IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO4-1521

RICHARD ENGLAND,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case involves the appeal from the final judgment of conviction for first-degree murder, robbery, and an attendant sentence of death. Citations to the record on appeal shall be designated (R page #). Other references shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. England has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. England, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On November 6, 2003, a grand jury in Volusia County, Florida, returned a two-count indictment against Mr. England (R1-2). Count 1 alleged that, on or about June 25, 2001, Mr. England killed Howard Wetherell either in a premeditated manner, during the course of a robbery or attempted robbery of Wetherell by the use of blunt force trauma, or "by aiding, abetting, counseling, hiring, or otherwise procuring such offense to be committed by Michael Jackson" (R1). Count 2 alleged an armed robbery of Wetherell with a deadly weapon (a metal rod) (*Id*.). The Public Defender was appointed to represent Mr. England, but moved to withdraw because it had previously represented co-defendant Jackson and through that representation learned of confidential information concerning the homicide (R4). On December 2, 2003, attorney Gerard Keating was appointed to represent Mr. England (R7).[1] Mr. England thereupon entered a written plea of not guilty (R8). On December 15, 2003, the State filed its written notice of intent to seek the death penalty (R15). Counsel filed a number of pretrial motions, including a motion to dismiss on constitutional speedy trial grounds (R22-28). Following a hearing the court denied the motion (R74-76). A

[1]Shortly before trial, Mr. Keating filed a motion for the appointment of Robert A. Sanders, Jr, to be co-counsel at both trial and penalty phase (R86-89). The court granted the motion (R90).

motion to dismiss the charges was also filed based on the Jackson's recanting testimony (R285-290). Following argument, the court denied the motion (R392). Mr. England also filed a motion to suppress confessions/admissions (R299-303), which was granted in part and denied in part (R398-399).[2] A motion to suppress the testimony of jailhouse snitch Steven Diehl as well as documents relating to Diehl was also filed (R265-266), and subsequently denied by the court (R396-397). Mr. England also sought an order *in limine* regarding the State's use of gruesome and unfairly prejudicial autopsy photographs (R289-290)

On April 23, 2004, the State filed a notice of its intent to introduce evidence of other crimes, wrongs, or act, namely (1) an incident in November, 1987,[3] in which Mr. England, while acting in a premeditated fashion or while engaged in the perpetration or attempted perpetration of a robbery, killed Robert Ryland by beating him in the head with a metal object, and also committed a robbery on Mr. Ryland with a deadly weapon by the taking of his motor vehicle; (2) an incident in June, 2001, in which Mr. England unlawfully possessed cocaine and transported

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[2]The only statement that the court suppressed was Mr. England's statement "I don't want to talk to you" which was made while he was being questioned by State Attorney investigator Shon McGuire. The court ruled that such statement "could be fairly be susceptible of interpretation as a comment on the defendant's right to remain silent" (R399).

[3]Mr. England was 16 years old, and therefore a juvenile, at the time of this incident (R96).

said substance to Louisville, Kentucky (R94-97). Mr. England filed his own notice of intent to introduce reverse-*Williams* rule[4] evidence in the form of co-defendant Jackson's involvement in the July, 2000, first-degree murder of a homosexual man, James Beamon, with whom Jackson was living at the time and who Jackson murdered in a strikingly similar fashion as the victim in the case in which Mr. England and Jackson were charged (R304-309). As to the motion filed by Mr. England, the court granted the motion in part, concluding that there was "clear and convincing evidence" that Jackson was Beamon's assailant and that there were "striking similarities between the instant murder charge and the prior crime" (R404-405).[5] Thus, the court concluded that due to the uncertainty about whether Jackson would testify at trial, the defense could, outside the presence of the jury, introduce the evidence and seek a ruling from the court at that time (*Id*.).

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[4]*Williams v. State*, 110 So. 2d 654 (Fla. 1959).

[5]Among the "striking similarities" found by the court between Jackson's assault on Beamon and the facts of the instant case were (1) the beatings were accomplished with solid objects (fire poker, possible pipe); (2) the beatings were to the heads and faces of both victims; (3) the beatings were "very brutal"; (4) there was much blood spatter; (5) weapons were not located in either crime; (6) both victims were older white males; (7) both victims were homosexuals; (8) Jackson lived with both victims as a hustler; (9) both victims wanted Jackson to leave; (10) the attacks took place in the victims' homes; (11) property was taken from both victims; (12) attacks took place in the evening or very early morning; (13) the beatings resulted in severe injury or death (R405). The court did note some dissimilarities between Jackson's assault on Beamon and the facts of the instant case, but found they were "insubstantial" (*Id*.).

but subject to impeachment and/or *Williams*-rule evidence (R400). The parties later agreed that neither side would be presented its respective *Williams* rule evidence at the guilt phase (R1378-79), although the defense did seek to introduce the reverse *Williams* rule evidence as to Jackson at the penalty phase (R1949).

Mr. England also filed motions with respect to the constitutionality of Florida's capital sentencing scheme (R104-129; 136-49; 150-58; 159-76; 178-208; 209-225; 239-262; 291-298). Mr. England also filed a motion for a statement of particulars requesting the State divulge what aggravating circumstances it intended to rely on (R267-279), as well as a motion to bar imposition of the death sentence as unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002) (R310-324). All of these motions were denied (R393, 394, 395, 401, 407-08). Mr. England also filed extensive objections, on constitutional grounds, to the standard penalty phase jury instructions (R326-384); these objections were denied (R390).

On May 24, 2004, the jury returned a verdict of guilty of first-degree premeditated murder *and* felony murder on Count I, and guilty of robbery with a deadly weapon as alleged in Count II (R409-410). A penalty phase took place on May 27, 2004, following which time the jury returned an 8-4 death recommendation (R415). After the penalty phase, defense counsel filed a motion requesting the appointment of a confidential mental health expert to examine Mr. England, contending that counsel had reason to believe Mr. England was either incompetent

to proceed or that he may have been insane at the time of the offense (R417-418). The motion was granted by court order dated July 2, 2004 (R444-445). On that same day, Mr. England moved for an unopposed continuance of the *Spencer* hearing, then set for July 9, 2004, noting that the court had yet to issue an order on the mental health expert's appointment and that even were the court to grant it at this late date, the anticipated mental health expert would not have sufficient time to evaluate Mr. England and prepare an adequate report by the July 9 *Spencer* hearing (R456-57). The court, however, on July 6, 2004, denied the requested continuance (R458). The *Spencer* hearing ultimately took place in two parts, July 9, 2004, and July 16, 2004.[6] Following the *Spencer* hearing, both the State and the defense filed sentencing memoranda (R422-430; 431-439). Mr. England also filed a memorandum regarding the issue of proportionality (R440-443).

On July 23, 2004, the trial court issued its findings of fact in support of the death penalty on Count I (R461-469). The court found the following aggravators established beyond a reasonable doubt: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, community control, or felony probation, pursuant to §921.141 (5)(a), Fla. Stat.;[7] (2)

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[6]No mental health testimony was presented at the *Spencer* hearing from the court-appointed expert.

[7]The court found that this while this aggravator was a factor to be considered, "it is neither a heaver or great factor, nor a light or minor factor, but

the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, pursuant to §921.141 (5)(b);[8] (3) the capital felony was committed during the course of an enumerated felony (robbery), pursuant to §921.141 (5)(d);[9] and the capital felony was especially heinous, atrocious, and cruel, pursuant to §921.141 (5)(h) (R461-462).[10]

The court found that no statutory mitigating factors had been reasonably established. The court rejected the no significant history or prior criminal activity statutory mitigating factor pursuant to §921.141 (6)(b), noting that the evidence established the contrary (R463). The court rejected that Mr. England was under the influence of an extreme mental or emotional disturbance under because Mr. England denied committing the murder and because although there was "some evidence of drug and alcohol consumption by the Defendant prior to the murder," it was "not enough to establish this mitigator" (R463). As to whether the statutory mitigator under §921.141 (6)(d), Fla. Stat., had been established, the court noted

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rather a medium factor" (R461).

[8]The court used Mr. England's prior conviction as a juvenile for second-degree murder (R462). The court afforded "great weight" to this aggravator (R462).

[9]The court found that this aggravator "is entitled to consideration and is afforded medium weight" (R462).

[10]The court afforded this factor "great weight" (R462).

there was "much conflicting evidence" as to whether Mr. England was an accomplice to Jackson or whether his participation was relatively minor; the court, however, found that Mr. England was a "full and actual participant in the murder, and together with Jackson actually beat Weatherell" (R463). The court also rejected the statutory mitigator regarding the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law under §921.141 (6)(f), Fla. Stat., because "no mental health issue [was] raised" and the testimony regarding drug/alcohol use was "not enough" to establish this factor (R464). The court likewise rejected the age statutory mitigator under §921.141 (6)(g) as not being a factor "in mitigation or otherwise" (R464).

The court found that evidence reasonably established a number of nonstatutory mitigating factors. The court first addressed the factor of disparate treatment, concluding that Mr. England and Michael Jackson were "equally culpable of the murder" (R464). However, the court found that Mr. England's sentence was not "legally" disparate in light of the Court's decision in *Kight v. State*, 784 So. 2d 396 (Fla. 2001) (R465). The court then discussed, in detail, the additional testimony of nonstatutory mitigation presented by Mr. England at both the penalty phase and *Spencer* hearing (R465-468), and made the following findings:

> 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[] 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 coming 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. 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.

(R468) (footnote omitted).

After concluding that the jury's 8-4 recommendation for death "is supported by the evidence," the trial court sentenced Mr. England to the death penalty on Count I, and to a concurrent term of natural life on Count II (R472; 474; 477).

STATEMENT OF THE FACTS

THE PROSECUTION CASE

In early July, 2001, after neighbors became concerned that the victim had not been seen or responded to phone calls for some time, they decided to enter his apartment and discovered that it was in "very bad shape" with a pronounced odor inside (R598-99). After looking around the downstairs area, the neighbors went upstairs but the master bedroom was locked (R600-01). The victim's car, a green

Mercury Sable, was not in the garage (R601-02). Because the victim had a tendency to go on trips, the neighbors did not want to jump to any conclusions (R601), but on July 2, they decided to call the police (R601-02). After the police arrived, the victim's body was discovered (R602).

Officer Raymond Cruz responded scene and entered the apartment (R604). Being unable to gain entry to the upstairs bedroom, Cruz called the fire department, which did gain entry by force (R605-06). The first thing Cruz noticed was blood all over the room, and, upon entering the bathroom, the victim's body was discovered in the tub (R606). The area was thereupon secured as a crime scene (R607).

At approximately 9:50 PM on July 2, 2001, FDLE analyst Timothy Mell responded to the scene (R611-12). Mell was assisted by Stacy Colton and Kelly May, also of FDLE, as well as Tom Youngman of the Daytona Beach Police Department (R614). The earliest date of newspapers found at the front door of the apartment was June 26, 2001, up through July 2, 2001 (R615). When entering the bedroom, Mell observed a large amount of blood, and there was a "powdery substance" on the blood that was on the floor (R616; 632; 954). A lot of the furniture also was covered with "a mist type powdery substance" (R616-17; 954). Mell had no personal knowledge of what this substance was, although he speculated that the substance hampered his ability to obtain latent fingerprints from

the condominium (R647-48).

Mell then explained to the jury, through the use of poster-board enlargements of photographs, the layout of the condominium (R619 *et seq.*). One of the photographs depicted a fireplace in the living room, along with fireplace tools (R621). Another photograph depicted a marker on a table and a pen on the floor in front of a lounge chair in the living room (R622-23); the two writing instruments, a Rub A Dub pen and a permanent marker, were impounded and introduced into evidence (R641; State's Composite Exhibit 19). An attempt was made to collect latent fingerprints from the condominium, and although one print was located on the refrigerator, it was the only one that was collected and it was never identified with anyone (R625). Mr. England's fingerprints were never found on either of the writing instruments (R645). In a garbage can located in the second bedroom, Mell located and impounded two cigarette butts (R630), which were later introduced into evidence (R643) (State's Composite Exhibit 20). A piece of shower curtain from the bathroom associated with the second bedroom also had what was a presumptive blood stain, and the cutting from the curtain was impounded and introduced into evidence (R628; 644; State's Exhibit 21). The bed in the master bedroom also had what appeared to be blood stains on the bedspread and pillow area (R633-34). Blood had seeped through to the bottom of the mattress and was also located on the carpet between the two mattresses (R634). A green washcloth

was also located by the blood (R635). A blue chair in the master bedroom also had what was presumptively blood on the covering on the arm, on the back of the chair, and on the bottom of the chair cushion (R637). The jury was also shown, in State's Exhibit 16, three photographs of the victim in a state of decomposition and bloating (R638). Three photographs comprising Exhibit 17 depicted the technicians removing the different items (towels and pieces of plastic) that were covering the victim's body (R639). A pillow had also been covering the victim's face (R639). The victim was not wearing anything save for a pajama top (R640). A photograph collected in the hallway of the victim's apartment was also impounded (R641; State's Exhibit 18); no fingerprints belonging to Mr. England were located on the photograph, however, despite an attempt by the laboratory to process the photograph for fingerprints (R645). No comparison between the latent fingerprints found at the scene and those of Samuel Jackson was ever conducted by technician Mell because "that wasn't my job to do that" (R645).

Thomas Youngman assisted the FDLE technicians in the collection of evidence at the victim's condominium (R652-54). Youngman testified that State's Exhibit 18, which was the photograph collected in the hallway, had the words "pervert, fuck off" written on it with a marker-type writing instrument (R655; 955). There was an arrow pointed toward the individual depicted in the photograph, and the words "fuck with us" were written below (R656; 955). *See also* R663.

Youngman also testified that the fireplace poker was missing from the fireplace set (R657). He later went back and collected the fireplace set because it could have been involved in the crime (R657-58; State's Exhibit 22).

N. Leroy Parker, a crime lab analyst from FDLE, was admitted as an expert in the field of blood stain pattern analysis (R665-69). Parker responded the crime scene, where he documented and photographed the relevant areas of the scene (R676-77). Parker testified to his opinion that in the master bedroom the victim was forcefully beaten in several different locations including on or near the floor, next to the door, near the dresser, and the nightstand next to the bed (R678). Some of the impacts occurred when the victim was upright and some when he was on or near the floor (R679). Parker explained the location of the blood spattering by use of a series of photographs introduced into evidence (R681-705; State's Exhibits 23 through 30). Parker's conclusion was that there was a lot of movement by the victim because there were impact sites in different locations, and the victim was in different positions at the time of the forceful impacts (R705-06).

