IN THE SUPREME COURT OF FLORIDA

PAUL G. EVERETT,

Appellant,

v. CASE NO. **SC03-73**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTEENTH** JUDICIAL CIRCUIT,
IN AND FOR **BAY** COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as either "defendant," "appellant," or by his proper name. References to the record shall be by the volume number in Roman numerals, followed by the appropriate page number, both in parentheses.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Bay County on January 28, 2002, charged the Appellant, Paul Everett, with one count of first-degree murder, burglary of a dwelling with a battery, and sexual battery involving serious physical force (1 R 5). He pled not guilty to those offenses, and the State later filed a notice that it intended to seek the death penalty if he was convicted of the murder (1 R 17, 19). Everett subsequently filed motions to suppress evidence taken from him and also statements he made to the police (1 R 31, 33). The trial court, after hearing evidence and arguments, denied those requests (1 R 46-50). The defendant also filed penalty phase motions dealing with the wording of the instructions that repeatedly told the jury that their verdict was only advisory and gave an inadequate definition of the heinous, atrocious, or cruel aggravator (1 R 52, 109). Everett also challenged the constitutionality of Florida's death penalty scheme based on Ring v. Arizona, 122 S. Ct. 2428 (2002). The Court denied those motions (8 R 335-36).

Everett proceeded to trial before Judge Donald Sirmons, and the jury, after it had heard the evidence, argument, and relevant law, found him guilty as charged on all counts (1 R 113). After further evidence, argument, and legal instruction, the jury also unanimously recommended the court sentence him to death (1 R 131).

The court followed that recommendation. In aggravation it found:

(1) Everett was under sentence of imprisonment at the time of the murder.
(2) He committed it during the course of a sexual battery or burglary.
(3) It was especially heinous, atrocious, or cruel.

(1 R 154-55) In mitigation, it found:

(1) That at the time of the murder Everett was under the influence of an extreme mental or emotional disturbance.
(2) He had no significant criminal history.
(3) He used drugs immediately before the murder.
(4) The defendant was remorseful.
(5) He conducted himself well while awaiting trial.
(6) He confessed to the murder.

The court weighed the aggravating factors against the mitigation, and it found the former tilted the scales in favor of death. Accordingly, the court sentenced Everett to death (1 R 165). It also sentenced him to serve two consecutive life sentences for the burglary and sexual battery convictions (1 R 165).

This appeal follows.

STATEMENT OF THE FACTS

Paul Everett lived in Alabama, but during the week of November 2, 2001 he had come to Panama City Beach, Florida. (1 SR 2). He stayed at a motel on the beach, played video games at one of the arcades, and used drugs (7 R 153, 165). About dusk on the evening of November 2, he took some LSD, "started tripping," and went looking for money (7 R 153). Shortly, he walked into the house of Kelli Bailey, saw her purse, and began rummaging through it, eventually finding about $70 (7 R 153-55). Bailey came into the living room and immediately started running toward Everett. The defendant, when questioned later, remembered only bits and snatches of what happened because of the acid (7 R 155). He did recall that they got into a fight with him hitting her at least two times, she started bleeding, and he had sexual intercourse with her (7 R 155-56). He was "pretty sure" he never kicked her, and was unsure of what happened other than hitting her with his fists a couple of times and grabbing her by her hair as she ran into her bedroom (7 R 158, 160). When he fled he thought she was still alive (7 R 159). Actually, he probably twisted her neck, because the medical examiner would testify she died of a broken neck (8 R 218).

When he left, Everett took a sweater belonging to Bailey. He tried to put it on, but apparently could not, and he threw it away along with a credit card of hers

that was in a pocket in the sweater several hundred feet from her house (7 R 161, 167).

Everett was on bond pending the resolution of an appeal he had filed with an appellate court in Alabama. By coming to Florida, he had violated the conditions of the bond, and within hours of the homicide, he was seized and placed in the Baldwin County, Alabama jail. After some police investigation, they focused on the defendant as their main suspect. About a month after the murder, they arrested him, and he eventually confessed to breaking into Bailey's house, getting into a fight with her, and having sexual intercourse with her.

SUMMARY OF THE ARGUMENTS

ISSUE I. The police questioned Everett three times after being placed in custodial confinement. The read him his Miranda rights each time, and he cut short the first two interrogations by clearly invoking his right to counsel. Despite the unambiguous invocation of his Fifth Amendment rights the police reproached him two times, once to ask for his consent to give blood, and the second to serve him with an arrest warrant. Such dealings with the defendant violated his Fifth Amendment right to counsel. Once the defendant has invoked that right, the police must insure he had access to a lawyer, and before they approach the accused they must be certain counsel is present. In this case, they did neither, and that was particularly egregious here because Everett twice asked for a lawyer, and no law enforcement official ever made any evident effort to get him the attorney he requested, and which they said they would provide.

ISSUE II. As a result of one of the uncounseled meetings with Everett, the police took blood samples from him and sent them to a laboratory for DNA testing. DNA testing is a two step process: First there is the blood analysis that creates a DNA profile. Second, that profile acquires meaning when a statistical analysis is made to estimate its frequency in the population. At trial, the State presented Jacqueline Benefield as a DNA expert. The defendant accepted her as one in DNA

analysis, but objected to her being able to also testify about the population profile, or likelihood that someone with Everett's DNA matched the DNA found on evidence taken from the crime scene. The court overruled that objection, but it was error. Ms. Benefield, as she admitted, was primarily an analytical chemist. She had no demonstrated expertise in interpreting her test results, and the prosecution never established she had sufficient knowledge of the database grounded in the study of authoritative sources. Here, her sparse testimony reveals only that she knew how to detect the DNA markers from the various pieces of evidence given to her. She had only a pedestrian knowledge of how to use that knowledge to determine how rare or frequent it would likely show up in some population.

