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Attorney for Lucious Boyd

IN THE SUPREME COURT OF FLORIDA

LUCIOUS BOYD,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC02-1590
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Lucious Boyd appeals his murder conviction and death sentence in the death of Dawnia Dacosta and his convictions and sentences for sexual battery and armed kidnapping of Dacosta.

The state's evidence showed that Dacosta's car ran out of gas on the interstate in Deerfield Beach after leaving a midnight church service on the night of December 4-5, 1998. T 493-94, 502, 1026. She apparently walked to a Texaco station and bought gas in a small gas can. T 508, 1018, 1219-20.

Linda Bell and Johnnie Mae Harris testified to seeing a woman on foot with a gas can around 1 or 1:30 a.m. on December 5 at the Texaco station. T 515-20, 548-49.

Bell said the woman spoke with a black man in a "green like" truck or van. T 520-21. She did not notice any writing on the van. T 528, 538. Shown photographs, she testified that they looked like the truck she saw. T 535. She did not see all of the man's face, and did not identify appellant as the man; the police produced a sketch based on her description of the man. T 521-22.

Harris said she saw the woman talk to a man in a van. T 549. The man nodded yes when Harris asked him if he was going to help the woman. T 549. She identified appellant's photograph in a photo lineup 3 ½ months later; at trial she said of appellant: "it seems that I seen him but his hair is

different." T 550. Harris testified that Bell "turned and she said, 'I know him. He's okay.'", T 565, but Bell gave no such testimony. Harris had told the police that she thought the van was burgundy-colored and had the word "Hope" on it - she thought it was a church van. T 561-62.

Rev. Frank Lloyd of Hope Outreach Ministry Church testified that appellant did handyman work for his church, which had a green van with "Here's hope" written in burgundy on the side. T 682-85. He identified this van as being depicted in the photographs which had been shown to Linda Bell. T 684. On December 4, 1998, there were tools in the van including various screwdrivers and a reciprocating saw. T 689-90. There were Torx screwdrivers or wrenches. T 711. Also in the van was a laundry bag. T 711-12. On December 4, Lloyd went to Quincy, leaving appellant with the van, which appellant was to return to the church school at the end of the day. T 683-85. Upon his return on December 15 or 16, Lloyd heard that appellant had not returned the van. T 685.

Geneva Lewis, the mother of appellant's children, testified that appellant visited her at her mother's house in Deerfield on the evening of December 4. T 809. Appellant had Rev. Lloyd's church van, saying that Lloyd had left him with the van and was out of town. T 811-12. He left around 10 or 11 p.m., and returned around 9 or 10 a.m. T 810. When Lewis came back from

church on the morning of Sunday, December 6, people in the neighborhood had fliers. T 834-35. She asked why, and appellant, who was at her house that morning, said a girl was missing. T 836. Between August and October 1998, Lewis and her children had lived with appellant at his Deerfield apartment. T 808. While living there, she had bought a bed, which she left at the apartment when she moved out in October. T 813-14. She and her children moved back to appellant's apartment in February 1999, and the bed was gone. T 814-15. Appellant said he gave the bed away. T 815. At some later time, he said she would not want the bed. T 823-24. At the apartment were king size brown and bright yellow flat sheets. T 824. In March, officers showed Lewis a photograph of a brown sheet. T 817. Asked if it looked familiar, she said: "It didn't look like sheets that I didn't know where it was anymore. It just looked familiar." Id. Det. Bukata asked her about a loud yellow sheet; Lewis did not remember if the sheets were at the Deerfield apartment or at her mother's house. T 817-18. The Deerfield apartment was between two other apartments, and they could hear the men in one of the adjoining apartments shouting when they watched a football game. T 854-55. She would be able to hear someone's raised voice, and a struggle. T 853-54.

On the morning of December 7, the owner of an industrial warehouse found Dacosta's body in a sheet near a dumpster on his

property. T 592. The car of two responding officers drove through a puddle by the body, leaving muddy tire tracks. T 640-41. A crime scene officer thereafter found tire tracks left from sand and mud over the leg of the victim. T 649. The body was in a brown sheet and a brown flat sheet and a shower curtain, and the head was wrapped in a laundry bag and a black trash can liner. T 911-15, 906.

The court read the following stipulation to the jury:

> 1. The deceased victim in this case is, in fact, Dawnia Dacosta.
>
> 2. The cause of death of Dawnia Dacosta is a penetrating head wound.
>
> 3. The manner of death of Dawnia Dacosta is homicide.
>
> 4. The bruising on Dawnia Dacosta's head is consistent but not exclusive of a face plate of a reciprocating saw.
>
> 5. The wounds to Dawnia Dacosta's chest, hands, arms and head are consistent with but not exclusive of a Torx driver.
>
> 6. The bruising to Dawnia Dacosta's vagina is consistent with sexual intercourse, either consensual or non-consensual.
>
> 7. The injuries on the hands and arms of Dawnia Dacosta are consistent with defensive wounds.

T 764-65. Dr. Valery Alexandrov, a medical examiner testified that there were 36 superficial wounds to the chest, four antemortem wounds on the right side of the head, 12 sets of diverse wounds, some of them "quite superficial", to the right hand, and contusions and abrasions on the forearm which were

pretty much consistent with bite marks. T 766-67. A wound to the head perforated the skull and penetrated the brain, causing death. T 768. Death occurred between 36 and 72 hours before the doctor examined the body at 9:30 a.m. on December 7. T 771-72. The wounds to the chest occurred while she was still alive. T 774-75.

Det. Glenn Bukata testified that on December 9 he received a phone call from a homicide detective, after which he put together the photo lineup with appellant's photograph, and added appellant to the investigation. T 1230-31, 1325. On January 30, while working another case, Bukata saw Lewis's van, and decided to investigate it. T 1236-37. On March 22, Bukata spoke with Lewis, and immediately afterward had a forensic chemist compare DNA found on Dacosta's body with appellant's DNA profile. T 1237-40. On March 25, Harris identified appellant in the photo lineup. T 1244. On March 31, Bukata went to appellant's apartment and took a taped statement from Geneva Lewis. T 1256-57, 1260-61.

On April 1, Bukata returned to the apartment with crime scene officers Mosher, Kurz, and Engels, and the crime scene van to serve a warrant to search the apartment and told Geneva that she and the children had to leave for a few days. T 1257, 1320. While he informed her of the warrant at the apartment door, the crime scene officers were in the street. T 1258-59. Bukata

testified that he went only about a foot inside the doorway and backed out when Geneva and the children gathered their stuff and left. T 1259.

Although Bukata testified that he and the crime scene officers went to the scene together, in a caravan, T 1320, the crime scene officers testified otherwise. Addison Singh testified that Bukata was already at the scene when he arrived. T 1099. Bukata met them when they arrived. T 1098. Sgt. Mosher testified that he and the other crime scene officers met Lieutenant Knight at the Deerfield police station while Bukata served the search warrant at the apartment. T 1166. They arrived after Bukata had everybody out of there. Id.

A drop of blood found on the living room floor by Singh did not match appellant or Dacosta, but did show a genetic relathionship with Geneva Lewis. T 1718-26. A blood stain found on the carpet by Singh matched Dacosta. T 1727-28. Approximately 1 in 15 thousand people selected at random, in addition to Dacosta, have the same profile. T 1728. A drop of blood on an armoire matched appellant. T 1728-29. Material under Dacosta's fingernail made a one in two trillion match with appellant. T 1730. A swabbing from Dacosta's right thigh contained sperm which made a 1 in 300 billion match with appellant. T 1373-78, 1731. A swabbing from her left thigh made a one in three million match with appellant. T 1733.

Nothing in Lloyd's van tested positive for blood, T 948, but Bruce Ayala, a trace analyst, testified that a burgundy fiber from the van matched a fiber found on the yellow sheet in that they were almost exactly the same width and their dye matched, indicating that they were dyed on the same day, but it could not be said that they came from the same rug. T 1692-1703. Ayala performed 24 comparisons on various fibers in the case, but there was only the one match. T 1711. A green fiber found on the trash can liner did not match fiber taken from the green carpet in appellant's apartment. T 1687-91.

The tire tread on the sheet over the body was from a General Amera 550 tire, as was the tread of a tire from Lloyd's van. T 1553, 1556. 1,275,753 such tires were manufactured. T 1563.

A forensic odontologist testified within a reasonable degree of dental certainty that appellant's teeth made the marks on Dacosta's arm. T 1580.

Seven fingerprints were found on the trash bag and photographed. T 1524. According to the state's fingerprint examiner, who received the photographs in January 1999, one of the prints, or a photograph of the prints, "was of no value." T 1519-20. The examiner later "received an enhancement with our older system", referring to computer manipulation of the image, and he ran a comparison through AFIS (the Automated Identification Fingerprint System, T 1517), which "returned back

a number of respondents as to one of the prints". T 1520-21. It appears that appellant was not one of these respondents.[1] An employee of the sheriff's digital imaging lab later conducted a second digital enhancement of photographs of two prints (identified as 2B, which was generated through a three-step enhancement process, and 7A, which was generated through a four-step process), in which the images were manipulated with Adobe Photo Shop, a commercial computer program. T 1482-93. These second enhancements were given to the fingerprint examiner in June 2001. T 1522. One matched Geneva Lewis, T 1512-13, and the other matched her son, Zeffrey Lewis. T 1515. There was a third print of use found on the bag, but it was not digitally enhanced. T 1523-24. This print could have been from a finger, palm or even a foot, and was never matched to anyone involved in the case. T 1522-26.

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[1] A discovery issue arose regarding this computer run. In testimony outside the presence of the jury, the examiner testified that "there is a list that AFIS does kick out listing the order basically of probability of each of the prints or the possibilities." T 1531. There are usually about 20 to 50 persons on such lists. T 1532. The fingerprint officers routinely throw out the list if it is negative. Id. "In other words, I look at the possibilities the system gives me. If it's not a match, then we don't retain those reports. We just normally always toss them out." T 1533. He did a visual on screen comparison of the latents and none of them matched. Id. The defense moved to strike the print examiner's testimony if the list could not be regenerated. T 1545. The court said the list could not be regenerated, but denied the defense motion, finding no prejudice to the defense. T 1547-48. The defense also moved for Brady material, but the judge ruled that it no longer existed. T 1548-49.

Det. Bukata testified that, after an extended interrogation, in which appellant denied involvement in the murder, appellant leaned forward in his chair, put his head down, looked up and said "what took you so long to catch me". T 1285.

Appellant testified on his own behalf, denying involvement in the crimes charged. He testified that Bukata "told me when he had me in the interrogation room his exact words was, 'Nigger, we told you we was going to get you.'" T 1807.

During jury penalty proceedings, Dr. Charles Perper, the chief medical examiner, testified that various superficial injuries to Dacosta were consistent with having been caused by a reciprocating saw and a Torx screwdriver. ST 446-50. He testified that there would be bleeding and "because there are nerves in the skin, it's going to cause pain so those are the two major things. And probably, again physiologically, it's going to induce fear because of the blows with the perforation in this particular region, so those would be the three things." ST 452-53. The superficial injuries would not cause unconsciousness. ST 453. He testified that her hands could not have come up for defensive wounds if she were unconscious. ST 453. The only injury that could cause death was the one to brain. ST 454. Other injuries were consistent with the blade on the saw. ST 461. The bruising around the wounds on the chest, hands, arms indicative that Dacosta was alive when they

were inflicted. ST 461. She would have survived indefinitely with the injuries except for the brain wound, which would have caused death probably within “less than hours”, but would not cause immediate death. ST 462. Her injuries were “very fresh”, “less than half an hour. That’s about the time when you have to start to see changes or reaction in the tissue.” ST 465. He could not tell the order of injuries “Except to say that in my opinion, because you have the injuries in clusters, I believe that the cluster of the chest was done at one time, the cluster of the four lateral to the right eye was done at one time, and the cluster of the four in the head penetrating the brain was done at one time. I cannot tell you the order.” ST 465-66. He did not believe that she died right away from the head injury. ST 465. The heart had to keep beating for a period of time after the penetrating injury. ST 467. He could not tell if the chest injuries came after the head injury, and the same was true for the injuries to her hands and forearms. ST 467-68. He could not say if the injury to her head associated with the plate-formed mark would have rendered her unconscious. ST 469. He testified on redirect examination that, within a reasonable degree of medical certainty, the chest injury occurred when she was alive and conscious. ST 470. The chest injuries were consistent with appellant being on top of her with her arms pinned and him sitting on her chest stabbing her 36 times. ST

470. The injuries were consistent with her getting her right arm free and trying to block some of the blows, within a reasonable degree of medical certainty. ST 470-71. The chest injuries were just as consistent with him standing above her while on the ground or reaching around behind and stabbing her in the front. ST 476. He testified: "I can say also the fact that there are the three types of injuries and obviously that injuries which were done to the chest were inflicted at the time when the person was alive because if the person would be unconscious, it doesn't make any sense - there's no reason to make injuries to the chest, so I know that within a reasonable degree of medical certainty." ST 477. He also said, "I know at the time when the injuries of the arms were inflicted that they were injuries when the individual tried to protect herself either from the head injuries or the chest injury, and obviously there is an additional element of the sexual activity which was evident as a result of seminal fluid and bruises. So those are the things that I know." ST 477.

Daphne Bowe, Dacosta's mother, read a statement which said: Dawnia came from Jamaica when she was 10; she wanted to be a baby nurse, was well behaved and a great help to family and friends, and helped cook for families in neighborhood. ST 479-80. She was enrolled in a college nursing program, was going to be a pediatric nurse, was active in her church and was killed

leaving church, so that her mother would never see her husband or any grandchildren. ST 480. Her death left a big void. ST 481.

Rochelle Dacosta, Dawnia's sister also read a statement: Dawnia was her inseparable sister; they had many fun times and loved each other. ST 483. They would go to Denny's after church, and sit eat and talk for hours; Denny's has not been the same since she died. ST 484. She was a wonderful person, with a vibrant personality and a smile on her face, "an angel on earth" with a passion for working with children; she was a great asset to society and had a passion for pediatric nursing. ST 484.

Andrea Hall, a friend of Dawnia, also read a statement: Dawnia was a gift from God; only the good die young. ST 486. Death has taken a toll on the church congregation; she was working toward a nursing career, and kept a picture of the perfect wedding dress; a part of us was taken away. ST 487.

During pretrial proceedings and after the verdict, appellant repeatedly said that he did not want to present mitigating evidence. Eventually, he waived all mitigation except to agree, T 2226-27, to the presentation of only the testimony of a pastor engaged in jail ministry, and made a rambling statement to the jury.

Pastor Chester Matthews, who was engaged in jail ministry

for 20 years, testified for the defense that he had known appellant for three years during appellant's incarceration. T 2241. He testified that appellant was well-grounded in his belief. T 2242. Appellant "always expressed sympathy for the victim and the victim's family", and was very forgiving. Id. Appellant was a "leader among the other inmates and he helped them." Id. Appellant was concerned for everybody, and helped inmates who were not appreciative of his work. T 2243. He "loved Bible study groups." Id. Matthews "never heard anything negative concerning his behavior from any of the corrections officers." T 2243-44. Appellant's family was "a very fine family". T 2245. Asked if appellant would be different in prison, Matthews said: "No, because he's always expressing that no matter what happens here … he wants to continue his faith and belief and his worship regardless." T 2246. Appellant was raised with the "highest of standards of integrity and love and giving." T 2247. Appellant's behavior was very good in jail, and he would behave the same in prison. T 2250. On cross-examination, Matthews testified that appellant's forgiveness was for witnesses who lied. T 2252.

