IN THE SUPREME COURT OF FLORIDA

RICHARD ENGLAND,

Appellant,

vs. **Case Number SC04-1521**

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSUA COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

TODD G. SCHER
FLORIDA BAR NUMBER 0899641
LAW OFFICE OF TODD G. SCHER, P.L.
5600 COLLINS AVENUE #15-B
MIAMI BEACH, FLORIDA 33140
(305) 861-9252
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT IN REPLY

ARGUMENT I

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

Despite the trial court having granted a defense motion *in limine* precluding the State from any mention of Mr. England's prior murder case, the State, through its cross-examination of Michael Jackson, elicited from Jackson that Mr. England "already got a murder charge" (T1453). Mr. England's Initial Brief acknowledged that there was no contemporaneous objection to this testimony, and the State argues that "not only did defense counsel not object, but he made a tactical decision not to object" (AB at 64).[1] Thus, in the State's view, the issue was "not only waived, it was waived intentionally" (*Id*.).

The State's waiver argument is premised on trial counsel's statements to the lower court made in response to Mr. England's own complaints about counsel not having previously objected to Jackson's testimony. When this matter was addressed during the *Spencer* hearing, Mr. England informed the lower court that trial counsel had not made any objection to Jackson's testimony which violated the

court's order *in limine* but rather he "just let it go" (R2129-30). The court, out of "fairness," inquired of trial counsel if he wished to respond to Mr. England's complaints (R2130-31). Trial counsel, who still represented Mr. England at the time, proceeded to reveal all sort of client confidences with regard to his communications with Mr. England, and then told the court that, as to the Jackson testimony, in "my mind I didn't want a mistrial because I thought he was helping us" and therefore he did not object to what he viewed as "a minor part of his testimony" (R2133). Responding to trial counsel's statements, Mr. England told the court that the whole purpose of the motion *in limine* had been violated by the State eliciting the testimony from Jackson about the prior murder, and thus "they win again" (T2134). The court informed Mr. England that any grounds for a new trial had to be made through his attorney, that he would respectfully deny the motion in any event, and that "[t]hose are things that, if you want, you can raise some of them on direct appeal, some of them probably after that" (R2135). Thus, while there was not an objection to Jackson's testimony at the time of the improper statement, the lower court did address the matter in the context of dealing with Mr. England's own complaint about the lack of objection.

---

[1]References to the State's Answer Brief shall be designated as (AB page #).

In the event that the Court declines to review this matter because it was not adequately preserved below, or questions whether trial counsel made an informed and reasonable tactical decision with regard to the lack of objection to Jackson's testimony, Mr. England submits that the Court should make it clear that Mr. England would be allowed to raise this issue in a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. The colloquy in the lower court raises a number of serious matters with regard to trial counsel disclosing, without waiver from Mr. England, confidential attorney-client communications, as well as whether counsel's putative "tactical" decision not to object was reasonable and made with adequate consultation with Mr. England. Moreover, any "tactical" decision made by counsel to permit the jury in a capital murder case to be informed of a client's prior murder is questionable at best, particularly given the efforts made here prior to trial to obtain an order *in limine* to exclude the testimony. Should the Court decline to find that the admission of Jackson's statement was fundamental error and should the Court otherwise affirm the convictions and sentence under challenge herein, Mr. England should be allowed to raise this issue in a Rule 3.850 motion so that this important issue can be properly litigated in the appropriate forum.

In a one-sentence conclusory fashion, the State argues that "[e]rror, if any, was harmless" (AB at 65). This is an insufficient demonstration of harmlessness. A constitutionally-appropriate harmless error analysis requires the State, as the beneficiary of the harm, to prove, beyond a reasonable doubt, that the error was harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Chapman v. California*, 386 U.S. 18 (1967). Under *DiGuilio* and *Chapman*, a reviewing court looks not only to the "permissible evidence on which the jury could legitimately have relied" but also requires "an even closer examination of the impermissible evidence which might have possibly influenced the jury's verdict." *DiGuilio*, 491 So. 2d at 1135 (emphasis added).[2] A reviewing court must also "resist the temptation to make its own determination of whether a guilty verdict could be sustained by excluding the impermissible evidence and examining only the permissible evidence." *Goodwin v. State*, 751 So. 2d 537, 542 (Fla. 1999).

In the instant case, Jackson's testimony regarding Mr. England's prior murder (previously ruled inadmissible by the trial court's order *in limine*) was precisely the type of devastating evidence that cannot be amenable to harmless error analysis. As a court has recently noted, "[t]he admission of evidence

---

[2]Certainly, the *DiGuilio/Chapman* test does not entail an analysis of whether the prosecutor "noticed the statement" at issue (AB at 64). The focus is the effect

concerning a defendant's prior criminal history is frequently too prejudicial for a jury to disregard, regardless of any curative instruction given by the trial court." *Brooks v. State*, 868 So. 2d 643, 644 (Fla. 2d DCA 2004). Under the circumstances of this case, the State cannot (nor has it made any attempt to) establish that the error was harmless beyond a reasonable doubt, and therefore, a new trial is warranted.

---

on the integrity and fairness of the trial.

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.

In this argument, Mr. England challenged the lower court's refusal to provide the jury with a special verdict form to require the jury, when reaching a verdict, to specifically find either premeditated or felony murder. The State argues that when the verdict forms were discussed at the charge conference, defense counsel raised no objection to the format (AB at 66). The State fails to acknowledge, however, that 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] premeditated 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 the special verdict, ruling that it was "going to go with the Florida Supreme Court. And it's denied" (R26). This is sufficient to preserve the issue for purposes of appeal.