ISSUE III. This Court wrongly avoided the issues presented by Ring v. Arizona, 536 U.S. 584 (2002), in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Because Ring was an "intervening development of the law" this Court could determine its affects on Florida's death penalty scheme without incurring the wrath of the United States Supreme Court, as this Court was leery of doing in those two state cases. When it conducts that examination, this Court should conclude that Ring requires at least unanimous jury recommendations of death. This Court should also find that even though the

defendant may have a single valid aggravator, Ring still has relevance to the constitutionality of his death sentence.

ISSUE IV. Within the space of four pages of the court's penalty phase instructions, the trial judge told the jury eleven times that its recommendation was just that, a recommendation. Doing so diminished the role of the jury in sentencing the defendant to death, and that was error.

ISSUE V. At the time of the murder, Everett was under a sentence of imprisonment in Alabama for committing some forgeries and passing bad checks. The court found that as an aggravating factor, as Section 921.141(5) Florida Statutes (2000), permits. That was error because there was no nexus or causal link between the murder and the defendant's status of being under some sentence of imprisonment.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING EVERETT'S MOTIONS TO SUPPRESS BLOOD, HAIR, AND OTHER BODY SAMPLES TAKEN FROM HIM AS WELL AS A CONFESSION HE GAVE TO POLICE OFFICERS, IN VIOLATION OF HIS FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

This case presents an unusual issue for this Court to resolve. After he was in jail, Everett was questioned by the police three times. He stopped the questioning after the first two times by invoking his Fifth Amendment right to have a lawyer present before the police interrogated him further. The third time he confessed to the murder of Kelli Bailey. Before trial, he challenged the admissibility of that statement as well as the blood and other samples taken from him at the second interrogation. The court rejected both motions saying that, even though he had invoked his constitutional right to have counsel present, he had waived that right because he had initiated the last two interrogations. The correctness of that ruling presents a mixed question of law and fact, and while this Court gives the trial court discretion as to resolving the conflicts in the evidence, it reviews, de novo, the application of the law to those facts. Loredo v. State, 836 So. 2d 1103 (Fla. 2nd DCA 2003).

On November 2, 2001, Everett was captured by an Alabama bail bondsman because he had absconded from Alabama. He had appealed a sentence for some crimes he had committed there, and pending the Alabama appellate court's resolution of the matter, he remained free on bond. His bondsman took him into custody, however, and had him jailed at the Baldwin County, Alabama jail on November 2, 2001 (1 R 154).

Twelve days later Lieutenant Chad Lindsey and Sergeant Rodney Tilley of the Panama City Police Department questioned Everett about Kelli Bailey's murder. Before doing so, they read him his Miranda rights, and he agreed to talk with them (1 SR 1). They interrogated him for a while, but he stopped their questioning when he clearly asked for a lawyer.

> Q. It don't jive Paul, getting rid of the only pair of shoes that you have because it's got some blood on it.
> A. I wish to have a lawyer present. I can tell you, I can see where this is going. I mean I want a lawyer.
> Q. Okay. You've requested a lawyer. The time is 4:35 p.m. hours.

(1 R 8)

By this time the police believed that Everett was "their man." (2 SR 66) They wanted to talk with him again, and they decided to do so by asking him for consent to get blood and other body samples (2 SR 67). If he persisted in refusing

to talk with them they believed they could get a warrant to get them (2 SR 69). They decided to ask Investigator John Murphy of the Baldwin County Sheriff's Office to talk with the defendant about consenting to "give DNA" because he had talked with him before, apparently on some unrelated charges, and intended to speak with him again (2 SR 67). Significantly, the Panama City Beach police told them about their interview with Everett and his invoking his Fifth Amendment rights (2 SR 67-68)

> A. Did you tell Murphy about the interview that you and Lindsey had had where you were talking to him and then Everett indicated he didn't want to talk to you anymore?
>
> Q. I'm sure we discussed all that . . .

(2 SR 67-68) Murphy nevertheless approached Everett, and got his consent to give blood.

So, on November 19, 2001, five days later, after the police had gotten the defendant's consent, the Panama City Police, along with the Alabama investigator, talked with the defendant again. But, as with the first interrogation, he again reasserted his Fifth Amendment right to have a lawyer present.

> A. .... Had I know, you know, as soon as she jumped up I knew something was wrong (inaudible), she jumped (inaudible). (Inaudible) want to say this, but (inaudible) but (inaudible) I do want to talk to a lawyer, but I did want to let you know to get you in the right direction to where. . .
>
> Q. So you are asking for a lawyer at this point?

A. Yes sir (inaudible) right direction (inaudible)

(1 SR 21)

Eight days later and armed with a warrant for the defendant's arrest, Sergeant Tilley returned to Baldwin County jail and served it on the defendant. He claimed Everett said he wanted to talk with him, and waiving his right to have counsel present, he then confessed to killing Kelli Bailey (1 SR 23, et. seq, 78.).

Under the unique facts presented by this case, the trial court erred in denying Everett's motions to exclude the evidence of his DNA and his confession.