Appellant made a statement to the jury. He said that he was sympathetic to the victim's family, and that he was innocent. T 2263-64. He had no hatred against his accusers. T 2264-65. He said he had been falsely accused in the past. T 2266. He

said that a lie will not live forever and God will make a way. T 2269.

The jury unanimously recommended the death penalty. R 498.

The court ordered a PSI, which revealed a number of arrests and adjudications for minor traffic offenses and several misdemeanors. R 44-46. It also showed that appellant had a 1991 adjudication and probation term for possession of cocaine, and an adjudication and revocation of probation for domestic battery. R 45. It showed that appellant had been previously tried for, and acquitted of: murder in a 1993 case; sexual battery in a 1997 case; and armed kidnapping, armed sexual battery, and aggravated assault in another 1997 case. R 46. It showed that appellant was an Army veteran who had received a medical discharge in 1978. R 48-49. The report also outlined the findings of Drs. Shapiro, Block-Garfield and Haber regarding appellant's mental competence. R 49-50.

In sentencing appellant to death, the court found two aggravating circumstances: that the murder was especially heinous, atrocious, or cruel, to which it gave great weight; and that the murder was committed while appellant was engaged in the commission of, or attempting to commit, or escape after the commission of kidnapping and/or sexual battery, to which it gave moderate weight. R 547-49. It found and gave medium weight to the statutory mitigating circumstance that appellant had no

significant history of prior criminal activity. R 551. It also found, and gave minimal weight to the following mitigating circumstances: that appellant is religious; that he had a good jail record; that he has family and friends who care for and love him; that he comes from a good family; and that he expressed remorse and sympathy for the victim and her family. R 551-53.

The court imposed sentence on June 21, 2002, R 537-45, and appellant filed his notice of appeal on July 11. R 566.

SUMMARY OF THE ARGUMENT

1. After a witness testified that she overhead jurors discussing appellant's past, and that one of them told another that appellant's father had always gotten him out of trouble, and that appellant had "done it before", the judge should have made an inquiry of the individual jurors regarding this incident or declared a mistrial. The judge erred by refusing to do either.

2. Upon learning that the state's print examiner had destroyed a printout of possible matches for the fingerprints in the case, defense counsel moved for access to such a printout or to strike the witness's testimony. The judge erred by refusing to do either.

3. The speculative evidence at bar did not show that the murder was premeditated. It also did not show a sexual battery or a kidnapping. The judge erred in denying the defense motion for judgment of acquittal.

4. The judge erred by overruling defense objections when the state introduced evidence that appellant had been charged with a crime of dishonesty and when the state used the evidence in cross-examining appellant.

5. The judge erred in letting the state exceed the proper scope of cross-examination by rehashing its entire case through its questioning of appellant.

6. The judge erred in considering the testimony of only one expert in finding appellant competent, when he had available, but did not consider, the reports of two experts who found him incompetent.

7. The court erred in declining to order competency evaluations during penalty proceedings.

8. The waiver of mitigation at bar was not valid because defense counsel failed to put on the record what the mitigating evidence was that they proposed to present as required by Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

9. The court erred in giving "great weight" to the jury's recommendation of a death sentence when appellant sought to waive penalty proceedings and waived mitigation.

10. The waiver of mitigation was invalid because it was premised on the view that appellant had a constitutional right to incompetent assistance of counsel. Under the constitution and Florida law, decisions as to the presentation of evidence are for the lawyer to make, not the client.

11. The record does not support the aggravating circumstances used in sentencing appellant to death.

12. The court erred in overruling defense objections to photographs showing the decomposition of the body.

13. The death sentence was not proportional at bar.

14. The court erred in giving only minimal weight to

mitigating circumstances.

15. The court did not comply with the requirements of Muhammad v. State, 782 So. 2d 343 (Fla. 2001) in sentencing appellant when he waived mitigation.

ARGUMENT

The following errors, separately or cumulatively, require reversal of the convictions and/or sentences at bar.

1. WHETHER THE COURT ERRED IN REFUSING TO INQUIRE OF THE JURORS AND DENYING A MISTRIAL UPON HEARING TESTIMONY THAT JURORS HAD DISCUSSED EXTRA-JUDICIAL INFORMATION THAT APPELLANT HAD COMMITTED SIMILAR CRIMES IN THE PAST.

During the sentencing phase, outside of the jury's presence, the court received information that some of the jurors had been talking about appellant's past and saying that his father had always gotten him out of trouble and he had done this before. T 2292. The court then heard testimony from Margaret Woods Alcide, a friend of appellant's family. She testified that, during the guilt phase, she was in the bathroom with three female jurors, one black and two white. T 2296-97. The two white women were talking about appellant's past. T 2297-98. This was before the guilty verdict, and they were "talking about what had happened, what he had done before". T 2309.

One of the jurors "asked the other one, she said did you know about his past, and she said, no, I read about it, and then they were discussing about, well, from what I was told and from what I heard his father had always gotten him out of trouble. He's done it before." T 2310.

Alcide testified that this occurred during a break near the end of the trial, one of the breaks being "just before they went

out to deliberation and the other one was for a few days before." T 2296. She did not tell anyone about this until she told appellant on the phone. T 2299. She had been trying to tell him to call her so he could tell his lawyers, but he had called before when she was not at home. T 2300. She spoke with him on the weekend, two to four days before her testimony. T 2304-2305. She had talked to appellant at the railing in the court twice during the trial, but those conversations occurred before the bathroom incident. T 2311-12. She wrote down the substance of the conversation in the bathroom when it occurred, and gave it to appellant's brother on the day of her testimony. T 2315. She wrote it down because she has memory problems arising from brain surgery in 1992. T 2315-16, 2306. The bathroom incident occurred during an afternoon break. T 2316.

Defense counsel moved for a mistrial, T 2331, 2339, which the court denied:

> In reflecting on the information, the source of the information, the circumstance of the information, respectfully the Court is going to deny the defendant's motion for a mistrial. We are going to proceed to present this case to the jury panel and then we will follow-up, if you will, with Ms. Alcide at the conclusion of the jury's decision.[2]

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[2] This apparently referred to the prosecutor's statement earlier on page 2339 that Ms. Alcide should have to bring her caller ID device into court "and we'll bring it in here and we'll plug it into a phone jack and see what it says." The prosecutor never followed up on this matter.

Earlier, before the lunch break, the court had suggested that appellant could "take any post-judgment remedies that he

T 2339. After further discussion, the following colloquy occurred between appellant and the court (T 2342-44):

> THE DEFENDANT: ... [I]f the jurors are going to have to go back there and deliberate on this part of the trial, I personally wouldn't want those jurors who were brought up in question still sitting on the panel. Personally I wouldn't and that's my concern.
>
> THE COURT: And your concern is noted and that's exactly why I wanted Ms. Alcide to have the opportunity to testify. I would make a finding that the evidence that has been presented to this Court does not rise to a level that I would even make the inquiry to the members of this jury panel.
>
> THE DEFENDANT: Can I ask why, your Honor?
>
> THE COURT: You can ask why, but I will deny to tell you why and I say that with respect, and certainly, sir, you will have all your appellate rights available to you and I certainly as always will never dissuade any defendant from exercising those constitutional rights.
>
> ...
>
> THE DEFENDANT: Judge, I would like to request and ask you, would you make an inquiry to the jurors about this alleged information that was brought to the Court?
>
> THE COURT: No, sir.

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feels are approriate". T 2335. Defense counsel objected that appellant did not "have any authority to continue an investigation into this matter if in fact he has one now which I don't think he does. He certainly won't have any once the Court has relinquished jurisdiction over the jurors which will happen at the conclusion of deliberations." Id. Counsel contended that "if we're going to do something, you better move now or instruct the State Attorney's investigatory arm to move on this or instruct the State Attorney to have Al Stone or Glenn Bukata -" Id. It was after the lunch break that the prosecutor said he wanted Ms. Alcide to bring in the caller ID device. T 2339.

THE DEFENDANT: Thank you.

THE COURT: As I say, respectfully, I do not feel that the circumstances, the evidence gives reasonable rise to have me do so at this time.

After receiving the penalty verdict, the court asked generally of each juror whether he or she could assure that "at no time during any moment since you have been seated as a juror since the beginning of this trial, have you discussed this matter with any third persons, whether it be at home, whether it would be at the office, whether it would be in the hallway, whether it would be in the restroom, whether it would be in the Burger King, or any place in this courthouse, you have not discussed these matters with anyone nor have you seen, listened, viewed, heard anything about this case other than what transpired in this courtroom in your presence." T 2395. Each juror answered affirmatively, and the judge discharged the jury. T 2395-97.

Under these circumstances, the court should have either inquired of the jurors about the bathroom incident or granted a mistrial. The judge did neither.

When a suggestion of juror bias is not frivolous, the court should make an adequate inquiry of the juror. See Gonzalez v. State, 511 So. 2d 700 (Fla. 3d DCA 1987). Gregorio Gonzalez presented an insanity defense at his murder trial. At the end of the trial, an alternate juror reported that another juror,

Ms. Greenwood, "had described the insanity defense as a 'cop-out,' and had asked the alternate juror, 'Did you bring your coffin nails today?'" When the judge confronted the juror in question with this allegation,

> ... Ms. Greenwood avoided answering directly, responding rather vaguely that the word "cop-out" was used by one of the attorneys and one of the potential witnesses. The court immediately dropped that line of questioning and thereafter never inquired whether Ms. Greenwood had made such a comment or whether she believed that the insanity defense was indeed a "cop-out." The court did ask Ms. Greenwood whether she had any problem in following the law. She responded that she did not.

Gonzalez, 511 So. 2d at 701. The court wrote that a trial court "has substantial discretion in deciding how to respond to allegations of juror bias or misconduct", and found that the court abused its discretion by not inquiring further of juror Greenwood. Id.

This Court wrote in Marshall v. State, 854 So. 2d 1235, 1241-42 (Fla. 2003): "Indeed, this Court has stated that any receipt by jurors of prejudicial nonrecord information constitutes an overt act subject to judicial inquiry. See Baptist Hospital, 579 So. 2d at 100-01." Baptist Hospital, 579 So. 2d at 100 (text and footnote 1), stated that an inquiry is permissible where the movant "has made sworn factual allegations that, if true, would require a trial court to order a new trial".

The court ordered a new trial under circumstances somewhat

similar to those at bar in Henderson v. Dade County School Bd., 734 So. 2d 549 (Fla. 3rd DCA 1999). The plaintiff sued the school board alleging that she had been raped while at school, contending that the board had failed to provide adequate security. After opening statement, an assistant to plaintiff's counsel heard one juror tell another that "You can only tell them certain things ... They need to instruct the kids, and that's about all they can do." The judge at first indicated that she would question the two jurors. After initially expressing misgivings about questioning the jurors because they might hold it against her, the plaintiff asked the court to question them as to what they had discussed. The judge "did not do so, but instead merely re-instructed the jury as a whole not to discuss the case." The appellate court reversed pursuant to Gonzalez.

Cappadona v. State, 495 So. 2d 1207 (Fla. 4th DCA 1986) is also instructive. At Vincent James Cappadona's retrial for murder after an appellate reversal of an earlier conviction, the court questioned jurors as to whether they had read a newspaper article discussing evidence used in the first trial. The article said that he had presented a different defense at the first trial than at the retrial, and that he had been convicted at the first trial. Three jurors admitted reading the article or hearing it read, but said that it would not affect them. The

court denied a mistrial. The appellate court reversed, writing that "the subjective influences produced by the newspaper article imposed a burden on appellant's defense which was an intolerable dilution of the presumption of innocence to which he was constitutionally entitled." Id. 1208. Weber v. State, 501 So. 2d 1379 (Fla. 3rd DCA 1987) involved a similar situation and a similar result.

In Keen v. State, 639 So. 2d 597 (Fla. 1994), the trial court learned after the penalty jury proceedings that an inflammatory article had been in the jury room during guilt-phase deliberations. The article dealt with defense tactics in criminal cases. The trial court conducted an inquiry, and two jurors admitted to reading the article, but assured the judge that it did not influence their decisions. A juror had underlined and bracketed parts of the article. The judge denied the defense's motion for mistrial. This Court reversed and ordered a new trial, writing that a defendant has a right to jury deliberations free from distractions and outside influences. It held that the state had failed to show that the presence of the article in the jury room was harmless.

In Wilding v. State, 674 So. 2d 114 (Fla. 1996), a court employee informed the court between guilt and penalty phases that some jurors were concerned that the defendant might have access to their personal information. Id. 116. This Court

wrote that the clerk's sworn statement constituted an "initial showing of juror misconduct" so that "inquiry of the jurors was proper." Id. 118. Once jurors confirmed the misconduct, saying that they had discussed their concerns, the judge denied the defense's motion for mistrial. This Court reversed and ordered a new trial because the state could not demonstrate beyond a reasonable doubt that there was no reasonable possibility that the misconduct affected the verdict. Id.

This Court also wrote at pages 117-18 of Wilding that the court had erred in asking the jurors whether their concerns affected their verdict. It noted that, while such concerns might inhere in a verdict, the open discussion of the concerns "becomes an overt act of misconduct that may be inquired into." This part of the decision was directed to Wilding's argument that the jurors "may have relied on something other than the evidence presented, such as fear of or other bias against the defendant." Id. 117.

In Devoney v. State, 717 So. 2d 501 (Fla. 1998), this Court distinguished Wilding and disapproved of some language in that case which is not relevant to the case at bar. At Devoney's trial for DUI manslaughter, the court sustained a defense objection and instructed the jury to disregard evidence about a prior speeding ticket. After the jury returned a guilty verdict, it was learned that jurors had in fact relied on the

evidence of the prior ticket in their deliberations. This Court concluded that the discussion of the prior ticket during the deliberations inhered in the verdict, and upheld the conviction. It wrote as to Wilding:

> Wilding was a capital case in which we set aside the verdict because it became known that three of the jurors had expressed concern over their belief that the defendant had information about their personal lives. Of course, the jurors' knowledge regarding information posessed by the defendant must have come from external sources. In any event, we believe that Wilding stands alone for the proposition that the risk of injustice was too great when it was determined in a capital case that the jurors feared that the defendant might be in a position to impose retribution upon them if he was ever free to do so. We recede from that portion of Wilding which says that, while the jurors' subjective beliefs inhere in the verdict, any discussion of them can become an overt act of misconduct.

717 So. 2d at 504-505 (e.s.).

At bar, as in Wilding but not as in Devoney, the information came to the jury from external sources. Cf. Sims v. State, 444 So. 2d 922, 925 (Fla. 1983) ("A jury's consideration of a defendant's failure to testify is not the same as considering evidence outside the record, but is rather an example of its misunderstanding or not following the instructions of the court.") (cited and quoted with favor in Devoney, 717 So. 2d at 502-503). Further, the jurors' discussion, outside of the jury room, of the appellant's having "done it before" and that "his father had always gotten him out of trouble" did not inhere in the verdict. Further, Deveoney was not a capital case to which

heightened standards of due process apply. Devoney's limitation on Wilding does not apply at bar.

Alcide's testimony[3] was sufficient to trigger the obligation to make an adequate inquiry of the jurors about this very serious matter. Appellant's convictions and sentences were obtained contrary to the Due Process, Jury, and Cruel and/or Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

2. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE REQUEST FOR BRADY MATERIAL AND DENYING THE DEFENSE MOTION TO STRIKE THE TESTIMONY OF THE FINGERPRINT EXAMINER.