The State argues that the verdict form given to the jury "seem[s] to comply" with *Ring* (AB at 65). However, as explained in Mr. England's Initial Brief, Count 1 of the indictment in this case alleged that Mr. England killed the victim either in a premeditated manner, during the course of a robbery or attempted robbery, or by "aiding and abetting, counseling, hiring, or otherwise procuring such offense to be committed by Michael Jackson" (R1). While the State alleged three separate methods by which Mr. England purportedly committed the crime of first-degree murder, the indictment failed to specify the elements of each of the alternative theories, and the jury returned a general verdict of guilt of both premeditated and felony murder (R409). Under these circumstances, Mr. England submits that the Sixth Amendment was not satisfied, and, while he does acknowledge *Schad v. Arizona*, 501 U.S. 624 (1991), he respectfully urges that *Schad*'s reasoning cannot be squared with *Ring*. Because this Court has an independent obligation to ensure that the Sixth Amendment is enforced in the Courts of this State, Mr. England submits that this Court can and should re-examine the verdict forms in light of *Ring*.

ARGUMENT III

THE TRIAL COURT ERRED IN ADMITTING NUMEROUS AUTOPSY PHOTOGRAPHS OF THE VICTIM WHICH WERE INFLAMMATORY AND IRRELEVANT, IN VIOLATION OF

MR. ENGLAND'S CONSTITUTIONAL RIGHT TO A FUNDAMENTALLY FAIR TRIAL.

The State concedes that objections were lodged as to the admission of numerous autopsy photographs, but argues that the objections were "not specific" and that defense counsel merely incorporated a "boilerplate" pretrial motion and arguments made at the pretrial hearing (AB at 69). The record fails to bear out the State's attempt to thwart review of clearly and adequately preserved objections regarding the autopsy photographs at issue.

Prior to trial and before even knowing which, if any, autopsy photographs the State would seek to introduce at either the guilt or penalty phase, the defense moved *in limine* to exclude autopsy photographs that were "especially gruesome" (R289). The motion further stated:

> The body was found in a moderately decomposed condition with numerous insect larvae over the surface of the body and within the orifices of the body and with abundant skin seepages and rigor mortis and livor mortis. The post-mortem changes affected the body and changed the body's appearance. There is diffuse green to red brown discoloration over the body. There is abundant post-mortem gas formation within the external genitalia which appears as a bloated scrotum and enlarged erect penis. This is a post-mortem condition and not a pre-death condition.

(R289). At the pre-trial hearing on the defense motion, defense counsel, prior to the parties and the court addressing the photographs one by one, made the following arguments:

> MR. KEATING: Your Honor, next motion is motion in limine reference autopsy photos. Richard England brings on to be heard this motion at this time. I've taken the deposition of the medical examiner. He has provided us with photographs from the autopsy. The photographs in the instant case are especially gruesome. The body was found in a moderately decomposed position–condition, I'm sorry, with numerous postmortem changes and decomposition. The postmortem changes affected the body and changed the body's appearance, which resulted in photographs showing diffuse green to red brown discoloration over the body.
>
> There is abundant postmortem gas formation which affected the external genitalia including the scrotum and penis. These are postmortem conditions and not predeath conditions. They're not live person conditions. Under 90.403, the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence. This evidence will enflame [sic] the jury, will improperly appeal to their emotion and it will confuse the jury. Your Honor, I took the medical examiner's deposition. I can go through – I talked to him about – I asked him about the photographs, and starting on page 48 through page 58, we go through each photograph and talk about decompositional changes, and I will go through that quickly, but there is a whole lot of decompositional changes that affect the photographs.

(R1007-08). The prosecutor agreed that the there were "decompositional changes" depicted in the photographs, and suggested that "we can get" the photos and review them because defense counsel "hasn't even seen them" (R1008). Defense counsel then noted that the court "traditionally" looks at objectionable photographs "at or near the time of introduction" and the parties and the court agreed that the court would "hold off on that motion" until the parties had an opportunity to adequately review the photographs (R1010).

The issue arose again later that same day, when the court noted that "we're here basically for taking a look at the pictures of the deceased at the crime scene and also autopsy" (R1029).[3] The State then made its arguments for the admissibility of all the photographs, and defense counsel made specific objections to certain photographs that depicted decomposition and other post-mortem changes to the body, such as the depiction of the victim's erect penis, as well as those which were unnecessarily gruesome and depicted skin slippage, skin weeping, and discoloration (R1038-39; 1051). Following the court's ruling permitting the introduction of a number of the objected-to photographs (R1051-52), the defense reiterated its objections to the admissibility of the photographs at both the guilt and penalty phases (R1052-53). In light of the extensive discussion about the photographs, it is clear that the State's characterization of the defense argument as "broad" and "sweeping" is not well taken (AB at 69).

The State next argues that the defense was required to record a specific and contemporaneous objection to the objectionable photographs at the time of they were offered at trial in order to preserve his motion *in limine* (AB at 69). Aside

---

[3]Because there were also photographs of the victim at the crime scene which were, in the defense view, inflammatory and gruesome, the defense orally amended its motion *in limine* to encompass any objectionable photographs also

from stating the general proposition regarding preservation of an issue for appeal, the State makes no specific argument, and appears not to acknowledge that defense counsel did lodge the appropriate objections at the appropriate time during the medical examiner's testimony to the particular photographs at issue. *See* Initial Brief at 57-58. The State's procedural bar argument is therefore without merit and should be rejected by this Court.