A. The Fifth Amendment right to counsel.

Miranda v. Arizona, 384 U.S. 436 (1966), giving meaning to the Fifth Amendment's protection against compelled self-incrimination, provides three guarantees to defendants facing custodial interrogation: (1) They do not have to talk to the police unless they want to. (2) They have the right to consult with an attorney before the police question them. (3) If they want the advice of counsel, the police must provide them with a lawyer. In Edwards v. Arizona, 451U.S. 477 (1981), the United States Supreme Court expanded on the last two guarantees. When an accused person has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

communication, exchanges, or conversations with the police." Id. at 484-85.[1] Said another way, when a defendant indicates he wants legal advice before talking with the police he is saying "The authorities may communicate with him through an attorney." Michigan v. Mosely, 423 U.S. 96, 110 n. 2 (1975)(White, concurring). A defendant who has invoked his right to counsel "raises the presumption that he is unable to proceed without a lawyer's advice." Arizona v. Roberson, 486 U.S. 675, 683 (1988). The police can deal with him only through counsel, and they can have no contact with him unless his lawyer is present. If they do, any resulting confession or statement "may properly be viewed with skepticism." Arizona v. Roberson, 486 U.S. 675, 681 (1988).[2] In short, dealing with the defendant involves

[1] The Court created a "bright-line rule" to provide "clear and unequivocal" guidance for law enforcement officers by holding that once a person in custody has expressed his desire to deal with the police only through counsel, they cannot question or "deal" with him until counsel has been made available to him. *Arizona v. Roberson,* 486 U.S. 675, 682, 108 S. Ct. 2093, 2098, 100 L.Ed.2d 704 (1988) (quoting *Edwards,* 451 U.S. at 484-85, 101 S. Ct. at 1884- 85)

[2] Obviously, they can talk with him on purely administrative matters such as are necessary when booking him into jail, which may require him to give his name, address, birth date, and other such biographical information. United States v. Hinckley, 672 F. 2d 115 (D.C. Cir 1982).

more than interrogation and properly encompasses any communication with the defendant.[3]

B. What can the police do once a defendant invokes his right to counsel?

Unlike the companion Fifth Amendment right to remain silent, the Fifth Amendment right to counsel means that the police cannot approach the defendant, on their own initiative at all. Miranda, cited above at p. 474; See, Michigan v. Mosely, 423 U.S. 96 (1975)(providing test to determine if the police had violated a defendant's Fifth Amendment right to remain silent when, subsequent to his invoking it, they reproached him or her). The "bright line rule" is that they can do nothing.

Now does asking a defendant if he or she will consent to the police drawing blood or other bodily samples violate the Edwards bright line rule? Some courts have said no, arguing that seeking a defendant's permission to invade his body,

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[3] The Fifth Amendment right to counsel is broader than the Sixth Amendment right to counsel. McNeil v. Wisconsin, 501 U.S. 171 (1991). That right is "offense specific," and that means a defendant cannot assert that right to apply to uncharged crimes. The Fifth Amendment right, on the other hand, applies to all offenses a defendant might face. Arizona v. Roberson, 486 U.S. 675 (1988). Thus, in this case, once Everett asserted his right to have counsel present, not only could the Panama City Beach police not talk to him, investigator Murphy, the Alabama law enforcement officer, could not question him about any Alabama crimes he thought the defendant may have committed.

which clearly invoked Fourth Amendment interests, Schmerber v. California, 384 US. 757, 767-70 (1966), nevertheless was not interrogation, and that taking a person's blood was not testimonial in nature. State v. Crannel, 750 A. 2d 1002, 1008-1009 (Vt. 2000).

Others, however, have found that asking a defendant for his consent to take blood or consent to some other Fourth Amendment intrusion, was an interrogation covered by Edwards.

> I suppress this evidence on Fifth Amendment grounds. The holding in *Edwards v. Arizona, supra,* is "that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-85, 101 S. Ct. at 1884-85. I consider the rationale of *Edwards* to be broad enough to include "interrogation" about whether the accused will consent to a warrantless search. Surely that is an area where an accused would be well advised "to deal with the police only through counsel." . . . Once a suspect expresses a desire for counsel, explicit or equivocal, all questioning should cease, including questions about a consent search. To hold otherwise would require courts to separate the wheat of Fourth Amendment voluntary consent from the chaff of illicit Fifth Amendment interrogation. Such a rule has obvious practical difficulties; and the broader Fifth Amendment analysis adopted here seems to me more in keeping with recent authority.

U.S. v. Yan, 704 F. Supp. 1207, 1211 -1212 (S.D. N.Y.,1989)

The court in Yan has it correct. It is the exploitation of the Fifth Amendment

violation, and not the fruits of that illegal questioning that is critical. Indeed, Miranda itself identified several police techniques that were not strictly speaking interrogation but amounted to as such. "It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation." Rhode Island v. Innis, 446 U.S. 291, 299 (1980). See also United States v. Rojas, 655 F. Supp. 1156, 1168 (E.D.N.Y.1987) (evidence found as a result of oral consent to search suppressed because consent was product of questioning in violation of defendant's exercising his rights under Miranda to remain silent); United States v. D'Antoni, 856 F.2d 975 (7th Cir.1988) (obtaining defendant's consent to search after he invoked right to counsel arguably violated Edwards bright-line rule); People v. Johnson, 48 N.Y.2d 565, 423 N.Y.S.2d 905, 399 N.E.2d 936 (1979) (consent to search held legally ineffective, even though found to be voluntarily given, because it was unconstitutionally obtained after request for attorney was not granted).