The record shows that there were apparent fingerprints on the black trash can liner in which Dacosta's head was wrapped. After two of the prints were digitally enhanced, the fingerprint examiner ran a computer check through AFIS, the Automated Fingerprint Identification System, which "returned back a number of respondents as to one of the prints" in January 1999, T 1517, 1520-22, 1524, three years before the trial. The defense contended that the list was exculpatory material which should have been forwarded to the defense. T 1529. The

[3] At bar, because the judge did not ask the jurors about the bathroom incident, one must take as true Ms. Alcide's testimony. Cf. Alan & Alan, Inc. v. Gulfstream Car Wash, Inc., 385 So. 2d 121, 123 (Fla. 3d DCA 1980) ("a fact cannot be established by circumstantial evidence which is perfectly consistent with direct, uncontradicted, reasonable and unimpeached testimony that the fact does not exist."); Child v. Child, 474 So. 2d 299, 301 (Fla. 3rd DCA 1985) (quoting Alan & Alan).

examiner testified outside of the presence of the jury that he made a visual on screen comparison of the latents and none of them matched. T 1533. He discarded the list. Id. Such lists have about 20 to 50 names. T 1532. If he re-ran the prints, he might or might not get a different result. T 1537.[4]

Defense counsel argued that the evidence was Brady material and that the defense could not cross examine the witness about the list because it had not been provided. T 1541. He said that the defense needed to confront the witness on the issue of his credibility and the thoroughness of his investigation, and asked that "the prints be rerun, the AFIS list be given, and that this witness not be excused and to be able to be cross

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[4] The exact testimony on this point was (T 1537-38):

> Q. Let me ask you this. If you were to take that initial print that you received and ran it through AFIS, would you get a printout?
>
> A. Yes, I would.
>
> Q. Would it be the same printout that you got before?
>
> A. Depending on what other 10 prints are entered into the system, it may or may not be different.
>
> Q. But you would get a list of potential people that you would compare it with, correct?
>
> A. The computer would give you the possibilities based upon its database.

The term "10 prints" apparently referred to the ten prints making up an individual's full set of fingerprints. See transcript page 1523, referring to a "10-print file, that is the actual fingerprint cards that you have on file for all known individuals".

examined at a later date. At this point I can't do any more because I don't have the information." Id. The prosecutor maintained that he had been unaware of the AFIS generated list, suggested that the defense had known about it before because the defense had brought the matter up, noted that the defense had not deposed the witness, said that he would have provided the list had the defense requested it, and said the witness had testified that he had visually compared the people on the list with the prints. T 1542-43.

Defense counsel denied that he had known about the computer list, and he had simply made a guess when he asked about it on cross-examination. T 1544. He argued that the adversarial process of the trial was destroyed when a witness deliberately withheld or destroyed information so that the defense could not disprove his testimony because there was nothing to impeach or cross examine him with because he had destroyed it. T 1544-45. Defense counsel asked that the list be generated so that the defense could review and determine whether to cross-examine the witness, or that his testimony be stricken. T 1545. The state again maintained that the defense should have deposed the witness, and that it would be wrong to make the prosecutor personally responsible or for something to happen regarding the witness's testimony. T 1546-47.

The court denied the defense motion to strike the witness's

testimony, ruling that there was no reasonable possibility of regenerating the list because “there may be more people in the system today than there were in the system two years ago [when the prints examiner ran the computer search]”. T 1547. The judge said that he had “not been provided any materials or information that I believe would be detrimental or prejudicial I think being the appropriate standard to this defendant based upon what we have heard”. T 1547-48. The judge denied the defense motion for access to the exculpatory evidence, ruling that the evidence no longer existed, indicating that he might have ruled otherwise “if you can give me any reasonable basis that it exists”. T 1548.

Under Florida Criminal Rule 3.220(b)(1)(J), the state must, upon demand, disclose “results of ... scientific tests, experiments, or comparisons”. Under rule 3.220(b)(4), the state has an independent duty to disclose any material information within its possession or control that tends to negate the guilt of the defendant, regardless whether the defendant has engaged in reciprocal discovery. Similarly the Due Process Clauses of the state and federal constitutions require that the state disclose exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1963).

The state’s duty to disclose includes the duty to disclose material in the possession of the police: “Pursuant to rule

3.220(j), Florida Rules of Criminal Procedure, the state has a continuing duty to disclose evidence held by other state agents, such as law enforcement officers, even if the defendant could have obtained the information by other means." Whites v. State, 730 So. 2d 762, 764 (Fla. 5th DCA 1999) (discussing case law). Where the discovery rule requires that the state disclose a particular item in discovery, the state may not excuse its failure to disclose by saying that the defense should have deposed the witness. Cf. Donahue v. State, 464 So. 2d 609, 610-11 (Fla. 4th DCA 1985) (form response to discovery insufficient; state must reveal substance of defendant's statement to police: "The state has an affirmative duty, upon demand, to furnish full discovery" (emphasis in original)); State v. Evans, 770 So. 2d 1174 (Fla. 2000) (discussing Reese v. State, 694 So. 2d 678 (Fla. 1997)); Blatch v. State, 495 So. 2d 1203, 1204 (Fla. 4th DCA 1986) ("The trial court ruled that the defense, having been advised of the names of the officers, had an obligation to depose them. This is not the law.").

"When the trial court is given notice of an alleged failure to disclose witnesses, it has a duty to conduct a Richardson[5] inquiry as to the nature of the violation to determine whether the violation was willful or inadvertent and whether there was undue prejudice to the accused." Pagan v. State, 830 So. 2d

[5] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

792, 812 (Fla. 2002). The court cannot place on the defense the burden of showing prejudice. See In Interest of J.B. 622 So. 2d 1175, 1175 (Fla. 4th DCA 1993) (error to put burden on defense to demonstrate prejudice arising from discovery violation).

In Cox v. State, 819 So. 2d 705 (Fla. 2002), an officer testified to a remark made by the defendant. On cross-examination defense counsel asked the witness why this quote had not been disclosed to the defense, and then moved for a mistrial. The trial court conducted a Richardson hearing and then denied the motion. This Court wrote at page 712:

> As the trial court held a Richardson hearing in response to the appellant's motion for a mistrial, its decision is subject to reversal only upon a showing that it abused its discretion. See State v. Tascarella, 580 So. 2d 154, 157 (Fla. 1991). However, where the State commits a discovery violation, the standard for deeming the violation harmless is extraordinarily high. A defendant is presumed to be procedurally prejudiced "if there is a reasonable probability that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Pomeranz v. State, 703 So. 2d 465, 468 (Fla. 1997) (quoting State v. Schopp, 653 So. 2d 1016, 1020 (Fla. 1995)). Indeed, "only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id.

This Court determined that, although a discovery violation occurred, the defense had suffered no procedural prejudice. It then concluded that, since there was no prejudice, the judge did not abuse his discretion in denying the motion for mistrial.

At bar, the judge failed to conduct a proper Richardson

hearing in that he erred in placing on the defense the burden of showing absence of prejudice, and denied the defense relief because there was no showing of prejudice. The state has an affirmative duty to show the absence of procedural prejudice arising from a discovery violation. As appellant noted, he was denied the important procedural and constitutional right to cross-examine the witness as to his testimony regarding the fingerprint comparisons in this case. The state did not disprove this prejudice.

Further, the judge erred in ruling without an evidentiary basis that the report or a similar one could not be generated at the time of trial. There was no testimony from the fingerprint examiner that the database did not allow running a comparison limited to entries made as of January 1999. Further, a report generated from the database as it existed at the time of trial would also have been of use to the defense.

Under these circumstances, the court erred in denying the defense motions. There was also prejudice in that the evidence tended to contradict the theory of defense. Defense counsel argued to the jury that Det. Bukata planted the evidence used against him. T 1934-64. The discrepancy between Bukata's testimony and that of the crime scene officers regarding the circumstances in which evidence was found at the apartment tended to support the defense theory. Further, Bukata had the

opportunity to tamper with DNA evidence taken from Dacosta's body. He had less chance to have altered the fingerprints found on the plastic bag. Hence, it was crucial for the defense to challenge the fingerprint evidence, and the judge's ruling on the discovery issue regarding that evidence prejudiced the defense.

3. WHETHER THE STATE'S EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS.

When the state rested and at the close of the evidence, appellant moved for judgment of acquittal as to the charged offenses of armed kidnapping, armed sexual battery, and first degree murder, which motion the court denied, except that it reduced the sexual battery charge to one of unarmed sexual battery. T 1757-80.[6] The court erred in denying the defense motion.

The Due Process Clauses of the state and federal constitutions forbid conviction where the evidence is insufficient, and the Cruel and Unusual Punishment Clauses of the state and federal constitutions impose a heightened standard of due process in death penalty cases.

A court must grant a motion for judgment of acquittal when the state's circumstantial evidence fails to rebut the defendant's reasonable hypothesis of innocence, or where the

[6] Count II of the indictment, which alleges the sexual battery, actually contains no allegation that appellant was armed, R 6, and the record contains no amended indictment.

state fails to present substantial, competent evidence of guilt. See Darling v. State, 808 So. 2d 145, 155-57 (Fla. 2002). This Court engaged in similar analysis in Francis v. State, 808 So. 2d 110 (Fla. 2001). It first considered whether the state's evidence refuted the theory of defense. Id. 131-32. Next, it considered whether the state had presented competent evidence to support the verdict. Id. 132-34.

The trial court and the appellate court are equally capable of determining whether it is proper to grant a judgment of acquittal. State v. Smyly, 646 So. 2d 238 (Fla. 4th DCA 1994). It is the appellate court's function "to determine sufficiency as a matter of law". Tibbs v. State, 397 So. 2d 1120, 1123, n. 10 (Fla. 1981).

A. Sexual battery.

Defense counsel contended that the state had failed to show threats or the use of a deadly weapon to establish non-consensual intercourse, and that the murder might have happened after intercourse, or that the case could involve necrophilia. T 1771-72. The defense argued that there was no evidence of force used to accomplish the intercourse. T 1772. As already noted, the court found that the state failed to show use of a deadly weapon, but otherwise denied the motion. T 1774-75.

The parties stipulated that bruising to Dacosta's vagina was "consistent with sexual intercourse, either consensual or non-

consensual." T 764-65. She was not a child and the evidence does not otherwise bar the possibility of consensual intercourse. Thus, the facts in this case are not comparable to those cases in which this Court has upheld a sexual battery theory on stronger evidence, such as Carpenter v. State, 785 So. 2d 1182 (Fla. 2001) or Darling.

In Carpenter, there was a great disparity between Carpenter's age (32) and the victim's (62), there was substantial evidence regarding the chastity of the victim, there were several injuries to her vagina consistent with forceful penetration, she had been gagged with her bra, and Carpenter made contradictory statements to the police about the incident which were not consistent with the physical evidence. 785 So. 2d at 1195-96. In Darling, the medical examiner testified that examination of the vagina indicated "very violent sex" such that "the encounter would be so painful that any continuation ... would not be consensual". 808 So. 2d at 156. The medical examination also revealed other evidence contrary to the claim of consensual sex, and the evidence was not consistent with Darling's claims about his relationship with the victim, and he told an officer that he was at work during the relevant time frame, contradicting his claim of consensual sex. 808 So. 2d at 156.

At bar, the state's evidence did not support a finding of

sexual battery. The physical evidence was consistent with consensual sexual intercourse, and the jury was left to speculate as to what occurred between Dawnia Dacosta and her killer.

B. Premeditated murder.

Defense counsel also argued that the state failed to prove a premeditated murder. T 1775. The state's case for premeditated murder at bar was analogous to its case in Kirkland v. State, 684 So. 2d 732, 734-35 (Fla. 1996), where this Court wrote:

> Premeditation is defined as follows:
>
> > Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.
>
> Asay v. State, 580 So. 2d 610, 612 (Fla. 1991). The State asserted that the following evidence suggested premeditation. The victim suffered a severe neck wound that caused her to bleed to death, or sanguinate, or suffocate. The wound was caused by many slashes. In addition to the major neck wound, the victim suffered other injuries that appeared to be the result of blunt trauma. There was evidence indicating that both a knife and a walking cane were used in the attack. Further, the State pointed to evidence indicating that friction existed between Kirkland and the victim insofar as Kirkland was sexually tempted by the victim.
>
> We find, however, that the State's evidence was insufficient in light of the strong evidence militating against a finding of premeditation. First

> and foremost, there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide. Second, there were no witnesses to the events immediately preceding the homicide. Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide. Indeed, the victim's mother testified that Kirkland owned a knife the entire time she was associated with him. Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan. Finally, while not controlling, we note that it is unrefuted that Kirkland had an IQ that measured in the sixties.

Likewise, in Terry v. State, 668 So. 2d 954 (Fla. 1996), this Court found the evidence sufficient to support a conviction of felony murder but not of premeditated murder where the defendant shot a kneeling woman in the head during a robbery immediately after his co-defendant threatened to shoot her husband if he moved. This Court wrote at page 964 that there was "simply an absence of evidence of premeditation. In fact, there is an absence of evidence of how the shooting occurred."

Similar to Kirkland is Green v. State, 715 So. 2d 940 (Fla. 1998), in which the state had failed to prove that Curtis Champion Green's murder of Karen Kulick was premeditated. The afternoon before the murder, Green said that he was going to kill Kulick. That night, he picked her up at the jail and murdered her. He later detailed the murder to Angelo Gay: "Gay testified that Green confessed that he and a friend picked

Kulick up in front of the jail and 'did things' to her. Green related to Gay that 'the bitch got crazy' and he and his friend killed her." Id. 944. Kulick was stabbed three times. This Court noted that "there was little, if any, evidence that Green committed the homicide according to a preconceived plan." Id. Thus this Court concluded on the same page:

> We find that the record in this case supports the reasonable hypothesis that Kulick's murder was committed without any premeditated design. On the night of the murder, Kulick was intoxicated and had a heated argument with Gulledge, her former boyfriend and employer. Kulick was arrested and charged with disorderly conduct and resisting arrest. She was angry and intoxicated upon her release from custody, as indicated by her blood alcohol level at the time of her death. Gay testified that Green confessed that he and a friend picked Kulick up in front of the jail and "did things" to her. Green related to Gay that "the bitch got crazy" and he and his friend killed her. There were no witnesses to the events immediately preceding the homicide. Although Kulick had been stabbed three times, no weapon was recovered and there was no testimony regarding Green's possession of a knife. Moreover, there was little, if any, evidence that Green committed the homicide according to a preconceived plan. Finally, although not controlling, it is undisputed that Green's intelligence is exceedingly low.

At bar there was no evidence of any prior intent by appellant to kill Dacosta. There were no witnesses to the murder or the events immediately preceding it. Appellant made no special arrangements to obtain a murder weapon in advance - he already had the tools in his custody. There was no evidence of a preconceived plan to kill. The state's evidence at bar was insufficient to support a verdict of premeditated murder.