With regard to the merits of the argument, the State simply posits that the photographs were relevant to the medical examiner's testimony (AB at 69-71).[4] The State fails to acknowledge Mr. England's argument, however, that while gruesome autopsy and crime scene photographs may be "relevant," they are nonetheless inadmissible if they are "so shocking in nature as to defeat the value of their relevance." *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1999). Here, Mr. England argued below, and argues on appeal, that the objected-to photographs were not only of little or no relevance, but were also so gruesome as to outweigh their relevance. *See Almeida v. State*, 748 So. 2d 922, 929 (Fla. 1999) (relevancy

---

taken at the crime scene (R1009). No objection to the *ore tenus* amendment was lodged by the State.

[4]Mr. England's challenge to the gruesome autopsy and crime scene photographs encompasses the guilt and penalty phases. The State does not address Mr. England's argument as to the penalty phase, clearly identified and set out in the Initial Brief. *See* Initial Brief at 59-60).

standard for admissibility of photographs is "by no means constitutes a carte blanche for the admission of gruesome photographs"). The nature of the injuries and the cause of death were not in dispute here, and there was simply no relevance for the admission of photographs depicting the post-mortem damage to the victim's body. *See Czubak*, 570 So. 2d at 928-29 (trial court erred in admitting gruesome photos that depicted the victim at least a week after she had died and had suffered additional post-mortem injuries from events that occurred neither during nor directly after the murder). Because the State has failed to establish the relevance of the complained-of photographs, and has made no cogent argument that the probative value of the pictures defeated the gruesome nature of said photographs,[5] Mr. England submits that relief in the form of a new trial and/or sentencing phase is warranted.

ARGUMENT IV

IN VIOLATION OF THE BEST EVIDENCE RULE, THE LOWER COURT ERRED IN PERMITTING IVEY EVANS TO

[5]The State makes no attempt to argue in the body of its brief that even if the trial court erred in admitting the photographs at either the guilt or penalty phase, any error was harmless beyond a reasonable doubt.

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.

With regard to Mr. England's challenge to the testimony of Ivey Evans. Mr. England relies on the arguments and authorities set forth in his Initial Brief. Mr. England does provide the following argument in reply to the State's arguments as to the Reynaldo DeLeon testimony.

Asserting best evidence and hearsay grounds, Mr. England below and on appeal argued that DeLeon should not have been permitted 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 and that he did not have the letter because he purportedly threw it away (R854). The State first argues that there was no contemporaneous objection to DeLeon's testimony and thus, in its view, the issue is waived for appellate review (AB at 72-73). The State is incorrect.

The record of the trial proceedings at page 854 reflects DeLeon's testimony regarding the letter, but, on the following page (page 855), defense counsel objected "and incorporates by reference his previous objections regarding the letter and contents" (R855). The trial court overruled the objection (*Id*.). Thus, the

State's assertion that there was no contemporaneous objection is patently incorrect. Under these circumstances, where the initial objections were made during a proffer immediately prior to the questioned testimony and, moments later, following the testimony at issue defense counsel renewed the objection, the defense objection was more than sufficient to preserve the issue for appeal on this record. *See generally State v. Cumbie*, 380 So. 2d 1031 (Fla. 1980).[6]

The State argues that, even if error, the admission of Deleon's testimony was harmless because of the alleged "strength" of the State's case for guilt (AB at 74) (discussing other evidence that "proved England was guilty") This is not the appropriate harmless error test, however:

---

[6]This was not a situation where the litigation as to the admissibility of Deleon's tesimony was done weeks or months before trial. Rather, the defense litigated the issue immediately prior to the offending testimony. Clearly, the trial court, which had just ruled the testimony admissible, was on notice as to what defense counsel was objecting to when he did lodge his objection after Deleon testified. Thus, the purpose of the contemporaneous objection rule was more than satisfied here.

> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

Goodwin v. State, 751 So. 2d 537, 542 (Fla. 1999) (citations omitted). In this case, the interconnection between the testimony of Deleon and jailhouse snitch Diehl was extensively argued by the prosecution at trial, and both of these witnesses unquestionably provided damaging testimony against Mr. England (*See, e.g.* R1676-77). In particular, Deleon's testimony about the letter was highlighted by the prosecution to buttress the otherwise shaky credibility of both Deleon and Diehl (*Id*.; R1739-43). Under the facts of this case, the State cannot establish the error to be harmless beyond a reasonable doubt and, thus, a new trial is warranted.