Moreover, as suggested above, a close reading of Edwards and other cases from the United States Supreme Court reveals that the Fifth Amendment's right to counsel has a broader focus than police interrogations. When a defendant has invoked his Fifth Amendment right to counsel, he is telling the authorities he wants no dealings with them unless his lawyer is present, or he has had the opportunity to

talk with the counsel the police have made available to him. See, Michigan v. Mosely, cited above at p. 110 n. 2 (White, concurring. Invoking his right to counsel means a defendant has expressed his view "that he is not competent to deal with authorities without legal advice.") Whether the evidence the police seek from the defendant is testimonial or not is irrelevant. It is their uninvited and counselless contact with the accused that is illegal.

Of course, if a defendant initiates the conversation with the police, they can talk with him without any violation of the Fifth Amendment. Edwards, at p. 485 And it is that limited exception to the constitutional right to counsel that the police and trial court in Everett's case relied on in justifying the police interrogation of the defendant.

> Here, the deposition of Officer Tilley and the statement of John Murphy reflect that the November 19, 2001 interview was the result of the defendant, himself, initiating contact with law enforcement after (emphasis supplied) he had given his consent for the taking of his blood and DNA swab samples. Specifically, at paged 35 and 36 of Detective Tilley's deposition, Detective Tilley had asked Officer Murphy to see if the defendant would voluntarily agree to a DNA test. Officer Murphy's statement indicates that the sole reason for contacting the defendant on November 19, 2001 for the Panama City Beach case was to get consent for the taking of blood and DNA swab samples. There was no attempt to question or interrogate the defendant prior to getting his consent for the taking of the DNA samples. Officer Murphy had also contacted the defendant about an entirely different case in Alabama that had nothing to do with the Panama City Beach case. There was nothing improper about Officer

> Murphy's contact with the defendant about the other case that would adversely impact on the Panama City Beach case.
>
> * * *
>
> The Court notes that the defendant was being served with a warrant at the time he gave his statement. The defendant was not being brought in for the purpose of any additional questioning. The above colloquy establishes it was the defendant, and not the officers, who initiated the request for the interview of November 27th after being served with the arrest warrant (emphasis supplied).
>
> Because the defendant initiated the request to be interviewed by the officers on both November 19 and November 27, 2002 and there is nothing to establish that the officers coerced, forced or misled the defendant into giving either the November 19th or November 27, 2001 interviews the Court will find the defendant's interviews of November 19 and November 27, 2001 were freely and voluntarily made and are not subject to being suppressed.

(1 R 48, 50)

First, the court was clearly wrong when it said "There was nothing improper about Officer Murphy's contact with the defendant about the other case that would adversely impact on the Panama City Beach case." (1 R 48). Arizona v. Roberson 486 U.S. 675 (1988), is directly on point, and it rejects the trial court's order on that point. Quoting language from the Arizona Supreme Court, it held that Edwards applies to questionings involving unrelated offenses:

> The only difference between Edwards and appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about an unrelated offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes.

Roberson, at 677-78. quoting State v. Routhier, 669 P.2d 68, 75 (Az 1983).

Second, the court was wrong when it found that Everett had reinitiated the questioning. The police did that when they approached the defendant without counsel being present. The Fifth Amendment right to counsel means that the police cannot approach the defendant for any reason without counsel being present. It does not matter why they wanted to talk with the defendant. When a defendant invokes his right to counsel, he is telling the police that he cannot deal with them without the assistance of counsel, not simply that he wants a lawyer's help when they question him. This means that not only can they not question the defendant, they cannot contact him without counsel being present.

As argued above, a lawyer's assistance goes beyond merely guiding the defendant's responses to police interrogation. Counsel can provide significant help in matters such as whether to consent to giving blood. While providing such samples may appear as a matter of routine, it is so usually only after the defendant has been charged with a crime, the State has requested them, and the court approved their collection. See Rule 3.220(c)(1)(G), Fla. R. Crim. P. Before then, and without any exigency, Schmerber, cited above, the police need a warrant to get the samples. Moreover, the Fourth Amendment's probable cause requirement and independent judicial approval present significant barriers to the police being

able to collect a suspects blood, hair, and other samples. In this case, the police had very little tying Everett to the murder, so life for them became distinctly easier with his consent to gather incriminating evidence. They may very well have not gotten a search warrant.[4]

A more difficult question arises when they approached him on November 27, ostensibly to only serve an arrest warrant. Under the unusual facts of this case, the result is the same. After almost two weeks of being in the Alabama jail, his situation had deteriorated. Not only was he subject to the inherently coercive influences of that prison, the police had twice rebuffed his efforts to talk to a lawyer and had as often failed to provide counsel for him as they had promised to do. Thus, by November 27, that he may have wanted to talk with Sergeant Tilley before "he got the tape going" and "reminded him of Miranda" (2 SR 78) was never consent.

Edwards requires the police to do more than give a defendant an opportunity to talk to a lawyer. They must make one available to him. Here, they

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[4] The only evidence linking Everett to the murder was a bat found 133 feet from Bailey's house that the police claimed he had bought from a local Walmart (7 R 97-99). Given the generic sameness such items have and the distance and location from the murder scene in which it was found, a reasonable person would have been hard pressed to conclude that the defendant had anything to do with Bailey's death.

simply did nothing, and they did nothing from November 14, 2001, when he first invoked his right to counsel to November 19, 2001 when they got his "consent" for the blood sample and questioned him a second time; and he, for a second time, asked for a lawyer; to November 27, 2001 when they questioned him a third time. They had plenty of time to pick up a telephone, call a local attorney, and ask him or her to talk to Everett. They simply had no legitimate excuse for keeping counsel away from him, especially when they had could have very easily complied with his repeated requests to see an attorney.

So, we have in this case the distinct bad faith specter of deliberate police conduct designed to wear down a defendant's will, which is precisely what the protections of Miranda and Edwards were crafted to avoid.

