IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-1972

RICHARD ALLEN JOHNSON,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA, (Criminal Division)

****

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Richard Allen Johnson, was the defendant below and will be referred to as "Defendant" or "Johnson". Appellee, State of Florida, will be referred to as "State". References to the record on appeal will be by the symbol "ROA," and the supplemental record will be designated by the symbol "S", each will be followed by the appropriate volume and page number(s). Johnson's initial brief will be by the symbol "IB".

STATEMENT OF THE CASE AND FACTS

On Valentine's night, February 14, 2001, the victim, Tammy Hagin, accompanied her brother, Anthony Carrick and his friend, Joshua Taylor, to Club Babylon, a gay bar/nightclub in Port St. Lucie, Florida (ROA. 22, 1489-1512, 1518-30). At the bar, Tammy met the defendant, Richard Johnson, who was there with his friend John Vitale, a gay man (ROA. 23, 1668-72). Johnson bought Tammy drinks and when the bar closed at 2:00 a.m., he invited her, her brother and his friend back to his house to play pool (ROA. 22, 1495-1500, 1526-30). Johnson and Vitale were living in a house owned by Adrienne Parker and also occupied by roommates Thomas Beakley and Stacy DeNigris (ROA. 22, 1534-57). Before leaving the bar Johnson bought a bottle of Captain Morgan's rum which they drank on the way to the house

and once at the house (ROA. 23, 1677-80). Tammy's brother and his friend Joshua decided to leave at about 4:30 a.m, but Tammy wanted to stay and Johnson offered to drive her home (ROA.22, 1501-08). Johnson told Tammy's brother "don't worry, I'll get her home safe." (ROA.22, 1505-08).

It is unclear exactly what time they left to take Tammy home. According to Johnson, Vitale wanted to take Tammy home right away but she wanted to stay; however, a little while later Vitale was playing pool and was not ready to take her home (ROA.23 2412-20). Vitale agreed that he wanted to finish his pool game and that they left 30 minutes later to take her home (ROA.23 2412-20). Vitale knew that Tammy lived in Vero Beach but Johnson claimed she wouldn't tell them her address because she didn't want to go home (ROA.23 2412-20). Vitale stated that they stopped at a Circle K for Tammy to use the restroom and she took his keys so that he would not leave without her (ROA.23 1686-90). Tammy then fell asleep in the backseat and Johnson directed Vitale to drive to the Savannas (ROA.23 1686-90). He told Vitale they couldn't drive her home because she was passed out and could not tell them her address (ROA.23 1686-90).

Tammy was still sleeping when they arrived at the Savannas and Johnson directed Vitale where to park (ROA.23 1686-90).

After a while he asked Vitale to take a walk; Vitale knew that he wanted to have sex (ROA.23 1686-90). Vitale agreed that Tammy was not awake when he left the car (ROA.23 1691-95). The two later exited the car, Tammy was naked and they went to have sex in an area by the bushes (ROA.23 1691-95). When it was getting light outside, Vitale went to look for them and saw them having sex (ROA.23 1691-95). Upon returning to the car, Vitale stated that Tammy said to take her home, then not to take her home so Vitale decided to drive back to the house until a decision was made (ROA.23 1691-95). Vitale agreed, though, that once they were back at the house, there was an argument in the driveway, Tammy wanted to go home but Johnson did not want her to go home (ROA.23 1691-95).

Catherine Shipp, who lived across the street from Vitale and Johnson, was an eyewitness to what happened in the driveway that morning. Mrs. Shipp, testified that she was awakened, in the early morning hours of February 15, 2001, (approximately 6:45-7:00 a.m.) by very loud, blood-curdling screams (ROA. 22, 1562-65, 1572-75). It was a woman screaming; Mrs. Shipp opened her front door and heard the woman saying “I want to go home, just let me go.” Mrs. Shipp saw the young woman sitting in the middle of the back seat of a dark green Saturn, a car she knew

belonged to Vitale. It was light enough for Mrs. Shipp to see across the street with no problem. Johnson was standing outside the car, by the passenger side. The young woman tried to exit the car but Johnson would not let her, he held the door closed, stuck his head inside the car, and then closed the door.

When the young woman made an attempt to exit the car from the other side, Johnson blocked her way. (ROA Vol. 22, 1566-71). At one point he let her exit the vehicle but when she tried to enter the front seat, he picked her up in a "bear hug" and took her into the house. The young woman did not want to go into the house. She kicked her feet and put both arms on the door frame to keep from entering (ROA Vol. 22, 1576-79). She screamed "I don't want to go in and clean up," and was trying to get away from Johnson. The forcible entry into the house took place at approximately 7:00-7:10 a.m., about 20-25 minutes after she first saw the girl. Mrs. Shipp had a gut feeling that something was wrong. The only reason she didn't call the police is because she has a daughter who screams and fights with her boyfriend and has been told by them that it's none of her business if she tries to get involved.

There was also eyewitness testimony from roommates Thomas Beakley and Stacy DeNigris regarding what happened to Tammy once

she was taken into the house. Thomas and Stacy shared the room next to Johnson's. Thomas testified that he arrived home at approximately 3:00 a.m. on February 15, 2001 (ROA Vol. 23, 1593-96). He fell asleep about 4:30 because there was a lot of noise. He later (at approximately 7:30 a.m.) heard a girl scream, "let me go, let me go, I want to go home." (ROA Vol. 23, 1593-96, 1604-07). Tom described it as sounding almost like crying, he heard the scream once, then he heard what sounded like crying. After the crying, he heard the words "let me go, I want to go home." He heard the scream coming from the hallway, outside his bedroom. Johnson's bedroom was perpendicular and a few feet away from his; they could literally run into each other if both exited their bedrooms at the same time (ROA Vol. 23, 1610-13). There was a bathroom between the two bedrooms. Stacy also testified that Tom woke her up at about 7:00 a.m., saying that he heard Adrienne crying in the bathroom. Stacy heard a girl crying and saying that she wanted to go home, but she didn't think it was Adrienne (ROA Vol. 23, 1617-21). When she opened her bedroom door she saw a girl with brown hair holding on to the door frame and saw Johnson grab her by the waist and yank her back into his bedroom (ROA Vol. 23, 1622-25). Johnson gave Stacy a dirty look. She saw John by the garage door, so

she asked him what was going on and they spoke for a while.

At about 8:00 a.m. Johnson came into the garage crying, telling Vitale that she was gone (ROA. 1701-06). Johnson told Vitale that he broke her neck. Vitale went into the room and was shocked to find Tammy dead, she was purple, her eyes black and blue and wide open (ROA. 1701-06). Vitale saw marks on her neck. Johnson deflated the air mattress, rolled her up in it and put her body in the trunk of John's car (ROA. 1707-12). Johnson admitted it was his idea to deflate the air mattress and roll her up in it (ROA. 2311-2321). They went to Shane's house, Johnson's best friend, for help in disposing of the body, but he refused to help. Johnson told Shane that he had done something bad, that he killed a dude, but then said it was a lady (ROA 2030-36). Johnson told Shane that he met her at Club Babylon, that "she was the most annoying person that he ever met and that she tried to stab him with an object." Also told Shane that she "screamed at him."

Johnson admitted that it was his idea to buy a chain and bricks, which they used to sink Tammy's body at the Savannas (ROA. 2311-2321). They tied a chain around Tammy's body, attached a lock and a cinder block and submerged her body in the Savannas water. They used Tammy's money to purchase the cooler

to transport her body to the Savannas and the chain, lock and cinder block to drown her body. The medical examiner, Dr. Charles Briggs, testified that the cause of death was strangulation, which requires tremendous force and is not a sudden death (ROA.28, 2211-15). When oxygen is cut off to the brain, it usually takes 15-30 seconds for a person to pass out, and about 3-4 minutes of further strangulation to die. Tammy was strangled both by ligature and manually (ROA.28 2197-98). Tammy also had head injuries, a bruise on the forehead (about 1 ½ inches diameter) and a cut from a knife-like object above the top of left ear. There was also bruising on Tammy's face. In addition, there was post-mortem laceration of the vaginal and anal areas (ROA. 2197-98), Tammy's vagina, uterus and bladder were cut out so no semen was found (ROA. 2219-21).

Johnson admitted, in a video-taped statement to the police, that he killed Tammy, stating that he "was drunk," "lost his mind," and that he becomes mean when he drinks rum (ROA, Vol. 29, 2285-95). When asked whether he raped Tammy, Johnson stated that "she wasn't fighting him" during sex and that "it didn't feel like he was raping her." He claimed that he put his hand on her neck during sex and realized she was dead after they stopped, when he got up and said "get up" and she wasn't moving

(ROA Vol. 29, 2308-10). Johnson's statement was played for the jury. When Johnson took the stand during the trial, he changed his story, claiming that he passed out after sex and that what he meant by "got up" was when he woke up (ROA Vol. 31, 2412-20). Johnson's theory of defense was that Vitale killed her while he was passed out and put her back in the bed. Johnson claimed that he only admitted killing her to the police because Johnson told him he must have killed her.

On June 7, 2004, the penalty phase commenced. In addition to the guilt phase facts, the State's penalty phase evidence consisted of victim impact statements from Tammy's mother and sister as well as testimony from Michael Finger showing Johnson was on community control at the time of the murder. (ROA.34 2783-96). In support of mitigation, the defense called Johnson's mother, brother, sister, and a mental health expert. Johnson read a letter[1] to the court (ROA.34 2798, 2835, 2860-61; ROA.35 2919-20, 3015-17). The family members revealed Johnson had a difficult childhood and suffered incidents of physical and/or sexual abuse. Both his parents had drinking problems and fought

[1]In it he noted his sorrow for the endless nightmare of his life and that of the families; he will never understand how his life ended up the way it did. He does not hate anyone involved, and gives his life to Tammy's brother. (ROA.35 3015-17).

openly in front of their children. When Johnson was young, his parents divorced, and his mother was seldom home as she worked three jobs. Johnson had poor grades in school, was placed in a class for slow learners, and dropped out of school for a period of time, before receiving a diploma. (ROA.34 2798-2814, 2826-30, 2839-45, 2854-56, 2862-69, 2871-73, 2875, 2882-85). When he was in his early teens, Johnson's mother married Frank Speres. There was friction between Mr. Speres and the children. (ROA.34 2815-16, 2832-33, 2874-75, 2885-86).

Johnson committed criminal acts for which he served jail and community service sentences, stole approximately $500 from his mother, and got into trouble starting fires in his neighborhood. He abused drugs and/or alcohol and had a sporadic employment history. (ROA.34 2816-21, 2875-76, 2876-80, 2889-91). He had several girl-friends and fathered a child whom he had not seen since a few months after the child was born (ROA.34 2822, 2824-25, 2833-34, 2849-51, 2876-77).

Dr. Williams, who has testified in 50 cases, but only once for the state, opined Johnson was sane at the time of the crime and competent to stand trial. (ROA.35 2922, 2964-69). Dr.

Williams testified Johnson[2] grew up in an abusive home[3] and showed signs of post-traumatic stress disorder[4] and depression in his early life. He did well in his special education classes until he entered adolescence, and acted "bad" so he would not be teased about the classes. As Johnson grew older, he self-medicated with drugs/alcohol and got into trouble. He is not a major depressive type, but has many unresolved issues; he has "just this mild mild, moderate dysthmic depression." His setting of fires and getting into trouble meet the diagnostic criteria of antisocial personality disorder. Johnson's testing showed learning disabilities. (ROA.35 2925-37, 2939-43, 2944-47, 2950-54, 2972-76, 2979-80).

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[2]Because Johnson initially admitting having his hands on Tammy's throat, but prior to the evaluation, changed his story to one of innocence, Dr. Williams did not discuss the crime with Johnson. Hence, Dr. Williams did not and would not ask [Johnson] about his responsibility in the crime and saw his purpose to be limited to finding mitigation. (ROA.35 2999, 3002-04).

[3]Most of the incidents of sexual abuse were presented by Johnson's mother and sister. Dr. Williams recognized Johnson's sister may have discussed sexual abuse in hopes it would assist her brother, but because his mother spoke of abuse, the doctor thought it happened. However, Dr. Williams has no reports whatsoever from Johnson regarding physical abuse by his father. (ROA.35 2978-79).

[4]Johnson did not meet the criteria for post-traumatic stress disorder and his symptoms disappeared when he was nine to ten

It was Dr. Williams' opinion Johnson was intoxicated at the time of the crime[5] and met the minimum requirements for a mixed personality disorder and antisocial personality disorder (ROA.35 2959-60). He offered two statutory[6] and ten non-statutory mitigators.[7]

The jury recommended death by a vote of eleven to one.

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years old. (ROA.35 2971-72).

[5]Other than Mr. Vitale's letter discussing giving the drug, Ecstasy, to Johnson, Dr. Williams had no evidence that drugs played any factor in Tammy's murder. (ROA.35 2998-99).

[6](1) under the influence of extreme mental or emotional disturbance at the time of the crime based on Johnson's depression and personality profile, although nothing was severe enough to establish a mental illness or thought disorder and (2) ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired based on his mental problems, extreme intoxication, and possible drug usage. (ROA.35 2954-58, 2960-61)

[7](1) dysfunctional family; (2) remorse; (3) acceptable courtroom behavior; (4) under the influence of alcohol; (5) artistic ability; (6) able to show kindness; (7) family loves Johnson; (8) diminished learning ability and low IQ (performance score was 99, but because there was an 18 point difference in the full scale score, the test was deemed invalid); (9) low frustration tolerance; and (10) low self-esteem. (ROA.35 2961-63, 2982).