ARGUMENT V

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

The State makes another attempt to thwart appellate review of an argument which was clearly and properly preserved below. As to this claim, the State argues that defense counsel, when objecting to the admissibility of DeLeon's testimony at trial, failed to repeat the legal grounds that had been asserted during

the motion *in limine* hearing (AB at 75). Thus, in the State's view, the instant issue was not properly preserved for appellate review. The State's argument is without any merit. It is correct that a defendant is required to lodge a contemporaneous objection to evidence that had previously been found to be admissible as the result of a motion *in limine*. *See generally Correll v. State*, 523 So. 2d 562 (Fla. 1988). However, all that is required in order for the defense to preserve the previous ruling in a motion *in limine* is to "renew the prior objections." *Brooks v. State*, 762 So. 2d 879, 890 (Fla. 2000). *See also Thompson v. State*, 615 So. 2d 737, 744 (Fla. 1st DCA 1993); *Donaldson v. State*, 369 So. 2d 691, 694 (Fla. 1st DCA 1979). Here, there is no question that trial counsel renewed the objection to Deleon's testimony, and counsel was not required to regurgitate, chapter and verse, all of the specific arguments previously made when the issue was fully litigated. By objecting and incorporating the prior arguments, the trial court was clearly apprised of the nature of the defense objection and thus the purpose of the contemporaneous objection rule was satisfied. This argument was more than adequately preserved for appeal.

On the merits of the argument raised by Mr. England, the State argues that the testimony demonstrated "consciousness of guilt" and that a defendant's attempt to threaten a witness is relevant and admissible (AB at 76). Under the

circumstances of this case, the State's arguments are without merit. Here, the purported threat made by Mr. England was testified to by Deleon and the threat was not made toward Deleon, but toward yet another witness, Michael Jackson (who happened to testify on behalf of Mr. England at trial). The State's reliance on *Sireci v. State*, 399 So. 2d 964 (Fla. 1981), is misplaced. In *Sireci*, the defendant complained that the trial court permitted the testimony from a jailhouse informant that the defendant had attempted to have his brother-in-law, Wilson, killed. *Id.* At 968. At trial, however, Wilson had testified to "various statements made by the defendant which fully implicated him in the crime charged." *Id*. Under these circumstances, this Court found that the testimony regarding the threat was permissible because it was based on consciousness of guilt inferred from such actions. *Id*. Here, there was a statement in the form of an alleged threat testified to by a prosecution witness about yet another witness who was not a prosecution witness. This is not only hearsay, but also evidence of an uncharged collateral crime. And, even if relevant and admissible, the balancing test of §90. 403 cannot be satisfied here because the probative value of the purported threat was substantially outweighed by its unduly prejudicial nature. Under the facts of this case, particularly when combined with the other errors that took place at the guilt phase, Mr. England submits that a new trial is warranted.

ARGUMENT VI

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

Mr. England relies on the arguments and authorities in his Initial Brief in reply to the State's arguments on this issue.

ARGUMENT VII

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

The State contends that the lower court properly found the HAC aggravating circumstance because the victim died a "brutal, painful death" and this Court has upheld a finding of HAC "in beating deaths" (AB at 80). Of course, it is the lower court's findings that controls whether this Court will find that the evidence supported such a finding, not the arguments made by the State which are not part of the lower court's factual findings. Here, the lower court found that HAC applied because there was "[b]lood everywhere," there was evidence that the victim "begged for his life," he moved around the bedroom while fending off blows, he "experienced pain before losing consciousness," and was hit so hard that a spinal fracture ensued (R462). It must be remembered that all murders are unnecessary and generally involve bloody crime scenes. What must be established, beyond a reasonable doubt, however, is that the capital felony must be

"especially" heinous, atrocious, or cruel. *Diaz v. State*, 860 So. 2d 960, 966 n.7 (Fla. 2003).

Citing a string of cases where this Court has upheld a finding of HAC, the State argues that such a finding is practically required in "beating deaths" (AB at 80). This is simply incorrect, as this Court has rejected a finding of HAC despite evidence that the victim was beaten and/or bludgeoned. *See, e.g. Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998); *Elam v. State*, 636 So. 2d 1312 (Fla. 1994). What appears to be one of the dispositive issues when the Court addresses the applicability of HAC in a beating death is whether the trial court found evidence that the victim "was conscious and aware of impending death." *Douglas v. State*, 878 So. 2d 1246, 1261 (Fla. 2004). Unlike the factual situation in *Douglas*, however, in Mr. England's case, the medical examiner's testimony established that the victim died as the result of a single blow to the head which caused a fracture of the neck (R1272; 1299-1300). The medical examiner's testimony was rife with speculation, however, as to how long the victim would have been alive after the injury and how long the victim underwent the initial struggle with the assailant(s) before the ultimate and fatal blow. Significantly, the lower court's order does not contain any factual findings like those at issue in *Douglas* and other cases where courts have made the specific findings required in order to sustain a finding of

HAC. Mr. England submits that the facts of this case are most like those addressed in *Zakrzewski* and *Elam*, and the State does not attempt to distinguish those cases from the circumstances of Mr. England's case.

Citing *Lamb v. State*, 532 So. 2d 1051 (Fla. 1988), the State argues that because the beating that took place in the instant case "tool place over a longer period of time" than it did in *Lamb*, the lower court properly found HAC in the instant case. In the first place, the lower court made no finding as to how long the beating took in the instant case, nor could the medical examiner so testify (R1575-76) This Court's function in reviewing a lower court's determination that HAC applied is not to count how long it took a victim to die in a particular case as opposed to the case under review. Rather, the Court looks at the lower court order in each particular case and makes an independent determination if the court properly found HAC, which applies "only in torturous murders–those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Rose v. State*, 787 So. 2d 786, 801 (Fla. 2001) (quoting *Guzman v. State*,

721 So. 2d 1155, 1159 (Fla. 1998)). Under the circumstances of this case, given the findings made by the lower court, HAC does not apply and relief is warranted.[7]

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.