> Especially in a case such as this, in which a period of three days elapsed between the unsatisfied request for counsel and the interrogation about a second offense, there is a serious risk that the mere repetition of the Miranda warnings would not overcome the presumption of coercion that is created by prolonged police custody.

Arizona v. Roberson, cited above at p. 686. Said more bluntly, acquiescence is not consent. Like their earlier tactic of approaching Everett to ask for his consent, the police used the excuse of serving a warrant to see Everett a second time without ever having honored his request to have counsel present.

Thus, contrary to the court's finding that Everett "initiated" the police contact (1 R 48-50), the evidence in this case shows that he never called them and asked to see them. To the contrary, they repeatedly approached him, and he merely acquiesced to their presence when he talked with them. None of the interrogations were at his suggestion or request. The State never carried its "heavy burden" of showing Everett knowingly and intelligently waived his right to counsel even when reminded of his rights. Arizona v. Roberson, 486 U.S. 675 (1988). As such, the police never honored his right to remain silent until they had provided a lawyer for him. Edwards, cited above, at pp. 485, 487.

In short, the police were not seeking to uphold the law but were trying to find ways to get around it. This Court should reverse the trial court's judgment and sentence and reverse for a new trial.

ISSUE II

THE COURT ERRED IN ALLOWING JACQUELINE BENEFIELD, AN EXPERT IN DNA ANALYSIS , TO ALSO TESTIFY ABOUT THE LIKELIHOOD OF OTHERS HAVING THE SAME DNA RESULTS AS THOSE SHE DETERMINED IN THE SAMPLES SHE TESTED, A VIOLATION OF Everett'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

As part of its case in chief, the State presented the testimony of Jacqueline Benefield as an expert in DNA analysis. After saying that she had a bachelor's degree in chemistry and biochemistry, she also testified that she had worked as an analytical chemist and had completed a year-long training program with the Florida Department of Law Enforcement (8 R 179). She had testified four times as an expert in DNA analysis (8 R 179-80). She admitted, however, she had no special training in population genetics or statistics other than taking a statistics class as an undergraduate and attending "short courses and conferences in the teaching of population genetics and statistics." (8 R 180). She was, as she admitted, primarily an analytical chemist because that was her background and training (8 R 180). Everett had no problem with her testifying about the test results of evidence presented in this case. He did, however, object to her "giving a population profile." (8 R 180). The court overruled it, noting:

> I think in terms of her DNA analysis, if there was an attack per say on a specific aspect of the population that she's using, then that would be done through maybe an different type of expert. But in light of the Court's experience with prior testimony about DNA and graphing and analysis, this is unutilized by everyone that testifies, assuming this is not something brand new. And I'll note the defense objection and overrule that objection and allow her to testify.

(8 R 181) Everett renewed his objection a short time later. "Judge, I don't thing there's been sufficient predicate laid to, by the State, to introduce the frequencies. We haven't heard any testimony about how these are calculated or how she went about calculating them (8 R 187). Ms. Benefield then said 1. She used the "products rule when calculating the frequency of occurrence. 2. The National Research Council approved the procedure she used. 3. She used the database created by the FBI to calculate the frequencies. 4. The method she use is generally accepted throughout the world in determining the frequencies of the genetic profile. (8 R 188-89). Everett renewed his objection, but it was overruled, and she then testified that the odds or "frequency occurrence of this profile for unrelated individuals in the following population is on in 15.1 quadrillion of the Caucasian population." (8 R 190)

The court erred in letting Benefield testify that the odds of finding DNA similar to those found on the victim and the defendant, and in doing so it abused the discretion given it in matters of this sort. The State never presented any

evidence that she was qualified in using the statistical analysis necessary to estimate the frequency of the profile in the population.

That is, DNA testing involves a two step analysis. First, the sample must be analyzed biochemically. That Benefield could do and testify about without any objection from the defense. The State, however, never presented any evidence that she was qualified in using the statistical analysis necessary to estimate the frequency of the profile in the population, the second step of the analysis. Butler v. State, 842 So. 2d 817 (Fla. 2003). Thus, it is not enough that Ms. Benefield could competently analyze the evidence given to her by the police in this case. Without in anyway minimizing the skill or expertise necessary to determine the DNA markers, in order for her to testify about the significance of her tests to this case, she also had to have an expertise in population frequencies. Id. Said another way, "the state must prove by a preponderance of evidence that an expert testifying about DNA statistical and population genetics analysis must demonstrate 'sufficient knowledge of the database grounded in the study of authoritative sources.'" Hudson v. State, 844 So. 2d 762, 763 (Fla. 5th DCA 2003)(quoting Murray v. State, 692 So. 2d 157, 162 (Fla. 1997)) Here, it never did that.

In Hudson the State met this burden by showing its expert: (1) could explain the number of samples taken in the database used by the Florida

Department of Law Enforcement; (2) knew the geographic area from which the samples were taken; (3) knew how the samples were used to establish the database; (4) could explain that the database was constructed according to the National Research Council guidelines; that (5) It had been independently validated; (6) was familiar with the NRC's guidelines; and (7) he was familiar with the data used in compiling the database and had read the literature about its scientific validation.

Here, Ms. Benefield's sparse testimony reveals only that she knew how to detect the DNA markers from the various pieces of evidence given to her. She had, on the other hand, only a pedestrian knowledge of how to use that knowledge to determine how rare or frequent it would likely show up in some population.

