IN THE SUPREME COURT OF FLORIDA

RICHARD ALLEN JOHNSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC04-1972
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

REPLY BRIEF OF APPELLANT

On Review from the Circuit Court of
Nineteenth Judicial Circuit

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ARGUMENT[1]

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

A. The answer brief (AB) says appellant did not preserve this issue.

Scott v. State, 920 So.2d 698 (Fla. 3rd DCA 2006) refutes appellee's argument. Scott held that the defendant preserved his issue regarding a peremptory challenge in circumstances like those at bar. Scott accepted the jury after the judge told him twice that the objection was preserved. The Third District wrote (id. at 699-700) (e.s.):

> First, this issue is preserved for appellate review. As a general matter, counsel must renew an objection to the seating of a juror before tendering the panel. Joiner v. State, 618 So.2d 174 (Fla.1993). If counsel was not required to renew an objection before accepting a panel, a defendant "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." Joiner v. State, 618 So.2d at 176.
>
> In the instant case, the issue is preserved despite defense counsel's failure to specifically renew his objection before accepting the panel. The record reveals that it was clear to the trial court and the State that defense counsel was not abandoning his objection. When the defense attempted to strike the juror, the court re-called the juror, subjected him to additional questioning, had the court reporter read his earlier voir dire responses aloud, and entertained argument from counsel. After the court denied the peremptory challenge, it twice assured defense counsel

[1] Appellant relies on his initial brief as to the issues not discussed in this reply brief.

> that the objection was preserved for the record. Defense counsel accepted the panel just a few transcript pages after the court asked if there was any other business that needed to be addressed. In these specific circumstances, "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. State, 902 So.2d 357, 359 (Fla. 4th DCA 2005); see also Langon v. State, 636 So.2d 578 (Fla. 4th DCA 1994) (same); Meade v. State, 867 So.2d 1215 (Fla. 3d DCA 2004)(issue was preserved where the defense accepted the jury subject to its previous objections).

The case at bar is similar. The challenge to the juror was fully argued below. The judge assured the defense the issue was preserved. He said the defense had a standing objection. T20 1261-63. He said it in a context in which he explained regarding other objections that a standing objection meant that there was no need to renew the issue. T20 1265, T20 1292. Hence, as in Scott, neither the state nor the court was misled into a belief that the voir dire issue was being abandoned.

When a judge rules that a party has a standing objection, the party is relieved of the need to renew the matter. Cf. Liberatore v. Kaufman, 835 So.2d 404, 407, n. 3 (Fla. 4th DCA 2003) (standing objection to use of document preserved issue for appeal); Campbell v. State, 679 So.2d 720, 723-24 (Fla.1996) (considering evidentiary issue when trial court ruled that the defense had a continuing objection); Phillips v. State, 894 So.2d 28, 41 (Fla.2004) (where judge refused standing objection

to group of photographs, defense had to make further objections to individual photographs).

This rule serves the purpose of judicial efficiency. It serves to prevent the obstreperous rearguing of issues. The time of the court, the parties, and the jurors is not taken up by the further discussion of issues which have already been decided.

This Court did not set up Joiner v. State, 618 So.2d 174 (Fla.1993) as a trap to be sprung on the unwary in such circumstances. Appellee seeks a result which is unjust and contrary to common sense. It sat silently by while the judge made his assurances to appellant. If it believed that appellant could not have a standing objection and that he had to renew the issue and that an acceptance of the panel after such assurances constituted a waiver, it should have said so at the time.

B. The abuse of discretion standard of review involves deferential review of the decision that the judge actually made, not of a decision that the appellee wishes the judge had made. Appellant agrees with AB 16-17 and 24-25 that this Court reviews the judge's decision for an abuse of discretion because of the judge's unique vantage point. A deferential review necessarily entails deference to the judge's actual assessment of the

juror's responses, and then de novo review of the application of the law to that assessment.

