IN THE SUPREME COURT OF FLORIDA

RICHARD ALLEN JOHNSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Nineteenth Judicial Circuit

CAROL STAFFORD HAUGHWOUT
Public Defender

GARY LEE CALDWELL
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 256919
Attorney for Richard Allen Johnson

421 Third Street
West Palm Beach, Florida 33401

(561)355-7600

TABLE OF CONTENTS

POINT XIV

AUTHORITIES CITED

CASES
PAGE(S)

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Richard Allen Johnson appeals his convictions and sentences for murder, kidnapping, sexual battery, and grand theft. R5 625. The jury recommended a death sentence by a vote of 11-1. R5 656. The judge imposed a death sentence for the murder. R6 913.

A. On February 14, 2001, Tammy Hagin, Anthony Carrick (Hagin's brother), and Joshua Taylor (a friend of theirs) went to Club Babylon in Port St. Lucie. T22 1490-1496. There they became acquainted with appellant and his friend John Vitale. T22 1481-82, 1497-99, 1523-24. After several hours of talking and drinking, they all went to a house owned by Adrienne Parker. T22 1500-04, 1535. Living in the house were appellant, Vitale, Parker, Thomas Beakley, and Stacy Denigris. T22 1535-36.

After drinking and playing pool, Carrick and Taylor left, but Hagin stayed with appellant and Vitale. T 22 1504-05. Shortly before dawn, Vitale drove appellant and Hagin to Savannas State Park, a recreation area, where appellant and Hagin had sex. T23 1688-95. The three then returned to the house. Id..

That morning, Hagin was strangled in a bedroom shared by appellant and Vitale. (See the discussion below.) Appellant and Vitale then bought a large cooler, some chains, and concrete

blocks. T23 1639-45, T27 2067-71, T24 1725. They went to the house of Shane Bien, who refused to help them. T 23 1711-12. At Savannas, they rented a canoe, and dumped the body in the water, weighted with concrete blocks attached by a chain. T24 1726-32. They returned to the house and moved to another residence. T24 1734-35. When the body was found on February 19, the vaginal area had been cut or ripped out, as discussed below.

Catherine Shipp, who lived across the street, testified that between six and seven a.m., shortly before Hagin's death, she heard blood curdling screams and saw a woman sitting in the back of a dark green car. T22 1563-64. (There was no dispute about the facts that the woman was Hagin and the car was Vitale's.) The woman tried to get out of the car, but appellant would not let her out. T22 1565. She screamed, "saying just let me go home." Id. She tried to get out of the other side, but Vitale prevented her from getting out on that side. T22 1566. The woman got out of the back seat and walked toward the front of the car, and turned to get in the front when appellant grabbed her in a bear hug and took her in the house. Id. She resisted, kicking her feet a little bit and holding the door frame. T22 1567. She screamed "I don't want to go in and clean up." Id.

Beakley said he was sleeping in a bedroom in the house and

woke up hearing a woman crying or screaming, “let me go, let me go, I want to go home.” T23 1599-1600. He sent his girlfriend Denigris out to investigate, and went out himself five minutes later, at which time Denigris was upset and talking to Vitale. T23 1600. He went back to sleep. T23 1602.

Denigris testified to hearing someone saying she wanted to go home. T23 1620. Going out of her room, she saw a woman with a backpack holding a door frame. Id. Appellant grabbed the woman around her waist and yanked her back into the bedroom, giving Denigris a dirty look. T23 1620-21, 1624. After talking to Vitale, Denigris went back to sleep. T23 1625.

Parker slept through this entire incident on a couch in the living room. T22 1546.

Much of the trial centered on the question of whether appellant or Vitale killed Hagin. Each of them gave different accounts at different times.

Vitale testified for the state that appellant and Hagin had consensual sex at Savannas, and then Hagin could not decide whether she wanted to go home or back to appellant’s and Vitale’s house. T23 1691-95. Vitale “just said, well, I’m going back to the house now and when you decide, everybody decides what they want to do, then you let me know.” Id. When they got to the house, appellant and Hagin argued; she now

wanted to go home, and appellant wanted her to come inside the house. T23 1695. Vitale got out of the car, and entered the house, and when he came back out "they were coming in and [appellant] was behind her and he had his arm around her waist and like pushing her in. He had his hand in-between in hers, pushing her in." T23 1696. She was talking very loud, but not screaming, and said she wanted to go home and also wanted to go to the bathroom. Id.

In the house, appellant would not let her go to the bathroom. T23 1696-97. As Denigris came out of her bedroom, appellant yanked Hagin into his and Vitale's bedroom. T23 1699. Vitale talked with Denigris and Beakley, and it was quiet in appellant and Vitale's bedroom. T23 1699-1701. Appellant later came out, said Hagin was sleeping, and went to the bathroom. T23 1702. Appellant had left the bedroom door ajar; Vitale went to close the door and saw Hagin lying on the bed. T23 1703-1704. When appellant came out of the bathroom, he was crying and said she's gone, I broke her neck. T23 1703-1705. Vitale went to the bedroom and saw that she was all purple, black and blue, her eyes were open, and there were marks on her neck. T23 1705. He and appellant set about disposing of the body as discussed above.

While in jail, Vitale wrote letters to various persons

saying that he had drugged appellant and had killed Hagin while appellant was passed out in the bed, and that he had let appellant think that he (appellant) had killed her. SR2 168-205.[1] He said he had written these letters at appellant's urging. He was in love with appellant and appellant had led him to believe that his love would be returned if he took responsibility for the murder. T25 1893-1900. The state put into evidence letters from appellant to Vitale in which he urged Vitale to confess, told him to emphasize various facts and claim that he acted in the heat of passion, urged him to have his confession notarized, and expressed love for Vitale. SR1 56-123.

The medical examiner testified that Hagin died of strangulation. T28 2213. On the left side of the neck there was a ribbon like contusion or bruise right around the neck, which had the "appearance of a ... ligature type." T28 2205. On the right side of the neck were bruises "more consistent with a sort of a manual type gripping, strangulation". T28 2207. There was a pre-mortem cut on the scalp that could have been caused by a knife. T28 2201-04. There was some "very superficial type bruising," on the face. T28 2209. As to the

1 Vitale had also originally told the police that he and appellant had dropped Hagin off at a Pizza Hut. T25 1894.

cutting or tearing of the perineal area, he said that it seemed to be cutting, but he could not definitely attribute that injury to a cutting, and could not rule out that it was caused by marine life. T28 2220-21.[2] The tip of the coccyx was broken as a result of application of some force. T 28 2222. It may have occurred when the body was dropped into a hard bottom of a cooler. T28 2233. Hagin had a blood alcohol reading of .186, although .04 or .06 of that may have resulted from decomposition. T28 2231-33.

Shane Bien said they arrived at his house around 9:00 a.m., and appellant looked like he had been up all night, like he was on cocaine. T26 2033-34. He said he killed a dude, then changed it and said he killed a woman, saying she was the most annoying person that he ever met and that she tried to stab him with an object. T26 2034-35. He offered Bien $150 to help them, saying he had got the money from the woman he killed. T26 2039.

In a taped statement to the police, appellant initially said

---

2 One officer testified that, based on his experience of seeing a total of about 30 bodies in water over many years, marine life did not eat the body. T11 1376, 1379-80. A member of the dive team testified that he did recall having ever seen major body trauma from marine life over a lengthy career. T11 1406-07. Appellant denied having cut the body, and Vitale did not testify to being involved in or having seen any such cutting

he and Vitale left Hagin at a Pizza Hut around dawn. T29 2287. He then said that they were having sex and Hagin was not fighting him; he said, "I put my hand on her neck and she died." T29 2291. He was drunk, he could barely see and was spinning. T29 2292. He kind of lost it. T29 2293. He remembered they had sex, he put his hands around her, she was not screaming, she did not struggle. T29 2294. He did not realize he had killed her until after she wasn't moving any more; it didn't really click that he killed her. T29 2297. He got up and said for her to get up, and she didn't get up. T29 2310. It looked like she had passed out, and he shook her. Id. He told Vitale he thought she was gone, and he was crying. T29 2311. Asked if he pulled her in the house from the driveway, he said he remembered having her by her hands, and she said she wanted to go; he was pulling her and she walked back in; he was telling her that they would leave soon. T29 2237-38. He could not believe he killed her. T29 2239.

Appellant testified that he had consensual sex with Hagin at Savannas and that Vitale and Hagin then began arguing in the car. T30 2422-23. Vitale wanted to take her home, and she did not want to go home. Id. Appellant began arguing with Vitale, who got fed up and drove them to the house. T30 2423. At the

---

of the body.

house, Vitale got out, but Hagin would not get out of the car, and they all began arguing loudly. T30 2424. Appellant did not remember forcing Hagin to get out of the car. T 30 2425. She walked in the house, although appellant did grab her, not to stop her from leaving but to calm her down because she was ranting and raving; she wanted to go home and also wanted to stay. Id. She didn't know what she wanted. T30 2425-26. In the house she was still screaming; she followed him to the room, but then she turned around and he grabbed her. T30 2426. She said something but he was not sure what, and he thought she was just going to keep arguing so he pulled her back in the room. Id.

In the room, they started talking, and she started kissing him. T 2427. They had sex and then appellant passed out. Id. The last thing he remembered was her pulling up the covers. Id. She may or not have had a chain or necklace on. T 2427-28. Later, "I woke up and I tried, I tried to get her up and she wouldn't move. I shook her. She still wouldn't move and that's when I checked her pulse and after I checked her pulse I realized she was dead." T 2428. He ran to Vitale, and told her she was gone. Id. Vitale replied that appellant had killed her. Id.

Vitale confessed to appellant that he killed Hagin before he

wrote the letters confessing to killing her. T30 2484. The letters that appellant wrote to Vitale were part of a plan the two formed in which they referred back "to our statements and see what kind of information we could get and we'd try to make up a good confession. But in doing so, I found in John's statement there was inconsistants [sic] and stuff that I knew weren't true and couldn't be true, and that's when I confronted John, because what I believed to be the truth -- and then he confessed in a different confession." T30 2463.

B. At the penalty phase, the state presented testimony that appellant was on community control at the time of the murder. T34 2784-88. It also presented testimony from Harding's brother and mother regarding their loss. T34 2792-96.

Appellant's mother, Sandy Johnson, testified that appellant's father "beat me up, pulled knives on me, shot guns in the house." T34 2801. "One time I was hanging up the clothes on the clothes line and he told the kids to shoot mommy. And I didn't know that there were blanks in the gun at the time and he shot a hole through the kitchen window. He brought a knife on me one time and his mother intervened and said if you want to stab somebody, stab me." T34 2801-02. He was a violent drunk who would pass out in front of the children. T34 2802. He would kick appellant's sister Danielle with steel toed boots.

T34 2803. He choked Sandy with her shirt, causing a burn and scab on her neck. T34 2812. He split her head open, he threw her out of the house naked. Id. If awakened during the night, he would become violent, hitting and swinging, apparently as a result of his experiences as a soldier in Vietnam. T34 2800.

He would knock the kids around and she called the law many times. T34 2828-29. The couple broke up "countless times." T34 2804. Appellant had nightmares while in kindergarten and first grade. T34 2805. His grades went downhill when the father moved away for good. T34 2806-08. The father moved to the Virgin Islands and stopped paying child support. T34 2807-08.

Sandy got engaged to another man. T34 2810. He drank a lot. T34 2811. He beat appellant black and blue. T34 2810-11.

Sandy drank from when she got home from work until she went to bed. T34 2813.

She married a man named Frank Speres. T34 2815-16. He had problems with the kids. Id.

Sandy testified that appellant set fire to a neighbor's field when he was nine. T34 2818-19. As a teenager, he took money which she had been sent to visit her dying father. T34 2818. At the time of the murder, he was on community control because he had taken her car. T34 2816-17.

The testimony of appellant's brother, David Johnson, Jr., and his sister Danielle Blount, confirmed and amplified Sandy's testimony.

David hated it when the father was around on weekends. T34 2839. The father was always drinking, always had an attitude. T34 2840. Asked what the father did when he was drinking, David replied: "Yell, scream, fight." Id. He yelled and screamed at all of them, fought with Sandy, spanked the children. Id. He would take the children to bars. T34 2840-41. He would stay there for hours, leaving the kids to wait in the car or beg for money to play pool. Id. He "would wake up in the middle of the night screaming, hollering. You know, yelling at us to get down, get behind and covered. And one time I remember he threw my sister across the room." T34 2841. He often "would have us go out to the woods and get a stick" to hit them with for stupid stuff like leaving a toy lying around. T34 2842-43.

The mother, Sandy, was drunk a lot. T34 2844. It was "like she was in her own little world". Id. She sometimes passed out when it was late. Id. She was working at Publix and also had a night newspaper route, sometimes taking the children with her. T34 2844. They were too tired to go to school. T34 2845.

Danielle characterized the relationship of the parents as "Horrible." T34 2862. She explained (id.):

> They would fight a lot. He would stay gone most of the night, come home drunk, wanting to fight and argue with her. He would hit her, beat her up. One day my mother picked me and my brothers up from my aunt's house because that's where we were staying when she was at work, he got home and he chased her all over the yard. She ran to my grandmother's house, nobody answered the door. She would come running back over to the house and went to hit her, he hit the bedroom window and split his arm open. And she grabbed me and we ran off to my cousin's house.

The father "would always pick me and my brother, little brother [appellant] up, throw us across the room." T34 2863. He once threw her across the room onto a couch, then dropped a tool box on her with nails hanging out of it and a nail went into her stomach. Id.

She said of his nightmares: "I would wake up in the middle of the night to see what the commotion was because he would normally make a lot of noise and he would jump on top of me. One night he had a gun in his hand, yelling at me, get down you fucking kook, you get down, you want to die, get down. He would always go back to kook. I presume it was from the Nam era." Id.

He would beat them with sticks. T34 2864. He drank all the time; he took them to bars and drank there all night. Id.

Later, Sandy would go out drinking at night, leaving the children to fend for themselves or to go to a neighbor's. T34 2864-65.

