IN THE SUPREME COURT OF FLORIDA

RICHARD ENGLAND,

Appellant,

v. **Case No. SC04-1521**
Lower Tribunal No. 2003-35769
STATE OF FLORIDA, **CFAES**

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Richard England was indicted on charges of First Degree Murder and Armed Robbery with a Deadly Weapon. (Vol.I, R[1]1-2) The State filed a Notice of Intent to Seek the Death Penalty. (Vol.I, R15) The defense filed a Motion to Dismiss Case on Constitutional Speedy Trial Grounds, alleging England was arrested on August 2, 2001, and was not indicted for the murder until November 6, 2003. (Vol.I, R22-28) The motion was heard on February 11 and 12, 2004, and denied. (Vol.I, R74-76)

England filed a motion to suppress the statements of inmates: inmate Diehl because he signed a contract with Appellant not to divulge information, and inmates Seals and Garcia because they were allegedly working as state agents. (Vol.II, R265-266) Before the hearing, the defense limited the motion to the testimony of Diehl since the State did not intend to call Seals and Garcia as witnesses. (Vol.III, R396; Vol.V, R960-61) The motion was denied. (Vol.III, R396-397)

England moved to exclude autopsy photos. (Vol.II, R289-290) He filed a Notice of Alibi, listing two witnesses and claiming he had been at Molly Brown's

[1] Cites to the record and hearings will be by volume number, followed by "R." Cites to the trial transcript will be by volume number, followed by "TT." Cites to the supplemental record will be "SR."

and Razzles (nightclubs), then to an after-hours party at one of the witness' house. (Vol.III, R385-386)

At the status conference on April 16, 2004, Appellant refused to waive speedy trial in spite of the fact defense counsel stated he needed more time to prepare. (Vol.IV, R657-681) Trial was set for May 10, 2004.

The case was tried by jury from May 10 to May 24, 2004. After jury selection, the court heard pre-trial motions. (Vol.V, R688-868) The first motion was a motion to dismiss the charges because Michael Jackson, the co-defendant recanted his testimony. (Vol.II, R285; Vol.V, R691-708) The motion was based on a deposition conducted May 7, 2004, which was inconsistent with Jackson's four prior statements. (Vol.V, R697, 707) The motion was denied.

The second motion was Appellant's motion to admit reverse *Williams* Rule evidence. (Vol.V, R708-759, 770-804) Appellant filed a Notice of Evidence of Other Crimes, Wrongs or Acts involving co-defendant Michael Jackson, i.e., "reverse *Williams* Rule" evidence. (Vol.II, R304-307) The motion alleged that Jackson committed a similar crime at age seventeen (17) when he attempted to murder a man with whom he lived, similar to the situation with Howard Wetherell, the victim in the present case. Jackson had also solicited another person to help him kill Wetherell. Appellant requested the court take judicial notice of the police reports and files in Jackson's prior cases. (Vol.III, R391) The motion was granted

with conditions.(Vol.III, R404-405) However, after the State proffered evidence of the *Williams* rule evidence against England, the parties stipulated that neither party would present *Williams* Rule/reverse *Williams* rule evidence. (Vol.X, TT1379)

The motions to declare the death penalty statute unconstitutional were denied. (Vol.V, R762-769; Vol. VI, TT26)

The motion to suppress statements was heard next. (Vol.V, R805-882) England moved to suppress statements arguing that when he was arrested on August 2, 2001, on a VOP warrant, he was implicitly arrested on the murder charge for which he was under investigation. England alleged that the VOP arrest was a "subterfuge" to take him into custody without the benefit of an attorney or first appearance. Furthermore, even though England had an attorney on the VOP charge who was negotiating with the State Attorney investigator and offering England's assistance on the murder charge, and even though that attorney allowed the State to interview England, the *Miranda* rights were not complete. (Vol.II, R299-303) The motion was granted in part and denied in part. (Vol.III, R398-399).

Before the testimony of Reinaldo DeLeon, Appellant moved *in limine* to preclude England's statement to DeLeon that "I killed the victim like I killed the last time," that Appellant and DeLeon were in State prison together, and that England would kill Jackson if Jackson told on him. (Vol.VIII, TT799) The motion

was granted. (Vol.VIII, TT 801) The prosecutor advised DeLeon of the rulings. (Vol.VIII, TT802) The trial judge later reversed the ruling regarding England's statement that he would kill Jackson if he told on him. (Vol.VIII, TT822)

At one point in the trial, defense counsel indicated he had a difference of opinion with England. Counsel had received a letter from an unnamed inmate at the jail offering to refute the testimony of Diehl and Garcia. (Vol.IX, TT1063) Defense counsel did not want to call the witness, but England wanted the witness to be called. (Vol.IX, TT1064) England also wanted to call inmate Seals as a witness. Seals was listed as a State witness. (Vol.IX, TT1065) The trial judge offered his opinion that the decisions were up to the defendant, but advised England that he had "good counsel who is trying to do a good job for you." (Vol.IX, TT1069) After counsel discussed the issue with England, England agreed that Seals would not be called. The unnamed inmate witness would be announced the next day if the defense decided to call him. (Vol.IX, TT1074)

During the trial, Appellant moved for a confidential handwriting expert. (Vol.IX, TT1106-07) The motion was granted. (Vol.IX, TT1109)

After the State rested, Appellant moved for judgment of acquittal. (Vol.X, TT1381-1384) The motion was denied. (Vol.X, TT1388) The motion was renewed at the close of the defense case. Appellant personally stated he did not choose to testify. (Vol.X, TT1503) The motion for judgment of acquittal was renewed at the

close of all the evidence. (Vol.X, TT1604) The motion was denied. (Vol.X, TT 1605)

During the 100-page cross-examination of Jackson, the following exchange occurred:

> Q: Do you remember telling your brother Sam that as you were riding in the car up to Walton County?
>
> A: I told him what I did. He—he told them his own version to try to help me out I'm sure.
>
> Q: So now among law enforcement – the law enforcement is playing a game or lying against you and now your brother is included in this; is that what you're saying here?
>
> A: I'm saying that he lied to try to help me out, yeah.
>
> Q: And do you remember telling your brother that?
>
> A: Put it off on Rich. He's already got a murder charge. You'll get off easy.
>
> Q: So I want to make this clear. I want to make this absolutely clear. Are you saying that you did not tell your brother Sam, the one that you went running to, the one that you confided in, that you and Rich beat Mr. Wetherell to death?
>
> A: No.

(Vol.X, TT1453)

During the testimony of Oliver VanValkenburg, the witness testified that he had been shown photos by law enforcement approximately three weeks to one month before trial. (Vol.X, TT1551). Defense counsel objected and requested a

Richardson hearing. (Vol.X, TT 1551) Oliver testified that he had seen five to six photos and picked out Jackson and England. (Vol.X, TT 1554) Oliver had already said he would have no problem identifying the two men at the party. The reason for showing him the photos was to identify which man took the necklace. (Vol.X, TT1555) The court found the non-disclosure inadvertent and non-prejudicial. (Vol.X, TT1560) The defense then presented information that a complaint had been filed against Oliver in 2003, but the case was closed the same day. (Vol.X, TT1561-1568). The trial judge ruled the complaint was inadmissible. (Vol.X, TT1568)

After closing argument but before jury instructions, defense counsel indicated that Tom Anderson, a defense witness for the penalty phase, called over the weekend that alternate Juror Brown said "he's guilty" to another juror. If Brown was going to sit on the jury, defense counsel said he "may have" an objection. (Vol.XI, TT 1776-77)

The jury returned verdicts of guilty of First Degree Premeditated Murder and Felony Murder, and Robbery with a Deadly Weapon. (Vol.III, R 410; Vol. XI, TT1807) Before the penalty phase, the trial judge indicated that the defense had moved to remove Juror Brown as an alternate and move Juror Butts into the first alternate position. The State had no objection. (Vol. XII, TT1818) England personally asked the court for a mistrial. (Vol. XII, TT1819) The trial judge stated

that defense counsel had suggested the compromise he outlined, and they should talk it over. (Vol. XII, TT 1819-20) England stated he wanted a mistrial because Juror Brown made the statement to Juror #8. (Vol. XII, TT1819, 1820) Defense counsel repeated the motion for mistrial. (Vol. XII, TT1821) The State objected because the motion was untimely. (Vol. XII, TT1823) In the meantime, Juror DeFeo was sick and in the hospital, so one of the alternates needed to move into her slot. (Vol. XII, TT1821)

The trial judge asked for testimony. Tom Anderson testified that he worked with England and was a mitigation witness. (Vol. XII, TT1830) He sat in the courtroom during the trial. (Vol.XII, TT1831) He was "almost 99 percent sure" he heard a juror tell another juror "He's guilty." (Vol.XII, TT 1832) Anderson was about 15 feet from the jurors. He had some doubt that he heard correctly. He told his wife "I'm not really sure if I heard it or not." (Vol.XII, TT1834) He was "almost certain" he heard something. (Vol.XII, TT 1835) He did not know what "He's guilty" referred to. (Vol.XII, TT1837)

Juror Brown testified she did not talk about the case to another juror and did not say "He's guilty."(Vol.XII, TT1846, 1848) Juror #8, Ms. Dixon, testified that Juror Brown did not say anything about Appellant being guilty. (Vol.XII, TT1851) The trial judge found there was no juror misconduct and denied the motion for mistrial. He also stated he was not going to remove Juror Brown. (Vol.XII,

TT1851) Alternate Juror Brown took the place of the sick juror, Ms. DeFeo. At the suggestion of defense counsel, Alternate Juror Butts took the place of Ms. Klink who had continuously informed the court of childcare problems and whose child was currently in the court administrator's office. (Vol.XII, TT1854) After the replacements, there were no alternate jurors. (Vol.XII, TT1852)

The penalty phase took place May 27, 2004. The jury returned an advisory sentence of eight (8) to four (4) recommending death. (Vol.III, R415) After the penalty phase, defense counsel requested the assistance of a mental health expert. (Vol.III, R417-418) Dr. Jeffrey Danziger was appointed. (Vol.III, R444) His evaluation was sealed and filed. (Vol.III, R488)

The *Spencer* hearing was held July 9 and July 16, 2004. Appellant was sentenced to death on July 23, 2004, for the murder at which time the trial judge filed the following findings of fact supporting the sentence. (Vol.III, R481, 461-469)

II. AGGRAVATING FACTORS:

The Court finds the following aggravating factors exist beyond a reasonable doubt:

1. Florida Statute 921.141(5)(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.

This aggravator was clearly established through the testimony of

Defendant's probation officer and State Exhibit "63". While it is a factor to be considered it is neither a heavy or great factor, nor a light or minor factor, but rather a medium factor.

2. Florida Statute 921.141 (5)(b): The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

This aggravator was definitely established. A judgment for second degree murder was introduced (State Exhibit "62"). The jury also heard details of the 1987 murder through the testimony of the Defendant's then co-defendant, Johnny Towner. This 1987 murder was strikingly similar to the present murder.[2] In short it involved the Defendant, in a situation involving homosexual overtones, beating a much older male to death with a metal object, i.e., motorcycle exhaust pipe. This beating was brutal (see State Exhibit "61"). This aggravator must be given great weight.

3. Florida Statute 921 141 (5)(d): The capital felony was committed while the defendant was engaged or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing or discharging of a destructive device or bomb.

Robbery was discussed by Co-Defendant and Defendant prior to the murder and was a motive for this murder. The Defendant and Co-Defendant took many items from Mr. Wetherall's condo (see State

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[2] Both England and Co-Defendant Jackson were perpetrators of prior violent acts. This gave rise to the State attempting to introduce the Ryland murder in its case in chief as Williams Rule evidence and the defense attempting to admit Jackson's prior act as reverse Williams Rule. This Court ruled the defense reverse Williams Rule would be admissible and was about to rule on the State motion when the parties informed the Court they reached an agreement that evidence of neither prior violent incident would be introduced at the guilt/innocence phase. (footnote in trial court order)

Exhibits "33-37"), and tried to fence them in Orlando through a former cell mate of Defendant's. In fact, Defendant at trial actually admitted to fencing these items. This aggravator is entitled to consideration and is afforded medium weight.

4. Florida Statute 921.141(52(h) ("HAC"): The capital felony was especially heinous, atrocious, and cruel.

This Court specifically finds that England fully participated in this actual beating (see State Exhibits "57 - 59"). It was a particularly brutal beating. Blood was everywhere (see particularly State Exhibits "23-30"). There was evidence Mr. Wetherall begged for his life, but was told to shut up. He moved around the bedroom while fending off blows. He experienced pain before losing consciousness. He was hit so hard in the head with the fire poker that his spine fractured. This was an exceptionally violent and brutal death. This aggravator must be given great weight.

5. Florida Statute 921.141(7): Victim impact evidence.

The Court did receive impact evidence. The Court however did not consider it as an aggravating factor, and did not use this evidence in the weighing process.

III. MITIGATING FACTORS:

The Court finds no statutory mitigating factors to have been reasonably established by the evidence. The Court however will address all the statutory mitigating factors. The Court did find several non-statutory mitigators and will discuss then.

1. Florida Statute 921.141(6)(a): The defendant has no significant history of prior criminal activity.

This factor was not established. To the contrary Defendant murdered Mr. Ryland in 1987.

2. Florida Statute 921.141(6)(b): The capital felony was committed while the defendant was under the influence of extreme mental or

emotional disturbance.

Defendant denied committing the murder. There was some evidence of drug and alcohol consumption by the Defendant prior to the murder, but not enough to establish this mitigator.

3. Florida Statute 921.141(6)(c)_: The victim was a participant in the defendant's conduct or consented to tire act.

This mitigator was not established.

4. Florida Statute 921.141(6)(d): The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

There was much conflicting evidence presented on this issue. At the sentencing phase the Defendant took the stand and protested he did not participate in the murder, only the fencing of the stolen goods. Yet, there was substantial evidence he fully participated in the murder, including actually beating Wetherall with the poker. This Court specifically finds the Defendant was a full and actual participant in the murder, and together with Jackson actually beat Wetherall.

At the July 16, 2004 continuation of the Spencer Hearing the defense argued that the testimony of Brian Merrill should be considered as evidence that Defendant was not a full participant in the murder.[3] Likewise the defense argued the Court should consider the Co-Defendant's horrible beating of Frank Beamon as evidence indicating Defendant was not a full participant in the Wetherall murder. The Court rejects both arguments.

5. Florida Statute 921.141(6)(e): The defendant acted under extreme duress or under the substantial domination of another person.

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[3] See testimony of Diehl, DeLeon, and earlier statement of Jackson. (footnote in trial court order).

This mitigator was not argued or established.

6. Florida Statute 921.141(6)(f): The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

There was no mental health issue raised. There was some evidence of drug and alcohol use on the night/morning of the murder, but not enough to establish this factor. Additionally, Defendant's sister mentioned too much alcohol use, but the Court will address this under non-statutory mitigators.

7. **Florida Statute 921.141(6)(E): The age of the defendant at the time of the crime.**

The Defendant was 29 at the time of the crime. His sister testified Defendant was stuck at age 16 behavior wise. Additionally, defense counsel at the July 16, 2004 Spencer Hearing argued the Court should consider Defendant's disruptive trial behavior as evidence of emotional arrestment, and it should be used to support age as a mitigator.

This Court disagrees with both the above arguments. First, the testimony of Tom Anderson, Shane Connor, and Karen Duggins shows that after Defendant got out of prison for the first murder he behaved well. He was a good worker, dependable, socially appropriate, helped other people, a role model, etc.