C. Kidnapping.

Defense counsel moved for judgment of acquittal as to the kidnapping charge. T 1757-71. He argued that kidnapping requires an abduction or taking in secret, by force, or against the victim's will, and that it cannot be merely part of the scheme or plan of another crime. T 1758. He noted that the evidence showed that Dacosta voluntarily entered the van. T 1759. He also argued that there was no showing that appellant was armed at the time of any kidnapping. T 1759-60. The state argued in response that the stab wounds and blood showed that the kidnapper was armed. T 1760. It also argued that the injuries showed force, and that the kidnapping was done secretly and by threat because "no normal human being would subject themselves to being stabbed 36 times and tortured", and that Dacosta was confined "because no one would subject themselves to that type of punishment, that type of torture." T 1761-62. Defense counsel argued that the evidence of any confinement independent of the murder was speculative. T 1763-64. He argued that the state had not shown a forcible or secretive abduction because witnesses saw Dacosta voluntarily entering the van. T 1765. The prosecutor argued that the kidnapping continued until the body was found: "So, her kidnapping ends when she's discovered by other human beings that are summoning rescue personnel to try to assist her. Unfortunately, it's too

late to save her life. However, my suggestion is that that kidnapping, that confinement, that abduction ends when she's discovered. … . Further, she is found, she's wrapped up and then dumped out, run over by a van and that's when her kidnapping ends, when she's found … ." T 1767-68. Defense counsel rejoined that what occurred after she was dead was not against her will and could not be kidnapping. T 1767-70. Defense counsel argued that while Dacosta may have been lured "surely it wasn't secretly and it surely wasn't by threat and it certainly wasn't against her will.", and that "there's no weapon, there's no threat, there's no secrecy." T 1770. In denying the motion, the court found that the kidnapping "did not occur when Ms DaCosta allegedly got into" the van, but may have "occurred somewhere and sometime after the alleged victim was removed from that Texaco station in that van." T 1771.

The indictment alleged that appellant "did unlawfully and forcibly, secretly, or by threat, confine, abduct or imprison" Dacosta "against her will and without lawful authority with the intent to commit or facilitate commission of a felony, to wit: Sexual Battery and/or inflict bodily harm upon or to terrorize her" while armed. R 7.

As defense counsel argued, the state did not show the element that the crime was committed "forcibly, secretly, or by threat". Dacosta got into the van at a rather busy gas station

with witnesses looking on, and the evidence as to what happened next is so sketchy and incomplete that it cannot supply this element. A conviction may not rest on speculation as to how the crime may have occurred: the state must present substantial competent evidence of each element of the crime. There is no legal support for the state's amazing contention that the kidnapping continued until the body was found.

Likewise, as defense counsel argued, the state did not show any confinement, abduction or imprisonment except that incidental to the commission of the underlying crime. Where the state proceeds on a theory of kidnapping in order to commit or facilitate a felony, the confinement may not be merely incidental to that crime, for otherwise the kidnapping statute "would apply to any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery." Faison v. State, 426 So. 2d 963, 966 (Fla. 1983).

In Faison, this Court so construed the intent element to avoid the absurd result that any robbery or other felony would automatically be two crimes.

A similar logic applies to the alternative theory of intent to inflict bodily harm or terrorize. In Bedford v. State, 589 So. 2d 245, 251 (Fla. 1991), this Court wrote:

> We also find that there was sufficient evidence to support convictions of kidnapping and felony murder

based on that underlying felony. Count II of the indictment alleged that Bedford unlawfully and forcibly, secretly, or by threat, confined, abducted or imprisoned Herdmann against her will and without lawful authority with the intent to inflict bodily harm upon or to terrorize her, in violation of section 787.01(1)(a), (3), Florida Statutes (1987).

First, we reject Bedford's claim that because there was evidence that Herdmann went willingly with the two men, the State failed to prove that she was forcibly, secretly, or by threat, abducted or confined against her will. There was testimony that Bedford admitted a plan to "kidnap" Herdmann and take her out to the Everglades and leave her. There was also evidence that while she was being transported to this destination, Herdmann asked if she was going to be killed and began to struggle. Her body was found bound and there was evidence that she sustained numerous injuries to her head and legs prior to her death. This evidence supports a finding that Herdmann was being forcibly abducted and confined against her will. Further, evidence that Herdmann was transported to the Everglades, an isolated area where there would be no possibility of meaningful contact with members of the public, was tantamount to "secretly" abducting and confining her. Robinson v. State, 462 So. 2d 471 (Fla. 1st DCA 1984), review denied, 471 So. 2d 44 (Fla. 1985). We also agree with the State that the evidence was sufficient to prove a specific intent to do bodily harm or to terrorize Herdmann under any definition of the latter term.

We also find no merit to Bedford's contention that a conviction for kidnapping cannot be sustained because any confinement was "merely incidental" to the homicide. Bedford was charged with confining, abducting, or imprisoning Herdmann with the intent to "[i]nflict bodily harm upon or to terrorize" Herdmann, under section 787.01(1)(a), (3), rather than with the intent to "[c]ommit or facilitate commission of any felony," under subsection 787.01(1)(a), (2). Our decision in Faison v. State, 426 So. 2d 963 (Fla. 1983), which held that the latter subsection does not apply to unlawful confinements or movements that were merely incidental to or inherent in the nature of the underlying felony, has no application here.

Thus, the confinement and abduction in Bedford were not merely incidental to the infliction of bodily harm or terror. The victim was bound and gagged and transported out into the Everglades while she was in fear for her life. The inconclusive facts at bar do not support a conviction under Bedford.

Under Faison, a conviction of kidnapping in order to commit a felony cannot stand because it would turn every such felony into a kidnapping. The same logic should apply to kidnapping in order to inflict bodily harm or terrorize. Otherwise, any crime of violence of whatever degree would automatically become the major crime of kidnapping.[7]

Most importantly, it would turn any homicide into first degree murder. Homicide necessarily involves the infliction of bodily harm or terror. Further, a broad interpretation of confinement will apply the term to any murderous assault, because the victim is immobilized. Such is especially so under the state's argument below that the kidnapping does not end until the body is found: death immobilizes the victim until the body is recovered.

Thus, just as this Court construed the element of intent to commit a felony to require that the confinement or abduction not be merely incidental to the felony, so should it interpret the

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[7] Richard Sanders, "Double Offense" Problems in Kidnapping and False Imprisonment Cases, Fla. B.J., Dec. 2003, p. 10, discusses this problem at length.

element of intent to inflict bodily harm or terrorize element to require that the confinement or abduction be merely incidental to the bodily harm or terror.

State v. Smith, 840 So. 2d 987 (Fla. 2003) does not dictate a contrary result. There, this Court held that the Faison construction does not apply to the crime of false imprisonment. That crime differs from kidnapping precisely in that kidnapping has the specific intent elements involved in Faison and at bar. 840 So. 2d at 990, n. 3. Since false imprisonment does not have a specific intent element, this Court refused to read Faison's construction of the specific intent element into that crime.

Appellant respectfully submits that a careful reading of Bedford does not support the dicta about Bedford at page 991 of State v. Smith. In Bedford, as already noted, the abduction was not merely incidental to the infliction of bodily harm or terror. Further, the Faison construction did not apply directly to Bedford because he was not charged with intent to commit an felony. That does not mean however that, as State v. Smith suggested, "a criminal defendant can be charged with kidnapping based on intent to terrorize and also be convicted of robbery based on confinement that is inherent in both crimes". 840 So. 2d at 987.

Section 787.01(1)(a), the kidnapping statute, as written, is just as unclear as to whether the confinement or abduction

may be merely incidental to the commission of a felony as it is as to whether they may be merely incidental to the infliction of bodily harm or terror.

The Legislature has declared that criminal statutes must be strictly construed in favor of the accused. Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This rule of strict construction arises from fundamental principles of due process. "To the extent that penal statutory language is indefinite or 'is susceptible of differing constructions,' due process requires a strict construction of the language in the defendant's favor under the rule of lenity." Kobel v. State, 745 So. 2d 979, 982 (Fla. 4th DCA 1999) (quoting Register v. State, 715 So. 2d 274, 278 (Fla. 1st DCA 1998)). This Court wrote almost a century ago: "It is a rule too well recognized to require citation of the authorities that penal laws should be strictly construed, and those in favor of the accused should receive a liberal construction." Sanford v. State, 75 Fla. 393, 400, 78 So. 340, 342 (1918).

Under this principle of strict construction, the kidnapping statute must be construed to mean that it does not apply where the confinement is merely incidental to the infliction of bodily

harm or terror. The record at bar does not support a conviction for kidnapping.

4. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO EVIDENCE THAT APPELLANT HAD BEEN CHARGED WITH A CRIME OF DISHONESTY, FAILURE TO PAY A TRAIN FARE, AND IN OVERRULING THE DEFENSE OBJECTION TO THE STATE'S USE OF THE CITATION IN CROSS-EXAMINING APPELLANT.

The state put into evidence a citation found in appellant's apartment for failure to pay a train fare. The citation had been issued two and a half days before Dawnia Dacosta disappeared and bore appellant's name and address. T 1203. The defense objected that the citation was not material or relevant, and was being admitted just to "trash" appellant, and pointed out that the defense conceded that appellant lived in the apartment. Id. The state contended that defense counsel had denied in opening statement that appellant lived in the apartment. T 1204. In fact, defense counsel had only noted in his opening statement that appellant did not live in the apartment when the officers expelled Geneva Lewis and her children out of the apartment while they searched the apartment on April 1, 1999. T 467.[8] The judge overruled the defense objection "based on the location issue that the parties have

[8] Appellant was arrested on March 26, 1999, T 1245-46, so that he was no longer at the apartment when the officers conducted the search on April 1. T 1250.

raised." T 1204. Defense counsel renewed his objection when the citation was put into evidence. T 1251.

The jury had already heard undisputed testimony from Geneva Lewis earlier in the trial that appellant lived in the apartment at the time of the murder, T 808-809, 827, and that appellant paid the rent on the apartment. T 823. Further, immediately before putting the citation into evidence, the state put in evidence without objection an electric bill in appellant's name for the apartment. T 1250. Additionally, Det. Bukata testified without objection that it was appellant's apartment. T 1254.

On cross-examination by the state, appellant testified that he lived in the apartment at the time of the murder, T 1815, that various photographs introduced during the state's case depicted the interior of the apartment in which he lived, T 1822-23, 1825-27, and that the electric bill was for his apartment. T 1837. The state then questioned him about the citation for failure to pay the railroad fare over the defense's renewed objection. T 1837.

The trial court erred in overruling the defense objection to the citation and to the state's use of the citation in cross-examining appellant.

"[I]n order to be admissible, evidence must be relevant. See § 90.402, Fla. Stat. (1995). Relevant evidence is defined as evidence 'tending to prove or disprove a material fact.' Id. §

90.401." Gore v. State, 719 So. 2d 1197, 1199 (Fla. 1998).

"There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." Almeida v. State, 748 So. 2d 922, 929-30, n. 17 (Fla. 1999) (quoting McCormick on Evidence 773 (John William Strong, ed., 4th ed. 1992)). "A critical aspect of the test of admissibility under section 90.404(2)(a) ... [is] whether such evidence tends to prove a material fact issue that is in dispute. ... . Whether a relevant material fact is in issue ... must be determined from the particular facts and circumstances involved in each case, i.e., has the defendant put such fact in issue." Foburg v. State, 744 So. 2d 1175, 1176 (Fla. 2nd DCA 1999) (quoting Thomas v. State, 599 So. 2d 158, 162 (Fla. 1st DCA 1992)) (ellipses in Foburg). Thus, Roberts v. State, 662 So. 2d 1308, 1310 (Fla. 4th DCA 1995) (quoting and following Thomas), found error in admitting collateral crime evidence because the fact to which it was relevant "was not actually in dispute."

At bar, there was no dispute about the fact that appellant lived in the apartment. Before putting the citation in evidence, the state had presented ample undisputed evidence that

appellant lived in the apartment. Further, appellant admitted to living in the apartment during cross-examination. Hence, the state's admission of the citation and its use in cross-examination had no bearing on any material issue in dispute before the jury. Its sole purpose was to put before the jury the entirely collateral fact that appellant committed a crime involving dishonesty.

An appellate court reviews an evidentiary ruling for an abuse of discretion, but the rules of evidence circumscribe the trial court's discretion . See Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) ("As to abuse of discretion, we cannot agree, since the trial court's discretion here was narrowly limited by the rules of evidence."); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001) ("a trial court's discretion is limited by the rules of evidence"; citing Taylor).

"Where a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law." Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980). A court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

The judge's decision at bar was based on an erroneous view that the defense disputed that appellant lived in the apartment, and was contrary to established evidentiary principles. Hence, the ruling was erroneous.

Where the court has erroneously admitted evidence, the appellee, as beneficiary of the error, must show that it was harmless beyond a reasonable doubt. "The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

"Application of the test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. " Id. 1135 (e.s.).

At bar, the defense rested almost entirely on the credibility of appellant's denial of involvement in the murder. Presenting to the jury the fact that appellant had been charged with a crime of dishonesty went directly to his credibility, thus damaging the defense case of innocence. Under the facts of this case, the erroneous rulings of the judge were not harmless

beyond a reasonable doubt, and this Court should order a new trial.

5. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTIONS TO THE STATE'S CROSS-EXAMINATION OF APPELLANT.

Appellant's testimony on direct examination lasted less than two full pages of transcript. T 1806-1807. He said he knew what he was charged with, denied kidnapping Dawnia Dacosta, denied raping her, denied murdering her, and said he was on trial because Det. Bukata had said the police were out to get him.

On cross-examination, the state asked appellant about the fact that his family operated a funeral home while he was growing up, and asked if his duties there included cleaning up bodily fluids. T 1810. Defense counsel objected to the line of questioning pursuant to section 90.612(2), Florida Statutes, which governs the scope of cross examination. T 1810-13. At a bench conference, the judge overruled the objection but said the he was "going to ask you [the prosecutor] to limit Mr. Boyd's life experiences in terms of his youth to more immediate matters." T 1813. The state then questioned appellant about his relationship with Geneva Lewis during the summer and fall of 1998, and about his employment by Rev. Lloyd. T 1814-17. When the state asked appellant to show Geneva Lewis's mother's house on a map, the defense renewed its objection that the testimony

was outside the scope and argued that the defense had not opened the door. T 1817-18. The judge overruled the objection, and acknowledged that appellant had an ongoing objection. T 1818-19. The state then questioned appellant about the location of the Texaco station, his apartment and the home of Geneva Lewis's mother, appellant's use of Rev. Lloyd's van, and the missing person flyers. T 1819-22. The prosecutor began showing photographs of appellant's apartment. T 1823. Defense counsel renewed his prior objections, and said that the state was repeating its case-in-chief and showing exhibits already in evidence. Id. The judge ruled that he was "going to overrule the objection in principle", but was "respectfully just going to ask Mr. Loe any exhibits he refers to certainly he can present them to the witness for his response, but I'm just going to ask that we not display them again going down the jury rail since they have been previously displayed." T 1824-25. The state proceeded to ask appellant about numerous other items introduced during its case-in-chief. T 1825-35. It showed appellant the photo lineup in which he had been identified, and asked appellant whose photograph it showed. T 1835. Defense counsel again renewed his previous objections and also said the it was an irrelevant, immaterial comment on another witness's testimony. T 1835-36. The court ruled that appellant could identify himself in the photograph, but ruled that "we're not

going to go very much father than this as that photo lineup." T 1836. Defense counsel also renewed his prior objection to the state's having appellant identify the Tri-Rail citation on the grounds raised during the state's case-in-chief. T 1837. Defense counsel renewed his prior objections regarding the state's questioning of appellant regarding his fingerprint card. T 1840.