Claude Dove, a security manager with Bell South (R707), testified that in June, 2001, the telephone number 386-253-0460 belonged to the victim (R710-11). Dove was able to produce a "call detail" document, which listed the day, time, and number called for the subscriber's phone number (R712-13). According to Dove, a number of phone calls were made from the phone number listed as that belonging

to the victim on June 25, 2001, June 26, 2001, and July 2, 2001 (R713-17). Several of these calls was made in the early morning hours of June 26, 2001, to Eugene and Ivy Evans, who were friends of Mr. England (R780-82; 786). None of these calls was answered by either Eugene or Ivy Evans, but they did have an answering machine (R783; 787). Ivy Evans recalled receiving these calls in the middle of the night, and testified that she heard Mr. England's voice on the answering machine asking for her husband (R788-90).[11] She later erased the answering machine messages (R789-92).

Karen Duggins was a friend of Mr. England's, and subsequently they developed a personal sexual relationship (R754-55). Through Mr. England, Duggins met Michael Jackson (T756-57). One time, Duggins went to the condo where Jackson was living with his "uncle" in order to find Mr. England (R757). In the evening hours of Monday, June 25, she went over to the condominium after Jackson called her to bring back some music CDs he had previously left at her house (R758-59). When she got to the condo, Jackson was in the back parking lot by the pool area. She saw him and gave him back his CDs (R760-61). As she was getting ready to leave, Jackson told her that Mr. England was on his way over and, shortly thereafter, Mr. England showed up on his bicycle (R761-62). She spent

[11]An objection on best evidence grounds was overruled (R788).

about 45 minutes or so with them out by the pool area and then she left (R762).

Duggins next saw Mr. England the following night, June 26, after he came by her house after work around 6:30 or 7:00 after work (R763; 773).[12] On Friday, June 29, she and Mr. England drove to Kentucky along with Duggins' daughter (R767-68). Prior to going to Kentucky, however, they drove to the Orlando area to see someone named Deleon (R768-69). After spending a day in Kentucky, they drove back to Daytona Beach (R770). In September, 2001, Duggins made a call to Deleon at the request of Mr. England, who was in jail at the time for unrelated reasons (R770-71). Mr. England told her to tell Deleon that "if he had anything at his house that wasn't his he needed to get rid of it" (R771). Duggins did not know "if it was property, drugs, or anything. All I did was relay that message" (R772).

Reynaldo Deleon, currently in prison for heroin trafficking charges and a six-time convicted felon (R857), gave a statement to law enforcement in September, 2003, before entering his plea to the trafficking charges (R804-05). Deleon befriended Mr. England in 1994 (R805). Sometime in the summer of 2001,[13] Mr. England and a young male friend came to visit him in Orlando and brought some

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[12]She did place a call to the Wetherell residence in the morning of June 26 to look for Mr. England (R776).

[13]Deleon could provide no date, month, or day of week when these visits purportedly took place (R861-62).

items, including guns, jewelry, and silver items, which Mr. England said had been stolen (R809-11; 821). About a week later, Mr. England came to visit him again, this time with his girlfriend (R824) Deleon ended up selling the gun and some of the jewelry (R811). Mr. England told Deleon he wanted his help selling the items, in exchange for which Deleon was to give Mr. England half an ounce of cocaine (R811-12; 824). During the visit when Mr. England came with his girlfriend, Deleon testified that Mr. England told him that his friend had gone to someone's house, hit him with something, and then went to get Mr. England to take some of the property (R825). Mr. England also told him that when he returned to the victim's home, he (Mr. England) hit the man with "this thing that you use to move charcoal" (R826). Mr. England also told Deleon that Michael Jackson was driving the victim's car (R828). In response to Mr. England's statements, Deleon testified that he told Mr. England that "that young man was going to get him into trouble" (R828), and Mr. England responded "If he got me in trouble, I would kill him" (R829).[14] He also told Deleon that he would say that his girlfriend was his alibi, and that he and Karen Duggins were going to take a trip to Kentucky (R830).

[14]The defense had previously argued that this purported statement should not be admissible and the court initially agreed (R801). Shortly thereafter, the court *sua sponte* changed its ruling as the statement was probative (R822). The defense objected when Deleon was permitted to testify to this statement (R829).

On the day Deleon was arrested on the drug charges, he received a phone call from Karen Duggins, who told him that Mr. England had been picked up and that detectives were looking for the property (R832). Deleon took the property he still had and hid it in a hotel (R832). The police later went to the hotel and retrieved the items (R833). Upon his arrest, Deleon initially refused to discuss any knowledge of this matter with law enforcement (R834-35). Shortly before he was to be sentenced on his drug charges, and over two years after his arrest, Deleon changed his mind and gave a statement implicating Mr. England in exchange for getting out from under the life sentence he was facing on the drug charges (R835-37; 856).[15] In his words, if he "testified correctly" for the State, the State would reduce by 12 years his drug trafficking sentence (R860-61). Deleon was also permitted to testify that while he was in prison, he received a letter asking him not to testify against Mr. England (R854).[16] The letter was not, however, handwritten by Mr. England, and bore the signature of someone named Orlando (R854). Deleon threw the letter away after reading it because he was afraid to have it in prison and "didn't know that it had any significance in this trial" (R854).

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[15]Deleon also acknowledged that despite knowingly selling stolen property, the State never charged him with dealing in stolen property, a second degree felony (R858).

[16]There was extensive argument over the admissibility of this testimony, with the court eventually overruling all defense objections (R839 *et. seq.*).

Mr. England's wife, Sarah Dullard, testified that on Monday, June 25, 2001, she had purchased a new car in Deland, then went right to work at the Oyster Pub (R884-85). Shortly after 1:00 AM on June 26, Dullard saw Mr. England, who had come by the pub in order to borrow the car; Michael Jackson was right across the street at another bar called Molly Brown's (R886-87). She did not give him her car (R895), and after arriving home several hours later, Mr. England was not there (R887). She thought that the next time she heard from him on June 27, when she got a phone call from him telling her he was at a gas station and asking for a ride (R888-89; 899). The two went home and went to bed (R889). While they were in bed, Michael Jackson showed up and Mr. England said "what the fuck are you doing here" (R891). The two went into another room to talk, after which Mr. England came back to the bedroom and asked Dullard to give him and Jackson a ride to Titusville, where Jackson's brother lived (R891-92). After dropping Jackson off at a gas station in Titusville, Dullard and Mr. England drove back to Daytona Beach (R893).

Samuel Jackson, the older brother of Michael Jackson, testified that in June, 2001, he was living in Titusville when he went to meet his brother one day, who had been dropped off in the area (R900-02). After Michael requested that Samuel drive him to Daytona in order to "get the car," they drove there along with a few

friends (R904-05). The car, a green Mercury Sable, was parked behind their brother Eddie's apartment complex (R905). They drove back to Titusville, stopping along the way at the Volusia Mall and making purchases with the credit card belonging to the victim (R906-07; 933-34; 937-39). They also drove the car and used the credit cards in the following days (R908). A few days later, Samuel and Michael drove to Walton County, where they got into an accident and were subsequently arrested (R910-12). After his arrest, Samuel met with police on several occasions with regard to his knowledge of certain matters (R914). He was never charged, however, with any crime relating to either driving the victim's car or repeatedly using his credit cards to make purchases (R935).[17]

On July 2, 2001, Samuel and Michael Jackson were first interviewed in Walton County by Volusia County State Attorney Investigator Shon McGuire (R952-53). On July 6, McGuire returned to Walton County to interview Samuel again, who, this time, provided "more details" than he had in his earlier statement (R955-56). Based on this statement, McGuire began his search for someone named "Rich" (R956). "Rich" turned out to be Mr. England, who McGuire was able to speak with on the phone on July 16 (R959-61). Mr. England was busy

[17]Samuel Jackson's DNA was ultimately matched to a sample taken from a cigarette butt located in the ashtray of the victim's car (R1125).

working and could not talk, however (R961). That same day, McGuire obtained a state attorney subpoena for Karen Duggins, who gave a statement (R961-62). Several days later, he went back to Walton County to conduct a search warrant and obtain DNA samples from Michael Jackson to compare with the cigarette butts found at the victim's residence (R962). McGuire returned to Walton County on July 31 to interview Michael Jackson again; this time Jackson provided "more information" than he previously provided (R964).

Several days later, McGuire had a second contact with Mr. England who had been arrested on an unrelated matter (R964). McGuire informed him that he wanted to question him about the homicide and about Michael Jackson (*Id*.). Mr. England stated that he did not know these people (R965). McGuire followed up with a conversation with Sarah Dullard, and, from that conversation, learned of the existence of Reynaldo Deleon (R965-66). On August 16, 2001, McGuire returned to Walton County to again interview Michael Jackson and transport him back to Volusia County (R966). During the trip from Walton County, Jackson provided even "more detail" than he provided in his earlier statements (R969).

McGuire had another contact with Mr. England on October 16 at Mr. England's request (R972-73). In addition to Mr. England, his attorney on the unrelated case, Melissa Moore, and Detective Debbie Session were present (R972).

Mr. England waived his *Miranda* rights and gave a statement (R972-73), which was introduced into evidence (R994; State Ex. 38). In his statement, Mr. England explained that on Monday, June 25, 2001, he was with his wife, Sarah, buying a car[18], after which Sarah went to work and Mr. England went over to the victim's house after receiving several phone calls from Michael Jackson (R984; 997-98; 1000). The two smoked cigarettes and had a drink in the kitchen area (R1001), and Mr. England sees Jackson go upstairs and bring down some items in a brown bag which appeared to be bloody rags and "something like a rod" (R985; 1002). Jackson insinuated that he had "done something" to "his uncle" and Mr. England got nervous and stepped outside of the house; a few moments later, Jackson exited the house and they both left to go to Molly Brown's (R985; 1002-03). On their way to the bar, Jackson said he had killed the victim, or in his exact words, he "took his uncle out" (R1003; 1019). After reaching Molly Brown's and deciding not to stay there, they went outside and Mr. England saw his wife, Sarah, who works at the nearby Oyster Pub (R1005). Mr. England told Sarah he was coming home later and he and Jackson went back into Molly Brown's (R1005). Mr. England left shortly thereafter and went to another bar, Razzles, and lost contact

[18]It was later confirmed by McGuire that Sarah Dullard did purchase a vehicle on Monday, June 25, 2001 (R1030).

with Jackson at that point (R1007). He stayed at Razzles until around 3:00 AM and got home to find Sarah also arriving home; they got into an argument and Mr. England wound up sleeping in another room that night (R1007-08). Later that morning, Sarah woke him and told him to come to bed and the two fell asleep to be awakened by Jackson's arrival in their bedroom at around 10:00 AM (R1008). Mr. England went into another room with Jackson, when Jackson told him he had to help him "get out of here" (R1008-09). Mr. England talked Sarah into driving with him to take Jackson to Titusville, where they dropped him off at a store (R987; 1009). Mr. England said he never went to the upstairs portion of the victim's house, he had never before been inside the house, did not know the man that was killed, and had never been in his car (R986; 1011; 1017; 1019). Mr. England also said he had no knowledge of any contact with Reynaldo Deleon or why Deleon would lie to McGuire (R987; 1013-15). He did acknowledge that Deleon was a buddy of his who would visit on occasion, which would explain the phone calls Deleon made to Mr. England's house (R1018-19).

After giving this taped statement, McGuire testified that Mr. England asked him to turn off the tape, and then informed McGuire that he had seen Michael Jackson hide the murder weapon and could assist McGuire in locating it if McGuire could help with his pending charges (R1031-32). A search of the area was

conducted but no murder weapon was ever found (R1033-35).

In early November, McGuire met again with Samuel Jackson in Walton County, and, on December 18 and 21, 2001, and February 11, 2002, had additional interviews with Mr. England (R973-75). At Mr. England's request, these interviews were not taped (R975-76). During the December 18 interview, Mr. England told McGuire that he wanted to make some changes in what he earlier said (R1036). Mr. England said that on the night in question, he had been summoned to the victim's house by Michael Jackson, went inside, had some drinks, and then saw Jackson pick up a rod from the living room and go upstairs (R1036-37). He then heard some noises "like someone getting hit" (R1037). He also acknowledged going to Orlando in the victim's car with Jackson and giving the property to Deleon (R1038-39), and that Jackson threw away bloody clothes and rags into a restaurant dumpster (R1047-48).

McGuire again spoke with Mr. England on December 21, 2001, when, consistent with his earlier statement, he told McGuire that he went to the victim's house after being summoned there by Jackson, had drinks with Jackson, saw Jackson get a "rod of some type" and go upstairs and heard "sounds like whacks and he hears Mr. Wetherell screaming `Why are you hitting me?'" (R1078). His explanation of what occurred after they left the victim's house was also consistent

with his prior statements (R1080-82). Mr. England also continued to deny that he had been in the upstairs portion of the victim's house (R1084).[19]

On February 11, 2002, McGuire received a phone call from Mr. England wanting to know why McGuire had been talking with Michael Jackson (R1085). This time, McGuire informed Mr. England of the discovery of the cigarette butt found in the upstairs section of the victim's house[20], and Mr. England admitted that he actually had been in the upstairs part of the house the day before the murder and had been afraid to admit that he visited the home previously (R1087-88). At no time during any of McGuire's interviews with Mr. England did Mr. England ever confess to killing the victim (R1102). No fingerprints matching Mr. England were ever found at the home, nor did Mr. England use any of the victim's credit cards (R1102-03).

Jailhouse snitch and convicted felon Steven Jason Diehl testified that he was in the Volusia County Jail on a violation of probation charge when he met Mr. England after the two were housed on the same block for about a month (R1130-

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[19]Importantly, as the defense noted in cross-examination, the cigarette butt was *not* found in the victim's bedroom, but rather in a trash can in the room used by Michael Jackson (R1102).

[20]Testimony later established that Mr. England's DNA profile matched samples from one of the cigarette butts, and the other cigarette butt matched the DNA profile of Michael Jackson (R1122-23).

31). Because Diehl was in "protective lockdown" as the result of a jailhouse fight, he was not able to leave his cell, but other inmates were able to communicate with him through a slot in his cell door (R1131-32). During the month they shared the same block, Diehl testified that Mr. England would just stand outside his cell door and talk with him through the slot in the cell door several times a day (R1133-34). Before Mr. England telling him anything about his case, Diehl knew that Mr. England was facing capital murder charges (R1135-36). Mr. England told Diehl that he was innocent and that Michael Jackson was the killer (R1136). However, Diehl claimed to have developed a "trust" with Mr. England and soon learned more information which he would jot down in notes periodically to "preserve," notes which he later turned over to law enforcement (R1136-37; 1145). Diehl denied reading any newspapers or legal documents about the case (R1137-38).

Diehl testified that Mr. England ultimately admitted that he committed the crime, telling him that the gentleman was bludgeoned to death with a pipe and that the "old pervert deserved it" because he was having sex with a young male (R1138). Diehl also claimed that Mr. England discussed the fact that items were taken from the residence to a Hispanic friend of his and drug dealer in Orlando (R1140; 1142). When asked if Mr. England told him if he did the crime alone or with someone else, Diehl testified that he was "unclear on that" but that a "Mr.

