IN SUPREME COURT OF FLORIDA

LUTHER DOUGLAS,

Appellant,

v. Case No. **SC02-1666**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE[1]

On March 2, 2000, the Duval County grand jury indicted Luther Douglas for the first-degree murder of Mary Ann Hobgood. I 20. On October 4, 2001, an amended indictment was filed, charging Douglas with first-degree murder, sexual battery, and kidnapping. II 265. The state abandoned the kidnapping count prior to trial. VIII 4.

Douglas was tried by a jury on March 11-15, 2002, and found guilty of sexual battery and felony murder, based on the sexual battery. II 343-344, XIV 1219.

The trial judge denied Douglas's motion for new trial, II 355-358, and the penalty phase proceeding was held on April 4-5, 2002. The jury recommended that Douglas be sentenced to death

[1] References to the twenty-volume record on appeal are designated by the volume number in Roman Numerals and the page number. All proceedings were before Clay County Circuit Judge William A. Wilkes.

by a vote of 11 to 1. III 407, XVII 1518.

The state and defense submitted sentencing memoranda to the court, III 408-413, 416-426, and on April 26, 2002, the court heard additional arguments as to the sentence. VII 1305-1316.

On June 14, 2002, the trial judge sentenced Douglas to death for the murder and life imprisonment for the sexual battery. The court found two aggravating circumstances, the murder was committed during a sexual battery and was heinous, atrocious, or cruel. The trial judge found as statutory mitigating circumstances: (1) Douglas had no significant history of prior criminal activity; (2) Douglas has a close-knit, religious family; (3) Douglas's family fully supports him even after his conviction; (4) Douglas was abused by his father psychologically and physically; (5) Douglas witnessed his father commit acts of domestic violence on his mother; (6) Douglas and his siblings were afraid of their father when they were children; (7) Douglas's father was arrested for child abuse after beating Douglas with a belt; (8) Douglas's father sexually abused his older sister for seven years and eventually was arrested for the crime; (9) the revelation of the sexual abuse had a devastating impact on Douglas and the rest of the family; (10) Douglas has taken an interest in the Bible since his arrest; (11) Douglas was helpful to his stepfather around the house; (12) Douglas was diagnosed with learning

disabilities; (13) Douglas never finished high school; (14) Douglas has made plans for self-improvement since his incarceration, including obtaining his GED; (15) Douglas can be rehabilitated; (16) Douglas can be a productive prison inmate; (17) Douglas exhibited appropriate behavior during trial. III 432-440, **Appendix A**.

STATEMENT OF FACTS

Guilt/Innocence Phase

Mary Ann Hobgood, 18, left home around 7 p.m. on December 25, 1999. IX 380. The next day, Ms. Hobgood's body was found along the railroad tracks off Evergreen Avenue in Jacksonville. IX 392. She was lying face up, unclothed from the waist down and with the clothing on her upper body pushed up and in disarray. X 422, 467. Several feet from her body were a tire lug wrench, a rubber car part, and a maroon jacket. X 425, 442, 444.

Dr. Matthew Areford, the medical examiner, testified Ms. Hobgood had injuries to her entire body, including the head, shoulders, chest, stomach, and front of the legs. X 467. After conducting an autopsy, Dr. Areford concluded she had died of blunt head trauma. X 519. With the exception of the arm and right shoulder injuries, the injuries below the neck were sustained post-mortem and were consistent with being run over by a vehicle. X 458, 519. Dr. Areford said she received at

least ten blows to the face and seven blows to the back of her head, X 517, which “to the best of my opinion ... are all before she died ... that also includes ... the period of time around when she died.” X 504-505. Some of the injuries to the head could have been inflicted by a fist but most or all more likely were inflicted by a blunt object. X 497, 504. Dr. Areford could not sequence the head injuries and testified Ms. Hobgood could have been rendered unconscious by the initial blow. X 534-535. Dr. Areford said the injuries to her hands and arms fell “within the broad classification of wounds that could be defensive wounds” but “[t]here is nothing about them that lets me say for sure that they are defensive wounds.” X 507. A semen sample collected from Ms. Hobgood's vagina was found to match Douglas's blood, using DNA analysis. XII 935. Dr. Areford found no evidence of sexual trauma and could not say whether a rape had occurred. X 520. The victim's blood alcohol was .05. The drug MDA, or Ecstasy, was present in trace amounts, though in Dr. Areford’s opinion, Ms. Hobgood was not under the influence of Ecstasy when she died. X 527-529, 544.

Misty Jones, 21, testified she and Mary Ann Hobgood had been friends since childhood. Misty had been dating Luther Douglas since November 1999. X 552-553. On December 25, 1999, Misty, Mary Ann, and Luther went to several bars together.

Luther drove a red Ford Escort he had borrowed from Jimela Dozier. The car was dirty inside and out. Luther had not met Mary Ann previously. Misty identified the maroon jacket found near Ms. Hobgood's body as the jacket Luther was wearing that night. X 555-558.

Before hitting the bars, the threesome bought a bottle of rum and some soda at a liquor store, which Luther and Mary Ann drank. They then went to several pool halls and bars. Luther and Mary Ann continued to drink throughout the evening. Misty said she did not drink any alcohol that night. At some point, Misty went outside because she wasn’t feeling well. Luther and Mary Ann came out about 15 minutes later. They were laughing and having a good time. Luther dropped Misty off at her house, then left in the Escort with Mary Ann. Before Luther left her house, Misty tried to talk him into letting her go with him to take Mary Ann home because “they were both drinking and I wanted to make sure she got home okay,” but Luther said it would be a waste of gas since Misty and Mary Ann lived on opposite sides of town. X 559-563, 619.

Misty testified further that Luther called her at four that morning. First, he said he had left Mary Ann at a bar. Later, he said he had taken her home. When he came over the next morning, Misty noticed scratches on his neck. She called Mary Ann's house and learned Mary Ann had not come home. X 564-566.

Misty then confronted Luther, and he asked her to go for a ride because he needed to tell her something. Misty noticed the Escort was clean. During the ride, Douglas told her Mary Ann had disrespected him, and he had hit her, then pulled her in the car and beaten her. He said he threw her out of the car in the Springhill area and left her for dead. Misty asked if he beat her because she did not have sex with black boys, and he just smiled. X 568-571.

Misty admitted she lied when first questioned by police on December 27, by saying she and Mary Ann had gone out that night with Timothy Hightower. She also lied in her sworn statement to the State Attorney that day. On January 24, 2000, when confronted with the results of the investigation, she told the truth and was arrested. X 572-576. She had been in jail since her arrest on a charge of accessory after the fact to Ms. Hobgood's murder. She had pled guilty in exchange for truthful testimony regarding her friend's death and faced a sentence of 0 to 7 years. A perjury charge had been dropped as part of the plea, and if she did not testify truthfully, she could receive up to 30 years. She had three prior felony convictions and was facing a charge of violation of probation in another county. X 548-551.

On cross-examination, Misty said she had just gotten out of jail in October 1999 and was on probation when Mary Ann was

killed. She was charged with two counts of burglary of a dwelling and one count of grand theft. X 585-587. She denied she was jealous of the relationship between Luke and Mary Ann. X 590. When shown a letter from jail addressed to "Mr. Luther Douglas" from Misty Jones and postmarked February 18, 2000, Misty denied she wrote the letter and denied she had someone write it for her. XI 612-615. She denied drugging her father's wife's drink when she was fifteen, denied giving her father a sleeping pill so she could sneak out of the house, denied she had the house shot at, denied trying to hit her grandmother, denied trying to poison her grandmother, and denied slashing the tires or hitting Luke's baby's mother, Mimi. She admitted she had a temper and admitted to an explosive temper outburst with her boyfriend, Nathaniel Orem. She admitted getting into fist fights with Orem, as well as all her prior boyfriends. She admitted being the only female in the Folk Nation gang, a branch of the Crips, and admitted "jumping on" a girl as an initiation into the gang, but said she was told she would be put in the hospital if she didn't. XI 634-636, 642. She admitted telling her probation officer she drank four to five fifths of liquor a week and was addicted to cocaine and marijuana but denied using these substances the night Mary Ann was killed. XI 649.

Bradley Johnson testified Luke was living with him and his

son in December 1999. Johnson said Luke came home about 2 a.m. on December 26, 1999, and asked Mr. Bradley's son if he would like to go with him to take care of some business. Johnson told his son it was too late to go out, and Luke left. XI 658-660.

Jimela Dozier testified she and Luke had a son together, born in May 1999. Ms. Dozier owned a red Ford Escort, which she let Luke drive on occasion. Before she went to Ft. Lauderdale for Christmas, she asked Luke to check on the car. She had given her sister and brother-in-law, Timothy Hightower, permission to borrow the car while she was gone, but they called and told her the car was not there when they went to pick it up. When Jimela returned on December 26, the car was in the yard. When she talked to Luke the next morning, he said he had used the car, and a tire had blown, which he fixed. He asked her to look in the trunk, where she found a black leather jacket. He told her to look in the pockets, where she found a watch and some rings. He said the jacket was her Christmas present, which he bought from a drug user. When she visited Luke in jail after his arrest, she asked him whether he had sex with Mary Ann Hobgood, and he said he did not remember having sex with her. XI 665-678.