When the family lived in Stuart, Danielle and appellant would stay with their grandmother and Uncle Mike. Mike "was mean. He hurt Richard." T34 2866. She continued (id.):

> When Richard got up hungry he would, I thought, would go over there and get an apple pie, a frozen apple pie out of the freezer or out of the back patio, but he was crawling through the back window in the back of the house in the door getting it out of the kitchen freezer, I didn't know that. When my Uncle Mike caught him one time, and I just happened to be with him, he took him into the bathroom and filled the tub up with water and ice cubes and threw my brother in it and told him if he was bad, this is what he got, this was his punishment. And he had assaulted my brother, started messing with his private parts.

Appellant was about three or four at the time. Id. There were numerous incidents between appellant and Mike. T34 2867. Danielle would see the after effect with his penis being red because it was burning. Id.

Their teen-age cousin Dean "taped Richard up with duct tape, taped his arms up to the bed post, put duct tape over his mouth and would suck on his penis." T34 2868.

Sandy became involved with Pat Kent, who was abusive. "If we would come home from the bus late Pat would be there. If we were late, even five minutes late he would get a belt and hit us with it, call us names, tell us we were stupid." T34 2869.

In school, appellant would fall asleep in class, having nightmares and they would come and get Danielle out of class to help settle him down. T34 2871. He was always failing in

middle school, he hated it. Id. The family never pushed education. T34 2872. After the divorce, Sandy would get up before two a.m. to do the paper route, and would take the kids with her, then she would come home, get dressed and go to work at Publix. T34 2873. She did not sit down to help the kids with their homework. Id.

The stepfather, Frank Speres, did not like the children. T34 2874. He felt one brother was a "goody two shoes", and he considered appellant "the horrible child. He was the demon as Frank would call him." Id.

Dr. Theodore Williams, a psychologist, cast more light on the family background. The father's abuse of Sandy began almost immediately after the marriage. T35 2925. During the marriage, she was abused, dramatically beat up, thrown against the wall, and the kids witnessed these kinds of things. Id. The children

> ... described how they would be awakened in the night by the father who was typically intoxicated. He would have the children line up, put a pistol in their hand and make them point it at their brother's head. There were periods of time where he would ... come up behind Richard's mother and grab her and say I'm going to slit your throat. Guns were shot off, windows broken, people dragged out in the back yard, statements of mommy's going to die, mommy's going to die today. And all the kids were there. And certainly how it affected Richard early on is he began to manifest some symptoms, what's referred to in our profession as posttraumatic stress disorder, is another way.

T35 2925-26.

There was "a lot of domestic violence, not talking, just yelling, screaming, somebody throwing cups, we're talking about pretty significant abuse by dad against all members of the family." T35 2926. All of this resulted in disturbed behavior which was not treated. T35 2931. Appellant developed a dysthemic disorder. T35 2932.

One time someone "put a rope around Danielle and Richard's neck, strung them over a tree, pulled them up off their feet and then laughed about it as they turned blue and shook all over the place. It was only when the grandfather came out and cut them down that they were let down." T35 2946-47. Their brother Chris masturbated appellant, tried to sodomize him, and brutalized Danielle as well. T35 2947.

Dr. Williams testified T2934-35:

> Well, you know, you take an individual who, you know, is born with a predisposed set of coping skills, you subject them to violence, sexual abuse, physical abuse, emotional abuse and over a period of time you end up with an individual of tragic coping skills. In Richard's case, low frustration tolerance, impulsivity, depression, anxiety. Certainly trust was a big issue for them, which is not surprising, he really didn't trust people. And certainly is going to affect his ability to, you know, hold things together over a long period of time. And indeed, to his credit, Richard did fairly well in his special education program up until I believe early adolescence started. And I just don't think he could, he could continue with his current coping skills. What we see is, during this period of time we have obviously being physically, sexually and emotionally abuse, that's ongoing.

At first appellant did fairly well in school, but was in a special education class. T35 2937. He had borderline low average to borderline mental retarded verbal skills, and had a hard time learning or communicating. Id. He had average non-verbal skills, but scored at 81 (on the cut between borderline retarded and low average) for verbal skills. T35 2938. He was in special education classes until around age 12. T35 2939.

At this time, the abuse was continuing, and his mother was diagnosed with a brain tumor. Id. He couldn't keep up with everybody, he was in special education classes, likely to be teased by his peers. T35 2939. His grades went down and he dropped out. T35 2940.

Williams explained appellant's fire-starting (T35 2941-42):

> You know, fire starting, lying, not caring, getting into trouble, getting arrested, these kinds of things. And the theory behind why a lot of these individuals end up the way they do is by setting a fire, you are proving to yourself that you have some control over your environment. And you imagine a boy for his entire life has no control over who's getting beaten when, you know, worried about financing, just no control. To have set a fire, it's a pretty powerful thing to have when you don't really have any power. And, again, that's when he's trying do this. It only stops when he got arrested and then from that point on after that he began to engage in other multitude of behaviors.

Starting as a teenager, appellant had significant substance and alcohol abuse. T35 2950. The drugs included marijuana,

Ectasy, acid, GHB hormone, Special K, crystal meth. Id.

During his incarceration, appellant showed "no evidence that he was behaving inappropriately, in fact, he wasn't a management problem. He appeared to be well adjusted." T35 2952. He is "an individual who is not going to be someone where anyone would be concerned that he's going to be killing other inmates, acting out aggressively, being a threat to correctional officers. He's somebody who has I believe extremely good rehabilitation potential within a prison system. Not talking about rehabilitation as far as being paroled, I'm talking about within the prison system. And might even be a role model to the other inmates as he spends his life there." T35 2953-54.

Williams administered the MMPI test, which showed depression, a lot of paranoia, suspiciousness, and high schizophrenic and paranoia scales. T35 2957-58. Because appellant's disturbed behavior as a child was not treated, there was no documented psychological history. T35 2957-59. Because of the lack of such a history, and Williams' inability to interview the state's witnesses, there was not enough information to determine if there was a more serious mental illness. Id.

Williams said in summary that appellant suffered from moderate depression and more than likely, according to the

personality testing, a mixed personality disorder. T35 2960. Williams believed appellant's condition met the minimum criteria for that statutory mitigator. Id.

Appellant had a mental health related problem and was extremely intoxicated at a minimum, possibly under the influence of other elicit drugs at the time of the crime. T35 2960-61.

As to nonstatutory mitigation, there was a "horrendous dysfunctional family upbringing involving emotional physical and sexual abuse." T35 2961.

Williams concluded (T35 2963-64):

> I think what happened, quite frankly, is you have an individual who has repressed a life of grief and pain and trauma, who is extremely intoxicated and likely, I wish there were a clinical word, but he lost it. I don't think -- there is no indication that Richard planned to abduct a woman in a bar and take her home and kill her. I think that he just couldn't cope with a situation at the time, a lot of screaming and yelling, he's got a low frustration tolerance, he's tired an he lost it.

In sentencing appellant, the court found three aggravating circumstances: the murder occurred during the course of kidnapping and sexual battery (great weight); appellant was previously convicted of a felony and put on community control (moderate weight); and the murder was especially heinous, atrocious or cruel (great weight). It found in mitigation that appellant: had no significant history of criminal activity, particularly violent crimes (moderate weight); witnessed and

suffered frequent physical and verbal abuse from his father (some weight); had a history of extensive drug and alcohol abuse and was under the influence of alcohol at the time of the murder (moderate weight); was sexually abused at a young age (some weight); was a slow learner (no weight); was able to show kindness to others (little weight); exhibited good behavior in court (little weight); and would adjust well to prison and would not commit further violent crimes (little weight). R6 913-27.

SUMMARY OF THE ARGUMENT

1. The court erred in granting a cause challenge based on a juror's views on the death penalty. The judge used an erroneous standard, and the juror's views did not support the challenge.

2. The court erred in overruling appellant's objection to Vitale's testimony on re-re-direct examination that Hagin said she wanted to see her children while appellant was choking her. The error was independently prejudicial as to penalty.

3. The lower court lacked jurisdiction because the indictment was improperly amended to expand the charges against appellant and to expand its theory of felony murder.

4. The court erred in letting the state question appellant about the truthfulness of the testimony of a state witness and using cross-examination to reiterate the witness's testimony.

5. The evidence did not support the convictions for kidnapping, sexual battery, and felony murder, and did not support the felony murder aggravating circumstance.

6. Appellant's death sentence is disproportionate.

7. Appellant's death sentence is unconstitutional in that the state sought a death sentence because he turned down its offer of life imprisonment in exchange for a guilty plea.

8. The evidence does not support the finding that the

murder was especially heinous, atrocious or cruel.

9. Appellant's death sentence is unconstitutional because the statute placed the burden on the defense to present mitigation that outweighed the aggravating circumstances.

10. The death sentence is unconstitutional because jury did not make a unanimous finding of sufficient aggravating circumstances to support the sentence.

11. Section 921.141, Florida Statutes, is unconstitutional so far as it permits imposition of a death sentence without the finding of aggravating circumstances.

12. Section 921.141, Florida Statutes, unconstitutionally limits the consideration of mitigating evidence.

13. The court erred in overruling appellant's motion to bar instructions to the jury that its penalty verdict was advisory.

14. The court erred in denying appellant's motion contending that the statute and jury instructions unconstitutionally fail to give the jury adequate guidance as to its penalty deliberations.

ARGUMENT

The following points separately or cumulatively require reversal of appellant's convictions and sentences.

POINT I

WHETHER THE COURT ERRED IN GRANTING THE STATE'S CAUSE CHALLENGE TO POTENTIAL JUROR MONFORTE.

On her juror questionnaire, potential juror Grace Monforte wrote that she was "Not sure" whether she had feelings or opinions about the death penalty, and she checked off that it was "Absolutely appropriate in every case where someone is murdered," and that it was "Appropriate in some cases, inappropriate in some cases." R5 702.

During voir dire, the judge asked if any jurors felt they could never recommend the death penalty under any circumstances. Several said they could not, but Monforte was not among them. T14 519-521. Later, she told the state that she would not have a problem coming up with a guilty verdict. T19 1085. She asked why the case took three years to get to trial. T19 1117-18. As to the death penalty, she said, "I don't say I don't believe in the death penalty, but I would choose it as a very very last resort." T19 1124. She continued to say that she did not like to vote for the death penalty, but that she could vote for it (T19 1124-25):

I don't know, don't agree with it, I don't agree that

> it should be applied to everything, even though I feel that everybody has the right to live and if a person takes another's life, they should pay for their consequences, their actions, but the death penalty, I would have some doubt myself.
>
> MR. SEYMOUR: Okay. Are you doubting your ability to vote for the death penalty?
>
> GRACE MONFORTE: Yes, I'm doubting my ability that I could. I don't believe in it but could I bring myself to not vote for it, no. If it needed to be that way then, yes, I could vote for it. I don't like it, I don't agree with it.
>
> 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.

She responded affirmatively when the state asked if she was not sure of her attitude about the death penalty and not sure of her ability to vote for it. T19 1140-41.

She told the defense that she would vote for the death penalty as a last resort. T20 1226-27. She said she could weigh the sentencing circumstances. T20 1227-28.

Finally, the state questioned her as follows (T20 1258-59):

> MR. SEYMOUR: Yes, sir, very briefly.
>
> Ms. Monforte, kind of did this earlier today, I think you told us that you really don't like the death penalty?
>
> GRACE MONFORTE: Correct.
>
> MR. SEYMOUR: And you really wouldn't like to vote for it?
>
> GRACE MONFORTE: Correct.
>
> MR. SEYMOUR: I think I asked you earlier whether your ability about the death penalty would substantially impair your ability to follow the law in that regard and to vote for it if it were required?
>
> GRACE MONFORTE: 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.
>
> MR. SEYMOUR: Okay. And do you think it would impair your ability to --
>
> MR. GARLAND: Judge, I'm going to object; this has been asked and answered several times.
>
> MR. STONE: Numerous times, repetition.
>
> THE COURT: I agree. The objection is sustained. It has been asked and answered. Any other questions by the state?
>
> MR. SEYMOUR: No, sir.

The state made a cause challenge Ms. Monforte, and the court granted the challenge over defense objection (T20 1261-63):

> MR. SEYMOUR: Challenge deals with her ability to follow the law in regard to the death penalty. When I examined her earlier, she said that she didn't like

the death penalty, she didn't want to have to vote for it. And I asked her would that substantially, in so many words, would that substantially impair her ability to follow the law in regard to the death penalty, and her answer was yes. Now, Mr. Stone got up and she gave some different answers indicating that maybe she could vote for it but she still doesn't like it. State's position is that the earlier statements indicate, I mean, she said in so many words it would substantially impair my ability to follow the law.

... .

MR. GARLAND: ... we certainly disagree with the state's characterization of her testimony. I believe her answers were that if it needs to be done, I can do it regarding the death penalty. Then when she was further questioned by Mr. Seymour she said I would follow the law, I wouldn't like it, but I would follow the law. And I think certainly at this point not everybody is going to be in favor of the death penalty, but to excuse her for cause because she doesn't like the death penalty is not sufficient grounds at this point and we object to the state's motion to excuse her for cause.

THE COURT: 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.

MR. GARLAND: We object to the Court's ruling.

THE COURT: You have a standing objection on that challenge.

The judge also said that the defense had “a standing

objection" when the defense objected to other rulings during jury selection. T20 1265 (cause challenge to juror Mukeerji; judge said, "You have a standing objection without having to renew it."), T20 1292 (Neil issue regarding juror Brown; judge again said, "You have a standing objection, you don't have to renew it any further."). Shortly afterward, the defense accepted the jury without further discussion of its objections and the jury was sworn. T 20 1282, 1297-98.

The state and federal constitutions forbid excluding jurors from capital cases because of their views about the death penalty unless those views would prevent or substantially impair the performance of their duties in accordance with the judge's instructions and the jurors' oath. See Gray v. Mississippi, 481 U.S. 648, 658 (1987); Ault v. State, 866 So.2d 674, 684 (Fla.2003) (quoting and following Gray). Chandler v. State, 442 So.2d 171, 173-74 (Fla.1983), found error in excusing for cause jurors who did not express an "unyielding conviction and rigidity of opinion regarding the death penalty".