With regard to Johnson's remorse, Dr Williams reported it was for helping Vitale commit the murder; Johnson never admitted guilt. Although he knew of Johnson's original confession, Dr. Williams did not think it was his place to ask what Johnson meant when he expressed remorse, because his "job isn't to gather evidence to convict him, but to simply provide mitigating evidence, competency issues, insanity issues." (ROA.35 2984-87,

(ROA.35 3061-66). A Pre-sentence Investigation Report and sentencing memoranda were ordered. No testimony was offered during the July 15, 2004 Spencer hearing, but further argument was made. (ROA.35 3069; ROA.36 3075-95) At the August 9, 2004 sentencing, the court found three aggravators: (1) felony murder (kidnapping/sexual battery) (great weight); (2) under sentence of community control (moderate weight); and heinous, atrocious or cruel ("HAC") (great weight) (ROA.6 914-18; ROA.37 3106-16), the statutory mitigator of no significant history of criminal activity (moderate weight) and eight non-statutory mitigators.[8] Johnson was sentenced to death for Tammy's murder and received consecutive sentences of 30 years for the kidnapping, life for the sexual battery, and 60 days for petit theft. (ROA.37 3135-38). This appeal follows.

2993-94, 2998, 3004-06).

[8](1) physical/verbal abuse by father (some weight); (2) drug/alcohol abuse and under the influence of alcohol at time of murder (moderate weight); (3) sexually abused at young age (some weight); (4) slow learner (no weight); (5) kindness to others (little weight); (6) family loves Johnson (little weight); (7) acceptable courtroom behavior (little weight); and (8) will adjust to prison (little weight).(ROA.6 918-28; ROA.37 3117-35).

SUMMARY OF THE ARGUMENT

Point I - Potential Juror Monforte was excused for cause properly, as she could not assure the court she could set aside her views on the death penalty and follow the law.

Point II - The trial court properly admitted testimony from accessory after-the-fact, John Vitale, regarding an admission Johnson made to him that while he was choking Tammy, the victim, "she said that she wanted to see her children.

Point III - The State did not improperly amend the Indictment and the trial court had jurisdiction to try Johnson.

Point IV - Johnson has failed to preserve his argument that the trial court improperly allowed the State to question him, on cross-examination, about the veracity of the eyewitness testimony provided by roommates Stacy and Tom regarding the night of the murder for appeal. Further, Johnson failed to object to the question which referred to Tom's truthfulness, but instead, objected only to the question asking whether Johnson had heard Tom's testimony. Finally, impeachment of a criminal defendant who takes the stand is allowed under the evidence code, as is impeachment of a witness by pointing to contradictory evidence.

Point V - The trial court properly denied Johnson's motions for judgment of acquittal on the sexual battery and kidnaping charges and on the felony-murder charges premised on those crimes.

Point VI - Johnson's sentence is proportional.

Point VII - There is no constitutional infirmity in imposing a death sentence following a defendant's rejection of the State's offer of a life sentence in exchange for a guilty plea.

Point VIII - The HAC aggravator is supported by substantial, competent evidence. The record reflects the victim was struggling before and conscious as she was being choked.

Point IX and XIV - Florida's capital sentencing does not create a presumption for the death penalty, nor does it improperly place upon the defense the burden to prove that life is the appropriate sentence. It gives the jury adequate guidance for determining the sentencing factors.

Points X and XI - Death eligibility occurs at time of conviction and sentencing selection is completed during the penalty phase, thus, Ring has no impact of Florida's capital sentencing.

Point XII - There is no constitutional infirmity in

Florida's death penalty statute nor its jury instructions regarding the standard of proof necessary to establish mitigation.

Point XIII - Johnson's reliance upon his interpretation of Ring to suggest there was a violation of Caldwell is without merit.

ARGUMENT

POINT I

THE COURT PROPERLY EXERCISED ITS DISCRETION IN REMOVING JUROR MONFORTE FOR CAUSE (restated)

Johnson takes issue with the granting of the State's challenge for cause to Juror Grace Monforte ("Monforte"). It is his position Monforte should not have been excused for cause as she did not express an "unyielding conviction and rigidity of opinion regarding the death penalty." (IB 24-26). Not only is this issue unpreserved, but the for cause challenge was granted properly. Monforte's answers, when considered in their entirety, show she could not assure the court she could set aside her views on the death penalty and follow the law. This evinces there was no abuse of discretion and the matter should be affirmed.

The standard of review of a court's decision striking a juror for cause is abuse of discretion. See Ault v. State, 866 So.2d 674, 683-84 (Fla. 2003); Kearse v. State, 770 So. 2d 1119 (Fla. 2000); Castro v. State, 644 So. 2d 987 (Fla. 1994). Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, i.e., where no reasonable person would take the view adopted by the trial court. See Green V.

State, 907 So.2d 489, 496 (Fla. 2005); Trease, 768 So. 2d 1050, 1053, n. 2 (Fla. 1990).

As a preliminary matter, this issue is unpreserved. In order to preserve the issue of the granting of a for cause challenge, the party opposing the challenge must re-raise its objection before the jury is sworn. Ault, 866 So.2d at 683 (finding issues preserved as counsel renewed his objection to the removal of the juror prior to jury being sworn); Joiner v. State, 618 So.2d 174, 175-76 (Fla. 1993) (requiring party opposing challenge renew objection prior to swearing in of jury in order to preserve issue as acceptance of jury without objection gives rise to reasonable assumption counsel abandoned earlier objection and now is satisfied with jury); Arnold v. State, 755 So.2d 696, 698 (Fla. 4th DCA 1999). Johnson's counsel objected to Monforte's excusal, but did not renew his objection before the jury was sworn, thus, the matter is unpreserved. (ROA.20 1294-95).

Johnson recognizes his failure to preserve under Joiner, but, points to the court's statement that counsel had a standing objection. (IB 27-30). Contrary to Johnson's suggestion, the

court did not assure counsel the matter was preserved[9] or that he did not have to renew his objection to Monforte. (ROA.20 The court merely stated with regard to two other jurors,[10] "You have a standing objection to that challenge." (ROA.20 1263). More important, when questioned by the court specifically as to his acceptance of the jury, Johnson agreed to the 14 jurors selected (ROA.20 1294). Given this acceptance, and under the law as provided in Joiner and Ault, it was incumbent upon Johnson to re-raise his objection to Monforte before the jury was sworn or have it presumed the objection abandoned. As noted in Joiner, 618 So.2d at 175-76, and in light of Johnson's affirmation he agreed to the jury, there is a reasonable assumption that Johnson no longer objected to Monforte's removal, and was satisfied with the jury as selected. Should this Court find the matter preserved, it will be abandoning its precedent and will

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[9]The circumstance presented here is not that of Ingrassia v. State, 902 So.2d 357 (Fla. 4th DCA 2005), Langon v. State, 636 So.2d 578 (Fla. 4th DCA 1994) or Pindar v. State, 738 So.2d 428 (Fla. 4th DCA 1999). The court did not specifically and repeatedly assure counsel the issue was preserved for review. (ROA.20 1263). Moreover, none of these cases are from this Court.

[10]It was to Juror 14, Judith Mukeerji, the court noted the defense had "a standing objection without having to renew it; and made a similar statement when Juror Brown was excused. (ROA.20 1265, 1292).

be permitting Johnson to "proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial." Id. at 176, n.2. This is a situation this Court explicitly decried as improper.

While Johnson cites to Thomas v. State, 419 So.2d 634 (Fla. 1982) and Green v. State, 80 So.2d 676 (Fla. 1955) to support his position on preservation, neither case is on point. As Joiner identified, because additional changes may have been made to the jury following the juror's excusal, counsel may have become satisfied with the final panel, thereby, making it incumbent upon him to reassert the prior objection. Such was not the case in Thomas, 419 So.2d at 636 or Green, 80 So.2d at 678 where the objections involved the failure to give a jury instruction and to the order of closing arguments respectively. In those cases, nothing else transpired between the ruling and objection that might give rise to a presumption the objecting party had become satisfied with the result as would be the case where the jury's composition was at issue. It is this unique difference that mandates the opposing party renew its objection as required by Joiner. See Franqui v. State, 699 So.2d 1332, 1334 (Fla. 1997) (holding counsel waived issue even though he

accepted panel “subject to our previous objection” because counsel permitted the court to define his objection as limited jurors other than the one stricken for cause). This Court should find the matter unpreserved. However, should the merits be reached, the record establishes the strike was proper.

Ault, 866 So.2d at 683-84, governs review of cause challenges:

> The test for determining juror competency is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. ... **A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind**. ... "In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make observations which simply cannot be discerned from an appellate record." ... Thus, a trial court has great discretion when deciding whether a challenge for cause based on juror incompetency is proper. ... A trial court's determination of juror competency will not be overturned absent manifest error....
>
> However, prospective jurors may not be excused for cause simply because they voice general objections to the death penalty. ... The relevant inquiry in deciding whether prospective jurors may be excluded for cause based on their views on capital punishment is "whether the juror's views would 'prevent or

substantially impair the performance of his duties as a juror in accordance with [the court's] instructions and [the juror's] oath.'"

Ault, 866 So.2d at 683-84 (emphasis supplied, citations omitted). See Adams v. Texas, 448 U.S. 38, 45 (1980); Lusk v. State, 446 So.2d 1038, 1041 (Fla. 1984).

As noted in Wainwright v. Witt, 469 U.S. 412, 424-26 (1985), there is no requirement for absolute clarity or that the juror would "automatically" vote against guilt or the death penalty:

> ... because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully *infra*, this is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-26 (footnotes omitted)

In Hannon v. State, 638 So.2d 39 (Fla. 1994), this Court stated "[t]he inability to be impartial about the death penalty

is a valid reason to remove a prospective juror for cause". However, jurors who have expressed strong feelings about the death penalty may serve if they indicate an ability to abide by the trial court's instructions. Johnson v. State, 660 So.2d 637 (Fla. 1995). If there is any reasonable doubt that a prospective juror cannot render a verdict based solely on the evidence submitted and the trial court's instruction of law, he should be excused. Bryant v. State, 656 So.2d 426, 428 (Fla. 1995); King v. State, 622 So.2d 134 (Fla. 3d DCA 1993). The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. Farina v. State, 680 So.2d 392, 396 (Fla. 1996).

Johnson concedes Monforte's answer regarding her ability to set aside her feelings about the death penalty and follow the law were "somewhat confused"(IB 25), but complains that the court utilized the incorrect standard for assessing the cause challenge. The State maintains Monforte's answers, when viewed in their totality, show her feelings against the death penalty would substantially impair her ability to follow the law, and that she could not state without equivocation that she would follow the law (ROA.19 1124-25; ROA.20 1258). This shows she was not qualified and was stricken properly.

After stating she would choose the death penalty only as a "very very last resort"(ROA.19 1124) and that she "doubted her ability to vote for it"(ROA.19 1124),[11] the following exchange took place between the prosecutor and Monforte:

> Mr. Seymour: Okay. Let's take this one step further. The law is going to provide, as I said, the definition of aggravators, mitigators, you weigh the two, assuming that the state has proved one aggravator, one or more, then you weigh those and you come out with what should be an appropriate recommendation in this case. That may disagree with the way you feel. You may sit there and say, the law says I should vote for this, but I just don't like it and I don't want to do it in this case and this is not one of the cases I would define as calling for the death penalty, **could you subordinate your own feelings and vote for the death penalty in this case or are your personal feelings so strong you just wouldn't be able to?**
>
> Grace Monforte: **I down [sic] know. I can't give you a yes or no answer**.

(T.19 1124-25). Under questioning by defense counsel, Monforte merely agreed she could consider mitigation/aggravation, assign

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[11] The context of Monforte's initial answers is of significance here. After the State asked: "Anybody here who feels, I've got certain ideas of when the death penalty should be applied **and I'm not sure I can follow the law", the court noted a "couple of hands**(raised)..."(ROA.19 1122)(emphasis supplied), it questioned jurors Mukeerji and Atkins. While the record does not clearly indicate Monforte's hand was raised, she was questioned immediately after Atkins told the court he could not vote for the death penalty "no matter what the acts are and no matter what the judge tells you the facts are," and in response to the State's question: "Anyone else feel that way?"

weight to those circumstances, and "**recommend life**." (ROA.20 1228). Even when pressed by the State, she stated: "I would definitely follow the law if asked to, **but it's not something I like to do. I would not–I would like to follow the law, I would not like to give that decision**." (ROA.20 1258). Although she stated she "would definitely follow the law", she immediately followed with the statement she "**would like** to follow the law", but "**would not like** to give that decision." Such comments undermine any confidence in Monforte's ability to set aside her feelings about the death penalty and actually follow the law as instructed, especially when all her comments are considered together. There is reasonable doubt Monforte could follow the law as she could not assure the parties that she could set aside her feelings about the death penalty and follow the court's instructions.

Monforte's equivocal answers underscore the deference afforded to the trial judge given his "unique vantage point." As this Court announced: "In reviewing a claim of error such as this, we have recognized that the trial court has a unique vantage point in the determination of juror bias. The trial court is able to see the jurors' voir dire responses and make

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Yes, ma'am. It's Ms. Monforte." (ROA.19 1124).

observations which simply cannot be discerned from an appellate record." Smith v. State, 699 So.2d 629, 635-36 (Fla. 1997). See Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998)(sitting as fact finder, judge has superior vantage point to see/hear witnesses and assess credibility); Chandler v.State, 442 So.2d 171, 174 (Fla. 1983) (stating "court was better able to observe [juror's] depth of conviction regarding the death penalty, [and] we defer to his estimation of her ability to serve impartially"); Witt, 469 U.S. at 424-26 (opining "because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism ... deference must be paid to the trial judge who sees and hears the juror"; bias need not be proved with "unmistakable clarity").