As to Defendant's disruptive behavior, the Court finds it was intentional and calculated. After the Defendant was finally gagged by the Court he told the deputy assigned to him he finally succeeded in provoking the Court to gag him, and words to the effect it would help get a new trial.

This Court has carefully considered this mitigator and concludes Defendant's age of 29 was not a factor in this case, either in mitigation or otherwise.

8. Florida Statute 921.141(6)(h): The existence of any other factors in the defendant's background that would mitigate against imposing the death penalty.

Evidence was presented to reasonably establish the following nonstatutory mitigating factors:

a. Disparate treatment of Co-Defendant Jackson.

The State allowed Jackson to plea to second degree murder and other charges that could result in sentence up to life in prison, but not death. The State would make recommendation at sentencing based on his assistance (see Defense Exhibit "6"). As this Court has found both England and Jackson equally culpable of the murder, a death sentence for England would be disparate. However, the Florida Supreme Court held in the case of *Kight v State*, 784 So. 2d 396 (Fla. 2001) that it is not disparate sentencing where a co-defendant pleas to a lesser offense in exchange for his assistance to the State. So, legally it is not disparate.

Even from an equitable standpoint any disparity should not be a factor in mitigation. At England's trial Jackson repudiated many of his prior admissions/statement and tried to exculpate his friend. He said England did not participate. England testified the same. The jury and this Court reject this testimony. England and Jackson chose this risky course and the fact that it results in one having a death sentence and the other not, should not be a mitigating factor.

b. Other Mitigators.

1. Testimony of Tom Anderson, tile contractor:

Defendant was a good worker; learned fast; hard worker; good personality; friendly; outgoing; trustworthy on job; trustworthy with Anderson's family; no violence or anger; clean cut; healthy; did not smoke or drink; good friend; good at tiling; life worth saving.

2. Testimony of Shane Connor, street metal sub-contractor:

Defendant was a good learner; good worker; dependable; trustworthy; professional; desired to learn; did not steal from wallet he left behind; socially appropriate; cheerful; no trouble; observed to be appropriate while with Duggins; helped other people if he could; life worth saving.

3. <u>Family life as told by sister to Jake Ross, P.I.:</u>

Never met father; father abandoned family; mother married Ronnie England; England in the service; much moving; England abusive to wife and children; England an alcoholic; England eventually run out of service; mother leaves and eventually goes to Texas; divorce; England gets kids; England sends sister and brother to mother but keeps Defendant (Defendant wanted to be with siblings); at age 11 Defendant learns from mother who real father was; mother marries third husband; Defendant and mother do not have a good relationship; Defendant starts getting into trouble at age 13; England very controlling; England's abuse physical as well a mental; England would come home drunk and scream at and assault children; Defendant was a good student; Defendant's brother recently died of a heart attack. Defendant was a good brother.

4. **<u>Testimony of Karen Duggins, girlfriend:</u>**

Defendant helped her escape from an abusive relationship; he got along well with her two children; was a role model for her daughter; he was never abusive; was warm, caring, made her feel good; he was compassionate; her dog Peanuts liked him; he worked every day; he contributed to household expenses; Defendant got along well with friends and co-workers; he loved and respected his sister and mother; he was devastated when his brother died; she trusts him; he would never hurt anyone; he helped her return her daughter to Kentucky; he would be a positive influence in prison; Defendant talked to inmates about The Lord. Defendant is religious.

5. <u>Testimony of Richard England, Defendant:</u>

He took advantage of programs during last imprisonment; studied religion; received his high school diploma in 1991; got a two

year degree in mechanical drafting; ran box factory in prison; tutored other inmates; was a training officer; learned to operate computer; started own tile company upon release; drank too much.

6. <u>Spencer Hearing:</u>

The defense called three witnesses to testify at the July 9, 2004 Spencer Hearing. They also presented some documentary evidence as did the State.

a. **Allison England:** Sister of the Defendant testified by phone from Texas. Her testimony had previously been presented to the jury at the sentencing hearing, through defense investigator Jake Ross. Much of the testimony was the same as presented by Ross. She testified:

1. Family was split up when Defendant was 12 or 13;
2. Family lived in many states;
3. Ronnie England, Defendant's adoptive father, was a bad alcoholic: a. he had Viet Nam flashbacks; b. it was dangerous to wake him - could be violent; c. was very strict with the boys; d. punished the boys with beatings; e. punished the boys military style; f. made the boys do push-ups, running; g. children were caught eating cookies - when wakened he made them sit at table filled with junk food and eat until they were sick.
4. The Defendant was still respectful to Ronnie England.
5. The Defendant is a good person, is cheerful, smiling, and helps others;
6. Ronnie England abused the Defendant;
7. The split of the children's' custody was against their will and father did it intentionally;
8. She loves her brother; life cheated them out of a relationship;
9. She wishes her three children could know him;
10. Their mother gave more attention to children than father did;
11. Defendant could help other prisoners if given a life sentence;
12. Their mother is distressed about current situation and blames herself;

13. Richard is a wonderful brother;
14. He was well behaved;
15. He was willing to help with anything;
16. He sent his mother art work;
17. He is artistic;
18. He is good with his hands;
19. Defendant, now 32, but maturity frozen in time, never had a chance to grow up; he went to penal institutions early.

b. Inez Fyffe: Defendant's mother testified from Texas by phone.

1. English is her second language (she was difficult to understand);
2. Barry, her younger son, died of a heart attack last year;
3. She calls Defendant "Willie";
4. She met Ronnie England when Defendant was eight months old;
5. Defendant's biological father, Richard Williams, abandoned them while she was pregnant;
6. Ronnie England adopted Defendant;
7. Ronnie England had an alcohol problem;
8. Ronnie England had many drinking/driving offenses;
9. They lived in Panama then moved to Kentucky;
10. Ronnie England mistreated the kids:

a. slapped them;
b. threw them into a wall;
c. wanted them to be perfect;
d. son Barry was taken to a psychiatrist because of mistreatment;
e. thinks Defendant needed psychiatric treatment after he lived with Ronnie England;
f. Ronnie England discharged from the Army for too many DUl's and lost his military benefits;
g. Ronnie England threatened to kill her with a gun;
h. Ronnie England won custody of all three children in their divorce. He let her have custody of Allison and Barry, but kept custody of Defendant to hurt her. This severed communication

between she and Defendant;

i. Ronnie England brainwashed Defendant against her. She thinks things would have been different if she had custody of "Willie."

j. She and Defendant's relationship is better now;

k. Defendant could help other inmates;

1. Defendant is a good son and good with his sister, Allison.

c. Brian Merrill: Mr. Merrill is presently an inmate at the Volusia County Jail. State witness Diehl tried to get him to snitch on Defendant in exchange for a plea deal. Diehl said he would lie against Defendant.

1. Merrill was impeached by the State;

2. He is a good friend of Defendant's;

3. He has seven prior felony convictions;

4. He was found guilty of carjacking last month and faces a lengthy PRR sentence;

5. Mental health evaluations of Merrill show he is troubled, possibly malingering.[4]

7. <u>Discussion of Mitigators:</u>

The Court found no statutory mitigators to be established. On the other hand, the Court finds the non-statutory mitigators to be strong, and entitled to substantial weight. The defense, despite not being allowed enough time by the Defendant[5] to fully develop the sentencing phase, was able to portray the Defendant's other side. In stark contrast to being a brutal killer, they showed him to be intelligent, a quick learner, a hard worker. He is personable, trustworthy, a leader, a good friend, and capable of a loving relationship. He is all these things despite a terrible childhood full of abuse, uncertainty, and abandonment. This Court keeps coining back

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[4] The questioning of this witness veered off into whether the defense should have called Mr. Merrill at trial, and specifically why they did not. The Court feels this was not a proper mitigation witness. The only possible mitigating factor presented was possible "lingering doubt," and this Court rejects that. (footnote in trial court order)

[5] Defendant refused to waive speedy trial despite counsel urging him to give them enough time to develop his case. (footnote in trial court order)

to the testimony of Defendant's mother, Inez Fyffe. Her abusive and alcoholic husband, just to spite and hurt her, kept his one non-biological child and let her take the other two children. The Defendant was torn from his siblings and raised by this abusive man. One cannot help but wonder what would have happened if the Defendant had a normal childhood. If the Defendant had a decent childhood this opinion may not have been necessary. The Court believes these mitigators, at least in part, explain the four jury votes for life. The Court gives these non-statutory mitigators great weight.

IV. DISCUSSION

The Court finds four aggravators have been established beyond a reasonable doubt. No statutory mitigators have been established, but non-statutory mitigators have been reasonably established.

The exceptional strong aggravators of a prior violent felony conviction and the heinous, atrocious, and cruel murder of Howard Wetherall clearly outweigh the substantial mitigation put on by the defense. While this Court is impressed by Defendant's potential as a person, one cannot ignore the horrible, brutal, bone crushing beating of Mr. Wetherall by the Defendant. Additionally, one of the stunning factors of this case is that the Defendant previously committed another murder that is uncannily similar to this murder. Finally, this murder was committed while Defendant was still on probation for the former murder.

V. CONCLUSION:

The jury's eight to four recommendation for the death penalty is supported by the evidence. The death sentence is clearly appropriate for Count I.

(Vol.III, R461-469) Appellant was sentenced to life imprisonment on the robbery.

(Vol.III, R474) This appeal follows.

STATEMENT OF THE FACTS

Saul Feldman and some other neighbors at the East Bank Condominiums became concerned about Howard Wetherell around July 1, 2001. As secretary of the condo association, Feldman had keys to all the condos, so he and the neighbors went inside Mr. Wetherell's unit. Feldman saw that the "place was in very bad shape." He smelled an unusual odor. (Vol.VII, TT599) He went upstairs, but the master bedroom door was locked. Mr. Wetherell's green Mercury Sable was not in the garage. (Vol.VII, TT601, 602) Feldman thought Mr. Wetherell may have gone on a trip, but called the police the next day after urging from Bob Gregory. (Vol.VII, TT602)

Officer Cruz responded to the call. He noticed piles of newspapers in front of the door and flies in the apartment. (Vol.VII, TT604) The newspapers were dated June 26-July 1, 2001. (Vol.VII, TT615) When Cruz could not enter the bedrooms, he called the fire department, and the doors were forced opened. (Vol.VII, TT605-606) There was blood all over the carpet and bed, and Mr. Wetherell was deceased in the bathtub. (Vol.VII, TT606)

FDLE crime lab technicians arrived to process the scene. There was a white powdery substance on the bloody floor and furniture. (Vol.VII, TT 616-617) The white powder was sprayed everywhere, covering up or destroying anything under the powder. (Vol.VII, TT648) There was only one fingerprint suitable for testing

in the entire condo. (Vol.VII, TT647) It is not unusual to find no identifiable prints at a crime scene. (Vol.VII, TT650) A photograph of Mr. Wetherell and some friends had the words "Pervert, f--k with us" written across the face with an arrow pointing to the victim. (Vol.VII, TT655-56; State Exhibit 18) Don Quinn, handwriting expert, examined the handwriting on the picture and compared it to exemplars from England and Jackson. (Vol.IX, TT1195-1205) In Quinn's opinion, Jackson did not author any of the text, but England "very probably" did write the text. (Vol.IX, TT1207-1208)

Near the fireplace was a set of tools with the poker missing. (Vol.VII, TT657, 664) The blood spatter pattern in the master bedroom indicated the victim was beaten in several different locations of the room. Some of the impact occurred on or near the floor. (Vol.VII, TT 678) A telephone call from Mr. Wetherell's residence was made at 9:40 p.m. on July 25, 2001, to Karen Duggins. (Vol.VII, TT716, Vol.VIII TT759) There were also calls at 4:25, 4:26 and 5:01 a.m. on July 26, 2001, to Ivy and David Evans. (Vol.VII, TT717, Vol.VIII TT782) Ivy Evans testified that she heard Appellant asking for David on the answering machine. (Vol.VIII, TT 791) David had known England since 1987; Ivy, since England was a teenager. (Vol.VIII, TT780, 786)

Linda Hamilton lived next door to Mr. Wetherell. She remembered that a young man stayed with him and identified Michael Jackson. (Vol.VII, TT596;

State Exhibit 1) The photo had been developed from a camera found in Mr. Wetherell's house. (Vol.VII, TT655)

Karen Duggins, Appellant's girlfriend, was in custody at the time of trial due to a child support obligation from Kentucky. (Vol.VIII, TT754-55) She met Michael Jackson through Appellant. (Vol.VIII, TT756) One time Duggins dropped Jackson off at some condos on Halifax Drive. Jackson said he was living with his uncle. (Vol.VIII, TT757) On June 25, she went to the condo to return Jackson's CD's. Jackson had called her at 9:40 p.m., and she drove over shortly thereafter. (Vol.VIII, TT759) Duggins met Jackson outside the condo near the pool. While she was there, Appellant rode up on a bicycle. (Vol.VIII, TT762) Duggins left with her 8-year-old daughter. The next time she saw England was the night of June 26 when he came and slept on her floor. (Vol.VIII, TT763-64) Appellant, Duggins, and Duggins' daughter drove to Kentucky on June 30. On the way, they went to see a Hispanic male in Orlando named "DeLeon." England talked to DeLeon in Spanish. (Vol.VIII, TT768) In September, 2001, Appellant was in jail on unrelated charges and asked Duggins to call DeLeon. Appellant asked her to tell DeLeon "if he had anything at his house that wasn't his he needed to get rid of it." (Vol.VIII, TT771)

Shon McGuire, State Attorney investigator, first interviewed Jackson on July 2, 2001, in Walton County after Jackson was arrested. (Vol.VIII, TT952-953) He

returned to Walton County July 6 to speak to Samuel Jackson, Michael Jackson's brother. (Vol.VIII, TT955) McGuire spoke to Michael Jackson on July 16. (Vol.VIII, TT963) He spoke to England when he was arrested August 2. (Vol.VIII, TT964) England said he did not know Mr. Wetherell or Jackson. (Vol.VIII, TT965)

McGuire conducted a taped interview with England on October 16. (Vol.VIII, TT973) England said that on June 25, he had been with his wife, Sarah Dullard buying a car, and went over to Mr. Wetherell's condo later in the evening. (Vol.VIII, TT 984) England and Jackson were having drinks downstairs when Jackson went upstairs and came down with a bag full of bloody rags and a rod. Jackson insinuated he did something to his "uncle," which is how they referred to Mr. Wetherell. England said he went outside to smoke a cigarette. They then took a box of small vodka bottles to Molly Brown's to sell. (Vol.VIII, TT985) England said he had only been inside Wetherell's condo this one time. (Vol.VIII, TT986) He denied any knowledge of DeLeon or stolen property. He did admit he and his wife drove Jackson to Titusville. (Vol.VIII, TT987) The taped interview was played for the jury. (Vol.VIII, TT993-1029; State Exhibit 38)

After the taped interview, on October 16, England had asked his attorney and Detective. Session to leave the room because he wanted to talk to McGuire alone. England then said he saw where Jackson hid the murder weapon and would

help recover it. (Vol.VIII, TT1031) England wanted to make a deal with the State and would testify against Jackson. (Vol.VIII, TT 1032)