This Court wrote in McCoy v. State, 853 So. 2d 396, 406 (Fla. 2003) (e.s.):

> ... . Our standard of review with regard to trial court rulings on the proper scope of cross-examination is clear: "Limitation of cross-examination is subject to an abuse of discretion standard." Moore v. State, 701 So. 2d 545, 549 (Fla. 1997); see also Winner v. Sharp, 43 So. 2d 634, 635 (Fla. 1949) ("The admission or rejection of impeaching testimony is within the sound discretion of the trial court."); Lewis v. State, 754 So. 2d 897, 901 (Fla. 1st DCA 2000). Thus, unless the trial court abused its discretion, which is guided and informed by applicable precedent, this Court will not disturb the judgment below.

An appellate court reviews an evidentiary ruling for an abuse of discretion, but the rules of evidence circumscribe the trial court's discretion. See Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) ("As to abuse of discretion, we cannot agree, since the trial court's discretion here was narrowly limited by the rules of evidence."); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001) ("a trial court's discretion is limited by the rules of evidence"; citing Taylor).

A court does not have discretion to make a ruling contrary

to an existing rule of law: "In order to properly review orders of the trial judge, appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion. Where a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law."). Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980).

Among the applicable precedents and rules guiding a court's discretion is the rule regarding the scope of cross examination, which is that:

> Cross-examination of a witness is limited to the subject matter on direct examination and matters affecting the credibility of the witness. See § 90.612(2), Fla. Stat. (1993). Thus, as a general rule, the questions on cross-examination must be no more broad in scope than those on direct. See McCrae v. State, 395 So. 2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981). Here, the question on direct was limited to Kintner's drinking on the night of the murder. Asking the witness about her alcohol use at other times thus went beyond the permissible scope of cross-examination.

Green v. State, 688 So. 2d 301, 305 (Fla. 1997). Cf. Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982) (defendant may not use cross-examination as a vehicle for presenting substantive evidence of defense).

In Green, an eyewitness to a murder testified on direct examination by the defense that she had not been drinking on the

night in question. This Court held that it was error to let the state question her about her drinking on prior occasions.

Similar error occurred at bar. The state at bar essentially turned its entire cross-examination of appellant into a recapitulation of its case-in-chief through appellant's own mouth. Cf. Gonzalez v. State, 450 So. 2d 585, 587 (Fla. 3rd DCA 1984) (Pearson, J., concurring) (state's cross-examination served "the singular and improper purpose of recapitulating the testimony of the State's witnesses at a point in the trial when such recapitulation is not called for. I am not aware of any authority which accords to any party the right to make a closing argument in mid-trial and a second at the trial's conclusion."). Since appellant's testimony was crucial to the defense, the state's use of appellant to corroborate its own case in the guise of cross-examination was not harmless beyond a reasonable doubt, and this Court should order a new trial.

6. WHETHER THE COURT ERRED IN FAILING TO CONSIDER DR. SHAPIRO'S REPORT AND FAILING TO HEAR TESTIMONY FROM DRS. SHAPIRO AND BLOCK-GARFIELD AS TO APPELLANT'S COMPETENCY.

Defense counsel filed a pre-trial motion for appointment of experts to determine appellant's competency. R 239. The court, apparently by stipulation of the parties, entered an order appointing Drs. Leonard Haber and Trudy Block-Garfield to examine appellant. R 242. Defense counsel thereafter filed a motion for a competency hearing, saying that appellant wished to

waive penalty proceedings. R 253. The motion noted that Dr. David Shapiro, a defense-retained expert had indicated that appellant was incompetent. Id. A copy of Dr. Shapiro's report was attached to the motion. R 256.

Dr. Shapiro wrote in his report that appellant "was quite delusional during the course of the examination with no insight into his mental illness." R 256. He said that appellant said he was placing his trust in the Lord and did "not want to put a negative image in my spirit." Id. Appellant said that the Lord had spoken to him in a prophesy that he "would engage in 'radical speaking and "firtatious."' Mr. Boyd indicated that while radical speaking and firtatious would seem strange to the world, it was perfectly comprehensive to him because 'God spoke to me through a preacher.'" Id. He spoke of divine visions and said he did not need to worry about being found guilty, and that "God had demonstrated to him through dreams and prophesy that he would stand up in Court and say, 'I told you so.'" R 257. Shapiro concluded that appellant had an active mental illness manifested by a delusional system and was incompetent to waive penalty proceedings. Id.

The request for competency hearing also noted that Dr. Haber had indicated that appellant was competent, and attached a copy of his report. R 254. Dr. Haber wrote that appellant presented himself "as soft-spoken, polite, alert, oriented, responsive and

cooperative" and "appeared to be an intelligent man." R 260. He wrote that appellant's mood and affect were appropriate and he was oriented to time, place and person and his speech was coherent. R 261. Haber concluded that appellant was competent to proceed to trial. R 262.

The request also noted that Dr. Block Garfield had indicated that appellant was incompetent to waive penalty proceedings, R 254, and attached a copy of her report. Her findings as to appellant's affect, speech and orientation were similar to Haber's, and she wrote that he did not use the neologisms found by Shapiro, but she also wrote that he "was deliberately very careful to avoid such verbalizations as he stated that the other doctor had thought him crazy." R 263. His attention and concentration were reasonable, but his insight and judgment were poor. Id. He "was not willing to entertain the possibility of any possible conviction or subsequent penalty phase." Id. He said he was confident in his attorney and that the jury would acquit him once it heard his side. R 264. He made contradictory statements as to whether he would waive penalty proceedings. Id. Block Garfield concluded that appellant had psychological difficulties, but did not want to be perceived as incompetent. Id. He "gave lip service" to her questions, and "was merely placating" to show himself to be competent. She did not feel that he had the capacity to waive penalty proceedings.

Id.

The court conducted a hearing at which Dr. Haber was the only witness. The defense presented his testimony that appellant was competent to proceed to trial. ST 183-91. His testimony was essentially similar to that in his report. He also said that appellant had an outstanding trial record, and that "based upon that, I can well understand his great confidence that he's going to succeed again and may not want to contemplate any other possible outcome, which is a rational decision. ... . But I see nothing in that decision which would suggest that this gentleman is mentally impaired." ST 189. The state told Haber that appellant had in the past been acquitted of a number of serious felonies. ST 189-90. Based on that record, Haber said that appellant had "no need to think about negative thoughts or alternatives." ST 190.[9]

After hearing the testimony, and declining an suggestion to question appellant personally, ST 191-92, the judge said (ST 192):

> Very candidly and at this point - and realize, it's not evidence as presented, but I do have the evaluation of Trudy Block-Garfield, which does come to a rather dramatically different result. I reviewed that report, and I guess without her presence for any further explanation, I'm somewhat at a loss even to consider the report. Although, again, the fact that

[9] It is noteworthy that Haber did not know the facts of the prior cases and did not know what evidence the state had against appellant in the case at bar. Hence, he could not know whether appellant's thinking was rational on this point.

> it comes to a - a different conclusion is the only hesitance that the Court has at this point.

In reply, defense counsel said there was some "serious miscommunication" regarding Dr. Shapiro. ST 192. He said: "But I'm not sure you can take Jewish fellow from Maryland and have him always communicate completely with a fallen-away southern black Baptist here. I think that is where this got started." St 192-93. He then said that Dr. Block Garfield's report relied on Shapiro's, adding: "It is not by whim or speculation that Mr. Boyd and I have not presented Dr. Shapiro or Dr. Garfield today. We happen to both be in agreement with Dr. Haber." ST 193. The judge asked appellant if it was his desire to be found competent, and appellant said it was. ST 193. The judge said that he himself had never had any doubts about appellant's competency based on his interaction with him in court. ST 195.

The judge said that he had never seen Shapiro's report. ST 195. He said that he had Dr. Block-Garfield's report, but that it was not in evidence. Id. The judge concluded (ST 196):

> So based on the evidence that has been presented to this tribunal, that being the testimony of Dr. Haber, having heard comment of the defendant, argument of defense counsel, as well as argument of the State, I now declare, for purposes of this proceeding, that Lucious Boyd is competent to proceed to trial.

The prosecutor told the judge: "Truthfully, if Dr. Shapiro had come today to testify, we would have been here all day." ST 201. The court reply: "I respect that. Enough said." Id.

Under the peculiar circumstances of this case, the court erred by not reviewing the report of Dr. Shapiro, not considering his report and that of Dr. Block-Garfield, and not hearing their testimony.

Under appropriate circumstances, a court has a duty to inquire into the mental competency of a defendant. Rule 3.210(b), Florida Rules of Criminal Procedure, provides that if, "at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition ... ." (E.s.) A judge has an independent duty to determine a defendant's competency regardless whether there is a motion for a competency hearing, where there is a bona fide doubt as to the defendant's competence. See Pate v. Robinson, 383 U.S. 375, 385-86 (1966). Pate rejected argument that the defendant had waived his right to a determination by not asking for a sanity hearing, writing: "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id. 384.

The trial court had discretion to call witnesses to testify

as to appellant's competency under rule 3.212(a), Florida Rules of Criminal Procedure, which provides that the experts preparing the reports "may be called by either party or the court". Under the circumstances of this case, the court abused its discretion in not inquiring further into the issue of appellant's competence. The judge was aware that two of the three experts who had examined appellant had found him incompetent. The defense attorney's reasons for not presenting their testimony were specious: he did not think that Dr. Shapiro, as "a Jewish fellow from Maryland" would not "communicate with a fallen-away southern black Baptist here", and he and his client (who two experts had found incompetent) disagreed with the diagnosis. The prosecutor's reason was equally baffling, considering that this is a capital case: it would have taken a few hours to conduct a full hearing.

Under these circumstances, the court abused its discretion by conducting such a truncated hearing regarding appellant's competency. The convictions violate the Due Process and Cruel and/or Unusual Punishment Clauses of the state and federal constitutions, and this Court should order a new trial.

7. WHETHER THE COURT ERRED IN NOT ORDERING A COMPETENCY HEARING AT SENTENCING.

A. When the case came up for jury sentencing proceedings, defense counsel moved to withdraw because of problems developing mitigation with appellant, and also said that "probably most

importantly" Dr. Shapiro continued to have concerns about appellant's competency. T 2158-59. The trial court addressed appellant and asked him about "the mental competency issue and ... getting some family history". T 2160. In the ensuing discussion, the judge asked appellant if he had talked to Dr. Shapiro as much as he wished to, and appellant said he did. T 2162. Appellant felt that it was in his best interest to go forward. T 2163. Defense counsel told the judge: "Well, I don't know how asking a person if he's competent and my relying on his answers." Id. Counsel said further:

> I'll just repeat what we've said, your Honor, we are significantly hamstrung, hamstrung by the actions of our client, and it's not in his interest to go forward at this time despite what he wants. There are issues that have been raised by Dr. Shapiro that needs to be investigated. It would be fair to say that Mr. Boyd just wants to get it done today and that's not the way to do it.
>
> So, for all those reasons, we would ask the Court, despite what Mr. Boyd says, to postpone this and allow us to either get another doctor or to have another counsel or as was discussed perhaps have outside counsel speak with Mr. Boyd.

T 2163-64. Defense counsel said that appellant "has been one of the best clients I've ever had in my life. Lucious is a great guy and I like him and I can't pierce his thinking, but it's one of the Court needs to be aware of and it's one that the Court needs to share." T 2166. The judge denied the motion to withdraw, and ruled that the sentencing proceedings would go forward in accordance with appellant's wishes. T 2167-68.

Under these circumstances, the court erred by not conducting competency proceedings. As noted above in this brief, a court has discretion under rule 3.210(b) and a duty under Pate to initiate competency proceedings under appropriate circumstances. At bar, there was ample reason to doubt appellant's competency. The basis for the prior determination of competency had been that it was rational for appellant to believe that he would be found not guilty, so that he acted rationally in wishing not to prepare for sentencing proceedings. The jury's verdict had rendered illusory this rationale. If appellant persisted in such thinking, he was manifestly not thinking in a rational manner.

The judge understood that the defense was seeking a competency hearing, but effectively overruled that request by directing that the case proceed in accordance with appellant's wishes. Under these circumstances, this Court should reverse and remand for new sentencing proceedings.

B. After the jury recommended the death sentences, there were additional hearings focussed on appellant's desire for other counsel, and his waiver of mitigation. At the last of these hearings, on April 10, 2002, defense counsel said (T 2487):

> Well, my concern as one sits here listening to this kind of circular analysis by Mr. Boyd and his trust of us, is he competent? I mean is this a manifestation

> of mental illness as he is sitting in contemplating the final analysis. I mean I know we had one a long time ago.

The judge replied that the hearing had occurred within six months[10] and added: "those reports, I know the one random I ordered, they all came back. I was not aware of any of those of any mental illnesses." T 2487-88. The judge then ruled (T 2488):

> I'm satisfied based on the totality of the mental history the past several years that Mr. Boyd remains competent. There's been no indicia to this Court that that condition in any way has changed and I will stand on the evaluations and demeanor and behavior of Mr. Boyd throughout the entire proceeding.

Thus the judge seems to have been under the misapprehension that all of the evaluations had found appellant competent. Such was not the case. Two of the three evaluations had found him incompetent. As just discussed in part A of this point on appeal, it was error not to institute competency proceedings at this time in the case.

At bar, the record raises substantial doubts about appellant's competence at sentencing. The resulting sentences violate the Due Process and Cruel and/or Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing.

> 8. WHETHER THE WAIVER OF MITIGATION COMPLIED WITH KOON v. DUGGER, 619 So. 2d 246 (Fla. 1993).

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[10] In fact, the competency hearing had occurred on March 26, 2001, more than a year before the April 10, 2002 hearing.

Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993) states:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

In Chandler v. State, 702 So. 2d 186 (Fla. 1997), this Court found compliance with Koon. Chandler waived the presentation of testimonial mitigation, but agreed to the presentation of documents in mitigation. Id. 191. Defense counsel informed the court of Chandler's decision and began to list the mitigation witnesses and what they would say. Id. 199. After a brief discussion, counsel continued to list the witnesses, noting that they would provide favorable testimony. Id.

The waiver of mitigation at bar did not comply with Koon and Chandler. Defense counsel said that there were witnesses flown in from various parts of the United States, who were present in the courtroom, ST 2215, but never indicated who they were or what they would have testified to. Under these circumstances, the waiver of mitigation was not valid under Koon. The death sentence is unconstitutionally unreliable under the Due Proces, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing.

9. WHETHER THE COURT ERRED IN GIVING GREAT WEIGHT TO THE JURY'S PENALTY RECOMMENDATION.

The trial court ruled that, pursuant to Muhammad v. State, 782 So. 2d 343 (Fla. 2001), it would conduct jury penalty proceedings notwithstanding appellant's desire to waive the proceedings. ST 205. At the jury sentencing proceedings, appellant effectively waived the mitigating evidence which counsel sought to present, limiting the defense case to his own monologue and the testimony of a minister which provided only mitigation to which the judge gave minimal weight. R 551-52.

In sentencing appellant to death, the judge "accorded great weight to the recommendation of the Jury". R 546. The court erred. The sentence in this case was imposed in violation of section 921.141, Florida Statutes, the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and Article I, Sections 2, 9, 16 and 17 of the state constitution.

In Muhammad, the defendant sought to waive jury sentencing proceedings and then presented no mitigating evidence. As in the case at bar, the judge found two aggravating circumstances and accorded little weight to various mitigating factors on the record. And, as at bar, the judge gave great weight to the jury's death recommendation in imposing a sentence of death.