In Gray, prospective juror Bounds "was somewhat confused," but "ultimately stated that she could consider the death penalty in an appropriate case and the judge concluded that Bounds was capable of voting to impose it." 481 So.2d at 654. Questioned by the state, she "stated that she could reach either a guilty

or not guilty verdict and that she could vote to impose the death penalty if the verdict were guilty." Id. 655. The judge erred in excusing her for cause under these circumstances.

In Ault, this Court wrote in disapproving the grant of a cause challenge (866 So.2d at 684-85) (footnotes omitted):

> During voir dire questioning by the State, Reynolds raised her hand to indicate her opposition to the death penalty. In response to questioning by defense counsel, Reynolds expressed her belief that a juror would make a better decision when calm and deliberate rather than when upset and angry, that just because she heard testimony from a witness it was not the same as proof beyond a reasonable doubt because the witness could be lying, expressed some concern about how her experiences with death in her personal life might affect her ability to find guilt or innocence or impose a proper penalty, stated that she could put her personal feelings aside and be fair in the penalty phase, and stated that she could be fair in both the guilt and penalty phases even though she was personally opposed to the death penalty. These are the only instances where Reynolds was personally questioned during voir dire. The State argued that Reynolds had indicated that she could not consider both sentences and would not impose death even if the aggravating circumstances outweighed the mitigating circumstances. The trial judge granted the challenge for cause and voiced his "agree[ment] with the State." However, the record of Reynolds' responses directly contradicts the State's recitation of her responses. Reynolds did not state that she could not consider both sentences and would not impose death even if the aggravating circumstances outweighed the mitigating. In fact, the voir dire record shows that Reynolds was not questioned about these issues at all. Thus, the trial judge's determination that it was proper to strike Reynolds for cause was premised on an erroneous recitation of her statements.
>
> Ms. Monforte's statements at bar were somewhat confused, but

she said again and again that she could follow the law and reach a verdict. She never said that she could not consider both sentences and would not impose death even if the aggravating circumstances outweighed the mitigation.

In granting the cause challenge, the judge focussed on his perception that the prosecutor "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."[3]

The judge used an incorrect legal standard. Being unsure whether it might be difficult to subordinate one's feelings and follow the law does not meet the requirements of Gray, Ault, and Chandler. Judges have wide discretion so far as the decision involves a determination of credibility, Ault, 866 So.2d at 684, but have no discretion to apply an erroneous legal standard. Cf. Johnston v. State, 863 So.2d 271, 278 (Fla.2003) (discretion in evidentiary rulings "is limited by the rules of evidence"); State v. Paul, 783 So.2d 1042 (Fla.2001) (upon bond

---

3 It appears that the judge in making his ruling focused on the prosecutor's combined remark-and-question at T19 1124-25. These remarks involved a confusing and incorrect statement of the law regarding capital sentencing combined with a convoluted question. Contrary to what the state said, section 921.141(2), Florida Statutes, requires that a jury must be convinced that there are "sufficient aggravating circumstances" before it even reaches the weighing of the aggravation and mitigation against each other. The state's remarks also indicated that there are situations in which the death penalty is mandatory.

revocation, discretion to deny new bond application is limited by statute); Nibert v. State, 574 So.2d 1059, 1061-62 (Fla.1990) ("this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law").

The state's question on this point was convoluted. It was not truly susceptible to a yes-or-no answer. T19 1124-25. Ms. Monforte later explained to the prosecutor: "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." T20 1258 (e.s.).

Although counsel did not renew his objection when accepting the jury, there was no waiver of this issue under Joiner v. State, 618 So.2d 174 (Fla.1993). The trial judge overruled Joiner's objection to the state's peremptory challenge to a black juror. Joiner later accepted the jury. This Court wrote at page 176 that he failed to preserve his issue for appeal:

> We do not agree with Joiner, however, that he preserved the Neil issue for review. He affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection. We agree with the district court that counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events

> occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. We therefore approve the district court to the extent that the court held that Joiner waived his Neil objection when he accepted the jury. [FN2] Had Joiner renewed his objection or accepted the jury subject to his earlier Neil objection, we would rule otherwise. Such action would have apprised the trial judge that Joiner still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.
>
> FN2. Were we to hold otherwise, Joiner could 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.

At bar, the judge repeatedly told the defense that it had a continuing objection to jury selection rulings. He assured counsel that he did not need to renew them. T20 1265 ("You have a standing objection without having to renew it."); T20 1292 ("You have a standing objection, you don't have to renew it any further."). He did not make the explicit statement about not needing to renew the objection. But it would be absurd to say that the same rule did not apply to the ruling about her. The state did not object to the judge's statements in this regard.

Ingrassia v. State, 902 So.2d 357 (Fla. 4th DCA 2005), reversed a conviction because the judge improperly restricted voir dire. She indicated to the defense that the issue was preserved for appeal. The defense did not renew the objection

when the jury was sworn. The Fourth DCA rejected argument that Ingrassia had waived the issue by not renewing it (id. 359-60):

> We have also reconsidered the state's argument that this issue was not preserved, because it was not explicitly renewed when the jury was empanelled. See Joiner v. State, 618 So.2d 174 (Fla.1993). However, as we recognized in Ingrassia I, this case is distinguishable from Joiner, as, here, the trial court specifically and repeatedly reassured counsel, in the course of the extensive colloquy, that the issue was on the record and preserved for appellate review. See Langon v. State, 636 So.2d 578 (Fla. 4th DCA 1994). Clearly, this record reflects that neither the state nor the court was misled into a belief that the voir dire issue was being abandoned by failing to renew it.

Ingrassia v. Thompson, 843 So.2d 986 (Fla. 4th DCA 2003) ("Ingrassia I") found that, even though the defense accepted the jury, appellate counsel was ineffective for not raising the issue of the limitation of voir dire. It distinguished Joiner because "here the trial judge repeatedly assured the defendant that the issue was 'preserved on the record' for appellate review." Id. 988.

Langon v. State, 636 So. 2d 578 (Fla. 4th DCA 1994), is similar. Langon did not renew an issue regarding the striking of a female juror on a non-gender-neutral ground. The DCA found no waiver as "the trial court made it clear that it understood that the issue in question would have to be resolved by an appeal."

Pinder v. State, 738 So.2d 428, 430 (Fla. 4th DCA 1999)

explained that the Langon rule applies when a "trial judge expressly state[s] ... that the earlier objections and colloquy would stand as the final objection for preservation purposes."

These cases conform to the principle that counsel need not undertake the empty rite of continuing to object when the court has made its ruling clear. Cf. Thomas v. State, 419 So.2d 634, 636 (Fla.1982) (once judge denied requested jury instruction, no further objection or argument needed to preserve issue for appeal: "The court, therefore, clearly understood Thomas' position, and further argument or objection would have been futile."); State v. Williams, 689 So.2d 1233, 1234 (Fla. 2nd DCA 1997) (following Thomas); Green v. State, 80 So.2d 676, 678 (Fla.1955) (one need not "do an obviously useless thing, and to continue to object to the procedure already specifically ruled upon by the trial judge.").

Counsel should be able to rely on the representations of the court. It would be unfair to apply a procedural bar where the judge, with no objection by the state, made clear his rulings and made clear that the defense had no need to renew its objection. If the state deemed this procedure improper, it was free to object at the time. Appellant would then have been on notice of the need to renew the objection. Cf. Robertson v. State, 829 So.2d 901 (Fla.2002) (appellee could not argue new

theory of admissibility of evidence on appeal where appellant did not have an opportunity to make argument on that theory).

The improper grant of a cause challenge on this ground is per se prejudicial under Gray, Ault, and Chandler. Those cases (and many others) held the error prejudicial only as to penalty rather than guilt, and ordered new penalty proceedings.

These cases were decided against a background understanding that it is the penalty phase that determines death eligibility. Bottoson v. Moore, 833 So.2d 693 (2002), however, held that a conviction of first degree murder without more makes one eligible for the death penalty. Justice Lewis explained: "An individual is eligible for the maximum penalty immediately upon being found guilty of a capital felony." Id. 728 (Lewis, J., concurring).

Bottoson was contrary to prior Florida law. Cf. Banda v. State, 536 So.2d 221, 225(Fla. 1998) ("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist."); Elam v. State, 636 So.2d 1312, 1314-15 (Fla. 1994) (quoting and following Banda); accord Buckner v. State, 714 So.2d 384, 390 (Fla. 1998); Thompson v. State, 565 So.2d 1311, 1318 (Fla.1990) ("Because no valid aggravating circumstances exist, the death sentence cannot stand and we find no need to discuss other points raised on appeal.");

Kampff v. State, 371 So.2d 1007 (Fla.1979) (vacating death sentence where state failed to establish any aggravating circumstance).

Further, and perhaps more importantly, section 921.141, Florida Statutes, requires the finding of "sufficient aggravating circumstances" (e.s.) as a requisite for a death sentence.

Before Bottoson, a conviction for first degree murder was a necessary step for death-eligibility, but not a sufficient one.

After Bottoson, a vote to convict for first degree murder is itself a vote for death eligibility. No further fact-finding is required. (If further fact-finding were required, the statute would violate the requirements of Ring v. Arizona, 536 U.S. 584 (2002).) The murder conviction is both necessary and sufficient for death-eligibility under Bottoson. The fact that Ault was decided after Bottoson does not affect this argument. The initial brief in Ault was filed in January 2002, well before the decision in Bottoson, and Ault requested only a new penalty phase. See Ault v. State, No. SC00-863 (briefs and transcript of oral argument)[4]. Hence, Ault did not decide the effect of Bottoson on the relief to be granted.

---

4 The briefs and transcript may be read at:

Grant of the cause challenge denied appellant his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

Since the guilt-phase verdict itself is now enough to qualify one for a death sentence, the erroneous exclusion of the juror was prejudicial both as to guilt and as to penalty. This Court should order a new trial.

Alternatively, if this Court finds the error prejudicial only as to the separate penalty phase, it should reverse the death sentence and remand for new jury sentencing proceedings.

POINT II

WHETHER THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO VITALE'S TESTIMONY THAT APPELLANT SAID THAT, WHEN HE WAS CHOKING HAGIN, SHE SAID SHE WANTED TO SEE HER CHILDREN.

On re-re-direct examination by the state, John Vitale said that appellant told him that, when he was choking Hagin, she said she wanted to see her children. T26 1997. Appellant objected that the evidence was hearsay, was outside the scope of recross, and had no probative value as to any issue and its prejudicial impact outweighed any probative value. T26 1995, 1986-87.

The judge overruled the outside-the-scope objection saying,

---

http://www.wfsu.org/gavel2gavel/archives/03-01.html#JAN10

"Well, I'm going to overrule the last objection because she can take him off the stand." T26 1987.

After hearing argument and a proffer, the judge concluded that Hagin's statement to appellant was admissible as an excited utterance. T26 1993-94. He said that an excited utterance is admissible if it relates to a startling event or condition while under the stress of the excitement caused by the event or condition, but that the statement need not "pertain to the causes of the event itself, as long as it's clear that when the statement is made the person is under a severe state of stress." T26 1993-94. He ruled further that the statement was not admissible as a dying declaration. T26 1994.

Further, the judge said the statement "would yield an inference of premeditation if she's making statements that would indicate that she thought she was dying and she's making this request." T26 1995. He agreed with an assertion by the state that the statement rebutted "the contention that it was an accident." T 1996. He said that, although the statement was "extremely damaging," he did not feel its prejudicial impact outweighed its probative value. T26 1996-97.

This Court reviews evidentiary decisions for an abuse of discretion, with the important provisos that the judge's discretion "is limited by the rules of evidence," Johnston v.

State, 863 So.2d 271, 278 (Fla.2003), and that judges do not have discretion to make rulings contrary to statutory or decisional law or contrary to the record. Cf. Canakaris v. Canakaris, 382 So.2d 1197, 1202-1203 (Fla.1980) ("Where a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law."; "Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness."), Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

A. Hagin's statement that she wanted to see her children was not probative and whatever probative value it had was outweighed by its prejudicial effect.

The judge said Hagin's statement "would yield an inference of premeditation if she's making statements that would indicate that she thought she was dying and she's making this request." Hagin did not say or indicate that she thought she was dying. All she said was that she wanted to see her children. The statement did not show whether appellant had a fully formed conscious intent to kill. It was not probative of

premeditation.

A statement of the victim may in some circumstances be relevant to showing a premeditated design to kill. For instance, if the defendant knew that the victim had accused him of a crime, such evidence could be relevant to motive. In such a case, however, the statement is not admitted to prove the fact of the matter asserted, and the jury receives a limiting instruction. The state made no claim at bar that Hagin's statement was admitted solely to prove that it was made. It sought its admission as substantive evidence, the judge admitted it as substantive evidence of the matter asserted, and the jury was not instructed that it could not consider the truth of the matter asserted.

Further, Hagin's statement did not go to establish a premeditated design to kill. It is equally consistent with appellant not having a fully formed conscious intent to kill.

The judge also agreed with the state that the evidence went to rebut "the contention that it was an accident." Hagin's statement that she wanted to see her children does not refute any claim of an accident, so it is not probative as to such an issue.

Again, there are circumstances in which a victim's statement can be admissible to rebut a claim of accident. Here, however,

the defense did not present a claim of an accident.

In his opening statement, defense counsel contended that Vitale was not credible because his story became ever more accusatory of appellant as he sought a deal with the state. T21 1335-39. Counsel noted that "Vitale made five statements. The first statement he said nothing about breaking anybody's neck. He simply said she's gone, and the police officers asked him, did she say anything else -- did he say anything else; no." T21 1336. He said that "each statement he gives he makes it a little worse." T21 1337. As the case went on, Vitale's lawyer was "meeting with him back in the jail, reporting to him what's happening in the case, what discovery there is. And he's learning more and more about what the state's got, so each time he address [sic] to his story and according to what his lawyer tells him." Id. The reason was that "Vitale's got a deal; the better he helps them, the better his deal is." Id. Thus Vitale learned that appellant told the police that he was passed out and could not remember what happened, "[a]nd then of course the statement of Vitale starts getting a little bit stronger against him." T21 1338-39.