McGuire received word that England wanted to talk to him, and conducted another interview on December 18, 2001. (Vol.VIII, TT1035) The interview was not taped at England's request. England was very eager to talk and wanted to make some changes to the story he told. (Vol.VIII, TT1036) England admitted going to Orlando with Jackson to take stolen property to DeLeon. (Vol.VIII, TT1038, 1041) Then Jackson threw away the bag of bloody clothes and rags in the Burger King parking lot on Nova Road. (Vol.VIII, TT1047)

England also told McGuire that he drove Mr. Wetherell's green Mercury Sable to Orlando to see DeLeon and they dropped off a TV, VCR, and cordless phone with Nicole Powers.[6] (Vol.VIII, TT942, 944, 1041; Vol.IX, TT1074) McGuire told Appellant his DNA was on a cigarette butt found in Mr. Wetherell's condo. (Vol.IX, TT1075) England offered no explanation as to how the cigarette came to be in the condo. McGuire told England he would be back on December 21 because he was getting a search warrant for blood to confirm the DNA test. (Vol.IX, TT1076)

When the blood was drawn on December 21, Appellant asked to speak to McGuire alone. (Vol.IX, TT 1077) The interview was not taped at England's

[6] Powers was never charged with a crime for receiving stolen property (Vol.VIII, TT946)

request. (Vol.VIII, TT975) England admitted that he had gone to Mr. Wetherell's condo on June 25 and had a drink or two with Jackson. Jackson then got a rod and went upstairs. England heard Mr. Wetherell screaming and yelling "Why are you hitting me?" (Vol.IX, TT1078) England said he did not go upstairs, that he never touched Mr. Wetherell, and that he went outside to smoke a cigarette. (Vol.IX, TT1079) When Jackson came downstairs, they gathered the liquor and took it to be sold at Molly Brown's, a topless bar. (Vol.IX, TT1080) The next day they went to Orlando to see DeLeon. (Vol.IX, TT1081) They drove back to Daytona Beach and parked the victim's car at the Wedgewood Apartments where Jackson's brother lives. England told Jackson to "Get away from me. Stay away from me." (Vol.IX, TT 1082) Dullard picked up Appellant five blocks from the Wedgewood Apartments. Nicole lived a half block from Wedgewood Apartments. (Vol.IX, TT 1089) The next time England saw Jackson, the latter was standing over England and Dullard's bed. They drove Jackson to Titusville. (Vol.IX, TT1083) During this interview England offered to help find the murder weapon if he could get some "consideration." (Vol.IX, TT1084)

The next contact with England was when McGuire received a collect call on February 11, 2002. (Vol.VIII, TT976; Vol. IX, TT1085) Appellant wanted to know why McGuire was talking to inmates at the jail. (Vol.IX, TT1085) McGuire asked England why there was a cigarette butt with his DNA upstairs in Jackson's

bedroom.[7] (Vol.IX, TT1088, 1102) England said he left the cigarette butt upstairs the day before the murder when he and Duggins were there. (Vol.IX, TT1087)

Sarah Dullard married Appellant in April, 2001. (Vol.VIII, TT882) Appellant only lived with her "off and on." (Vol.VIII, TT883) Dullard was aware Appellant stayed with his girlfriend, Karen Duggins. Dullard met Jackson through Appellant. (Vol.VIII, TT884) On June 25, 2001, Dullard and Appellant purchased a car, then she went to work at Oyster Pub. (Vol.VIII, TT885) She saw Appellant and Jackson around 1:00 a.m. on June 26 at Molly Brown's. (Vol.VIII, TT 888) Dullard did not see Appellant again until June 27 around 9:00 a.m. England wanted a ride from a gas station on Mason Avenue, so she went to get him and brought him home. (Vol.VIII, TT888-89) About a half hour after they arrived home, Jackson came into the bedroom. (Vol.VIII, TT890) England jumped up and asked "What the f—k are you doing in here?" (Vol.VIII, TT891) England and Jackson talked in another room for awhile, then England asked Dullard to drive them to Titusville where Jackson's brother lived. (Vol.VIII, TT892) They drove to Titusville, and Jackson got out at a gas station. (Vol.VIII, TT893)

Michael Jackson's brother, Samuel Jackson, was living in Walton County in Northwest Florida in June, 2001; however, toward the end of the month he was in

[7] FDLE analyst Pietre testified that England's DNA was on one cigarette butt from the condo and Jackson's was on another. (Vol.IX, TT1122-1123)

Titusville. (Vol.VIII, TT901) The day Michael was dropped off, Samuel went to pick him up at a gas station. (Vol.VIII, TT902) Samuel learned that Michael had participated in a murder. (Vol.VIII, TT903) A friend of Samuel's drove him and Michael to Daytona to pick up a car. (Vol.VIII, TT904) Another brother, Eddie, lived at the Wedgewood Apartments in Daytona Beach. There was a dark green Mercury Sable behind Eddie's apartments, and Michael and Samuel drove it back to Titusville. (Vol.VIII, TT 906) On the way, they stopped at a mall and purchased items using a credit card in the name of Howard Wetherell. (Vol.VIII, TT906) Items were bought for everyone in the group, but only Michael or Samuel would sign the card. (Vol.VIII, TT933) They also used the credit card in Titusville. (Vol.VIII, TT908, 968)

On June 27, the Jackson brothers went to Orlando to meet England at a club. England did not show. (Vol.VIII, TT934) The Jackson brothers traveled to Walton County, using the credit card on the trip. (Vol.VIII, TT910, 968) A day or two after they arrived in Walton County, Michael got into an accident with an ambulance while he was driving the Mercury. (Vol.VIII, TT912) Michael was arrested the next day. (Vol.VIII, TT 912) Samuel Jackson was never charged with any crime. (Vol.VIII, TT935)

Joey Meyers met Michael Jackson when Samuel Jackson called Meyers and asked him to take Michael to Daytona. Meyers took Jackson to an apartment

complex, where he picked up a car. Jackson then left the car at another apartment complex and got back into Meyers' car with a duffel bag. (Vol.VIII, TT937) They went to the mall and did some shopping with a credit card. (Vol.VIII, TT938) Meyers dropped the Jackson brothers at the apartment, and they drove the green car back to Titusville. (Vol.VIII, TT939)

DeLeon, 42, testified through a translator. (Vol.VIII, TT804) He was serving a 30-year sentence for drug trafficking, with 12 years suspended. DeLeon met Appellant in 1994 and had spoken to him on many occasions. (Vol.VIII, TT805) They speak to each other in Spanish. (Vol.VIII, TT806) England came to DeLeon's house one night with a young, blond male with Chinese tattoos on his neck. (Vol.VIII, TT809) They brought in some antique guns, jewelry, and silver. (Vol.VIII, TT810) Appellant said the items were stolen.

DeLeon sold some of the guns and jewelry. (Vol.VIII, TT811; State Exhibit 33 and 34) He gave England one-half ounce of cocaine a week later as payment for the stolen items. (Vol.VIII, TT812, 824-25) England told DeLeon that his friend hit a man and took some things, then went to get England. (Vol.VIII, TT825) When they went back to the house, the man was moving, so England "hit him on the floor with this stick that you move charcoal." (Vol.VIII, TT826) England stated that he, England, killed the man. (Vol.VIII, TT852) When England told him Michael Jackson was driving around in the car DeLeon said Jackson was going to

get caught. (Vol.VIII, TT828) England said that "If he got me in trouble I would kill him." Defense counsel objected. The objection was overruled. (Vol.VIII, TT829) England also said that he was going to use his girlfriend as an alibi. (Vol.VIII, TT830) DeLeon received a letter from Tampa which referred to him as "The P," a name only England used for him. (Vol.VIII, TT853) The letter, which was not in England's handwriting, asked DeLeon not to testify against England. The letter was in Spanish and signed "Orlando." (Vol.VIII, TT854) Defense counsel objected to this testimony. (Vol.VIII, TT855)

DeLeon was arrested for drug trafficking on September 25, 2001. That same day, England's girlfriend called him and told him to dispose of the property England had given him because England had been arrested and detectives were looking for the property. (Vol.VIII, TT832) DeLeon took the property to a hotel to hide it. (Vol.VIII, TT 832) The police recovered the items when DeLeon was arrested.[8] (Vol.VIII, TT833, 868; State Exhibit 33 and 34) DeLeon was facing life imprisonment on the drug charges, but he received an 18-year sentence because he agreed to testify in this case. (Vol.VIII, TT837, 860)

Steven Diehl met England in jail in mid-December. (Vol.IX, TT1130) Diehl was from Louisville, Kentucky, which was the hometown of England's girlfriend.

[8] Mr. Wetherell's son identified all the stolen property as belonging to his father (Vol.VIII, TT874)

(Vol.IX, TT1133) Diehl and England would talk several times a day. (Vol.IX, TT1134) At first, England said he was innocent and that Jackson committed the murder. As time went on, England started to trust Diehl and told him more. (Vol.IX, TT1136) Diehl would make notes when he returned to his cell. (Vol.IX, TT1137) England said that he bludgeoned a gentleman to death with a pipe and that "The old pervert deserved it." (Vol.IX, TT1138-39) England said the "old pervert" had been engaging in sexual relations with a young man. England could not stand "some old guy trying to – trying to f--k around with a young boy." (Vol.IX, TT1139) England and Jackson delivered stolen items to an acquaintance in Orlando, including a TV and dishes. (Vol.IX, TT 1140) The acquaintance was a drug dealer who was a friend of England's. (Vol.IX, TT 1142)

England inferred the murder was a "solo act." He regretted leaving behind a Rolex watch.[9] (Vol.IX, TT 1141) England also said he "f--cked up and left a cigarette butt at the house," but he would say that he had been partying at the house a few days prior. (Vol.IX, TT 1143) England said the case was all circumstantial and he could beat the charges. (Vol.IX, TT 1146) England was giving Bradley Collins commissary goods to testify that Jackson committed the murder but was trying to pin it on England. (Vol.IX, TTd1146-47) England was going to have someone write a letter in Spanish to the "drug dealer in Orlando" asking him not to

[9] A Rolex watch was found in the victim's pocket. (Vol.IX, TT1183)

testify. (Vol.IX, TT1148) At one point, England asked Diehl to sign an agreement that he could not testify against him. England had been "burned" in the past. (Vol.IX, TT 1149)

Diehl had previously worked for a business skip tracing, and England asked him to obtain background information on the prosecutor, McGuire, and defense counsel. (Vol.IX, TT1151) Diehl saved his notes, the contract, and the letter about background investigations. (Vol.IX, TT1151-52) Don Quinn, handwriting expert, testified that England "probably" executed the text of the contract, and that he absolutely did write the request for background information. (Vol.IX, TT1208, 1250) England wanted Diehl to contact his uncle, a mental health counselor at a prison in Kentucky, to get some "pointers" in his case so he could claim some type of mental instability as a defense. (Vol.IX, TT1155) Diehl had not read about the case in the newspaper, had seen no TV news, and had not talked to other inmates about the case. (Vol.IX, TT1138) Diehl did not receive any sort of deal in exchange for his testimony. (Vol.IX, TT1156)

Dr. Beaver, medical examiner, performed the autopsy on Mr. Wetherell on July 3, 2001. (Vol.IX, TT 1268) Mr. Wetherell was 6'1" tall and weighed 140 pounds. (Vol.IX, TT1268) The cause of death was blunt force trauma to the head and neck. (Vol.IX, TT1271) There were multiple lacerations over the scalp and ears, contusions and fractures of the hand bones, and two cervical spine fractures,

one of which severed the spinal cord and vertebral arteries. There was also blunt force trauma to the torso, specifically the abdomen. There was blunt force trauma to the hands and arms. (Vol.IX, TT 1272) It would take three to four minutes to suffocate if the cervical spine was fractured and the diaphragm muscles were paralyzed. Since the vertebral arteries were involved, that could shorten the time a bit. (Vol.IX, TT 1275) Mr. Wetherell would have been able to move around before the cervical fracture. The hand injuries would have been prior to the fracture because he would be paralyzed after the fracture. (Vol.IX, TT1276) The hand injuries were defensive injuries. (Vol.IX, TT1294) In Dr. Beaver's opinion, there were numerous blows to the head and torso prior to the cervical fracture. (Vol.IX, TT1297)

Jackson was called as a defense witness. He was 18 years old when Mr. Wetherell, his "sugar daddy and pimp" was murdered. (Vol.X, TT1392-93) Jackson lived with Mr. Wetherell for awhile and exchanged sexual favors for that privilege. Jackson had his own room upstairs which was separate from Mr. Wetherell's bedroom. (Vol.X, TT1393) Jackson stated that he killed Mr. Wetherell with a fire poker because he was a "pervert" and that England did not assist. Mr. Wetherell was attacked in his bed while asleep. (Vol.X, TT1395) Jackson gave prior statements implicating England because:

> [h]e didn't show up in Orlando and I was pissed off at him, and when I had got arrested, I thought it was an easy way out because I figured if I could give them somebody, they would let me go because I never been in the law before.

(Vol.X, TT1396) Jackson and England had smoked cigarettes the night before the murder in Jackson's bedroom and by the pool. (Vol. X, TT1397) England and Duggins were both at the condo on the night of the murder. (Vol. X, TT1403) England left the condo, and he and Jackson met later at Molly Brown's. (Vol. X, TT 1408) Jackson went into the Oyster Pub to talk to Sarah Duggins. (Vol. X, TT1409) He later saw England arguing with Duggins and went to Razzle's so he didn't have to "deal with that." Jackson met Oliver and went with him to Ray's Place, a homosexual bar. (Vol. X, TT1410) England did not go with Jackson to Oliver's. Jackson testified he was kicked out of Oliver's because he stole a gold chain. (Vol. X, TT 1412) Jackson got a ride back to Mr. Wetherell's condo and arrived around 3:00 a.m. He wanted to kill and rob Mr. Wetherell. He intended to rob the victim when he killed him. (Vol. X, TT1413)

Jackson got the fire poker and went upstairs. Mr. Wetherell was lying in bed asleep. When Jackson started beating him, Mr. Wetherell started "yelling, running across the room telling me to stop." (Vol.X, TT1414) Jackson kept beating the victim for five minutes. When he was dead, he dragged the body to the shower. (Vol. X, TT 1415) Jackson took his own clothes off, turned on the shower, and took

a shower with the body. (Vol.X, TT 1416) Jackson then went through the house wiping things down even though he lived there. (Vol. X, TT1419) He threw away his clothes and some pictures. He sprayed "fire hydrant stuff" all over. He went through the house looking for valuables which he put in the living room. Then he passed out. (Vol.X, TT 1421)

The next day, Jackson loaded Mr. Wetherell's car with the stolen items and drove to throw away blood-soaked clothing and the fire poker at a Burger King. (Vol.X, TT 1422-24) He then drove to England's house. Jackson told England earlier he was going to rob and kill Mr. Wetherell, and England told him not to do it. (Vol. X, TT 1424) Jackson and England went to Nicole's and gave her some things. They then drove to Orlando to meet with DeLeon on June 26. (Vol. X, TT 1425) They drove the car to the Wedgewood Apartments and left it there. England wanted to get away from Jackson at that point, and called his wife, Sarah, to come get him. (Vol. X, TT 1427) Jackson went back to Nicole's to get a ride, and she took him to England's house the morning of June 27. (Vol. X, TT 1428) Sarah and England drove Jackson to Titusville where he met his brother, Sammy. (Vol. X, TT 1429) England and Jackson were supposed to meet at a night club in Orlando on Friday, but England did not show. (Vol. X, TT 1430) Jackson and Samuel drove to Walton County, and Jackson told his brother about the murder. (Vol. X, TT 1431)