Here, the court recognized the applicable law and made factual findings before excusing Monforte for cause:

> Well, Mr. Seymour did ask her the question and I made a note, he asked her if she felt like her personal views, it may be difficult for her to subordinate those and follow the law, and **she said she was not sure**. And **based on the totality of all her comments**, because there were a number of times that she was addressed by the Court and the attorneys, and **when I look at the entire sequence of her comments and statements made during jury selection**, I do agree with the state, there has been a sufficient finding to grant a challenge for cause. So I am granting the challenge for cause.

(ROA.20 1263). This decision was based on extensive, face-to-face discussions with Monforte, no less than three occasions, where the court could observe body language and attitude regarding her views on the death penalty, and whether she could put them aside and follow the law. (ROA.19 1124-1125, 1140-1141; ROA.20 1226-1228). Assessment of the court's rationale establishes that the correct standard was used and that there was no abuse of discretion in excusing Monforte for cause.

Johnson cites Ault in support of his position.[12] To the

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[12]Johnson contends the court used an erroneous legal standard and cites Chandler v.State, 442 So.2d 171 (Fla. 1983) and Gray v. Mississippi, 481 U.S. 648 (1987). It should be noted Chandler was decided prior to Wainwright v. Witt, 469 U.S. 412, 424-26 (1985), which clarified Witherspoon v. Illinois, 391 U.S. 510 (1968) receding from the requirement that there be "unmistakable clarity" that the juror would vote automatically against the death penalty. Chandler is distinguishable in part because the prospective jurors there stated unequivocally that their feelings toward capital punishment **would not** affect their ability to return a verdict. However, as to one of the jurors, this Court agreed she was **ambiguous enough** in her responses which might lead one to conclude she could not be impartial in a capital case. Chandler, 442 So.2d at 174. Gray, re-affirmed the Witherspoon-Witt analysis and found, should a court violate it in striking a juror for cause, it could not be harmless error. Id., at 668. The juror in Gray was clear in her response about imposing the death penalty. Under Grey and Chandler, which would be modified in part by Witt, the equivocal nature of Monforte's responses and the deference paid to the court's first-hand observations support the strike granted in this case. The proper law, as modified by Witt was applied here.

contrary, Ault is congruous with the state's argument and there is a stark difference in the juror's responses in Ault as opposed to this case. In Ault, this Court affirmed the holdings of Gray v. Mississippi, 481 U.S. 648 (1987) and Witt, wherein it stated that the "relevant inquiry in deciding whether prospective jurors may be excluded for cause based on their views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with [the court's] instructions and [the juror's oath]'". Ault, 866 So.2d at 685. However, this Court held the judge abused his discretion because the juror's record responses directly contradicted the state's characterization of her *voir dire*. Moreover, this Court noted the State did not question the excused juror beyond asking a general question to the panel about opposition to the death penalty where she raised her hand. The juror in Ault, when compared with Monforte, was emphatic in her affirmative answers to questions by counsel regarding her opposition to the death penalty and, notwithstanding them, whether she could follow the law.[13]

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[13]Ms. Smith: After everything has been discussed in this room in this courtroom, and you understand that you are in

Here, the State questioned Monforte extensively, giving her every opportunity to explain her feelings about the death penalty. A fair reading of her responses indicates the State did not mis-characterize her comments. Monforte's equivocal answers of "I don't know...I'm not sure" and "I would like to follow the law" (ROA.19 1124-25; ROA.20 1258) as opposed to the unequivocal response of the juror in Ault, "Yes, I can", are vastly different. They support the instant trial court's finding, from its "unique vantage point" that Monforte was "unable to faithfully and impartially apply the law." See Kimbrough v. State, 700 So.2d, 634, 639 (Fla. 1997) (finding no abuse of discretion where complete review of *voir dire* showed juror clearly expressed uncertainty regarding death penalty even though juror affirmatively responded to question by defense she could follow and apply the law as instructed); San Martin v. State, 705 So.2d 1337, 1343 (Fla. 1997) (stating "jurors who were excused for cause had expressed their personal opposition to the death penalty and had, at best, responded equivocally

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opposition and your feelings about the death penalty are important to you, but not in this process, are you a juror who can be fair and impartial in the guilt phase and penalty phase of this trial?

Ms. Reynolds: Yes, I can.

Ault v. State, 866 So.2d 674, 685 n.9 (Fla. 2003) (emphasis added).

when asked whether they could put aside their personal feelings and follow the law"); Foster v. State, 679 So.2d 747(Fla. 1996)(holding no manifest error where juror gave equivocal responses about whether she could apply death penalty law).

In Morrison v. State, 818 So.2d 432 (Fla 2002), this Court found the juror removed properly for cause when he expressed uncertainty and equivocation about imposing the death penalty. "[E]quivocation, i.e., "not sure," is sufficient to support his excusal for cause, particularly in the absence of any attempted defense rebuttal." Id., at 443 (emphasis added). As noted above, the defense attempt at rehabilitation consisted of asking if Monforte understood the weighing process and could impose a life sentence. (ROA.20 1228). When the prosecutor attempted to give Monforte a last opportunity to clarify her views, and whether they "would impair her ability to" render an impartial verdict, the defense objection was sustained on the basis that the question had been asked previously (ROA.20 1258-59). It is significant that after defense counsel's attempt to rehabilitate Monforte, her final comments were equivocal, when she pen- ultimately agreed she really wouldn't like to vote for it and ultimately stated: "I would definitely follow the law if asked

to, but it's not something I like to do."[14] (ROA.20 1258). This supports the conclusion that Monforte's views would "prevent or substantially impair" her performance as a juror. There was no abuse of discretion here.

However, should this Court find otherwise, the conviction should be affirmed and the remand should be limited to a new penalty phase as was provided in Ault, 866 So.2d at 684. Johnson contends that a limited remand is no longer proper under Ring v. Arizona, 536 U.S. 584 (2002); Bottoson v. Moore, 833 So.2d 693 (2002); and Mills v. Moore, 786 So. 2d 532, 536-38 (Fla. 2001), because death eligibility occurs at conviction. His suggestion is not supported by the law. See Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death in maximum penalty under statute and repeated rejection of Ring arguments). See also Perez v. State, 31 Fla. L. Weekly S23 (Fla. Jan. 5, 2005). The dictates of Bottoson and Mills are addressed to the requirements of the Sixth Amendment and when

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[14]In Footnote 3, Johnson asserts the State's questions to Monforte were confusing and incorrect (IB 26-27). The State disagrees. Not only were the questions accurate regarding the weighing of sentencing factors, but were substantively the same as those propounded by the defense (ROA.20 1227-28). Johnson's assertion that the judge focused on the State's initial questions in making his ruling is refuted from the record. The court based its decision on the "totality of her comments" after

death eligibility occurs. Both pre-dated Ault and its recognition that an erroneously granted strike for cause based on death penalty issues would require only a new penalty phase, not a new trial. Moreover, the penalty phase in Florida is a sentencing selection issue under the Eighth Amendment and neither Bottoson nor Mills changed the law regarding sentencing selection. Monforte's ability to follow the law as it applies to sentencing, limits the issue to the penalty phase, and as such, should this Court find error, remand would be limited to a new sentencing.

POINT II

THE COURT PROPERLY ADMITTED TESTIMONY FROM CO-DEFENDANT, JOHN VITALE, THAT JOHNSON ADMITTED TO HIM THAT WHILE HE WAS CHOKING TAMMY, SHE SAID SHE WANTED TO SEE HER CHILDREN (restated).

Johnson contends the court abused its discretion by admitting testimony from accessory after-the-fact, John Vitale, regarding an admission Johnson made to him that while he was choking Tammy, the victim, "she said that she wanted to see her children." See Ray v. State, 755 So. 2d 604 (Fla. 2000)(holding admission of evidence is within court's discretion, and its ruling will be affirmed on appeal unless there has been an abuse

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questioning by both counsels and the court.(ROA.20 1263).

of discretion); Zack v. State, 753 So. 2d 9 (Fla. 2000)(same); Cole v. State, 701 So.2d 845 (Fla. 1997)(same); Trease, 768 So.2d at 1053, n.2 (same); Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990). According to Johnson, the testimony was inadmissible because: (1) it had no probative value and any probative value was outweighed by its prejudicial impact; (2) it was impermissible hearsay; and (3) it was outside the scope of "re re-direct." This Court will find that Tammy's statement that "she wanted to see her children" was properly admitted.

After defense counsel finished his re-cross examination of State witness John Vitale, the Court asked whether the State had any other questions, to which it replied that it had a couple more questions (ROA.26, 1979). During the re re-direct, the State asked Vitale whether Johnson had ever told him "what the last thing was that Tammy said before —" (ROA.26, 1986). Defense counsel objected arguing it was beyond the scope of re-cross. A sidebar was held, at which defense counsel re-iterated that the question was beyond the scope of re-cross and added that it was hearsay, not a dying declaration and that a proper predicate had not been laid. The trial court denied the "beyond the scope of re-cross" objection noting that the State could "take him off the stand", i.e., recall Vitale since he was a

State witness to ask the question (ROA. 26, 1986). The following proffer was then taken of Vitale's testimony:

> STATE: Mr. Vitale, did Richard Johnson at that time tell you the last thing Tammy said before he killed her?
>
> VITALE: Yes, he did.
>
> STATE: What was it he said to you? The defendant, what did the defendant say to you?
>
> VITALE: He said she asked for her kids.
>
> STATE: At what point was that, what was he doing when she asked for her kids?
>
> VITALE: Choking her.
>
> STATE: In your proffer did you say at one point he told me when he was choking her or breaking her neck, whatever he did, he said that she asked for her kids?
>
> VITALE: Yes, I did.
>
> STATE: And is that what the defendant told you?
>
> VITALE: Yes, it is.
>
> STATE: Did she ask for her children, she wanted to see her children?
>
> VITALE: Yes, it is.

(ROA.26, 1988). After the proffer, defense counsel argued that the statement was not a "dying declaration" and did not fall under any of the other hearsay exceptions. The State responded that it was not hearsay because it was the defendant's statement

and alternatively argued it fell under the "excited utterance" exception because anyone in that situation would have been excited, agitated, upset or in fear; would have been highly emotional (ROA.26 1990-92). The trial court noted the statement was "double hearsay," which is allowed, under section 90.805, Florida Statutes (2006), if each part of the combined statement falls within a hearsay exception. The court concluded that the first part of the statement was an admission by Johnson and that the second part was an excited utterance by Tammy; therefore, it was admissible (ROA.26 1993-94). Further, the Court found that the testimony was probative because it would show premeditation and it rebutted Johnson's contention that this was an accident (ROA.26, 1995-96). The court concluded that the probative value was not outweighed by any prejudicial impact (ROA.26, 11995-97). Johnson argues on appeal that the trial court erred by admitting the statement.

Johnson's contention that Tammy's statement was not probative and any probativeness outweighed by prejudicial effect

Johnson argues that Tammy's statement was not relevant to showing premeditation because she "did not say or indicate that she thought she was dying." (IB 34). According to Johnson, Tammy's statement does not show that he had a fully formed

conscious intent to kill and is equally consistent with him not having a fully formed conscious intent to kill.

This Court has defined premeditation as "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla. 1991), cert. denied, 112 S.Ct. 265 (1991). There is no minimum amount of time required to form premeditation; all that is needed is enough time to permit reflection and that may be only a few seconds. Here, Tammy said "I want to see my kids," while she was being choked. It is clear from the context within which the statement was made, i.e., while being choked, that Tammy knew Johnson was murdering her and was making a desperate plea for mercy, hoping (against all hope) that he would not take her life, not take her away from her children. Contrary to Johnson's assertion, there is no other plausible explanation for her statement. It is unlikely that someone would scream out "I want to see my kids" during sexual intercourse, unless they believed that they might never see their kids again--which is exactly why Tammy screamed out--because she knew Johnson was murdering her.

The trial court correctly found Tammy's statement probative and relevant to showing premeditation. Premeditation is generally proven by circumstantial evidence, including: the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. Pearce v. State, 880 So.2d 561, 572 (Fla. 2004), citing Spencer v. State, 645 So. 2d 377, 381 (Fla. 1994). Here, though, Tammy's statement is **direct** evidence of premeditation because it is clear from the context within which it was made that she was pleading for Johnson to not kill her. The fact that he heard this plea shows that he had time to reflect and form the requisite intent to kill. That fact is even more apparent when you consider the cause of death was strangulation, which Dr. Briggs testified requires tremendous force and is not a sudden death (ROA.28, 2211-15). When oxygen is cut off to the brain, it usually takes 15-30 seconds for a person to pass out, and about 3-4 minutes of further strangulation to die. Thus, Tammy had to make her dying plea before she passed out, which was at least 3-4 minutes before she died and therefore, the statement was clearly relevant to premeditation.

Johnson also takes issue with the trial court's finding that Tammy's statement was probative to rebutting Johnson's contention that this was an accident. According to Johnson "the defense did not present a claim of accident." (IB 35). In support of that assertion, Johnson relies upon defense counsel's opening statement, Vitale's testimony and Johnson's taped statement (IB 35-37); however, he ignores his own testimony at trial, during which he stated that when Vitale told him that he had killed Tammy, he figured he must have, that it "had to be an accident." (ROA.31 2511-20). He further explained his admission to the police as thinking, at the time, that he had accidentally killed Tammy. (ROA.31 2570-74). Moreover, the State addressed the defense of accident in closing argument (ROA.32 2633). Consequently, Tammy's statement was relevant to rebut Johnson's own testimony that if he did kill Tammy, it was an accident.