Jackson" had also been involved in the entire criminal episode (R1140). After a number of additional questions by the prosecutor, Diehl changed his testimony and stated that it was his "understanding" that the murder "was a solo act" by Mr. England (R1140-41). Diehl also testified that Mr. England told him that there was a Rolex watch left behind that they had intended on taking but did not out of "haste" (R1142), and that he had been in the victim's car but got "spooked" so he got out (R1143). Diehl then alleged that Mr. England admitted "I fucked up and left a cigarette butt at the house" (R1143). All of these various statements were made by Mr. England during different conversations (R1145).

Diehl further claimed that Mr. England said he would "beat" the case against him, and mentioned the name of Bradley Collins, who Mr. England said would be willing to state that Michael Jackson had told him (Collins) that he (Jackson) had committed the murder and that Jackson was just "setting Mr. England up to lighten the load on himself" (R1146-47). According to Diehl, Mr. England also mentioned that he was going to have a letter written by someone else in Spanish to the Orlando drug dealer asking him not to testify (R1148), and that he was going to file a motion for a speedy trial (R1148). Mr. England wanted Diehl to sign a "contract" that he would not tell anyone about what Mr. England had told him, and Diehl agreed if he would be provided with a copy of the contract (R1150). Diehl signed the contract,

which he also turned over to law enforcement (R1150-51).[21] He decided to talk to police because he was "very disturbed" about the situation and felt it was his "civic duty" (R1152), although he acknowledged he would be foolish to say that the thought did not cross his mind that by cooperating with the police he could help his own personal situation (R1153-54). In fact, on cross-examination, Diehl acknowledged that he had been extradited to Florida from Kentucy, where his fiancé lived and expecting a child (R1178). Two days after speaking with law enforcement in early January, 2002, Diehl was released from jail and put back on probation so that he could be home for the birth of his child (R1179-80).

Don Quinn, a forensic document examiner, was asked to examine the text written on the photograph from the victim's house and analyze whether any comparison could be made to the handwriting exemplars taken from both Mr. England and Michael Jackson. Quinn explained the area of forensic document examination, and noted that it was possible for a person to disguise writing (R1199-1200). He also explained the different levels of "conclusions" that experts in his field arrive at. "Full identification" would be one end of the opinion scale and "full elimination" the other end (R1204). The "middle of the road" scale is neither an

[21]The "contract" was introduced into evidence over objection of the defense, as were Diehl's notes (R1157-58; State Ex. 45, 46; R1181-82; State Ex. 48, 49).

identification or an elimination (R1204). From the "middle of the road" conclusion there are "various steps" of probability: "probably" the writer, "very probably" the writer, to the "full identification" (R1204). This sliding scale of probabilities is governed by the quality of the evidence received for examination (R1205).

In Quinn's opinion, Michael Jackson "did not execute any of the questioned writing that I examined for this report (R1207), and that Mr. England was the author of the writing on State Exhibit 47, which was a letter admitted into evidence that Diehl had provided to law enforcement (R1207-08; 1211-15). Quinn then opined that Mr. England "very probably" executed the text "pervert" on the photograph located in the victim's home; he could not opine, however, as to the author of the word "us" in the text "fuck with us" (R1208; 1217-18; 1222). Mr. England also "very probably" wrote the text contained in the "contracts of conveyance" that Diehl testified to (R1208-09; 1223-26).

On cross-examination, Quinn acknowledged his background was working for the U.S. Army Crime Lab and the Florida Department of Law Enforcement, both government bodies (R1227). He also acknowledged that the exemplars he used for comparison purposes were taken by law enforcement, he had no idea of the circumstances under which the exemplars were taken, and that there were ways in which a person could disguise or distort his handwriting (R1228-31). He

admitted that Jackson's exemplars bore a number of hallmarks of distortion such as embellishment, writing words not requested, and using different styles of writing (R1231-36). It is not a "certainty" that Mr. England wrote the text on the photograph (R1251). Despite the fact that Jackson unquestionably disguised his writing on the exemplars, Quinn refused to concede that Jackson could also have been the author of the questioned text (R1253).

Dr. Thomas Beaver, the medical examiner, testified that the victim died as a result of blunt force trauma to the head and neck (R1271). There were multiple lacerations to the head caused by a "metal rod type object," although the victim's skull was not fractured nor was there direct injury to the brain (R1272; 1274; 1284-85). Nor was there any evidence or signs of strangulation (R1293; 1303). In the doctor's view, a single blow to the victim's head caused a fracture of the neck resulting in death (R1272; 1299-1300). The victim also exhibited injuries to the torso, hands, and arms, which could be classified as defensive wounds (R1275).[22] Dr. Beaver opined that it would be "difficult to say" how long it took for the victim to die after the neck fracture because it would depend on a number of factors, but he would "estimate around two or three minutes, maybe a little less" (R1275-76).

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[22]Hair and blood were found on the victim's left hand, but these items were never submitted for forensic testing and thus Dr. Beaver could not determine whose hair and blood it was (R1294).

He "suspected" that the injuries to the hands occurred first, then the spinal fracture occurred and "he would be paralyzed from that point" (R1276). Until the point of the spinal fracture, Dr. Beaver opined that he had no evidence to suggest that the victim was unconscious (R1290). He would have lost consciousness after the spinal fracture, however, within 30 to 40 seconds, and would not have been in pain at that point (R1290-92). Dr. Beaver could not provide any time frame for how long the assault took place prior to the spinal fracture (R1296-97; 1304-05), nor could he render any opinion as to whether there was one or two assailants involved (R1299).

THE DEFENSE CASE

Michael Jackson testified that the victim in this case was his "sugar daddy and pimp" who "took care of me for a while for favors" (R1393-93). Jackson lived in the same condominium but had his own bedroom upstairs (R1393). In June, 2001, Jackson was living with the victim after meeting him at a gay bar and after the victim picked him up (R1394). Jackson killed the victim, Mr. England did not (R1394). Nor did Mr. England assist him in killing the victim (R1395). Jackson killed him with a firepoker because he was a pervert (R1395).

Jackson did give previous statements indicating that Mr. England was the killer, but he made those statements because he was initially "pissed off" at him

and, when he (Jackson) was 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" (R1396). Both he and Mr. England used to smoke cigarettes, and Mr. England did smoke in the condominium the night before the victim died (R1396-97).

On cross-examination, Jackson testified he met Mr. England when he was 16 years old and they became good friends (R1400-01). Jackson did not know if Mr. England hated homosexuals (R1402). The day before the murder, Mr. England came over to the condo, and then Karen came over later (R1403). Mr. England did go up to Jackson's room where they both smoked some cigarettes and they also hung out drinking in the kitchen (R1403-04). The victim was in his own bedroom at the time (R1404). At some point Karen Duggins came over to return some of Jackson's music CDs, and they all hung out by the pool (R1405-06). After Duggins left, he and Mr. England went up stairs, got cleaned up and they both went out (R1407). Jackson later saw Mr. England at Molly Brown's and at the Oyster Pub arguing with his wife (R1408). Jackson next went to a club called Razzles, where he met a guy named Oliver, and they went to Ray's Place, another gay bar (R1410). Oliver is gay, but Jackson is not although he had performed homosexual acts in the past (R1411). After leaving Ray's Place, Jackson, Oliver, and some

other friends went to someone's house for a party (R1411). Mr. England was not present at the party (R1412). Jackson eventually got kicked out of the party after being accused of stealing someone's necklace and eventually got a ride back to the condominium where he arrived around 3:00 AM (R1412-13). He intended to kill and then rob Mr. Wetherell when he got back to the house (R1413). He used the firepoker, went upstairs, and started beating the victim until he was dead, then Jackson dragged him into the shower (R1414-16). Jackson then got naked and took a shower with the victim (R1416). He then poured some "fire hydrant stuff' on the floor and went through the house looking for valuables (R1420-21). He put the stuff in the living room and then passed out (R1421). He woke up the following day and loaded the car with the valuables; he denied that Mr. England assisted him with removing the valuables (R1421-22). Jackson then drove to a Burger King, where he threw bloody clothing and the fire poker in a dumpster (R1423-24). He then drove to Mr. England's house and showed him the car and the stuff (R1425). Both then drove in the victim's car to Orlando to meet with Deleon (R1425-26). They then drove back to Daytona and Mr. England got "kind of freaky" about being in the car and left Jackson (R1427-28). Jackson had nowhere to go, however, and wound up going to Mr. England's house, and he and Sarah Dullard drove him to Titusville (R1428-29). Once in Titusville, Jackson hooked up with his

brother, Samuel, and they both eventually wound up in Walton County where they were arrested for the car accident (R1431).

Jackson acknowledged to previously giving different statements to law enforcement and in his deposition but he is not willing to take a life sentence "unless what I'm saying is true" (R1432-39). He lied about Mr. England's involvement in prior statements so that "they would let me go" and the truth was that Mr. England "didn't do nothing" (R1443-46). Jackson admitted that he lied at first and "tried to save himself at first. It took me three years to get right. Now I'm right, so I'm setting things straight" (R1448). He also explained that he told his brother, Samuel, what he did, and also told Samuel "Put it off on Rich. He's already got a murder charge. You'll get off easy" (R1453). Samuel is trying to help him by saying that both Michael and Mr. England beat the victim to death (R1452). Shon McGuire and Debra Session also "made me feel like it was in my best interest if I could stick something on Rich, so that's what I did" (R1460-61).

Jackson had been indicted for first-degree murder, armed robbery, and a few counts of using a stolen credit card in this case, and was set to go to trial on September 8, 2003 (R1493). The day before trial, Jackson gave a taped statement in exchange for a plea of second degree murder and a plea to the armed robbery and use of credit cards (R1494). Any recommendation by the State as to sentence

was to be based on his assistance in the case, but the ultimate decision would be up to the judge (R1494). Jackson, however, testified that the prosecutor and his defense lawyer told him that they "knew the judge" and that he would probably get around 15 years (R1494-95). He is currently attempting to withdraw his plea (R1496). Jackson admitted that he was the author of the word "pervert" on the photo after he killed Mr. Wetherell (R1499).

THE PROSECUTION REBUTTAL CASE

Detective Debra Session never made any promises to Michael Jackson about the sentence he might receive in exchange for his guilty plea to second degree murder (R1506-08). Prior to Jackson's statement on September 7, 2003, Session had never heard the name "Oliver" mentioned in the investigation (R1509). Based on that information, Session located an Oliver Vanvalkenburg and interviewed him (R1510).

On cross-examination, Session acknowledged being present for all of the statements made by Jackson in the course of the investigation (R1513). In his first statement of July 31, 2001, Jackson told police that it was Mr. England who used the fire poker to kill the victim (R1514). Then, in August, 2001, he changed his story and admitted that he (Jackson) was the one who killed the victim with the firepoker until it broke (R1514). On September 7, 2003, just before the change of

plea, Jackson said he hit the victim with the fire poker and Mr. England attempted to choke the victim (R1514). In each statement, Jackson assumed different levels of responsibility for the killing, but over time he attributed less responsibility to Mr. England (R1515). Session also admitted to employing "sophisticated" techniques in interviewing subjects, and Shon McGuire was even more experienced than she was (R1518-19). One of the techniques she knows McGuire to use is the word "hypothetically" when talking to a subject about certain facts or a possible sentence (R1522).

Oliver Vanvalkenburg testified that in the "time frame" of June 26, 2001, he attended a party at someone's house (R1533). During the party, he "went into the bedroom" and later discovered that his gold necklace "was missing" (*Id*.). He told a friend about this, and they both confronted the guy they thought took it (*Id*.). They made the guy take off his clothes and the necklace was found in his sock (*Id*.). The "guy" he was referring to was someone he had met earlier in Ray's Place (R1534). Vanvalkenburg explained that he met two men at Ray's Place, after which they all went back to Valvalkenburg's house (R1534-35). After finding the necklace, Vanvalkenburg asked the two to leave or else he would call the police (R1536). Because they had no way of getting home, someone at the party agreed to give them a ride (R1537). Vanvalkenburg identified Mr. England as being the

one whose sock he found his necklace in (R1542). The other person was named Mike (R1542). As they were leaving the party, Vanvalkenburg heard them yelling "[f]aggots and queers" (R1543).

On cross, Vanvalkenburg, who is gay, explained that the party at his house was attended by six people, some of whom were in bed during the party but not engaged in sexual activity (R1545). He was not sure of the date or month of the party, but thought it was a Friday or Saturday in 2001 (R1545-46). Alcohol was being consumed, including by Vanvalkenburg (R1546). Vanvalkenburg admitted he "picked up" Michael Jackson at Ray's Place but did not know he was a hustler (R1547). He did not know if Jackson performed any homosexual acts with anyone at the party (R1549). He admitted having been shown pictures of Mr. England by law enforcement a few weeks earlier (R1551).[23] He also admitted knowing the victim in the case and that he was an older homosexual man (R1568).

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[23]A *Richardson* inquiry was then conducted because this information had never been previously provided by the State (R1551). Vanvalkenburg explained that he met with the prosecutor and Detective Sessions a few weeks earlier and had been shown some photographs and he was able to identify Mr. England and Michael Jackson's pictures (R1553-56). The prosecution admitted to not disclosing "this event" because Vanvalkenburg was only recently listed as a witness and the prosecutor did not feel that this was not really an identification based on the photograph but merely "differentiating between" whether it was Mr. England or Jackson who had the necklace (R1560). The court found the non-disclosure to be inadvertent and not prejudicial because the witness "would have" identified Mr. England with or without the photos (R1560).

Don Quinn, the forensic document examiner, was recalled to testify that Michael Jackson was not the author of the words "pervert" and "fuck with" on State Exhibit 18 (R1574 *et seq*.).

Samuel Jackson was also recalled to testify to the discussions he had with his brother Michael on their drive from Titusville to Walton County (R1593). Michael told him that he and Mr. England took their clothes off, went into the victim's bedroom, and both began beating him (R1594). Michael never told him that he alone committed the murder, nor did he tell him that Mr. England committed the murder alone (R1595). On cross-examination, Samuel admitted to previously lying under oath in his deposition in order to save his brother (R1596-97). He also acknowledged being allowed to meet privately with his brother for two hours on September 7, 2003, the day before Michael entered his plea, before they both gave proffers to the State (R1597-98).

PENALTY PHASE

The State presented, with defense stipulation, the prior testimony of Johnny Lee Towner, who had previously given a proffer to the circumstances of Mr. England's involvement, as a juvenile, in a 1987 homicide to which he ultimately pled guilty to second-degree murder (R1876-1916). The State next called Arthur Bailey, a New Smyrna Beach police officer, who testified to his investigation into the 1987

homicide (R1917-19). Next, the State presented, with a defense stipulation, the autopsy report of the victim of the 1987 case, Robert Ryland (R1920). The State then presented the testimony of Irene Haig, a probation officer from the Florida Department of Corrections (R1922). Ms. Haig testified that, as a result of Mr. England's prior conviction, he was released from prison in March, 1997, and placed on probation (R1922-23). The State also presented victim impact testimony from the victim's two children (R1926-32; 1933-38).