The judge determined, based on the totality of the juror's responses, that Ms. Monforte said she was not sure whether it might be difficult for her to subordinate her personal views. T20 1263. It is to this determination that this Court must defer under the case law. He made the legal determination that she was not disqualified as a juror. Id. This determination is reviewed de novo.

Instead of looking to the judge's determination, appellee invites this Court to focus on other remarks made by the juror. But to focus on other remarks would be to substitute this Court's view of the facts for that of the trial judge. From his superior vantage point, he determined that the juror was not sure whether it might be difficult for her to subordinate her views. His conclusion that there was "a sufficient finding to grant a challenge for cause" id, was simply the application of the law to that fact. This Court does not defer to the application of the law to the facts.

The footnote at AB 26 discusses the legal standards used in various cases. Ault v. State, 866 So.2d 674, 684 (Fla.2003) sets out the correct legal standard: it is error to exclude jurors 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.

The answer brief points to no determination of the judge that Monforte's views would prevent or substantially impair her performance of her duties. Absent such a finding below, this Court should not substitute its judgement for that of the trial judge and make such a finding.

Despite what appellee says at AB 28-29, the judge "in his unique vantage point" did not find that Monforte was unable to faithfully and impartially follow the law or that she clearly expressed uncertainty regarding the death penalty or that she responded equivocally whether she could put aside her personal feelings and follow the law.

Appellee's cases do not support its argument. In San Martin v. State, 705 So.2d 1337, 1343 (Fla.1997), the defense does not seem to have disputed any individual cause challenge and merely argued that death qualification in general was somehow improper. In Foster v. State, 679 So.2d 747, 752 (Fla.1996), the judge specifically found the juror had said she was "never going to impose the death penalty because there's always going to be life imprisonment." The judge made no such finding at bar.

Morrison v. State, 818 So.2d 432 (Fla.2002) does not help appellee. The juror there said he would favor the death penalty for someone who "was in my home, [and] killed my children," but was not sure whether he could follow the law or vote for a death sentence as a juror. Id. 442. The AB stresses the statement at page 443 of Morrison that there was no attempted defense rebuttal. Footnote two on page 442 of Morrison explained that the defense asked the juror "no questions about his feelings towards the death penalty or his ability to vote for it, and made no attempt to rehabilitate" him. This complete failure to question the juror amounted almost to an acquiescence in the cause challenge.

At bar, the defense did question Monforte about her views about the death penalty. Appellee's brief minimizes this questioning, but the tenor of the colloquy was that Monforte could properly weigh the sentencing circumstances as instructed by the court. T20 1226-28. Any doubt in this regard was laid to rest when the state later questioned her and she said she would definitely follow the law, although it was not something she would want to do. T20 1258-59.

Our law only demands that jurors follow the law, not that they be enthusiastic about it.

AB 29 criticizes the defense's questions to Monforte, comparing them to the absence of any questioning by the defense in Morrison. The footnote at AB 30, however, says that the state's subsequent questioning of Monforte was "substantively the same" as the defense questioning.

AB 30-31 say that death eligibility is determined at conviction. But appellee then offers no reason for why this Court should not order a new trial when a juror who would follow the law was erroneously removed. Bottoson v. Moore, 833 So.2d 693 (2002), moves death eligibility forward to the time of conviction. Accordingly, a new trial is required for the erroneous cause challenge to Ms. Monforte.

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.

AB 36 says the statement was direct evidence of premeditation. In fact, the claimed connection between the statement and premeditation is a chain of hypotheses. First, it infers that Hagin was pleading for appellant not to kill her. From that inference it infers that appellant had time to reflect and form the requisite intent to kill. And from that inference it infers that appellant indeed did form such an intent.

AB 37 says the statement was somehow admissible to meet a supposed defense of accident. It points to appellant's testimony, which the jury had not yet heard, that Vitale told appellant that Vitale killed Tammy by accident. It does not show, however, how the jury could possibly have understood that to be the relevance of the statement, since appellant had not yet testified.

Thus, the state has not shown that the statement had probative value. Further, it does not dispute the trial judge's determination that it was very prejudicial.