Regarding the prejudicial effect outweighing the probativeness of the testimony, Johnson admits that this Court should defer to the trial judge's assessment of prejudice since it is he or she who is in the best position to judge its effect (IB 39-40). Given the probativeness of the statement, its prejudicial effect did not outweigh its probative value.

Johnson's contention that Tammy's statement was not an "excited utterance"

Johnson next contends that Tammy's statement does not qualify as an "excited utterance" exception to the hearsay prohibition. Section 90.803(2), Florida Statutes defines an excited utterance as, "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The essential elements of an excited utterance are: an event startling enough to cause nervous excitement; a statement made before there was time to contrive or misrepresent; and a statement made while under the stress of excitement. Henyard v. State, 689 So.2d 239, 251 (Fla. 1996); Rogers v. State, 660 So.2d 237 (Fla. 1995); State v. Jano, 524 So.2d 660 (Fla. 1988). "While the length of time between the event and the statement is a factor to be considered in determining whether the statement may be admitted under the excited utterance exception... the immediacy of the statement is not a statutory requirement." Henyard, 689 So.2d at 251. Tammy's plea, that she "wanted to see her kids," made while she was being choked, aware that she was being murdered meets all of the requirements for an "excited utterance." Being choked to death is an "event startling enough to cause nervous excitement"

and her plea to live to see her kids was made under the stress of the event and "before there was time to contrive or misrepresent." Further, unlike most cases, there was no lapse in time here between the startling event and the statement. Tammy made the statement while being choked. As such, her statement is a classic example of an "excited utterance."[15] See e.g. Rogers v. State, 660 So. 2d 237 (Fla. 1995) (finding that the victim had eight to ten minutes for reflective thought, but based on witness testimony regarding the victim's behavior during that time period, the victim did not engage in reflective thought, and the victim's statements were admissible as an excited utterance). Ferrell v. State, 686 So.2d 1324 (Fla. 1996); Pope v. State, 679 So.2d 710 (Fla. 1996)(holding that statements made by the victim of beating, who eventually died as a result of that beating, to neighbor and to police officer about the identity of her attacker, were properly admitted as an "excited utterance").

Johnson's contention that the testimony was outside the scope of re re-direct

Johnson's last claim is that the trial court abused its

[15] Johnson cites three examples of what he considers to be "classic examples" of "excited utterances" (IB 41); however, he fails to cite a single case finding a statement similar to

discretion by admitting Tammy's statement because the testimony was outside the scope of re re-direct examination. Section 90.612, Florida Statutes (2006) gives the trial judge the authority to exercise reasonable control over the mode and order of interrogation. Here, the trial judge allowed direct, cross, re-direct, re-cross, re re-direct and re-re-cross examination of State witness John Vitale (ROA.23-26). On direct, State witness Vitale explained the circumstances of the crime (ROA.23 1647-1745). On cross-examination, defense counsel vigorously attacked his credibility and suggested he was the real murderer (ROA.23-24 1745-1828). On the first re-direct, the State sought to rehabilitate Vitale by discussing the numerous letters Johnson had written him asking him to confess to the murder in order to save Johnson's life (ROA.24-26 1828-1947). Thereafter, on the first re-cross, defense counsel continued his attack on Vitale, pointing out inconsistencies in his several statements and suggesting strongly that he was the murderer (ROA.26 1947-81). Then, on the second re-direct (re re-direct) Vitale testified that Johnson admitted to him that Tammy said she wanted to see her kids as she was being choked to death. The trial court allowed a second re-cross, during which defense

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Tammy's to not fall under the "excited utterance" exception.

counsel attacked the veracity of the statement because it was not in his prior statements, first time he mentioned it was in his proffer (ROA.26 1997-2002). Defense counsel also pointed out that Vitale failed to mention it at his deposition, to which he replied that he was not asked about it at deposition. Vitale stated that Johnson told him this later, in jail, while they were being housed at Rock Road. Defense counsel further impeached him by pointing out that in prior statements he said "broke her neck" now saying choked her.

The trial court did not abuse its discretion by allowing a second re-direct of Vitale. As the trial court noted, he was the State's witness so it could have recalled him to testify about the statement. Further, the trial court was equally liberal to the defense, also allowing it a second re-cross. As such, the defense had an opportunity to make the last impression on the jury the impeachment of Vitale. Finally, Johnson has failed to cite any cases requiring reversal. Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996), is inapplicable. That case was a re-sentencing of a capital murder during which the feature of the State's case was to portray Hitchcock as a pedophile, improper aggravation. The State called the victim's sister, who testified, on direct, that Hitchcock had been

sexually abusing her sister before her murder and had threatened to kill both girls if they told their mother. On cross, defense counsel asked why the sister waited 17 years after he sister's death to come forward with this testimony. Thereafter, on re-direct, the State elicited testimony from the victim's sister that Hitchcock had sexually abused her also. This Court held it was error to permit the State to re-direct on that material because it did not explain, correct, or modify the testimony on cross. This Court reversed because of the combined effect of several errors.

Here, in contrast to Hitchcock, Tammy's statement corrected the testimony on cross and re-cross accusing Vitale of committing the murder. Finally, even if this Court finds error in the admission of the testimony, any alleged error was harmless. There were several eyewitnesses in this case who saw Johnson force Tammy into the house that morning against her will. Mrs. Shipp, the neighbor from across the street heard her blood-curdling screams and her begging to not go inside. Once inside, Tom and Stacy heard her crying and begging to go home. Vitale, an accessory-after-the-fact agreed that Tammy was taken into the house against her will and then taken into Johnson's bedroom where she died. Johnson himself admitted that he killed

Tammy. Moreover, the medical examiner testified that Tammy was beaten about the face (had bruising on the face) and had been struck/cut with a knife-like object in the head. He also agreed that her death was not sudden, stating that it took a lot of force to strangle Tammy. When oxygen is cut off to the brain, it usually takes 15-30 seconds for a person to pass out, and about 3-4 minutes of further strangulation to die. Thus, Tammy had to make her dying plea before she passed out, which was at least 3-4 minutes before she died and therefore, there was sufficient evidence of premeditation that the statement did not affect the jury's verdict.

POINT III

THE TRIAL COURT HAD JURISDICTION TO TRY JOHNSON (Restated).

Acknowledging that he failed to raise this issue below, Johnson argues that fundamental error occurred in this case when the trial court allowed the State to amend the Indictment and consequently, he argues, all of the resulting convictions are a nullity. Johnson's claim lacks merit because the State did not amend the Indictment; rather, it properly filed an Information adding an additional charge.

Johnson was indicted by the grand jury for first-degree murder, kidnaping, sexual battery and **third degree grand theft**

(ROA. 1, 1-2). On April 28, 2004, pursuant to rule 3.151(a), Florida Rules of Criminal Procedure, the State filed a Motion to Consolidate the grand jury Indictment with an Information it had filed charging Johnson with robbery(ROA. 4, 601). A hearing was held on the motion on April 30, 2004, at which defense counsel raised no objection to the consolidation (ROA. 11, 378-82). The State noted at the hearing that the grand theft count would be nolle prossed, becoming just a lesser-included offense. The parties also agreed that they would insert the robbery charge into the Indictment for purposes of reading it to the jury but would inform the jury it was an Information.

Relying upon Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997), Johnson argues that it was fundamental error to instruct the jury on robbery because the Indictment did not charge robbery. Johnson contends that the Information filed by the State charging robbery, which was consolidated with the Indictment, was a constructive amendment of the Indictment which was improper. As a result, he claims, all of the convictions are a nullity.

Johnson's reliance upon Akins is misplaced. In that case, the defendant was charged by Indictment with attempted first-degree felony-murder, to which he pled guilty. Prior to his

sentencing, the crime of attempted first-degree felony-murder was declared unconstitutional by the Supreme Court. Consequently, at sentencing, the parties stipulated to substituting the crime of attempted first-degree felony-murder with attempted first-degree premeditated murder and sentenced the defendant on those. The First District held that the convictions for attempted first-degree premeditated murder were a nullity, noting that the Indictment did not charge attempted first-degree premeditated murder and could not be amended by stipulation of the parties. The Court stated, however, that the State had the option of filing an Information charging a valid offense on remand.

In contrast to Akins, the parties here did not **amend** the Indictment by stipulation. Rather, the State followed the proper procedure of filing an Information charging the robbery and then the parties agreed to consolidate it with the Indictment. Thus, the procedure employed in this case was entirely different than that used in Akins. As Akins acknowledges, the State has the option of filing an Information to charge additional crimes. Thus, the State's actions were proper. Further, "the test for granting relief based on a defect in the charging document is actual prejudice to the

fairness of the trial." Akins, at 588. Here, the jury rejected the robbery charge which means that Johnson could not have suffered any prejudice. Consequently, Johnson's convictions must be affirmed.

POINT IV

THE TRIAL COURT CORRECTLY ALLOWED IMPEACHMENT OF THE DEFENDANT BY CONTRADICTION (RESTATED)

Johnson asserts that the court erred by allowing the State to question him, on cross-examination, regarding the veracity of the eyewitness testimony provided by roommates Stacy and Tom regarding the night of the murder. The State submits that Johnson has failed to preserve this precise argument for appeal. Further, Johnson failed to object to the question which referred to Tom's truthfulness, but instead, objected only to the question asking whether Johnson had heard Tom's testimony. Finally, impeachment of a criminal defendant who takes the stand is allowed under the evidence code, as is impeachment of a witness by pointing to contradictory evidence. The conviction should be affirmed.

Admissibility of evidence is within the trial court's sound discretion, and its ruling will not be reversed unless there is a clear abuse of discretion. Ray; Zack; Cole. (See Point II)

Substantial deference must be paid to the court's ruling. See Trease v. State, 768 So. 2d 1050, 1053, n. 2 (Fla. 2000).

At trial, Johnson took the stand and gave his version of the events that evening. According to Johnson, Vitale wanted to take Tammy home right away after her brother left but she didn't want to go home. (ROA Vol. 30, 2412-20). About thirty minutes later they attempted to take her home, but she wouldn't tell them her address, she wanted to stay. They drove around and Tammy wanted to stop for cigarettes/bathroom so they did at a gas station. Tammy took Vitale's keys so he would not leave her there. Afterwards, they went to the Savannas where they had sex (ROA Vol. 30, 2421-30). Thereafter, she and Vitale began arguing as they were driving around and they ended up going back home at around 7:00 a.m. According to Johnson, Tammy was ranting and raving outside; he claimed she didn't know what she wanted to do but then went inside and had sex again with him. Johnson asserts that he passed out after sex and when he got up, Tammy was not moving. On cross-examination, he agreed that he admitted to the police that his hands were on her neck while they were having sex, when she died (ROA.31, 2489-2500). He also agreed that he heard the medical examiner's testimony stating that it took a lot of force to strangle Tammy, but

denies applying that force (ROA.31, 2501-10). He was then asked about his roommate, Tom's, testimony and the following colloquy occurred:

> STATE: Okay. Now you heard Tom say that he heard a woman screaming, high pitched scream, I think is what he said, and then he heard crying and a woman's voice saying let me go, let me go, I want to go home. Did that happen?
>
> JOHNSON: Yeah, it happened. She also said she wanted to stay. But she wasn't crying, she was more like whining, like complaining. She wasn't crying.
>
> STATE: You heard his testimony, is that truthful testimony or not?
>
> JOHNSON: It's true but she wasn't crying.
>
> STATE: So he wasn't telling the truth? Are you saying that he was not accurate, what he said wasn't telling the truth?
>
> JOHNSON: He never seen her, so how could he know she was crying.
>
> STATE: Well, now, didn't he come in this courtroom and say that he heard a woman crying, thought it was Adrienne?
>
> JOHNSON: Yes, and I just told you she wasn't crying, she was whining.
>
> STATE: I'm not asking you what happened, I'm asking you did you hear Tom's testimony?

(ROA.31 2514-15). At that point defense counsel objected for the first time, stating "I object, he's asking his recollection of another witness's testimony. He's trying to answer. Not

given an opportunity to answer." "He's asked the same questions over and over and over again." (ROA.31, 2515). The trial court overruled the objection, but warned the State to be careful about being repetitive. The questioning continued

> STATE: Did you hear his testimony that he heard the woman crying, heard a high pitched scream and then heard her say, let me go, let me go, I want to go home?
>
> JOHNSON: I don't remember him saying high pitched, but I do remember him saying that she was crying, but he didn't see her.
>
> STATE: Is that truthful or not, was she or was she not crying?
>
> JOHNSON: She was not crying.
>
> STATE: Okay. Then you heard Stacy say that she heard her crying?
>
> JOHNSON: Heard her when she was walking out of the room. She didn't say that she was crying.
>
> STATE: Okay. She said she had heard crying then went out and the woamn was holding the sides of the casing and you yanked her back in the room?
>
> JOHNSON: I didn't yank her, I pulled her.
>
> STATE: So what you're telling us is that testimony is not true?
>
> JOHNSON: Stacy said pulled, not yanked.
>
> STATE: Did she not say yanked when she was in here?

JOHNSON: She said pull.

STATE: Did she not say in a prior statement yanked twice in one sentence?

JOHNSON: Can’t remember what was in her statement, but I do remember what she said here, she said pull.

STATE: Now, you’ve seen the statement, haven’t you?

JOHNSON: A while ago I’ve seen it, but I can’t remember word for word.

STATE: You’ve seen everything that the State had?

JOHNSON: Right here.