The defense presented Thomas Anderson, who testified that he and Mr. England worked together in the tile contracting business for about two years (R1951-53). Mr. England, who had no prior experience in the tile business, was a quick learner, hard worker, and a talented dedicated employee (R1954-55). Mr. England also spent time with Anderson's family, and Mr. England was always friendly, outgoing, and trustworthy (R1955). Anderson never saw Mr. England become violent or angry, and in fact would "walk away" when confrontational situations were presented (R1957-58). He believed Mr. England's was a life worth saving (R1959). Shane Alden Conner also employed Mr. England for a period of time in the sheet metal business in Daytona Beach (R1960-61). He was a good and quick learner on the job, and very dependable, trustworthy, and professional (R1961-63). Conner would also, on occasion, socialize with Mr. England and

Karen Duggins, who appeared to be in love with each other and treated each other with mutual respect (R1964-65). Connor also testified that Mr. England's life was one worth saving because he is a "good person" and "always looked after others" (R1966).

Jake Ross, the defense investigator, testified that he spoke with Mr. England's mother, Ines Fyffe, and sister, Allison England, who could not be personally present (R1975-76). Ross relayed to the jury that Mr. England's mother was eighth months pregnant with Richard and living in Panama when her first husband, Richard Williams, left her (R1977). Richard has never seen or met his biological father (*Id*.). When Richard was three months old, his mother married her second husband, Ronnie England, who later adopted Richard while they were still living in Panama (*Id*.). Ronnie Williams was in the U.S. Army and, when Richard was six years old, the family moved to Kentucky for a few years, then back to Panama, and then again to Huntsville Georgia (R1978-79). Ronnie Williams was an abusive alcoholic who was physically and mentally abusive to Richard and his siblings, Allison, the youngest daughter, and Barrie, the next oldest (R1978). When Richard was 11, he learned from his mother that Ronnie was not his real father (R1978).

After serving 19 years in the military, Ronnie Williams was kicked out of the

service, and Ines, tired of the abuse, decided to leave her husband and hoping to take her three children with her (R1976). However, Ronnie took Ines to court and was awarded custody of the children (R1979). After this, Ines moved to Georgia then Texas, where she married for a third time (*Id*.). During this period of time, Richard was continuing to endure abuse from Ronnie and struggling with the fact of having no mother around (R1979). After the abuse worsened, Richard called his mother to seek her intervention, but Ronnie only relinquished the custody of Allison and Barry back to her; Richard remained with his abusive step-father (*Id.*). Richard was 12 years old at the time, and he found himself missing his siblings but without any control over his step-father's abusive behavior and decision to send his brother and sister back to Ines (*Id*.). Richard also became upset with his mother over this situation, and, at the age of 13, refused to speak with her and, to this day, he still does not have a good relationship with her (R1979-80). Ines believes that Ronnie brainwashed Richard against her (R1980). As a result of this tug-of-war, Richard began getting into trouble (*Id*.). Richard's brother, Barry, subsequently died of a heart attack a year before Richard's trial (R1980-81).

Karen Duggins also testified at the penalty phase. She first explained that after she went to the State Attorney's Office pursuant to her subpoena, she was arrested on an outstanding child support warrant from Kentucky (R1983-84). Ms.

Duggins has two children, and began dating Mr. England in June, 2001, despite the fact that she knew he was married (R1986-88). Before becoming romantically involved with Mr. England, Ms. Duggins was in an abusive relationship that Mr. England helped extricate her from (R1987-88). Mr. England got along "great" with her kids, and her kids also got along with him (R1989). He was always appropriate around the children and was a good role model for her young daughter (R1989). Richard was a good, hard worker and always respectful of friends and co-workers (R1991-92). She was aware that he was taking classes while in jail, in addition to studying the Bible, in order to better himself and be a "positive influence" for her, her children, and his fellow inmates (R1994).

Mr. England testified on his own behalf at the penalty phase.[24] He explained that on June 25, 2001, he did not attend an after-party at the home of someone named Oliver; rather, the party took place on either the Friday or Saturday before the week of June 25, 2001 (R2002-03). He attended the party with Michael Jackson (R2003). Mr. England disagreed with Jackson that the party took place on June 25 (*Id*.).[25] On June 25, Mr. England went to the victim's house around 9:00 PM after

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[24]It would be more accurate to say that Mr. England *attempted* to testify on his own behalf. Mr. England's testimony was substantially cut-off by prosecution objections which were sustained by the trial court.

[25]At this point, the State advanced its first objection to Mr. England's testimony, arguing that the defense was not permitted to "re-litigate the issues

Jackson called him several times to have him come over, and Mr. England was persuaded to come when Jackson told him that Karen Duggins was also coming (R2004). They were hanging around the pool area when Jackson asked him to come inside to "help him get rid of some of the stuff inside of the condominium" (R2005).[26] After that, he and Jackson went to Molly Brown's, after which they split up for a while and later, around 4:00 AM, Mr. England went back to the victim's condominium, where he again ran into Jackson (R2006). Jackson had some of the victim's belongings laid out in the living room and asked Mr. England what they could do with it, and so Mr. England made some calls to David Evans (R2007). While Mr. England was downstairs, Jackson disappeared, and Mr. England then heard some "commotion" upstairs (R2007). Mr. England went upstairs and saw somebody covering his head, sitting down, asking Jackson "why he was doing this" (R2007). Mr. England panicked and decided to leave, but Jackson yelled at him not to go (R2007). Mr. England, however, did leave, rode his bicycle home but his wife would not open the door, so he left the bicycle in the backyard and "crashed" in a storage shed (R2008).

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during the guilt phase" (R2003). The court told Mr. England's counsel to "move on" (R2004).

[26]The State posed another objection, and the court ruled that the defense would not be permitted to re-litigate the guilt phase issues (R2005).

The following day, Mr. England walked over to Karen Duggins' house, where he showered and went back to his house (R2009).[27] While at the victim's house, Mr. England smoke "[m]ore than two" cigarettes (R2019). Mr. England did not write on the picture located in the victim's house; rather, Jackson had done it days before (R2020).[28]

Mr. England also testified regarding his prior conviction, which occurred when he had just turned 16 years old (R2021). The victim, an older gentleman, had approached him and Towner and they had nowhere to go (R2021). Mr. England had no intention of robbing the victim (*Id*.). He explained that the victim was "insinuating sexual stuff from us" upon arriving at his apartment (R2022). After Tower took his shower, Mr. England got in the shower and he heard Tower calling his name (R2023). Mr. England looked out and saw the victim, naked, on top of John (*Id*.). He got out of the shower and "reached for whatever" he could find and at first threatened the man, and then hit him in the face after the man laughed at him (R2024-25). At that point the man let us go of him but he started coming toward

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[27]The State again interjected an objection to Mr. England's testimony as not "pertinent at all whatsoever to the penalty phase portion" (R2009). The court sustained the objection (*Id*.). A few questions later, the State made the same objection, which the court again sustained after arguments by the parties made outside the presence of the jury (R2010-19).

[28]The State once more objected to this questioning and the court admonished defense counsel "[d]on't do it" (R2021).

Mr. England again, threatening to kill him, and Mr. England hit him again in order to defend himself and Tower (R2024-25). Mr. England had no intention of killing him; in fact the victim did not die until the following day (R2026).

Following this incident, Mr. England went to prison for nine (9) years (R2026). While there, he took advantage of available educational opportunities, including obtaining his high school diploma (R2027). He also helped tutor other inmates and learned a vocational trade (R2028). Following his release from prison, he set up his own little tile company (R2029). He acknowledged starting to drink "more than what I should have" (*Id*.).

***SPENCER* HEARING**

Testifying telephonically at the *Spencer* hearing were Mr. England's mother, Inez Fyffe, and his sister, Alison England. Alison, Richard's biological sister, is 29 years old (R2089). Alison testified that Richard, who the family called Willie, was adopted by Ronald England (R2090). There was another brother, Barry, who died 10 months earlier (*Id*.). The three grew up together until their parents separated, and Willie went to live with Ronald England (R2090). Ronald was in the army and was a "bad alcoholic" who suffered from "severe flashbacks" and inflicted "military-style violent punishments" on Richard (R2092-93).

Alison explained that the Willy portrayed during trial is not the real Willy; in

reality, her brother is a good and vibrant person, very artistic and not violent (R2094). However, after he was separated from his mother and siblings, Willy was affected deeply and his troubles stemmed from that (R2095). After Willy went to live with Ronald, she did not see him very much (R2096). She and her brother Barry fared far better having lived with their mother than did Willy, who was forced to live with Ronald (R2101).

Inez Fyffe testified that she has three children: Willy, Alison, and Barry (the latter died months earlier at the age of 31) (R2112). Willy's biological father was a man named Richard Allen William, but Willy never knew him (R2113). Willy was born in Panama shortly before his biological father left Inez, who was eight months pregnant at the time (R2113). Willy was still a baby when Inez married Ronald England, who later adopted Willy (R2114). Ronald served in the Army and was stationed at the Panama Canal until Willy was around five years old, when they moved to the United States (*Id*.). Ronald had a severe drinking problem and psychological problems (R2115). Ronald abused Willy with military-style punishments because "he wanted the children perfect" (R2116). Willy was deeply and more directly affected by the abuse than his siblings because he spent more time with Ronald than they did (R2116-17).

After Ronald became more and more violent, including threatening to kill

Inez with a gun, he took Willy away from her in order to hurt her (R2118-20). This hurt Willy tremendously, as he was very close with his brother Barry (R2120). In an attempt to further poison her relationship with Willy, Ronald told Willy that he was adopted (R2121). As a result, her relationship with Willy was permanently strained (R2121-22). She believes that Ronald brainwashed Willy against her (R2122). She loves Willy very much, he is her son (R2123).

The final witness at the *Spencer* hearing was Brian Merrill, an inmate at the Volusia County Jail where he met Mr. England (R2136).[29] Merrill also knew Jason Deihl and an Anthony Garcia, both inmates at the jail (R2137). On May 15, 2004, Merrill wrote a letter to Mr. England's attorney explaining that he would be a witness for Mr. England should Diehl and/or Garcia testify for the State to any falsehoods about Mr. England allegedly confessing to them (R2139).[30] Pursuant to this letter, Mr. England's counsel dispatched an investigator to interview and subpoena Merrill (R2141). He was never called to testify, however, and, in a letter dated June 5, 2004, he wrote to Mr. England's lawyer expressing his dismay at the injustice that had befallen Mr. England, noting that the investigator never gave any consideration to the testimony he could provide to counter the testimony of Diehl

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[29]Merrill had been convicted of seven (7) felonies and was awaiting sentencing on another conviction (R2156).

[30]Garcia never ultimately testified for the State, but Diehl did.

(R2143).[31]

Merrill testified that on or about December 28, 2003, Diehl approached his cell and inquired about his "feelings" about the case against Mr. England (R2144). Merrill "feigned indifference" toward Merrill in order to "feel him out" about where he was heading with his questions, since Merrill was a good friend of Mr. England's (R2144-45). Diehl then asked Merrill if he would be interested in "making an arrangement" with state investigators to testify that Mr. England confessed to the murder in exchange for a deal that he could work out (R2145). Diehl also told him that because he (Diehl) was in the process of working out a deal with the State where his charges would be dropped so he could return to his girlfriend in Kentucky, he intended to lie against Mr. England (R2146-48). Merrill had memorialized his interactions with Diehl in an affidavit, which was introduced into evidence (R2151-53).

SUMMARY OF THE ARGUMENTS

1. Fundamental error occurred when Michael Jackson, in response to a question by the prosecutor, referred to Mr. England's prior murder charge, a charge that had specifically been excluded by the court in a pretrial motion.

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[31]It was later revealed that the investigator spent only about ten minutes with Merrill (R2155).

Because of the unquestionable prejudice inherent in informing a jury that a defendant has a prior criminal history, not to mention a prior murder, the error vitiates the fairness of the proceedings and a new trial is warranted.

2. In light of *Ring v. Arizona*, this Court should revisit the issue of whether a special verdict form is required in order to properly instruct the jury, in accordance with the Sixth Amendment, that the State has the burden of proving beyond a reasonable doubt each and every element of the elements of the offense of first-degree murder. Here, the jury was provided with several theories of guilt yet returned a general verdict in accordance with the indictment. A new trial is warranted.

3. Over repeated defense objections, the State was permitted to introduce inflammatory, gruesome, irrelevant, and unduly prejudicial autopsy photographs. These photos depicted, *inter alia,* the gruesome images of "greenish brownish" decomposition, skin "slipping" off, partially mummified fingers, "yellow waxy things" resulting from decomposition, and "insect larva." These photos had little, if any, relevance to any issue in dispute and a new trial is warranted.

4. In violation of the best evidence rule, the trial court, over defense objection, permitted state witness Ivey Evans to testify that she identified Mr. England's voice from an answering machine, and permitted state witness Reynaldo

Deleon to testify to the contents of an alleged letter not written by Mr. England purportedly asking Deleon not to testify.

5. Over defense objection, the trial court permitted state witness Deleon to testify that Mr. England told him he would kill Michael Jackson. This statement constituted impermissible collateral crime evidence that was unduly prejudicial. When a defendant personally threatens a witness, the threat is generally admissible. Here, however, Mr. England did not personally threaten Michael Jackson, rather, the evidence was simply that Mr. England told Deleon that he would kill Jackson. This error warrants a new trial.

6. The lower court erred in denying a defense motion for mistrial due to juror misconduct. The court compounded the error by replacing on the penalty phase jury an ill juror with the juror who Mr. England accused of misconduct. This error warrants a new trial and/or a new sentencing proceeding.

7. The lower court erred in finding the heinous, atrocious, or cruel aggravating circumstance in this case. The medical examiner was unable to ascertain how long it took for the victim to die after the single blow to the head which caused a neck fracture, but the victim would have been lost consciousness quickly and would not have been in pain. There is a lack of competent evidence to support the fact that Mr. England intended to cause an especially unnecessary and

prolonged death.

8. Over defense objection, the court gagged Mr. England during the state's penalty phase closing argument. The court erred in resorting to such an extreme measure because Mr. England's behavior, while regrettable, did not rise to the level required by the Constitution to impose such a prejudicial restraint. Gagging the defendant is the most prejudicial of restraints and should only be employed as a last resort after other less-restrictive means have been attempted.

9. Mr. England's right to testify and to present mitigation was unduly and unconstitutionally restricted at the penalty phase. The court sustained repeated state objections during Mr. England's testimony based on the state's complaints that Mr. England was seeking to "re-litigate" the issue of his guilt. However, Mr. England's testimony went to support valid mitigating factors and the curtailment of his testimony violated his constitutional rights. A new penalty phase is warranted.

10. Over defense objection, the lower court refused to permit the defense to present reverse *Williams*-rule evidence pertaining to Michael Jackson. The court had previously ruled that the evidence would be admissible at the guilt phase, but both the State and defense agreed not to present *Williams* rule evidence at the guilt phase. When the defense attempted to introduce the evidence at the penalty phase, the state complained that the evidence was irrelevant. However, it went to valid

mitigation and the lower court erred in refusing the defense attempt to introduce it at the penalty phase.