Jackson said he lied in all his prior statements. (Vol.X, TT 1432, 1434) Jackson previously said England "did everything." He said he and England were coming back from Molly Brown's and decided to "make some money, steal something and get some money." They were in Mr. Wetherell's condo going through cabinets when they heard something upstairs. England picked up the fire poker, went upstairs and started hitting Mr. Wetherell. (Vol.X, TT1433) England had stripped naked before he ran upstairs. (Vol.X, TT 1435) England told Jackson to "Quit being a bitch. F—king do this sh-t." Jackson vomited. (Vol.X, TT 1434) England hit Mr. Wetherell 13-15 times with the poker. (Vol.X, TT 1438) Mr. Wetherell was running around the room, hitting the wall, falling, pushing things out of the way. He couldn't see, he was getting hit. (Vol.X, TT1458) After they put Mr. Wetherell in the bathtub, England got in the shower and rinsed off because he was covered in blood. (Vol.X, TT1438) Then England took all the stolen goods to someone Jackson didn't even know. Jackson was hesitant, but England kept telling him to "just chill the f—k out." (Vol.X, TT1436) England, the older of the two, was spreading white powder around, saying it would take off the fingerprints. He had socks on his hands and was wiping everything down. (Vol.X, TT1444)

When confronted with statements Jackson made to his brother that he and England "beat the ever living sh-t out of him," and they "just beat him and beat him" and the guy started yelling and screaming and wouldn't shut up, so they beat

him until he was dead, Jackson said his brother was just trying to protect him by saying he made those statements. (Vol. X, TT1452)

Jackson also made prior statements that it was England who stole the gold chain at Oliver's. (Vol. X, TT1455)

At one point during his trial testimony, when asked about the details of the beating, Jackson answered "No, I didn't do nothing; I just was there." (Vol.X, TT1443) He later said "I did it all." (Vol.X, TT1445) Jackson stated in his deposition that he changed his story because the State was seeking the death penalty against England. He was upset when he learned that. (Vol. X, TT1447)

Jackson also stated in his previous deposition that England wrote the "pervert" language on the photo of Mr. Wetherell. (Vol. X, TT 1440) Jackson met England when he was 16 years old and they became best friends. Jackson considered England his mentor and role model. (Vol.X, TT1401)

At trial Jackson said he didn't know whether England hated homosexuals; however, in his statement of July 31, 2001, Jackson said England hated them because of "the way they can use people the way they want with – because they have money." (1402) Jackson testified England did not ride a bike to the condo and his prior statement to that effect was a lie. (Vol. X, TT1471) England wrote Jackson and told him to go to trial because he would win. (Vol. X, TT1474) Jackson testified he wrote "pervert" on Mr. Wetherell's photo. He did not

remember what else he wrote on the picture. Jackson had received the discovery in the case and had gone over it with his attorney. (Vol.X, TT1500)

In conclusion, Jackson made four prior statements he recanted at trial: to his brother in July, to investigators on July 31 and August 16, 2001, and to the prosecutor and defense attorney on September 7, 2003. (Vol.X, TT1464-65, 1513) England had come by Jackson's jail cell and made a motion as if he were being injected, indicating the State wanted to kill him by lethal injection. (Vol.X, TT1468) Jackson did not know David and Ivy Evans. (Vol.X, TT1477)

Jackson had been scheduled to go to trial September 8, 2003. (Vol.X, TT 1493) On Sunday, September 7, Jackson, his attorney, the prosecutor, and the investigator met at the jail. Jackson was offered a plea to second-degree murder, armed robbery, and credit card theft. He had given a taped statement and agreed to testify. The next day, Jackson pled to the charges and signed and swore to a document stating the State made no recommendation as to sentence and the sentence range included life in prison. (Vol.X, TT1494) Jackson testified he was trying to withdraw his plea. (Vol.X, TT1496)

The State called four witnesses in rebuttal: Detective Session, Oliver VanValkenburg, Don Quinn, and Samuel Jackson. Det. Session was present on September 7, 2003, when Jackson agreed to testify against England and gave a taped statement implicating England. (Vol.X, TT 1505-06) There were no

promises made by Jackson's attorney, the prosecutor, or anyone else about the sentence Jackson would receive. (Vol.X, TT1506) There was no mention of a "hypothetical" 15-year sentence. The only representation was that Jackson could receive up to a life sentence, and the judge would make the decision. Jackson said he agreed to cooperate because it was "the right thing to do." (Vol.X, TT1507, 1524) The first time Det. Session heard the name "Oliver" was Jackson's September 7, 2003, statement. Jackson said both he and England went to a party with Oliver. (Vol. X, TT1509) Det. Session located Oliver VanValkenburg. (Vol.X, TT1510)

Oliver testified that he met England and Michael, or "Mike" on June 26, 2001, at Ray's Place and they all went to a party in Ormond Beach. (Vol.X, TT1533, 1534, 1542) Oliver drove with Scott Burch, England, and Mike in the car. (Vol. X, TT1535) They were at the party about six hours. (Vol. X, TT1570) England asked to use the bathroom and was taking longer than usual. When Oliver went to investigate, he noticed a gold necklace missing. Oliver and a friend confronted England and made him take off his clothes. Appellant had the necklace in his sock. (Vol.X, TT1533) Oliver told England and Mike to leave or they would call the police. The two men went outside, but had no transportation. (Vol. X, TT 1536) One of Oliver's friends agreed to give them a ride. As they were leaving, England and Mike were yelling "faggots" "queers." (Vol.X, TT 1543)

Don Quinn, the handwriting expert, compared Defense Exhibit 5 to other known exemplars of Jackson, and concluded that Jackson did not write the words "pervert, f—k with us" on Mr. Wetherell's photo. (Vol.X, TT1574. 1588)

Jackson talked to his brother, Samuel, on the way to Walton County. Jackson said he and England took their clothes off and went in Mr. Wetherell's bedroom. England and Jackson started beating the victim in a "hellish" beating. Mr. Wetherell was screaming and hollering. (Vol. X, TT 1594) He was begging for his life. They told the victim to "shut the f—k up" and kept beating him until he died. (Vol. X, TT1595) Before Jackson entered the plea, Samuel was allowed to visit with him for two hours. (Vol. X, TT1597) Samuel told Jackson that he would testify against him if he was called to the stand. Samuel was going to tell the truth even if it meant implicating his brother. (Vol. X, TT 1600) Shortly after that, Jackson made the proffer which was the factual basis of his plea. (Vol. X, TT1601) Jackson never said anything about receiving a 15-year sentence. (Vol. X, TT1599)

Appellant being gagged. Early in the trial, Appellant started requesting that he be allowed to move around the courtroom and view exhibits. (Vol. VIII, TT744) England wanted to leave the table so he could be "just as much a part of this trial as anybody else." He wanted to see what the prosecutor was "presenting to my jury." Appellant complained that he was not able to examine any of the evidence that was "on the bags up here." (Vol. VIII, TT744) The trial judge indicated he had

"never had a defendant ask for that before." The trial judge said he would allow the evidence to be viewed, but he was concerned with security and "letting the jury know that you're in custody." (Vol.VIII, TT745-46) Defense counsel stated that this was against his advice, but Appellant could make his own decisions. (Vol.VIII, TT746) Appellant was cautioned not to talk when he was near the jury, to which he replied: "Well, if he's going to sit there and accuse me of something, I'm going—I'm going to say something." Defense counsel replied: "No, you're not. Excuse me." Appellant then complained that the prosecutor had said he wrote something that he didn't write. (Vol.VIII, TT747) The trial judge asked Appellant to calm down. (Vol.VIII, TT747)

When Appellant's girlfriend, Duggins, entered the courtroom, he said "Karen, I love you" loud enough for both the judge and clerk to hear. (Vol.VIII, TT777) England also waved his hand and smiled when the prosecutor asked Duggins to identify him. (Vol.VIII, TT778) The trial judge advised England he should not say anything to the witnesses and should talk to his attorneys before he made gestures. (Vol.VIII, TT 777-778)

During the testimony of Inv. McGuire on the third day of trial, England blurted out:

> THE DEFENDANT: Will you tell the Court where I was getting that information from, that I was being framed for murder?

MR. KEATING: Stop it. Your Honor, can we have a recess?

THE DEFENDANT: I was being framed for murder.

MR. KEATING: Stop it. Your Honor, can we have a recess, please.

THE COURT: Sit down. Folks, need you to step out.

THE DEFENDANT: Let them know where I was getting the information from.

(Jury out.)

(Vol.VIII, TT1048-49) The trial judge advised England:

> Mr. England, can't have it, doesn't work that way. Got to try and play by the rules here. You may not like what's said. I'm sure you won't on some matters, and some matters you'll like what was said, but you can't blurt out like that.

(Vol.VIII, TT1049) England said he was sorry. The trial judge warned England that "if you do that again, I'm going to gag you and put you in your seat. You cannot blurt out like that or I will gag you." (Vol.VIII, TT1049) The judge then recessed for lunch so there would be a "cooling down" period. (Vol.VIII, TT 1050)

Later that day during the testimony of Diehl, the trial judge "heard the defendant sneer, made that noise." The judge heard England say something to the jury, which a deputy indicated was "You should be ashamed of yourself." (Vol.IX, TT1162) The judge warned Appellant again that he had to stop interfering with the trial, and that he could hear him from the bench. Appellant interrupted the judge, stating:

> THE DEFENDANT: What am I supposed to do? He's lying on me. Your Honor. Goodness gracious, man. He's sitting there lying through his teeth. It's hard.

(Vol.IX, TT1162). The trial judge told England to talk to counsel and if there was another outburst he would gag him. The judge repeated:

> I don't want to do that, but I think I got to. He's actually interfering with the trial. He can't be doing that with witnesses on the stand and in front of the jury. It's wrong. It's not fair. I'll stop it. Sir, no more.

(Vol.IX, TT1162) The prosecutor also advised the judge that the victims' family members observed England mouth "you're f—cked" to the witness, but the prosecutor did not see it. To this, England replied: "He heard exactly what I said. He's a witness to me. He just—and he told you, sir." (Vol.IX, TT 1163)

During a proffer, Oliver identified England as the person who stole his gold chain. England blurted out "I don't believe that—" and was interrupted by the trial judge who informed him that "If that jury was there, I'd have you gagged. You just remember that." (Vol.X, TT1541)

During England's testimony in the penalty phase, he testified he did not know Mr. Wetherell and Jackson had "some kind of gay relationship like the state has painted this to be." When the prosecutor stood to object England blurted out:

> THE DEFENDANT: Give me a chance.
>
> MR. DAVIS: Your Honor, first of all, I'm going to have the same objection.
>
> BY MR. SANDERS:

Q. Let me see if I can get us on track.
A. Right. Get me back on track.

MR. DAVIS: That was my objection earlier. This is not the purpose of the penalty phase. We're not here re-litigating—

THE COURT: We are not going to re-litigate—

THE DEFENDANT: No, we're not..That's right.

BY MR. SANDERS:
Q. Let me ask the question.

(Vol.XII, TT2005-06) England then persevered in testifying that he and Jackson went to Molly Brown's, then separated. England did not return to Mr. Wetherell's condo until 4:00 a.m. to pick up his bicycle. He ran back into Jackson. He went inside the condo and made some phone calls. (Vol.XII, TT2006) Jackson had some things, such as silver, laid out in the living room. (Vol.XII, TT2006) Jackson was asking England for help disposing of the property. England called David Evans. Jackson heard a commotion going on upstairs. He went to the top of the stairs and he could see someone sitting down covering their head. The person was asking Jackson why he was doing this. England panicked and left. Jackson ran behind telling England not to leave. (Vol.XII, TT2007)

England left on his bike. His wife would not let him in the house, so he went to sleep on a sofa in the storage section of the house. He woke up around noon the next day. His wife was gone so he went over to Duggins' house.

(Vol. XII, TT2008) He took a shower and went back to his wife's house. The State objected to re-litigating the guilt phase. The objection was sustained. (Vol. XII, TT2009)

England testified that David Evans and England were in prison together. David dealt in stolen property, so England thought he could help Jackson get rid of property. The State objected. The trial judge advised defense counsel: "You know, I've sustained a number of objections about re-litigating it. Do not re-litigate it or I'm going to start stopping you." (Vol.XII, TT2011). To this, England stated:

> THE DEFENDANT: I don't have nothing against you.
>
> MR. SANDERS: Let me ask you some questions.
>
> THE DEFENDANT: I don't have nothing against anybody in here. I know you have a position.
>
> MR. SANDERS: There's not a question posed.
>
> THE DEFENDANT: The attorney's got a position. The judge has got a position. And I understand that.

(Vol.XII, TT2011). The prosecutor objected to the defendant speaking without a question being posed. The objection was sustained. The defendant continued:

> THE DEFENDANT: You've got a job to do.
>
> MR. DAVIS: Your Honor, same objection.
>
> THE DEFENDANT: You do an excellent job at what you do.

MR. DAVIS: Your Honor, same objection.

THE DEFENDANT: You're a professional. You want to take information. You can't make a wrong—(Judge raps gavel)

THE DEFENDANT: --a right out of a wrong.

THE COURT: Knock it off. Be responsive.

(Vol.XII, TT2011-12).

At this point, defense counsel requested to speak with the judge outside the presence of the jury. (Vol.XII, TT2012) The jury exited and the prosecutor objected that England was doing nothing more than protesting his innocence. The State moved *in limine* once again to preclude England from simply stating "he didn't do it." (Vol.XII, TT2012-13). To this England stated: "That's right. I didn't." During further discussion by counsel, England interrupted to state: "I didn't even know Howard Wetherell," and "Nothing about him." Defense counsel instructed England: "Don't talk, please." (Vol.XII, TT2013). Defense counsel argued that England should be allowed to testify about his version of events to explain he was a principal but not the perpetrator because "[u]nder the principal theory, he doesn't have to do it. He doesn't even have to be there, but they still could have convicted him of murder one." (Vol.XII, TT2014) The judge stated:

THE COURT: You know, first of all, he got convicted by this jury of premeditated murder. Secondly, the state's right. He's not talking about being an accomplice up there. He's shouting out he didn't do it.

MR. KEATING: No, sir. He didn't say that.
THE COURT: No, no, no. He's shouting out he didn't do it.

MR. KEATING: And doesn't have to –

THE COURT: He hasn't even come close.
MR. KEATING: -- even hit Mr. Wetherell to be convicted.

THE COURT: Okay, sorry. You're going to make a point. You're going to basically try and say that he had a minor role in this; is that correct?

MR. KEATING: That is our mitigation defense. That's what we intend to prove.

THE COURT: And if he wants to get up there and yell that he didn't do it, do you think I should let him do that after they found him guilty of premeditated murder?

MR. KEATING: He should explain the circumstances regarding the –

THE COURT: That's not what he did, though. He's yelling out, I didn't do it.

(Vol.XII, TT2015-2016)

During further discussion, England kept interrupting that "I'm already convicted, also. Why are you worried about it?" and "I'm trying to tell the truth here; that's all." The prosecutor expressed concern that England was blurting out testimony with the jury present. To this, England stated:

THE DEFENDANT: These poor folks over here think I'm a murderer; a killer. You've painted this picture like that. And I can't even explain it to them? I didn't even know their dad?