STATE: Read it all, studied it all, you knew she said yanked before she came in here?

JOHNSON: I don’t remember that. Can’t remember what she said.

STATE: Didn’t you hear that testimony here?

JOHNSON: She said pulled.

STATE: Couple days ago. Do you recall what she did when she got on that stand and she did that, showing how you got her back in the room?

JOHNSON: Yeah.

STATE: Is that true?

JOHNSON: Yes.

STATE: Is what you did?

JOHNSON: Pulled, yes.

(ROA Vol. 31 2525-17). Johnson argues that the trial court improperly allowed the State to question him about the veracity of Tom and Stacy's testimony; however, it is clear that Johnson failed to raise that precise argument below, instead arguing that it was repetitive and that he was not being given an opportunity to answer the question. Consequently, this claim has not been preserved for appellate review because the precise argument was not presented to the trial court. See Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)(holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court; to be cognizable, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). Further, a review of the record shows that Johnson failed to object to the questions asking whether Tom's testimony was truthful. Instead, defense counsel objected only to a single question, which asked if Johnson had heard Tom's testimony. Consequently, even if this Court reaches the merits, Johnson will have to show fundamental error.

Turning to the merits, it is clear that the claim is not persuasive. Under Florida's evidence code, a criminal defendant who takes the stand to testify during trial places his

credibility at issue. See Booker v. State, 397 So.2d 910, 914 (Fla. 1981)(holding that a defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness and all the rules applicable to other witnesses are likewise applicable to him."); Brown v. State, 580 So.2d 327, 328 (Fla. 5th DCA 1991). Further, section 90.608(5), Florida Statutes (2006) recognizes that a witness's credibility may be attacked by pointing out evidence that contradict's the witness's testimony. See e.g. C.M. v. State, 698 So.2d 1306, 1307 (Fla. 4th DCA 1997)(holding that State was entitled to present evidence contradicting defendant's testimony that he fled the scene to avoid a truancy arrest); Garcia v. State, 564 So.2d 124, 127 (Fla. 1990)(holding that it was permissible to introduce payroll record to contradict testimony of State witness that defendant was working on particular day). Thus, it was entirely proper for the State to be pointing out the inconsistencies between Tom and Johnson's testimony.

The cases relied upon by Johnson are inapposite. In Knowles v. State, 632 So.2d 62, 65-66 (Fla. 1993), this Court held that questions asking one witness whether another witness has **lied** on the stand are improper; however, this Court found the error harmless because Knowles testified he did not remember

making certain statements so the improper questions did not necessarily lead to the conclusion that he was lying. See also Sullivan v. State, 751 So.2d 128, 129-30 (Fla. 2d DCA 2000)(holding that questions posed to the defendant asking whether the police officers were lying were improper and reversible because Sullivan had denied making the statements the police attributed to him); Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984)(permissible for prosecutor to establish, during cross-examination of a key defense witness, the differences between the witness's testimony and that of earlier state witnesses; however, improper for the prosecutor to ask the witness whether each of the earlier witnesses had been lying).[16] Here, in contrast to Knowles, the State never asked Johnson whether Tom was **lying**. While the State did ask, at one point, whether Tom's testimony was accurate, whether he was telling the truth, Johnson never objected to that question and it does not constitute fundamental error. Fundamental error is defined as the type of error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not

[16] Johnson also cites several out-of-state cases for the same proposition–that it is improper to ask a defendant whether another witness is lying (IB 51-52). These cases are inapplicable for the same reason as Knowles.

have been obtained without the assistance of the alleged error." Brown v. State, 894 So.2d 137, 159 (Fla. 2004). "[A]n error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998). It "should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." Smith v. State, 521 So.2d 106, 108 (Fla. 1988). This Court will not find fundamental error in the instant case. There were several eyewitnesses in this case who saw Johnson force Tammy into the house that morning against her will. Mrs. Shipp, the neighbor from across the street heard her blood-curdling screams and her begging to not go inside. Once inside, Tom and Stacy heard her crying and begging to go home. Vitale, an accessory-after-the-fact agreed that Tammy was taken into the house against her will and then taken into Johnson's bedroom where she died. Johnson himself admitted that he killed Tammy. Moreover, the medical examiner testified that Tammy was beaten about the face (had bruising on the face) and had been struck/cut with a knife-like object in the head. He also agreed that her death was not sudden, stating that it took a lot of force to strangle Tammy.

When oxygen is cut off to the brain, it usually takes 15-30 seconds for a person to pass out, and about 3-4 minutes of further strangulation to die. Thus, Tammy had to make her dying plea before she passed out, which was at least 3-4 minutes before she died and therefore, there was sufficient evidence of premeditation. The other evidence shows sufficient evidence of sexual battery, kidnapping and felony-murder based on those crimes.

POINT V

THE COURT DID NOT ERR BY DENYING JOHNSON'S MOTIONS FOR JUDGMENT OF ACQUITTAL ON THE SEXUAL BATTERY, KIDNAPPING AND FELONY-MURDER CHARGES BASED ON THOSE CRIMES (restated).

Johnson argues that the trial court reversibly erred by denying his motions for judgment of acquittal on the sexual battery and kidnaping charges and on the felony-murder charges premised on those crimes. This Court will find that the trial court correctly denied Johnson's motions for judgment of acquittal.

A *de novo* standard of review applies to motions for judgment of acquittal. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002). In discussing the applicable standard of review, this Court has stated:

In reviewing a motion for judgment of acquittal, a de

> novo standard of review applies. ... Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. ... If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. ... However, if the State's evidence is wholly circumstantial, not only must there be sufficient evidence establishing each element of the offense, but the evidence must also exclude the defendant's reasonable hypothesis of innocence. ... Because the evidence in this case was both direct and circumstantial, it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases.

Pagan, 830 So.2d at 803 (citations omitted). See Conde v. State, 860 So.2d 930, 943 (Fla. 2003) (noting where State produced direct evidence, court's determination will be affirmed if record contains competent, substantial evidence to support ruling); Crump v. State, 622 So.2d 963, 971 (Fla. 1993). Johnson argues that the evidence of sexual battery and kidnaping in this case is wholly circumstantial and therefore, the "circumstantial evidence" standard of review applies. However, as will be discussed below, it is clear that the State presented direct, as well as circumstantial, evidence of the sexual battery and kidnapping in this case; consequently, "it is unnecessary to apply the special standard of review applicable to circumstantial evidence cases." Pagan, 830 So.2d at 803.

When a defendant seeks a judgment of acquittal, he "admits

not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). Further:

> The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof of facts from which the ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.

Lynch, 293 So.2d at 45. Here, Johnson was indicted for first-degree murder, kidnaping, sexual battery with great force and third-degree grand theft (ROA Vol. 1, 1-2). At trial, the State proceeded under both a felony-murder and premeditated murder theory. Johnson moved for judgments of acquittal on the sexual battery and kidnaping charges and on the felony-murder theories based on those crimes. The trial court denied the motions, finding that a prima facie case had been presented on the sexual battery and kidnaping charges (ROA Vol. 30, 2380-84).

Kidnaping and Felony-Murder with Kidnapping as the underlying felony

Johnson argues that the evidence showed, at most, false imprisonment. Kidnaping is defined in section 787.01, Florida Statutes (2006) as "forcibly, secretly, or by threat confining, abducting, or imprisoning another person against her or his will and without lawful authority, with intent to: (1) hold for ransom or reward or as a shield or hostage; or (2) commit or facilitate commission of any felony; or (3) inflict bodily harm upon or to terrorize the victim or another person; or (4) interfere with the performance of any governmental or political function.

Here, the State presented direct evidence from eyewitness Catherine Shipp regarding how Tammy ended up back in the house after returning from the Savannas. Mrs. Shipp, who lived across the street, testified that she was awakened, in the early morning hours of February 15, 2001, (approximately 6:45-7:00 a.m.) by very loud, blood-curdling screams (ROA Vol. 22, 1562-65, 1572-75). It was a woman screaming; Mrs. Shipp opened her front door and heard the woman saying "I want to go home, just let me go." Mrs. Shipp saw the young woman sitting in the middle of the back seat of a dark green Saturn, a car she knew belonged to Vitale. It was light enough for Mrs. Shipp to see across the street with no problem. Johnson was standing outside the car,

by the passenger side. The young woman tried to exit the car but Johnson would not let her, he held the door closed, stuck his head inside the car, and then closed the door.

When the young woman made an attempt to exit the car from the other side, Johnson blocked her way. (ROA Vol. 22, 1566-71). At one point he let her exit the vehicle but when she tried to enter the front seat, he picked her up in a "bear hug" and took her into the house. The young woman did not want to go into the house. She kicked her feet and put both arms on the door frame to keep from entering (ROA Vol. 22, 1576-79). She screamed "I don't want to go in and clean up," and was trying to get away from Johnson. The forcible entry into the house took place at approximately 7:00-7:10 a.m., about 20-25 minutes after she first saw the girl. Mrs. Shipp had a gut feeling that something was wrong. The only reason she didn't call the police is because she has a daughter who screams and fights with her boyfriend and has been told by them that it's none of her business if she tries to get involved.

In addition to Mrs. Shipp's direct testimony showing that Tammy was forcibly taken into the house against her will, there was direct testimony from eyewitnesses Thomas Beakley and Stacy DeNigris regarding what happened to Tammy once she was taken

into the house. Thomas and Stacy shared the room next to Johnson's. Thomas testified that he arrived home at approximately 3:00 a.m. on February 15, 2001 (ROA Vol. 23, 1593-96). He fell asleep about 4:30 because there was a lot of noise. He later (at approximately 7:30 a.m.) heard a girl scream, "let me go, let me go, I want to go home." (ROA Vol. 23, 1593-96, 1604-07). Tom described it as sounding almost like crying, he heard the scream once, then he heard what sounded like crying. After the crying, he heard the words "let me go, I want to go home." He heard the scream coming from the hallway, outside his bedroom. Johnson's bedroom was perpendicular and a few feet away from his; they could literally run into each other if both exited their bedrooms at the same time (ROA Vol. 23, 1610-13). There was a bathroom between the two bedrooms. Stacy also testified that Tom woke her up at about 7:00 a.m., saying that he heard Adrienne crying in the bathroom. Stacy heard a girl crying and saying that she wanted to go home, but she didn't think it was Adrienne (ROA Vol. 23, 1617-21). When she opened her bedroom door she saw a girl with brown hair holding on to the door frame and saw Johnson grab her by the waist and yank her back into his bedroom (ROA Vol. 23, 1622-25). Johnson gave Stacy a dirty look. She saw John by the garage door, so

she asked him what was going on and they spoke for a while.

Vitale, also an eyewitness, agreed that there was an argument in the driveway, after they returned from the Savannas, because Tammy wanted to go home but Johnson did not want her to go home (ROA Vol. 23, 1691-95). Vitale stated that Johnson was using his hand to push her into the house and wouldn't allow her to go the bathroom (ROA Vol. 23, 1696-1700).

Considering the direct evidence from Mrs. Shipp, Tom, Stacy and Vitale, it is clear there was sufficient evidence that Tammy was "forcibly, secretly, or by threat" confined, abducted, or imprisoned against her will and without lawful authority, with intent to either commit or facilitate the commission of any felony; or to inflict bodily harm upon her or terrorize her. Johnson maintains that the sex in the house was consensual; however, the State's theory is that Tammy was kidnaped in order for Johnson to sexually asault her, the evidence of which will be explained below. Because Tammy was killed during the kidnaping, there was also sufficient evidence to deny the motion for judgment of acquittal on the felony-murder charge.[17]

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[17]Felony-murder occurs when a person is killed during the perpetration of, or in the attempt to perpetrate, any one of the seventeen (17) felonies listed in section 782.04, Florida Statutes (2005), including sexual battery. Thus, in order to

Sexual battery and Felony-Murder with Sexual Battery as the underlying felony

Johnson further argues that there was insufficient evidence of sexual battery because all of the evidence in this case establishes that the sex was consensual. Sexual battery is defined in section 794.011, Florida Statutes (2005), as non-consensual "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object...."

When taken in the light most favorable to the State, the evidence clearly establishes that Johnson committed a sexual battery upon Tammy and killed her during the commission of it. Evidence showing the commission of a sexual battery in this case includes Mrs. Shipp's, Tom's, Stacy's and Vitale's eyewitness testimony regarding Tammy being forced into the house, against her will, all the while crying and begging to be allowed to go home. Even when she tried to leave Johnson's bedroom, he grabbed her by the waist and yanked her back in. In addition to that compelling testimony, there is Johnson's own statement to the police and his testimony at trial. In Johnson's video-taped statement, which was played for the jury, he admitted that he

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prove felony-murder in this case, the State had to prove that Lisa was killed during the perpetration of or an attempt to

killed Tammy. Johnson admitted that he "was drunk," "lost his mind," and that he becomes mean when he drinks rum (ROA, Vol. 29, 2285-95). When asked whether he raped her, Johnson didn't deny it outright, but instead, stated that "she wasn't fighting him" during sex and that "it didn't feel like he was raping her." He claimed that he put his hand on her neck during sex and realized she was dead after they stopped, when he got up and said "get up" and she wasn't moving (ROA Vol. 29, 2308-10). During his trial testimony, Johnson tried to claim that he passed out after sex and that what he meant by "got up" was when he woke up (ROA Vol. 31, 2412-20).

Moreover, the medical examiner testified that Tammy was beaten about the face (had bruising on the face) and had been struck/cut with a knife-like object in the head. He also agreed that her death was not sudden, stating that it took a lot of force to strangle Tammy. When oxygen is cut off to the brain, it usually takes 15-30 seconds for a person to pass out, and about 3-4 minutes of further strangulation to die. Based upon the above, the trial court correctly denied Johnson's motions for judgment of acquittal.