[7]The State makes no argument that even if HAC did not apply, the death sentence in this case could still be valid.

The State first argues that the issue of the court gagging and handcuffing Mr. England is not sufficiently preserved for appellate review despite trial counsel's request to the court that it not gag Mr. England (AB at 84). While the State opines that this is "hardly an objection," it fails to explain what more defense counsel could have said to the court to apprise it of its objection to Mr. England being gagged. An objection does not require "magic words" and by requesting that the court not gag his client, defense counsel clearly put the court on notice that he was not assenting to his client being gagged and handcuffed before the jury at the penalty phase.[8] In the alternative, Mr. England submits that this issue would amount to fundamental error, as it clearly is the type of error that is "so prejudicial as to vitiate the entire [penalty phase proceeding]." *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997). *See Deck v. Missouri*, 125 S. Ct. 2007, 2012 (2005)

---

[8]The State discusses a part of the record which reveals a discussion during which defense counsel indicated he had "no intention of making any record" (AB at 84). This statement was made in reference to the court informing the parties that, during a recess, a courtroom deputy had reported to the court that Mr. England supposedly stated that this outbursts were "intentional" (R2045). When the court indicated that the deputy was available to testify under oath if either party desired to "find out about that," defense counsel requested that the matter be deferred until after the closing argument (*Id*.). The court said no, that it wanted to make the record "now" (*Id.)*. At that point, defense counsel made the statement about not wanting to make any record with regard to what was or was not said to the deputy (*Id*.). Certainly, this exchange cannot be construed as any sort of

(constitutional prohibition against shacking or restraining criminal defendant before a jury is "deeply embedded in the law" and is a "basic element" of the due process clause of the Fifth and Fourteenth Amendments); *Johnson v. State*, 906 So. 2d 1149 (Fla. 1st DCA 2005) (addressing merits of shacking argument that was not preserved by objection at trial under fundamental error analysis).

In *Deck, supra*, which was decided after Mr. England filed his Initial Brief, the Supreme Court held that the constitutional prohibition against the physical restraining of a defendant at the guilt phase of trial extended to a capital penalty phase. The Court explained:

> The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases. This is obviously so in respect to the latter two considerations mentioned, securing a meaningful defense and maintaining dignified proceedings. It is less obviously so in respect to the first consideration mentioned, for the defendant's conviction means that the presumption of innocence no longer applied. Hence shackles do not undermine the jury's effort to apply that presumption.
>
> Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given

---

waiver of Mr. England's constitutional rights or of his right not to be gagged during the penalty phase.

> the "severity" and "finality" of the sanction, is no less important than the decision about guilt. . .
>
> Neither is accuracy in making the decision any less critical. The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. . . . The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community–often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. . . . It also almost invariably affects adversely the jury's perception of the character of the defendant. . . . And it therefore inevitably undermines the jury's ability to weigh accurately all relevant considerations–considerations that are often unquantifiable and elusive–when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale." *Sochor v. Florida*, 504 U.S. 527, 532 (1992). . . .

Deck, 125 S. Ct. at 2014 (citations omitted). And, because shackling is "inherently prejudicial," a defendant need not demonstrate "actual prejudice to make out a due process violation." *Id*. at 2015.

In Mr. England's case, the trial court gagged him with duct tape as well as handcuffed him during the penalty phase, with no explanation or cautionary instruction given to the jury. It can hardly be argued that the restraints used here were not visible to the jury, as Mr. England was taped by the mouth with duct tape. The State relies on *Johnson, supra*, as providing a "strikingly similar" situation (AB at 85). *Johnson* is hardly similar, much less "strikingly" so. The most glaring distinguishing factor between *Johnson* and the instant case is that *Johnson*

addressed a burglary and theft case, whereas Mr. England's case involves a capital penalty phase, which, as the Supreme Court recognized in *Deck*, involves special considerations not generally applicable to a guilt phase, even a guilt phase in a murder case. Secondly, in *Johnson*, the trial court, even absent objection from defense counsel, provided a "cautionary instruction to the jurors informing them they were to decide the case on its facts and evidence and not be influenced by the measures taken." *Johnson*, 906 So. 2d at 1150. Moreover, the restraints were used only briefly and were then removed for the remainder of trial. *Id*. Here, although the defendant was not gagged and handcuffed until the penalty phase closing argument, the restraints remained on and visible for the remainder of the proceeding.

In Mr. England's Initial Brief, he acknowledged that the right to be free of physical restraint was not absolute, and the State argues that the trial court here followed the "most reasonable" option (AB at 85). There is nothing reasonable, however, in gagging the defendant with duct tape *and* handcuffing him during a capital penalty phase. Even assuming arguendo that it could be argued that gagging a defendant is not an unreasonable response to a verbally obstreperous

defendant in the course of a non-capital case,[9] there was no reason articulated by the court to require the additional restraint of handcuffs at the penalty phase, which implied that Mr. England was not simply verbose but also posed a physical risk to the security of the courtroom and the jurors.[10] Particularly in light of the sensitive and, in the view of the Supreme Court, the often "unquantifiable and elusive" factors that inhere in a jury's decision whether to sentence a defendant to death, the court's imposition of the duct tape and the handcuffs was an abuse of discretion and the prejudice is inherent in this practice. *Deck*, *supra*. And because the State

---

[9]Mr. England in no way agrees his physical restraint by the court was warranted due to verbal outbursts, as he did not engage in the type of behavior that posed a "special security need" or "escape risk." *Deck*, 125 S. Ct. at 2015. *See* Initial Brief at 75 *et. seq.*

[10]The handcuffs were clearly visible to the jury because the trial court noted that Mr. England was able to write despite being cuffed (R2046). Thus, the handcuffs were neither hidden from view nor was Mr. England handcuffed with his hands behind his back.

makes no argument that the error was harmless beyond a reasonable doubt, Mr. England submits that he has established his entitlement to relief.