(Vol.XII, TT2018) The judge then instructed defense counsel to get to the point (Vol.XII, TT2019). When the jury returned, England started making nonreponsive answers as his attorney cautioned "Just answer my question." The State objected, the objection was sustained, but defense counsel continued asking questions about whether England wrote on the photo. Another objection was sustained. (Vol.XII, TT2020) Defense counsel was once again instructed not to re-litigate the guilt phase, after which England blurted out "That's the truth." (Vol.XII, TT2020-21)

England then testified to his version of events regarding his prior conviction for second-degree murder. (Vol.XII, TT2021-26) He identified his high school diploma which he obtained in prison, and family photos. (Vol.XII, TT2027-2031)

Just before the State's closing argument, England started talking to the judge in front of the jury. The trial judge instructed counsel to talk to England and instructed England to stop "blurting out." England continued:

> THE DEFENDANT: I wanted them to hear it. I would have testified on my behalf if I would have known that he was going to bring two other witnesses ... rebuttal witnesses after the fact. I thought both parties rested or else I would have went up there and got on that stand and told my side of the situation here. But you asked me beforehand and I went in and got into an agreement with you and I said yes, thinking that both parties had rested.
>
> Then he was allowed to bring two other witnesses in afterward, which lasted ... and then he had a three-hour ... three hours versus our one hour in the closing statement. I feel like I've been done an unjust here. I haven't even been able to really explain my side. He's painted this

> picture and this whole thing about me as a murderer and a killer and all and he doesn't even know me. He's –
>
> MR. DAVIS: Your Honor, I'm going to object to speeches in front of the jury at this point without any evidentiary structure to them at all.
>
> THE DEFENDANT: It's the truth.
>
> THE COURT: Okay. Look, you've got to be quiet. Let them proceed. If you're unwilling to do that, we're going to have to stop and we're going to have to hold a hearing outside the presence of the jury. Let him present ... go present his case.

(Vol.XII, TT2035-36) The prosecutor then began closing argument. England began to protest and the trial judge ordered "Stop." England proceeded:

> THE DEFENDANT: He doesn't know. He's sitting here talking about something he doesn't know.
>
> THE COURT: Folks, in there, please.
>
> THE DEFENDANT: What kind of system do we have?
>
> (Jury exits into jury room)
>
> THE BAILIFF: The jury is out of the courtroom, Your Honor.
>
> THE COURT: Thank you. For the record, he's blurting out again. He's demonstrative. He's ... now he's yelling. I can't control him. I've tried very hard to do that. I've warned him three or four times during this trial not to do it. And I've tried to resist taking any other action. I've begged him not to do it. I've basically threatened him.
>
> I've been almost remiss in my duty here. He's just blurting out. I can't control him. And I didn't want to do this, but I'm at the point that he needs to be gagged.
>
> Gag him.

Defense, do you want to say anything to me?

MR. KEATING: Please don't gag him.

THE COURT: Okay. Thank you. Gag him. Andy, make sure he can breathe. Then when he comes back, hands cuffed, but let him be able to communicate in writing with counsel.

(Defendant exits courtroom with deputies)

THE COURT: Okay. We're in recess.
(Proceedings in recess at 4:30 p.m.)
(Court in order at 4:38 p.m. Jury not present)

THE COURT: We're all here except for the jury. I need to put something else on the record. After the break, the defendant reported to a deputy that the outbursts were intentional. He did it on purpose to provoke the court into taking action against him. I have the deputy available. I can place him under oath if either one of you would like to talk to him and find out about that. The deputy's right there. If you want him under oath, you can do it. And, basically, the deputy would say that he staged it. Okay. Counsel, the deputy's available. Do you want to talk to him or not?

MR. KEATING: Your Honor, could we defer that until we finish closing argument. And then at that point in time, if you believe –

THE COURT: No. I need to make a record now.
MR. KEATING: Well, I have no intention of making any record, sir.

THE COURT: Okay. Thank you. We'll proceed. Let's go. Bring the jury back in. For the record, he is gagged and he is writing.
(Jury enters courtroom)

(Vol.XII, TT2043-2045)

Closing arguments concluded without incident. After the jury was instructed and retired, the trial judge told defense counsel that if England would assure the court there would be no further outbursts, the gag would be removed. (Vol. XII, TT2072) The tape was removed from Appellant's mouth. (Vol.XII, TT2073) The jury recommended a sentence of death by a vote of eight (8) to four (4). (Vol.XII, TT2074)

PENALTY PHASE

By stipulation, the State read the deposition of Johnny Towner into evidence. Towner met England at a halfway house in Volusia County in 1987. (Vol. XII, TT1876) On November 8, 1987, he and England left the halfway house and went to an adult bookstore where they met Mr. Ryland. Mr. Ryland offered them a place to stay. (Vol. XII, TT 1878) They went to a Yamaha motorcycle shop in New Smyrna Beach. Mr. Ryland's apartment was in the basement. (Vol.XII, TT1879) England said something about robbing Ryland. (Vol. XII, TT 1880). Towner took a shower and was in the bedroom in his underwear in the bedroom when Ryland came in and took his clothes off. (Vol.XII, TT1883) England was taking his shower at this point when England finished taking his shower, he walked into the bedroom wearing a towel and saw Ryland, England hit Ryland in the face with a motorcycle muffler. (Vol.XII, TT 1884) Ryland said he was going to kill England. (Vol.XII, TT1885) England kept hitting Ryland after he fell to the floor.

(Vol.XII, TT 1886) Towner and England left the victim, found the keys to the car, and stole Ryland's car. (Vol.XII, TT 1888) Ryland died. Towner pled to accessory to the murder and robbery. He received a sentence of seven years in prison followed by eight years probation. He and England discussed their theory of defense and agreed to say Ryland tried to rape Towner. (Vol.XII, TT1890)

The State introduced the judgment and sentence for England's conviction for second-degree murder. (Vol.XII, TT1921; State Exhibit#62) Irene Haig, England probation officer, testified that England was released from custody on March 11, 1997, and was on probation for the murder on June 25, 2001, the day Mr. Wetherell was murdered. (Vol.XII, TT1922)

Defense counsel wanted to introduce testimony regarding a prior violent felony of Michael Jackson (an attempted murder on Mr. Beamon). The State objected that the testimony was irrelevant, introduced only to show the bad character of Jackson, and was inadmissible because Jackson was never charged with any crime involving the incident; therefore, the evidence was prior uncharged misconduct. (Vol.XII, TT1942) Defense counsel argued that the evidence showed England was a minor participant in Mr. Wetherell's murder. (Vol.XII, TT 1944) The trial judge ruled the evidence was not admissible. (Vol.XII, TT 1947)

The defense presented mitigation testimony from four witnesses and Appellant. England worked for Thomas Anderson's tile contracting company for

two years. (Vol.XII, TT 1952). Anderson showed Appellant the trade, and Appellant was a quick learner. (Vol.XII, TT 1953-54) England was a good worker, made friends easily, and had a good personality. England had been with Anderson's wife and children, and there was no question of trust. (Vol.XII, TT 1955) Anderson trusted Appellant with valuable tools. After working with Anderson for two years, Appellant went out on his own. Anderson felt England was able to be on his own. (Vol.XII, TT 1956) He was better than the average tile worker. (Vol.XII, TT 1957) Anderson had never seen England involved in violence. (Vol.XII, TT1958) Anderson was aware England had been in prison. England was a clean-cut, healthy person. He did not smoke or drink. He never did drugs in Anderson's presence. (Vol.XII, TT 1959)

England also worked for Shane Conner in the roofing business. England worked on the Adam's Mark hotel for about four to five months and up until his arrest. (Vol.XII, TT1961) England was a quick learner and became an installer after a month. (Vol.XII, TT1962) He was dependable, trustworthy, prompt, professional, and learned easily. (Vol.XII, TT1963) Conner socialized with England after work sometimes. They would shoot pool and drink beer. (Vol.XII, TT1964, 1966) Conner was not aware England was on probation for second-degree murder. (Vol.XII, TT1966)

Jake Ross, the defense investigator, spoke with Appellant's friends and family. The mother, Ines Fyffe, and sister, Allison England, had been present during the trial, but were unable to stay for the penalty phase. (Vol.XII, TT1976-77) They relayed the information about which they were going to testify to Ross. Tyffe was eight months pregnant with Appellant and living in Panama when her husband left her. Appellant never met his biological father. When Appellant was three months old, Fyffe married Ronnie England, an Army serviceman, who adopted Appellant while they were living in Panama. (Vol.XII, TT1977) They moved to Kentucky when Appellant was six years old and lived there until Appellant was eight. (Vol.XII, TT1977) Ronnie was an alcoholic who abused Appellant physically and mentally. The family moved from Kentucky back to Panama for two years, then to Huntsville, Georgia. The abuse escalated. Ronnie was stopped several times for DWI, and was eventually "kicked out" of the military. Around that time, Fyffe tired of the abuse and left Ronnie. (Vol.XII, TT 1978)

Ronnie managed to retain custody of the children in the ensuing divorce. Fyffe went to Texas, where she remarried. Ronnie sent two children back to Fyffe, but not Appellant who was twelve years old. (Vol.XII, TT 1979) By age thirteen, Appellant refused to speak to his mother. He began getting into trouble, but was a

good student. (Vol.XII, TT1980, 1981) Appellant's younger brother, Barry, died of a heart attack the year before trial. (Vol.XII, TT1981)

At the time of the penalty phase, Karen Duggins was incarcerated for failure to pay child support in Kentucky. (Vol.XII, TT1984) Duggins met England when she was in Daytona Beach on vacation in 1998 or 1999 (Vol.XII, TT1986) They talked by long distance and, when Duggins was divorced, she accepted a job in Daytona Beach. Duggins and England had been friends ever since. (Vol.XII, TT1987) England helped Duggins move from an abusive relationship. (Vol. XII, TT1988) By May, 2001, England and Duggins began a romantic relationship. Duggins was aware England was married, but that relationship was not good. (Vol.XII, TT1989) England got along well with Duggins' two children. (Vol.XII, TT 1989) He worked regularly. England never abused her as her previous boyfriend had. England would walk Duggins' dog. (Vol.XII, TT 1990) He contributed to house expenses even though he lived with his wife. England had a good relationship with friends and co-workers. (Vol.XII, TT1991) He would write and call his mother regularly. When his brother died in August, 2003, it was devastating. (Vol. XII, TT1992) Duggins trusted England with her children and with her life because he had a "great heart. He's a good man." Not only had he helped Duggins escape an abusive relationship, he went with her to Kentucky to bring her daughter home. (Vol.XII, TT 1993) Duggins was not aware England

helping her drive to Kentucky would cause him to violate probation. (Vol. XII, TT1995)

Duggins and England loved each other. He was a warm, caring person whose life was worth saving. (Vol.XII, TT1996-97) Duggins owed as much as $16,000.00 in child support. She would give England money in jail for commissary and other things. (Vol.XII, TT1997) She and England would go out drinking even though he was on probation. (Vol.XII, TT1998)

England testified that he was currently thirty-two years old. He did not attend a party at Oliver's house on June 25, 2001. (Vol. XII, TT2002) However, he had attended a party at Oliver's the week before. (Vol.XII, TT2003) The prosecutor objected that Appellant was trying to re-litigate the guilt phase. (Vol.XII, TT2003) The trial judge instructed counsel to move on.

England then testified he was at Mr. Wetherell's residence on June 25, 2001, around 9:00 p.m. Jackson had called and said Duggins was coming over, so England rode over on his bicycle. (Vol.XII, TT2004). They hung out at the pool and had a few drinks. Jackson asked England to come inside to talk. Jackson asked if England could "help him get rid of some of the stuff inside of the condominium."

***Spencer* Hearing**. The penalty phase concluded May 27, 2004. On June 7, defense counsel moved the court to appoint a mental health expert. (Vol. III,

R417-420) Dr. Danziger was appointed on July 2. Dr. Danziger's report was filed and sealed on July 27. (Vol. III, R482,483) At the *Spencer* hearing on July 9, 2004, Allison England and Ines Fyffe testified telephonically.

Allison, 29, called England by the nickname "Willie." He is four years older than Allison and two years older than Barry, the deceased brother. (Vol.XIII, TT2090) Allison testified about her father's military service, his alcoholism, his method of punishment, DWI arrests, and flashbacks from Viet Nam. (Vol. XIII, TT2090-94) Allison didn't remember a lot of things because she was so young. (Vol. XIII, TT2094) She described England as "a good person," one who is "playful, cheery, very vibrant, real artistic, real good with his hands, and real smiley all the time." (Vol.XIII, TT2094) England was separated from his brother and sister when he was 12 and Allison was 8. (Vol. XIII, TT2096) Allison never got to know England because "He was a kid when he was locked up the first time." He had been imprisoned since age 14. (Vol.XIII, TT2099) England stayed in touch with his mother and sister, but they had not seen him after he was released from prison and were not aware of his lifestyle in Daytona Beach. (Vol. XIII, TT2108)

Ines Fyffe's first language was Spanish. England's biological father left when she was eight months pregnant with England, and he had never seen his

father. (Vol.XIII, TT2113)[10] At one point, England's stepfather threatened to kill Fyffe and took England from her. (Vol.XIII, TT2120) England lived homeless and broke. (Vol.XIII, TT2124)

England insisted on making a statement at this point and without the consent of counsel. (Vol.XIII, TT2127-28) England thought his attorney should have asked for a judgment notwithstanding the verdict and filed a motion for new trial. (Vol.XIII, TT2128) England cited three issues: the right to present a defense, a handwriting expert, and that Jackson said England had a prior murder. (Vol.XIII, TT2129) Defense counsel stated that he had received a letter from England, but advised him that the issues should be raised on appeal. (Vol.XIII, TT2131) Insofar as presenting the testimony of Brian Merrill, counsel learned of the witness in the middle of trial, sent investigator Ross out to talk to him, and discussed the situation with England. England agreed not to present Merrill's testimony. (Vol. XIII, TT2131) Defense counsel made a tactical decision not to object to Jackson's statement about England's prior murder. (Vol.XIII, TT2132-33) Counsel did not want a mistrial and Jackson was helping the case. (Vol.XIII, TT2132) The statement was minor[11] and the jury could have believed Jackson was talking about the present murder. Defense counsel made a tactical decision to continue with the

[10] At this point, Fyffe's testimony repeats that of Jake Ross', account of her statements at the penalty phase and will not be recounted here.