This Court ruled that the judge erred giving great weight to the penalty recommendation under the circumstances of the case, given that the jury sentencing proceedings were

essentially meaningless. It wrote at pages 361-62:

> We do find, however, that the trial court erred when it gave great weight to the jury's recommendation in light of Muhammed's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence. In determining whether the court erred in this case in giving the jury's recommendation great weight, we must consider the role of the advisory jury. Pursuant to section 921.141(2), Florida Statutes (1995), the jury's advisory sentence must be based on "[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5)" and "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(a)-(b), Fla.Stat. (1995). "The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant." Herring v. State, 446 So. 2d 1049, 1056 (Fla. 1984). The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way.

This Court wrote further at page 362:

> It is certainly true that we have previously stated that the jury's recommendation should be given "great weight." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, this statement was made in the context of a jury's recommendation of a life sentence. This legal principle also contemplates a full adversarial hearing before the jury with the presentation of evidence of aggravating and mitigating circumstances. We have also made clear that "[n]otwithstanding the jury's recommendation, whether it be for life imprisonment or death, the judge is required to make an independent determination, based on the aggravating and mitigating factors." Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988); see King v. State, 623 So. 2d 486, 489 (Fla. 1993).

See also Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980)

(ordering resentencing because the trial court gave undue weight

to a death recommendation by applying Tedder standard to death recommendation).

This Court concluded at page 363 of Muhammad:

> Reversible error occurred in this case due to the trial court's decision to afford "great weight" to the jury's recommendation when that jury did not hear any evidence in mitigation and the defendant had, in fact, requested waiver of the advisory jury without objection by the State. Accordingly, we vacate the sentence of death and remand for resentencing proceedings before the trial court.

The jury sentencing proceedings below did not involve the sort of "full adversarial hearing" contemplated by Muhammad. The death sentence is unconstitutionally unreliable under the Due Proces, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing pursuant to Muhammad and Ross.

> 10. WHETHER THE WAIVER OF MITIGATION WAS INVALID BECAUSE THE DECISION WHETHER TO CALL WITNESSES AND PRESENT EVIDENCE IS FOR COUNSEL TO MAKE UNDER THE CONSTITUTION AND FLORIDA LAW.

The record reflects that appellant wished to waive the presentation of mitigating evidence from an early stage of the proceedings. Defense counsel moved for a competency hearing, alleging that the case "may well end up requiring a penalty phase proceeding; and the defendant's wish to waive same. The defendant made this request both orally and in writing by executing a 'waiver' letter." R 253. At a subsequent pretrial hearing, the court acknowledged appellant's "desire to waive any

penalty phase", ST 204, but said that it would "direct that there will be a penalty phase" pursuant to Muhammad v. State, 782 So. 2d 343 (Fla. 2001). ST 205.

After appellant's conviction, the court conducted an in camera hearing with defense counsel and appellant at which counsel moved to withdraw. Counsel said that the court was familiar with appellant's desire to waive mitigating evidence, and that appellant was not cooperating with a defense psychologist. T 2122-23. Appellant told the court that he was going to go along with his lawyers' advice. T 2126. Subsequently, in open court, the judge granted the state's request for a mental evaluation of appellant. T 2130-34.

When the case came up for penalty proceedings, defense counsel again moved to withdraw, saying that the defense attorneys had "sought family records, memorabilia, photographs, journals, anything, and have been denied these by our client", and because appellant had not cooperated with the defense mental health expert, and that there was a question as to "what Mr. Boyd's current mental status is." T 2157-59.

In a colloquy with appellant, the court elicited affirmative responses to the effect that appellant had not provided "all the information they wanted to see", but it was his direction to them to "present what they're going to present without any additional information or the depth of the information

particularly as it relates to family records or family history that they may have wished to have gone into", and that appellant had had the dialog with Dr. Shapiro that he wanted to have with him. T 2159-62.

Defense counsel suggested that it was not right to ask a person if he was competent and rely on his answers, and that there were "issues that have been raised by Dr. Shapiro that needs to be investigated. It would be fair to say that Mr. Boyd just wants to get it done today and that's not the way to do it." T 2163. Defense counsel asked for a postponement "to get another doctor or to have another counsel or as was discussed perhaps have outside counsel speak with Mr. Boyd." T 2163-64.

Defense counsel said that "Lucious is a great guy and I like him and I can't pierce his thinking". T 2166. The judge denied the motion to withdraw and said that appellant "does understand the nature and the consequence of this decision" and the decision was "made freely and voluntarily." T 2167.

In opening statement to the jury that afternoon, defense counsel told the jury that "you will hear from Lucious' family. You will hear about how he was raised here in Florida." ST 437. He also said that "We are going to hear from a lot of witnesses. Much of the evidence you're going to hear is going to be in the area of mitigation. Probably the fewer number of witnesses will be presented by the State ... ." ST 439.

The next day, defense counsel said that appellant "does not wish to put on any witnesses. We have made witnesses available, flown them in from various parts of the United States, they are present in the courtroom." T 2215. After some discussion, appellant said he would "proceed with just calling Bishop Chester Matthews and then I'll get up and read and then I have a couple of editorial words and that's going to be it." T 2226-27. Appellant said he understood he had the opportunity to bring more people if he wanted. T 2227. The judge named various non-statutory mitigators, and asked if appellant wished to reconsider, and appellant said he did not. T 2232-33. The court then read the list of statutory mitigators, and appellant said he was satisfied with his decision, although he did not "fully understand everything you just read, but for the proceeding at this time, this is the choice that I have made to proceed forward and that's the way I would like to do it." T 2235-36. Thereafter, the defense presented the testimony of Matthews and appellant.

The record reflects that the trial court and defense attorneys viewed the role of defense counsel as that of captive counsel, duty bound not to exercise their independent judgment. In effect, the view seems to have been that appellant had a constitutional right to ineffective assistance of counsel.

There is no such right: "the assistance of counsel must be

effective assistance of counsel. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)." Dagostino v. State, 675 So. 2d 194, 195 (Fla. 4th DCA 1996).

In Jones v. Barnes, 463 U.S. 745, 753, n. 6 (1983), the Supreme Court noted (partial emphasis added):

> The ABA Model Rules of Professional Conduct provide:
>
> > "A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.... In a criminal case, the lawyer shall abide by the client's decision, ... as to a plea to be entered, whether to waive jury trial and whether the client will testify." Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added).
>
> With the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client.
>
> Respondent points to the ABA Standards for Criminal Appeals, which appear to indicate that counsel should accede to a client's insistence on pressing a particular contention on appeal, see ABA Standards for Criminal Justice 21-3.2, at 21-42 (2d ed. 1980). The ABA Defense Function Standards provide, however, that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client. See ABA Standards for Criminal Justice 4- 5.2 (2d ed. 1980). See also ABA Project on Standards for Criminal Justice, The Prosecution Function and The Defense Function § 5.2 (Tent. Draft 1970). In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution.

Likewise, the Chief Justice wrote in his concurrence in Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J.,

concurring):

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. [FN1] The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds. [FN omitted]
>
> FN1. Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make. See ABA Project on Standards for Criminal Justice, The Prosecution Function and Defense Function s 5.2, pp. 237-238 (App.Draft 1971).

Thus, Rule 4-1.2(a), Rules Regulating the Florida Bar, provides:

> **(a) Lawyer to Abide by Client's Decisions**. A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to subdivisions (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. <u>In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify</u>." (E.s.).

The Comment to the rule provides in pertinent part (e.s.):

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the

> lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

The Comment further provides that an attorney and client may not enter into an agreement in which the attorney agrees to fail to provide competent representation as required by rule 4-1.1: "the client may not be asked to agree to representation so limited in scope as to violate rule 4-1.1 ... ."

The Commentary to Standard 4-5.1. ABA Standards for Criminal Justice provides in pertinent part (footnote omitted):

> The lawyer must be allowed to determine which witnesses should be called on behalf of the defendant.
>
> ...Some decisions, especially those involving which witnesses to call and in what sequence and what should be said in argument to the jury, can be anticipated sufficiently so that counsel can ordinarily consult with the client concerning them. Because these decisions require the skill, training, and experience of the advocate, the power of decision on them must rest with the lawyer, but that does not mean that the lawyer should completely ignore the client in making them. The lawyer should seek to maintain a cooperative relationship at al stages while maintaining the ultimate choice and responsibility for the strategic and tactical decisions in the case.

Standard 4-8-1(b), ABA Standards for Criminal Justice, while not

dealing specifically with capital sentencing, provides that counsel has a duty to present mitigation:

> Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused.
>
> If a presentence report or summary is made available to the defense lawyer, he or she should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, the lawyer should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on the lawyer's exploration of employment, educational, and other opportunities made available by community services.

In Dickey v. McNeal, 445 So. 2d 692, 696 (Fla. 5th DCA 1984), the court wrote: "It is unreasonable and unfair to expect an attorney to be controlled by a legal determination by his client to forego trial preparation. No competent and ethical attorney, privately retained, would accept such a restriction. Neither, then, should appointed counsel. An appointed counsel must not be a captive counsel bound by the legal stratagems of his client."

Appellant acknowledges that this Court has written in the past that a defendant has the right to waive the presentation of mitigating evidence. The case law in this regard originally arose from cases in which the defendant waived the right to counsel and proceeded pro se. Subsequent cases have allowed waivers of mitigation where the defendant was represented by

counsel. Appellant respectfully submits that the correct legal analysis is that the defendant has the right to proceed or to be represented by counsel, but that a defendant does not have the right to ineffective representation by counsel. There is no constitutional support for the proposition that a defendant may force counsel to represent him in a manner contrary to counsel's ethical and constitutional obligations.

In Klokoc v. State, 589 So. 2d 219, 221-22 (Fla. 1991), this Court wrote that it had ruled in a separate order that a condemned inmate does not have the right to prevent his attorney from challenging his sentence on appeal. This Court wrote that it "must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence", and directed counsel "to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests".

In Farr v. State, 656 So. 2d 448 (Fla. 1995), this Court confronted a situation in which the defendant had forbidden his trial attorney from presenting mitigation. This Court wrote at page 449:

> This appeal again poses a question we often have faced in recent years: Whether the death penalty is "reliably" imposed in those cases in which the defendant does not oppose or actually requests death by execution. The essential facts before us today are that Farr forbade his attorney to present a case for mitigation on remand and that Farr himself took the witness stand and systematically refuted, belied, or

> disclaimed virtually the entire case for mitigation that existed in the earlier appeal. Appellate counsel now asks us to reject Farr's testimony as self-serving and unreliable, and he further argues that more recent opinions of this Court have modified our earlier holding in Hamblen v. State, 527 So. 2d 800 (Fla. 1988).

In Hamblen, the defendant had discharged his attorney and, representing himself, had plead guilty, waived a jury sentencing proceeding, presented no mitigation, and said that a death sentence was appropriate. This Court affirmed the resulting death sentence noting that a defendant has a constitutional right to waive counsel. It found no error in the judge's not appointing stand-by counsel to present a case for a life sentence. This Court differentiated the case before it from cases from other jurisdictions which found error where appointed counsel had followed their clients' direction to present nothing in mitigation in capital sentencing proceedings. Those cases did not involve a waiver of the right to counsel. This Court then wrote at page 804:[11]

> While we commend Hamblen's appellate counsel for a thorough airing of the question presented by this issue, we decline to accept his logic and conclusions. We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his

[11] An issue glossed over in Hamblen and subsequent cases without discussion is whether a defendant actually does have a right to proceed pro se in sentencing proceedings. Faretta concerns the right to proceed pro se at trial. Many of a defendant's rights terminate upon conviction, and it may be that the right to proceed pro se is among these rights.

> wishes through the vehicle of guardian ad litem would violate the dictates of Faretta. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have a right to control their own destinies. This does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

In Farr, this Court wrote respecting Klokoc and Hamblen (e.s.):

> On this second point, counsel's argument essentially is that our opinion in Klokoc v. State, 589 So. 2d 219 (Fla. 1991), effected a modification of Hamblen. It is true that the Klokoc trial court exercised its own independent discretion and appointed special counsel to present a case for mitigation after Klokoc forbade his own attorney to do so. Id. at 220. However, nothing in Klokoc modified the core holding of Hamblen: that there is no constitutional requirement that such a procedure be used. While trial courts have discretion to appoint special counsel where it may be deemed necessary, there is no error in refusing to do so. Compare Klokoc with Hamblen. We thus find no error in the fact that no special counsel was appointed in this case.
>
> It deserves emphasis, however, that the ability of a capital defendant to restrict counsel's argument is not without limit. It is true that the right to counsel embodies a right of self-determination in the face of specific criminal charges. Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992). At the trial level, this certainly means that "defendants have a right to control their own destinies" when facing the death penalty. Hamblen, 527 So. 2d at 804 (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Nevertheless, there are countervailing interests that must be honored.
>
> In Klokoc, for example, we addressed the problem that

> can arise when a death-sentenced defendant attempts to restrict the argument of appellate counsel in this Court. The Florida Constitution imposes upon the Court an absolute obligation of determining whether death is a proportionate penalty. Art. I, § 17, Fla. Const.; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). For that reason, appeals from death penalties are both automatic and mandatory, and cannot be rendered illusory for any reason. Thus, the Klokoc Court held that appellate counsel must proceed with a proper adversarial argument notwithstanding the defendant's instruction to dismiss the appeal or to acquiesce to the death penalty. Klokoc, 589 So. 2d at 222.
>
> We acknowledge that this is a troubling area of the law. On a case-by-case basis, we have attempted to achieve a solution that both honors the defendant's right of self-determination and the constitutional requirement that death be imposed reliably and proportionately. While there are no simple solutions, we do strongly believe that trial courts would be wise to order presentence investigations in at least those cases in which the defendant essentially is not challenging imposition of the death penalty. Nevertheless, the failure to order one cannot be considered error in light of a defendant's refusal to seriously challenge death as a penalty.

656 So. 2d at 450.

There are two important points to note here:

First, this Court took from Hamblen and Faretta, two cases involving the constitutional right to waive counsel and represent oneself, the very different proposition that a defendant has some right to compel counsel to fail to present mitigation.[12] This interpretation of Hamblen and Faretta was

[12] The reference to Traylor in Farr is somewhat mysterious in this regard. This Court wrote in Traylor: "Our state clause embodies an express right to choose the manner of representing oneself--either pro se or through counsel--against criminal charges." 596 So. 2d at 967. It then expanded on this statement at page 968: "we hold that a prime right embodied by

itself dicta because it was not directly related to the issue before the Court in Farr. The argument in Farr was that the court should have appointed "special counsel" to present a case for mitigation. This Court's determination of that issue had nothing to do with the issue of whether Farr had some right to compel his court-appointed attorney to render ineffective services as captive counsel for his client.

Second, there cannot be meaningful appellate review of the death sentence where the death sentencing proceeding has been rendered meaningless by the misguided view that counsel must obey every dictate of the defendant. The inaction of trial counsel rendered illusory the appellate review.

In Koon v. Dugger, 619 So. 2d 246, 249 (Fla. 1993), a post-conviction case, this Court wrote: "We have repeatedly recognized the right of a competent defendant to waive presentation of mitigating evidence. Pettit v. State, 591 So. 2d

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the Section 16 Counsel Clause is the right to choose one's manner of representation against criminal charges". A footnote to this statement said: "This right necessarily entails two corresponding rights--the right to conduct one's own defense and the right to assistance of counsel." Id., n. 23. It was in this context that the Court said, in the same paragraph that a defendant had the right "to exercise self-determination in the face of criminal charges". This Court wrote further at page 968: "Once the defendant is charged--and the Section 16 rights attach--the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel." Thus, the right of "self-determination" which the Court was discussing was merely the right to determine whether to be represented by counsel. Traylor had no bearing on the issues involved in Farr.