The black jacket, jewelry, and Ms. Dozier's Ford Escort were collected by the Sheriff's office on December 28, after

Ms. Dozier's mother called the police and told them Luther had given them to her daughter. XI 709-712. Ms. Hobgood's father identified the black jacket and jewelry as Ms. Hobgood's. IX 381. Blood found at several locations inside and underneath the Escort matched Ms. Hobgood's, using DNA analysis. XI 758-775. Blood found on the maroon jacket found at the scene as well as Ms. Hobgood's black leather jacket also matched Ms. Hobgood's blood. XII 938-939. The lug wrench had human blood on it though there was an insufficient amount to match. The rubber car part recovered near Ms. Hobgood's body matched a missing car part from the bottom of the Ford Escort.

Detective Hinson, the lead detective, said after he spoke with Misty Jones on December 27, 2000, he questioned Timothy Hightower at the police station. Hightower provided a DNA sample and consented to a search his car and residence. The car was searched and processed but Hightower was never arrested for the homicide. XIII 1015-1020. On December 28, Hinson recovered the Ford Escort, black jacket, and jewelry from the Dozier residence. XIII 1021-1022. On January 24, he interviewed Misty Jones, and she said she was with Luther Douglas the night Ms. Hobgood was killed. XIII 1029. Also on January 24, Hinson interviewed Douglas about Ms. Hobgood's death. Douglas said he had driven the Ford Escort over the Christmas holidays and the only other person who drove the car

was his sister, for about two hours. He said he got the jacket and jewelry from a baser downtown. When asked how blood got inside the car, he said a friend of his, Eric Ranson, had gotten in a fight at a nightclub, and he had driven him to the hospital. Initially, he said he was out with Misty Jones on December 25, and when shown a photograph of Ms. Hobgood, he said he did not know her. Later, towards the end of the interview, he said Misty had a female friend with her but he did not remember her name. He said he became ill and remembered taking Misty home but did not remember taking the other woman home. He said he was extremely intoxicated. XIII 1029-1043, 1066.

The state introduced into evidence jail records showing Eric Ranson was incarcerated in the Duval County Jail from March 25, 1999, to January 6, 2001. XIII 1080.

Thomas Brown testified he previously was convicted of a felony and had met Luther in the Duval County Jail in August 2000. While housed in the jail together, Brown and Luther had several conversations about the charges Luther was facing. Brown agreed to testify about what Luther had told him in the hopes of getting a lighter sentence. After he agreed to testify, the prosecutor reduced the previous plea offer from 18 months to 13 months. Brown testified that Luther told him in the first conversation he had run over the girl because she

wouldn't move. In the second conversation, he said he had beaten her to death and ran over her to make it look like vehicular homicide, which would result in a lesser sentence. He also said he “took the p----,” which Brown took to mean he raped her. XII 988-995.

Penalty Phase

At the penalty phase, twelve witnesses testified on Douglas's behalf.

Until age 9 or 10, Luke lived with his mother, Sheryl, his father, “Big Luke,” his sisters, Lawanta and Lavonia, and his younger brother, David. "Big Luke" was a rigid authoritarian, who controlled and terrorized his wife and children with physical and emotional abuse and bizarrely cruel disciplinary techniques. When Luke was 9 or 10, it became known that Big Luke had been sexually molesting Lawanta for seven years, from the age of 7 to 14, and Big Luke left the household for good.

Luke's mother, Sheryl McKeever, described her ex-husband as a perfectionist who seldom interacted with his children except to punish them---"He was hard and he was cruel." He never hugged, kissed, or told the children he loved them. He beat them with belts and used an abusive form of punishment, the "air stool"---where the children had to stand as if sitting on a chair. They had to continue doing this after their backs ached and they cried in pain. Sheryl testified she could not

help them or she would get beaten herself. She described herself as "a punching bag" and said her husband would come in from the streets and pull her out of bed and start beating her with his fists. XVI 1396-1398.

The violence and abuse was perpetrated largely behind closed doors. As Sheryl testified, "Luther was taught, as we all were, things going on in the household you don't tell, was kept a secret, you don't let other people know your business." SVI 1395. On one occasion, abuse was reported, and charges were filed against the father for a beating inflicted on Luther, which left belt marks on his back, buttocks, and arms. According to Sheryl, the judge just told Big Luke to beat him on the buttocks next time. XVI 1398.

Sheryl's brother, Roy Smith, testified their were lots of secretive things going on as far as the father being abusive. His sister and her husband got into an altercation one night where Big Luke kicked Sheryl in the stomach. She was pregnant with Luke at the time. She called Roy, crying, to come and get her, and he told her he'd meet her halfway. Before he reached her, Big Luke drove by and pulled her into the car and took off for the hospital. Roy also suspected that things were going on with Lawanta. When he went to the house to find out exactly what was going on, Big Luke pulled a gun on him. XVI 1381.

Other than these incidents, family and friends did not know

what was going on inside the house, though they suspected things "were not right." No one was permitted to come inside the house when Big Luke was home. Sheryl's sister, Janice, testified that Sheryl had to "sneak around" to bring the children to visit so her husband wouldn't know. Big Luke did not come to family gatherings and when she interacted with him, he was cold and unpleasant to be around. XVI 1284.

Sandra Wright, a family friend and Lawanta's counselor after the sexual abuse was revealed, worked with Sheryl at a church day care. Ms. Wright said Sheryl took the children with her everywhere she went and she saw them five days a week until Luther was a pre-teen. As a child, Luther was very quiet and docile, very giving. Ms. Wright said all the children were so mannerable, it was "unnatural," that they were like "robots." If you told them to sit down and not talk for an hour, they would sit and not do anything, not even move. They were never dirty, never wrestling around, never doing the things kids normally do. They were "too perfect." Anything she asked Luther to do, anything any adult asked him to do, he did it. Luke was a follower, very docile, he never talked back. The children seemed afraid of their father. Sheryl was afraid of him, too, and afraid to say what was going on inside the house. Sheryl was as scared and disciplined as the children. She had to bathe the children and get the house in order before he got

home, like she was on a time clock. She did this to protect the kids. Sheryl and the children ate pork and beans, while Big Luke ate steak. XVI 1313-1319.

The Douglas apartment also was "too perfect." No one was allowed inside, no one was allowed farther than the front door when the father was home. He did not allow visitors. From the door, Ms. Wright observed the four children sitting cramped up on an old, raggedly sofa watching television quietly, not saying a word, while Mr. Douglas sat on a brand new sofa. The mother and children seemed to have strict time limits, they had to get everything done before the father came home. The children did not play outside, they were always at home. XVI 1315-1316.

Other relatives testifed Luke was a quiet, good natured child. His aunt, Janice Williams, saw him several times a month when he was a child. Luke was very polite. All the children were real good, especially Luke. Luke was a sweet child, very pleasant, very respectful, close to his mother. XVI 1277.

Lavonia and James Douglas testified their father was physically and emotionally abusive. Lavonia remembered seeing fighting in the home. XVI 1370. James said he always looked up to Luke and still does. Luke "a lot of times got into trouble for me." They were all afraid of their father and

lived "on eggshells," having to watch everything they did and said. Luther got the "air stool" more than anyone, and Luke took a lot of spankings for James. Their father as very controlling, "my way or no way." The children had no rights. XVI 1349-1352.

After the sexual abuse came out, Ms. Wright worked with Sheryl and Lawanta, but Luther received no counseling. XVI 1320. Although the the physical and verbal abuse stopped, the family was broken up. Sheryl testified it was very hard for the children when their father left. Luke looked up to his father and was doing reasonably well before this happened. After his father left, Luke changed. Luke was angry and he didn't understand. XVI 1400. According to Ms. Wright, there was no order after the father left. The children did whatever they wanted. Luke "was a time bomb waiting to go off." XVI 1321-1322. Lavonia testified the effect of discovering their father was abusing Lawanta "was crazy for us." They didn't understand what it was or why their father had to leave for it. XVI 1391. David said they had more liberty to be themselves, "it was like the walls were torn down," but there was a scar because "every young man wants a relationship with his father." XVI 1355. According to Roy Smith, the revelation of the sexual abuse "devastated" the entire family, especially Luke because of the special bond he and Lawanta had and his inability to

understand why this had happened. That was the start of his downfall. There was no contact with the father after that, although the father was picking up young girls on Market Street and telling them his name was John and taking them to motels. Lawanta did not know how to explain what had happened to Luke and he couldn't understand why it could happen. XVI 1384-1386.

Sheryl testified Luke stayed with her for a little while after his father left but then he got in the streets and into drugs. He would run away from home and cut class. He would sell drugs to buy a pair of shoes. Then he went and lived with Lawanta for a time. XVI 1401.