In this case, we know precious little about Ms. Benefield's qualifications to correlate her DNA test results to their frequency among the population. Unlike the expert in Hudson, Ms. Benefield never explained how the FBI created its database, from what geographical area it took its samples, how they were used to create its database, and whether it had been independently validated. There was no testimony regarding how the population frequencies of the genetic markers were determined. Moreover, although Ms. Benefield said she used the FBI database, she never provided any evidence that it was reliable. Hudson. While Ms. Benefield

took an undergraduate course in statistics, this Court can only speculate as to the extent of her experience in statistical analysis. Perdomo v. State, 829 So. 2d 280 (Fla. 3rd DCA 2002). While she had some knowledge of the database she used, she never provided any proof she had studied it through authoritative sources. Murray, cited above at p. 164.

In short, the State showed only that Ms. Benefield was the Sorcerer's Apprentice, and without any more proof than what we have in this record, this Court has no assurance that her testimony, as well intentioned as it may have been, nevertheless has not created a great mischief.

Of course, the State could and probably will say that the court's error was harmless. Yet, we have here a very short trial, as capital trials go. Ms. Benefield's testimony, that "the frequency of occurrence of this profile. . .is one in 15.1 quadrillion" (8 R 190) is so fantastic as to almost cinch the State's case that Everett murdered Ms. Bailey. Without a doubt it was a crucial part of the State's case. Hudson, at 1074 (rejecting the State's harmless error argument.) As such its admission could not be harmless . Or, said in terms of the harmless error test, a reasonably possibility exists that that evidence affected the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO. 2D 393 (FLA. 2002) AND KING V. MOORE, 831 SO. 2D 403 (FLA. 2002).

To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Because this argument involves only matters of law, this Court should review it de novo.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002) this Court rejected all Ring challenges by simply noting that the nation's high court had upheld Florida's capital sentencing statute several times,

and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriques d Quijas, has a notable exception. If there is an "intervening development in the law" this Court can determine that impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of *stare decisis* demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional

> interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
>
> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the "intervening development of the law" exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.)

The question, therefore, focuses on whether Ring is such an "intervening development in the law" that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision.

The answer obviously is that it a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in

overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled "'where the necessity and propriety of doing so has been established.'" Ring, cited above at p. 608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring's impact on Florida's death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring's fundamental holding. "Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring." Bottoson, cited above at p. 725. Justice Anstead views Ring as "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest (Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all

states.").[5] Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw concludes that Ring, therefore, has a direct impact on Florida's capital sentencing statute." Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of

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[5] Justices Quince, Lewis and Pariente agree that "there are deficiencies in our current death penalty sentencing instructions." Id. at 702, 723, 731.

Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that "new rules generally should not be applied retroactively to cases on collateral review." Teague v. Lane, 489 U.S. 288, 305, 310 (1989) . Moreover, subsequent actions by the nation's high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g. Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); Sansing v.Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendant's to death, it may simply have not wanted to deal with a post conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring. While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions.")

There is, therefore, no reason to believe the United States Supreme Court will accept this Court's invitation to reconsider this State's death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State's death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death.

When it does, this Court should consider the following issues:

1. Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction." Lawrence v. State, 846 So. 2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge's decision to impose death under section 921.141, Florida Statutes (2002).. . . [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has 'never suggested that jury sentencing is required'.. . .I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring.) In this case, the trial court found three aggravating factors, at least one of which would have satisfied her criteria. That is, a jury had found him guilty of burglary and sexual battery.

Justice Anstead has rejected Justice Pariente's partial solution to the Ring problem, and Everett adopts it as his response to her position.

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, "The question, however, under Ring is whether a trial court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence." (Emphasis in opinion.)

2. Unanimous jury recommendations and specific findings by it. Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing

schemes of the other hybrid statutes except Alabama[6], Florida allows a non unanimous capital sentencing jury to recommend death. Section 921.141(3) Florida Statutes (2002). Under Ring, Everett's death sentence may be unconstitutional. Bottoson, cited above, at 714 (Shaw, concurring in result only); Butler v. State, 842 So. 2d 817(Fla. 2003)(Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a

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[6] Alabama, like Florida, allows juries to return a nonunanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendations. SB449.

capital case, presents a strong argument that when a person's life is at stake that voice should unanimously declare the defendant should die.

This approval of a non unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations "The eleven -to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty. See Anderson v. State, 28 Fla. L. Weekly S51, 57 (Fla. Jan. 16, 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence)" Lawrence v. State, 846 So. 2d 440 (Fla. 2003); Butler v. State, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003)(Pariente, dissenting); Bottoson v. Moore, 833 So. 2d 693, 709 (Fla. 2002)(Anstead, dissenting).

Of course, in this case, the jury unanimously recommended the trial court impose a sentence of death. Everett's argument on this point obviously suffers because of that vote. Yet, looks can be deceiving, and in this case, we have no idea what aggravators the jury found. That is, without specific verdicts as to what factors they found, we can have no confidence they unanimously found the same

ones as the trial court. That is, for example, five of the jurors may have concluded that Everett deserved to die because he had a prior record for violence.[7] They may have rejected the murder as especially heinous, atrocious, or cruel and that he was under the sentence of imprisonment. The other seven jurors may have said all three aggravators the trial court would later find applied, or concluded some other combination of them applied or did not apply. Without some clear indication from the jury that they unanimously concluded as the trial court would do, that all three applied, we simply must speculate that they did. Or, as Justice Anstead said in Bottoson, "In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual jury may have determined existed." Id. at 708. Thus, the unanimous verdict, without the accompanying special verdict of what aggravators they unanimously had found is deceptive and violates Ring. Bottoson, cited above, at p. 723 (Pariente, concurring); p. 708(Anstead, concurring)

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida's death penalty scheme. It should also reverse Everett's sentence of death and remand for a new sentencing trial.