[11] When asked for his position on the issue, the prosecutor stated he hadn't even heard the comment but was told about it later. (Vol.XIII, TT2134)

trial and Jackson's testimony rather than request a mistrial. (Vol.XIII, TT2133) England also said he wanted to present four witnesses besides Jackson. (Vol.XIII, TT2133)

Brian Merrill was an inmate at Volusia County Branch Jail who met England in jail. (Vol.XIII, TT2136) Merrill also knew inmates Jason Diehl and Anthony Garcia. Merrill wrote a letter dated May 15, 2004, stating that he would testify on behalf of England "for the purpose of interdicting any falsehoods that Diehl and Garcia wish to swear before the Court." (Vol.XIII, TT2138-39) Defense counsel wrote back to Merrill, and investigator Ross went to the jail to talk to Merrill. (Vol.XIII, TT2141) Merrill wrote a second letter dated June 5, 2004 (Vol.XIII, TT2142) In it Merrill stated that Ross did not give the proper attention to his testimony, that he was treated in an unprofessional manner, and that he was certain his testimony would have resulted in an acquittal for England. (Vol.XIII, TT2144) The information Merrill thought would produce an acquittal was that Diehl allegedly approached his cell on December 28 at 11:30 p.m. while Diehl was in protective custody. (Vol.XIII, TT2144) Diehl asked whether Merrill would be interested in making an arrangement with state investigators to say England confessed to murder. (Vol.XIII, TT2145) Diehl said he was working out a deal with state investigators so he could "return to the street and his girlfriend up in Kentucky I believe." (Vol.XIII, TT2146) Diehl also said Garcia was working out a

deal with the state. (Vol.XIII, TT2147) Merill got the impression England never confessed to the murder. (Vol.XIII, TT2148) Merrill gave an affidavit to England after the trial, but he never gave it to Ross. (Vol.XIII, TT2140) Merrill was a good friend of England. He had been convicted of seven felonies. (Vol. XIII, TT2156) Additionally, he was facing a Prison Releasee Reoffender life sentence after a recent guilty verdict for carjacking. (Vol.XIII, TT2156, 2159) One expert found Merrill incompetent to stand trial. (Vol.XIII, TT2159) Another expert found Merrill was malingering and trying to appear incompetent and insane. (Vol.XIII, TT2160) The reason defense counsel presented Merrill's testimony at this point was to satisfy England. (Vol.XIII, TT2162) Defense counsel never had Merrill's affidavit, and Ross said he was an unreliable witness. (Vol.XIII, TT2165) Merrill's attorney said not to trust him. (Vol.XIII, TT2166)

At the continuation of the *Spencer* hearing on July 16, 2004, the parties argued their respective memorandum regarding aggravating and mitigation circumstances. Appellant made a statement to the court. (Vol.XIII, TT2175-2234)

England was sentenced on July 23, 2004, to life imprisonment for the robbery and to death for the first-degree murder. (Vol.XIII, TT2256)

SUMMARY OF THE ARGUMENT

ARGUMENT I: The claim that a non-responsive comment by Jackson requires a new trial was not preserved and has no merit. There was no objection to the comment, and defense counsel told the trial judge he intentionally did not object because the comment was of minimal significance and Jackson was helping England's case. There was no error to the insignificant comment. Any error was not fundamental and was harmless.

ARGUMENT II: England's claim about the special verdict forms on first-degree murder was not preserved and has no merit. The verdict form did differentiate between felony murder and premeditated murder even though established case law does not require special verdict forms.

ARGUMENT III: The issue regarding crime scene and autopsy photographs was not preserved. To preserve an issue for appellate review, a contemporaneous, specific objection must be raised. The photographs were relevant to the *res gestae* of the murder and to the injuries which caused death. Error, if any, was harmless.

ARGUMENT IV: Ivy Evans' testimony about a message on her answering machine the night of the murder did not violate the "best evidence" rule. Ivy testified the message had been erased. She was identifying England's voice, not trying to prove the content of the message. There was no contemporaneous

objection to DeLeon's testimony he received a letter asking him not to testify against England. DeLeon testified he disposed of the letter because it was dangerous to have it in jail, thus this evidence meets the exception of the "best evidence" rule. The letter was not admitted to prove the truth of the matter asserted, i.e., that England did not commit the murder, but merely to show there was such a letter and DeLeon was testifying under pressure. Error, if any, was harmless.

ARGUMENT V: DeLeon's statement that England said he would kill Jackson if he got him in trouble was not preserved by a motion in limine without a specific objection when the evidence was offered. In any case, a threat to a witness is relevant to consciousness of guilt. Error, if any, was harmless.

ARGUMENT VI: There was no juror misconduct. After one of England's mitigation witnesses accused an alternate juror of making a statement to another juror, the trial judge conducted a full hearing. Both jurors testified under oath no such statement was made.

ARGUMENT VII: The trial judge did not err in finding the HAC aggravating circumstance. Mr. Wetherell was brutally beaten to death. The testimony by the medical examiner established the brutality of the beating and the defensive wounds. The crime scene photographs showed Mr. Wetherell moved to every location in the master bedroom trying to avoid the blows. The testimony of

Samuel Jackson established that Mr. Wetherell was begging for his life and trying to avoid the blows.

ARGUMENT VIII: The trial judge did not abuse his discretion in gagging England during the prosecutor's closing argument in the penalty phase. England made gestures, mouthed words to witnesses, made repeated outbursts in front of the jury, and generally disrupted the trial. England was warned several times that he would be gagged if he did not stop. The trial judge finally gagged England for a short period during the penalty phase. As the deputy was applying the tape, England told the deputy he made the outbursts intentionally because he was trying to create a mistrial. Furthermore, defense counsel did not object to the gag.

ARGUMENT IX: England did not object that his right to testify was unduly restricted, and this issue is not preserved. The trial judge did not abuse his discretion in excluding testimony on residual doubt. England succeeded in testifying to his version even though the trial judge sustained repeated objections. Therefore, error, if any, was harmless.

ARGUMENT X: Testimony regarding a prior murder of Jackson was not relevant to any issue in the penalty phase, and the trial judge did not abuse his discretion by excluding the testimony.

ARGUMENT XI: Jackson pled to second-degree murder. England was convicted of first-degree murder. The trial judge did not err in sentencing England

to death even though Jackson received a life sentence. Established case law provides that when a co-defendant pleads to a lesser sentence as part of a plea agreement or prosecutorial discretion, there is no disparity in sentencing if the defendant receives a death sentence.

ARGUMENT XII: The recent United States Supreme Court case of *Roper v. Simmons* does not stand for the proposition that a person under 18 years of age cannot be held accountable for his crimes. *Roper* simply establishes that a person cannot be sentenced to death for a murder he commits before the age of 18. England was 28 when he murdered Mr. Wetherell .

ARGUMENT XIII: England's sentence of death is proportional. England, 28, brutally murdered Mr. Wetherell. He had previously committed a similar brutal murder, and was still on probation for that murder when he killed Mr. Wetherell. This case is proportional to other cases in which the death sentence was imposed.

ARGUMENT XIV: England's death sentence does not violate *Ring v. Arizona*.

ARGUMENT I

DEFENSE COUNSEL INTENTIONALLY WAIVED THE ISSUE REGARDING MICHAEL JACKSON'S STATEMENT ABOUT A MURDER CHARGE PENDING AGAINST ENGLAND

During the 100-page cross-examination of Jackson, the following exchange occurred:

> Q: Do you remember telling your brother Sam that as you were riding in the car up to Walton County?
>
> A: I told him what I did. He—he told them his own version to try to help me out I'm sure.
>
> Q: So now among law enforcement – the law enforcement is playing a game or lying against you and now your brother is included in this; is that what you're saying here?
>
> A: I'm saying that he lied to try to help me out, yeah.
>
> Q: And do you remember telling your brother that?
>
> A: Put it off on Rich. He's already got a murder charge. You'll get off easy.
>
> Q: So I want to make this clear. I want to make this absolutely clear. Are you saying that you did not tell your brother Sam, the one that you went running to, the one that you confided in, that you and Rich beat Mr. Wetherell to death?
>
> A: No.

(Vol.X, TT1453)

England alleges that Jackson's non-responsive answer: "Put it off on Rich. He's already got a murder charge. You'll get off easy" was fundamental error, and that he is entitled to a new trial. First, as England concedes, this issue was not preserved for appellate review.

Second, not only did defense counsel not object, but he made a tactical decision not to object. When England insisted on making a statement at the *Spencer* hearing criticizing defense counsel, he forced defense counsel into revealing that he made a tactical decision not to object to the above statement. (Vol.XIII, TT2127-29, 2132-33) Counsel did not want a mistrial because Jackson's testimony was helping England's case, the statement was minor, and the jury could have believed Jackson was talking about the present murder. Defense counsel made a tactical decision to continue with the trial and Jackson's testimony rather than request a mistrial. (Vol.XIII, TT2132-33) Therefore, this issue was not only waived, it was waived intentionally.

In any case, Jackson's statement could have been construed as a comment on the present pending murder charges and, as defense counsel noted, was minimal. In fact, the prosecutor did not even notice the statement. Even if there were error, it was not fundamental. A fundamental error is error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Rodriguez v. State*, 30 Fla. L.

Weekly S385 (Fla., May 26, 2005); *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991) (quoting *Brown v. State*, 124 So. 2d 481 (Fla. 1960)). Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

ARGUMENT II

THERE WAS NO ERROR IN THE VERDICT FORMS FOR FIRST-DEGREE MURDER.

England argues that, pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002), a special verdict is required so the jury may designate whether they are convicting of first-degree premeditated murder or first-degree felony murder.

The verdict form in this case designated the crimes as follows:

> _____GUILTY of First Degree Premeditated Murder and Felony Murder, a capital offense, as charged in the indictment.
>
> _____GUILTY of First Degree Premeditated Murder, a capital offense.
>
> _____GUILTY of Felony Murder, a capital offense.

(Vol.II R 409) The jury was instructed on the different charges on the verdict form. (Vol.XI, TT 1795) When this verdict form was discussed at the charge conference, defense counsel raised no objection to this format which seems to comply with his *Ring* request. If this form did not comply with whatever defense counsel deemed appropriate, he did not raise any objection at the charge conference. After the jury instructions and verdict form were read, the trial judge

asked whether there were any "objections, corrections, or additions." Defense counsel stated: "No, sir, without waiver, defendant incorporates reference to previous objections." (Vol.XI, TT1801) There was no prior objection.

If, by any chance, this verdict form does not comply with what England requested, England acknowledges established case law[12] from this Court holding that the jury is not required to make these specific findings, but argued the trial court erred in not deviating from this Court's cases. What Appellant does not acknowledge is that the United States Supreme Court has rejected his argument. *Schad v. Arizona*, 501 U.S. 624, 645 (1991). In fact, this court recently cited *Schad* with approval, stating:

> In *Schad v. Arizona*, 501 U.S. 624, 645 (1991), the Supreme Court held that the United States Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder were not required.

Mansfield v. State, 2005 Fla. LEXIS 1453 at *43 (Fla. July 7, 2005).

ARGUMENT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING CRIME SCENE AND AUTOPSY PHOTOGRAPHS RELEVANT TO THE MURDER

[12] *Haliburton v. State*, 561 So. 2d 248, 250 (Fla. 1990); *Brown v. State*, 473 So. 2d 1260, 1265 (Fla. 1985), cited in Initial Brief at 55.

England argues the trial court erred in admitting photographs of the victim because they showed the decomposition process. It is undisputed that Mr. Wetherell was murdered on June 25, 2001, and the body was not discovered until July 2, 2001.

England filed a motion in limine regarding autopsy photographs. (Vol. II, R289-29) The trial judge scheduled a pre-trial hearing on the motion. The prosecutor went through each photo he intended to introduce and explained its relevance. (Vol.V, R1030-33) The trial judge discussed the relevance in detail and heard arguments. (Vol.V, R1034-45) As to the crime-scene photographs, the judge excluded "D" and allowed the others (Vol.V, R1045) The parties then discussed the autopsy photographs in detail. (Vol.V, R1045-51) The prosecutor had 61 autopsy photos, but had selected the most relevant 11 (Vol.V, R1052) The trial judge ruled the first seven photos would come in and asked for argument on the injuries to the hands. (Vol.V, R1051, 1052) The four photographs of defensive wounds to the hands were allowed. (Vol.V, R1052)

When the photographs of the crime scene were admitted – Exhibits 2 through 17, the prosecutor stated he believed the defense wanted to be heard on Exhibits 16 and 17. Defense counsel stated:

> Your Honor, the defendant objects and incorporates by reference his motion in limine and argument heard previously.

(Vol.VII, TT618-19) The trial judge stated his "ruling remains the same." (Vol.VII, TT619) State Exhibit 16 consisted of three photos—A, B, and C—of the victim's body in the shower and was introduced during the testimony of a crime scene investigator who testified about the entire crime scene. (Vol.VII, TT638) The witness explained that the photos showed natural decomposition and bloating. (Vol.VII, TT638) State Exhibit 17 consisted of three photos—A, B, and C--of the forensic officers removing items which covered the body, such as different towels, pieces of plastic, and a pillow. (Vol.VII, TT639)

When the photographs of the autopsy were admitted, defense counsel stated:

> Your Honor, the defendant objects to the state's use of certain photographs and incorporates by reference its pretrial motion in limine.

(Vol.IX, TT1279) The trial judge admitted Exhibits 57, 58, and 59 (Vol.IX, TT1280) Exhibit 57 contained three photographs of the victim's head. (Vol.IX, TT1279) Exhibit 58 contained four photographs: two of the head region, one of the head, torso and back, and one of the abdomen region. (Vol.XI, TT1279-80) Exhibit 59 contained four photographs, two of each hand. (Vol.XI, TT1280) The medical examiner explained the decomposition process to the jury in scientific terms as he discussed the photographs. (Vol.XI, TT1282-1285)

First, the objections made to the photographs were not specific and this issue is not preserved for appellate review. Defense counsel simply "incorporated by reference" his boilerplate motion in limine and prior arguments. He did not specifically identify any photo which was objectionable or any reason that specific photo was objectionable. He simply made a broad, sweeping objection to the crime scene and autopsy photos. Under Florida law, the defendant was required to record a specific, contemporaneous objection to the supposedly inadmissible evidence at the time it was offered at trial. *See Correll v. State*, 523 So. 2d 562 (Fla. 1988) ("Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review"); *Phillips v. State*, 476 So. 2d 194 (Fla. 1985); *Perez v. State*, 717 So. 2d 605, 606-607 (Fla. 3d DCA 1998); *Anderson v. State*, 549 So. 2d 807 (Fla. 5th DCA 1989); *German v. State*, 379 So. 2d 1013 (Fla. 4th DCA 1980).

Second, the crime scene photos were relevant to the location of the body within that crime scene, the way the body was dragged across the room to the shower, the way items were placed on top of the body, and the way the body was posed in the shower. The autopsy photos were relevant to the medical examiner's explanation of the injuries and mechanism of death. The defensive wounds to the hands were relevant to premeditation and to show the victim was alive and defending himself as he was beaten.

The test for the admissibility of photographic evidence is relevance, not necessity. See *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (photographs depicting the mutilation of the victim's genitalia and an autopsy photograph of the victim's brain); *Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997). A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of an abuse of discretion. *Id*; *Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000). Photographic evidence is admissible if it is relevant to a material fact in dispute. Thus, "autopsy photographs, even when difficult to view, are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial." *Rose v. State*, 787 So. 2d 786, 794 (Fla. 2001). This Court has repeatedly upheld the admission of photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds. *See, e.g., Davis v. State*, 859 So. 2d 465, 477 (Fla. 2003); *Floyd v. State*, 808 So. 2d 175, 184 (Fla. 2002); *Pope v. State*, 679 So. 2d 710, 713-14 (Fla. 1996); *Boyd v. State*, 30 Fla. L. Weekly S459 (Fla. 2005). As this Court recognized in *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986): "those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." (quoting *Henderson v. State*, 463 So. 2d 196, 200 (Fla. 1985)).

The photographs in question were relevant not only to the *res gestae* of the crime, but also to the medical examiner's determination as to the manner of the victim's death, and were probative in the determination of the heinous, atrocious, or cruel aggravators. The trial court did not abuse its discretion in admitting these photographs.

ARGUMENT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING IVY EVANS' IDENTIFICATION OF APPELLANT'S VOICE ON HER ANSWERING MACHINE OR IN ALLOWING DELEON TO TESTIFY ABOUT A LETTER ASKING HIM NOT TO TESTIFY.