According to Sheryl, Luke had learning disabilities, especially a reading disability, for which he was placed in special programs in school. He also had trouble with math. One of his teachers tried to help him but "he was discouraged, because inside of him, you know, he had a secret he couldn't tell." He dropped out of school in the 7th grade. XVI 1402-1404. Douglas, Luke's brother, also testified Luke had poor reading and writing skills, and that he consequently was frustrated about employment. XVI 1357-1358.

Charlie McLoud, Lawanta's husband, testified he had known Luke since Luke was in the 7th grade. Luke had lived with him and Lawanta off and on for six or seven years. Mr. McLoud said

Luke's children were often at family cookouts, and Luke enjoyed spending time with his his children and loved and cared for them very much. He talked about them a lot and had great things planned for them. He wanted them to avoid some of the things he had gotten into and talked about them going to college. Luke worked with Mr. McLoud at Captain D's, Long John Silver's, Apperson Chemicals, and other places. He was an extremely good worker and did whatever he was asked to do. He also helped out around the house and with yard work. He was passionate about drawing and talented. They were a church-going family, and Douglas went, too, about once a month and on special occasions. XVI 1262-1274.

Laverne Montgomery, who was married to Luke's sister, Lavonia, said he had known Luke for about four years and saw him a couple of times a month. They were a very loving family. Luke was a "kindhearted man," a loving, sweet person, and they often laughed and talked together. Laverne said Luke got jobs easily, he was very outgoing, and loved to joke around and have fun. He was always talking about his children, what he wanted to do with them, even now. Luke had been a good son and a good brother. XVI 1325-1327.

Joyce Douglas, who was married to Luke's brother, James, said she had known Luke since 1993. He was an outgoing, positive person. He liked to laugh and joke and have a good

time. He was kind and easy to get along with. He was a good listener and patient. Luke was very close to his brother and sisters. He loved his father, too, but never had a relationship with him. Joyce had visited Luke since he'd been in jail every couple of weeks. Since he'd been in jail, he had become more focused and gotten closer to God. XVI 1299-1303.

Tammy Wright, a friend (and no relation to Sandra Wright), said she had known Luke since age 17. She lived with Luke and Lawanta for about six months in 1998, and Luke was like a brother to her. He cared deeply about his children, and his children were often at the house. He was a good father: he interacted with them and was committed to them. He wanted to get his high school diploma. He was supportive, always honest, funny, positive, passionate, and had helped her through some hard times. Luke was always there for her. XVI 1291-1298.

Matthew McKever, Luke's stepfather, said he had been married to Luke's mother for seven years. Luke lived with them every now and then during those years. He helped with the bills and household chores and did everything he was asked to do. Mr. McKever would ask Luke to mow the lawn or rake the leaves, "and when I got home, it's done." Luke would get up and cook him and his wife breakfast and bring it to their bed. Luke had a close, loving relationship with his mother. He had never seen Luke with his father but had heard he was very

abusive, that he beat his kids, and once had dropped Luke down the stairs. Mr. McKever tried to be a father figure to Luke but he was already an adult by then. XVI 1334-1340. Lavonia said after their dad left, their mother wouldn't let them have a close relationship with anybody she dated, so their father was the only role model they had. XVI 1375.

SUMMARY OF ARGUMENT

Point 1. The trial court erred in admitting into evidence numerous gory photographs of the slain victim, where the only basis for admitting them was to inflame the jury.

Point 2. The trial court erred in rejecting as mitigating evidence that Douglas never had a relationship with his father; loves his children, is a good father to them, and supports them by buying food, diapers, and other items for them; is a positive, upbeat person; has worked at several jobs; is an outgoing, friendly personality; is respectful of his elders; had learning disabilities; has been a good son and good brother; and was impaired by alcohol at the time of the crime. The evidence of these mitigating circumstances was unrebutted. The trial court also abused its discretion in diminishing the weight given to the mitigating evidence related to Luther's abusive childhood on the theory that these events occurred in the past. The passage of time does not negate the mitigating

circumstance of an abusive or traumatic childhood. No evidence was presented to indicate that time alone can ameliorate the effects of an abusive childhood.

Point 3. The trial court erred in instructing the jury on and in finding as an aggravating circumstance that the homicide was heinous, atrocious, or cruel, as there was no clear evidence the victim suffered prolonged physical or mental pain. The medical examiner testified the victim may have been rendered unconscious by the initial blow to the head, and there was no evidence the victim anticipated her impending death.

Point 4. The death sentence in this case is disproportionate for this felony murder. Even if the Court approves the heinous, atrocious, or cruel aggravating circumstances, death is disproportionate, given the substantial and compelling mitigation. Douglas had no prior criminal history and no history of violence. Numerous witnesses testified he was a kindhearted, loving person. The evidence indicates after he and the victim had been drinking together all evening, what began as a friendly encounter quickly and for no apparent reason turned deadly. Numerous other mitigating circumstances were found, including that Douglas can be rehabilitated and can be a productive prison inmate. Compared to similar cases, the death penalty is not warranted. This

Court should reverse the death sentence and remand for a life sentence.

Point 5. The death sentence was unconstitutionally imposed because the state failed to allege aggravating factors in the indictment, the jury recommendation was not unanimous, and the death sentence was imposed absent jury findings in aggravation, in violation of Ring v. Arizona.

ARGUMENT

Point 1

THE TRIAL COURT ERRED IN ADMITTING NUMEROUS ENLARGED CRIME SCENE AND AUTOPSY PHOTOGRAPHS OF THE SLAIN VICTIM, WHERE THE PHOTOGRAPHS WERE INFLAMMATORY AND HAD LITTLE OR NO RELEVANCE TO ANY MATERIAL ISSUE.

At trial, the state introduced, over objection, a 14-by-17" color photograph depicting the slain victim at the scene (State's Exhibit 3), X 407, and thirteen additional 8-1/2-by-10 autopsy photographs of the victim (State's Exhibits 21-33). X 487. The glossy color autopsy photographs were extremely gruesome and were of minimal relevance, as the nature of the victim's injuries was not an issue in dispute at trial. Accordingly, the probative value of the photographs was outweighed by their prejudicial effect, and the trial court abused its discretion in admitting them.

The admission of photographic evidence is within the discretion of the trial court. Jones v. Moore, 794 So. 2d 579

(Fla. 2001); Brooks v. State, 787 So. 2d 765 (Fla. 2001). Gruesome photographs are admissible, however, only if relevant to a material point and "not so shocking in nature as to defeat the value of their relevance." Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). The trial judge first must determine if the photographs are relevant, and second, determine whether "the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and impassioned consideration of the evidence." Id.

This Court has found no abuse of discretion in admitting allegedly inflammatory photographs when they "assist the crime scene technician in explaining the crime scene when the police arrived." See Pope v. State, 679 So. 2d 710, 713 (Fla. 1996); Looney v. State, 803 So. 2d 656 (Fla. 2001). The Court also had stated that autopsy photographs may be admissible when used “to illustrate the medical examiner’s testimony and the [victim’s] injuries,” Pope, 679 So. 2d at 714, or when “relevant to the medical examiner’s determination as to the manner of the victim’s death.” Mansfield v. State, 758 so. 2d 636, 648 (Fla. 2000). However, "[t]o be relevant, a photograph of the diseased must be probative of an issue that is in dispute." Almeida v. State, 748 So. 2d 922, 929 (Fla. 1999).

Courts have not hesitated to find reversible error in the

admission of gruesome photographs when the photographs have little or no relevance or the photographs are so shocking in nature as to outweigh their relevance. See, e.g., Pottgen v. State, 589 So. 2d 390 (Fla. 1991); Ruiz v. State, 743 So. 2d 1 (Fla. 1999); Czubak; Rosa v. State, 412 So. 2d 891 (Fla. 3d DCA 1982).

Here, the photographs had little if any relevance. Although the medical examiner referred to State's Exhibits 21-28 when testifying about the victim's injuries and the cause of her death, the nature of her injuries and the cause of death were never in dispute. The gruesome photographs thus served only to inflame the jury.

As for State's Exhibits 29-33, the medical examiner used these photographs during his testimony about the damage done to the victim's body after her death. X 512. These photographs clearly were not relevant to any fact in issue or to the medical examiner's testimony about the cause of death. See Looney (error to admit autopsy photographs depicting damage done to victims' bodies by fire that occurred after the victims' deaths).

The photographs were indeed shocking, particularly given the extensive injuries sustained when the victim was run over by a vehicle after her death. In light of the graphic and inflammatory nature of the photographs and their minimal

relevance, their probative value was substantially outweighed by the danger of prejudice. The trial court should not have admitted them, and this error requires reversal for a new trial.

Point 2

THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING MITIGATING EVIDENCE RELATED TO DOUGLAS'S BACKGROUND AND CHARACTER AND IN MINIMIZING THE WEIGHT GIVEN TO MITIGATING CIRCUMSTANCES RELATED TO DOUGLAS'S ABUSIVE CHILDHOOD ON THE THEORY THAT THESE EVENTS OCCURRED IN THE PAST.