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[7]The court found the defendant had no significant history of prior criminal activity, and that which he had was for non violent crimes (1 R 160).

ISSUE IV

THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF EVERETT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Before the penalty phase jury heard any testimony regarding what aggravating and mitigating factors existed, after they had heard all the evidence, and after the court had instructed the jury on the relevant law, Everett objected to the penalty phase instructions because they diminished the role of the jury in sentencing the defendant to death (1 R 52-53, 8 R 333-34). The court denied that complaint (8 R 334-36). This request took legal strength from the United State Supreme Court's opinion in Caldwell v. Mississippi, 472 U.S. 320 (1985). In that case, "[T]he State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated." 472 U.S. at 341. As with the two prior issues, this one involves a pure question of law, which should be reviewed de novo.

This Court has repeatedly and recently held that the standard penalty phase jury instructions comply with Caldwell. "This Court will note that the Florida

Standard Jury Instructions have been determined to be in compliance with the requirements of Caldwell. Burns v. State, 699 So. 2d 646, 654 (Fla.1997); Sochor v. State, 619 So. 2d 285, 291-92 (Fla.1993); Thomas v. State, 838 So. 2d 535 (Fl. 2003).

Despite these rulings, Everett asks this Court to reconsider its rulings in those cases in light of Justices Lewis's and Pariente's concurring opinion in Bottoson v. Moore, 833 So. 2d 693, 723, 731-34 (Fla. 2002). In that case, Justice Lewis had great trouble approving those instructions because of their "tendency to minimize the role of the jury," and the trial court's added explanation of Florida's death penalty scheme. "I question whether a jury in situations such as this can have the proper sense of responsibility with regard to finding aggravating factors or the true importance of such findings as now emphasized in Ring [v. Arizona, 536 U.S. 584 (2002)]." Id. Justice Pariente, likewise, has concluded that "the fact that the jury was told that its role is advisory presents additional concerns in light of Ring . . ." Butler v. State, 842 So. 2d 817, 837 footnote 10 (Fla. 2003)(Pariente, concurring)

Everett asks this Court to listen to Justice Lewis' and Pariente's arguments. In this case, it has particular resonance because within the space of four pages, the jury was told eleven times that their sentence was merely advisory (4 R 510-13). When the judge repeatedly, repeatedly, repeatedly let them know that he had the

responsibility to sentence Everett, never told them that it had to give "great weight" to their decision, and said that they need not reach a unanimous decision on what to recommend, then Justice Lewis' concerns raises to the point of prophesy. Tedder v. State, 322 So. 2d 908 (Fla 1975). The jury instructions used in the penalty phase portion of a capital trial generally and in this case specifically fail to eliminate the Caldwell problem.

This Court should reverse Everett's sentence of death and remand for a new sentencing hearing using jury instructions that properly emphasizes their crucial role as one of the co-sentencers in this capital case. See, Espinosa v. Florida, 525 U.S. 1079 (1992).

ISSUE V

THE COURT ERRED IN FINDING EVERETT COMMITTED THE MURDER WHILE UNDER SENTENCE OF IMPRISONMENT BECAUSE THERE WAS NO NEXUS OR CONNECTION LINKING THAT AGGRAVATOR WITH ANY ASPECT OF THE HOMICIDE, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Everett to death the trial court found that at the time of the murder he was under sentence of imprisonment, an aggravator authorized by Florida law. Section 921.141(5)(a), Florida Statutes (2000)[8]

> The murder occurred on November 2, 2001. The defendant had been given a ten (10) year suspended sentence and placed on probation for three (3) years in the State of Alabama on September 8, 1999. On February 8, 2000, the defendant had his probation revoked and was sentenced to ten (10) years in the State of Alabama prison system. The defendant appealed his sentence and posted a supersedeas bond pending appeal. On October 5, 2001, the defendant's appeal was denied. under the terms of his bond, the defendant was to begin serving his sentence within 15 days of the denial of his appeal. On November 2,2001 around 9:00 p.m. that evening the defendant was picked up by the bondsman and returned to the State of Alabama where he began serving his prison sentence.

(1 R 154)

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[8] (5)Aggravating circumstances.-Aggravating circumstances shall be limited to the following: (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation,

Not only did the court find the under sentence of imprisonment aggravator, it instructed the jury that they could also consider it as a fact that could justify recommending a death sentence (4 R 510). That was error because the State presented no evidence beyond Everett's status of being under sentence of imprisonment to link that aggravator to the facts of this case, and without more evidence to show his increased moral culpability, it is insufficient to establish that aggravator. This Court should review this issue under a de novo standard of review because the argument presented here involves only a matter of law.

This is a novel argument, but it is one that draws strength from what this Court has said concerning capital sentencing and mitigation in general and the age mitigator and avoid lawful arrest aggravator specifically.[9]

Regarding capital sentencing, this Court has found it to be a "moral inquiry into the culpability of the defendant." Zack v. State, 753 So. 2d 9, 23-24 (Fla. 2000). As to the mitigating factors, this Court has also declared that "Evidence is mitigating if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the

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[9] Indeed, it is so novel that trial counsel below never raised it. This lack of preservation should prove no barrier to this Court's consideration because if it allows it to go uncorrected it will have approved an unconstitutional death sentence as will be explained further in this argument.

crime committed." Evans v. State, 808 So. 2d 92, 107-108 (Fla. 2001). More specifically, a defendant's age is a statutory mitigator, Section 921.141(6)(g) Florida Statutes (2000), but it becomes relevant only "the closer the defendant is to the age where the death penalty is constitutionally barred." Urbin v. State, 714 So. 2d 411, 418 (Fla. 1998). Its significance diminishes, on the other hand, "by other evidence showing unusual maturity." Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993). In short, as this Court noted, everyone has an age, and for it to have any mitigating value, something more is needed. Echols v. State, 484 So. 2d 568, 575 (Fla. 1985)(Age is simply a fact, every murderer has one.")