618 (Fla.), cert. denied, 506 U.S. 836, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988)." Petit, like Hamblen, was a case in which the defendant had waived his right to counsel, plead guilty, and had sought to be sentenced to death. Koon found that Koon's lawyer was not ineffective in failing to present mitigation at Koon's direction.

Koon passed over the difference between cases like Petit and Hamblen, in which the defendant acted pro se, and cases in which he is represented by counsel. This Court did, however, write the following at pages 250-51 of Koon:

> Next, Koon claims that his trial counsel abdicated the decision-making authority to him without an appropriate Faretta [FN5] inquiry. This claim centers around Koon's demand during trial that counsel recall a witness and ask him certain questions that he had not asked during the witness's initial testimony. Defense counsel advised the court that Koon insisted on recalling the witness.
>
> FN5. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).
>
> Faretta requires that when a defendant asserts his right of self-representation, the court must conduct an appropriate inquiry to determine that the waiver of the right to counsel is voluntarily and intelligently made. Here, Koon clearly indicated that he did not wish to represent himself. No Faretta inquiry was required. The trial and postconviction record reflect that Koon was a difficult client who insisted, at times, on preempting his counsel's trial strategy. Koon informed the court that he would do whatever it took to have this witness recalled and requestioned. In an effort to prevent Koon from making a scene in front of the jury, counsel conceded to Koon's demand to recall this witness. This was a reasonable response

> under the circumstances and did not constitute an abdication of the decision-making authority.

It is noteworthy that the foregoing passage reflects that ordinarily an attorney does have the obligation not to abdicate the "decision-making authority" as to the presentation of evidence.

Overall, the discussion in Koon reflected that counsel was struggling to represent an extremely disruptive client and was seeking to preserve the decorum of the courtroom. The case at bar presents no such circumstance. Counsel repeatedly told the court that appellant presented no such problem.

In view of the foregoing case-law, a criminal defendant has the right to waive counsel and proceed pro se at trial. One also has the right to effective assistance of counsel. "Our state clause embodies an express right to choose the manner of representing oneself--either pro se or through counsel--against criminal charges." Traylor, 596 So. 2d at 967. A defendant does not, however, have any right to ineffective assistance of counsel, and counsel may not abdicate his constitutional duties simply to fulfill the client's irrational desires.

The death sentence at bar is unreliable because of counsel's abdication of their duty to present a case for a life sentence. It is unconstitutionally unreliable under the Due Proces, Jury, Counsel, and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should order

resentencing.

> 11. WHETHER THE EVIDENCE SUPPORTS THE HEINOUSNESS AND FELONY MURDER CIRCUMSTANCES, AND WHETHER SECTION 921.141, FLORIDA STATUTES, ALLOWS A DEATH SENTENCE WHEN THERE IS ONLY ONE AGGRAVATING CIRCUMSTANCE.

A. An aggravating circumstance may not rest on speculation. Hamilton v. State, 547 So. 2d 630, 633-34 (Fla. 1989), states:

> ... . Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

As the defense sentencing memorandum pointed out, the evidence on this circumstance was speculative (R 530-31):

> … . Had the first wound been the penetrating head wound, then the victim would have had slight or no awareness of anything else. The State's Medical Examiner could not testify to the sequence of the wounds or the consciousness of the deceased. Therefore, it is pure speculation that she knew anything was happening. To suppose otherwise may be correct, but is not substantiated by any credible evidence - merely supposition. … .

R 530-31.

Dr. Perper testified that he could not tell the order of the injuries, "[e]xcept to say that in my opinion, because you have

the injuries in clusters, I believe that the cluster of the chest was done at one time, the cluster of the four lateral to the right eye was done at one time, and the cluster of the four in the head penetrating the brain was done at one time. I cannot tell you the order." ST 465-66. He did not believe that Dacosta died right away from the head injury: the heart had to keep beating for a period of time after the penetrating injury. ST 465-67.

He could not tell if the chest injuries or the injuries to the hands and forearms came after the head injury. ST 467-68. He testified that within a reasonable degree of medical certainty, the injuries to the chest occurred when she was alive and conscious, and that the injuries were consistent with her getting right arm free and trying to block some of the blows. ST 470-71. This testimony, however, was speculative: "I can say also the fact that there are the three types of injuries and obviously that injuries which were done to the chest were inflicted at the time when the person was alive because if the person would be unconscious, it doesn't make any sense - <u>there's no reason to make injuries to the chest</u>, so I know that within a reasonable degree of medical certainty." ST 477 (e.s.).

Under the facts of this case, the state's evidence failed to show that Dacosta was conscious when she received the various wounds to the body. Indeed, it did not even show that she was

conscious when the fatal blow was struck: she may have been struck while asleep for all the evidence shows.[13] Alternatively, while she was conscious, she may have been trying to move her arm to evade the fatal blow, and then lost consciousness. After she lost consciousness, the arm would have remained in this "defensive" position as the other injuries were inflicted.

At this point it is worth noting the state's position on appellant's motion for a jury view of the apartment where the crime allegedly occurred. Defense counsel maintained that he wanted jurors to be aware that the walls were not sound proof so that persons in the apartment complex would have heard the violent attack. ST 362-63. It was his understanding that the state's case involved a "horrific, violent, heinous, atrocious, yelling, screaming incident". T 375. The state replied that "there's no evidence of any yelling and screaming." ST 376. The state argued further: "That's just another problem that's inherent in Mr. Laswell's argument to you about this horrific, yelling and screaming. Are we asking the jury to speculate that that's what happened? Because we don't know." Id. (e.s.)

We do not know, under the facts of this case, whether Dawnia Dacosta was aware of any attack before the fatal blow was struck, much less that the case involves a prolonged awareness of impending death or egregious suffering.

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[13] The evidence strongly suggests that the murder occurred on the bed.

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001). "Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim." Ferrell v. State, 686 So. 2d 1324, 1330 (Fla. 1996).

The heinous circumstance is "inapplicable under Florida law where the victim is unconscious or unaware of impending death at the time of the attack. See Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1998) (HAC requires showing of awareness of impending death); Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984) (events occurring after victim loses consciousness may not be considered in finding HAC)." Cherry v. State, 781 So. 2d 1040, 1055 (Fla. 2000).

In Zakrzewski, this Court struck the heinousness circumstance where the victim "may have been" rendered unconscious. The evidence was that "Zakrzewski approached Sylvia, who was sitting alone in the living room. He hit her at least twice over the head with a crowbar. The testimony established that Sylvia may have been rendered unconscious as a result of these blows, although not dead. Zakrzewski then

dragged Sylvia into the bedroom, where he hit her again and strangled her with rope." 717 So. 2d at 490 (e.s.). This Court wrote at pages 492-93 (e.s.):

> As for Sylvia's death, we find that the trial court's finding of HAC was erroneous. The State has the burden of proving beyond a reasonable doubt that an aggravator has been established. See Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989). Medical testimony was offered during the trial which established that Sylvia may have been rendered unconscious upon receiving the first blow from the crowbar, and as a result, she was unaware of her impending death. We have generally held awareness to be a component of the HAC aggravator. See, e.g., Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994) (holding that HAC is repeatedly upheld where the victims are "acutely aware of their impending deaths"); Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) (holding that events occurring after the death of a victim cannot be considered in determining HAC); Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984) (holding that circumstances that contribute to a victim's death after the victim becomes unconscious cannot be considered in determining HAC). Based on the medical expert's testimony, we conclude that the State has failed to meet this burden. Therefore, we find that it was error for the trial court to apply the HAC aggravator to Sylvia's murder.

Similarly, this Court struck the circumstance in Diaz v. State, 28 Fla. Law Weekly S 687, 688-89 (Fla. Sept. 11, 2003) where the victim died of multiple gunshot wounds and the sequence of the shots could not be determined.

At bar, the evidence of this circumstance was so speculative that it was error to use it in sentencing appellant. This Court should reverse appellant's death sentence.

B. As argued above regarding the defense motion for

judgment of acquittal, the state's evidence did not establish a sexual battery or a kidnapping. Hence, it was error to use the felony murder circumstance in sentencing appellant.

C. From the foregoing, this Court should strike at least one of the two aggravating circumstances at bar.

Section 921.141, Florida Statutes, does not authorize a death sentence when there is only one aggravating circumstance. Subsection (2) provides that the jury is to determine whether "sufficient aggravating circumstances" exist, and whether there is exist sufficient mitigating circumstances "which outweigh the aggravating circumstances." (E.s.) Likewise, subsection (3) provides that the judge is to determine whether "sufficient aggravating circumstances" exist, and whether there are sufficient mitigating circumstances to outweigh "the aggravating circumstances". (E.s.)

If the Legislature intended to allow a death sentence where there was only one aggravating circumstance, it could have said so by express language in the statute. For instance, section 13-703(e), Arizona Statutes, provides for imposition of a sentence of death "if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

(E.s.)[14]

The Legislature has declared that criminal statutes must be strictly construed in favor of the accused. Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This rule of strict construction arises from fundamental principles of due process. "To the extent that penal statutory

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[14] Other states with similar provisions include Pennsylvania (42 Pa.C.S. § 9711(c)(1)(iv) ("at least one aggravating circumstance")), Tennessee (Tenn. Stat. 39-13-204(f)(2) ("a statutory aggravating circumstance or circumstances")), Maryland (MD Code, Criminal Law, § 2-303(i) ("one or more of the mitigating circumstances")), Nebraska (Neb. Stat, § 29-2521 ("one or more aggravating circumstances")), Idaho (ID ST s 19-2515 ("at least one (1) statutory aggravating circumstance")), Wyoming (WY ST s 6-2-102(e) ("The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found.")), Oklahoma (OK ST T. 21 s 701.11 ("at least one of the statutory aggravating circumstances enumerated in this act")), Indiana (West's A.I.C. 35-50-2-9(a) ("the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged")), Kansas (KS ST s 21-4624 ("one or more of the aggravating circumstances")), Louisiana (La. C.Cr.P. Art. 905.3 ("at least one statutory aggravating circumstance"), Colorado (CO ST s 18-1.3-1302 ("at least one aggravating factor'), Missouri (MO ST 565.032 ("a statutory aggravating circumstance or circumstances")), South Carolina (SC ST s 16-3-20(B) ("a statutory aggravating circumstance")), Illinois (IL ST CH 720 s 5/9-1(g) ("one or more of the [aggravating] factors")), Nevada (NV ST 175.554 2(a) ("an aggravating circumstance or circumstances")), South Dakota (SD ST s 23A-27A-4 ("at least one aggravating circumstance")), California (Ca. Pen. Code s 190.4 ("any one or more of the special circumstances").

language is indefinite or 'is susceptible of differing constructions,' due process requires a strict construction of the language in the defendant's favor under the rule of lenity." Kobel v. State, 745 So. 2d 979, 982 (Fla. 4th DCA 1999) (quoting Register v. State, 715 So. 2d 274, 278 (Fla. 1st DCA 1998)). This Court wrote almost a century ago: "It is a rule too well recognized to require citation of the authorities that penal laws should be strictly construed, and those in favor of the accused should receive a liberal construction." Sanford v. State, 75 Fla. 393, 400, 78 So. 340, 342 (1918).

The same principle applies to governing sentencing. This Court wrote in State v. Rife, 789 So. 2d 288, 294 (Fla. 2001) (e.s.):

> To the extent, however, that there is any ambiguity as to legislative intent created by the confluence of these statutes, the default principle in construing criminal statutes is codified in section 775.021(1), Florida Statutes (1997). See Hayes, 750 So. 2d at 3. "The rules of statutory construction require courts to strictly construe criminal statutes, and that 'when the language is susceptible to differing constructions, [the statute] shall be construed most favorably to the accused.'" Id. (quoting section 775.021(1)); see also McLaughlin, 721 So. 2d at 1172. The rule of lenity is equally applicable to the court's construction of sentencing guidelines. See Flowers v. State, 586 So. 2d 1058, 1059 (Fla. 1991).

The common sense basis for this principle is: While the state is free to write its statutes, rules, and sentencing provisions as it wishes, it is stuck with what it has written. It may not through litigation alter to its advantage the meaning

of its enactments produced by the deliberative processes of rule-making and legislation.

Further, a court "may not rewrite statutes contrary to their plain language." Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999). In Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999), the court wrote: "We are not at liberty to add words to statutes that were not placed there by the Legislature." The Separation of Powers Clause of our constitution (Article II, Section 3) forbids the courts from substituting their judgment for that of the Legislature. See Sebring Airport Auth. v. McIntyre, 783 So. 2d 238, 244-45 (Fla. 2001). It is a violation of the separation of powers doctrine for the court to rewrite a statute. Johnson v. State, 660 So. 2d 637, 647 (Fla. 1995).

The Florida Legislature decided that the state must prove more than one aggravating circumstance. This is the sort of line-drawing judgment that one expects the political branches to make. It is not in the power of the judicial branch to replace this judgment with its own. This Court wrote in Sebring Airport Auth., 783 So. 2d at 244-45 (quoting City of Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769 (1914):

> Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

Since the section 921.141 requires a finding of aggravating "circumstances", imposition of a death sentence where there is only one aggravating circumstance is illegal.

In making this argument, appellant is aware that this Court has at times authorized death sentences in cases involving only a single aggravating circumstances. See, e.g., LeDuc v. State, 365 So. 2d 149 (Fla. 1978). Nevertheless, such cases fail to take into consideration the express plural language of the statute. Hence, they do not provide precedent for the issue presented here.

One of the two aggravating circumstances used in sentencing appellant was improperly found. Hence, there is only one aggravating circumstance, and this circumstance, alone, does not authorize a death sentence under section 921.141. The death sentence at bar is unconstitutional under the Due Proces, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should remand for entry of a life sentence.

12. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO THE INTRODUCTION OF PHOTOGRAPHS OF DAWNIA DACOSTA DURING THE PENALTY PROCEEDINGS.

At the guilt phase of the trial, the medical examiner testified to Dawnia Dacosta's injuries, and the jury was shown diagrams and photographs showing her injuries. T 766-70. During the penalty phase, the defense objected to the state's

proposed introduction of photographs of Dacosta taken after her death.

Defense counsel objected to proposed exhibit B noting that "B is the four that we already had except you can see the decomposition and I think this is the issue." T 2188. The state replied: "It is. Again, I don't believe we have that portion of the arm that's been introduced in any photograph and it's the right arm and it shows defensive wounds again on her right arm." Id. The defense objected because of the decomposition, id., but the photograph was admitted as State's Exhibit 2 over objection. ST 446. The defense also objected to exhibits D and E, which showed the head, on the ground that they simply served to show the decomposed state of the body, were inflammatory, and that there were other photographs establishing the injuries. T 2188-89. The prosecutor said they were relevant to show the relationship of the head injuries and to show that the murder was heinous, atrocious and cruel because there was a wound to the head. T 2189-90. The court overruled the objection to exhibit D, which was admitted into evidence as State's Exhibit 7, and sustained the objection to exhibit E. T 2190, ST 446. (Exhibit F, another photograph of head injuries was admitted without objection, T 2190-91, as Exhibit 4. This photograph did not have the inflammatory quality of exhibit 7.) The defense also objected to exhibit G and H, which both showed

Dacosta's chest. Exhibit H was a close-up, and exhibit G showed a trash bag over Dacosta's head and pubic area in addition to the chest. T 2191-92. The state maintained that they showed the pattern of injuries, and served to establish the heinousness and felony murder circumstances. T 2196-99. The court overruled the defense objections to the photographs, which were admitted into evidence as exhibits 5 and 6. T 2199, ST 446.