To insure the proper consideration of mitigating circumstances, the trial court must expressly evaluate each mitigating circumstance to determine whether it is supported by the evidence. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). A mitigator is supported by the evidence "if it is mitigating in nature and reasonably established by the greater weight of the evidence." Ferrell v. State, 653 So. 2d 367 (Fla. 1995). The trial court must find a mitigating circumstance has been proved if it is supported by a reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). The trial court must then decide whether the established mitigating factors are of sufficient weight to counter-balance the aggravating factors. Campbell, 571 So. 2d at 419. The result of the weighing process must be detailed in the written order and supported by sufficient competent evidence in the record. Ferrell.

In the present case, the defense presented twelve witnesses who gave testimony regarding Douglas's background and character. Based on their testimony, the defense proposed

thirty-one mitigating circumstances. The trial court found sixteen of the proposed mitigating circumstances had been proved and considered these in sentencing Douglas. The trial court rejected the remaining mitigating factors, despite ample evidence to support each of them. In addition, the trial court improperly diminished the weight given the mitigating evidence of Douglas's abusive childhood on the theory that these events occurred in the past. These errors require reversal for resentencing.

A trial court's discretion is never absolute; it is subject to "the test of reasonableness ... [which] requires a determination of whether there is logic and justification for the result." Cannakiris v. Cannakiris, 382 So. 2d 1197, 1203 (Fla. 1990); Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990). In the present case, the trial court rejected as unproved the mitigating circumstances that Douglas loves his children; is a good father to his children; supports his children by buying food, diapers, and other items for them; is a positive, upbeat person; has an outgoing, friendly personality; and has always has been respectful of his elders. The court's rejection of these mitigating circumstances was not supported by substantial, competent evidence, and the reasoning expressed in his sentencing order was arbitrary and illogical. See also Ellard v. Godwin, 77 So. 2d 617, 619 (Fla. 1955); Matire v.

State, 232 So. 2d 209, 210-11 (Fla. 4th DCA 1970); State v. Reed, 421 So. 2d 754 (Fla. 4th DCA 1982).

In concluding the mitigating circumstance that Douglas loves his children was not proven, the trial court wrote:

> The defendant has never stated in the presence of the Court that he loves his four (4) children nor does his conduct demonstrate his love for his children. On Christmas Day, rather than being with one or more of his children, he was engaged in irresponsible conduct that ended with the rape and murder of Ms. Hobgood.

Numerous witnesses testified Douglas loved his children and demonstrated that love by spending time with them, enjoying them, planning for their futures, inviting them to extended family gatherings, and providing for them financially. Douglas may not be the ideal father but the evidence presented showed he loves and cares for his children. Furthermore, that Douglas was convicted of the crime does mean he does not love his family. If this were so, then positive character traits would never be considered mitigating.

In finding unproved that Douglas is a good father to his children, the trial court wrote, "there is no evidence that he did anything worthwhile or beneficial for any of his children on a regular basis." Family members and friends testified Douglas spent time with his children and brought them to extended family gatherings on a regular basis. Charlie McCloud, Douglas's brother-in law, who lived with Douglas for

six or seven years, said Douglas had the children at the house often. Tammy Wright, a friend, who lived with Douglas for six months in 1998, testified she was there most of the time when the children were there, and Douglas interacted with them and communicated with them and cared for them deeply. The testimony belies the trial court's finding as to this mitigator.

In finding unproved that Douglas supported his children by buying food, diapers, and other items, the court wrote,

> [T]here is no evidence that the Defendant maintained employment on a regular basis. None of the Defendant's children's mothers or guardians testified as to receiving any financial support from the Defendant.

III 437.

Several witnesses testified Douglas purchased diapers and other items for the children and gave their mother money for the children. XVI 1365, 1407, 1422. The trial court erred in not considering this mitigating evidence in imposing the sentence.

In rejecting the mitigating factors that Douglas is a positive, upbeat person and has a friendly, outgoing personality, the court acknowledged that witnesses testified Douglas is friendly and easy to get along with but concluded "these character traits are inconsistent with the Defendant's behavior that was displayed on December 25, 1999, and December

26, 1999." III 437-438. The trial court recognized this homicide was inconsistent with Douglas's character. The fact of the homicide does not negate Douglas's positive character traits, however. It just means the homicide was an aberration. As explained above, if the crime negated any positive character traits, then character would never be mitigating, and that is not the law. See, e.g., Harmon v. State, 527 So. 2d 182 (Fla. 1988); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Thompson v. State, 456 So. 2d 444 (Fla. 1984).

As to the mitigating factor that Douglas is respectful of his elders, the court found "no evidence to support this mitigating circumstance although individuals testified Douglas was respectful to them." III 438. A mitigating factor must be found if supported by a quantum of reasonable, uncontroverted evidence. Charlie McCloud, Janice Williams, John Williams, Sandra Wright, Matthew McKever, James Douglas, and Sheryl McKever testified Douglas was respectful to his elders, did whatever he was asked to do, and got along with everyone. This mitigator was unrebutted. The trial court erred in not considering this mitigating evidence in imposing the sentence.

In rejected as mitigating that Douglas was a good son and a good brother, the trial court wrote,

> The Defendant's mother testified that the Defendant at one time chose to sell drugs rather than work in order to buy shoes and that he got into the streets

> and drugs and partying with girls. In addition, he did not maintain steady employment. This behavior does not support the conclusion that the Defendant was concerned with his mother's [and his siblings'] welfare.

III 439.

This reasoning is illogical and arbitrary. Numerous witnesses testified Luke was protective of his mother and a good son to her, including his mother. His siblings testified he was a loving, caring brother. His brother, David, said he had always looked up to Luke, and still did, and that Luke often took David's punishment for him. That Douglas got into drugs as a young teenager, after the devastating revelation of his father's sexual abuse and his father's arrest, does not negate that he was a loving son and brother. His use of drugs does not mean he did not care about his family's welfare. Does Noelle Bush's drug problem mean she doesn't love or care about her family? This reasoning is arbitrary and absurd. The trial court erred in not considering this mitigating evidence.

The trial court also abused its discretion in not considering as mitigating the removal of Douglas's father from the home and the absence of a relationship with his father after he left the home. The removal of his father, though it freed the family from his tyranny, was nonetheless painful to all the children. David Douglas testified he remembered the day they took his father away. He, Luther, and his sisters sat

on the sofa crying. They didn't know what was happening to their family or what would happen in the future. They never saw their father after this. The loss of a parent, even an abusive one, is devastating to a child. The loss may be even more difficult when the parent is abusive because the feelings are conflicting. The trial court erred in not considering this mitigating evidence.

The trial court also abused its discretion in not considering as mitigating that Douglas worked a variety of jobs. He was a good worker, according to his brother-in-law. This is mitigating because it demonstrates that Douglas can be productive in a prison setting and that his is capable of contributing to society.

Finally, in rejecting as mitigating that Douglas was impaired by alcohol at the time of the crime, the trial court wrote,

> The evidence established that the Defendant had been drinking alcohol at the time he killed Ms. Hobgood. The extent of his impairment was not established. He was able to drive an automobile with a manual shift transmission throughout the evening of the murder and he was able to converse with the teenage resident where he was living and Misty Jones during the early morning hours. No evidence of chronic or long term drug and alcohol abuse was presented in mitigation. The Court notes that the legislature has eliminated voluntary intoxication as a defense to any crime. The Court does not find voluntary impairment by alcohol to be a mitigating circumstance.

440.

The trial judge applied the wrong standard in rejecting alcohol impairment as mitigating. Mitigating evidence never constitutes a defense or excuse to a homicide. Mitigation is anything that establishes a basis for a sentence less than death. It is well-settled that alcohol impairment is mitigating. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Ross v. State, 474 So. 2d 1170 (Fla. 1985). Evidence of intoxication, even when it does not rise to the level of a statutory mitigator, is a valid mitigating circumstance. Robinson v. State, 487 So. 2d 1040, 1043 (Fla. 1986). As the judge recognized in his sentencing order, Luther Douglas was drinking heavily the night of the murder. Misty Jones testified she begged Luther to let her accompany him to drive Ms. Hobgood home because they both had been drinking all night. Furthermore, that Douglas was able to operate his vehicle or speak to people does not mean he was not impaired. The trial court erred in refusing to consider the evidence of alcohol impairment as mitigating.

The trial court also abused its discretion in diminishing the weight of the mitigating circumstances related to Douglas's abusive childhood, including that he was abused by his father psychologically and physically, that he witnessed domestic violence on his mother, that he and his siblings were afraid of

their father, that his father was arrested for child abuse after beating Douglas, that his father sexually abused his sister for seven years, and that the revelation of the sexual abuse was devastating to the entire family. The trial judge gave this mitigation little weight due to "its remoteness in time." III 435-436.

This Court repeatedly has held the passage of time does not negate the mitigating circumstance of an abusive or traumatic childhood. As this Court wrote in Nibert, 574 So. 2d at 1062:

> We find [the trial court's] analysis inapposite. The fact that a defendant has suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Accord Walker v. State, 707 So. 2d 300, 318 (Fla. 1998).