This Court has also affirmed cases where the evidence of

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perpetrate sexual battery.

sexual battery was much less compelling, including those where the evidence was wholly circumstantial. Carpenter v. State, 785 So.2d 1182, 1186, 1195-96 (Fla. 2001) and Darling v. State, 808 So.2d 145 (Fla. 2002), relied upon by Johnson are two such cases. In Carpenter, this Court found the evidence sufficient to prove sexual battery where the deceased had bruises to her body and head, but no defensive wounds and the medical examiner agreed it was medically possible that the vaginal injuries were the result of consensual or non-consensual sex. Similarly, in Darling, the medical examination revealed evidence inconsistent with consensual sex. Here, because Tammy's vaginal and anal area had been cut out, there was no such testimony to be had. Although Johnson denied cutting out Tammy's vaginal/anal area, he admitted that he knew he would get caught because his semen was inside her. Based on the evidence here, the trial court correctly denied the motions for judgment of acquittal. See also Boyd v. State, 910 So. 2d 167 (Fla. 2005)(circumstantial evidence that the victim did not know the defendant, that she was last seen alive with the defendant, that the defendant's semen was found on the victim's inner thighs, that there was bruising on the defendant's inner thighs and vaginal area, that the victim's blood was found in the defendant's apartment; and

that the defendant's DNA was found under the victim's fingernails sufficient to overcome a motion for judgment of acquittal); Fitzpatrick v. State, 900 So.2d 495, 508-09 (Fla. 2005)(finding circumstantial evidence sufficient where Defendant's contention that he had consensual sex with the victim was contravened by the circumstances under which the victim's body was found, including fact that there was a penetrating wound in the breast area that was either another stab wound or a bite mark, along with bruising and scratches on the victim's arms and legs); Thomas v. State, 894 So. 2d 126 (Fla. 2004)(finding circumstantial evidence sufficient where Defendant's contention that he had consensual sex with the victim-- which he claimed was supported by no evidence of trauma to the victim's genitals and his witnesses testimony that the two were kissing and hugging in the store parking lot--was contravened by evidence that the store clerk saw them arguing before they left the store and saw the defendant snatch the victim's car keys from her and push her into the vehicle and by fact that defendant's claims about where they had sex and how the victim's blood ended up on her socks were contravened).

Here, in addition to the circumstantial evidence--Tammy was found nude, her face beaten, a stab wound/cut to the head and

her vaginal/anal area cut out–-there was also direct evidence establishing that she was raped by Johnson. The eyewitness testimony shows that she was forced into the house against her will, kept there despite pleading to go home and ended up dead after Johnson pulled her back into his room. This evidence was sufficient to submit a felony-murder charge to the jury, with sexual battery as the qualifying felony.

Johnson's last claim is that it was reversible error for the court not to instruct the jury it must find premeditation or felony murder unanimously[18], but he fails to give a record cite where the matter was raised below.[19] The jury was informed its verdict had to be unanimous and it found the murder was both premeditated and felony murder.

Johnson does not cite any authority insupport of his argument. Instead, he points to the judge's instructions and the verdict form to show that is unclear how many jurors found

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[18]The standard of review applied to a decision to give or withhold a jury instruction is abuse of discretion. See James, 695 So. 2d at 1236; Kearse, 662 So.2d at 682.

[19]No objection was raised to the jury instruction on this ground nor was the court asked to inform the jury its determination how the murder was perpetrated (felony or premeditated) had to be unanimous. Thus, this matter is not preserved for appeal, and this Court should so find. See Steinhorst, 412 So.2d at 338.

felony-murder and how many found premeditated. The law is settled, there does not need to be a unanimous verdict as to the method (felony or premeditated murder) used in the homicide, only that there was a homicide for which the defendant was responsible. Schad v. Arizona, 501 U.S. 624, 644-45 (1991) (rejecting contention general verdict which fails to differentiate between premeditated and felony murder is inadequate; jury need not agree on precise theory of murder); Parker v. State, 641 So.2d 369, 375 (Fla. 1994) (finding "instruction requiring jury unanimity as to whether a premeditated or felony murder was committed" was not required "because special verdicts identifying the type of murder are not required"); Haliburton v. State, 561 So.2d 248 (Fla. 1990). In finding a general verdict for first-degree murder was permissible, this Court has effectively determined the method of committing murder is not an independent element of the crime, but merely a means of satisfying the *mens rea* element. Schad, 501 U.S. at 637. The mere fact the jury made added findings here does not require it be found unanimously, nor does the absence of a specific instruction or proof of unanimity for that method render the verdict unconstitutional. Johnson's jury was instructed its verdict had to be unanimous, and it so found. The

conviction should be affirmed.

Jurors are presumed to follow the court's instructions. U.S. v. Olano, 507 U.S. 725, 740 (1993)(finding presumption jurors follow instructions); Burnette v. State, 157 So.2d 65, 70 (Fla. 1963) (same). The instant verdict was unanimous, as were the findings on the methods used to accomplish the murder. The decisions were the verdict of each juror and the jury as a whole.[20]

POINT VI

THE DEATH SENTENCE IS PROPORTIONAL (restated)

Pointing to Vorhees v. State, 699 So.2d 602 (Fla. 1997) and Sanger v. State, 699 So.2d 619 (Fla. 1997), Johnson maintains his death sentence is not proportional. Contrary to his position, his sentence is proportional given the totality of the circumstances of this case in comparison to others where the death sentence was imposed. This Court has affirmed other death sentences involving similar circumstances. See Douglas v. State, 878 So.2d 1246 (Fla. 2004); Belcher v. State, 851 So.2d 678, 685-86 (Fla. 2003); Orme v. State, 677 So.2d 258, 263 (Fla.

[20] Johnson's contention that it was also error to instruct on the felony-murder aggravator is without merit. In addition to not raising this argument below, it is clear that the jury

1996); and Schwab v. State, 636 So.2d 3, 7 (Fla. 1994).

As this Court has stated: “[t]o determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed. Pearce v. State, 880 So.2d 561, 577 (Fla. 2004).” Boyd v. State, 910 So.2d 167, 193 (Fla. 2005). See Urbin v. State, 714 So.2d 411, 416-17 (Fla. 1998); Terry v. State, 668 So,2d 954 (Fla. 1996). It is not a comparison between the number of aggravators and mitigators, but it is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). See Fitzpatrick v. State, 900 So.2d 495, 526 (Fla. 2005). This Court’s function is not to re-weigh the aggravators and mitigators, but to accept the jury's recommendation and the judge's weighing of the evidence. Bates v. State, 750 So.2d 6 (Fla. 1999).

Here, the jury found first-degree murder was proven under both the premeditated and felony murder theories based upon the facts that Tammy was strangled during the course of a kidnapping and sexual battery (ROA.5 625-26). The court found three

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found Johnson guilty of both premeditated and felony-murder.

aggravators: (1) felony murder (kidnapping and sexual battery); (2) under sentence of community control; and HAC (ROA.6 914-18). In mitigation, it found one statutory mitigator of moderate weight, and eight non-statutory mitigators of moderate to no weight. With the exception of the HAC finding (**Point VIII**), Johnson does not challenge that court's aggravation and mitigation determinations.

Vorhees and Sager, cited by Johnson, are distinguishable from the instant case. In Vorhees and Sanger, there was less aggravation, only the felony murder and HAC aggravators, and based on this Court's reliance on Kramer v. State, 619 So.2d 274, 277 (Fla. 1993), it was the drunk victim who was the aggressor and started the fight which escalated to his death. Such is not the situation here where Tammy was kidnapped, picked up by Johnson and brought into his house by force, after she had screamed to go home. Further, he restrained her from leaving his bedroom even as she tried to escape. Following this, he committed a sexual battery and strangled her manually and by ligature. Johnson was the aggressor.

While he may point to the fact he and Tammy were intoxicated, the court's resolution of the statutory mental health mitigation further distinguishes this case from Vorhees

and Sanger. As reasoned by the court:

> The Court is reasonably convinced that Richard Johnson was intoxicated at the time he kidnapped, sexually abused, and murdered Tammy Hagin. Nonetheless, the testimony of John Vitale and others establishes that Richard was able to persuade Tammy to come to his house, play pool, persuade Tammy and her brother that he would take her home, persuade John to drive him and Tammy around, go to a friend's house, go to a recreational park where he had voluntary sex with Tammy, pick her up and carry her into a house, keep her from going to the bathroom, and pull her into a room before killing her. **In other words, the evidence shows that despite the intoxication, Richard Johnson was able to significantly control the activities he engaged in, exert purposeful influence over others around him, and otherwise engage in purposeful behavior**.
>
> ...
>
> The Court is not reasonably convinced that alcohol impaired Richard Johnson's capacity to *appreciate* the criminality of his conduct or to *conform* his conduct to the requirements of law. However ... the Court does conclude that alcohol substantially reduced his inhibitions, which was a contributing factor leading to Tammy's death.
>
> ...
>
> Dr. Williams opined that the excessive use of alcohol that night severely reduced Richard's ability to make rational decisions and appreciate the criminality of his conduct and conform his conduct to the requirements of law. ... contributed to Richard losing control. **However, the evidence also shows that despite the consumption of alcohol, Richard was controlling and directing the events from the time he left the bar until he first disclosed to John that he had killed Tammy**. ... **Richard was able to exert considerable control over the actions of others leading up to the murder**....

(ROA. 920-21, 923) (emphasis supplied). Unlike in Vorhees and Sager, the alcohol consumption did not lead to spontaneous acts or the finding of a "drunken episode." Instead, Johnson, although intoxicated, was able to make purposeful decisions and exert control over those around him, bending them to his objective.

Further, the court found three aggravators applied to Johnson, HAC, under sentence of community control, and felony murder. Only two aggravators were found to apply in Vorhees and Sanger, HAC and felony murder; neither defendant was under a sentence of imprisonment as was Johnson. Moreover, there was less statutory mitigation in Johnson's case, only one statutory mitigator of moderate weight; in Vorhees, there were three statutory and in Sager, four statutory mitigators.

It is the State's position the facts and circumstances of Belcher, Orme, and Schwab establish proportionality. All these involve strangulation murders during the course of a sexual battery and have three aggravators, felony murder and HAC common to each. In Belcher, the sentence was proportional given the three aggravators (prior violent felony, HAC, and felony murder), fifteen non-statutory mitigating factors. Proportionality was found in Orme, based upon felony

murder/sexual battery, HAC, and pecuniary gain aggravators and both statutory mental mitigators. This Court rejected Orme's claim that drug abuse caused the murder which was characterized by Orme as a lover's quarrel. Based in part on Orme's normal behavior on the night of the murder and lack of evidence that the killing was sparked by an emotional reaction, the sentence was affirmed. Orme, 677 So.2d at 263. Schwab also establishes proportionality wherein this Court noted the three aggravators (prior violent felony, felony murder, and HAC) were proven in the kidnapping, sexual battery, and strangulation murder of a young boy.

Although only two aggravators were found in Douglas, 878 So.2d at 1251-54, 1262-63, it is similar to the instant matter factually and with respect to the sentencing factors. In Douglas, as in the instant matter, the victim and defendant had been drinking all night and intoxication was offered in mitigation. The jury convicted Douglas of sexual battery and first-degree murder for the victim's beating death. HAC and felony murder/sexual battery were found. In mitigation, intoxication was rejected in part because of Douglas' physical

capabilities around the time of the murder.[21] Nonetheless, the court found one statutory mitigator and sixteen non-statutory mitigators. Id. at 1251-54. This Court determined that the sentence was proportional. Id. at 1262-63. Johnson's sentence should be found proportional as well giving it higher aggravation and less mitigation. See Mansfield v. State 758 So.2d 636, 647 (Fla. 2000) (upholding sentence with two aggravators of HAC and felony murder/sexual battery, no statutory mitigation and five non-statutory mitigators including defendant was alcoholic, whose mother was alcoholic and defendant had poor upbringing with dysfunctional family, and suffered from brain injury due to head trauma and alcoholism); Davis v. State, 703 So.2d 1055, 1061-62, (Fla. 1997) (affirming sentence based on HAC and felony murder/sexual battery outweighing nonstatutory mitigation); Hauser v. State, 701 So.2d 329 (Fla. 1997) (finding sentence proportionate where victim strangled and HAC, CCP and pecuniary gain outweighed one statutory mitigator and four nonstatutory mitigators); Rhodes v. State 638 So.2d 920, 927 (Fla. 1994) (finding proportionality

[21]As noted above, the court rejected statutory mitigation related to intoxication and gave only moderate weight to the non-statutory mitigator due to Johnson's physical and mental capabilities at the time of the murder. (ROA.6 920-21, 923).

for strangulation murder during sexual battery with felony murder, on parole, and prior violent felony conviction aggravation and two statutory mitigators including ability to conform conduct-appreciate criminality, and two non-statutory mitigators). Johnson's sentence is proportional and should be upheld.