AB 38-39 argues that the statement was an excited utterance because Hagin did not have time to reflect. Its argument at AB 35 belies this argument. AB 35 says that she knew she was being murdered "and was making a desperate plea for mercy, hoping … that he would not take her life … ." But this psychological process of evaluating the situation, drawing a conclusion, and developing a defense strategy entails reflection. Although appellee's sequence of Hagin's supposed thought processes is entirely hypothetical, it inarguably shows that she had time to reflect. The state has not shown that her statement was not the result of reflection.

The statements in the cases at AB 39 were excited utterances describing the startling event. Hence, they were

related to the startling event and admissible. The statement at bar, however, did not describe the startling event. As just noted, the argument at AB 35 shows how they could have resulted from a deliberative thought process involving reflection.

The discussion at AB 40-41 somewhat confuses the sequence of the questioning of Vitale. On direct examination, Vitale testified that appellant said that he broke Hagin's neck. T23 1704-05. Much of the cross and redirect examinations concerned correspondence written by Vitale and appellant. At the end of re-direct, the state asked Vitale about letters he had written confessing to the crime. T26 1946-47. Re-cross examination focussed on contradictions between Vitale's written confessions and his testimony. In this context, defense counsel pointed out that, among his various statements, Vitale had testified that appellant said he came out of the room, said she's gone, it's an accident. T26 1948. Vitale volunteered that he had also testified that appellant had also said he broke her neck. T26 1949. Defense counsel sought to point out that Vitale had not said this in his first statement, but the court sustained the state's objection that "this was asked and answered." Id.

Thus, the statement about appellant breaking her neck first came up in direct examination and was injected into re-direct examination by Vitale in a non-responsive answer to a defense

question, and the judge ruled, in effect, that Vitale's failure to have mentioned the statement before had already been covered. The re-cross examination of Vitale was devoted to questioning about his conflicting statements. Appellant did not introduce anything about Hagin wanting to see her children.

Contrary to AB 41-42, Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996) controls the issue of the scope of the re-re-direct examination. Hagin's supposed statement that she wanted to see her children was outside the scope of re-re-direct examination. It introduced a new issue into the case. The state's own argument that the statement showed premeditation shows that it had no bearing on the re-cross, which had nothing to do with the issue of premeditation.

AB 42-43's argument of lack of prejudice is basically an argument that there was sufficient evidence to convict. This is not the correct standard: "The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). The judge said the statement was "extremely damaging," T26 1996-97, and it was. This Court should order a new trial.

An error may require reversal even if it is not repeated later in the trial. For instance in State v. DiGuilio, an officer commented on the defendant's exercise of his right to remain silent. Although this Court's opinion does not make it clear, the lower court's opinion (Diguilio v. State, 451 So.2d 487, 488 (Fla. 5th DCA 1984)) shows that the trial court overruled DiGuilio's motion for mistrial. The state apparently made no further reference to this comment during the trial. Nevertheless, this Court reversed the conviction, finding that the error was not harmless beyond a reasonable doubt. Cf. also Lee v. State, 873 So.2d 582 (Fla. 3rd DCA 2004) (officer's testimony that victim was very positive in identifying defendant and that she was a credible witness was not harmless even though state did not solicit or highlight the testimony); Watts v. State, 921 So.2d 722 (Fla. 4th DCA 2006) (reversing for single comment on defendant's failure to testify); Barnes v. State, 743 So. 2d 1105 (Fla. 4th DCA 1999) (reversing because of single remark in final argument that former defense counsel's testimony amounted to the mercenary actions of a hired gun); Lee v. State, 873 So.2d 582, 585 (Fla. 3rd DCA 2004) (officer's testimony that victim was very positive in identifying defendant and that she was a credible witness was not harmless even though state "did not solicit or highlight" the testimony); McIntosh v. State, 858

So.2d 1098 (Fla. 4th DCA 2003) (admission of firearms not used during crime not harmless; no consideration of whether state relied on evidence in argument to jury); Hurst v. State, 842 So.2d 1041 (Fla. 4th DCA 2003) (evidence, that confidential informant said defendant was selling drugs, held harmful without consideration of whether state used it in final argument).