Furthermore, in the present case, the evidence showed Douglas never received any counseling or other treatment to ameliorate the effects of his abusive and traumatic childhood. Sandra Wright, who counseled Luke's's sister, testified the entire family was devastated by the revelation that Douglas's father had been abusing his sister for seven years. His uncle testified Luke was especially affected because of the special bond he and

Lawanta had and was the start of Luke's downfall. Accordingly, the trial court abused its discretion in considering remoteness of time as a factor in evaluating this mitigating circumstance.

Point 3

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

In finding the homicide especially heinous, atrocious, or cruel, the trial judge wrote:

> The evidence heard by the Court at trial, which can only be very briefly summarized and described in this Order, established beyond a reasonable doubt that the murder of Mary Ann Hobgood by Luther Douglas was a conscienceless or pitiless crime and unnecessarily torturous. Ms. Hobgood was alone with a twenty-five (25) year old man who had been drinking heavily and who had turned violent. She had no means of escape and she had no ability to protect herself from the violence of Luther Douglas. Death did not come quickly to Ms. Hobgood. The only inference to be drawn from the evidence is that Luther Douglas struck Ms. Hobgood between 24 to 27 times with force sufficient to shatter her skull and jaw and clavicles because she had not loss consciousness or died until he had struck her that many times.
>
> Luther Douglas very clearly intended to kill Ms. Hobgood by beating her to death, although his motive for doing so is not known. Ms. Hobgood knew Luther douglas was going to kill her after he had raped her and she had sufficient time to contemplate her impending death. One can only imagine the fear, horrow, and unbearable pain experienced by Mary Ann Hobgood during the final moments of her young life as Luther Douglas, an able-bodied young adult male, beat the life out of her defenseless body.

III 427.

Contrary to the trial judge's order, the evidence did not demonstrate Ms. Hobgood was conscious while she was beaten. Not only was she intoxicated, the evidence left open the reasonable possibility that she lost consciousness after the initial blow. Furthermore, the jury acquitted Douglas of premeditated murder, and the evidence itself points to a sudden, frenzied attack by someone too intoxicated to contemplate the consequences of his actions.

Under Florida law, aggravating circumstances must be proved beyond a reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). Moreover, the state must prove each element of the aggravating circumstance beyond a reasonable doubt. Banda v. State, 536 So. 2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). The state failed to meet its burden in this case as the evidence strongly suggests this was a quick killing that did not cause the victim extreme pain or fear.

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court defined those crimes that are heinous, atrocious, or cruel:

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

> felonies–the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9.

The Court refined this definition in Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), writing,

> The factor of heinous, atrocious, or cruel is proper only in torturous murders–those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

In Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), the court, citing Socher v. Florida, 504 U.S. 527 (1992), reaffirmed that to qualify for HAC, "the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." (emphasis in original).

Thus, there must be evidence the defendant deliberately intended to inflict a high degree of suffering or pain. See e.g., Bonifay v. State, 626 So. 2d 1310 (Fla. 1993)("fact that the victim begged for his life or that there were multiple gunshots is an inadequate factor absent evidence that [the defendant] intended to cause the victim unnecessary and prolonged suffering"); Porter v. State, 564 So. 2d 1060 (Fla. 1990)(murders were crimes of passion rather than designed to be extremely painful), cert. denied, 498 U.S. 1110 (1991); Santos v. State, 591 So. 2d 160 (Fla. 1991)(no suggestion Santos intended to inflict high degree of suffering); Shere v. State,

579 So. 2d 86 (Fla. 1991)(no evidence killers desired to inflict high degree of pain or enjoyed suffering they caused).

Although beatings usually inflict a high degree of pain, the HAC factor applies in such cases only where there is evidence the victim actually suffered prolonged physical or mental pain. The HAC factor was rejected in Elam v. State, 636 So. 2d 1312 (Fla. 1994), for example, where the victim was repeatedly bashed in the head with a brick because the victim was rendered unconscious in a very short period of time:

> Although the victim was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute), the victim was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

Here, there was no evidence the victim was aware of the impending attack for more than a very short period of time. The medical examiner testified he could not sequence the blows and one blow could have rendered the victim unconscious immediately. The evidence did not establish when the sexual assault took place, before or after the beating, or whether the victim was conscious during the sexual assault.

The physical evidence supports a reasonable hypothesis that Ms. Hobgood was rendered unconscious quickly. The inferences drawn by the trial court--that death did not come quickly, that Ms. Hobgood was conscious while beaten, and that

she “knew” Douglas was going to kill her after he had raped her-–are not the only reasonable inferences supported by the evidence. A finding of heinous, atrocious, or cruel cannot be based on the mere possibility that the victim may have experienced extreme pain or mental anguish. See Brown v. State, 644 So. 2d 52 (Fla. 1994)(disapproving HAC where examination of victim’s badly decomposed body revealed three stab wounds, none of which would have been immediately fatal); Bundy v. State, 471 So. 2d 9, 21-22 (Fla. 1985)(rejecting heinous aggravator where child’s unclothed body found in hog pen 45 miles from where she was abducted, her torn, bloodied and semen-stained clothes nearby, because circumstances indicated only that she may have experienced prolonged suffering), cert. denied, 479 U.S. 894 (1986). The evidence must be inconsistent with any reasonable possibility that might negate the aggravating factor. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992).

The state failed to prove beyond a reasonable doubt this was a torturous murder, and it was error for the trial judge to instruct the jury on this aggravating circumstance or to consider this aggravating circumstance as a reason for imposing the death sentence. Because only one aggravating circumstance–that the homicide was committed during a sexual battery–properly was found, these errors cannot be considered

harmless. This Court must reverse Douglas's death sentence and remand for a new penalty phase proceeding.

Point 4

THE DEATH SENTENCE IS DISPROPORTIONATE TO THE OFFENSE COMMITTED IN THIS CASE.

This felony murder resulted from an inexplicable outburst of violence after a night of heavy drinking. When compared to similar cases involving the death penalty, the ultimate penalty is not warranted.

As this Court repeatedly has said, death is a unique punish-ment, which must be limited to the most aggravated and least mitigated of first-degree murders. See Larkins v. State, 739 So. 2d 90 (Fla. 1999). In deciding whether the death penalty is the appropriate penalty, this Court must consider the totality of the circumstances in comparison to other cases. The death penalty is not warranted unless the crime falls within the category of both the most aggravated and least mitigated of murders. Almeida v. State, 748 So. 2d 922 (Fla. 1999), cert. denied, 528 U.S. 1181 (2000).

Here, since the heinous, atrocious, or cruel aggravating factor was improperly found, the present case involves a single aggravating circumstance, that the murder was committed during a sexual battery. The Court has never approved imposition of the

death penalty based solely on the felony murder aggravating factor where, as here, substantial mitigation exists. See, e.g., Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Smalley v. State, 546 So. 2d 720 (Fla. 1989).

"Substantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved." Nibert, 574 So. 2d at 1063; see Smalley; Blakely v. State, 561 So. 2d 560 (Fla. 1990). This is especially true where the heinous nature of the offense resulted from the defendant's mental illness, Miller v. State, 373 So. 2d 882 (Fla. 1979); Huckaby v. State, 343 So. 2d 29 (Fla.), cert. denied, 434 U.S. 920 (1977), drug or alcohol intoxication, Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Ross v. State, 474 So. 2d 1170 (Fla. 1985), or uncontrolled emotional state of mind, Buford v. State, 403 So. 2d 943 (Fla. 1981); Halliwell v. State, 323 So. 2d 557 (Fla. 1975).

Thus, even if this Court approves the heinous, atrocious, or cruel aggravating circumstance, the gravity of this aggravator should be evaluated in light of Douglas's intoxication and emotional state at the time of the murder. The evidence showed, and the trial court found that Douglas had been "drinking heavily" when what began as a friendly encounter suddenly turned deadly. The jury acquitted Douglas of

premeditated murder, and the number and force of the blows indicate this was a frenzied attack, born of sudden emotional rage. In short, something snapped that night.

The mitigation in this case was substantial and compelling. Luther was 25 years old and had no prior criminal history or history of violence. He grew up, however, in a brutal and violent home, suffering mental and physical abuse from his father and witnessing the abuse of his mother, sisters, and brother. When Luke was nine, his father was arrested for sexually abusing Luther's sister for seven years and abruptly removed from the home. Luke was very close to his sister and was devastated by the public revelation of this family secret. According to his mother's testimony, the family kept the secret because "we wasn't supposed to tell." After his father left, "Luke changed." He received no counseling. He thought he "had to be the man of the house" and he "saw the family falling apart and he couldn't release himself, he couldn't talk about it, because no one knew to ask him how did he feel about it." Luke had learning disabilities and though one of his teachers tried to help him, "Luke was discouraged, because inside of him, he had a secret that he couldn't tell." He started running away from home, got involved in drugs, and eventually dropped out of school in the seventh grade.