POINT VII

THERE IS NO CONSTITUTIONAL ERROR IN THE STATE GOING FORWARD WITH ITS INTENT TO SEEK THE DEATH PENALTY AFTER THE DEFENDANT REJECTS A PLEA OFFER (restated)

Johnson asks this Court to find that it is improper and unconstitutional for the State to seek and the court to impose a death sentence after the State has offered a life sentence in exchange for a guilty plea. While Johnson recognizes that the State virtually has unfettered discretion to seek the death penalty, State v. Bloom, 497 So.2d 2 (Fla. 1986), he submits that the State's willingness to accept a life sentence, irrespective of whether the defendant rejected the plea offer and opted for trial, forever circumscribes the sentence that could be imposed to life. He maintains that to seek a death sentence after offering life imprisonment is punishment for the exercise of the constitutional right to a jury trial necessitating that his sentence be vacated. The State disagrees

with Johnson. Not only is the issue unpreserved for review, but it is not supported by the law.[22] There is no constitutional infirmity in the death sentence imposed following Johnson's rejection of the State offer of a life sentence in exchange for a guilty plea. See Arango v. State, 437 So.2d 1099, 1102 (Fla. 1983). The sentence should be affirmed.

This issue has not been preserved as Johnson did not object to the holding of a penalty phase or the imposition of the death penalty on the grounds raised here. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)(opining "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Further, under Section 921.141, Florida Statutes, death is one of the two permissible sentences for a first-degree conviction, and as such, it is not an illegal sentence and challenges must be preserved for appellate review by the

[22]Should this Court agree that the death penalty may not be imposed once the State has offered a life sentence during pre-trial negotiations, such would eviscerate completely plea negotiations, not only in capital cases, but in all criminal matters and place sentencing limits in the defendant's hands. Taking Johnson's suggestion to its limits would allow a defendant to negotiate the lowest sentence possible, reject that plea offer, and take his chances at trial while still binding the State to is last offer to its offer without any benefit for its bargain. Such is the antithesis of fair negotiations.

appropriate objection. Cf. Foster v. State, 614 So.2d 455, 463 (Fla. 1992) (rejecting claim death penalty was unconstitutional where defendant offered no proof "specific to his own case to support an inference" that the State used improper considerations in seeking death sentence).

The standard of review is abuse of discretion. Cf. Freeman v. State, 858 So.2d 319, 322 (Fla. 2003). It is well settled "the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute" Bloom, 497 So.2d at 3, "[a]lthough ... that discretion may be curbed by the judiciary where motives such as bad faith, ... or a desire to prevent the defendant from exercising his constitutional rights contributes to the prosecutor's decision." Freeman, 858 So.2d at 322.

The record establishes that the defense, throughout the litigation, was on notice that the prosecution intended to seek the death penalty, and on the record, Johnson was advised of the offer and rejected it (ROA.1 42; SROA.17 196-205). Nonetheless, Johnson attempts to equate his unfettered negotiations with an unconstitutional federal statute which allowed those defendants who waived a jury trial to unilaterally avoid a death sentence. United States v. Jackson, 390 U.S. 570

(1968). He suggests that given the State's discretion in seeking the death penalty, it should be precluded from seeking a death sentence any time it makes a life offer during plea negotiations. This Court has rejected such claims. See Francis v. State, 473 So.2d 672, 677 (Fla. 1985) (finding "no merit to Francis' contention that the trial court unconstitutionally sentenced him to death because he chose to exercise his constitutional right to a jury trial and rejected a plea offer of life imprisonment"); Arango, 437 So.2d at 1101-02 (rejecting as meritless, claim that appellate counsel was ineffective for failing to argue on appeal that "[i]mposition of the death sentence after petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and fourteenth amendments"). See also; Foster v. State, 778 So.2d 906, 923, n.9 (Fla. 2000) (affirming death sentence following rejection of plea offer); Lopez v State, 536 So.2d 226, 229 (Fla. 1988) (noting state entitled to seek death penalty when defendant, who received life sentences in return for agreement to testify against accomplices, later refused to testify); Hoffman v. State, 474 So.2d 1178, 1182 (Fla. 1985) (affirming "defendant cannot be allowed to arrange a plea bargain, back out of his part of the bargain, and yet insist the prosecutor uphold his

end of the agreement).

Given Johnson's informed decision to reject the State's plea offer and to proceed to trial, his subsequent death sentence is constitutional and should be affirmed. See Jones v. Barnes, 463 U.S. 745, 751 (1983) (opining "[i]t is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal...."). It is well settled that a defendant who rejects a plea offer "may not complain simply because he received a heavier sentence after trial" because, "[h]aving rejected the offer of a lesser sentence, [the defendant] assumes the risk of receiving a harsher sentence. Were it otherwise, plea bargaining would be futile." Stephney v. State, 564 So. 2d 1246, 1248 (Fla. 3d DCA 1990) (citing Mitchell v. State, 521 So. 2d 185 (Fla. 4th DCA 1988)). Based upon the foregoing, this Court should affirm.

POINT VIII

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR IS SUPPORTED BY THE EVIDENCE (restated)

Relying upon cases where the victim was unconscious at the time of the murder or was in such a state that the victim did not comprehend his situation, Johnson asserts HAC was found

improperly. He points to Tammy's intoxication, opinion she may have been conscious for only 15 to 20 seconds during the strangulation, and argues there was no evidence she knew of her impending death. Contrary to this position, the court's finding of HAC is supported by substantial, competent evidence as the record reflects Tammy was struggling to leave Johnson's home, and was conscious and talking of wanting to see her children as she was being strangled. In spite of the fact that she may have been intoxicated and lost consciousness in as little time as 15 to 20 seconds,[23] her pre-mortem wounds, actions, and final words as she was being killed indicate she was conscious, suffering, and aware of her pending death which could have taken up to four minutes to accomplish. This Court should affirm the finding of HAC.

"In reviewing a trial court's determination of heinous, atrocious, or cruel, this Court examines the record to ensure that the finding is supported by substantial competent evidence." Mansfield v. State, 758 So.2d 636, 645 (Fla. 2000)(citation omitted). This Court noted in Alston v. State, 723 So.2d 148, 160 (Fla. 1998), it "is not this Court's function

[23]The medical examiner also stated that it could take as much as a minute for a person to lose consciousness. (ROA.28

to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding."

This Court, in Bowles v. State, 804 So.2d 1173 (Fla. 2001), discussed the finding of the HAC aggravator as follows:

> In *Rogers v. State*, 783 So.2d 980, 994 (Fla. 2001), we recently stated that:
>
> > In order for the HAC aggravating circumstance to apply, the murder must be conscienceless or pitiless and unnecessarily tortuous [sic] to the victim. A finding of HAC is appropriate only when a murder evinces 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.
>
> (Citation omitted.) Strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture. Accordingly, this Court has consistently upheld the HAC aggravator in cases where a conscious victim was strangled....
>
> In light of the evidence of a great struggle and the medical examiner's testimony, we find that competent, substantial evidence in the record supports the trial court's finding that the victim was strangled while conscious for a time sufficient to

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2214-15).

> suffer a physically and mentally cruel and torturous death. *See Mansfield*, 758 So.2d at 645. Accordingly, we affirm the trial court's finding of HAC.

Bowles, 804 So.2d at 1178-79 (citations omitted). See Mansfield, 758 So.2d at 645 (affirming HAC finding where strangulation victim was conscious and struggling for a few minutes).

Here, the trial court found:

> The evidence at trial presented by Dr. Charles Driggs, the medical examiner, proved beyond a reasonable doubt that Tammy Hagin died from strangulation. The autopsy examination of Tammy revealed that she had a pattern of bruising around the left, center and right portions of her neck. The bruising on the right side of her neck indicated manual strangulation, while the bruising on the left side of her neck indicated strangulation by a ligature. It is Dr. Diggs' opinion that both hands were used to accomplish the strangulation....
>
> Dr. Driggs opined that Tammy would have lost consciousness within fifteen to twenty seconds of being strangled, but the strangulation would have had to continue for three to four minutes to accomplish death.
>
> Dr. Driggs further testified that he found two or three bruises on her chin, and a bruise near the hairline on the left side of her forehead. Also near the bruise on her forehead, Dr. Diggs found a superficial cut above the left ear. The cut was all the way to the skull and would have been painful, but would not have been debilitating. His opinion was that the cut was caused by a knife and was a pre-mortem injury, and the bruises were also pre-mortem injuries.
>
> ...

> John Vitale testified that Richard told him it took longer than he thought to break someone's neck and that the last thing Tammy said as she was being choked was a request to see her children.
>
> ...
>
> The evidence shows in this case that Richard used a bear hug to carry Tammy into the house against her will and he later pulled her from behind into his bedroom before her death. There was a painful cut to her head before she died, and she was struck about the head before her death with sufficient force to cause bruising. There is evidence she knew she was about to be killed because she asked to see her children. Richard Johnson made the statement that it was harder to break her neck than he thought....

(ROA.6 916-18). In making this finding, the court noted that the pre-death terror suffered by the victim, even if the death is rapid, is a matter to be considered in determining HAC. Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997) (finding HAC based on the terror victim experienced as she fled the defendant's attack not on the quick death from gunshot wounds). Similarly, the victim's consciousness at the start of her strangulation is a matter supporting HAC as "strangulation of a conscious victim involves foreknowledge of death, extreme anxiety, and fear, and that this method of killing is one to which the factor of heinousness is applicable." Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986) (citations omitted) See Sochor v. State, 580 So.2d 595, 603 (Fla. 1991), rev'd on other

grounds, 504 U.S. 527 (1992).

Each fact cited by the court is supported by the record. The testimony from Catherine Shipp, Johnson's neighbor, revealed Tammy's terror and resistence to being taken into the house. Tammy held onto the door jamb and through loud, blood curdling screams expressed her desire to be taken home and freed by Johnson even as he picked her up in a bear hug and forcibly took her into his home. Her desire to leave as expressed through her screaming and crying continued in the house as overheard by Thomas Beakley and witnessed by Stacy Denigris. However, Johnson again forcibly dragged his victim back into his room. Once there, as admitted by Johnson and reported by John Vitale, Tammy was strangled as she pleaded to see her children. Although not cited by the court, there were scratches to Johnson's arms which could be interpreted as evidence of Tammy's struggle against her attacker. Dr. Driggs' examination revealed pre-mortem, painful wounds and bruising to Tammy's head and face. She was strangled manually and by ligature. Consciousness may have been lost in as short as 15 seconds or as long as one minute, however, it would have taken between three and four minutes of constant pressure to Tammy's neck to effectuate death. (ROA.22 1562-79; ROA.23 1597-1600, 1610-13,

1617-25, 1627-31, 1634-37, 1691-1706; ROA.26 1997; ROA.29 2301-10, 2322-30, 2335; ROA.28 2197-98, 2205-15, 2225-27, 2229-31; ROA.29 2268-75, 2335).

Although Tammy may have lost consciousness quickly, there was a long period of time preceding the strangulation which must be considered, i.e, the struggle to remain outside the home, to leave Johnson's bedroom, and that period of time once the choking began and Tammy uttered her final words that she wanted her children. Further, even though intoxicated, Tammy was conscious and struggled against her attacker; she made known to those who perpetrated and those who witnessed the events that she wanted to leave, and her final words to Johnson, as he was choking her, were that she wanted to see her children. Together, this evidence shows a conscious, struggling victim - one who knows of her impending death. Such events are the epitome of HAC and are not the result of speculation on the part of the court as decried in Knight v. State, 746 So.2d 423, 435-36 (Fla. 1998).

The finding of the HAC aggravator has been affirmed under similar circumstances. See Huggins v. State, 889 So.2d 743, 770 (Fla. 2004) (affirming HAC finding based in part on inference that lack of head injury showed victim was conscious during

strangulation); Conde v. State, 860 So.2d 930, 955 (Fla. 2003) (agreeing HAC proven based on pre-mortem trauma to strangulation victim, evidence she tried to flee, and testimony she did not die instantaneously); Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986) (finding HAC where victim conscious during strangulation).

Given the fact that the evidence supports a finding Tammy was conscious at the time of her strangulation based on her verbalizations and physical struggles, Johnson's suggestion otherwise, and cases rejecting HAC where the victim was unaware of her situation or killed by a method other than strangulation are inapplicable. See Deangelo v. State, 616 So.2d 440, 442-43 (Fla. 1993)(refusing to overturn court's resolution of conflicting evidence and determination State had failed to prove beyond a reasonable doubt victim was conscious based on lack of defensive wounds or evidence of a struggle, medical examiner's testimony victim could have been unconscious at time of strangulation, and large amount of marijuana in victim's system); Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989)(rejecting HAC where victim was either unconscious or only semi-conscious at the time of the strangulation). Johnson's reliance upon Elam v. State, 636 So.2d 1312, 1314 (Fla. 1994);

Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993); and Clark v. State, 443 So.2d 973, 976 (Fla. 1983) is misplaced. First, none deal with strangulation of a conscious person. Elam involves the bludgeoning of the victim and Robertson and Clark involve a single gunshot wound. Second, this Court has determined strangulation of a conscious person supports HAC; Tompkins, while no such ruling has been made for bludgeoning death or gunshot wounds. Third, in Clark and Robertson, there is no evidence of the experiences of the victim's shortly before death. Johnson's offered case law does not undermine the court's resolution of the facts or determination of HAC. Based upon the foregoing, it is clear the proper law was applied and the court's findings in support of HAC, i.e., Tammy was conscious during the strangulation and struggling against her attacker, are supported by substantial, competent evidence.

However, even if this Court strikes HAC, two valid aggravators, felony murder and under sentence of imprisonment, remain and support the death sentence.[24] Rogers v. State, 511

[24]See Pope v. State, 679 So.2d 710 (Fla. 1996) (holding sentence proportionate based on pecuniary gain and prior violent felony, two statutory mitigators - under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and various nonstatutory mitigators); Melton v. State, 638 So.2d 927 (Fla. 1994)

So.2d 526, 535 (Fla. 1987) (announcing that where an aggravator is found improperly, "[i]f there is no likelihood of a different sentence, the error must be deemed harmless"). This Court should affirm.