Finally, the state does not seem to dispute that the evidence was prejudicial as to penalty.

The admission of hearsay statement at bar violated appellant's basic constitutional right of confrontation under the state and federal constitutions and requires reversal.

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

AB 44 says, without any record citation, "The parties also agreed that they would insert the robbery charge into the Indictment for purposes of reading it to the jury but would inform the jury it was an Information." Apparently, appellee refers to a discussion at T11 379-80. There, Judge Angelos (who wound up not being the trial judge) asked that at the start of the trial she be given a copy of the indictment with the robbery allegations inserted into it. Prosecutor Seymour clarified that the court wanted him to "just designate in there information so that you'll know this is the one that came out of the

information." T11 380 (e.s.). The judge said to "write it in there and just make sure you agree to it and when you give it to me as you read through it make sure that it reads well so that when I take an indictment then I'm going to read it to the jury ... ." Id (e.s.). Seymour repeated that they would "just take the Information, the body of the Information and just put that in [the indictment] where the grand theft was." Id.

Thus, there was no agreement to tell the jury that the robbery was charged by information, and the jury was never so told. In fact, the jury instructions told the jury that all four crimes (murder, kidnapping, sexual battery, and robbery) were alleged in the indictment. R5 628, 639, 642. Likewise, the verdict, which included the robbery charge, bore the case number of the indictment. R5 625.

Appellant disagrees with the analysis of Akins v. State, 691 So.2d 587 (Fla. 1st DCA 1997) at AB 45. Akins was based on settled law governing the amendment of indictments: "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." Id. at 588 (citing and discussing cases). The fact that Akins said that the state could file an information on remand does not authorize what happened at bar, where a charge from an information was put into

the indictment. Finally, the quotation from Akins at AB 45-46 is unfortunately incomplete. The full sentence is: "The state is correct in arguing that ordinarily the test for granting relief based on a defect in the charging document is actual prejudice to the fairness of the trial." Id. at 588 (e.s.). The court then discussed the well-settled principle that an unauthorized amendment of an indictment amounts to jurisdictional error. Id. at 588-89. It wrote further: "An 'invited error' analysis is inapplicable in the instant case because jurisdiction cannot be conferred on the court by agreement of the parties." Id. at 589.

IV. 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.

Appellant relies on his initial brief.

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.

A. Sexual battery.

The facts at AB 62-63 do not support a conviction of sexual battery. The persons who saw Hagin in the yard and in the house did not see a sexual battery, they did not hear any signs of a sexual battery, and they did not testify to anything showing a sexual battery. The state's main witness, Vitale, testified

that appellant and Hagin had consensual sex earlier in the night. Appellant's statement to the police did not make out a case of sexual battery: he did not say that Hagin indicated any resistance. He said that, after they got in the room, "We started talking, then she started kissing me." T30 2427. Asked what happened next, he said, "Started kissing and we started taking our clothes off and we ended up having sex." Id. The fact that Hagin was later beaten and strangled did not establish sexual battery: it is speculation to say that appellant committed a sexual battery by subduing and beating Hagin.

The only evidence that appellant had sex in the bedroom with Hagin was his self-report of consensual sex. The fact that he may have cut out the sexual organs and anus shows only that he knew that his semen could be linked to a dead body, which was consistent with the evidence of consensual sex.

The cases cited by appellee do not support a conviction at bar.

Appellant already discussed Carpenter v. State, 785 So.2d 1182 (Fla.2001) and Darling v. State, 808 So.2d 145 (Fla.2002) in the initial brief. Suffice to say that they involved stronger evidence than the case at bar.