Despite this background, Luke has many positive attributes,

which are relevant to the question of whether the death penalty is appropriate for him. He was described by numerous witnesses as a kindhearted, caring person with a sweet disposition. He has a family who loves him and view him as a positive influence in their lives. He has been a good brother to his siblings and a good son to his mother. Numerous witnesses testified he loved and cared deeply for his own children, talked about them constantly, and spent quality time with them, bringing them to numerous family gatherings, such as cookouts. He treated his own child's brother, who was not his biological child, like a son. XVI 1422. Luther Douglas has redeeming qualities. Furthermore, the trial court found he can be rehabilitated and can be a productive prison inmate.

This Court has reversed the death sentence in other cases involving a similar balance of aggravation and mitigation. In Larkins v. State, there were two aggravators and no statutory mitigation but some nonstatutory mitigation. The aggravators were prior violent felony, based upon a prior manslaughter and assault with intent to kill and robbery/pecuniary gain. Similarly, in Johnson v. State, 720 So. 2d 232 (Fla. 1998), two aggravators, prior violent felony and burglary/pecuniary gain were balanced against the defendant's age of twenty-two and nonstatutory mitigation that included a troubled childhood, previous employment, and that Johnson was respectful to his

parents and neighbors.

In several cases, this Court has reversed the death sentence despite its approval of the heinous, atrocious, or cruel aggravating circumstance, where the murder occurred after a drunken episode between the victim and the defendant. See Sager v. State, 699 So. 2d 619 (Fla. 1997); Voorhees v. State, 699 So. 2d 602 (Fla. 1997); Kramer v. State, 619 So. 2d 274 (Fla. 1993); Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

The present case is not one of the most aggravated and least mitigated of capital murders. Equally culpable defendants have received sentences of life imprisonment. The death penalty is not the appropriate punishment for Luther Douglas, and this Court should vacate his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

Point 5

THE DEATH SENTENCE WAS UNCONSTITUTIONALLY IMPOSED IN VIOLATION OF RING V. ARIZONA, 122 S. Ct. 2428 (JUNE 24, 2002).

The Florida capital sentencing procedure is unconstitutional under the recent holding of Ring v. Arizona, 122 S. Ct. 2428 (June 24, 2002), and is in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 2, 9, 15(a), 16(a), 17, and 22, of the Florida Constitution.

a. The Florida Statute is Unconstitutional Under Ring Because It Requires the Trial Judge to Make the Findings Necessary to Impose a Death Sentence.

In Ring, the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment, as construed in Apprendi v. New Jersey, 530 U.S. 466 (2000), because it allocated to the judge rather than the jury the responsibility of making the findings of fact necessary to impose a sentence of death. In so holding, the Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 122 S. Ct. at 2443.

Ring thus eliminated the premise of the Florida Supreme Court's decision in Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001), which reasoned "because Apprendi did not overrule Walton [v. Arizona, 497 U.S. 639 (1990)], the basic scheme in Florida is not overruled either." In Ring, the Supreme Court did overrule Walton, which relied in turn on opinions upholding the constitutionality of Florida's death penalty scheme, i.e., Hildwin v. Florida, 490 U.S. 638 (1989)(per curiam); Spaziano v. Florida, 468 U.S. 447 (1984); and Proffitt v. Florida, 428 U.S. 242 (1976).

This Court has nevertheless concluded it must uphold the

constitutionality of Florida's statute unless and until the United States Supreme Court overrules Hildwin and expressly applies Ring to Florida. See Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002). While concurring in the decision to defer to the United States Supreme Court, four justices wrote separately to express their opinion that Florida's statute is problematic under Ring. Bottoson, 27 Fla. L. Weekly S891, S894-96 (Fla. October 24, 2001)(Anstead, C.J., concurring); id. at S896-98 (Shaw, J., concurring); id. at S898-901 (Pariente, J., concurring); id. at S901-04 (Lewis, J., concurring).

Three justices clung to Mills' rationale that Apprendi is inapplicable to Florida's statute because aggravating circumstances do not increase the maximum punishment authorized for first degree murder under Florida law, which is death. Bottoson, 27 Fla. L. Weekly S891, n.6 (Wells, J., concurring); id. at S893 & nn. 11 & 13 (Quince, J., concurring); id. at S902 (Lewis, J., concurring).

This reasoning, however, was expressly rejected in Ring on the ground that it would reduce Apprendi to a "meaningless and formalistic' rule of statutory drafting." Ring, 122 S. Ct. at 2441. The Court explained in Ring that "[t]he Arizona first-degree murder statute 'authorizes a maximum penalty of death

only in a formal sense.'" Ring, 122 S. Ct. at 2440, quoting Apprendi, 530 U.S. at 538 (O'Connor, J., dissenting)). In reality, "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Ring, at 2440, quoting Apprendi, 530 U.S. at 538 (O'Connor, J., dissenting)). Thus, under Arizona law, "Defendant's death sentence required the judge's factual findings." Ring, 122 S. Ct. at 2440.

Florida's capital sentencing statute suffers from the identical flaw that led the Court in Ring to declare the Arizona statute unconstitutional. Florida law, like Arizona law, makes imposition of the death penalty contingent on the judge's factual findings regarding the existence of aggravating circumstances. Section 775.082(1), Florida Statutes, which prescribes the punishment for a "capital felony," states specifically that a defendant may be sentenced to death only if "the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise, such person shall be punished by life imprisonment." § 775.082(1), Fla. Stat. (1995)(emphasis added). Section

921.141(3), Florida Statutes, provides in turn that "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." To enter a sentence of death, the judge must make "specific written findings of fact based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." Id. (emphasis added). If the judge fails to "make the findings requiring the death sentence" within a specified period of time "the court shall impose a sentence of life." Id.

Thus, in Florida, as in Arizona, although the maximum sentence authorized for first-degree murder is death, a defendant convicted of first-degree murder ***cannot*** be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury. The Florida statute therefore is unconstitutional under the Sixth and Fourteenth Amendments.

b. The Nonunanimous Advisory Sentencing Recommendation of a Florida Capital Jury Does Not Satisfy the Sixth and Fourteenth Amendments.

It is true that Florida, unlike Arizona, is a so-called "hybrid" state, in which a jury renders a nonunanimous, advisory

recommendation as to the appropriate sentence. See Ring, 122 S. Ct. at 2442 n.6. As the Supreme Court explained in Walton, however, this distinction is legally irrelevant:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton v. Arizona, 497 U.S. 639, 648 (1990)(emphasis added); see also Espinosa v. Florida, 505 U.S. 1079, 1080 (1992)(observing that under § 921.141(2), Fla. Stat., the penalty phase jury's determination "does not include specific findings of aggravating and mitigating circumstances, but states only the jury's sentencing recommendation").

Moreover, for several reasons, a Florida jury's advisory sentencing recommendation cannot be equated with a verdict for Sixth Amendment purposes. First, an advisory jury in Florida does not make findings of fact. See, e.g., Hunter v. State, 660 So. 2d 244, 252 & n.13 (Fla. 1995)(citing Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988), aff'd, 490 U.S. 638 (1989)); see also Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)("unlike ... states where the jury is the sentencer," a Florida "jury's advisory recommendation is not supported by findings of fact.... [B]oth [the Florida Supreme Court] and the sentencing judge can

only speculate as to what factors the jury found in making its recommendation ....")(Shaw, J., concurring).

Second, the jury's advisory recommendation need not be unanimous. The Sixth and Fourteenth Amendment right to jury trial recognized in Apprendi and Ring stands upon an

> historical foundation ... [that] extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,'and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . (emphasis added).

Apprendi, 530 U.S. at 477 (emphasis added).[2] This history is

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[2] Neither Johnson v. Louisiana, 406 U.S. 356 (1972), nor Apodaca v. Oregon, 406 U.S. 404 (1972), holds that a nonunanimous verdict is acceptable in a capital case. The Louisiana statute at issue in Johnson required jury unanimity in capital cases; it authorized nonunanimity only in *noncapital* cases punishable by imprisonment at hard labor. The latter provision was all that was at issue in Johnson and was all that the Court addressed. Similarly, the Oregon statute at issue in Apodaca authorized conviction by a nonunanimous jury for all crimes *except* first-degree murder – the sole capital crime in Oregon. Again, the single issue presented and decided in Apodaca was whether the defendants' *noncapital* convictions by nonunanimous juries were constitutional. And of course since Reid v. Covert, 354 U.S. 1 (1957), it has been clear that the Sixth Amendment's guarantee of the right to jury trial has special force and special significance in capital cases. As Justice Harlan put it in Reid – in respect to "a question analogous . . . to

reflected in the fact that every jury sentencing jurisdiction in the United States requires the jury's verdict at the penalty phase to be unanimous.[3]

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issues of due process . . . [specifically,] the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context," id. at 75 – "capital cases . . . stand on quite a different footing than other offenses. . . . I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." Id. at 77. The reason for the distinction is equally clear: "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Id*. at 45-46 (concurring opinion of Justice Frankfurter). And *see*, *e.g.*, Beck v. Alabama, 447 U.S. 625, 637-638 (1980), and cases cited therein.