It was against this background that defense counsel cross-examined Vitale about his various statements so as to discredit his testimony. The word "accident" arose only as follows:

Defense counsel asked Vitale, "the second time when you called Detective Hamrick back out, did you say that, she's gone but it was an accident, that Richie told you that?", and Vitale said he could not remember, but, after viewing a transcript, he admitted that he had made such a statement. T24 1772-74. Vitale further said that during an indiscernible part of the transcript immediately after the word accident ("it was an accident, indiscernible crying"), he had said that appellant said he broke Hagin's neck. T24 1774. He said the same thing at page 1797 of the same volume. Counsel later asked Vitale about a letter he wrote to Adrienne Parker at appellant's urging, in which he said that appellant "didn't kill her - I did" and that it "was all an accident." T24 1813.[5]

Thus, the defense made no claim that appellant killed Hagin by accident. The defense contended that Vitale made up a false claim that appellant said he killed Hagin by accident. The evidence that Hagin said she wanted to see her children did not refute the defense contention.[6]

---

5 This letter was introduced into evidence as defense exhibit 10, and appears at page 202 of the second volume of the supplemental record.

6 Later in its case, the state presented appellant's taped statement. On the tape, an officer asked appellant if the killing was accidental, but appellant did not directly respond. T29 2289. Later he said, "I really don't even know what I done," and "I put my hand on her neck and she died." T29 2291.

Regardless, the fact that Hagin wanted to see her children had no relevance to the question of whether the killing occurred by accident. Hence, the court erred in finding the statement relevant to the issue of accident.

From the foregoing, Hagin's statement that she wanted to see her children was not probative as to any material issue in the case. Further, as the judge said, it was "extremely damaging." Hence, its prejudicial effect outweighed its minimal or non-existent probative value.

Relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla.Stat.

This Court defers to a judge's discretion in weighing the probative value of evidence against its prejudicial effect,

---

The state did not claim that these statements made out a claim of accident, and the judge made no such finding. Regardless, the state may not use statements of the decedent to refute taped statements of the defendant which the state itself has put into evidence. Cf. Stoll v. State, 762 So.2d 870, 875 (Fla. 2000) ("Notably, four of these statements that the State claims Martin's testimony would rebut were introduced at trial via the taped statements the State submitted in its case-in-chief. However, the State may not introduce rebuttal evidence to explain or contradict evidence that the State itself offered."); Peterka v. State, 890 So.2d 219, 244 (Fla.2004) ("In [Stoll], we rejected the State's argument that a witness's testimony as to the victim's state of mind was relevant to rebut the defendant's taped statements introduced by the State in its case-in-

although the deference is not unlimited. Taylor v. State, 855 So.2d 1, 21-22 (2003) says (e.s.):

> … . Although section 90.403 mandates the exclusion of unfairly prejudicial evidence, a large measure of discretion rests in the trial judge to determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect. See Walker v. State, 707 So.2d 300, 309 (Fla.1997). This discretion must be exercised in accord with controlling legal principles:
>
> > In weighing the probative value against the unfair prejudice, it is proper for the court to consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction.
>
> State v. McClain, 525 So.2d 420, 422 (Fla.1988) (quoting Charles W. Ehrhardt, Florida Evidence § 403.1, at 100-03 (2d ed.1984)).

All of the foregoing considerations weigh against use of Hagin's statement that she wanted to see her children.

First, there was no need for the evidence. In no way did the state have to prove that Hagin wanted to see her children, or even that she had made such a statement. As already noted, it had no probative value; much less was it necessary to the state's case.

Second, the testimony that she wanted to see her children as she was being choked suggested an emotional basis for the jury's

---

chief.").

consideration. Examples of inflammatory evidence under section 90.403 are: "testimony that a defendant was arrested in a high crime area, general behavior of drug dealers, racial slurs, traffic citations, a party's financial status, evidence of drug use and the criminal history of a defendant." See State v. Gerry, 855 So.2d 157, 160 (Fla. 5th DCA 2003). The evidence at bar easily fits into this group in terms of emotional impact.

Third, the statement was not part of any chain of inference necessary to establish the material fact. As already said, it was not probative of premeditation. It was also not probative to refute any claim of accident, which, in any event, was not a material issue in the case.

Fourth, there was no limiting instruction to remove the prejudicial effect of this "extremely damaging" evidence.

This Court should defer to the judge's assessment of prejudice. In effect, a judge is able to take the emotional temperature of the courtroom and is best placed to observe the prejudicial effect of inflammatory evidence. Such is in keeping with the "you are there" principle of deference to a trial court's discretionary rulings, which Prof. Maurice Rosenberg discussed in a famous lecture to a seminar of appellate court judges:

> The "you are there" reasoning ... is in my opinion the chief and most helpful reason for appellate court

> deference to trial court rulings. As one trial judge pungently phrased it, he "smells the smoke of battle" and can get a sense of the interpersonal dynamics between the lawyers and the jury. That is a sound and proper reason for conferring a substantial measure of respect to the trial judge's ruling whenever it is based on facts or circumstances that are critical to decision and that the record imperfectly conveys. This reason is a discriminating one, for it helps identify the subject matter as to which an appellate court should defer to the trial judge, and suggests the measure of finality or presumptive validity that should be accorded.

Maurice Rosenberg, Appellate Review of Trial Court Discretion, 79 F.R.D. 173, 183 (1975).

On the other hand, the question of the probative value of evidence does not involve such intangible considerations: the fact that Jones threatened Smith is clearly relevant to Smith's claim of self-defense; the fact that the grandmother gave the grandson her stamp collection manifests an intent that he have the collection, and so forth. As already shown, the evidence did not have probative value.

Under the circumstances of this case, the judge erred in overruling appellant's relevancy and prejudicial impact objections.

B. Hagin's statement that she wanted to see her children was not admissible as an excited utterance.

Section 90.803(2), Florida Statutes, sets out a hearsay exception for a "statement or 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 mere fact that someone was excited speaking does not automatically make the statement admissible. The requirement that the statement relate to the startling event or condition means that it must describe or say something about the event or condition. In Willis v. State, 727 So.2d 952, 953 (Fla. 4th DCA 1998), an eyewitness's cry that "Oh, my God, he has a gun." was "a classic example of an excited utterance, admissible as an exception to the hearsay rule." Identification of an assailant within moments of the event were "near-classic examples of the excited utterance exception" in People v. Fratello, 706 N.E.2d 1173 (N.Y. 1998). The hysterical statement of a teenager running into a house and reporting that she had just been raped was "a textbook example of an excited utterance" in U.S. v. Morgan, 40 M.J. 405, 408 (U.S. Ct. of Military App.).

The statement that Hagin wanted to see her children does not fit into this category, it was not an excited utterance, and it was error to admit the statement as an excited utterance.

C. The testimony was outside the scope of re-re-direct examnation.

The statement at bar was outside the scope of re-re-direct examination, so that the judge abused his discretion by

admitting the evidence. A trial court has considerable latitude in this regard, but does not have discretion to make a ruling contrary to well-established law. The scope of redirect examination is to explain, correct, or modify testimony on cross-examination. See Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996).

On the state's re-direct examination, Vitale testified that appellant had him write letters confessing to the murder. T25 1895-1908. The state put in evidence letters from appellant to Vitale telling Vitale what to say in his letters. Recross examination focussed entirely on the letters written by Vitale. At pages 1948-65 and 1976-79 of volume 26, the defense asked him about a letter (defense exhibit 1) from Vitale to the prosecutor, Ms. Park. At pages 1967–72, it questioned him about two letters (defense exhibits 2 and 3) that Vitale sent to appellant. At pages 1966 and 1972-75, it asked him about two letters (defense exhibits 4 and 5) that he sent to appellant's mother.

These exhibits did not involve statements that Hagin wanted to see her children, and the defense did not question Vitale about any such statement.

Under these circumstances, the statement was outside the scope of re-re-direct examination under Hitchcock.

....

From the foregoing, the judge erred in overruling appellant's objections. This error was prejudicial as to guilt and independently prejudicial as to penalty. Admission of the evidence denied appellant his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

Although it may be contended that the statement was an isolated incident during the trial, the judge himself said that it was "extremely damaging." It added an irrelevant emotional tone to the conflict between Vitale's version of the facts and appellant's. It went directly to the vital issue in the case - whether appellant told the truth when he said that he did not kill Hagin.

There is not and should not be a rule that evidence is harmless because it is not repeated later in the trial. There is no policy favoring a rule allowing a party one free item of inadmissible evidence per trial.

This Court has in the past indicated that the question of whether the erroneous admission of evidence was an isolated incident may play a part of its harmless error analysis. Cf. Doorbal v. State, 837 So.2d 940 (Fla. 2003). But it has never set up a rule that a particular item of evidence is never

harmful for that reason. For instance, Doorbal involved a much more compelling case for guilt than the case at bar. Doorbal argued on appeal that testimony on a particular point constituted fundamental error. This Court held that the admission of the evidence was not fundamental error (id. 955-56):

> Finally, on this issue, Doorbal claims that error occurred when Frank Fawcett, a person with whom Lugo and Doorbal had previously conducted business, testified that he once overheard Doorbal threaten to kill his girlfriend while Doorbal was speaking on the telephone. Fawcett also testified that once when he telephoned Doorbal about a certain matter, Doorbal tersely replied that he could not be bothered because he was making a bomb. Our examination of the context in which Fawcett made these comments leads us to doubt their relevancy. Their relationship to matters material to Doorbal's trial is strained at best. However, we also note that the comments were relatively isolated incidents in a protracted trial. When we further note the overwhelming amount of unrebutted evidence presented against Doorbal, we cannot conclude that Fawcett's comments "reache[d] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." McDonald, 743 So.2d at 505. Relief based on fundamental error is not warranted.

Somewhat similar is Fitzpatrick v. State, 900 So.2d 495 (Fla.2005), which involved the denial of a motion for mistrial. This Court noted that denial of a motion for mistrial is reviewed for an abuse of discretion. Id. 516-17. It then discussed the harmless-beyond-a-reasonable doubt standard, and wrote at page 517 (e.s.):

> On this record, we conclude that there was no reasonable possibility that Bousquet's testimony affected the jury verdict, and it was therefore harmless beyond a reasonable doubt. There was overwhelming permissible evidence of Fitzpatrick's guilt. The jury was presented with DNA evidence matching Fitzpatrick to the source of the semen recovered from the victim and eyewitness testimony establishing that Romines was last seen alive with Fitzpatrick three hours before she was discovered. The only arguably impermissible testimony placed before the jury was the fact that Fitzpatrick simply stated that he thought he needed an attorney. This Court in [Jones v. State, 748 So.2d 1012 (Fla.1999)], stating that it was convinced "beyond a reasonable doubt that the error complained of did not contribute to the verdict," emphasized that "although the witness did improperly comment on the defendant's invocation of his right to silence, the remark was neither repeated nor emphasized." Jones, 748 So.2d at 1022; see also Cole v. State, 701 So.2d 845, 853 (Fla.1997) (concluding that a remark regarding the defendant's prior criminal history, which the witness had been instructed by the trial court not to mention, was isolated and was not focused on and therefore was not so prejudicial as to require reversal). Here, the impermissible remark was neither repeated nor emphasized, and the trial judge expressly indicated the lack of importance he felt the jury attributed to the remark. Based upon the review of the record, this Court concludes that this isolated and singular comment does not constitute harmful error.

At bar, of course, the judge indicated the opposite. He said the evidence was "extremely damaging." Its admission was not harmless beyond a reasonable doubt, and this Court should order a new trial.

Even if its admission were harmless as to guilt, it was prejudicial as to penalty. The state relied on the statement in its argument to the jury that appellant should receive a death

sentence (T35 3024-25):

> You heard the testimony of John Vitale that Richard Johnson, the last thing that Tammy Hagin said was I want my children. We have Tammy Hagin being choked, in anticipation of death, pain and knowing that she's being murdered and saying, the last conscious moment of her life, I want my children. And of mental torture of that is beyond human, understanding where she was coming from at that moment knowing that she wouldn't ever see her children again. Heinous, atrocious and cruel.

It concluded its final argument by relying on the statement (T35 3030-31):

> State would submit, I'm not going to go on and on, I'm going to sit down, but I would submit that when you add up the aggravators in this case, you weigh them, you consider what went into the murder in this case, not just that it was a murder, but what went into this murder; the use of a ligature, depress, compressing of the throat, time lapse that it took, the amount of force that it took, and the effect that it had on Tammy Hagin who knew she was being murdered and said I want my children, and you add it all up and you balance the mitigators and aggravators, there's one sentence in this case, it's fair and appropriate and compelled by law, and that's the, I would submit that that sentence as difficult as is it, maybe it's not going to come easy, but your sentence, your recommendation to the judge should be the death sentence in this case. Thank you.

Finally, the judge relied on the statement three times in his sentencing order. R6 917, 918, 930.

Hence, the evidence was not harmless beyond a reasonable doubt as regards the sentencing decision. If this Court does not order a new trial, it should order resentencing.

POINT III

WHETHER THE COURT LACKED JURISDICTION TO TRY APPELLANT BECAUSE THE INDICTMENT WAS IMPROPERLY AMENDED.

Florida law has provided from its earliest days that only a grand jury may amend an indictment as to matters of substance. Cf. State v. Gleason, 12 Fla. 190 (Fla. 1868) ("Indictments are found upon the oaths of a jury, and subject only to be amended by themselves") (quoting common law authority in other context); State ex rel. Wentworth v. Coleman, 163 So. 316, 317 (Fla. 1935). This is an issue of fundamental jurisdictional error subject to de novo review.

In Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997), the indictment charged Akins with attempted felony murder. After he pled guilty as part of a plea agreement, he stipulated to amending the indictment to allege attempted premeditated murder. The DCA held that the stipulated amendment was unauthorized (id. 588-89):

> In the instant case appellant was charged by indictment, and Florida cases have long held that an indictment, unlike an information, cannot be amended, not even by a grand jury, to charge a different, similar, or new offense. Smith v. State, 424 So.2d 726, 729 (Fla.1983)("[A] grand jury has no authority to amend an indictment to charge an additional or different offense," but "may file a completely new indictment regarding the same alleged criminal actions, even though a prior indictment is pending."), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983). Amending an indictment by stipulation to charge attempted premeditated murder as was done in the instant case, therefore, is not permissible. See Huene v. State, 570 So.2d 1031, 1032

> (Fla. 1st DCA 1990)("An indictment is amended when it is so altered as to charge an additional or different offense from that found by the grand jury."), review denied, 581 So.2d 1308 (Fla.1991). The trial court thus lacked jurisdiction to sentence appellant for attempted first-degree felony murder because this offense was no longer a crime at the time he was sentenced, and the court lacked jurisdiction to sentence appellant for attempted premeditated murder because an indictment cannot be amended by stipulation of the parties. An "invited error" analysis is inapplicable in the instant case because jurisdiction cannot be conferred on the court by agreement of the parties. Evans v. State, 647 So.2d 180 (Fla. 1st DCA 1994) ("The parties cannot, even by stipulation, confer jurisdiction upon a court where no jurisdiction exists.")

At bar, a grand jury indicted appellant in 2001 for murder, kidnapping, sexual battery, and grand theft. R1 1. In 2004, the state said it would nolle pros the grand theft charge, and moved to consolidate the 2001 murder case with a newly filed case charging by information that appellant robbed Hagin. T11 378-82; R4 601. Appellant did not oppose the motion. T11 378. The state never actually filed a written nolle pros as to the grand theft. It gave the court as an exhibit a sort of mock indictment purporting to show that in 2001 the grand jury charged appellant with murder, kidnapping, sexual, battery, and robbery. S3 210.

When the case came up for jury selection, the state amended the robbery charge over defense objection to allege the taking of U.S. currency in excess of $300. R14 486-88. Appellant was

not arraigned on this amended charge.

By agreement of the parties, T14, 472-75, the judge read the "indictment" to the potential jurors. T14 507-509. The state argued the jury an alternative theory of felony murder with robbery as the underlying felony. T32 2627, 2631, 2635. The jury instructions referred to all four crimes (murder, kidnapping, sexual battery, and robbery) as being alleged in the indictment. R5 628, 639, 642. Presumably the "indictment" was sent back with the jury for consideration in its deliberations pursuant Rule 3.400(a), Florida Rules of Criminal Procedure, although the record is silent on this point. The verdict bore only the 2001 case number. R5 625-27. On the robbery count, the jury found appellant guilty of grand theft. R5 626-27. At sentencing, the judge entered separate judgments and sentences for the 2004 and 2001 cases.

Under these circumstances, there was an unauthorized amendment of the indictment. The grand jury did not find probable cause to charge robbery. The state apparently saw this as making problems for a robbery felony murder theory. It grafted a robbery charge onto the indictment by "consolidating" the robbery charge and orally dropping the grand theft except to keep it as a lesser included offense. It then argued to the jury an alternative theory of felony murder with robbery as the

underlying felony. Thus, it not only amended the grand theft charge, it overruled the grand jury's decision not to charge robbery. It expanded its leeway in making a claim of robbery felony murder.[7]

The fact that the jury rejected the robbery theory (and hence also a theory of robbery felony murder) does not change the fact that there was an unauthorized amendment to the indictment. Even with the defense attorneys' assent, the amendment constituted fundamental error under settled Florida law, and amounted to a dismissal of the indictment. The resulting convictions were a nullity and denied appellant his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should vacate the convictions and sentences and order a new trial.

POINT IV

[7] Presumably, the state was concerned that a conviction of grand theft might constitute a double jeopardy bar to a robbery theory. Cf. U.S. v. Dixon, 509 U.S. 688 (1993). Dixon violated his terms of pretrial release by committing a drug offense. He was found guilty of contempt of court for the violation of the terms of pretrial release. The Supreme Court held that the contempt conviction was a double jeopardy bar to prosecution on the drug charges.

WHETHER THE COURT ERRED IN LETTING THE STATE QUESTION APPELLANT ABOUT THE TRUTHFULNESS OF THE TESTIMONY OF A STATE WITNESS AND USING CROSS-EXAMINATION TO REITERATE THE WITNESS'S TESTIMONY.

The following occurred on the state's cross-examination of appellant (T 31, 2515-16):

Q Well, now, didn't he come in this courtroom and say that he heard a woman crying, thought it was Adrienne?

A Yes, and I just told you she wasn't crying, she was whining.

Q I'm not asking you what happened, I'm asking you did you hear Tom's testimony?

MR. GARLAND: Your Honor, I object; he's asking his recollection of another witness's testimony. He's trying to answer. Not given an opportunity to answer the questions.

MR. SEYMOUR: Judge, I think he's had plenty of opportunity. I'm trying to ask the questions.

MR. GARLAND: And he's asked the same questions over and over and over again.

THE COURT: Overrule the objection at this point. But you do need to be careful about repetitive.

BY MR. SEYMOUR:

Q 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?

A I don't remember him saying high pitched, but I do remember him saying that she was crying, but he didn't see her.

Q Is that truthful or not, was she or was she not crying?

A She was not crying.

Q Okay. Then you heard Stacy say that she heard her crying?

A Heard her when she was walking out of the room. She didn't say that she was crying.

Q Okay. She said she had heard crying then went out and the woman was holding the sides of the casing and you yanked her back in the room?

A I didn't yank her, I pulled her.

Q So what you're telling us is that testimony is not true?

A Stacy said pulled, not yanked.

It is improper to question a witness about the veracity of another witness's testimony:

> First, allowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility. Second, although the fact that two witnesses disagree does not necessarily establish that one is lying, such questioning may lead the jury to conclude that the witness being questioned is actually lying. Finally, unless there is evidence that the witness is privy to the thought processes of the other witness, the witness is not competent to testify concerning the other's state of mind.

Knowles v. State, 632 So.2d 62, 65-66 (Fla.1993); see also Sullivan v. State, 751 So.2d 128, 129-30 (Fla. 2nd DCA 2000).

Reviewing cases from various jurisdictions, the Utah Supreme Court wrote in State v. Emmett, 839 P.2d 781, 787 (Utah 1992) (footnotes omitted):

> The prosecutor also asked Emmett if he was claiming that his son was lying. Several courts have noted that it is improper to ask a criminal defendant to comment on the veracity of another witness. The question is improper because it is argumentative and seeks information beyond the witness's competence. The prejudicial effect of such a question lies in the fact that it suggests to the jury that a witness is committing perjury even though there are other explanations for the inconsistency. In addition, it puts the defendant in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury. This question, therefore, was also improper.

See also State v. Manning, 19 P.3d 84, 100-101 (Kan.2001) ("Questions which compel a defendant or witness to comment on the credibility of another witness are improper. It is the province of the jury to weigh the credibility of the witnesses."; discussing cases from numerous jurisdictions); United States v. Œston, 299 F.3d 1130, 1136 (9th Cir.2002) (error to ask if defense witness "would change his testimony if he knew that other officers had testified to the contrary, or alternatively, if the other officers were mistaken in their respective recollections."); State v. James, 557 A.2d 471, 473 (R.I.1989) ("A witness's opinion about the truth of the testimony of another witness is not permitted.").

Along the same lines, a party may not use cross-examination as a guise to reprise the testimony of its own witnesses. The concurring opinion in Gonzalez v. State, 450 So.2d 585, 587 (Fla. 3rd DCA 1984) (Pearson, J., concurring), states:

> The functions of cross-examination are to elicit testimony concerning the facts of the case and to test the credibility of the witness. What a witness did or did not hear other witnesses say in the courtroom tends neither to prove nor disprove any material fact in issue and is therefore totally irrelevant unless, which is hardly the case here, the witness's ability to hear is in issue. Thus, it is clear that the prosecutor's foregoing and like questions can lead to no admissible testimony and serve the singular and improper purpose of recapitulating the testimony of the State's witnesses at a point in the trial when such recapitulation is not called for. I am not aware of any authority which accords to any party the right to make a closing argument in mid-trial and a second at the trial's conclusion.

In view of the foregoing authorities, the trial court abused its discretion in overruling the defense objection. Since the defense rested entirely on appellant's credibility, the attack on his credibility in this manner was improper. As this Court wrote in Knowles, it invaded the province of the jury, it could have led the jury to consider that appellant was lying merely because his testimony was contrary to that of Stacy Denigris, and it put incompetent evidence before the jury. As the Utah Supreme Court wrote in State v. Emmett, it put appellant "in the untenable position of commenting on the character and motivations of another witness who may appear sympathetic to the jury."

The state's theory was that appellant kidnapped Hagin by forcing her into and through the house to the bedroom where he committed a sexual battery on her and killed her. The conflicts

between the testimony of Denigris and appellant were crucial to the jury's consideration of this point. The improper cross-examination of appellant on this point was not harmless beyond a reasonable doubt. It denied appellant his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should order a new trial.

POINT V

WHETHER THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT THE STATE'S THEORIES OF SEXUAL BATTERY AND KIDNAPPING AND FELONY MURDER WITH THOSE OFFENSES AS THE UNDERLYING FELONIES, AND THE FELONY MURDER AGGRAVATING CIRCUMSTANCE.

When the state rested and at the close of the evidence, appellant moved for judgment of acquittal as to the charged offenses of armed kidnapping, armed sexual battery, and first degree murder, which motions the court denied. T 2375-84, 2595-96. The court erred in denying the defense motions as to the state's theories of sexual battery and kidnapping and felony murder with those offenses as the underlying felonies.

The Due Process Clauses of the state and federal constitutions forbid conviction where the evidence is insufficient, and their Cruel and Unusual Punishment Clauses impose a heightened standard of due process in capital cases.

A court must grant a motion for acquittal if the state's

circumstantial evidence fails to rebut the defendant's reasonable hypothesis of innocence, or if it fails to present substantial, competent evidence of guilt. In Francis v. State, 808 So.2d 110 (Fla. 2001), this Court considered first whether the state's evidence refuted the theory of defense. Id. 131-32. Next, it considered whether the state had presented competent evidence to support the verdict. Id. 132-34.

The trial court and the appellate court are equally able to determine if it is proper to grant a motion for acquittal. State v. Smyly, 646 So. 2d 238 (Fla. 4th DCA 1994). The appellate court is to "determine sufficiency as a matter of law". Tibbs v. State, 397 So. 2d 1120, 1123, n. 10 (Fla. 1981).

A. Sexual battery.

Defense counsel contended that all the evidence was that the sexual contact was consensual. T30 2376-77. The judge rejected the argument without explanation. T30 2380.

The state's main witness, John Vitale, testified that appellant and Hagin engaged in consensual sex at Savannas Park. T23 1692-93. The three of them then returned to the house, where Hagin began hollering and acting out. Ms. Shipp testified to a blood curdling scream while Hagin was still outside the house. She said Hagin screamed that she did wanted to go home and did not want to go in and clean up. Shipp did not know what

happened after Hagin went inside. The people in the house testified that appellant pulled Hagin into the bedroom, but they did not testify to hearing anything thereafter, and their testimony did not contradict appellant's police statement and his testimony that there was consensual sex in the bedroom.

Thus, the facts in this case are not comparable to those cases in which this Court has upheld a sexual battery theory on stronger evidence, such as Carpenter v. State, 785 So.2d 1182 (Fla.2001) or Darling v. State, 808 So.2d 145 (Fla.2002).

In Carpenter, there was a great disparity between Carpenter's age (32) and the victim's (62), there was substantial evidence regarding the chastity of the victim, there were several injuries to her vagina consistent with forceful penetration, she had been gagged with her bra, and Carpenter made contradictory statements to the police about the incident which were not consistent with the physical evidence. 785 So.2d at 1195-96. In Darling, the medical examination revealed evidence contrary to the claim of consensual sex, and the evidence was not consistent with Darling's claims about his relationship with the victim. 808 So.2d at 156.

At bar, the state's evidence did not support a finding of sexual battery. It did not refute the defense claim of consensual sexual intercourse, and the jury could reach a

finding of sexual battery only by speculation.

B. Kidnapping.

The indictment alleged that appellant confined, abducted or imprisoned Hagain "with intent to hold for ransom or reward or as a shield or hostage, and/or commit or facilitate commission of a felony, and/or inflict bodily harm upon or to terrorize" her. R1 2. The jury was instructed that the underlying felonies could be sexual battery or robbery. R33 2718. As already noted, the jury specifically did not find appellant guilty of robbery.

Defense counsel moved for judgment of acquittal as to the kidnapping charge, arguing that the state had at most shown false imprisonment. T30 2376. Again, the judge denied the motion without explanation. T30 2380.

John Vitale testified for the state that Hagin could not decide whether she wanted to go home or back to appellant's and Vitale's house as they drove around. T23 1694. Shipp said Hagin was screaming that she wanted to go home and did not want to go inside and clean up. T22 1565, 1567. Vitale said Hagin said she wanted to go home, but when she went inside she also said she wanted to go to the bathroom. T23 1696. As Denigris came out of her bedroom, appellant yanked Hagin into his bedroom. T23 1699. Vitale talked with Denigris and Beakley,

and it was quiet in appellant's bedroom. T23 1699-1701.

There was no evidence or any claim of kidnapping for ransom or hostage-taking. Further, the evidence does not show that appellant forced Hagin into the house or yanked her into the room with any intent to commit a felony or to terrorize her or cause bodily harm. The evidence showed that she was acting out in front of the house and that appellant forced her inside and into the bedroom to calm her down. This may have been an unlawful detention amounting to a false imprisonment, but the evidence does not show a kidnapping. The state did not refute that, once in the room, appellant and Hagin engaged in consensual sex. The state did not show a detention in order to commit a felony. Under these circumstances, it failed to prove a kidnapping.

...

The verdict form for first degree murder instructed the jury that it had to answer whether the murder was premeditated murder, felony murder, or both, and bore the notation "check only one." R5 625. When the verdict was returned, there was a check mark on the line "Both Premeditated Murder and Felony Murder". Id.