In Boyd v. State, 910 So.2d 167 (Fla. 2005), the defendant offered to help a woman who had run out of gas while returning

from a church service. He took her to his apartment and tortured her by repeatedly stabbing her. He did not make a claim of consensual sex: his theory of innocence was that "he had never met [the victim] and that the evidence against him was planted by [the police]." Id. 181. But at bar, appellant and Hagin spent the night together drinking and partying and having sex, and the state has not overcome the hypothesis of consensual sex.

In Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005), the victim was found around 3 a.m., and the physical evidence was that Fitzpatrick had had sex with her within less than two hours, whereas Fitzpatrick said he had only had sex with her before noon the day before. Thus, the state presented evidence negating the defense claim. Further, the results of the physical examination of the victim were consistent with, if not conclusive of, the state's theory that Fitzpatrick committed a sexual battery.

In Thomas v. State, 894 So.2d 126 (Fla. 2004), the defense hypothesis was that Thomas and the victim had consensual sex in a car near a hospital, and that they then went to a cul-de-sac in a residential construction area where he killed her during a heated argument in which the victim threw bricks at him. Id. at 128-29. The physical evidence contradicted Thomas's claim: it

showed a violent beating at the hospital area and that Thomas had sex with the victim outside the car at that location. Thus, the state refuted the defense hypothesis of innocence.

At bar, by contrast, the state did not have physical evidence contradicting appellant's hypothesis of consensual sexual intercourse. Its evidence did not support a finding of sexual battery. The jury could reach a finding of sexual battery only by speculation.

B. Kidnapping.

The AB relies on Mrs. Shipp's testimony, but her testimony does not show an intent to facilitate a felony or inflict bodily harm or terrorize. It shows Hagin was making a scene in a residential area in the early morning and when forced inside she said she did not want to "go in and clean up." T22 1567.

The testimony of Beakley and DeNigris also do not show intent to facilitate a felony or inflict bodily harm or terrorize. Beakley "heard a girl scream, not like real loud, but I heard a scream, then I heard let me go, let me go, I want to go home." T23 1598. It sounded like Adrienne Parker. DeNigris saw appellant pull Hagin into the room, but did not hear or see anything indicating the commission of a separate felony or the infliction of bodily harm or any terrorizing act.

AB 61 says the state's theory is that there was a kidnapping with an intent to commit a sexual battery, but it points to no evidence supporting that claim. The only evidence of any resulting sexual act was appellant's self-report of consensual sex.

. . .

The discussion at AB 66-68 misunderstands appellant's argument. Appellant contends that the verdict does not show jury unanimity as to any of the state's theories of guilt. Hence, the insufficiency of the evidence as to the underlying felonies for felony murder requires a new trial because appellant was entitled as a matter of state and federal constitutional law to a unanimous verdict. The cases at AB 67-68 are irrelevant to this point. Further, the jury could have followed the judge's instructions by rendering a unanimous verdict of first degree murder without being unanimous as to the theory of guilt. Neither the instructions nor the verdict required such unanimity.

Appellant's argument goes to the issue of harmless error. Appellee has not shown that an erroneous ruling on the motion for judgment of acquittal would be harmless beyond a reasonable doubt. This Court should order a new trial.

Finally, the AB does not seem to dispute that such error was prejudicial as to penalty.

VI. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE.

AB 69 correctly notes that proportionality review "is not a comparison between the number of aggravators and mitigators". But AB 70 specifically relies on a comparison of the number of aggravators in urging this Court not to follow Voorhees v. State, 699 So.2d 602 (Fla.1997), and Sager v. State, 699 So.2d 619 (Fla.1997) at bar.

Appellant disagrees with the statement at AB 70 that the victim (Bostic) was the aggressor in Voorhees and Sager. Sager says that "Sager and Bostic started to fight," 699 So.2d at 620, but does not say that Bostic was the aggressor or started the fight. Voorhees says Voorhees woke up after Sager and Bostic had started fighting, and also does not say that Bostic was the aggressor or started the fight. Regardless, any issue of who started the fight was irrelevant. Sager and Voorhees subdued Bostic and tied him up, so that the fight was over. They began to ransack Bostic's home. They then kicked and gagged Bostic because he was making noise. They thereafter beat and kicked the bound man, they dragged him about the residence by his legs, and they stabbed him. Sager and Voorhees cannot be

distinguished from the case at bar on the ground that Bostic was the aggressor.