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.

Once again, the State attempt to create a procedural out of whole cloth, this time arguing that Mr. England's claim is not preserved for review because defense counsel failed to move for a mistrial despite the repeated sustaining of objections made by the State and granting the State's motions *in limine* (AB at 86-87). The State cites no legal authority for the proposition that a motion for mistrial has to be made in order to preserve this issue for appellate review. Most importantly, the record clearly establishes the continued defense arguments and complaints about the trial court's restrictions on Mr. England's testimony and these arguments and complaints are more than sufficient to preserve this issue for appeal.

On the merits, the State argues that the lower court's rulings precluding Mr. England from testifying about his version of the events surrounding the crime were correct because lingering or residual doubt is not admissible evidence at a capital penalty phase (AB at 87). Mr. England re-asserts the arguments set forth in his

Initial Brief regarding the argument that because the "circumstances of the offense" are valid considerations for the jury to consider at a penalty phase, the lower court erred in restricting Mr. England from testifying fully at the penalty phase (Initial Brief at 84-86) Moreover, as noted in the Initial Brief, the United States Supreme Court is presently considering this very question in a case arising out of the State of Oregon (Initial Brief at 86 n.45). According to the Supreme Court website, the case of *Oregon v. Guzek* is set to be argued on December 7, 2005. Mr. England thus submits that the Supreme Court will be deciding this very issue during the pendency of this direct appeal and that the case should be held pending a decision in *Oregon v. Guzek* at some point during the upcoming Supreme Court term.

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.

The State makes no procedural arguments as to this claim, but simply argues that anything related to the culpability of Michael Jackson is not relevant to the jury's consideration of Mr. England's punishment (AB at 88). The State's argument, however, itself violates the Constitution. The Eighth and Fourteenth

Amendments "require the sentencer, in all but the rarest kind of capital case, not to 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). While the State may believe that the evidence at issue in this argument was irrelevant (AB at 89), *Lockett* and its progeny establish otherwise. Indeed, the State does not dispute that this Court has found that "[c]onflicting evidence on the identity of the actual killer" is a valid mitigating circumstance. *Barrett v. State*, 649 So. 2d 219, 223 (Fla. 1995). The reverse-*Williams* rule evidence at issue here had already been ruled relevant and admissible at the guilt phase, and would have been powerful evidence in mitigation, as it went to establishing Jackson's culpability in the instant offense (just as it would have had it been presented at the guilt phase). The State has argued nothing to truly refute Mr. England's argument and, thus, relief 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.'

Relying on cases where a co-defendant has pled guilty to a crime of less than first-degree murder, the State argues that the trial court here did not err in refusing

to consider for proportionality purposes the disparate treatment of Mr. England and Michael Jackson because Jackson pled guilty to second-degree murder (AB at 89-90). The State and the lower court are incorrect.

None of the cases relied on by the State involve a situation like this case, where there is an explicit factual finding by the trial court that Mr. England and Michael Jackson are "equally culpable of the murder."[11] As this Court has recently noted, "[w]hen one or more defendant was involved in the commission of a crime, this Court performs an analysis of the relative culpability of the coperpetrators of the crime to ensure that *the equally culpable individuals are treated alike in their capital sentencings and that they received equal treatment." Rodgers v. State*, 2004 Fla. LEXIS 2120 at *25-*26 (Fla. Nov. 24, 2004). Under the facts of this case, where the trial court made an express finding of equal culpability, the lower court committed constitutional error in failing to consider Jackson's sentence as valid mitigating evidence for Mr. England. Regardless of whether Jackson and Mr. England were convicted of the same offense, the court determined them to be equally culpable, and this Court has made clear that "equally culpable co-

[11]For example, in *Steinhorst v. State*, 638 So. 2d 33 (Fla. 1994), the Court concluded that the case did not involve equally culpable perpetrators. *Id*. at 35. In *Brown v. State*, 473 S. 2d 1260 (Fla. 1985), the co-defendant's participation was

defendants should receive equal treatment." *Jennings v. State*, 718 So. 2d 144 (Fla. 1998).

ARGUMENT XIII

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 FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION UNDER *ROPER V. SIMMONS*, 125 S. CT. 1183 (2005).

Based on the reasoning of *Roper v. Simmons*, 125 S. Ct. 1183 (2005), Mr. England argued that the court below could not constitutionally use the prior violent felony aggravator or the under sentence of imprisonment aggravator in order to support a death sentence for Mr. England. Relying on *Moreno v. Dretke*, 362 F. Supp. 2d 773 (W.D. Tex. 2005), the State argues that Mr. England's argument is without merit and that *Roper* established a "bright line rule" (AB at 91-92).