This check mark, however, did not necessarily mean that the jury was unanimous as any of the several theories of first

degree murder. The judge's instructions said in general that the verdict had to be unanimous. T33 2739. They did not say the jury had to be unanimous as to the theory of murder. It is possible that less than a majority of the jurors found premeditated murder, and that the remainder were divided between two theories of felony murder (with sexual battery and kidnapping as the underlying felony). It is possible that eight jurors found all theories, and four found only one or another theory. There is no way of telling from the verdict that the jury unanimously found that the murder was premeditated. Since the jury did unanimously find sexual battery and kidnapping, one must assume that all or at least some of them found felony murder. Given that, they could not check the line for premeditated murder only. Hence, they had to choose between the felony murder line and the line for both premeditated murder and felony murder. The check mark on the line for both forms of murder may indicate that they were unanimous as to all theories or that they were divided with different factions finding one or another theory. There was no place for them to check off to show a split decision, and they were told to check off only one of the three options provided. The option covering both theories was the closest to a description of a verdict that was not unanimous as to the theory of first degree murder.

Under this circumstance, the insufficiency of the evidence as to the underlying felonies for felony murder requires a new trial. Appellant was entitled as a matter of state and federal constitutional law to a unanimous verdict. We cannot know if the jury unanimously found premeditated murder. This Court must order a new trial as to the murder charge, and instruct that the court enter a judgment of acquittal as to kidnapping` and sexual battery.

The error was independently prejudicial as to penalty. Having found both sexual battery and kidnapping, the jury must have weighed both in reaching its penalty decision. Likewise, the judge explicitly relied on both in undertaking the delicate weighing decision in reaching his sentencing decision. He gave the felony circumstance great weight. Under these circumstances, the use of these felonies at sentencing was not harmless beyond a reasonable doubt, and this Court should order resentencing.

POINT VI

WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

The death penalty law is reserved for the most aggravated

and least mitigated murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) held that the death penalty statute provides "concrete safeguards beyond those of the trial system to protect [the defendant] from death where a less harsh punishment might be sufficient." This Court wrote at page 8:

> Review of a sentence of death by this Court, provided by Fla.Stat. s 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

Hence: "Our law reserves the death penalty only for the most aggravated and least mitigated murders". Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993). Accord Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997).

> Our proportionality review requires us to "consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, [cit.]. Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, [cit.]. We conclude that this homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate.

Terry v. State, 668 So. 2d 954, 965 (Fla. 1996).

Proportionality review "involves consideration of the totality of the circumstances of a case and comparison of that case with other death penalty cases." Snipes v. State, 733 So. 2d 1000, 1007 (Fla. 1999).

> Proportionality review "requires a discrete analysis of the facts," Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in Tillman v. State, 591 So. 2d 167 (Fla. 1991):
>
> > We have described the "proportionality review" conducted by this Court as follows:
> >
> > > Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.
> >
> > Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.

> ... Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.
>
> Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of "the totality of the circumstances in a case" in comparison with other death penalty cases. Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (citing Terry, 668 So. 2d at 965).

Urbin v. State, 714 So. 2d 411, 416-417 (Fla. 1998).

In Vorhees v. State, 699 So.2d 602 (Fla.1997), and Sager v. State, 699 So.2d 619 (Fla.1997) Donald Vorhees and Robert Sager murdered Audrey Steven Bostic. The three drank together at Bostic's residence. Voorhees and Sager tied Bostic to a chair after Sager and Bostic began fighting. They looked for something to steal, then beat and kicked and tried to gag Bostic because he was making noise. They dragged him around and kept hitting him, then stabbed him several times in the throat. He died of extensive injuries including a broken hyoid bone, a severed windpipe, a broken nose, facial bruising, and cuts on his arms. Both men were convicted of murder and sentenced to death.

In sentencing Sager, the court found in aggravation that the crime was committed during a robbery (great weight), and that the crime was heinous, atrocious, or cruel (great weight). Sager, 699 So.2d at 621. In mitigation, it found that he was

under the influence of extreme mental or emotional disturbance at the time of the murder (little weight); that his capacity to appreciate the criminality of his conduct and to conform his behavior to the requirements of law was substantially impaired (very little weight; that he was 22 at the time of the murder (very little weight); and that he was an accomplice whose participation was relatively minor (very little, if any, weight). Id.

As to Vorhees, the court found that in aggravation that the crime was committed while Voorhees was engaged in a robbery (great weight), and that the crime was heinous, atrocious, or cruel (great weight). Vorhees, 699 So.2d at 606. It found in mitigation that he was under an extreme mental or emotional disturbance at the time of the offense (minor weight); that he was twenty-four years old at the time of the crime (very little weight); and that he was an accomplice whose participation in the crime was relatively minor (very little weight), and was emotionally, physically, and sexually abused as a child (not substantial weight). Id.

This Court found the death sentences in those cases disproportionate. It wrote in Vorhees, 699 So.2d at 614-15:

> Turning to the penalty phase, we find dispositive Voorhees' issue 15: whether the death penalty is proportionate. Our proportionality review is not a comparison between the number of aggravating and

mitigating circumstances. See Terry v. State, 668 So.2d 954, 965 (Fla.1996). Rather, it requires this Court to consider the totality of the circumstances in a case and to compare the case with other capital cases. Id. By ensuring that death not be imposed as a punishment for a murder in cases similar to those in which death was deemed an improper punishment, proportionality prevents the imposition of "unusual" punishments contrary to article I, section 17 of the Florida Constitution. See Kramer v. State, 619 So.2d 274, 277 (Fla.1993). The totality of the circumstances in this case do not place this murder among the most aggravated and least mitigated for which the death penalty is reserved. Id.

In Kramer, after drinking beer with the victim, the defendant and the victim began arguing. When the victim pulled a knife on the defendant, the defendant threw a rock at the victim, hitting the victim in the head. The defendant then hit the victim again in the head with the rock, killing him. In aggravation, the trial court found two aggravators: prior violent felony conviction; and the murder was heinous, atrocious, or cruel. Id. at 277-78. Nevertheless, we found that the evidence taken in the worst light showed that this was a spontaneous fight, occurring for no apparent reason between the defendant, a disturbed alcoholic, and the victim, who was legally drunk. Id. at 278. Based on this finding and the mitigation presented, which included alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison, we found death not to be a proportionate penalty. Id.

As in Kramer, we find the evidence here does not support the imposition of the death penalty. The two aggravators in this case are overshadowed by the mitigation and circumstances of this murder: the murder occurred after a drunken episode between the victim and the defendant. There was direct evidence that Voorhees, Sager, and the victim were all intoxicated during the murder. This evidence came in through Voorhees' confession and statements made by Sager in which he acknowledged that the three were drinking. This is also corroborated by the victim's

> blood alcohol level of .24 percent. As well, there was expert testimony that Voorhees began drinking at an early age, suffered from alcoholism, and had an abnormal reaction to alcohol. Cf. Nibert v. State, 574 So.2d 1059, 1063 (Fla.1990) (finding that defendant suffered from extreme alcohol abuse and had been drinking during commission of crime was relevant and supportive of mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of defendant's capacity to control his behavior). The totality of the circumstances and the mitigation presented here require us to conclude that death is not a proportionate penalty in this case.

Sager contains a similar analysis.

The case at bar presents a situation like that in Vorhees and Sager. The murder occurred after a very long night of drinking involving appellant and Hagin. The judge found that appellant was under the influence of alcohol at the time of the murder, and Hagin had a high blood alcohol reading. Appellant began drinking at an early age, and had a long history of alcohol and drug abuse.

The case at bar involves one additional aggravator not found in Vorhees and Sager: that appellant was put on community control at the time of the murder. The judge only gave this circumstance moderate weight, however, and the evidence was that appellant was put on community control after stealing his mother's car. Further, the circumstance was counterbalanced by appellant's lack of a significant criminal record, a mitigator

that did not apply to Vorhees and Sager. The judge at bar gave substantially more weight to the mitigation than in those cases, and the mitigation at bar was more extensive.[8]

The death sentence at bar is disproportionate. Its imposition denied appellant's rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should reverse the death sentence and remand for entry of a life sentence.

POINT VII

WHETHER THIS COURT SHOULD REVERSE THE DEATH SENTENCE BECAUSE THE STATE SOUGHT THE SENTENCE BECAUSE APPELLANT EXERCISED HIS RIGHT TO PLEAD NOT GUILTY AND BE TRIED BY A JURY.

The state offered appellant a life sentence in exchange for a guilty plea. T13 463-64, 495. He declined the offer. Id. The state then successfully prosecuted him and obtained a death sentence.

The state's action of obtaining a death penalty because appellant rejected its offer renders his death sentence illegal and unconstitutional. The prosecution has a unique role in death penalty cases: a court may impose a death sentence only if

8 Additionally, although the judge did not consider it in mitigation, appellant was 24 (the same age as Vorhees) at the time of the murder.

the prosecution elects to seek such a sentence. Further, the death penalty itself is qualitatively unlike other punishments. Constitutional and policy considerations require extra safeguards to prevent its arbitrary or vindictive application.

A Florida judge cannot impose a death sentence unless the state first seeks a death sentence. In State v. Bloom, 497 So.2d 2 (Fla.1986), this Court determined that the state has essentially unfettered discretion in deciding whether to pursue a death sentence, except where its decision violates the defendant's constitutional rights. The only curb on the state's discretion arises "only in those instances where impermissible motives may be attributed to the prosecution, such as bad faith, race, religion, or a desire to prevent the exercise of the defendant's constitutional rights." Id. 3 (quoting and following federal authority).

In Bloom, a judge had conducted a pretrial hearing and determined that the state lacked sufficient evidence to obtain a death sentence. This Court concluded that this ruling violated the constitutional doctrine of separation of powers.

This Court has since explained that under State v. Bloom a court "cannot decide if the State can seek the death penalty." Burk v. Washington, 713 So.2d 988 (Fla. 1998).

It follows that a judge has no discretion to refuse the

state's agreement to a life sentence in a capital case because the sentence is too lenient. Once the state decides not to seek a death sentence, the only possible sentence is life imprisonment under section 775.082(1), Florida Statutes.

There is nothing new about the principle that capital cases are qualitatively different from other felony cases. For instance, in 1932, long before Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court established the right to court-appointed counsel in capital cases in Powell v. Alabama, 287 U.S. 45 (1932), the "Scottsboro boys" case. Likewise, Florida accorded the right to appointed counsel in capital cases but not in other felony cases. See Johnson v. Mayo, 158 Fla. 264, 28 So.2d 585, 587 (1947) ("We have repeatedly held that in cases where the charge was less than a capital offense no duty rested upon the trial court to supply counsel for the defendant."); Watson v. State, 142 Fla. 218, 194 So. 640, 642 (1940) (Florida law "restricts the power of the courts to appoint counsel for indigent defendants at public expense to capital cases. The case at bar is not a capital case and therefore no duty rested on the lower court to supply counsel for plaintiffs in error at public expense."). Other safeguards also applied only to capital cases. Cf. Cotton v. State, 85 Fla. 197, 95 So. 668 (1923) (jury of six could try non-capital case, but capital case

required jury of twelve); Morrison v. State, 42 Fla. 149, 28 So. 97 (1900) (instructions to capital case jury had to be in writing); Rabon v. State, 7 Fla. 10 (1857) (in capital cases writs of error were taken as of of right; rule otherwise in non-capital cases). In general, the doctrine of "in favorem vitae" is hardly a new one. Cf. Stettinius v. U.S., 5 Cranch C.C. 573 (C.C.D.C. 1839); 4 W. Blackstone, Commentaries, Ch. 26, IV; Ch. 27, IV.

The state and federal constitutions forbid imposition of a harsher sentence, much less a death sentence, as a consequence of invoking the constitutional rights to plead not guilty and have a trial by jury. Exercise of a constitutional right should not be punishable by death. Yet at bar, the difference between a life sentence and a death sentence for first degree murder was a direct consequence of appellant's exercise of those rights.

United States v. Jackson, 390 U.S. 570 (1968) involved a statute providing that only a jury could impose a death sentence for kidnapping. One who entered a guilty plea or otherwise waived trial by jury could not be sentenced to death.

The Court wrote that, under the statute, a "defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds

him guilty and does not wish to spare his life, he will die." Id. 581. "The inevitable effect," it wrote, was to discourage exercise of the rights to plead not guilty and be tried by a jury, adding: "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." Id.

The Court wrote that the crucial question was not the statute's intent, but its effect: "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear." Id. 582.

The Court wrote that it did not matter that judges have the power to reject involuntary guilty pleas and waivers of jury trial, adding (id.; footnote omitted):

> For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital

punishment provision of the Federal Kidnaping Act.

A similar analysis applies at bar. Had appellant abandoned his rights and plead guilty, he could not have been sentenced to death. The procedure at bar had no other purpose or effect than to penalize the exercise of his constitutional rights. Hence it was "patently unconstitutional."

Instructive on this point is Wilson v. State, 845 So.2d 142 (Fla.2003). Wilson involved the role of the trial judge in sentence bargaining[9] in non-capital cases. As already noted, the judge has a uniquely limited role in capital sentencing. If the state decides not to seek a death sentence, the judge can only impose a mandatory life sentence upon conviction. Likewise, a judge cannot impose a death sentence if the state does not seek a death sentence. Hence, the analysis concerning judges in Wilson applies to prosecutors in the limited situation at bar.

Wilson noted that, under United States v. Jackson, "any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and

---

9 Wilson used the term "plea bargaining." That term is ambiguous, however, and refers to entering a plea in exchange for reduction or dismissal of charges as well as for a reduction of sentence. A judge can have no role in reducing or dismissing charges in the context discussed in Wilson and at bar, which focuses on negotiations for reduction of the sentence. To clarify this distinction, appellant will refer to the practice here in question is "sentence bargaining."

deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional." Wilson at 150. This Court was concerned with how to establish a rule for determining when there was a presumption that a judge's role in sentence bargaining violated the foregoing principle. It approved a policy of review of the totality of the circumstances. Id. 156. It noted that one consideration was judicial participation in sentence negotiations followed by a harsher sentence. Id. It then identified a non-exclusive list of four other factors: (1) whether the judge initiated the discussions; (2) whether the judge appeared to have departed from the role of an impartial arbiter; (3) the disparity between the sentence offered and the sentence imposed; and (4) the lack of any facts on the record that explain the increased sentence other than that the defendant exercised his or her right to a trial or hearing. Id.