[3] See Ark.Code Ann. § 5-4-602 (1993); Cal.Penal Code Ann. § 190.4(b) (West 1999); Conn. Gen.Stat. § 53a-46a (2001) and State v. Daniels, 542 A.2d 306, 388 (1988) ("A nonunanimous jury therefore cannot render any 'finding' of fact"), abrogated on other grounds, Cobham v. Commissioner of Correction, 779 A.2d 80 (Conn. 2001); Ga.Code Ann. § 17-10-31.1(c) (Supp.1996); Ill. Comp. Stat. Ann., ch. 720, § 5/9-1(g) (West 1993); Kan. Stat. Ann. § 21- 4624(e) (1995); Ky.Rev.Stat. Ann. § 532.025(1)(b) (1993), and Skaggs v. Com., 694 S.W.2d 672, 681 (Ky. 1985) ("when the jury deadlocks during the penalty phase of a capital case . . .[t]he failure of a jury to reach a verdict results in a mistrial . . . "); La.Code Crim. Proc. Ann., Art. § 905.6 (West 1997); Md. Ann.Code, Art. 27, § 413(i) (1996); Miss.Code Ann. § 99-19-101(3) (1973-2000); Mo.Rev.Stat. § 565.030(.4) (1999 and Supp.2002); Nev.Rev.Stat. Ann. § 175.556 (Michie 2001); N.H.Rev.Stat. Ann. § 630:5(IV) (1996); N.J. Stat. Ann. § 2C:11-3(c)(3)(c) (Supp.2001); N.M. Stat. Ann. § 31-20A-3 (2000); N.Y.Crim. Proc. Law § 400.27(11)(a) (McKinney Supp.2001-2002); N.C. Gen.Stat. § 15A-2000(b)(3) (1999); Ohio Rev.Code Ann. § 2929.03(D)(2) (West 1997); Okla. Stat., Tit. 21, § 701.11 (Supp.2001); Ore.Rev.Stat. Ann. § 163.150(1)(c)(B) (1997); 42 Pa. Cons.Stat. § 9711(c)(1)(iv)

When the jury's sentencing recommendation is not unanimous, a factual finding of death eligibility cannot be inferred from a recommendation of death. Florida's statute does not define eligibility for the death penalty by the existence of one aggravator, but rather by the existence of "sufficient" aggravating circumstances to justify imposition of a death sentence. §921.141(2) & (3), Fla. Stat. (Supp. 1996). One aggravating circumstance is necessary under Florida law,[4] but not always "sufficient" to render the defendant eligible for the

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(Supp.2001); S.C.Code Ann. § 16-3-20(C) (1985); S.D. Codified Laws §§ 23A-26-1, -27A-2 (1998); Tenn.Code Ann. § 39-13-204(g)(1) (Supp.2000); Tex.Code Crim. Proc. Ann., Art. 37.071(d)(2), (f)(2) (Vernon Supp.2001); Utah Code Ann. § 76-3-207(5)(a) (Supp.2001); Va.Code Ann. § 19.2-264.4(D) & (E) (2000); Wash. Rev.Code § 10.95.060(4) (1990); Wyo. Stat. Ann. § 6-2-102(b) & (d)(ii) (2001); 18 U.S.C.A. § 3593(e) (2000). Indiana amended its capital sentencing statute, effective June 30, 2002, to make the jury's verdict binding on the trial court; the verdict must be unanimous. Ind.Code Ann. § 35-50-2-9(e) & (f) (Supp.2002).

Prior to Ring, only Florida, Delaware, and Alabama – all of which are hybrid states – permitted nonunanimous jury recommendations of death. Ala. Code §13A-5-46(f) (2002) (vote of ten jurors required to recommend death); Del. Code Ann, tit. 11, § 4209(c)(3)b.1 & (d)(1) (1995) (bare majority), *amended* by 2002 Delaware Laws Ch. 423 (S.B. 449) *and* Ch. 424 (S.B. 450), to require unanimous finding of at least one aggravating circumstance; § 921.141(3), Fla. Stat. (2001) (bare majority).

[4] See Banda v. State, 536 So. 2d 221, 225 (Fla. 1998)("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist"); accord *Buckner v. State*, 714 So. 2d 384, 390 (Fla. 1998); Elam v. State, 636 So. 2d 1312, 1314-15 (Fla. 1994); Thompson v. State, 565 So. 2d 1311 (Fla. 1990).

death penalty.[5] Consequently, even if the jury unanimously finds facts at the first phase of the case that would establish the existence of one aggravating circumstance, such a finding does not, as a matter of law, establish death eligibility under the Florida statute. Because the jury is not required to make any separate finding on the question of eligibility, it is not possible to tell in the case of a nonunanimous recommendation whether dissenting jurors disagreed as to eligibility, as to the ultimate weighing of aggravating and mitigating circumstances, or both.

Third, by its terms, the jury's penalty phase "verdict" *is*, in fact, merely advisory. The jury is told during voir dire, and again at the beginning and end of the penalty phase that "the final decision as to what punishment shall be imposed rests solely with the judge of this Court," and that the jury renders only "an advisory sentence." Fla. Std. Jury Instr. (Crim.) - Penalty Proceedings–Capital Cases. Thus, the advisory jury in Florida does not bear "the same degree of responsibility as that

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[5] See Barclay v. Florida, 463 U.S. 939, 954 n.12 (1983) (plurality opinion of Rehnquist, J.) (Florida requirement that "'sufficient aggravating circumstances exist,' § 921.141(3)(a), [Fla. Stat.] indicates that any single statutory aggravating circumstance may not be adequate to meet this standard [of death eligibility] if, in the circumstances of a particular case, it is not sufficiently weighty to justify the death penalty.")

borne by a 'true sentencing jury,'" Pope v. Wainwright, 496 So. 2d 798, 805 (Fla. 1986); accord Combs, 525 So. 2d at 855-858; Burns v. State, 699 So. 2d 646, 654 (Fla. 1997), and cases cited therein.

The jury factfinding requirement of Apprendi, Ring, and the Sixth and Fourteenth Amendments is based on recognition of the importance of interposing independent jurors between a criminal defendant and punishment at the hands of a "compliant, biased, or eccentric judge," Duncan v. Louisiana, 391 U.S. 145, 156 (1968), and cannot be satisfied by a jury which is told that "the final decision as to what punishment shall be imposed rests solely with the judge." Fla. Std. Jury Instr. (Crim.), supra.

c. Because Aggravating Circumstances are Elements of the Offense of Capital Murder Under Ring, Florida Law Also Requires That They Be Charged in the Indictment and Found Unanimously By the Jury Beyond a Reasonable Doubt.

Ring is premised in part on the principle that "[c]apital defendants, no less than non-capital defendants," are entitled to the due process and jury trial rights that apply to "the determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring, 122 S. Ct. at 2432; accord id. at 2443 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's

sentence by two years, but not the factfinding necessary to put him to death."). This reasoning applies with equal force to the state law protections, both constitutional and common law, that apply to the determination of essential elements of an offense. *See* Bottoson, 27 Fla. L. Weekly at S896 (Anstead, C.J., concurring) (noting that Florida state law requires unanimous verdicts); id. at SS896 (Shaw, J., concurring)(finding that if Ring's rationale is applied to Florida's capital sentencing statute, "the statute violates settled principles of *state* law.").

As in Arizona, Florida's "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, 122 S. Ct. at 2443 (quoting Apprendi, 530 U.S. at 494 n.19). Indeed, Florida law has long recognized that aggravating circumstances "actually define those crimes ... to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); see also Hootman v. State, 709 So. 2d 1357, 1360 (Fla. 1998)(addition of new aggravating circumstance "alter[s] the definition of the criminal conduct that may subject [the defendant] to the death penalty and increas[es] the punishment of a crime...."), abrogated on jurisdictional grounds, State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998).

In the noncapital context, Florida courts have consistently treated aggravating factors that cause an offense to be reclassified to a more serious level or that trigger the application of a minimum mandatory sentence as elements of an offense that must be charged in the indictment and specifically found by the jury, unanimously and beyond a reasonable doubt. See Bottoson, 27 Fla. L. Weekly at S896 & n.21 (Anstead, C.J., concurring)(noting that Florida law requires jury fact findings for noncapital sentencing enhancements); id. at S900 (Pariente, J., concurring)(same).[6]

In contrast, the current procedures for imposing a death sentence in Florida do not require notice of aggravating circumstances; do not require that the jury unanimously agree on the existence of any aggravating circumstance or on the ultimate question whether there are "sufficient" aggravating circumstances to warrant imposition of the death penalty; do not require that a finding of "sufficient" aggravating circumstances be made beyond a reasonable doubt; and are not subject to the rules of evidence. This violates Florida law, independent of federal constitutional law, and impermissibly affords capital

[6] See, e.g., State v. Rodriguez, 575 So. 2d 1262, 1264 (Fla. 1991)(prior convictions for felony DUI), receded from on other grounds Harbaugh v. State, 754 So. 2d 691 (Fla. 2000); State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984)(possession of a firearm).

defendants fewer rights than defendants facing a three year minimum mandatory sentence for possessing a firearm during commission of a crime. See Bottoson, 27 Fla. L. Weekly at S896 (Anstead, C.J., concurring).