AB 70-71 also claims that Sager and Voorhees are distinguishable on the ground that the judge found that appellant controlled the activities he engaged in and exerted purposeful influence over others. The judge's findings in this regard are in part not supported in the record, and the remainder of them do not reflect circumstances very different from those in Sager and Voorhees.

The judge wrote that appellant persuaded Hagin to come to his house and persuaded her and her brother (Anthony Carrick) to let him take her home. The record does not support these findings. Carrick said he did not know whose idea it was to go to appellant's house, but Hagin wanted to go to appellant's house. T22 1499. Joshua Taylor said appellant and Hagin "hit it off", "seemed at each other's level", and "saw eye to eye." T22 1523. He said appellant and Vitale invited them over to play pool. T22 1526. Neither Carrick nor Taylor testified to any persuading by appellant. Vitale said appellant "was saying bye to her, you know, to them, she jumped into the front seat, came into the back, she told me she was coming to the house to play pool." T23 1678 (e.s.). Again, this is not evidence of any persuasion on appellant's part.

Nor did appellant persuade Hagin to stay at his place when Carrick and Taylor left. Carrick testified that he and Taylor "had gone out to the hallway where the car was parked and just decided that we were ready to go, then my sister came out and I told her we were going to leave and if she wanted to go we should get ready, and she was, I think contemplating staying." T22 1504 (e.s.). Carrick believed Hagin wanted to stay. Id. "She was deciding I think at the time if she wanted to stay or not, kind of asking me and then asking Richard." Id. There was a discussion and appellant "was just kind of like, you know, go ahead and stay or, you know, I can take you home, it's not a big deal." T22 1505. Appellant did not "persuade" Hagin or exert any influence over her other than agreeing to take her home. Taylor said, "Tammy decided to stay. She was going to go with us originally, however, Richard offered to take her home later that night or day rather." T22 1530. Taylor said they asked Hagin several times if she wanted to go, and she "said yes, she'd like to stay if she was going to be taken home later that morning or day, that she did have to tend to her children." T22 1532 (e.s.). Vitale did not know how Hagin came to stay when Carrick and Taylor left. T23 1683-85. Thus, the evidence did not show that appellant persuaded Hagin to stay.

With respect to the rest of the judge's findings in this regard, the actions of appellant did not differ significantly from those of Voorhees and Sager.

Voorhees and Sager drove Bostic to his home, they took him to an ATM to get money, they tied him with telephone cords, they searched his apartment, they then decided to silence him by kicking and gagging him, they dragged him into another room and kept beating and stabbing and strangling him, they disposed of evidence and made plans to destroy the house, they took Bostic's cash, ATM card and phone calling card, and fled the area in his car. Voorhees, 699 So.2d at 605; Sager, 699 So.2d at 620-21.

Appellant's actions at bar did not involve a higher level of control of his behavior or of the behavior of others. Vitale's relationship with appellant was such that he adopted a general strategy of acquiescence to appellant's wishes with an aim of gaining his own romantic goal. Regardless, when appellant asked him to take Hagin home, Vitale refused to do so until he was finished playing pool. T23 1685. They left the house around 5:30 a.m. or 6. T23 1686. Vitale testified that Hagin and appellant were drunk during the time that they were driving around. Id. When they stopped at a convenience store, Hagin effectively took control of the situation by taking the car keys so that the men could not drive away. T23 1686-87.

Vitale decided to take Hagin back to the house after they had been driving around. T23 1693-94. When they got back to the house, appellant forced Hagin inside when she was making a scene and indicated both that she wanted to go home and that she wanted to go to the bathroom. T23 1696.

Thus, the evidence shows a level of purposeful behavior or control of others no greater than that in Voorhees and Sager.