POINTS IX AND XIV

FLORIDA'S CAPITAL SENTENCING IS CONSTITUTIONAL - THE DEATH SENTENCE IS NOT PRESUMED, THE PROPER BURDENS OF PROOF WERE APPLIED, AND ADEQUATE GUIDANCE FOR DETERMINING SENTENCING CIRCUMSTANCES WAS PROVIDED (restated)

Citing several out of state and federal cases interpreting foreign statutes, Johnson complains in **Point IX** that his sentencing was unconstitutional[25] because he was required to prove mitigation outweighed the aggravation and that the statute created a presumption that death is the appropriate sentence, thereby, unconstitutionally placing the burden of persuasion upon the defense. In **Point XIV**, he challenges the statute, asserting it gives inadequate guidance to the jury regarding the

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(affirming sentence with pecuniary gain and prior violent felony outweighing some nonstatutory mitigation); Heath v. State, 648 So.2d 660 (Fla. 1994) (upholding sentence based on prior violent felony and felony murder and extreme mental or emotional disturbance mitigator).

[25]Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed *de novo* on appeal).

finding of mitigation and aggravation.[26] Not only was the jury given a special instruction that the aggravation must outweigh mitigation, but it was told the defense presentation should not be construed as shifting or minimizing the State's burden, but his out-of-state and federal cases[27] interpreting foreign statutes is misplaced. Moreover, section 921.141 has been found constitutional repeatedly.

Johnson's jury was instructed: "Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to

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[26]Johnson points to Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990) in support of his argument. These cases do not further his position as the penalty phase instructions in those cases either directed or allowed the jury to conclude it had to be unanimous in its finding of an offered mitigator, thereby, possibly running afoul of Lockett v. Ohio, 438 U.S. 586 (1978) by precluding consideration of mitigating evidence. The same infirmity does not exist here.

[27]State v. Wood, 648 P.2s 71, 83-84 (Utah 1981); State v. Rizo, 833 A.2d 363 (Conn. 2003); People v. Young, 814 P.2d 834 (Colo. 1991); State v. Biegenwald, 524 A.2d 130 (N.J. 1987); Hulsey v. Sargent, 868 F.Supp 1090 (E.D. Ark. 1993); State v. Kleypas, 40 P.3d 129 (Kan. 2001) (noting Kansas' statute is not like Florida's statute); State v. Marsh, 102 P.3d 445 (Kan. 2004) (same). Williams' reliance upon Mullaney v. Wilbur, 421 U.S. 648 (1975); In re: Winship, 397 U.S. 358 (1970); Cage v. Louisiana, 498 U.S. 39 (1990); Sandstrom v. Montana, 442 U.S. 510 (1979); and Francis v. Franklin, 471 U.S. 307 (1985) is misplaced. Proffitt v. Florida, 428 U.S. 242, 245-46, 255-56 (1976) resolved these matters when it reviewed Florida's capital

determine whether the aggravating circumstances outweigh the mitigating circumstances that you find to exist. The defense presentation of mitigating circumstances should not be construed as to shift or minimize the State's burden in these penalty proceedings." (ROA.35 3043-44). Further, the jury was told:

> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. If after weighing the aggravating and mitigating circumstances; or in the absence of mitigating circumstances, if you find that the aggravating circumstances alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather that a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances, you are never required to recommend a sentence of death.

(ROA.35 3051-52).

This Court has rejected the instant challenges repeatedly and should do so again as Johnson has not offered any persuasive authority calling into question the determination Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 255-56 (1976); Rodriguez v. State, 2005 WL 1243475, *20 (Fla. 2005); Elledge v. State, 911 So.2d 57 (Fla. 2005);[28] Griffin v. State, 866 So.2d 1, 14 (Fla. 2003); Bottoson,

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sentencing and found it constitutional.

[28]This Court rejected challenges that: "Florida's capital sentencing statute fails to provide a necessary standard for

833 So.2d at 695 (recognizing the the United States Supreme Court has upheld Florida death penalty statute); Cox v. State, 819 So.2d 705, 725 (Fla. 2002); Freeman v. State, 761 So.2d 1055, 1067 (Fla. 2000); Shellito v. State, 701 So.2d 837, 842-43 (Fla. 1997); Hunter v. State, 660 So. 2d 244, 252-53 (Fla. 1995); Henry v. State, 613 So.2d 429, 433 n.11, 13 (Fla. 1992); Fotopoulos v. State, 608 So.2d 784, 794 & n. 7 (Fla. 1992); Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992) (finding "Florida's death penalty statute, and the instructions and recommendation forms based on it, set out a clear and objective standard for channeling the jury's discretion"); Young v. State, 579 So. 2d 721 (Fla. 1991), cert. denied, 112 S.Ct. 1198 (1992); Robinson v. State, 574 So. 2d 108 (Fla. 1991); Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990. Johnson's instant claims should be rejected and his sentence affirmed.

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determining that aggravating circumstances 'outweigh' mitigating factors, does not define 'sufficient aggravating circumstances,'... does not have the independent reweighing of aggravating and mitigating circumstances...." and "that Florida's capital sentencing scheme violates the Sixth and Fourteenth Amendments because ... the jury is not instructed as to the reasonable doubt standard for two of the three elements required to render him death-eligible-that sufficient aggravating circumstances exist and that mitigating circumstances do not outweigh the aggravating circumstances.... and that the jury instructions shift the burden of proof to the defendant to prove that mitigating circumstances outweigh the aggravating circumstances." Ellege v. State, 911 So.2d 57, 78-

POINTS X AND XI

RING V. ARIZONA DOES NOT RENDER FLORIDA'S CAPITAL SENTENCING UNCONSTITUTIONAL (restated)

It is Johnson's position in **Point X** that Ring v. Arizona, 536 U.S. 584 (2002) and the tenet that a criminal statute must be strictly construed in favor of the defense, together render section 921.141 unconstitutional because "death eligibility" does not occur until "sufficient aggravating circumstances" and insufficient mitigating circumstances have been proven beyond a reasonable doubt as found by a jury. He further argues that setting "death eligibility" at time of conviction, as noted in Bottoson v. Moore, 833 So.2d 693 (2002) violates the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution. Citing to Furman v. Georgia, 408 U.S. 238 (1972), Johnson reiterates his Eighth Amendment challenge in **Point XI**. Not only has Johnson failed to preserve this matter for appeal by making the same argument below as he presents here, but the matter has been rejected repeatedly. Under either ground, lack of preservation or merit, Johnson's sentence should be affirmed.[29]

80, n.28-29 (Fla. 2005)

[29]Questions of law, are reviewed *de novo*. Elder v. Holloway,

Below, Johnson challenged the constitutionality of section 921.141 based upon Ring, however, he did not challenge the statute on the ground death eligibility should occur at time of sentencing or that there must be unanimity as to sufficient aggravation and insufficient mitigation. (ROA.3 410-20; ROA.4 421-39; ROA.8 74-75, 141-45). Further, he did not make an Eighth Amendment challenge based on the fact death eligibility occurs at time of conviction, hence, these matters are unpreserved. The merits should not be reached. Steinhorst, 412 So.2d at 338.

Both the Sixth and Eighth Amendment challenges have been rejected by this Court when it reviewed the statute.[30] Death eligibility occurs at time of sentencing Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001); and the constitutionally required narrowing occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death in maximum penalty under statute and

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510 U.S. 510, 516 (1994).

[30]Johnson argues the statute should be re-reviewed using the statutory construction rule that criminal statutes are to be construed strictly. Not only did he not argue this below, but it is presumed this Court applied the appropriate standard of review when it addressed this matter previously. Johnson has

repeated rejection of arguments that aggravators had to be charged in the indictment, submitted to the jury and individually found by a unanimous jury). See also Perez v. State, 31 Fla. L. Weekly S23 (Fla. Jan. 5, 2005) (rejecting challenges to capital sentencing under Ring and Furman); King v. Moore, 831 So.2d 143 (Fla. 2002); Proffitt, 428 U.S. at 251 (upholding Florida's capital sentencing as constitutional as defined in Furman); Hildwin v. Florida, 490 U.S. 638 (1989)(noting case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida" and determining it does not); Spaziano v. Florida, 468 U.S. 447 (1984). Moreover, Johnson has contemporaneous felony convictions (sexual battery and kidnapping). This Court has rejected challenges under Ring where the defendant has a contemporaneous felony conviction. Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting that "felony murder" and the "prior violent felony" aggravators justified denying Ring claim). Relief must be denied.

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not pointed to anything to indicate otherwise.

POINT XII

THE INSTRUCTION REQUIRING THE JURY TO BE "REASONABLY CONVINCED" OF A MITIGATING FACTOR DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE AND DOES NOT RENDER FLORIDA'S CAPITAL SENTENCING UNCONSTITUTIONAL (restated)

Pointing to his motions and argument below (ROA.2 208-15; ROA.8 131-32), Johnson complains that section 921.141 fails to set forth a standard for proving mitigation, yet the standard jury instruction provides a "reasonably convinced" standard. This difference, he asserts, violates the separation of powers, incorrectly states the law and limits the jurors' consideration of mitigation rendering the statute unconstitutional. This matter, a question of law,[31] should be found meritless.

It is Johnson's claims the use of the phrase "reasonably convinced" in defining the standard of proof is a violation of the separation of powers doctrine. Separation of powers is intended to preserve the system of checks and balances built into the government as a safeguard against the encroachment/aggrandizement of one branch at the expense of the other. Buckley v. Valeo, 424 U.S. 1, 122 (1976). The judiciary has the power to promulgate standard instructions putting into

[31]Questions of law, are reviewed *de novo*. Elder v. Holloway,

effect the legislative intent.

Under section 921.141(1), both parties are permitted to put on evidence relevant to the nature of the crime and character of the defendant including evidence related to aggravating and mitigating circumstances. Section 921.141(2), requires the jury determine: "(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c)Based on these considerations, whether the defendant should be sentenced to life imprisonment or death." Thus, in order to give guidance as to whether aggravators and/or mitigators exist, this Court has determined the State must prove the aggravator beyond a reasonable doubt, but the defendant need only reasonably convince the jury of the existence of mitigators. See Robertson v. State, 611 So.2d 1228, 1232 (1993); Walls v. State, 641 So.2d 381, 390 (Fla. 1994). The state's burden is higher than the defendant's burden and it is only logical that the jurors must be reasonably convinced of a fact before they may use it as a basis for advising the court of the appropriate penalty. The promulgation of this instruction does not violate the separation

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510 U.S. 510, 516 (1994).

of powers doctrine, nor render the statute uncostitutional. It merely gives effect to the legislative intent.

The State submits the standard instructions for mitigation are proper and reflect the law accurately. Walls, 641 So.2d at 389-90 (reaffirming validity of instruction on penalty phase mitigation in capital murder case and finding it has been upheld, repeatedly upheld by this and federal courts). This Court found the standard penalty phase jury instructions describes Florida law properly. See Jackson v. State, 502 So.2d 409, 410 (Fla. 1986). The "reasonably convinced" standard advises the jury correctly and is a proper instruction. Walls, 641 So.2d 389-90.

The State disagrees with the suggestion the instruction precludes the jury from considering "all" the mitigating evidence. Rather, the instruction requires the jury to look at all the evidence, both aggravating and mitigating, to determine the established facts. If the jurors are convinced a mitigator exists, they are to assume it has been established. The jury is not precluded from considering all mitigation presented. It is only logical the mitigating facts which have been established should be considered in rendering an advisory opinion, and those that do not exist should have no bearing upon the sentence.

Without some burden of proof for mitigation, the advisory sentence would be meaningless. The jury instruction describes the law accurately. This Court should find the statute unconstitutional.

POINT XIII

INSTRUCTING THE JURY THAT ITS SENTENCING RECOMMENDATION IS ADVISORY DOES NOT VIOLATE CALDWELL V. MISSISSIPPI (restated)

Here, Johnson continues his challenge to his death sentence commenced in **Points X and XII** based upon his interpretation of Ring that death eligibility does not occur until a jury finds sufficient aggravation and insufficient mitigation to outweigh the aggravation. Based upon this premise, he asserts that under Ring and Caldwell v. Mississippi, 472 U.S. 320 (1985) it was error to inform the jury that its sentencing determination was advisory, when, according to Johnson, it was a necessary predicate for a death sentence (IB at 95). Not only is this matter unpreserved, it is meritless. Relief must be denied.

Before the trial court, Johnson asserted that informing the jury of its advisory sentencing role diminished its sense of responsibility under Caldwell. He did not, as he does here, refer to Ring as a basis for challenging the jury's role. (ROA.2 224-26; ROA.8 133). As such, the matter is unpreserved and

should be rejected. Steinhorst. However, should this Court reach the merits,[32] it will find no constitutional infirmity. Johnson's death sentence should be affirmed.

The State reincorporates its argument for **Points X and XI** to counter Johnson's Ring interpretation and submits the statute as outlined in the instructions advises the jury correctly as to its role. "To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 407 (1989). This Court has recognized repeatedly that the jury's sentencing role is advisory, and the standard instructions adequately, correctly, and constitutionally advise the jury of its responsibility. See Cook v. State, 792 So.2d 1197, 1201 (Fla. 2001); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998); Burns v. State, 699 So. 2d 646, 654 (Fla. 1997); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). There is no question the jury was instructed adequately; the judge here gave the standard instructions or special ones Johnson requested. This satisfied constitutional dictates, not

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[32]Questions of law, are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994).

implicated by Ring.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Gary Caldwell, Esq. Office of the Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on March 10, 2006.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on March 6, 2006.

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LESLIE T. CAMPBELL