11. The lower court erred in refusing to consider the disparate treatment of Mr. England and Michael Jackson as mitigation evidence despite making a factual finding that they were "equally culpable."

12. Under *Roper v. Simmons* and the Eighth Amendment, the State may not use as an aggravating circumstance a prior violent felony committed by the defendant at the age of sixteen, or the fact that Mr. England was on probation resulting from that offense at the time he was convicted of committing the instant offense.

13. The death penalty is not proportionately warranted in this case.

14. Florida's capital sentencing scheme violates the Sixth Amendment and the holding of *Ring v. Arizona*.

ARGUMENT I

FUNDAMENTAL ERROR OCCURRED WHEN MICHAEL JACKSON TESTIFIED DURING THE GUILT PHASE THAT MR. ENGLAND HAD COMMITTED A PRIOR MURDER.

Prior to trial, the defense moved *in limine* to preclude the State from making any mention of the fact that Mr. England pled guilty to a 1987 murder because it was a collateral crime and its prejudicial value outweighed the probative value (R263). The lower court granted the motion (R403).

During the defense case-in-chief, Mr. England called Michael Jackson as a defense witness. Jackson admitted that he, not Mr. England, was the actual killer (R1395). On cross, however, the prosecutor asked Jackson about whether his brother, Samuel, had lied in order to help out Michael, and Michael testified in response that he had told Samuel "Put it off on Rich. He's already got a murder charge. You'll get off easy" (R1453).

Jackson's reference to Mr. England's prior murder charge is fundamental error that so vitiates the fairness of the trial that the only remedy is for the Court to order a new trial.[32] Fundamental error is that type of error that is "so prejudicial as

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[32]There was no contemporaneous objection when Jackson mentioned the prior murder. However, Mr. England himself brought the matter to the lower court's attention during the *Spencer* hearing, noting that Jackson made the statement out loud, "and that violated the motion [*in limine*] itself and my attorney didn't move for a mistrial or anything at that time. He just let it go" (R2129-30).

to vitiate the entire trial." *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997). Because "[e]vidence of any crime committed by a defendant, other than the crime for which the defendant is on trial, is inadmissible in a criminal case[,]" *Brooks v. State*, 868 So. 2d 643, 644 (Fla. 2d DCA 2004); *Cornatezer v. State*, 736 So. 2d 1217, 1218 (Fla. 5th DCA 1999), its admission, when not properly noticed as potential *Williams*-rule or used as impeachment evidence, is the type of error that is fundamental. *See Billie v. State*, 863 So. 2d 323, 331 (Fla. 3d DCA 2003) (citing *Bush v. State*, 690 So. 2d 670 (Fla. 1st DCA 1997)).

In *Brooks*, *supra*, a similar situation occurred.[33] There, the defendant was charged with two counts of aggravated battery with a deadly weapon on Rosa Brookins, his former wife, and his daughter. Brooks's defense was that Rosa was the aggressor and that he acted in self-defense. Brooks's counsel cross-examined Rosa about a prior incident of domestic violence in which Rosa had shot Brooks twice, suggesting that on that occasion, Rosa had "gotten away with it." On redirect, the prosecutor elicited a lengthy explanation of the prior incident and why

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Defense counsel suggested that his failure to object was a strategic one (R2132-33). Mr. England maintained that he should be granted a new trial on the issue, and the lower court denied the request, informing him that he could raise the issue on appeal (R2135). Trial counsel included this issue in his statement of judicial acts to be reviewed on appeal (R487).

[33]There was, however, an objection in *Brooks.*

she believed she had shot Brooks in self-defense. During this questioning, Rosa gave a non-responsive answer to a question posed by the prosecutor in which she stated that Brooks "was sent back to prison." Defense counsel objected to Rosa's mention of Brooks's prior criminal history, and the appeals court reversed Brooks's convictions because "Rosa's non-responsive answer to the prosecutor's question implied that Brooks had been sent to prison twice–once in connection with a prior incident of domestic violence in which she had shot him twice and had not been arrested. This testimony was improper and unfairly prejudicial to Brooks." *Brooks*, 868 So. 2d at 644. As the court noted, "[t]he admission of evidence concerning a defendant's prior criminal history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court." *Id.* (citing *Henderson v. State*, 789 So. 2d 1016, 1018 (Fla. 2d DCA 2000)). *See also Garvey v. State*, 754 So. 2d 130 (Fla. 3d DCA 2000).

Jackson's testimony that Mr. England had a prior murder charge was unquestionably improper and highly prejudicial and could not but have had a "devastating impact" upon the jury. *Harris v. State*, 427 So. 2d 234, 235 (Fla. 3d DCA 1983). As the Fifth District has explained:

> The prospect of the state submitting evidence to the jury that a defendant had been previously convicted of committing an unrelated crime is often so vital to the outcome of a trial that it is the focus of defense counsel's trial strategy. For example, in order to avoid the

> likely emphasis that jurors will place on such evidence, defendants often decline to exercise their right to testify so that evidence of their prior criminal conduct cannot be introduced by the state.[34] The improper introduction of evidence concerning the defendant's prior criminal history is oftentimes too prejudicial for the jury to disregard, notwithstanding the issuance of a curative instruction.

Cornatezer, 736 So. 2d at 1218. *Accord Gore v. State*, 719 So. 2d 1197, 1199-1200 (Fla. 1998). Because the State cannot establish that this error was harmless beyond a reasonable doubt, *see State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Chapman v. California*, 386 U.S. 18 (1967), a new trial is required.

ARGUMENT II

THE LOWER COURT ERRED IN REFUSING TO PROVIDE THE JURY WITH A SPECIAL VERDICT FORM TO REQUIRE THE JURY TO DISTINGUISH BETWEEN FIRST-DEGREE PREMEDITATED MURDER AND FELONY MURDER, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Prior to trial, defense counsel moved the court, in light of *Ring v. Arizona*, 536 U.S. 583 (2002), to provide the jury with a "verdict form to specify whether there's a finding . . . [of] premediated first-degree murder or felony murder. We think those are constitutional requirements before you can even get to phase two, if, in fact we get there" (R21). The court denied the *Ring* argument as to the issue of

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[34]Indeed, Mr. England did not testify at the guilt phase, he chose instead to testify at the penalty phase when the jury had already been informed of his prior criminal history.

the special verdict, ruling that it was "going to go with the Florida Supreme Court. And it's denied" (R26). Mr. England submits that the time had come, particularly and especially in light of *Ring,* for the Court to address the constitutionality of refusing to require a Florida jury to render a unanimous verdict as to which theory of first-degree murder it is convicting the defendant.

Because of its view that "constitutional principles" do not compel otherwise, this Court has long sanctioned the practice of not requiring juries in capital cases to make specific and unanimous findings at the guilt phase as to which theory of first-degree murder it is basing its verdict. *See, e.g. Haliburton v. State,* 561 So 2d 248, 250 (Fla. 1990); *Brown v. State*, 473 So. 2d 1260, 1265 (Fla. 1985). However, as *Ring* makes clear, the Sixth Amendment right to trial by jury requires that the State allege in the indictment and prove to a unanimous jury beyond a reasonable doubt every element of the crime (including aggravating circumstances). Count 1 of the indictment in this case alleged that, on or about June 25, 2001, Mr. England killed Howard Wetherell either in a premeditated manner, during the course of a robbery or attempted robbery of Wetherell by the use of blunt force trauma, or "by aiding, abetting, counseling, hiring, or otherwise procuring such offense to be committed by Michael Jackson" (R1). Thus, the State alleged three separate methods by which Mr. England purportedly committed the crime of first-degree

murder, but the indictment failed to specify the elements of each of the alternate theories, and the jury returned a general finding of guilt as opposed to a finding of either premeditated or felony murder (R409-10).[35] Because, under the Sixth Amendment, the State is required to allege and establish beyond a reasonable doubt, and the jury is required to unanimously find, each and every element of the crime, the lower court erred in failing to provide a verdict form which complies with the Sixth Amendment and *Ring*. A new trial before a properly and constitutionally-instructed jury is warranted.

ARGUMENT III

THE TRIAL COURT ERRED IN ADMITTING NUMEROUS ENLARGED AUTOPSY PHOTOS OF THE VICTIM WHICH WERE INFLAMMATORY AND IRRELEVANT, IN VIOLATION OF MR. ENGLAND'S CONSTITUTIONAL RIGHT TO A FUNDAMENTALLY FAIR TRIAL.

At trial, the State introduced, over defense objection, a number of enlarged poster-board sized photographs of the victim both at the crime scene and at the autopsy. Unfortunately, at the pretrial hearing on the issue, the photographs were not clearly identified so that an exact accounting of which photographs were

[35]While the verdict form did provide a separate entry for premeditated murder and felony murder, it also provided, as the first option, guilty of both premeditated and felony murder "as charged in the Indictment." The jury chose the first option in its verdict.

discussed can be ascertained for purposes of appeal. *See* T. Hearing, May 13, 2004.[36] At that hearing, however, the defense made its objection known to the gruesome nature of the photographs and their prejudicial value at both the guilt and penalty phases. *Id*. at 119; 133. At the conclusion of the hearing, the prosecutor noted that of the 60 some odd autopsy photos, 11 would be used during the trial. *Id*. at 133.

During the course of trial, defense counsel repeatedly renewed his objections to the introduction of the autopsy photographs, particularly State's Exhibits 16 and 17 (R618-19), which depicted the victim in the shower where his body was located, and Exhibits 57, 58, and 59 (R1279-80), which depicted the victim during the autopsy. These exhibits were particularly gruesome and inflammatory as they depicted "the decomposition process" during which the victim's skin "breaks down" and "body fluids ooze and weep" (R1281-82). The photos also showed some "greenish and brownish discoloration" which was also from decomposition (R1282-83), as well as the skin "sloughing" off (R1283). Some of the other photographs depicted the victim "a little bit" more cleaned up but nonetheless still

[36]Because the photographs were enlarged and put on a poster board at trial, they were not exhibits which could be copied and made part of the record for counsel to review. Counsel's descriptions of the contents of the photographs are pieced together from the testimony at trial.

depicted the "greenish brownish discoloration" from decomposition or "residual livor mortis" (R1284-85). Yet additional photos depicted the victim's skin "slipping off and it's weeping . . . it's not a very clean picture" as well as "this yellow waxy thing that is a postmortem abrasion" (R1284). As the medical examiner explained, "after blood pressure has ceased and the skin is tore off, it leaves an irregularly shaped defect with a yellow waxy base and fine little net like vascular structures that run through here" (R1286). Photos in Exhibit 59 depicted further decomposition with the "end of the fingers" a "little bit mummified and the skin is slipping off" (R1287). According to the medical examiner, the picture depicts "where skin has already slipped off the thumb and the fingernail is the last thing to go" (R1287). Another photo in this exhibit depicted "insect larva" which they "try to wash off" but "sometimes they stay around" (R1288).

The admission of photographic evidence is within the discretion of the trial court. *Jones v. Moore*, 794 So. 2d 579 (Fla. 2001). Gruesome autopsy and crime scene photos are admissible, however, only if relevant to a material fact and "not so shocking in nature as to defeat the value of their relevance." *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990). The trial court must first determine if the photographs are relevant, and second, determine whether "the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and

[distract] them from a fair and impassioned consideration of the evidence." *Id*.

While the Court has found no abuse of discretion in admitting purported inflammatory photos when they assist the medical examiner's testimony or when relevant to the manner of death, *see Pope v. State*, 679 So. 2d 710, 714 (Fla. 1996); *Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000), inflammatory photos, to be relevant, "must be probative of an issue that is in dispute." *Almeida v. State*, 748 So. 2d 922, 929 (Fla. 1999). Courts have not hesitated to find reversible error in the admission of gruesome photos when they have little or no relevance or are so shocking in nature as to outweigh their relevance. *See Pottgen v. State*, 589 So. 2d 390 (Fla. 1991); *Ruiz v. State*, 743 So. 2d 1 (Fla. 1999); *Rosa v. State*, 412 So. 2d 891 (Fla. 3d DCA 1982).

In the instant case, the photos had little, if no relevance, to any issue in dispute. While the medical examiner referred to the photographs extensively while testifying to the victim's injuries, the nature of the injuries and the cause of death were not in dispute. Moreover, many of the photos depicted gruesome images of "greenish brownish" decomposition, skin "slipping" off, partially mummified fingers, "yellow waxy things" resulting from decomposition, and "insect larva." All of these depictions were of damage done to the body *after* his death. These photos were clearly not relevant to any fact in issue or to the cause of death.

Looney, supra (error to admit autopsy photos depicting damage done to victims' bodies by fire that occurred after death). Mr. England notes that the inflammatory nature of the gruesome autopsy photos infected not just the guilt phase, but also the penalty phase; indeed, the prosecutor, after "apologiz[ing] for doing this," paraded out State's Exhibits 57, 58, and 59 for the jury to look at while he was urging the applicability of the HAC aggravator (R2039-41). These were the very photos depicting the gruesome images of "greenish brownish" decomposition, skin "slipping" off, partially mummified fingers, "yellow waxy things" resulting from decomposition, and "insect larva." There can be no question that this was done to inflame the passions of the jurors at the penalty phase. Because the State cannot establish that this error was harmless beyond a reasonable doubt, *see State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Chapman v. California*, 386 U.S. 18 (1967), a new trial and/or penalty phase is required.

ARGUMENT IV

IN VIOLATION OF THE BEST EVIDENCE RULE, THE LOWER COURT ERRED IN PERMITTING IVEY EVANS TO TESTIFY OVER OBJECTION THAT SHE IDENTIFIED MR. ENGLAND'S VOICE FROM AN ANSWERING MACHINE, AND IN PERMITTING REYNALDO DELEON TO TESTIFY TO THE CONTENTS OF AN ALLEGED LETTER NOT WRITTEN BY MR. ENGLAND PURPORTEDLY ASKING DELEON NOT TO TESTIFY AGAINST MR. ENGLAND.

During the state's case-in-chief at the guilt phase, the State wanted to establish that Mr. England was present at the victim's residence at the time of the murder. To that end, the State presented testimony that several phone calls were made from the victim's residence in the early morning hours of June 26, 2001, to Eugene and Ivy Evans, who were friends of Mr. England (R780-82; 786). None of these calls was answered by either Eugene or Ivy Evans, but they did have an answering machine (R783; 787). Critically, Ivy Evans recalled receiving these calls in the middle of the night, and testified that she heard Mr. England's voice on the answering machine asking for her husband (R788-90).[37] An objection and motion to strike on best evidence grounds were made by defense counsel and overruled by the court (R788). Mr. England submits that the lower court erred in overruling the defense objection and in failing to strike this damaging testimony.

The best evidence rule is set forth in §90.952, Fla. Stat., and states as follows:

> Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photographs.

As Professor Charles W. Ehrhardt has explained:

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[37]She later claimed to have erased the answering machine messages (R789-92).