Similarly, this Court has required more of the avoid lawful arrest aggravator than simply leaving the scene of a homicide. When the defendant kills a police office that something extra may be little else, because that factor most readily applies to murders of police officers who are trying to arrest a defendant. Farina v. State, 801 So. 2d 44 (Fla. 2001). But, for it to have a broader application, the State needs to show more. It needs to prove that the dominant motive for the homicide was to avoid a lawful arrest. Bell v. State, 841 So. 2d 329 (Fla. 2003).

Thus, if capital sentencing is fundamentally a moral inquiry, mitigation looks at the defendant's lessened moral culpability, and aggravation examines factors that increase that moral culpability. See, Kilgore v. State, 688 So. 2d 895 (Fla. 1996).

Accordingly, the under sentence of imprisonment aggravator has its most obvious relevance when applied to prison murders. Christian v. State, 550 So. 2d 450 (Fla. 1989).

Indeed, the drafters of The Model Penal Code's model death penalty statute, on which Florida based Section 921.141, justified including this aggravating factor in its list of aggravators because it tends to deter those in prison who have nothing to lose by murdering:

> Paragraph (a) recognizes the need for a special deterrent to homicide by convicts, under sentence of imprisonment. Especially where the prisoner has no immediate prospect of release in any event, the threat of further imprisonment may well seem inconsequential.

American Law Institute, Model Penal Code and Commentaries, Section 210.6 p. 136. (1980).

If an inmate already has one life sentence and no hope of ever seeing the free world, there is no deterrence to prevent him from killing. One more life sentence added to the others he is already serving is meaningless. Hence, the under sentence of imprisonment aggravator provides a reason to live a law abiding life while incarcerated. Prison inmates need to know that they cannot kill with impunity, and that is what this aggravator does.

On the other hand, its significance considerably weakens when a defendant enjoys the large measure of freedom provided by probation, community control, or parole. It also has lessened meaning for defendants like Everett who face short prison sentences. Indeed, like it has with the age mitigator, this Court should conclude that the more restricted the defendant's freedom the greater the significance of the under sentence of imprisonment aggravator. Thus, if the prosecution wants to argue it has application beyond a prison's walls and barbed wire fences, it must show this with more evidence than simply that the defendant was under some form of imprisonment.

In this case, the State proved only that Everett was free pending resolution of his appeal. While perhaps technically under a sentence of imprisonment, its restrictions at the time of the murder were so weak as to prove insufficient to prove this aggravator. Further weakening its relevance, his victim was not another inmate, guard, or prison official. It was a woman who happened to catch him as he was in her house on Panama City Beach. As such, the State presented no evidence, and in fact, there likely was none, to show that this defendant killed Ms. Bailey out of some fear that he would go to prison. Or more pertinent, the State never proved he killed her out of some belief that he could do so without fearing he would be sentenced to more prison time than he already faced.

Thus, like the avoid lawful arrest aggravator, the under sentence aggravating factor needs some very strong evidence showing that the defendant's dominant reason for committing a murder arose from his being under a sentence of imprisonment if he was not actually confined at the time of the murder. Here, we have only the mere fact of his status, and without more, that single fact does nothing to justify a death sentence. If a defendant's age, without more, can do nothing to reduce his moral culpability, and merely leaving the scene of a homicide adds nothing to the case for aggravation, then neither should a defendant's status as being under sentence of imprisonment increase his moral blameworthiness. In other words, for this aggravator to apply to Everett, the State has to show some relevance, some nexus between the murder and his status of being under sentence of imprisonment. It needs more than simply that fact.

Moreover, if this Court says it applies, even without a nexus, it runs the risk of casting the state's death penalty statute into constitutional jeopardy. That is, death penalty schemes pass muster when they significantly limit the number or type of persons eligible for execution. Spaziano v. Florida, 468 U.S. 447 (1984). Aggravating factors that fail to provide that necessary narrowing, but in fact make it easier to put someone to death, put the legitimacy of our capital sentencing law in question. In this case, allowing a death sentence because Everett killed because

he was under some type of imprisonment makes his sentence unconstitutional. Section 921.141(5), with as much relevancy, could have made the sexual preference, sex, skin color, or home town an aggravating factor. But without showing that being a gay white male from Miami had any relevance to imposing a life or death sentence, using those factors in determining what punishment to impose would be unconstitutional. Similarly, simply being in prison, without more, makes our death sentencing scheme unconstitutional. Status, without more, does little to narrow the class of persons eligible for execution.

This Court should, therefore, reverse the trial court's sentence of death, not so much because it found this aggravator, but because the jury could very well have found and considered it in recommending death (4 R 510). This Court should, therefore, remand for a new sentencing phase trial before a jury.

CONCLUSION

Based on the arguments presented here, the Appellant, Paul Everett, respectfully asks this honorable Court to (1) Reverse the trial court's judgment and sentence and remand for a new trial, or (2) Reverse the trial court's sentence of death and remand for a new sentencing hearing with a jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **CURTIS M. FRENCH**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to appellant, on this date, September 2, 2003.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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DAVID A. DAVIS