Mr. England submits that the State's reliance on *Moreno* is misplaced. Certainly, *Roper* established such a line. In *Moreno*, the defendant was eighteen

---

determined to be "minor" compared to that of Brown (who later received a life sentence in his postconviction proceedings). *Id*. at 1268.

years old when he committed his crime, but he argued that he should not be sentenced to death because he planned the crime when he was seventeen. These facts distinguish Mr. England's case from *Moreno* because Mr. England was sentenced to death in reliance on a conviction and probationary sentence which *occurred* before Mr. England turned eighteen.

The State further argues that Mr. England's claim is without merit because he was sentenced to death for a murder committed when he was 28 years old (AB at 91). This argument overlooks Florida's definition of capital murder and the structure of Florida's death-sentencing scheme. This Court has explained what constitutes a capital crime in Florida and where that definition comes from:

> The aggravating circumstances of Fla. Stat. §921.141 (6), F.S.A., actually define those crimes–when read in conjunction with Fla. Stat. §§ 782.04 (1) and 794.01 (1), F.S.A.–to which the death penalty is applicable in the absence of mitigating circumstances.

State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Florida's capital sentencing statute makes imposition of the death penalty contingent upon factual findings made after a verdict finding the defendant guilty of first-degree murder. § 775.082 provides that a person convicted of first-degree murder "shall" be sentenced to life imprisonment "*unless* the proceedings held to determine sentence according to the procedure set forth in [sec.] 921.131 result in findings by the court that such person shall be punished by death." § 921.141 requires three factual determinations before

a defendant is eligible for a death sentence. The sentencer (1) must find the existence of at least one aggravating circumstance, (2) must find that "sufficient aggravating circumstances exist" to justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141 (2), (3). If these findings are not made, "the court *shall* impose sentence of life imprisonment in accordance with [sec.] 775.082." Thus, under the particulars of Florida's capital sentencing statute, Mr. England's prior conviction and his probationary sentence stemming from that conviction are elements of capital murder and Mr. England was sentenced to death based upon these aggravating factors.[12]

Next, the State argues that the judge and jury were "free to consider England's age at the time he committed the prior murder to lessen the weight each chose to give to those convictions" (AB at 93). This argument, however,

---

[12]In a non-capital case in which the issue concerned whether to classify a criminal defendant as a career offender based upon prior offenses committed by the defendant before his eighteenth birthday, a federal district court has relied on *Roper* to conclude "that these prior convictions should not be used to enhance the sentence as suggested by the guidelines." *United States v. Naylor*, 359 F. Supp. 2d 521, 524 (W.D. Va. March 7, 2005). In reaching this conclusion, the district court did not find *Roper* controlling in the non-capital context; but it did find language in *Roper* to be instructive: "[a]s the Supreme Court has recently noted, there are significant differences in the moral responsibility for crime between adults and juveniles under eighteen." *Id*.

overlooks that *Roper* established a bright-line rule not amenable to such an analysis. Under *Roper* a criminal defendant cannot be sentenced to death based on a crime committed when the defendant was under eighteen. This line cannot be blurred–the defendant is either under or over eighteen, and the jury is not free to "consider" the defendant's age under *Roper*. Under the reasoning of *Roper*, Mr. England submits that he is entitled to relief.

ARGUMENT XIII

THE DEATH PENALTY IS NOT PROPORTIONATELY WARRANTED IN THIS CASE.

The State acknowledges that proportionality review is not a comparison of the number of aggravating and mitigating circumstances, but nonetheless argues that the court here found four aggravating circumstances and goes on to cite cases also finding such aggravating circumstances. Notably, the State does not cite to or discuss the fact that the lower court made an explicit finding that Mr. England was "equally culpable" to Michael Jackson, yet Mr. England was sentenced to death and Jackson was not. This alone, given the finding of equal culpability, warrants a finding of disproportionality here (Initial Brief at 96 and cases cited therein). The State also fails to contemplate that, as to the prior violent felony and under sentence of probation aggravating factors, Mr. England was a juvenile and the

offense was committed many years before the instant offense (Initial Brief at 95-96 and cases cited therein).

The State focuses on the fact that the lower court found the HAC aggravating circumstance, which is certainly as "serious" aggravator (AB at 94). The cases cited by the State, however, are readily distinguishable.

In *Orme v. State*, 677 So. 2d 258 (Fla. 1996), the defendant, acting on his own, was convicted of a robbery, murder, and sexual battery for the strangulation rape and murder of the victim who had extensive bruising and hemorrhaging on the face, skull, chest, arms, lets, and abdomen, and semen was found in the victim's orifices. *Id.* at 260. The lower court found three aggravators, but found that the statutory mitigation was only entitled to "some weight" and rejected altogether the nonstatutory mitigation presented, and this Court found the death penalty proportionate, concluding that the murder was a "strangulation murder designed to further both a sexual assault and a robbery, not a 'lovers' quarrel." *Id*. at 263.[13] In *Johnston v. State*, 841 So. 2d 349 (Fla. 2002), the defendant, acting alone, was convicted of murder, kidnaping, robbery, sexual battery, and burglary with assault or battery. *Id.* at 351. The victim in that case had been brutally raped, the medical

[13]This Court has since vacated the death sentence in this case due to ineffective assistance of counsel. *Orme v. State*, 896 So. 2d 725 (Fla. 2005).

examiner having testified that she was not only strangled but suffered from extensive vaginal tearing and bruising, and the jury returned a 12-0 death recommendation. Although detailing the numerous nonstatutory mitigating circumstances presented, the trial court determined them to be of little or sleight weight, *id*. at 360 n.13, whereas here, the trial court gave Mr. England's non-statutory mitigating "great weight" (R468).