> Section 90.952 codifies the best evidence rule, which requires that when the contents of a writing, recording or photograph are being proved, an original must be offered unless a statutory excuse for the lack of an original exists. If an excuse cannot be shown, secondary evidence of the contents is inadmissible. Section 90.952, which requires the original of a writing, recording, or photograph to be offered when its contents are being proved, recognizes and substantially restates the traditional original writing or best evidence rule. The original writing is required because oral testimony may be inaccurate, fraud may result, and when a dispositive instrument such as a contract is offered, a slight variation of words can result in a significant difference in rights. Historically, the hazard of inaccurately reproduced copies was also a strong basis for the rule.

EHRHARDT, FLORIDA EVIDENCE at §951.1 (2002 Ed.) (footnotes omitted). Unless the original or a statutorily authorized alternative is available, "no evidence should be received which is merely `substitutionary in nature.'" *McKeehan v. State*, 838 So. 2d 1257, 1259 (Fla. 5th DCA 2003) (quoting *Liddon v. Bd. of Pub. Instruction for Jackson County*, 128 Fla. 838, 175 So. 2d 806, 808 (Fla. 1937)). *Accord State v. Eubanks*, 609 So. 2d 107, 109 (Fla. 4th DCA 1992). The best evidence rule is "not applicable if the [item] is not offered to prove the truth of the matter therein." *Id*.

In the instant case, the State, through the testimony of Ivey Evans, sought to prove the truth of the matter, *i.e.*, that Mr. England was the person who made the call in the early morning hours from the victim's residence. Indeed, the State, in closing argument, relied on Evans' purported identification of Mr. England's voice

on her answering machine to establish one of the "sloppy mistakes" that Mr. England made that helped get him caught:

> The other [sloppy mistake] is calling his friend from the condominium during those early morning hours. You recall the testimony, three phone calls from the records to Mr. Evans' house between 4 o'clock and 5 o'clock in the morning, a call to his residence, Mr. Evans', a call to Mr. Evans' cell phone right after that, and then a call back to his home a few minutes after that.
>
> He's looking for Mr. Evans. His friend he's looking for after this murder. And not only does he call him, *he leaves a message on the answering machine that Mrs. Evans heard, and it was this defendant calling looking for David Evans.* That's another mistake that led this defendant getting caught.

(R1652-53) (emphasis added). Because the State cannot establish that this error was harmless beyond a reasonable doubt, a new trial is required.

In addition to the testimony of Ivey Evans, the court, over defense objections on hearsay and best evidence grounds (R840-46), permitted key prosecution witness Reynaldo Deleon to testify that he received a letter from someone named "Orlando" that asked him not to testify against Mr. England (R853-54). Deleon acknowledged that the letter was not written by Mr. England (R854). Deleon did not have the letter because he purportedly threw it away (R854). For the reasons and legal authorities set forth above, the court should not have permitted Deleon to testify to the contents of this letter. Because the State cannot establish that this error was harmless beyond a reasonable doubt, *see State*

v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); *Chapman v. California,* 386 U.S. 18 (1967), a new trial is required.

ARGUMENT V

THE LOWER COURT ERRED IN PERMITTING REYNALDO DELEON TO TESTIFY THAT MR. ENGLAND TOLD HIM THAT HE WOULD KILL MICHAEL JACKSON.

During the testimony of state witness and convicted heroin trafficker Reynaldo Deleon, the defense moved *in limine* to prevent Deleon from testifying that when he and Mr. England were talking about Michael Jackson driving the victim's car, Deleon said that Jackson "is going to get you in trouble" to which Mr. England purportedly responded that if Jackson told on him, "he would kill him" (R799). The defense contended that this statement was irrelevant, incompetent, immaterial, and, under §90.403, the prejudicial value outweighed the probative value and that the statement constituted impermissible collateral crime evidence (R799).

In response, the State argued that the statement "he would kill him" was consciousness of guilt and "it's a fact stated by the defendant indicating where he's serious about this; if he gets in trouble, he's going to take care of things" (R800). The State also suggested that Deleon, in his deposition, said he "really just kind of brushed it off" but that the statement "helps to show that there is a confidence level exchanged between these people that trust each other to say things like that with

each other" (R801). The State had no response to the defense argument that the prejudice outweighed any probative value (R801). The court indicated it would grant the motion (*Id.)*.

During Deleon's testimony, the court suddenly indicated it was reversing its ruling granting the defense motion *in limine* (R822). As a result, Deleon did testify that he told Mr. England that "that young man was going to get him into trouble" (R828), and Mr. England responded "If he got me in trouble, I would kill him" (R829). The defense renewed its prior objection to this testimony, which was overruled (*Id*.).

The court erred in permitting Deleon to testify that Mr. England told him that he would kill Michael Jackson if he got him into trouble. As the defense correctly noted, this statement constitutes impermissible evidence of a collateral crime. Evidence of other crimes, wrongs, and acts is admissible if it is relevant because it is probative of a *material* issue other than the bad character or propensity of an individual. *See Bryan v. State*, 533 So. 2d 744, 746 (Fla. 1988). In the instant case, the statement in question was not offered as "similar fact" evidence; indeed the State made no such argument.[38] Rather, the State's position was that the

[38]Unfortunately the trial court, in reversing its ruling, failed to elucidate the basis for its decision except to note that the statement was probative.

statement went to establishing a level of trust between Mr. England and Deleon and consciousness of guilt. The "level of trust" between Mr. England and Deleon is and was not a material issue at trial. As to the "consciousness of guilt" argument advanced by the State, this likewise fails to support the court's decision to admit this statement. It is important to note that the statement "I will kill him" was not a statement that purportedly made by Mr. England *to Michael Jackson*. When "a defendant personally threatens a witness, the threat is admissible as evidence of defendant's guilt." *Lopez v. State*, 716 So. 2d 301, 307 (Fla. 3d DCA 1998) (citing *Koon v. State*, 513 So. 2d 1253, 1256 (Fla. 1991)). Here, however, the purported threat to Jackson was made to *Deleon, not to Jackson*. Indeed, Jackson *testified on behalf of Mr. England at the guilt phase*. There is no evidence whatsoever to suggest that Mr. England made a personal threat to Jackson that he would kill him if he got Mr. England into trouble. This is a critical distinction, because a personal threat to a witness "indicates a desire to evade prosecution and is evidence of consciousness of guilt." *Coronado v. State*, 654 So. 2d 1267, 1269 F(la. 2d DCA 1995). Without the "personal threat" nexus, which was never established here, the testimony at issue here cannot but be viewed as impermissible collateral bad act evidence.

Moreover, even if relevant and admissible, such collateral crime evidence

must still meet the balancing test of §90.403, that is, the evidence, even if relevant, is not admissible when its probative value is substantially outweighed by its unduly prejudicial nature. *Koon*, 513 So. 2d at 1256. Here, the lower court's revised ruling simply found the statement "probative" without ever analyzing whether the probative value was substantially outweighed by its unduly prejudicial nature. In failing to do so, and in admitting this testimony, Mr. England submits that the court erred. Because the State cannot establish that this error was harmless beyond a reasonable doubt, *see State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Chapman v. California*, 386 U.S. 18 (1967), a new trial is required.

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING A MOTION FOR MISTRIAL AT THE GUILT PHASE DUE TO JUROR MISCONDUCT.

Prior to the commencement of the penalty phase, the defense moved for a mistrial as to the guilt phase because one of the alternate jurors, Ms. Brown, told sitting juror number 8 that Mr. England was guilty (R1821). The State argued that the motion was untimely, but the court rejected that argument (R1823-29).

The court then took testimony on the motion. Thomas Anderson, a penalty phase witness for Mr. England, told the court he was attending the trial and, on the day that Michael Jackson testified, was "almost 99 percent positive" that he heard

an elderly lady juror make a statement to another juror and "I could have almost swore I heard the one lady say, He's guilty" (R1832; 1834; 1837). The juror to whom the comment was made did not say anything in response to the comment (R1834). Anderson had no idea what the comment was in reference to (R1838). Sarah Brown, who is the alternate juror in question, testified that she did speak with other jurors out in the hallway during the trial including juror Dixon, but denied ever telling another juror that she felt that Mr. England was guilty (R1845-48). Juror Dixon then testified that she did have an opportunity to speak with Ms. Dixon in the hallway, but Dixon never made a comment to her that, in her opinion, Mr. England was guilty (R1851). After listening to this testimony, the court found that there was no juror misconduct and denied the motion for mistrial. Then, to make matters worse, over defense objection, the court then replaced one of the other jurors who had to be hospitalized with alternate Brown, the very juror who had been questioned about juror misconduct.

Mr. England submits that the court erred in denying the motion for mistrial.[39] In a case where the defendant's life is at stake and where allegations surface that a juror told another juror that the defendant was guilty, a mistrial should have been

[39]The standard of review for this issue is abuse of discretion. *Boyd v. State*, 2005 Fla. LEXIS 207 at *11 (Fla. Feb. 10, 2005).

granted in an abundance of caution. In the alternative, the court should not have put Brown on the jury at the penalty phase after she obviously knew that Mr. England had made an accusation that she engaged in juror misconduct. Given the overarching importance of an impartial jury at a capital penalty phase, and given the narrow 8-4 margin by which the jury returned a death recommendation, the court's decision to but Brown on the jury at the penalty phase was an abuse of discretion and relief is warranted.

ARGUMENT VII

THE TRIAL COURT ERRED IN FINDING THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Because the facts of this case do not show both the constitutionally-required intent for narrowing the class eligible for the death penalty and that the victim was conscious so as to experience prolonged suffering, Mr. England submits that the lower court erred in finding the especially heinous, atrocious, or cruel (HAC) aggravating circumstance. In finding HAC, the trial court made the following findings:

> 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.

(R462).

The findings of the lower court must be considered in connection with the evidence. While it is correct that Dr. Beaver testified that the victim "moved around the bedroom" while the initial assault was undertaken and "experienced pain before losing consciousness," a single blow to the victim's head caused a fracture of the neck resulting in death (R1272; 1299-1300). Significantly, Dr. Beaver opined that it would be "difficult to say" how long it took for the victim to die after the neck fracture because it would depend on a number of factors, but he would "estimate around two or three minutes, maybe a little less" (R1275-76). He "suspected" that the injuries to the hands occurred first, then the spinal fracture occurred and "he would be paralyzed from that point" (R1276). Until the point of the spinal fracture, Dr. Beaver opined that he had no evidence to suggest that the victim was unconscious (R1290). He would have lost consciousness after the spinal fracture, however, within 30 to 40 seconds, and would not have been in pain at that point (R1290-92). Also of note, Dr. Beaver could not provide any time frame for how long the assault took place prior to the spinal fracture (R1296-97; 1304-05).

All murders are unnecessary and can be characterized as heinous, atrocious,

or cruel. However, the lower court's finding that "blood was everywhere" cannot sustain a finding of HAC, as most crime scenes are bloody.[40] To avoid an overbroad, and hence unconstitutional, application of HAC, restrictions have been placed on this aggravator. It is well-settled that HAC does not apply unless, *inter alia*, the defendant intended to cause *especially unnecessary and prolonged* suffering. *See, e.g. Porter v. State*, 564 So. 2d 1060, 1063 (Fla. 1990) (hypothesis consistent with crime not "meant to be deliberately and extraordinarily painful" and thus not HAC); *Santos v. State*, 591 So. 2d 160, 163 (Fla. 1990); *Mills v. State*, 476 So. 2d 172, 178 91985); *Lloyd v. State*, 524 So. 2d 396, 403 (Fla. 1988); *Smalley v. State*, 546 So. 2d 720, 722 (Fla. 1989). Here, the lower court made no finding whatsoever that Mr. England "intended to inflict a high degree of pain or otherwise torture the victim." *Santos*, 591 So. 2d at 163. This case is very similar to *Bonifay v. State*, 626 So. 2d 1310 (Fla. 1993), where the "victim was lying on the floor begging for his life and talking about his wife and children. Bonifay told him to shut up and shot him twice in the head." *Id*. at 1311. The medical examiner

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[40]As this Court has noted, "[p]erhaps because of our practice of using the acronym "HAC" for this aggravator, we have not consistently recognized that the capital felony must be "especially" heinous, atrocious, or cruel, as section 921.141 (5)(h) explicitly provides." *Diaz v. State*, 860 So. 2d 960, 966 n7 (Fla. 2003). "'Especially' or 'especial' is defined as 'of some special note or importance, unusually great or significant.'" *Id*. Thus, the Court observed that "[a] more proper acronym for this aggravator may be "EHAC." *Id*.

testified that the victim was rendered unconscious following the gunshots "with death following in minutes." *Id*. at 1313. Based on this evidence, the Court held that HAC did not apply, even though the victim was told to beg for his life, because Bonifay did not intend to cause unnecessary and prolonged suffering.

The facts surrounding the death of the victim in the instant case simply do not qualify for a finding of HAC in light of the striking of this aggravator in *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998). There, the defendant approached the victim, "who was sitting alone in the living room. He hit her at least twice over the head with a crowbar. The testimony established that Sylvia *may have been* rendered unconscious as a result of these blows, although not dead. Zakrsewski then dragged Sylvia into the bedroom, where he hit her again and strangled her with a rope." *Id*. at 490. Based on these facts, and given the evidence of strangulation, the Court held that the State failed to meet its burden and found that the lower court improperly found HAC. Similarly, in *Elam v. State*, 636 So. 2d 1312 (Fla. 1994), the defendant "bludgeoned" the victim (who had suffered defensive wounds during the assault), the assault took place in a short period of time, and the victim was rendered unconscious at the end of the attack. Because "[t]here was no prolonged suffering or anticipation of death," the Court struck HAC. *Id*. at 1314.

Here, there is an absence of competent evidence to support a finding of

HAC beyond a reasonable doubt. The medical examiner's testimony as to the length of time the assault took place before the victim would have been rendered unconscious was uncertain and speculative; in his own words, it was merely an "estimate" (1575-76). An aggravating circumstance may not rest on speculation. *Hamilton v. State*, 547 So. 2d 630, 633-34 (Fla. 1989). Moreover, the medical examiner was certain that once the victim suffered the spinal fracture, he would not have felt any pain (1290-92). Even in a situation where a victim lives for "a couple of hours" and is in "undoubted pain" and "knew that he was facing imminent death," this Court has struck HAC where there is insufficient evidence to set the murder "apart from the norm of capital felonies." *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla. 1983). Under the facts of the instant case, the lower court erroneously found HAC, and relief is warranted.