Further, the judge in Voorhees and Sager gave "minor weight" to mitigation regarding Voorhees's mental condition at the time of the offense, Voorhees, 699 So.2d at 606, n.2, and "little weight" and "very little weight" to mitigation regarding Sager's mental condition. Sager, 699 So.2d at 621, n. 2. At bar, the judge gave moderate weight to such evidence at bar.

Belcher v. State, 851 So.2d 678 (Fla. 2003) does not help appellee. Belcher entered a college student's home during the night, committed a sexual battery on her and then drowned her in the bathtub during a violent struggle. In addition to the felony murder and HAC factors, the judge gave great weight to Belcher's prior convictions for violent felonies (armed burglary, aggravated assault, attempted robbery, and robbery), an aggravator not present at bar. Id. 681 (majority opinion), 687 (special concurrence of Pariente, J., identifying Belcher's prior violent felonies). The third aggravator at bar was that

appellant was on community control for theft of his mother's car in a case in which he took her car without permission. The judge did not give this aggravator great weight and it pales in comparison with Belcher's criminal record. Only by blindly comparing the number of aggravators would one consider Belcher relevant to the case at bar.

Orme v. State, 677 So.2d 258, 263 (Fla. 1996) has little to do with the case at bar. Orme argued that his sentence was not proportionate "because his will was overborne by drug abuse, and because any fight between the victim and him was a 'lover's quarrel.'" Id. This Court simply found that the record did not support his claims. At bar, the state's evidence was that appellant and Hagin spent the night drinking and partying and had consensual sex at a park shortly around sunup.

In Schwab v. State, 636 So.2d 3 (Fla.1994), within a month of his release from prison for sexual battery on a child, Schwab kidnapped and murdered an eleven-year-old boy. The case at bar was not nearly so aggravated. Appellant had no prior violent felony conviction, was not a convicted child molester, and did not murder a child. The judge in Schwab found almost nothing in mitigation, unlike the judge at bar. The judge at bar found that appellant: had no significant history of criminal activity, particularly violent crimes; witnessed and suffered frequent

physical and verbal abuse from his father; had a history of extensive drug and alcohol abuse and was under the influence of alcohol at the time of the murder; was sexually abused at a young age; was a slow learner; was able to show kindness to others; exhibited good behavior in court; and would adjust well to prison and would not commit further violent crimes. R6 913-27.

Douglas v. State, 878 So.2d 1246 (Fla.2004) is also unlike the case at bar. The judge there gave little or very little weight to the mitigating factors. Id. at 1262. Further, this Court relied on the fact that, unlike in Voorhees and Sager, there was no evidence that suffered from any mental or emotional disturbance at the time of the crime. Id. at 1263. There was only some evidence that Douglas had childhood learning problems, which had no relation to the murder. Id. In addition, there was evidence that Douglas committed the murder out of racial animus. Id. at 1251.

The cases cited at AB 74-75 do not bear on the case at bar. In Mansfield v. State, 758 So.2d 636 (Fla.2000), the judge gave little weight to the evidence of Mansfield's use of alcohol, and this Court found the death sentence proportionate in comparison with other cases involving limited mitigation. Id. 646-47. In Davis v. State, 703 So.2d 1055 (Fla.1997), Davis committed a

sexual battery on a two-year-old girl. He beat the little girl to death. Id. at 1056-57. There was only "slight nonstatutory mitigation." Id. at 1061. In Hauser v. State, 701 So.2d 329 (Fla.1997), Hauser plead guilty and presented no mitigating evidence. Although the judge accepted as true some mitigating factors mentioned by defense counsel, the picture of mitigation was sketchy at best, and there was no proportionality argument on the appeal. This Court simply stated that the death sentence was proportionate without analysis, and it is not clear how Hauser can play into the proportionality review in other cases. In Rhodes v. State, 638 So.2d 920, 927 (Fla.1994), the only proportionality argument was that the evidence did not support one aggravating circumstance and that the remaining circumstances did not support a death sentence. This Court rejected Rhodes' argument that the evidence did not support the challenged circumstance. Hence, Rhodes' proportionality argument lacked merit.