Before the photographs were shown to the jury, the state's medical examiner testified extensively regarding Dacosta's injuries. ST 446-48. He then reiterated his testimony while the photographs were shown to the jury. ST 448-50. After further discussion, he pointed out that exhibit 7 "shows the decompositional changes because the face is swollen and the eyes have protruded and the skin shows changes of the decomposition." ST 453. On exhibit 7, "what appears to be some fragments of brain sitting on the skin outside the perforation of the skin and the head." ST 454. The only injury to cause death was the one to the brain. ST 454. He testified that State's Exhibits 5 and 6 showed superficial wounds, ST 450, which testimony added nothing to the guilt-phase testimony. Similarly, he testified that State's 2, showed the right forearm with a number of injuries "consistent with being produced by a screwdriver", ST 449, which again added nothing to the guilt-phase testimony.

While Dr. Perper was testifying, construction work was being

done on the floor directly above the courtroom. Appellant moved for a mistrial on the ground that noise from the construction, including a masonry drill, was causing jurors to react. ST 455-56. The judge said, "My only comment, for the record, they are somewhat more recoiling from the photographs than the sound. That's my observation." ST 456. Defense counsel argued that "we are worried about the visible reactions that one or more jurors have had and, as you said, it's coming in during the display of photographs involving screwdrivers and Sawzalls". ST 457. After talking to chief judge, the judge said they might move to a different courtroom. ST 459-60. Defense counsel said that "the question is not that the noise is distracting. It's that the noise has a certain emotional aspect to it that pervades the testimony of Dr. Perper and is somewhat reminiscent of a dentist with a drill kind of grinding away. It's not the distracting aspect but the emotional aspect that we object to, and the stopping for the noise is not the issue. It's the noise itself." The judge said he would call recess if the noise "presents itself again". ST 460.

The court erred in overruling the objections to the photographs and they were prejudicial under the circumstances at bar.

In Rose v. State, 787 So. 2d 786, 794 (Fla. 2001), this Court set out the following standard regarding the admissibility

of relevant autopsy photographs:

> As recently stated in Zack v. State, 753 So. 2d 9, 16 (Fla. 2000), relevant evidence is ordinarily admissible unless it is barred by a rule of exclusion or its admission fails a balancing test to determine whether the probative value is outweighed by its prejudicial effect. This standard is equally applicable to photographs. See Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995). Hence, we have held that autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial. See id. Absent a clear showing of abuse of discretion by the trial court, a ruling on admissibility of such evidence will not be disturbed. See Gudinas v. State, 693 So. 2d 953, 963 (Fla. 1997).

On the other hand, such photographs are irrelevant and hence inadmissible if not probative of any fact in issue. In Almeida v. State, 748 So. 2d 922, 929-30 (Fla. 1999), this Court wrote:

> The State introduced as Exhibit No. 10 an autopsy photo of the victim that depicted the gutted body cavity. Almeida claims that this was error. We agree. Although this Court has stated that "[t]he test for admissibility of photographic evidence is relevancy rather than necessity," Pope v. State, 679 So. 2d 710, 713 (Fla. 1996), this standard by no means constitutes a carte blanche for the admission of gruesome photos. To be relevant, a photo of a deceased victim must be probative of an issue that is in dispute. [FN17] In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute. Admission of the inflammatory photo thus was gratuitous. We find the error harmless, however, in light of the minor role the photo played in the State's case. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).
>
> FN17. See McCormick on Evidence 773 (John William Strong, ed., 4th ed. 1992) ("There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the

> issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." (Footnote omitted)).

In Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993), this Court wrote:

> In his fourth claim, Thompson alleges that the trial court improperly admitted, at the penalty phase, the photographs of the victim's body taken during the autopsy. Thompson alleges that the trial court's admission of the autopsy photographs into evidence improperly inflamed the jury. In our view, the autopsy photographs in this instance were not essential, given the other photographs introduced. The other photographs introduced more than adequately support the claim that the murder was heinous, atrocious, or cruel. Accordingly, we find it was error to admit the autopsy photographs, but the error was harmless given the testimony of the eyewitness, the medical examiner, and the appellant himself, and the other photographs admitted into evidence.

Hoffert v. State, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990) states:

> Finally, appellant contends the trial court erred when it permitted the introduction of an autopsy photograph of the victim's head. The photograph depicted the internal portion of the victim's head after an incision had been made from behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair and overlies the skull. The state argues that it introduced the photograph to show that in addition to the other injuries sustained by the victim, he had suffered a separate blow to the left side of his head, and that he received the worst of the fight. The record contains other evidence which showed that the victim had broken fingers, bruises above the nose and lacerations on the back of the head. The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis muscle without reference to the photograph. The danger of unfair prejudice to appellant far outweighed the probative value of the photograph and the state has failed to

show the necessity for its admission.

The photographs at bar were inadmissible. State's Exhibit 7 did not and could not establish that the murder was especially heinous, atrocious or cruel or that it occurred in the commission of an enumerated felony. The decomposition it depicted occurred after death and was therefore irrelevant to the aggravators. The testimony about Exhibit 7 dwelt on the decompositional changes and the fact that the brain was protruding from the injury. ST 453-54. The witness was able to, and did, testify about the head injury before the jury was shown the exhibit. ST 454. He did not testify that it went to either of the aggravators. It appears that its sole value was to shock the jury: the prosecutor said to the jury in opening statement that "You have yet to see any photos of Mr. Boyd's handiwork." ST 432. Although he said that such was not the purpose, "the photographs that you are going to see will probably shock you. They may overwhelm you." ST 434. Shock seems to have been the effect: the judge noted that the jurors were "somewhat more recoiling from the photographs than the sound" of construction and pneumatic drills directly over their heads. ST 456.

Under these circumstances, it cannot be said beyond a reasonable doubt that the erroneous admission of Exhibit 7 did not affect the verdict. This Court should order resentencing.

Error similarly occurred in the admission of Exhibits 5 and 6. The witness testified to the injuries before the exhibits were even shown to the jury, ST 446-48, and the state had already established the injuries at the guilt phase and in fact they had been the subject of the stipulation read to the jury. T 764-67. The photographs did not serve to establish the heinousness circumstance, since they could not establish the order in which the injuries occurred. Likewise, they did nothing to establish a kidnapping or sexual battery. In any event, the jury had already found appellant guilty of kidnapping and sexual battery, so that these facts were no longer in issue.

Exhibit 2 was likewise inadmissible. As with the other exhibits, the witness had already testified to the injuries before the exhibit was shown to the jury and the state had already established the injuries at the guilt phase. The photograph of the bodily decomposition did not go to any fact in issue.

Under these circumstances, the court erred in overruling the defense objection to the photographs. Both the state and the judge acknowledged their shock effect on the jurors. They tended to divert the jury from the fact that the evidence of the heinousness circumstance was at bottom based entirely on speculation as to the order of the injuries. The death sentence is unconstitutionally unreliable under the Due Proces,

Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing.

13. WHETHER THE DEATH SENTENCE AT BAR IS DISPROPORTIONATE.

"Our law reserves the death penalty only for the most aggravated and least mitigated murders". Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). Accord Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997). See also State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988).

As explained above, the state failed to establish the heinousness aggravator. Only the felony murder aggravator would then remain, and the judge gave it only moderate weight. As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will only be affirmed in cases supported by one aggravating circumstance only in cases where there is "either nothing or very little in mitigation". Accord Clark v. State, 609 So. 2d 513 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988). As explained above, the record at bar shows substantial mitigation.

Further, the death penalty has not been held proportionate where the only aggravating circumstance is that the defendant killed the victim during the commission of a felony. Hence, this is not an appropriate case for the death penalty.

Assuming arguendo that the heinousness aggravator is valid in this case, the death sentence would still be disproportional. Proportionality analysis is not based solely on the number of aggravating factors. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (although five aggravating factors, including prior violent felony but excluding HAC and CCP, existed -- death was not proportionally warranted); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (death disproportionate when proportional review of two aggravating factors, including a prior violent felony, against mitigating factors). Rather, proportionality review is also based on the quantity and quality of the mitigating evidence.

There was substantial mitigation present to make death disproportional. See Nibert, 574 So. 2d at 1063.

Pastor Matthews' testimony showed that appellant was an exemplary inmate and had a great potential for rehabilitation. "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). In Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for

rehabilitation" was a mitigating factor this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Indeed, evidence relating to the possibility of rehabilitation is deemed so important that exclusion of such evidence requires a new sentencing hearing. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987). At bar, there was substantial totally unrebutted testimony about appellant's good behavior, indicating a substantial ability to live well in prison. This is an important mitigator showing "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986).

This circumstance is especially important because the alternatives were death or life imprisonment without parole. A defendant's behavior while in jail is crucial in making this determination.

Pastor Matthews' testimony also showed appellant's strong religious beliefs, which is valid mitigation. See Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992).

As in other cases, the substantial mitigation takes this case from the group of the most unmitigated cases for which the death penalty is reserved. Cf. Jackson v. State, 575 So. 2d 181

(Fla. 1991) (death not proportional despite two aggravators including prior violent felony); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (death not proportional where two aggravators (prior violent felony and during the commission of felony) where mitigators of low intelligence, cocaine and marijuana abuse, and abusive childhood were present); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (death not proportional despite 5 aggravators found); Kramer v. State, 619 So. 2d 274 (Fla. 1993) (death not proportional where two aggravators (prior violent felony and HAC) where mitigators of alcoholism, mental stress, loss of emotional control, good worker, adjustment to prison, were present). The death sentence in this case violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

14. WHETHER THE COURT ERRED IN ITS ASSESSMENT OF MITIGATING CIRCUMSTANCES.

The court wrote regarding the mitigating circumstance that appellant came from a good family (R 553):

> Pastor Williams testified that Mr. Boyd came from a good family, and that he was raised by his parents with love and with the highest standards of integrity. Nevertheless, this Court finds that the positive influence of Mr. Boyd's loving family background did not prevent him from committing the brutal murder of Dawnia Dacosta, who also came from a good family, and it is therefore especially tragic that, because of Mr. Boyd's actions, two good, loving families are made to suffer.

> The factor has been proven by a preponderance of the evidence. The Court gives it minimal weight.

It appears that the judge's reason for giving this circumstance minimal weight was that appellant was guilty of first degree murder. This is a logically absurd reason: if appellant had not been convicted of the murder, he would not be before the court for capital sentencing. Under the judge's reasoning, this mitigating circumstance could never be considered. This Court has found error in similar circumstances in which judges have refused to consider mental mitigation because the jury did not find the defendant not guilty by reason of insanity. See Morgan v. State, 639 So. 2d 6, 13-14 (Fla. 1994). In Morgan, this Court wrote that "the trial judge should not have relied on the jury's verdict to reject factors in mitigation", including mental mitigation and the defendant's age. Id. 13. See also Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) ("From the record it is clear that the trial court properly concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition.").

The fact that Dacosta also had a loving family also cannot have any bearing on this circumstance. It would make no sense to say that the killing of someone without a loving family would add weight to the mitigating circumstance.

Similarly flawed was the judge's decision to give minimal weight to the circumstance that appellant is religious (R 551-52):

> Pastor Lester E. Matthews, Mr. Boyd's prison minister, testified about Mr. Boyd's embrace of Christianity. Pastor Matthews testified that while in the county jail, Mr. Boyd has been a model Christian, exhibiting forgiveness to those who have wronged him, and sharing his beliefs with other prisoners.
>
> This Court finds that Mr. Boyd's religious beliefs, however, did not prevent him from brutally assaulting, raping, and murdering Dawnia Dacosta. The forgiveness professed by Mr. Boyd is directed towards members of the Broward Sheriff's Office and the Office of the State Attorney, as Mr. Boyd believes he was framed by these agencies.
>
> The mitigator involving religion has been proven by a preponderance of the evidence. The Court gives it minimal weight.

The court also gave minimal weight to the circumstances that appellant had a good jail record and had family and friends who care and love for him. The court did so without explanation, but in the context of the two foregoing circumstances, there is an inescapable conclusion that it applied the same reasoning to them. Otherwise, it is impossible to discern any reason for the judge minimizing these mitigating circumstances. In determining whether to sentence a defendant to death or to life imprisonment without parole, a defendant's behavior in jail is of vital importance.

Although the determination of the weight to give to mitigating circumstances is largely in the discretion of the

trial court, this Court has never held that a trial court may use an illogical or legally unfounded reason for minimizing or rejecting mitigation. In fact, this Court has ruled that it will not disturb a judge's ruling as to mitigation unless "it is 'arbitrary, fanciful, or unreasonable,' so that no reasonable person would adopt the trial court's view." Caballero v. State, 851 So. 2d 655, 661 (Fla. 2003) (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)).

At bar it was unreasonable to give minimal weight to the mitigation because appellant was guilty of the crimes charged. Further, it was unreasonable to give minimal weight to appellant's exemplary behavior in jail without any reason at all. The death sentence is unconstitutionally unreliable under the Due Proces, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing.

> 15. WHETHER THE COURT ERRED IN FAILING TO COMPLY WITH MUHAMMAD v. STATE, 782 So. 2d 343 (Fla. 2001), IN SENTENCING APPELLANT.

In Muhammad v. State, 782 So. 2d 343 (Fla. 2001), this Court established a prospective rule for capital sentencing proceedings where the defendant has waived mitigation. Ocha v. State, 826 So. 2d 956, 962 (Fla. 2002) summarizes Muhammad as follows:

> … In Muhammad, we vacated the defendant's death sentence and remanded for resentencing, in part

> because Muhammad waived the right to present mitigating evidence and the trial court provided no alternative means for mitigating evidence to be presented to the jury. See id. at 349, 361-62. In anticipation of Muhammad's continued refusal to offer mitigating factors at resentencing, this Court prospectively required a presentence investigation report (PSI) for all cases in which the defendant does not challenge his death sentence and refuses to present evidence in support of mitigating factors. See id. at 363.
>
> > To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses.
>
> Id. at 363-64 (footnote omitted).

The sentencing at bar did not comply with these requirements. The court did not provide alternative means for mitigating evidence to be presented to the jury. It ordered a PSI, but the evidence therein was not presented to the jury. Further, the PSI was not thorough. It contains brief unverified remarks about appellant's education, employment and financial status, noting only that he had claimed to have graduated from high school and attended community college and had listed his occupation as a driver when arrested, and that child support enforcement cases had been closed because he was in custody. ST 47. It contained a brief account of appellant's family, but it

appears that the investigation was limited to repeated attempts to contact one family member. No attempt was made to contact other family members or to investigate other sources of information in this regard. ST 48. The report reflects that appellant had said he was an Army veteran, but there was no further investigation into this matter. The only investigation of his physical and mental health history was to summarize the reports of Drs. Shapiro, Block-Garfield and Haber and defense counsel's dismissive comments regarding Drs. Shapiro and Block-Garfield. The record reflects no effort by the state to put in the record all evidence in its possession of a mitigating nature. The court was aware from remarks of defense counsel that there was a significant mitigation, but did not call persons with mitigation as its own witnesses. The court denied defense counsel's request that the court appoint alternative counsel to present mitigating evidence.

Under these circumstances, the death sentence is unconstitutionally unreliable under the Due Proces, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions, and this Court should order resentencing.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 by courier 13 January 2004.

Attorney for Lucious Boyd

STATEMENT OF FONT

This brief was prepared in a Courier new Regular 12-point font.