Indictment. In addition to federal due process and notice requirements, state law independently requires that:

> A charging document must provide adequate notice of the alleged essential facts the defendant must defend against. Art. I, §§ 9, 16, Fla. Const. In recognition of this concern, Florida Rule of Criminal Procedure 3.140(b) provides that an "indictment or information upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Rodriguez, 575 So. 2d at 1264 (emphasis added); State v. Dye, 346 So. 2d 538, 541 (Fla. 1977)("An information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference."); see also Drain v. State, 601 So. 2d 256, 261-62 (Fla. 5th DCA 1992)(citing Art. I, § 16, Fla. Const. and Fla. R. Crim. P. 3.140(d)(1) and (o)); Fla.R.Crim.P. 3.140(d)(1)("Each count of an indictment or information upon which the defendant is to be tried shall allege the essential facts constituting the offense charged.")(emphasis added). "Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it *fails to charge a crime under the laws of the state."* State v.

Gray, 435 So. 2d 816, 818 (Fla. 1983).

Taking from the jury its obligation to determine any element of an offense is a denial of due process and "an invasion of the jury's historical function." Overfelt, 457 So. 2d at 1387; Henderson v. State, 155 Fla. 487, 490, 20 So. 2d 649 (1945)("It is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence."). Thus, in order to prevent "a miscarriage of justice," a jury and not a judge, must make the finding "that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087...." Overfelt, 457 So. 2d at 1387.

A jury can only find elements alleged in the information, because conviction of an offense not charged violates due process. See State v. Gray, 435 So. 2d at 818, citing Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937). For example, a defendant's sentence for attempted murder may not be enhanced for use of a firearm where the information did not allege use of a firearm, notwithstanding that the jury actually found the uncharged element. Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999); accord Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Peck v. State, 425 So.

2d 664 (Fla. 2nd DCA 1983). Similarly, a court cannot reclassify an armed burglary charge from a first-degree felony punishable by life to a life felony for burglary with assault without an allegation in the charging document of an actual assault. See Wright v. State, 617 So. 2d 837, 841-42 (Fla. 4th DCA 1993).

Unanimity. Jury unanimity is a necessary ingredient of Florida's right to trial by jury. Bottoson, 27 Fla. L. Weekly at S897-98 (Shaw, J., concurring); id. at S896 (Anstead, C.J., concurring); id. at S900 & n.63 (Pariente, J., concurring). As Justice Shaw noted in Bottoson,, the provision in Article 1, section 22 of the Declaration of Rights that the right to trial by jury shall "remain inviolate" dates back to article 1, section 6 of the Constitution of 1838, which provided that the right to trial by jury "shall for ever remain inviolate." Bottoson, 27 Fla. L. Weekly at S897-98 (Shaw, J., concurring); id. at S900 (Pariente, J., concurring). This has been interpreted to mean that the jury trial right, as it existed at common law, must remain intact. See id. at S897 (Shaw, J., concurring); see also Buckman v. State, 34 Fla. 48, 55, 15 So. 697, 699 (1894).

At common law, the jury's verdict had to be unanimous. See Motion to Call Circuit Judge to Bench, 8 Fla. 459 (1859)("The common law wisely requires the verdict of a petit jury to be

unanimous"). Accordingly, Brown v. State, 661 So. 2d 309, 311 (Fla. 1st DCA 1995), held that the defendant was denied his right to trial by jury on the element of using a firearm during the commission of the offense when the jury "having convicted the defendant of manslaughter" failed to check the relevant box on the verdict form, and only five of the six jurors subsequently agreed that the defendant had indeed used a firearm. "In a jury trial," the court emphasized "'the truth of every accusation ... should ... be confirmed by the unanimous suffrage ... of [the defendant's] equals and neighbors....'" Id. (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769))(emphasis added).[7] In so holding, the court relied specifically on Article I, section 16(a) of the Florida Constitution (1968) and section 775.01, Florida Statutes (1991), which incorporates "[t]he common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment . . . where there is no existing provision by statute on the subject." Brown, 661 So. 2d at 311.

Beyond a Reasonable Doubt. While the jury is instructed that "[e]ach aggravating circumstance must be established beyond

[7] While not squarely addressing the issue of jury unanimity as a matter of Sixth Amendment law, the majority in Apprendi, 530 U.S. at 477, cited this same passage from Blackstone.

a reasonable doubt before it may be considered by you in arriving at your decision," nothing in the statute or standard jury instructions requires the jury to agree unanimously on the existence of any aggravating circumstance; nor is the jury instructed that it must agree unanimously or beyond a reasonable doubt that there are "sufficient aggravating circumstances" to warrant moving on to the next stage of weighing the mitigating circumstances against the aggravating circumstances. Fla. Std. Jury Instr. (Crim.) - Penalty Proceedings–Capital Cases.

The reasonable doubt standard is an essential component of the Due Process Clause of Florida's Declaration of Rights: "The requirement that the evidence shall show guilt beyond a reasonable doubt is a rule of judicial procedure, designed to secure the organic right to personal life and liberty where that right has not been by due process of law clearly and indubitably shown to have been forfeited by the commission of the crime charged." Russell v. State, 71 Fla. 236, 246, 71 So. 27, 30 (1916)(Whitfield, J., concurring).

d. A Life Sentence is the Maximum Penalty that can be Imposed for First Degree Murder.

In 1972, the U.S. Supreme Court invalidated all then-existing state capital punishment laws, holding that they presented an undue risk that the death penalty would be imposed in an arbitrary and capricious manner. See Furman v. Georgia,

408 U.S. 238 (1972). This holding had the effect of rendering Florida's capital sentencing procedures unconstitutional. See Donaldson v. Sack, 265 So. 2d 499, 502 (Fla. 1972)(holding that Furman abolished the death penalty "as heretofore imposed in this state"); accord State v. Whalen, 296 So. 2d 678, 679 (Fla. 1972)(held "at the present time that the trial judge does not have the power to impose the death sentence" after Furman, but before new statute enacted; "If there is no capital offense, there can be no capital penalty"); Anderson v. State, 267 So. 2d 8 (Fla. 1972)(death sentences imposed under statute in existence at time of Furman were illegal and required imposition of life sentence).

In light of Furman, the Florida Supreme Court held that Fla. Stat. §775.082(1) mandated life imprisonment upon conviction for capital murder. See Donaldson, 265 So. 2d at 503; State v. Whalen, 296 So. 2d at 678. Section 775.082(1) provides that a "person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life in prison." In Donaldson, the Florida Supreme Court held that this statutory provision provided for a sentence -- life

imprisonment -- where the provisions for imposition of a death sentence had been rendered unconstitutional. The Court reasoned that "eliminating the death penalty from the statute does not of course destroy the entire statute," because "we have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances." Id.

That same reasoning applies here. The findings required by Section 921.141 cannot be made, consistent with the requirements of the Sixth and Fourteenth Amendments as established in Ring. In this circumstance, just as in Donaldson and Whalen, the appropriate outcome under Section 775.082(1) is the entry of a life sentence if the defendant is convicted of first degree murder, because as a matter of federal constitutional law the court cannot make the findings "according to the procedure set forth in s. 921.141." As Section 775.082(1) states, without those findings "such person shall be punished by life in prison."

If further confirmation of this conclusion is needed, it is provided by Section 775.082(2), a severability clause, which confirms that if portions of the statute are rendered unconstitu-tional, the balance of the statute is to remain in

place. See Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990)("When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided ... [that] the unconstitutional provisions can be separated from the remaining valid provision ... [and] the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void."). Thus, as Donaldson and Whalen establish, the fact that the death penalty procedures of Section 921.141 are now unconstitutional requires the entry of the only remaining sentence available if the death penalty cannot be imposed -- namely, a life sentence should the defendant be convicted of first degree murder.

Florida's capital sentencing procedure is unconstitutional under the holding and reasoning of Ring v. Arizona, and under Florida law that requires elements of an offense to be alleged in the charging document and found by a jury unanimously and beyond a reasonable doubt. This Court must therefore vacate Mr. Douglas's death sentence and remand to the trial court for imposition of a life sentence without the possibility of parole.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Point 1, reverse and remand for a new trial; Point 2, reverse and remand for resentencing by the trial judge; Point 3, reverse and remand for a new penalty phase proceeding; Points 4 and 5, vacate the death sentence and remand for imposition of a life sentence with no possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **CURTIS M. FRENCH**, Assistant Attorney General, by delivery to The Capitol, PLO1, Tallahassee, FL 32399-1050, and to appellant, **LUTHER DOUGLAS**, #125172, Florida State Prison, 7819 NW 288th Street, Raiford, FL 32026, on this date, May ____, 2003.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 point.

_____
Nada M. Carey

IN SUPREME COURT OF FLORIDA

LUTHER DOUGLAS,

Appellant,

v. Case No. **SC02-1666**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
A	Sentencing Order