In *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000), the defendant, acting alone, was convicted of the murder and rape of the victim who was found in a grassy area next to a grocery store with her substantial portions of her genitalia, including her nipples, labia minor, majora, and clitoris, having been excised. *Id*. at 640. The victim had been manually strangled. *Id*. at 641. There was a pattern injury on the victim's neck consistent with the pattern found on a "grim reaper" ring removed from Mansfield upon his arrest. *Id.* The court found two aggavators (HAC and during the commission of a sexual battery), no statutory mitigation, and found three nonstatutory mitigating factors offered by the defense to be of "very little weight" and two others to be of "some weight." *Id*. at 642. Unlike the instant case, none of the mitigation in *Mansfield* was found to be of "great weight."

In *Geralds v. State*, 674 So. 2d 96 (Fla. 1996), the defendant, acting alone, was sentenced to death following a 12-0 death recommendation for his convictions

of first-degree murder of a woman who was bound with plastic ties around her wrist during a robbery. *Id*. at 102. The victim was severely beaten prior to her death, her body stomped on by the defendant's foot, choked with a towel, and stabbed three times in the neck. *Id*. The Court found, *inter alia*, the HAC aggravator and, in rejecting a claim of disproportionality, noted that the lower court had found only three nonstatutory mitigating factors to which it assigned "very little weight."

In *Everett v. State*, 893 So. 2d 1278 (Fla. 2004), the defendant, acting alone, entered the victim's home, then beat the victim, knocked her down, and raped her. *Id*. at 1280. The defendant also twisted the victim's neck, breaking a vertebra, which paralyzed her and cause her to suffocate to death. *Id*. DNA testing tied the defendant to the crime as the perpetrator of the rape/murder, and the defendant gave a "detailed" confession. *Id*. at 1280 & n.2 The jury unanimously recommended the death penalty, which was imposed after finding three aggravators, including HAC, during the course of a sexual battery, and under sentence of imprisonment. *Id*. Of the nonstatutory mitigation presented, the trial court, unlike here, afforded it either "little" or "very little" weight. *Id*. at 1281. In light of the substantial aggravation, lack of substantial mitigation, and unanimous

recommendation for death, the Court rejected the claim of disproportionality. *Id*. at 1287-88.

In *Finney v. State*, 660 So. 2d 674 (Fla. 1995), the defendant, acting alone, was convicted of the stabbing death of the victim, armed robbery, and dealing in stolen property. *Id*. at 678. The jury returned a death recommendation by a 9-3 vote, and the court found three aggravating circumstances, including prior violent felony, pecuniary gain, and HAC, the latter finding based on the fact that the victim drowned in her own blood. *Id*. at 685. The court found minimal nonstatutory mitigation to have been established. *Id*. at 679.

In *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997), the defendant, acting alone, was charged with first-degree murder, robbery, grand theft, and conspiracy to commit murder. The victim died of blunt force trauma and asphyxia caused by a mop handle being shoved down his throat by the defendant. *Id*. at 1221. The jury returned a 9-3 recommendation for death, and the court found 2 aggravating circumstances, including HAC and CCP, and only minimal nonstatutory mitigation. *Id*.[14]

Finally, in *Johnston v. State*, 660 So. 2d 637 (Fla. 1995), the defendant, acting alone, was convicted of the murder of a 73-year old woman who was found

naked from the waist down and suffered 24 stab wounds to the back of her head. *Id*. at 641. The victim also showed evidence of abrasions near the vagina and anus "most likely caused by a forceful opening by hand or fingernails." *Id.* The defendant gave a taped confession to the police in which he acknowledged choking the victim to unconsciousness and, following an 8-4 recommendation for death, the defendant was given the death penalty. In aggravation, the court found a prior violent felony, financial gain, and HAC and did find some nonstatutory mitigation (the weight of which was not discussed).

None of the cases relied on by the State are factually similar to the instant case. As noted above, most of the cases involve rape charges and also involve victims who were strangled. Most of the cases cited by the State involve unanimous jury recommendations; only one case involves an 8-4 recommendation like that in the instant case. Most significantly, however, not one of the cases cited by the State as supporting its argument on proportionality involved a case with a co-defendant, much less one involving a co-defendant who was "equally culpable." Moreover, unlike the cases relied on by the State, the lower court here found the nonstatutory mitigation presented at trial to be "strong" and of

---

[14]The CCP factor is not at issue in Mr. England's case.

"substantial weight." Under all the facts and circumstances presented, Mr. England submits that his death sentence must be vacated.

ARGUMENT XIV

MR. ENGLAND'S DEATH SENTENCE VIOLATES *RING V. ARIZONA*.

Mr. England relies on his Initial Brief in reply to the State's arguments.

CONCLUSION

Mr. England requests this Court reverse his convictions and sentence of death for the reasons set forth herein and in his Initial Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid to Barbara Davis, Assistant Attorney General, 444 Seabreeze Blvd, Suite 500, Daytona Beach, Florida, 32118, this 26th day of September, 2005.

TODD G. SCHER
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue #15-B
Miami Beach, FL 33140
(305) 861-9252 (Tel)

(305) 861-9253 (Fax)

CERTIFICATE OF FONT COMPLIANCE

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

Counsel for Appellant