Ivy Evans identification of England's voice. England claims the trial judge erred by allowing Ivy Evans to testify about calls received on her answering machine the night of the murder. The evidence showed that telephone calls from Mr. Wetherell's residence were made at 4:25, 4:26 and 5:01 a.m. on July 26, 2001, to Ivy and David Evans. (Vol.VIII, TT717, 782) Ivy Evans heard Appellant asking for David on the answering machine. (Vol.VIII, TT 791) David had known England since 1987; Ivy, since England was a teenager. (Vol.VIII, TT780, 786) England claims Ivy's testimony was not the best evidence, and the State should have been required to admit the original tape recording from the answering machine. He concedes that Ivy testified that she had erased the answering machine messages. (Vol.VIII, TT789)(Initial Brief at 61)

England confuses the purpose behind the best evidence rule which is to "prove the contents of the writing, recording, or photograph." §90.952 Fla. Stat. (2001) As Professor Ehrhardt recognized:

> Only when the contents of a writing are being offered is the rule applicable...The major problem involved in applying the best evidence rule is determining when it is applicable, i.e., when the contents of a writing [or in this case a recording] are being proved.

C. Ehrhardt, *Florida Evidence* §952.1 (2005). We do not have this problem in the present case. Ivy was not trying to prove the contents of the message on the answering machine. She was identifying England's voice. The evidence had already established a call was made from Mr. Wetherell's residence to the Evans' residence. The issue was who made the call. Ivy was a life-long friend of England and was familiar with his voice. She was certainly qualified to identify Appellant's voice.

Letter to Reynaldo DeLeon. England also claims the trial court erred in allowing DeLeon to testify he received a letter from "Orlando" asking him not to testify against England. England acknowledges that DeLeon also testified that England did not write the letter and that DeLeon threw the letter away. (Initial Brief at 63) There was no contemporaneous objection to this testimony (Vol.VIII, TT854), and this issue is waived for appellate review. The objections cited in the Initial Brief were arguments made during a proffer.

In order to preserve an issue for appellate review the objection must be timely and specific. On appeal, only the specific argument raised below is preserved. *Harrell v. State*, 894 So. 2d 935, 939-940 (Fla. 2005).

Even if the objections had been properly made, the testimony was neither hearsay nor did the best evidence rule apply. The testimony was not offered to prove the truth of the matter asserted, i.e., that Appellant did not commit the murder. The letter stated that DeLeon should not testify against England because England did not commit the murder and that the "young man" (Jackson) was lying. (Vol.VIII, TT 840) Since the contents of the letter were not being proved, the best evidence rule did not apply. Even if the best evidence rule applied, DeLeon testified he destroyed the letter because his life could be in danger in prison (Vol.VIII, TT845). Therefore, the exception to production in Section 90.952 applies. The trial judge heard arguments after the proffer and overruled the objections. (Vol.VIII, TT846) Defense counsel failed to make a contemporaneous objection when the testimony was introduced. DeLeon was also attached as to his reason for testifying and the letter was relevant to show he was testifying under pressure.

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *See Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005), *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998); *see also Kearse v. State*, 662 So.

2d 677, 684 (Fla. 1995); *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984). The trial count did not abuse its discretion in allowing the evidence, particularly since there was no objection.

Even if this issue were preserved and had merit, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). DeLeon's testimony regarding the letter was minimal compared his testimony that Appellant admitted to DeLeon that he murdered Mr. Wetherell, that DeLeon disposed of stolen property for England, that England had Karen Duggins call DeLeon and tell him to get rid of the property, that England told DeLeon he would kill Jackson if he implicated him, and that he was going to use his girlfriend as an alibi. (Vol.VIII, TT803-863) Not only did DeLeon's testimony implicate England, but England's own inconsistent statements, the phone calls from Mr. Wetherell's house, the forensic evidence, England's handwriting on Mr. Wetherell's photo, and England's statements to his associates, all proved England was guilty.

ARGUMENT V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING REYNALDO DELEON TO TESTIFY THAT ENGLAND SAID HE WOULD KILL JACKSON IF JACKSON IMPLICATED ENGLAND

During DeLeon's testimony, he stated that England told him "If he [Jackson] got me in trouble, I would kill him." (Vol.VIII, TT829) Defense counsel objected,

moved to strike, and "incorporated by reference the previous motion in limine." (Vol.VIII, TT829) England now argues this statement was impermissible evidence of a collateral crime (Initial Brief at 65) As England recognizes, when the motion in limine was argued, a litany of objections were raised, none of which were specifically propounded when the testimony was admitted. As such, there was no specific objection, and "incorporating by reference" a motion or prior argument does not satisfy the contemporaneous-objection rule. Under Florida law, the defendant was required to record a specific, contemporaneous objection to the supposedly inadmissible evidence at the time it was offered at trial. *See Correll v. State*, 523 So. 2d 562 (Fla. 1988)("Even when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review"); *Phillips v. State*, 476 So. 2d 194 (Fla. 1985); *Perez v. State*, 717 So. 2d 605, 606-607 (Fla. 3d DCA 1998); *Anderson v. State*, 549 So. 2d 807 (Fla. 5th DCA 1989); *German v. State*, 379 So. 2d 1013 (Fla. 4th DCA 1980).

Even if this issue was preserved, it has no merit. A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *See Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005), *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998); *see also Kearse v. State*, 662 So. 2d 677, 684 (Fla. 1995); *Blanco*

v. State, 452 So. 2d 520, 523 (Fla. 1984). The trial count did not abuse its discretion in allowing the evidence, particularly since there was no objection.

This testimony showed consciousness of guilt and was an admission of the defendant that Jackson had information that could implicate him. England's argument that this testimony was evidence of a collateral crime fails to account for the fact England did not kill or attempt to kill Jackson and there was no "collateral crime." This is simply an admission by the defendant that he was so involved with Jackson that if Jackson told on him, he would kill him.

Further, England's argument that the threats must be made directly to the witness threatened, is misplaced. *See Sireci v. State*, 399 So. 2d 964, 968 (Fla. 1981); *Heath v. State*, 648 So. 2d 660, 664 (Fla. 1994) (a defendant's attempt to intimidate a state witness is relevant and admissible).

Even if this issue were preserved and had merit, any error would be harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

ARGUMENT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MOTION FOR MISTRIAL; THERE WAS NO JUROR MISCONDUCT

England claims the trial judge erred in finding no juror misconduct and denying the motion for mistrial. After Tom Anderson, a mitigation witness for

England, made allegations that an alternate juror said “he’s guilty” to another juror, the trial judge conducted a full hearing.

Juror Brown, the alternate, testified she did not talk about the case to another juror and did not say “He’s guilty.”(Vol.XII, TT1846, 1848) Juror #8, Ms. Dixon, testified that Juror Brown did not say anything about Appellant being guilty. (Vol.XII, TT1851) The trial judge found there was no juror misconduct and denied the motion for mistrial. (Vol.XII, TT1851)

The record supports the trial court’s finding there was no juror misconduct. A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial. *See Snipes v. State*, 733 So. 2d 1000 (Fla. 1999); *Buenoano v. State*, 527 So. 2d 194 (Fla. 1988). "It has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999). *See also Pagan v. State*, 830 So. 2d 792, 814 (Fla. 2002). In this case, there was no necessity for a mistrial. The trial judge thoroughly investigated the allegations made by one of England’s mitigation witnesses, listened to the testimony of all the parties, and properly determined there was no juror misconduct.

ARGUMENT VII

THE TRIAL JUDGE DID NOT ERR IN FINDING THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE.

England argues the trial court erred in finding the heinous, atrocious and cruel ("HAC") aggravating circumstance because there was testimony regarding the loss of consciousness (Initial Brief at 70), HAC only applies where the defendant intends to cause unnecessary and prolonged suffering (Initial Brief at 71), and the facts of this case were not heinous or atrocious (Initial Brief at 72). The trial court findings are:

> **4. <u>Florida Statute 921.141(52(h) ("HAC"): The capital felony was especially heinous, atrocious, and cruel.</u>**
>
> This Court specifically finds that England fully participated in this actual beating (see State Exhibits "57 - 59"). It was a particularly brutal beating. Blood was everywhere (see particularly State Exhibits "23-30"). There was evidence Mr. Wetherall begged for his life, but was told to shut up. He moved around the bedroom while fending off blows. He experienced pain before losing consciousness. He was hit so hard in the head with the fire poker that his spine fractured. This was an exceptionally violent and brutal death. This aggravator must be given great weight.

(Vol.III, R462)

These findings are supported by competent substantial evidence. The crime scene photos show that Mr. Wetherell was in bed at the time of the initial attack and there is pooling of blood under the bed. He then moved about the entire room

where there was blood spatter over dressers, walls, curtains, and carpet. The final resting place was on the floor where blood pooled and drag marks show he was dragged into the bathroom. He had defensive wounds on his arms and hands. The testimony of Samuel Jackson established that Mr. Wetherell was begging for his life as he moved about the room trying to defend himself from the fatal blows.

Dr. Beaver, the medical examiner testified that the cause of death was blunt force trauma to the head and neck. (Vol.IX, TT1271) There were multiple lacerations over the scalp and ears, contusions and fractures of the hand bones, and two cervical spine fractures, one of which severed the spinal cord and vertebral arteries. There was also blunt force trauma to the torso, specifically the abdomen. There was blunt force trauma to the hands and arms. (Vol.IX, TT 1272) It would take three to four minutes to suffocate if the cervical spine was fractured and the diaphragm muscles were paralyzed. Since the vertebral arteries were involved, that could shorten the time a bit. (Vol.IX, TT 1275) Mr. Wetherell would have been able to move around before the cervical fracture. The hand injuries would have been prior to the fracture because he would be paralyzed after the fracture. (Vol.IX, TT1276) The hand injuries were defensive injuries. (Vol.IX, TT1294) In Dr. Beaver's opinion, there were numerous blows to the head and torso prior to the cervical fracture. (Vol.IX, TT1297)

Mr. Wetherell died a brutal, painful death. This Court has consistently upheld HAC in beating deaths. *Douglas v. State*, 878 So. 2d 1246, 1261 (Fla. 2004); *Dennis v. State*, 817 So. 2d 741, 766 (Fla. 2002); *Lawrence v. State*, 698 So. 2d 1219, 1222 (Fla. 1997); (trial court's finding of HAC was supported by evidence that the victims suffered skull fractures as the result of a brutal beating and that the victims were conscious for at least part of the attack); *Bogle v. State*, 655 So. 2d 1103, 1109 (Fla. 1995) (trial court's finding of HAC was supported by evidence that the victim was struck seven times in the head and the medical examiner testified that the victim was alive at the time of the infliction of most of the wounds); *Wilson v. State*, 493 So. 2d 1019, 1023 (Fla. 1986) (trial court's finding of HAC was supported by evidence that victim was brutally beaten while attempting to fend off blows to the head before he was fatally shot); *Colina v. State*, 634 So. 2d 1077 (Fla. 1994); *Owen v. State*, 596 So. 2d 985 (Fla. 1992) *Penn v. State*, 574 So. 2d 1079 (Fla. 1991); *Lamb v. State*, 532 So. 2d 1051 (Fla. 1988); and *Heiney v. State*, 447 So. 2d 210 (Fla. 1984). In *Colina* this Court stated:

> In regard to Angel Diaz, the record reflects that Angel was first hit by Castro and fell to the ground. Castro testified that when Angel attempted to get to his feet, Colina stepped in and hit Angel several times in the back of the head with the tire iron. Castro also stated that, as he turned to get something to tie up the victims, one of the victims started to get up and that Colina hit them with the tire iron several more times. We find that these murders are the type of beating

> murders to which the heinous, atrocious, or cruel aggravating factor applies. *See, e.g., Zeigler v. State*, 580 So. 2d 127 (Fla.), *cert. denied*, 502 U.S. 946, 112 S.Ct. 390, 116 L.Ed.2d 340 (1991); *Penn v. State*, 574 So. 2d 1079 (Fla. 1991); *Bruno v. State*, 574 So. 2d 76 (Fla.), *cert. denied*, 502 U.S. 834, 112 S.Ct. 112, 116 L.Ed.2d 81 (1991).

Id. at p. 1081,1082.

In *Lamb v. State*, 532 So. 2d 1051 (Fla. 1988) the defendant was burglarizing the victim's apartment and when he heard the victim coming up the stairs he hid with a claw hammer. When the victim came in he attacked him from behind and struck him six times in the head. The court found that the murder was HAC. On appeal, the Florida Supreme Court upheld this application of HAC and noted:

> Further, we affirm the finding that the murder was heinous, atrocious, and cruel. The victim had a defensive wound. He was struck six times in the head with a claw hammer. Even though Lamb delivered each blow with sufficient force to penetrate the skull, the victim did not die instantaneously. The evidence shows that he fell to his knees and then to the floor after Lamb pulled his feet out from under him. The victim moaned, rolling his head from side to side, until Lamb kicked him in the face. This evidence supports the court's finding that the murder was heinous, atrocious, and cruel.

Id. at p. 1053.

The instant case involves a beating that took place over a longer period of time. In the *Lamb* case the victim never saw his attacker until he was struck in the head with a hammer. Mr. Ebernez, the victim there, fell to the floor immediately, groaned and then was struck in the face and ceased making any noise. Another

case wherein a beating death was found to be HAC is *Heiney v. State*, 447 So. 2d 210 (Fla. 1984). Therefore this Court found that seven severe hammer wounds to the victim's head and the testimony of the medical examiner that the injuries to the victim's hands were probably defensive wounds, were sufficient to prove this aggravator.

This Court has also consistently held that it is not the intent of the defendant, but the actual facts of a heinous murder that make HAC appropriate. In *Lynch v. State,* 841 So. 2d 362, 369 (Fla. 2003), this Court reiterated that, when analyzing the heinous, atrocious aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina,* 801 So. 2d 44, 53 (Fla. 2001); *see also Hitchcock v. State,* 578 So. 2d 685, 692 (Fla. 1990). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State,* 533 So. 2d 270, 277 (Fla. 1988); *see also Chavez v. State,* 832 So. 2d 730, 765-66 (Fla. 2002). The HAC aggravating factor focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the

torturous anxiety and fear of impending death. *See Barnhill v. State,* 834 So. 2d 836, 849 -850 (Fla. 2002); *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998).