Again, Wilson was concerned with judicial vindictiveness. Nevertheless, the core evil to be avoided is the imposition of a harsher sentence simply because one has exercised one's constitutional rights. As noted above, a judge's power to engage in sentence bargaining in capital sentences is non-existent. Bloom gives the state the role that the judge played in Wilson. Further, under United States v. Jackson, the role of the judge is not the crucial consideration: there the court was

concerned with the fact that the decision to go to trial before a jury triggered the possibility of a death sentence. Under the unique circumstances of capital sentencing, the rules set out in Wilson should apply at bar.

Two of the Wilson factors show that this Court should disapprove of the procedure at bar. First, the disparity between the sentence offered and the sentence received is literally the difference between life and death. Second, nothing on the record explains the increase in the sentence other than that appellant exercised his right to a trial. It would be absurd to think that the able and experienced prosecutors were not fully aware of their case for a death penalty before trial.

The rule that appellant proposes does not affect the prosecution's constitutional power to enter into charge-bargaining, nor does it affect its power to waive or seek a death sentence. Indeed, in many if not most capital prosecutions the state already elects not to seek a death sentence regardless of whether the defendant goes to trial. Appellant's rule affects a narrow range of cases in which the decision to seek the death penalty hinges on the defendant's exercise of his constitutional rights to plead not guilty and go to trial.

It is equally unconscionable to induce a person to plead guilty upon pain of death or to punish one with a death sentence for going to trial. As Justice Scalia has written for the Supreme Court in another context, "there is already no shortage of in terrorem tools at prosecutors' disposal." Blakely v. Washington, 542 U.S. 296, -, 124 S.Ct. 2531, 2542 (2004).

It may be said that a ruling in appellant's favor will be harmful to capital defendants in general. Appellant, however, does not represent capital defendants in general. Further, it is not the business of the courts to make life easier or harder for capital defendants or for any other litigants. The courts must protect the constitutional rights of all litigants. The procedure at bar violated appellant's constitutional rights.

If the state truly believes that a case is appropriate for capital punishment, there is no public policy favoring bargaining that away. If it does not believe that a case is appropriate for death, it would be unconscionable to seek it only as a bargaining chip. Public policy does not favor a contract entered into under threat of death.

Because appellant was found guilty of first degree murder, he is condemned to spend the rest of his life in prison. Because he invoked his right to a jury trial, the term in prison is to end by lethal injection. This Court should not

countenance a death sentence under the circumstances at bar. Appellant's sentence violated his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. This Court should vacate the death sentence.

POINT VIII

WHETHER THE COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

It was error for the court to find the murder especially heinous, atrocious, or cruel (HAC).

The judge noted the medical examiner's testimony that Hagin 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. R6 917. He also noted Vitale's testimony that appellant said it took longer than he thought to break someone's neck and that the last thing Hagin said as she was being choked was a request to see her children. Id. He noted that the circumstance applies when there is a conscious victim with a foreknowledge of death, extreme anxiety, and fear, and it focuses on the mental anguish of the victim and the pain suffered by the victim. Id.

The judge relied on the testimony that appellant forced Hagin into the house and into the bedroom, that there was a painful cut to her head and she was bruised about the head. R6

918. He wrote that there was evidence that "she knew she was about to be killed because she asked to see her children." Id. He concluded that Hagin "experienced extreme terror, agony and pain before her death. Her murder was unnecessarily torturous, conscienceless, and pitiless." Id.

Speculation cannot substitute for proof of this aggravating circumstance. See Knight v. State, 746 So.2d 423, 435-36 (Fla.1998). "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

Not every strangulation is HAC. This Court wrote in Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989):

> The trial court found the murder was especially heinous, atrocious, or cruel because the evidence suggested the victim was manually strangled. We note, however, that in the many conflicting stories told by Rhodes, he repeatedly referred to the victim as "knocked out" or drunk. Other evidence supports Rhodes' statement that the victim may have been semiconscious at the time of her death. She was known to frequent bars and to be a heavy drinker. On the night she disappeared, she was last seen drinking in a bar. In Herzog v. State, 439 So.2d 1372 (Fla.1983), we declined to apply this aggravating factor in a situation in which the victim, who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony "to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d at 9. Due to the conflicting stories told by Rhodes we cannot find that

> the aggravating circumstance of heinous, atrocious, and cruel has been proven beyond a reasonable doubt.

Cf. Deangelo v. State, 616 So. 2d 440, 442-43 (Fla. 1993) (trial court did not err in rejecting HAC in strangulation case where facts were unclear).

In Elam v. State, 636 So. 2d 1312 (Fla. 1994), David Elam knocked Carl Beard to the ground and then beat him to death with a brick. This Court struck HAC (id. 1314):

> Elam claims that the trial court erred in finding aggravating circumstances applicable here. We agree. We find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel inapplicable. Although the [victim] was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute"), the [victim] was unconscious at the end of this period, and never regained consciousness. There was no prolonged suffering or anticipation of death.

The rationale for applying the circumstance to strangulation cases is that "'it is permissible to infer that strangulation, when perpetrated upon 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), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987)." Deangelo, 616 So. 2d at 442-443.

HAC is "inapplicable under Florida law where the victim is

unconscious or unaware of impending death at the time of the attack." Cherry v. State, 781 So.2d 1040, 1055 (Fla.2000).

In Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992), this Court wrote: "The United States Supreme Court recently has stated that this factor would be appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' Sochor v. Florida, 112 S.Ct. 2114, 2121 (1992). Thus, the crime must be both conscienceless or pitiless and unnecessarily torturous." At bar, the state did not show these elements. The court erred in finding the circumstance.

Appellant forced Hagin into the house and then into his room. The record does not show that she was terrorized to the extent required for HAC. While Ms. Shipp testified to a blood curdling scream, she said Hagin cried that she not want to go in and clean up. Vitale testified that the problem was that Hagin was acting out after a night of drinking and partying, and suddenly decided that she wanted to be brought home immediately. The record shows that appellant forced her into the house when she was making an early morning disturbance in the neighborhood.

The state's evidence was that once in the house appellant forced her into the bedroom, but there was no evidence of any terror on her part at that time, much less contemplation of

death. Vitale testified that all was quiet once she entered the room. Denigris and Beakley did not testify to any further disturbance. Parker was asleep throughout the entire episode. The evidence does not refute appellant's claim that he and Hagin engaged in consensual sex in the room.

There was no evidence that the injuries to Hagin's head occurred while she was conscious.[10] Hagin's statement that she wanted to see her children did not show terror or fear of impending death. Appellant's statement that it took longer to break a neck than he thought also does not show that Hagin had a consciousness of impending death. She had a high blood alcohol level and had been up all night. She may have been only barely conscious and may have lost consciousness within a few seconds.

"A trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent substantial evidence in the record." Ford v. State, 802 So.2d 1121, 1133 (Fla.2001).

The evidence at bar does not rise to the level of proof required for this circumstance. Its use renders the death

---

10 Indeed, there was no evidence as to when the injuries occurred. Vitale testified that after spending the night drinking appellant and Hagin went into the bushes during the night at Savannas to make love. She may have hit her head

sentence unconstitutional under the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Its erroneous use was not harmless beyond a reasonable doubt. Without it, the state had only two aggravators set against extensive unrebutted mitigation. The judge gave it great weight. This Court should strike the circumstance, vacate the sentence and remand for resentencing.

POINT IX

APPELLANT WAS DENIED HIS RIGHT TO A RELIABLE CAPITAL SENTENCING AND DUE PROCESS BECAUSE, PURSUANT TO STATUTE, THERE WAS A PRESUMPTION IN FAVOR OF A DEATH SENTENCE UNLESS HE PRESENTED MITIGATION THAT OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES AND BECAUSE THE STATE WAS NOT REQUIRED TO ESTABLISH AGGRAVATION THAT OUTWEIGHED THE MITIGATION BEYOND A REASONABLE DOUBT.

Section 921.141, Florida Statutes, requires that the judge and jury determine that the mitigators are insufficient to outweigh the aggravators. Appellant unsuccessfully challenged the standard that mitigators must outweigh aggravators. R3 255; R4 283. The judge's ruling denied appellant's rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of

---

stumbling about in the bushes.

the state and federal constitutions.

In People v. Young, 814 P.2d 834, 845 (Colo. 1991), the Colorado Supreme Court held unconstitutional a similar statutory weighing equation, which favored death if there were insufficient mitigating factors to outweigh the statutory aggravating factors:

> The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury cannot determine with reliability and certainty that the death sentence is appropriate under the standards established by the legislature. A statute that requires a death penalty to be imposed in such circumstances without the necessity for further deliberations, as does section 16-11-103(2)(b)(III), is fundamentally at odds with the requirement that the procedure produce a certain and reliable conclusion that the death sentence should be imposed. That such a result is mandated by statute rather than arrived at by a jury adds nothing to the reliability of the death sentence. The legislature has committed the function of weighing aggravators and mitigators to the jury. A jury determination that such factors are in equipoise means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded inconclusive results. A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. Accordingly, we conclude that the statute contravenes the prohibition of cruel and unusual punishments under article II, section 20, of the Colorado Constitution, and deprives the defendant of due process of law under article II, section 25, of that constitution.

Similarly, State v. Biegenwald, 524 A.2d 130, 150-51 (N.J. 1987), held that a death sentence was improper where

instructions provided for death when the aggravating factors were not outweighed by the mitigating factors (e.s.):

> While defendant did not raise the issue either at trial or on appeal, we find that the trial court's instructions in the sentencing proceeding constituted plain error of a nature to warrant our consideration sua sponte. See State v. Grunow, 102 N.J. 133, 148-49, 506 A.2d 708 (1986) (even in absence of objection, court must instruct jury on fundamental principles that control case); State v. Federico, 103 N.J. 169, 176, 510 A.2d 1147 (1986) (obligation extends to proper charge on State's burden of proof). The error concerns the jury's function in balancing aggravating factors against mitigating factors, a function that leads directly to its ultimate life or death decision. Its effect was to allow a death sentence without a finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. We hold that such a finding was required by the Act at the time of defendant's trial as a matter of fundamental fairness and that its absence mandates reversal and retrial of the penalty decision. Legislative policy also mandates this result, as indicated by the 1985 amendments to the Act; those amendments, furthermore, provide an independent basis for this result.

See also Hulsey v. Sargent, 868 F.Supp. 1090 (E.D. Ark. 1993) (statute requiring mitigation to outweigh aggravation created a presumption of death that would result in death when the aggravating and mitigating circumstances were in equipoise).

Finally, in State v. Kleypas, 272 Kan. 894, 40 P.3d 129 (Kan. 2001), the Kansas Supreme Court reversed a death sentence due to an instruction conforming to a statutory requirement that mitigating circumstances must outweigh aggravating circumstances:

> Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its' reasoned moral response" to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue. We see no way the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional.

40 P.3d at 232 (emphasis added). The court held that its construction of invalidating the weighing equation saved the statute itself from being unconstitutional, but three years later in State v. Marsh, 278 Kan. 520, 102 P.3d 445 (Kan. 2004), it recognized that the language of the statute was unambiguous and that the court could not usurp the legislature by rewriting the statute and, despite stare decisis, declared the Kansas death penalty statute was declared unconstitutional.

The burden of proof in criminal cases is beyond a reasonable doubt. The death penalty is uniquely severe and irrevocable. A higher degree of certitude must be required for its imposition.[11]

---

[11] The state and federal constitutions require "heightened reliability ... in the determination whether the death penalty is appropriate ... ." Sumner v. Shuman, 483 U.S. 66, 72 (1987). Heightened standards of due process apply to imposition of the death penalty due to the severity, uniqueness and finality of

The factfinder must determine that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.

In State v. Wood, 648 P.2d 71, 83-84 (Utah 1981), cert. denied, 459 U.S. 980 (1982), the Utah Supreme Court held that the certitude required for deciding whether the aggravating factors outweighed the mitigating factors was beyond a reasonable doubt:

> The sentencing body, in making the judgment that aggravating factors "outweigh," or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances.

In State v. Rizo, 833 A.2d 363 (Conn. 2003), the Connecticut Supreme Court recognized that the reasonable doubt standard was appropriate for the weighing process (id. 407; e.s.):

> Imposing the reasonable doubt standard on the weighing process, moreover, fulfills all of the functions of burdens of persuasion. By instructing the jury that its level of certitude must meet the demanding standard of beyond a reasonable doubt, we minimize the risk of error, and we communicate both to the jury and to society at large the importance that we place on the awesome decision of whether a convicted capital felony shall live or die.

---

that sanction. See Elledge v. State, 346 So. 2d 998 (Fla. 1977); Beck v. Alabama, 447 U.S. 625, 638 (1988). See also Burger v. Kemp, 483 U.S. 776, 785 (1987) (A court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.").

It recognized that the greater certitude lessened the risk of error that is practically unreviewable on appeal (id. 403; e.s.):

> ... in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instructions, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some constitutional floor based on the need for reliability and certainty in the ultimate decision-making process.

It reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable doubt, writing at pages 410-11:

> Consequently, the jury must be instructed that it must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that, therefore, it is persuaded beyond a reasonable doubt that death is the appropriate punishment in the case. In this regard, the meaning of the "beyond a reasonable doubt" standard, as describing a level of certitude, is no different from that usually given in connection with the questions of guilt or innocence and proof of the aggravating factor.
>
> The trial court's instructions in the present case did not conform to this demanding standard. We are constrained, therefore, to reverse the judgment of death and to remand the case for a new penalty phase hearing.

At bar, the judge and jury applied the unconstitutional standard that the mitigation had to outweigh the aggravation

before appellant could receive a life sentence.

It matters not that neither the statute nor the standard jury instructions use the word "presumption." They still operate to create a presumption that death is the proper sentence. The ability of a defendant to rebut the presumption does not make the statute and jury instructions constitutional, where the burden of persuasion cast upon the defendant is higher to prove that a life sentence is justified than was on the state to initially prove that the death penalty is the proper sentence. The initial determination made that death is appropriate is based solely on consideration of the aggravating circumstances and expressly excludes the consideration of mitigating considerations.

The right to a jury trial under the Sixth Amendment and the rights to fundamental fairness and Due Process and reliability of the death sentence under the Fifth, Eighth and Fourteenth Amendments and under the Florida Constitution require that the State ultimately bear the burden of persuasion that imposition of capital punishment is justified.