ARGUMENT VIII

DURING THE PENALTY PHASE, THE LOWER COURT ERRED IN GAGGING THE DEFENDANT IN VIEW OF THE JURY WITH NO EXPLANATION OR CAUTIONARY INSTRUCTION, IN VIOLATION OF MR. ENGLAND'S RIGHT TO A FAIR SENTENCING HEARING AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During the State's penalty phase closing argument when the prosecutor was discussing Mr. England's penalty phase testimony and arguing that he was trying to

"sell" his version of the crime and the prior offense to the jury, Mr. England blurted out "He doesn't know. He's sitting here talking about something he doesn't know" (R2043). The court dismissed the jury, after which time the court noted that Mr. England was blurting out, was demonstrative, and "I can't control him" (R2044). The court also noted that he had warned Mr. England a few times earlier about this and that he had no choice but to gag Mr. England (R2044). Over defense objection and with an instruction to the bailiff to "make sure he can breathe," Mr. England was gagged[41] and cuffed when the closing arguments resumed. No explanation or cautionary instruction was given to the jury. Mr. England submits that the lower court abused its discretion in ordering him to be gagged before the jury at the critical phase of the case–moments before the jury was sent out to deliberate whether Mr. England should be sentenced to life or death.

As a general rule, a defendant in a criminal trial has the right to appear before the jury free from physical restraints. *See Illinois v. Allen*, 397 U.S. 337 (1970); *Taylor v. Kentucky*, 436 U.S. 478, 485 (1985). The Supreme Court has recognized that "certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" *Holbrook v. Flynn*, 475 U.S. 560 (1986) (quoting *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976)).

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[41]The court apparently used duct tape to gag Mr. England (R486).

While a defendant's right to be free of physical restraints at trial is not absolute, it is only in the most extreme of situations where a court can infringe on a defendant's constitutional right to a fair trial and to the presumption of innocence. For example, where a defendant engages in "speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial," *Allen*, 397 U.S. at 338, courts have upheld the removal or restraint of criminal defendants. These situations, however, are limited to "extreme" ones where, for example, defendants engage in "very obstreperous" behavior, used "obscene or abusive language," or "threatened or attempted violence." *People v. Johnson*, 241 Cal. App. 2d 423, 437 (Ct. App. Cal. 2d Dist. 1966). Indeed, in *Allen*, the Supreme Court approved the removal of the defendant from court where he had engaged in repeated arguments with the judge "in a most abusive and disrespectful manner," threatened to kill the judge, tore files and threw them on the floor, and generally addressed the court with "vile and abusive language." *Allen*, 397 U.S. at 340-41.

Mr. England submits that the behavior was insufficient under *Allen* to impose the harsh sanction of gagging him during the penalty phase. While it is correct that the record reflects several instances where Mr. England blurted out during the proceedings, these instances were not so disruptive, obstreperous, or "vile and

abusive" such that gagging was appropriate. The first instance reflected by the record occurred following the testimony of Mr. England's girlfriend, Karen Duggins. Following the conclusion of her testimony, the judge informed Mr. England that he and the clerk heard him say "Karen, I love you" (R777). The court also noted that he observed Mr. England wave his hand and smile at her after she was asked to identify him (R778). The court informed Mr. England that it was inappropriate to speak to a witness and the matter concluded without incident (R779). The next incident occurred the following day during the testimony of State Attorney Investigator McGuire, when Mr. England blurted out that he was being framed for murder (R1048). The jury was removed from the courtroom, and the court informed Mr. England that he may not like what was being said but that he could not blurt out comments and threatened to gag him if it occurred again (R1048-49). Mr. England indicated his understanding, and the proceedings resumed without further incident (R1049-50). Later, at the conclusion of the direct exam testimony of jailhouse snitch Diehl, the court, after Diehl exited the courtroom, noted that Mr. England "sneered" at Diehl and said to Diehl something to the effect "You should be ashamed of yourself" (R1162). The court again admonished Mr. England, and Mr. England told the court that Diehl was "sitting there lying through his teeth" (R1162). The court warned Mr. England not to do

that again and threatened to gag him (R1162). The proceedings then continued without further incident (R1163).

The record contains no further problems with Mr. England during the remainder of trial until the following week at the penalty phase. During Mr. England's testimony, the prosecutor repeatedly objected to Mr. England testifying about the circumstances of the offense (R2003, 2005, 2009, 2010). After an exchange between Mr. England, defense counsel, the prosecutor, and the court as a result of the State's repeated attempts to curtail Mr. England from exercising his right to testify, the jury was taken out of the courtroom and the State moved *in limine* to prevent Mr. England from testifying about the offense and professing his innocence (R2012-17). The court did not say anything to Mr. England regarding his statements or testimony, and the jury was brought back into the courtroom (R2019). Almost immediately after being asked questions by defense counsel, the State again objected and Mr. England kept trying to answer the questions posed to him by counsel (R2020-21). After the conclusion of his testimony, Mr. England attempted to address the court to inform the judge what he wanted to testify to had he not been precluded from doing so by the State's objections (R2035). The court told Mr. England to be quiet and let the State present its closing argument (R2036). The closing argument then began, culminating in the court gagging Mr. England as

described above.

The circumstances set forth above do not nearly rise to the level described in *Allen* or other cases where severe restrictions were imposed on a "disruptive, contumacious, stubbornly defiant" defendant. *Allen*, 397 U.S. at 343. Certainly, there is no suggestion that Mr. England was engaging in violent behavior that was threatening the security of the courtroom, *see Dufour v. State*, 495 So. 2d 154 (Fla. 1986); *Diaz v. State*, 513 So. 2d 1045 (Fla. 1987), or that he had escaped or was planning an escape, *see Stewart v. State*, 549 So. 2d 171 (Fla. 1989), or that he had threatened bodily injury on courtroom personnel and observers. *Blanco v. State*, 603 So. 2d 132 (Fla. 3d DCA 1992). *See also Woodlock v. State*, 99 Md. App. 728 (Ct. App. Md. 1994) (approving judge's decision to bind and gag defendants who were disruptive throughout trial, threatened judge, used offensive language, demanded the replacement of defense counsel, and refused to remain in courtroom). Mr. England's conduct was not of such a nature or frequency to require the court to gag him before the jury at the penalty phase. Rather, it appears that Mr. England's conduct was in response to his perception that witnesses were lying against him and his frustration in not being permitted to inform the jurors of his true involvement in the crime in order to convince them to spare his life. Courts have noted that "if a defendant is to be presumed innocent, he must be allowed to

display the indicia of innocence." *Jackson v. State*, 698 So. 2d 1299, 1302 (Fla. 4th DCA 1997) (citing *United States v. Samuel*, 431 F. 2d 610, 614 (4th Cir. 1970)).

Moreover, the decision by the court to gag Mr. England, rather than impose other, less restrictive and prejudicial measures, also constituted error. "[B]ecause a bound and gagged defendant might so prejudice the defendant in the eyes of the jury, such a confinement should be used *only as a last resort in extreme circumstances.*" *Jackson*, 698 So. 2d at 1302 (emphasis added). As the Supreme Court has written:

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of the technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Allen, 397 U.S. at 344. *See also id.* At 345 (noting "serious shortcomings" of gagging defendant during trial). "Although binding and gagging a defendant may be constitutionally acceptable in certain circumstances, the United States Supreme Court and the courts of this State have observed that it is likely to have a significant prejudicial impact upon the jury and generally is less preferable than removing the defendant from the courtroom." *Weldon v. State*, 247 Ga. 17, 19-20 (Ct. App. Ga. 2000). Here, as in *Weldon*, the record, while reflecting that the defendant was

disruptive,[42] does not indicate that "binding and gagging were used as a last resort among reasonable and less prejudicial alternatives, which included removing him from the courtroom until he was willing to be present without disruption." *Id.* at 20.

Here, the trial was nearly at an end and Mr. England, out of clear frustration about not being permitted to fully explain himself to the jurors so that they might be inclined to spare his life, engaged in conduct which, while regrettable, was far below the threshold for the imposition of the one of the harshest and most prejudicial forms of physical restraint. The spectacle of a gagged Mr. England being one of the last things the jurors had in their minds as they began their penalty phase deliberations is so prejudicial as to vitiate the fairness of the penalty phase proceedings in this case.

ARGUMENT IX

MR. ENGLAND'S RIGHT TO TESTIFY ON HIS BEHALF AT THE PENALTY PHASE WAS UNDULY RESTRICTED, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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[42]In fact, in *Weldon*, the record reflected a far more "obstreperous" and out-of-control defendant than Mr. England's conduct purportedly established. *Weldon*, 247 Ga. App. at 20.

Mr. England attempted to exercise his fundamental right to testify on his behalf at the penalty phase proceeding, but his right was repeatedly and fatally curtailed by the State's repeated objections which were sustained by the lower court. As a result, not only was Mr. England's right to testify infringed, his right to have the jury consider valid mitigation was unconstitutionally restricted, in violation of the Sixth and Eighth Amendments and the Due Process Clause of the Fourteenth Amendment.

During Mr. England's attempt to testify on his own behalf at the penalty phase, his attorney questioned him as to the events of June 25 and 26, 2001 (R2002). After being asked to clarify the date that the party at Oliver's house, the State objected to Mr. England "going . . . through every detail" of the events because the purpose of the penalty phase was not to "re-litigate the issues during the penalty phase" (R2003). The court told defense counsel to "move on" (R2004). Defense counsel then questioned Mr. England about the circumstances of his going to the victim's condominium and meeting Michael Jackson there, and the State again objected and the court indicated "We are not going to re-litigate–" (R2005). Defense counsel did manage to ask Mr. England some additional questions about going into the victim's residence and the State again objected and the court sustained the objection (R2008-09). After an attempt by defense counsel

to ask Mr. England about discussions with Jackson as to Jackson's intent to injure the victim, additional State objections were sustained, with the court admonishing defense counsel "Do not re-litigate it or I'm going to start stopping you" (R2010-11). Following an exchange between the prosecutor, defense counsel, and Mr. England, the court excused the jury and argument was presented as to the issue of Mr. England's testimony. The State asserted its "concern" that Mr. England was going to "protest his innocence in this matter" and moved *in limine* to prevent Mr. England from testifying "about the incidence" any more than he already had (R2012-13). The defense position was that Mr. England could not be prevented from presenting evidence, consistent with due process, that he was a principal, not the perpetrator, that he was an accomplice to the murder committed by Jackson, and that his role was relatively minor (R2014-15). The court stated that Mr. England was already convicted of premeditated murder[43] and that "[h]e's not talking about being an accomplice up there. He's shouting out he didn't do it" (R2015). The defense countered that Mr. England should be able to testify to the circumstances of the crime "to show why his life should be saved and that's what he's doing" (R2017). The defense further argued that Mr. England was not

[43]The court's statement is incorrect; Mr. England was convicted of both forms of first-degree murder, the jury declining to find him guilty of premeditated murder alone.

professing innocence but rather "[h]e said he was there" to make the phone call regarding the victim's personal property and therefore he aided and abetted after the fact (R2017). Mr. England himself complained that the jurors "think I'm a murderer; a killer. You've painted this picture like that. And I can't even explain it to them?" (R2018). The court then told defense counsel to "get right to" the questioning about Mr. England being an accomplice (R2018-19). Defense counsel then asked Mr. England questions about the cigarette butts at the crime scene, and the State objected again, and the court sustained the objection (R2020). A follow-up question about whether Mr. England wrote the text on the picture in the victim's house was objected to and again sustained (R2020).

By continually sustaining the State's objections to Mr. England's attempt to testify, the lower court unquestionably violated Mr. England's fundamental right to testify and to present mitigating circumstances to the jury at the penalty phase. The Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record *and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."* *Lockett v. Ohio,* 438 U.S. 586, 604 (1978). Any sentencing scheme or ruling that prevents the sentencer "from considering the particular

circumstances of [the] crime and aspects of [the defendant's] character and record as mitigating factors" is violative of the Eighth and Fourteenth Amendments. *Bell v. Ohio*, 438 U.S. 637, 642 (1978). *See also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Thus, *Lockett* and its progeny stand for the proposition that a court must allow a defendant to present at sentencing, and a sentencer must be able to consider, any evidence relevant to any circumstances of the offense that mitigates against imposition of the death penalty, for example, "evidence that a defendant played an insignificant role in the offense or otherwise possessed a less culpable *mens rea*, notwithstanding an earlier guilt finding of intentional participation in capital murder." *State v. Guzek*, 336 Ore. 424, 460 (Ore. 2005), *cert. granted*, 2005 U.S. LEXIS 3543 (U.S. Apr. 25, 2005). *Accord Green v. Georgia*, 442 U.S. 95 (1979) (due process violated when defendant precluded from introducing, at capital penalty phase, testimony of third person that the co-defendant had stated to that person that the co-defendant had killed the victim after sending the defendant on an errand).[44]

Mr. England's testimony was not simply an attempt to "re-litigate" the issue

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[44]This Court, of course, follows *Green* and, for example, has found error where the defendant is precluded from introducing at a penalty phase his co-defendant's prior sworn testimony exonerating the defendant. *Garcia v. State*, 816 So. 2d 554, 566-67 (Fla. 2002).

of his guilt but rather to provide the jury with valid mitigation as explained in *Lockett*, *Boyd*, *Green*, and *Eddings*. The jury was indeed instructed that, in terms of mitigation, it could consider "any other circumstance of the offense," as well as the fact that Mr. England was an accomplice, that the offense was committed by another person, and his participation was relatively minor (R2068). Mr. England's testimony went to establishing these mitigating factors, factors which this Court has previously determined to be relevant at a capital penalty phase. *See, e.g. Marta-Rodriguez v. State*, 699 So. 2d 1010, 1013 (Fla. 1997) (jury could have been influenced by evidence that co-defendant "initiated and instigated the plan"); *Christmas v. State*, 632 So. 2d 1368, 1371 (Fla. 1994) (evidence proffered by defendant that co-defendant actually killed the victims was a persuasive mitigating factor); *Stevens v. State*, 613 So. 2d 402 (Fla. 1992) (testimony that co-defendant committed murder outside of defendant's presence was important mitigating evidence); *Barrett v. State*, 649 So. 2d 219, 223 (Fla. 1994) (finding as possible reason for jury recommendation of life, not death, evidence proffered by the defendant that the co-defendant could have been the actual killer); *Bedford v. State*, 589 So. 2d 245, 253 (Fla. 1991) (evidence that co-defendant instigated crime was a likely reason the jury recommended life); *Dolinsky v. State*, 576 So. 2d 271, 273-74 (Fla. 1991) (finding testimony that co-defendant was mastermind behind the

murders to have been mitigating factor that could have convinced jury to recommend life).

