brown v. State*, 565 So.2d 304, 308 (Fla. 1990); *Alvord v. State*, 322 So.2d 533 (Fla. 1975)(holding jury's advisory recommendation as the sentence in a capital case need not be unanimous).

[26] *Cf. Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)(holding a conviction based on plurality of nine out of twelve jurors did not deprive defendant of due process and did not deny equal protection); *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972)(holding a conviction by less than unanimous jury does not violate right to trial by jury and explaining that the Sixth Amendment's implicit

agree in the particular aggravators just as they are not required to agree on the particular theory of liability. *Schad v. Arizona*, 501 U.S. 624, 631, 111 S.Ct. 2491, 2497, 115 L.Ed.2d 555 (1991)(plurality opinion)(holding that due process does not require jurors to unanimously agree on alternative theories of criminal liability but declining to address whether the constitution requires a unanimous jury verdict as to guilt in state capital cases). Thus, *Apprendi* did not change the jurisprudence of jury unanimity.

In sum, *Ring* requires that the jury rather than the judge find facts beyond a reasonable doubt. A jury found the existence of at least one aggravating circumstance was proven at the highest standard of proof. Belcher's penalty phase met the requirements of *Ring*.

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guarantee of a unanimous jury verdict is not applicable to the states).

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to W.C. McLain, Esq., Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, FL 32301 this 24th day of June, 2002.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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