Functionally, Florida's statute is equivalent to the procedure condemned in Mullaney v. Wilbur, 421 U.S. 684 (1975). Mullaney found a denial of due process where the State had only to prove that an intentional and unlawful homicide occurred, and

the defendant then bore the burden of proving "by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation" to avoid punishment for committing murder as opposed to manslaughter. Id. 686-87. The Court ruled that it is fair to cast the burden of producing evidence on the defendant to put an ultimate fact in issue but, consistent with In re: Winship, 397 U.S. 358 (1970), due process and the right to a jury trial require that the State ultimately bear the burden of persuasion beyond a reasonable doubt. "The safe-guards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." 421 U.S. at 698. The Court said at page 699:

> Winship is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the state," (citation omitted), and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.

Both Mullaney and In re: Winship explained the importance of the state's bearing the burden of persuasion beyond a reasonable doubt of the ultimate issue in question. It is a component of fundamental fairness that serves as a cornerstone for public acceptance of the outcome of the trial:

> "The requirement of proof beyond a reasonable doubt has (a) vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction... Moreover, the use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 363, 364.

Mullaney, 421 U.S. at 699-700. Given the severity and finality of capital punishment, due process compels a heightened scrutiny of the procedures as to both the conviction and sentencing of a defendant in order to achieve the requisite reliability:

> Even assuming, however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in Bullington, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Because the death penalty is unique "in both its severity and its finality," id., at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668 (1984) (Brennan, J., concurring in part and dissenting in

> part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 731-32 (1988) (e.s.). The Constitution also requires reliable fact finding in the context of capital punishment. See Arvelaez v. Butterworth, 738 So. 2d 326, 326-27 (Fla. 1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner ...") (emphasis added). The reliability of a death sentence is constitutionally deficient when the burden of persuasion as to the propriety of the imposition of the death sentence is cast upon the defendant rather than the state. The constitutional requirement of reliability arises founded in the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the Florida Constitution.

By mandating that the defendant prove that the mitigating circumstances "outweigh" the aggravating circumstances, Section 921.141(3), Fla. Stat., Florida's capital sentencing procedure casts the burden of persuasion on the defendant to prove that a life sentence is appropriate. Due process requires that the burden of persuasion be on the State. Application of the statute further denies fundamental fairness because the

defendant actually has a higher burden of persuading the jury and judge that a life sentence is appropriate than the State's burden to show that a death sentence should be imposed. The language of the statute and standard jury instructions create a presumption that death is appropriate when an aggravating circumstance is proved to exist, without any consideration of the mitigating considerations surrounding the facts of the crime or the individual characteristics of the defendant. This determination, made without consideration of mitigation, becomes a presumption that can only be rebutted by more evidence than was required by the State to persuade the jury that the death penalty is appropriate.

To persuade the jury and/or judge that a life sentence is appropriate, the defendant must persuade the jury on the ultimate issue – whether the death penalty should be imposed, and the burden of proof is higher than was case upon the State. The State proves beyond a reasonable doubt that the death penalty is appropriate based solely on the aggravating circumstances without considering the mitigating circumstances, the defendant must meet a higher standard – he must prove that "mitigating circumstances exist that outweigh the aggravating circumstances."

The statute puts on the defendant an

unconstitutional burden of persuasion in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and, Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the holdings of In re Winship, Mullaney. See also State v. Marsh, supra. It dilutes the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. See Cage v. Louisiana, 498 U.S. 39 (1990) and Sandstrom v. Montana, 442 U.S. 510 (1979). The fact that the statute and the instructions it requires might reasonably be interpreted as casting the burden of persuasion on the defendant denies due process. Francis v. Franklin, 471 U.S. 307 (1985); In re Winship, supra; Mullaney v. Wilbur, supra; State v. Marsh, supra. Simply said, this requirement of section 921.141, Florida Statutes, is unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United Stats Constitution and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution. The death sentence erroneously imposed here must be reversed and Section 921.141, Florida Statutes, must be ruled unconstitutional in part.

POINT X

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR FURMAN v. GEORGIA, 408 U.S. 238, 313(1972).

Section 775.082(1), Florida Statutes, provides that one convicted of a capital felony shall be punished by death "if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death", and that otherwise there shall be a life sentence. Under section 921.141, the jury is to determine whether "sufficient aggravating circumstances exist" and whether there are "sufficient mitigating circumstances exist which outweigh the aggravating circumstances", and the court must find that "sufficient aggravating circumstances exist" to support a death sentence, and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hence, to obtain a death sentence, the state must establish "sufficient aggravating circumstances" and that there are insufficient mitigating circumstances to outweigh them. Under the statutory and constitutional rule of strict construction of criminal statutes,[12] a defendant is not eligible for a death sentence unless there are "sufficient aggravating circumstances"

---

[12] See § 775.021(1), Fla.Stat.; Trotter v. State, 576 So.2d 691, 694 (Fla. 1990) (rule applies to capital sentencing statute); Borjas v. State, 790 So.2d 1114, 1115 (Fla. 4th DCA 2001) (rule derives from due process and applies to sentencing statutes); Dunn v. United States, 442 U.S. 100, 112 (1979) (rule is rooted in due process).

and insufficient mitigation to overcome them.

Under Ring v. Arizona, 536 U.S. 584 (2002), the question of death eligibility must be determined beyond a reasonable doubt by a jury pursuant to the Jury and Due Process Clauses. The jury proceeding under section 921.141 does not comport with the requirements of the Jury and Due Process Clauses of the state and federal constitutions because the jury renders an advisory non-unanimous verdict at which it is not required to make the eligibility determination by proof beyond a reasonable doubt and the normal rules of evidence do not apply. Hence, Florida's death penalty sentencing scheme is unconstitutional, and this Court should vacate appellant's death sentence.

Appellant recognizes that this Court has rejected similar arguments in, e.g., Bottoson v. Moore, 833 So.2d 693 (2002). He submits, however, that such decisions did not consider the rule that the statute must be strictly construed in favor of the defense so that one is death eligible only on a finding of sufficient aggravating circumstances and insufficient mitigation.

So far as Bottoson stands for the proposition that a conviction for first degree murder without more makes the defendant death eligible, it renders Florida's death sentencing scheme unconstitutional under the Cruel and Unusual Punishment

and Due Process Clauses of the state and federal constitutions. Under Furman v. Georgia, 408 U.S. 238, 313(1972), there must be a narrowing of the category of death eligible persons. Cf. Jurek v. Texas, 428 U.S. 262, 276 (1976) (statute constitutional because by "narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered"); Gregg v. Georgia, 428 U.S. 153, 196-97 (1976); Lowenfield v. Phelps, 484 U.S. 231, 245 (1988) (constitutionally required "narrowing function" occurred when jury found defendant guilty of three murders under death-eligibility requirement that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person": "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers").

Although the jury did unanimously find appellant guilty of felony murder, that circumstance alone could not make him death eligible because the statute requires sufficient aggravating circumstances. The jury made no unanimous finding of sufficient aggravating circumstances.

This issue presents a pure question of law subject to de novo review. The sentence at bar denied appellant his rights under the Due Process, Jury, and Cruel and Unusual Punishment

Clauses of the state and federal constitutions. This Court should reverse appellant's death sentence and remand for imposition of a life sentence.

POINT XI

SECTION 921.141 IS UNCONSTITUTIONAL SO FAR ONE IS ELIGIBLE FOR THE DEATH PENALTY JUST BY BEING CONVICTED OF FIRST DEGREE MURDER.

As already noted, Bottoson held that one becomes eligible for the death penalty by a mere finding of guilt of first degree murder. If this is true, Florida's death penalty statute is unconstitutional because it does not narrow the category of death eligible defendants as required by Furman v. Georgia, 408 U.S. 238 (1972).

Thus, appellant's sentence denied his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. and must be reversed and remanded for imposition of a life sentence.

POINT XII

SECTION 921.141 IS UNCONSTITUTIONAL SO FAR AS THE JURY IS TO ONLY CONSIDER MITIGATION AFTER IT IS REASONABLY CONVINCED OF ITS EXISTENCE.

Section 921.141 sets no standard for the proof of mitigating evidence. But the standard jury instructions limit jurors to consideration of mitigation after being "reasonably convinced" of its existence. The instruction improperly invades the

province of the Legislature, incorrectly states the law, and limits the consideration of constitutuional mitigating evidence. The judge overruled appellant's motion on this point. R2 208-15, R4 482, T8 131-32. Appellant was denied his rights under the Due Process, Jury, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

(a) Article 2, section 3 of the Florida Constitution forbids the judiciary from exercising the powers of the Legislature. The provision of criminal penalties and of limitations upon the application of such penalties is a matter of substantive law and, as such, is properly addressed by the Legislature.

The "reasonably convinced" standard violates the constitutional separation of powers. The statute does not restrict consideration of mitigation. By placing a "reasonably convinced" restriction, the instruction places a high restriction where none exists by statute, and is contrary to the constitutional requirement that all mitigating evidence be considered. It imposes an unconstitutionally high standard of proof.

The state and federal constitutions require that all mitigating evidence be considered. Under Tennard v. Dretke, 124 S.Ct. 2562, 2570 (2004): "Relevant mitigating evidence is

evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." "Thus, a State cannot bar 'the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" Id. Further: "We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death .... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." Id. Any jury instruction that prevents consideration of all mitigating evidence is unconstitutional. Mills v. Maryland, 486 U.S. 367 (1988). Full consideration of mitigating evidence is essential in a capital case; the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. Penry v. Lynaugh, 109 S.Ct. 2934 (1989).

POINT XIII

WHETHER THE DEATH SENTENCE MUST BE REVERSED BECAUSE THE ROLE OF THE JURY WAS MINIMIZED BY JURY INSTRUCTIONS.

The Cruel and Unusual Punishment, Jury, and Due Process Clauses of the state and federal constitutions forbid imposition of a death penalty where the jury has been mislead as to its

role in the sentencing process.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court reversed a death sentence because the prosecutor told the jury (correctly) that "the decision you render is automatically reviewable by the Supreme Court." Id. 325-26. The Court wrote that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. 328-29.

Under Ring, the state may not obtain a death sentence unless the jury makes a finding of the predicate facts that make a defendant eligible for a death sentence. Under section 921.141, Florida Statutes, one is not eligible for a death sentence unless there is a finding of "sufficient aggravating circumstances" and the mitigation does not outweigh these aggravators. Hence, under Ring, a defendant may not be sentenced to death unless the jury makes these findings.

At bar, appellant moved to prevent telling the jury that its penalty verdict was and "advisory verdict," citing to Caldwell, and the court overruled his motion. R2 224-26, R4 481, T8 133. The jury was instructed that its penalty verdict was advisory. T35 3041. The court erred, since, under Ring, the verdict is

not merely advisory, but is a necessary predicate for a death sentence. This Court should order resentencing.

POINT XIV

WHETHER THE DEATH SENTENCE MUST BE REVERSED BECAUSE THE JURY INSTRUCTIONS FAILED TO GIVE THE JURY ADEQUATE GUIDANCE IN ITS PENALTY DELIBERATIONS.

The Cruel and Unusual Punishment, Jury, and Due Process Clauses of the state and federal constitutions forbid imposition of a death penalty where the jury has failed to properly consider mitigation and is not properly guided by the jury instructions in its penalty deliberations.

Section 921.141 requires that the jury find sufficient aggravating circumstances, and must determine whether sufficient mitigating circumstances exist to outweigh them, but sets out no method by which the jury is to do this.

First, the statute is silent as to whether the mitigating circumstances are to be determined unanimously, or by a substantial majority, a bare majority, a plurality, or only by individual jurors. The standard jury instructions say only that the penalty verdict must be made by majority vote with a tie vote resulting in a life verdict, but makes no provision as to how individual circumstances are to be determined by the jury.

This absence of guidance renders section 921.141 unconstitutional.

The Constitution requires strict guidance to the jury in capital sentencing. The eighth amendment requires a higher standard of definiteness than does the Due Process Clause with respect to jury instructions in capital cases. See Maynard v. Cartwright, 486 U.S. 356 (1988). Jury instructions which preclude the full consideration of mitigating evidence are improper. Hitchcock v. Dugger, 481 U.S. 393 (1987).

Mills v. Maryland, 486 U.S. 367 (1988), and McKoy v. North Carolina, 494 U.S. 433 (1990) disapproved instructions that did not adequately guide the jury as to how many votes were necessary to determine the existence of mitigating circumstances.

Under section 921.141, the jury has no guidance as to whether there is a threshold number of votes required before mitigating evidence can be determined. Given the standard instructions, the jury could conclude that there is such a threshold and could in consequence be misled into failing into considering mitigating evidence. Accordingly, section 921.141 is unconstitutional.

Second, the statute is silent as to how the jury is to go about determining the existence of aggravating circumstances.

It is unconstitutional because it does not provide for how many votes are necessary to find any particular aggravating circumstances.

Since it is usually the case that the jury is instructed as to several aggravators, it is possible for a jury to return a death verdict without even a majority of the jurors finding any one aggravating circumstance. This situation is contrary to the constitutional requirement of definiteness in sentencing determinations and the general due process requirement that verdicts in criminal cases be rendered by at least a substantial majority of the jury.

Since jurors could reasonably construe the law as authorizing a death verdict where not even a majority of them agree as to any one aggravating circumstance, Florida's death penalty statute is unconstitutional for failure to channel the sentencer's discretion as required by the state and federal constitutions.

From the foregoing, the lower court erred in denying appellant’s motion on this issue, R2 227-29, R4 462, T8 113-14, and this Court should reverse and order resentencing.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse appellant's convictions and sentences and remand with appropriate instructions, or grant such other relief as may be appropriate.

Respectfully submitted,

CAROL STAFFORD HAUGHWOUT
Public Defender

_____
GARY LEE CALDWELL
Assistant Public Defender
Florida Bar No. 256919
15th Judicial Circuit of Florida
Attorney for Richard Allen Johnson

The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600; 624-6560

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to Leslie Campbell, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier 31 August 2005.

_____
__
Attorney for Richard Allen Johnson

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

_____

Attorney for Richard Allen Johnson