To the extent that the lower court's conclusion was premised on the notion that "residual doubt" is not valid mitigating evidence, Mr. England submits this, too, was error. While it is true that a plurality of the Supreme Court has held that the Constitution does not compel a court to give the jury an instruction that it consider residual or lingering doubt at a capital penalty phase, *see Franklin v. Lynaugh*, 487 U.S. 164 (1988), nothing in *Franklin* lessened the direction from *Lockett* and its progeny that the Eighth and Fourteenth Amendments *do* require that a defendant be permitted to *introduce mitigating evidence relevant to any circumstances of the offense.* As the Oregon Supreme Court has recently observed, a "`residual' or `lingering doubt[]' remaining from the guilt phase . . . is qualitatively different from actual `evidence' proffered during the penalty phase" and thus *Franklin* is inapposite. *State v. Guzek*, 336 Ore. at 463 n.30.[45]

Mr. England's fundamental right to testify and present mitigating evidence

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[45]Mr. England notes that the Supreme Court has granted *certiorari* review in *Guzek* on the specific question: "Does a capital defendant have a right under the Eighth and Fourteenth Amendments to offer evidence and argument in support of a residual-doubt claim–that is, that a jury in a penalty phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?" (Question set forth at www.deathpenaltyinfo.org).

through his own testimony was violated by the State's repeated objections which were improperly sustained by the lower court. To make matters worse, the State, during closing argument, exhorted the jurors to disbelieve Mr. England's attempt to explain his view of what occurred, going to far as to call it a lie and "spin" (R2051-52). Thus, the State got to have it both ways: prevent Mr. England from fully testifying on his own behalf at the penalty phase, and turn around and use his interrupted and objected-to testimony against him. This is error of the highest constitutional magnitude at a capital penalty phase, and reversal for a new jury sentencing proceeding is required.

ARGUMENT X

AT THE PENALTY PHASE, THE LOWER COURT ERRED IN REFUSING TO PERMIT THE INTRODUCTION OF REVERSE-*WILLIAMS* RULE EVIDENCE AS TO MICHAEL JACKSON, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

During pre-trial litigation, the defense filed a notice of intent to introduce reverse-*Williams* rule evidence in the form of co-defendant Jackson's involvement in the July, 2000, first-degree murder of a homosexual man, James Beamon, with whom Jackson was living at the time and who Jackson murdered in a strikingly similar fashion as the victim in the case in which Mr. England and Jackson were charged (R304-309). The court granted the motion in part, concluding that there

was "clear and convincing evidence" that Jackson was Beamon's assailant and that there were "striking similarities between the instant murder charge and the prior crime" (R404-405).[46] Thus, the court concluded that due to the uncertainty about whether Jackson would testify at trial, the defense could, outside the presence of the jury, introduce the evidence and seek a ruling from the court at that time (*Id*.). The parties subsequently decided that neither side would present its *Williams* rule evidence at the guilt phase, but at the penalty phase, defense counsel sought to introduce the reverse *Williams* rule evidence as to Jackson because it went to establishing relevant mitigating evidence that Jackson was the actual perpetrator and Mr. England's participation was relatively minor (R1944). Additionally, the defense argued that the evidence was relevant to show that Jackson got a plea to a sentence less than death despite a prior attempted murder under strikingly similar

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[46]Among the "striking similarities" found by the court between Jackson's assault on Beamon and the facts of the instant case were (1) the beatings were accomplished with solid objects (fire poker, possible pipe); (2) the beatings were to the heads and faces of both victims; (3) the beatings were "very brutal"; (4) there was much blood spatter; (5) weapons were not located in either crime; (6) both victims were older white males; (7) both victims were homosexuals; (8) Jackson lived with both victims as a hustler; (9) both victims wanted Jackson to leave; (10) the attacks took place in the victims' homes; (11) property was taken from both victims; (12) attacks took place in the evening or very early morning; (13) the beatings resulted in severe injury or death (R405). The court did note some dissimilarities between Jackson's assault on Beamon and the facts of the instant case, but found they were "insubstantial" (*Id*.).

circumstances (R1944). The defense noted that the court had already ruled that the reverse *Williams* rule evidence against Jackson would have been admissible at the guilt phase and thus it was likewise admissible at the penalty phase (R1946). The State strenuously objected that the evidence was irrelevant to the penalty phase and even though it already obtained its conviction against Mr. England, told the court it was willing to risk the issue on appeal (R1949). The court agreed with the State and refused to permit the defense to introduce the evidence.

The lower court's preclusion of the reverse *Williams* rule evidence regarding Jackson was error and unconstitutionally precluded the defense from presenting mitigating circumstances. It is axiomatic that the Eighth and Fourteenth Amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record *and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Any sentencing scheme or ruling that prevents the sentencer "from considering the particular circumstances of [the] crime and aspects of [the defendant's] character and record as mitigating factors" is violative of the Eighth and Fourteenth Amendments. *Bell v. Ohio*, 438 U.S. 637, 642 (1978). *See also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Thus, *Lockett* and its

progeny stand for the proposition that, under the Eighth and Fourteenth Amendments, a court must allow a defendant to present at sentencing, and a sentencer must be able to consider, any evidence relevant to any circumstances of the offense that mitigates against imposition of the death penalty. Indeed, this Court has found that "[c]onflicting evidence on the identity of the actual killer" is valid mitigating in terms of providing a reasonable basis for sustaining a jury's recommendation of life. *Barrett v. State*, 649 So. 2d 219, 223 (Fla. 1995). Here, the information sought to be introduced by the defense supported the defense argument that Jackson, not Mr. England, was the actual perpetrator of the murder; given that Jackson had attempted to murder another man under strikingly similar circumstances, the reverse *Williams* rule evidence, which the court had already ruled admissible at the guilt phase, would have been powerful evidence in mitigation. Under these circumstances, the lower court's preclusion of this valid mitigation was constitutional error, and a resentencing is warranted.

ARGUMENT XI

THE LOWER COURT ERRED IN REFUSING TO CONSIDER THE DISPARATE TREATMENT OF MR. ENGLAND AND MICHAEL JACKSON DESPITE FINDING THAT THEY WERE "EQUALLY CULPABLE."

In its written findings in support of the death penalty, the lower court first addressed the factor of disparate treatment, concluding that Mr. England and Michael Jackson were "equally culpable of the murder" (R464). However, the court refused to consider disparate treatment as a mitigating factor, concluding instead that Mr. England's sentence was not "legally" disparate in light of the Court's decision in *Kight v. State*, 784 So. 2d 396 (Fla. 2001) (R465). The lower court erred.

This Court has long held that "[w]hen a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate." *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996). *Accord Downs v. State*, 572 So. 2d 895 (Fla. 1990); *Slater v. State*, 316 So. 2d 539 (Fla. 1975). Thus, "an equally or more culpable codefendant's sentence is relevant to a proportionality analysis." *Larzelere*, 676 So. 2d at 407 (*citing Cardona v. State*, 641 So. 2d 361 (Fla. 1994). *See also Jennings v. State*, 718 So. 2d 144 (Fla. 1998) ("It has long been established that equally culpable co-defendants should receive equal treatment").

This Court's decision in *Kight*, which provided the sole basis for the lower court's refusal to consider as mitigation the disparate treatment of Mr. England and Jackson, does not stand for the proposition cited and is distinguishable. First and foremost, the issue in *Kight* arose in the context of a claim in a successive Rule 3.850 motion alleging newly discovered evidence. Nothing in *Kight* indicated that the Court was retreating from its long line of cases cited above that equally culpable co-defendants should receive different treatment. Indeed, in *Kormondy v. State*, 845 So. 2d 41 (Fla. 2003), a direct appeal proportionality decision post-*Kight*, this Court noted *Kight* but nonetheless considered a claim of proportionality where one of the co-defendants, Buffkin, had accepted a plea offer for a lesser sentence in exchange for his testimony against Kormondy. *Id*. at 46. This Court considered the disparate treatment afforded Buffkin but held that Kormondy's death sentence was proportional because Kormondy was "more culpable" than the co-defendants. *Id*. at 47. Thus, *Kormondy* establishes that this Court in *Kight* did not retreat from its historical practice of assessing the disparate treatment of equally or more culpable co-defendants even when the co-defendant accepts a plea in exchange for testifying against the defendant. Here, in contrast to *Kormondy*, the trial court found that Mr. England and Michael Jackson were "equally culpable." Under these circumstances, it was constitutional error for the trial court to refuse to consider

Jackson's disparate treatment when evaluating whether Mr. England was entitled to mitigating effect of Jackson's lesser sentence. Relief is warranted.

ARGUMENT XII

BASING AGGRAVATING CIRCUMSTANCES ON A PRIOR CONVICTION FOR CRIMINAL ACTIVITY COMMITTED WHEN MR. ENGLAND WAS SIXTEEN YEARS OLD AND ON A PROBATIONARY SENTENCE STEMMING FROM THAT JUVENILE CONVICTION VIOLATES THE EIGHTH AND FOURTEEN AMENDMENTS OF THE UNITED STATES CONSTITUTION UNDER *ROPER V. SIMMONS*, 125 S.Ct. 1183 (2005).

In *Roper v. Simmons*, 125 S.Ct. 1183 (2005), the Supreme Court declared that the Eighth Amendment precluded reliance upon criminal acts committed before the age eighteen from serving as a basis for the imposition of a sentence of death. At Mr. England's penalty phase, the State introduced, and the court found, that (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, community control, or felony probation, pursuant to §921.141 (5)(a), Fla. Stat.;[47] and (2) that Mr. England was previously convicted of another capital felony or of a felony involving the use or threat of violence to the

[47]The court found that this while this aggravator was a factor to be considered, "it is neither a heaver or great factor, nor a light or minor factor, but rather a medium factor" (R461). The probationary sentence that Mr. England was serving stemmed from his 1987 conviction as a juvenile.

person, pursuant to §921.141 (5)(b).[48] The introduction and use of the prior conviction, and the probationary sentence stemming therefrom, premised upon acts committed by Mr. England when he was under the age of eighteen, violate *Roper v. Simmons* and the Eighth Amendment.[49] Under the reasoning of *Roper*, any aggravating factors based on events occurring while the defendant was under the age of eighteen, such as the two aggravating factors discussed above in Mr. England's case, violates the Eighth Amendment. Relief in the form of a resentencing is required.

ARGUMENT XIII

THE DEATH PENALTY IS NOT PROPORTIONATELY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." *Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988). This Court summarized proportionality review as a consideration of the "totality of circumstances in a case," and due to the finality

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[48]The court used Mr. England's prior conviction as a juvenile for second-degree murder (R462). The court afforded "great weight" to this aggravator (R462).

[49]Mr. England is entitled to the benefit of *Roper* since his case was pending on direct appeal when *Roper* was decided. *See Griffith v. Kentucky*, 479 U.S. 314 (1987); *Smith v. State*, 598 So. 2d 1063 (Fla. 1992).

and uniqueness of death as a punishment, "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So. 2d 954, 956 (Fla. 1996).

This case does not involve one of the most aggravated and least mitigated offenses. Importantly, as noted elsewhere, Mr. England submits that the aggravators of prior violent felony and the probationary status he was under as a result of that felony are unconstitutional under the Eighth Amendment. Moreover, he submits that the court improperly found the heinous, atrocious, or cruel aggravating factor. Thus, the only arguable remaining aggravating circumstance is that the crime occurred during the course of a robbery, which the lower court afforded medium weight (R462). This aggravating circumstance is insufficient to warrant the imposition of the death penalty. *See Rembert v. State*, 445 So. 2d 337, 340 (Fla. 1984).

Moreover, in considering the prior violent felony, the Court must consider not only Mr. England's youth at the time (he had just turned 16), but the crime occurred some 14 years before the instant offense. In *Jorgenson v. State*, 714 So. 2d 423 (Fla. 1998), this Court addressed a case where the State presented an aggravating circumstance of a prior conviction for second degree murder which occurred some 26 years earlier. In determining the death sentence was

disproportionate, this Court noted that "[t]he facts of this prior conviction mitigate the weight that a prior violent felony would normally carry." *Id*. *See also Larkins v. State*, 739 So. 2d 90, 94-95 (Fla. 1999) (finding death sentence disproportionate and noting that "the most serious aggravator, the prior violent felony aggravator, was predicated upon two convictions which were committed almost twenty years before the murder in the instant case, and the defendant apparently led a comparatively crime free life in the interim").

This Court also must consider the proportionality of Mr. England's death sentence in comparison to the lesser sentence received by co-defendant Jackson, who, as the lower court found, was "equally culpable" to Mr. England (R464). This Court has long held that "[w]hen a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate." *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996). *Accord Downs v. State*, 572 So. 2d 895 (Fla. 1990); *Slater v. State*, 316 So. 2d 539 (Fla. 1975). Thus, "an equally or more culpable codefendant's sentence is relevant to a proportionality analysis." *Larzelere*, 676 So. 2d at 407 (*citing Cardona v. State*, 641 So. 2d 361 (Fla. 1994). *See also Jennings v. State*, 718 So. 2d 144 (Fla. 1998) ("It has long been established that equally culpable co-defendants should receive equal treatment").

In evaluating proportionality, the Court should also consider the substantial mitigating evidence found by the lower court:

> 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[] 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 coming 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. 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.

(R468) (footnote omitted).

In light of the substantial mitigation which was afforded great weight by the trial court, the fact that an equally culpable co-defendant received a lesser sentence, the inapplicability of several aggravating circumstances, the circumstances surrounding Mr. England's prior conviction, including his age at the time of the prior crime and the fact that 14 years elapsed from that time to the time of the instant offense, Mr. England submits that death is not a proportionate sentence and

that his death sentenced be reduced to life imprisonment.

ARGUMENT XIV

MR. ENGLAND'S DEATH SENTENCE AND THE FLORIDA SENTENCING STATUTE VIOLATE THE SIXTH AMENDMENT AND *RING V. ARIZONA*, 536 U.S. 584 (2002).

Prior to trial, Mr. England filed a series of motions with respect to the constitutionality of the death penalty and Florida's capital sentencing scheme, arguing that under *Ring v. Arizona*, his death sentence and Florida's capital sentencing statute violated the Sixth Amendment because, *inter alia*, the judge, not the jury, is required to make the necessary findings to make the defendant death eligible, the statute fails to satisfy the Sixth Amendment due to a lack a unanimous verdict, and the aggravating circumstances are not charged in the indictment nor found unanimously by the jury beyond a reasonable doubt (R310-23). Mr. England also filed a motion for a statement of particulars requesting the State divulge what aggravating circumstances it intended to rely on because aggravating circumstances are substantive elements of the offense of capital murder (R267-279). All of these motions were denied (R393, 394, 395, 401, 407-08). Mr. England also filed extensive objections, on constitutional grounds, to the standard penalty phase jury instructions (R326-384); these objections were denied (R390). Mr. England acknowledges that the Court has been repeatedly rejecting *Ring*

challenges on direct review. *See Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003); *Fitzpatrick v. State*, 30 Fla. L. Weekly S45 (Fla. Jan. 27, 2005). However, for the reasons set forth herein and in the motions filed below, he maintains that, under the Sixth Amendment and *Ring*, relief is warranted. *See Duest v. State*, 855 So. 2d 33, 52 (Fla. 1993) (Anstead, J., concurring in part and dissenting in part).

CONCLUSION

Based on the foregoing arguments, Mr. England submits that a new trial and/or a new sentencing proceeding and/or the imposition of a life sentence is warranted.

CERTIFICATE OF FONT

I hereby certify that this Initial brief was typed in New Times Roman font, 14 pt. type.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid to Barbara Davis, Assistant Attorney General, Department of Legal Affairs, 444 Seabreeze Boulevard, Daytona Beach, FL 32118, this 10th day of May, 2005.

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