ARGUMENT VIII

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY GAGGING ENGLAND AFTER REPEATED WARNINGS ABOUT UNCONTROLLED OUTBURSTS

England argues the trial judge abused his discretion by gagging him after his uncontrolled outbursts and the repeated warnings by the judge that he would gag him if he did not stop. England was trying to provoke a mistrial by his outbursts and intentionally persevered. England was quite aware of the mistrial procedure, even requesting a mistrial twice during the Juror Brown issue in which a mitigation witness accused a juror of making a statement. After England forced the trial judge to take action so the trial might proceed, he bragged to the deputy bailiff that he was trying to provoke a mistrial. The period of time England was gagged was minimal: he was gagged during the prosecutor's closing argument at the penalty phase, and the gag was removed while the jury was deliberating.[13] The trial judge made sure England's hand was free to write notes to his attorneys. First, this issue was not preserved for review. Defense counsel did not object to the procedure. When the trial judge asked the deputy bailiff to gag England, he turned to defense counsel and asked: "Defense, do you want to say anything to me?" Defense

[13] The extensive facts which lead to the gagging are at pages 38 – 49 herein.

counsel responded: "Please don't gag him." (Vol.XII, TT2043-2045) This is hardly an objection. Later, when the trial judge advised the parties England told the bailiff he intentionally tried to provoke the judge, defense counsel stated he had "no intention of making any record." (Vol.XII, TT2043-2045)

Even if the issue was preserved, the trial judge did not abuse his discretion. The United States Supreme Court has explained the need to balance the integrity of the court system and the need to effectively handle the disruptive defendant as follows:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant . . . : (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Illinois v. Allen, 397 U.S. 337, 343-44 (1970); *See also Knight v. State*, 746 So. 2d 423, 432 (Fla. 1998); *Valdes v. State*, 626 So. 2d 1316, 1321 (Fla. 1993); *Wilson v. State*, 753 So. 2d 683, 690 (Fla. 3d DCA 2000). The penalty phase was almost complete, and the trial judge made a reasonable choice. The trial judge had warned England time and time again, but England ignored the warnings because he

wanted to create a mistrial. Removing England from the courtroom until he agreed to behave himself would be unavailing. England assured the judge at each stage that he would behave himself, but he never did. Holding England in contempt would have been equally unavailing. The most reasonable option of the three options allowed by *Allen* was to gag the defendant.

A strikingly similar situation was addressed recently in *Johnson v. State*, 30 Fla. L. Weekly D1544 (Fla. 1st DCA June 20, 2005). After the court repeatedly warned Johnson that the court would not tolerate future disruptions during the course of his trial, and would gag and handcuff him in the presence of the jury if he violated the court's order, and secured his promise that no such untoward actions would occur, Johnson persisted, and interrupted his counsel's examination of a witness and undertook the examination. The court excused the jury and imposed the restraints previously threatened. The defense did not object to such procedure and the court followed its action with a cautionary instruction to the jurors informing them they were to decide the case on its facts and evidence and not be influenced by the measures taken. After the witness completed her testimony, the gag and handcuffs were removed from appellant for the remainder of the trial. The First District court first noted that the abuse-of-discretion standard applies to restraining a defendant and that courts of different states generally uphold the use of restraints when there is disruptive behavior and the solution is the most

appropriate under the circumstances. *See generally Avant v. State*, 528 N.E. 2d 74 (Ind. 1988); *Molina v. State*, 971 S.W. 2d 676 (Tex. Ct. App. 1998); *Commonwealth v. Kenney*, 317 Pa. Super. 175, 463 A. 2d 1142 (Pa. 1983).

After exploring the three options set forth in *Allen*, the First District court in *Johnson* concluded the trial court opted for the remedy of restraining defendant from further disruptive verbal behavior while allowing him to remain in the courtroom and permitting him to observe his attorney ask the witness the question he had wanted her to ask, and thereafter the handcuffs and tape were removed. The court also noted that, although the jury was fully cognizant of this procedure, the restraints were imposed for only a few minutes of a day-long trial. Based upon these facts Johnson failed to show that the trial court committed fundamental error in employing the method it chose for maintaining order during the course of the trial.

ARGUMENT IX

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY LIMITING THE TESTIMONY OF RESIDUAL DOUBT DURING THE PENALTY PHASE

England argues that his right to testify was unduly restricted because the trial judge would not let him testify about residual doubt. England never objected that his right to testify was restricted, and this issue is not preserved for appellate

review. If England is now taking issue with the trial judge granting the State's motions and sustaining the State's objections to testimony about residual doubt, he should have moved for a mistrial.

Even if this issue was preserved, the State's objections to England's profession of innocence in the penalty phase were well-taken. This Court has repeatedly held that lingering or residual doubt is not a valid nonstatutory mitigating circumstance, and that a defendant has no right to present evidence or an instruction thereon. *See Darling v. State,* 808 So. 2d 145, 162 (Fla. 2002) (explaining that this Court has followed United States Supreme Court precedent holding that a defendant has no right to present evidence of lingering doubt); *Sims v. State,* 681 So. 2d 1112, 1117 (Fla. 1996) (concluding that the trial court did not err in declining to instruct the jury on imperfect self-defense as a mitigating circumstance); *see also Franklin v. Lynaugh*, 487 U.S. 164, 173-74 (1988) (rejecting the argument that the Eighth Amendment requires a capital sentencing jury to be instructed that it can consider lingering doubt evidence in mitigation). *Duest v. State,* 855 So. 2d 33, 40-41 (Fla. 2003).

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *See Fitzpatrick v. State,* 900 So. 2d 495 (Fla. 2005), *Alston v. State,* 723 So. 2d 148, 156 (Fla. 1998); *see also Kearse v. State,* 662 So. 2d 677, 684 (Fla. 1995); *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984). The trial

court did not abuse its discretion in allowing the evidence, particularly since there was no objection. Notwithstanding, England succeeded in getting most of his testimony before the jury by ignoring the trial judge's ruling on the State objections. Therefore, error, if any, was harmless *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986).

ARGUMENT X

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING ENGLAND'S MOTION TO ADMIT REVERSE *WILLIAMS* RULE EVIDENCE

England next faults the judge for not allowing him to present evidence during the penalty phase of co-defendant Jackson's involvement in an unrelated first-degree murder case. He claims this evidence was relevant to the statutory mitigating circumstance that England was a "minor participant" in Mr. Wetherell's murder. He also cites cases for the proposition a defendant should be allowed to present "any aspect of the defendant's character and record as mitigating factors" (Initial Brief at 89). England was not precluded from presenting any aspect of *his* character or record. In fact, he presented extensive testimony and evidence of his background and upbringing. What is not relevant in the penalty phase is any aspect of a co-defendant's record.

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *See Fitzpatrick v. State*, 900 So. 2d 495

(Fla. 2005), *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998); *see also Kearse v. State*, 662 So. 2d 677, 684 (Fla. 1995); *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984). The trial court did not abuse its discretion in upholding the State's objection to irrelevant evidence.

ARGUMENT XI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SENTENCING ENGLAND TO DEATH EVEN THOUGH JACKSON RECEIVED A LIFE SENTENCE

England claims the trial court erred in failing to consider "disparate treatment" of Jackson as a mitigating circumstance. Jackson pled to second-degree murder. England was convicted of first-degree murder.

Although England is correct in stating that in certain instances this Court has concluded that a codefendant or accomplice's life sentence precluded a death sentence for the defendant, this is not that case. *See, e.g.*, *Slater v. State*, 316 So. 2d 539, 542 (Fla.1975) (holding that less culpable nontriggerman cannot receive a death sentence when the more culpable triggerman receives a life sentence). However, in instances where the codefendant's lesser sentence was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing. *See San Martin v. State*, 705 So. 2d 1337, 1350-51 (Fla. 1997) (upholding court's rejection of codefendant's life sentence as a mitigating circumstance where codefendant's plea, sentence, and agreement to testify for the

State were the products of prosecutorial discretion and negotiation); *Steinhorst v. State*, 638 So. 2 33, 35 (Fla. 1994) (concluding that codefendant's sentence for second-degree murder was not relevant to claim of disparate sentencing); *Brown v. State*, 473 So. 2d 1260, 1268 (Fla.1985) (finding that death sentence was proper even though accomplice received disparate prosecutorial and judicial treatment after pleading to second-degree murder in return for life sentence). Here, Jackson pled to second-degree murder, pursuant to a plea agreement. Therefore, Because Jackson and England were not convicted of the same offense, their sentences cannot be "disparate" and England is not entitled to relief on this claim. *See Kight v. State*, 784 So. 2d 396, 400-401 (Fla. 2001).

ARGUMENT XII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THE AGGRAVATING CIRCUMSTANCE OF "PRIOR VIOLENT FELONY"

England argues the trial court erred in finding the prior-violent-felony aggravating circumstance because his prior murder conviction occurred before he was 18 years old. England bases this argument on the recent case of *Roper v. Simmons*, ___U.S.___, 125 S.Ct. 1183 (2005). England misreads *Roper*. The new rule announced in *Roper* is simple. A person cannot be sentenced to death for a murder he committed before the age of eighteen.

England was not sentenced to death for a murder he committed before the age of 18. England was not sentenced to death for the prior murder he committed before the age of 18, and for which he was tried and convicted as an adult. *See e.g., Witte v. United States,* 515 U.S. 389, 400-401 (U.S. 1995) (noting that consideration of prior convictions in sentencing "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one"); Moore *v. Missouri,* 159 U.S. 673, 677 (1895) (under a recidivist statute, "the accused is not again punished for the first offence" because "'the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself '").

England was sentenced to death for a murder committed when he was 28 years old. Under *Roper*, England was unquestionably death-eligible upon his conviction for the first degree murder of Mr. Wetherell. England seeks to obliterate the bright line established by the United States Supreme Court in *Roper*.

As *Roper* was decided only recently, there is little precedent by which this Court may be guided. However, in *Moreno v. Dretke*, 362 F. Supp. 2d 773 (W.D. Tex. 2005) a Texas Federal District Court was faced with a claim in which the petitioner argued that while he committed the murder after he turned 18 years of

age, the *mens rea* to commit the murder was formed when he was 17. Moreno alleged that *Roper's* prohibition on the execution of juvenile offenders should apply to him as well.

In refusing to extend *Roper* beyond its holding, the federal district court noted that the United States Supreme Court had drawn a bright line in ruling that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper*, 125 S.Ct. at 1200. The Court went on to rule that "[d]espite the fact that Petitioner may have engaged in certain preparatory acts while he was seventeen years of age, the undisputed fact remains that he committed the murder when he was eighteen years of age." The Court determined that ruling in favor of Moreno would "eviscerate the bright line drawn by the Supreme Court." *Moreno v. Dretke*, 362 F. Supp. 2d 773 (W.D. Tex. 2005).

Even if the prior violent felony convictions used in aggravation were committed at a time when England was less mature or responsible than he was on the day he attempted to rob, and then murdered, Mr. Wetherell, his continuing commission, and indeed accelerated commission, of violent crimes justifies consideration of a sentence to death. Consideration of his prior offenses was only part of the weighing process effected by both the jury and the trial judge in this case. The jury was instructed upon, and the trial judge found, three additional

aggravating factors. Likewise, both the judge and jury were free to consider England's age at the time he committed the prior murder to lessen the weight each chose to give to those convictions. This Court, as did the federal district court in *Moreno,* should decline to extend *Roper* beyond its actual holding and reject England's strained interpretation.

ARGUMENT XIII

ENGLAND'S DEATH SENTENCE IS PROPORTIONAL.

England also contends that his death sentence in this case is not proportionate. This Court performs proportionality review to prevent the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. *See Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991). In deciding whether death is a proportionate penalty, the Court considers the totality of the circumstances of the case and compares the case with other capital cases. S*ee Urbin v. State*, 714 So. 2d 411, 417 (Fla. 1998). However, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." *Sexton v. State*, 775 So. 2d 923, 935 (Fla. 2000) (*quoting Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990)).

In this case, the trial court found four aggravating circumstances: (1) committed during a robbery; (2) committed while under sentence of imprisonment; (3) heinous, atrocious and cruel; and (4) prior violent felony (murder). The trial

court summarized the extensive presentation of non-statutory mitigation as follows:

> [England is] intelligent, a quick learner, a hard worker. He is personable, trustworthy, a leader, a good friend, and capable of a loving relationship. He is all these things despite a terrible childhood full of abuse, uncertainty, and abandonment. This Court keeps coining back to the testimony of Defendant's mother, Inez Fyffe. Her abusive and alcoholic husband, just to spite and hurt her, kept his one non-biological child and let her take the other two children. The Defendant was torn from his siblings and raised by this abusive man.

(Vol.II, R 468).

This Court has recognized that HAC is one of the most serious aggravators in the statutory sentencing scheme, *see Morton v. State*, 789 So. 2d 324, 331 (Fla. 2001); *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999), and has upheld death sentences based on circumstances similar to those presented in this case. In *Orme v. State*, 677 So. 2d 258, 263 (Fla. 1996), this court rejected a proportionality challenge where the victim was sexually assaulted, beaten, and strangled. The trial court imposed the death sentence in *Orme* after weighing three aggravating circumstances--HAC, pecuniary gain, and that the crime was committed during the commission of a sexual battery--against two statutory mitigators--substantial impairment and extreme emotional disturbance. *See also Douglas v. State*, 878 So. 2d 1246, 1262-1263 (Fla. 2004). This Court has upheld the death penalty in comparable cases. *Johnston v. State*, 841 So. 2d 349, 361 (Fla. 2002) (finding

death sentence proportional where four aggravators were found--(1) previous violent felony convictions; (2) murder committed during commission of sexual battery and kidnapping; (3) murder committed for pecuniary gain; and (4) murder was especially heinous, atrocious, or cruel--and moderate weight was given one statutory mitigator and slight weight ascribed to nonstatutory mitigation); *Mansfield v. State*, 758 So. 2d 636, 642, 647 (Fla. 2000) (holding death sentence proportional where two aggravating circumstances were found--murder was especially heinous, atrocious, or cruel and murder was committed in course of sexual battery or attempted sexual battery--and no statutory mitigators were found and five nonstatutory mitigators were accorded some or very little weight); *Geralds v. State*, 674 So. 2d 96, 104 (Fla. 1996) (upholding death sentence where two aggravators were found--murder was especially heinous, atrocious, or cruel and committed in course of robbery or burglary--and little weight was ascribed to statutory mitigator and very little weight accorded three nonstatutory mitigators); *Everett v. State*, 893 So. 2d 1278, 1288 (Fla. 2004); *Finney v. State*, 660 So. 2d 674 (Fla. 1995) (death sentence upheld where three aggravating circumstances were arrayed against five nonstatutory mitigating circumstances); *Lawrence v. State*, 698 So. 2d 1219, 1221 (Fla. 1997); *Johnson v. State*, 660 So. 2d 637 (Fla. 1995) (death sentence upheld where three aggravating circumstances were arrayed against fifteen nonstatutory mitigating circumstances).

ARGUMENT XIV

ENGLAND'S DEATH SENTENCE DOES NOT VIOLATE *RING V. ARIZONA*.

England's claim that *Ring v. Arizona*, 536 U.S. 584 (2002), operates to invalidate Florida=s long-upheld capital sentencing statute has been repeatedly rejected by this Court and by the United States Supreme Court. *See Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003); *Butler v. State*, 842 So. 2d 817 (Fla. 2003)(relying on *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002) and *King v. Moore*, 831 So. 2d 143 (Fla. 2002) to a *Ring* claim in a single aggravator (HAC) case); *Banks v. State*, 842 So. 2d 788 (Fla. 2003); *Spencer v. State*, 842 So. 2d 52 (Fla. 2003); *Grim v. State*, 841 So. 2d 455 (Fla. 2003); *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Anderson v. State*, 841 So. 2d 390 (Fla. 2003); *Lucas v. State/Moore*, 841 So. 2d 380 (Fla. 2003); *Porter v. Crosby*, 840 So. 2d 981 (Fla. 2003).

Furthermore, England=s death sentence is supported by aggravators that fall outside any interpretation of *Ring*. England was convicted of not only a prior violent felony (murder), but also armed robbery during the course of this murder.

CONCLUSION

Based on the foregoing arguments and authority, Appellee respectfully requests this Honorable Court deny all relief and affirm the convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Mail to the **Florida Supreme Court**; and U.S. Mail to: **Todd G. Scher**, Office of Todd Scher, P.L, 5600 Collins Ave., #15-B, Miami, Florida 33140 this _____ day of July, 2005.

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COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

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