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.

Arango v. State, 437 So.2d 1099 (Fla.1983) throws no light on this issue. It was a post-conviction proceeding in which one cannot tell exactly what argument Arango made, and this Court

summarily rejected his argument without discussion. Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982) involved an evidentiary issue. It did not involve the question of whether the death sentence was unconstitutional. Foster v. State, 614 So.2d 455 (Fla.1992) involved a claim that prosecutors in Bay County generally made decisions regarding the death penalty based on racial criteria. Foster offered nothing to suggest that the state acted with purposeful discrimination in his case. Foster does not affect the case here. At bar, the state did seek the death penalty when appellant turned down its offer. The state's decision to seek the death penalty turned directly on appellant's exercise of fundamental constitutional rights.

Freeman v. State, 858 So.2d 319 (Fla.2005) was a postconviction case involving a claim of reverse racial discrimination. Freeman based his claim on his version of an out-of-court discussion between his attorney and the prosecutor. After an evidentiary hearing, the judge agreed with the state's version of the discussion and concluded that there was no racial animus. This Court affirmed because the record supported the judge's findings. At bar, by contrast, the record is clear that the state offered not to seek a death sentence if appellant waived his constitutional rights. When appellant stood on his

rights, the state went ahead and obtained a death sentence. There is no factual issue in dispute at bar.

Thus, this case is not like Francis v. State, 473 So.2d 672, 677 (Fla.1985). Francis claimed that, during the trial, the judge promised a life sentence if Francis plead guilty. This Court found no basis in the record for this claim. It wrote further that even if the judge had made such a promise, it would not make the death sentence illegal. The latter conclusion was speculative and obiter dicta and without precedential effect. Regardless, it is highly doubtful that the Court would say the same today. In Wilson v. State, 845 So.2d 142 (Fla.2003), this Court condemned such judicial sentence bargaining. Further, Francis did not consider United States v. Jackson, 390 U.S. 570 (1968). Finally, Francis did not involve the state's on-the-record offer of a life sentence if the defendant waived his constitutional rights.

In Foster v. State, 778 So.2d 906 (Fla. 2000), this Court merely noted that Foster had rejected a plea offer, but there was no argument that the death sentence was the unconstitutional result of punishment for the exercise of constitutional rights. Hence, it has no bearing on the case at bar. Lopez v. State, 536 So.2d 226 (Fla.1988) and Hoffman v. State, 474 So.2d 1178 (Fla.1985) were cases in which the defendant entered into plea

agreements in exchange for agreements to testify against co-defendants. Thus, in those cases the state suffered a specific loss as a result of the actions of the defendants in reneging on their agreements. At bar, the state's only benefit from appellant's waiver of his constitutional rights would be to spare it the inconvenience of a trial. There is an obvious difference between the case at bar and a case in which the defendant induces the state to enter into an agreement to a life sentence and then backs out of it. A defendant should not obtain a benefit from his own act of bad faith. The case at bar shows no such bad faith on appellant's part: he openly rejected the state's unilateral, unnegotiated offer. T14 494-95.

Finally, Stephney v. State, 564 So.2d 1246, 1248 (Fla. 3rd DCA 1990) is most unhelpful to appellee. The judge offered Stephney a below-guidelines sentence of three and a half years if he would plea guilty. He rejected the offer. After the jury found Stephney guilty, the judge imposed the highest permissible guidelines sentence, nine years in prison. The Third District reversed, finding that the judge's comments supported a presumption of judicial vindictiveness. Stephney was decided before Wilson imposed yet further limitations on judicial plea bargaining, so any language in that case favorable to appellee is no longer of use.

Regardless, Stephney was not a capital case. As discussed in the initial brief, and as hardly disputed in the state's brief, the prosecutor in capital cases has the power to prevent the court from imposing the maximum sentence by deciding not to seek a death sentence. The judge cannot interfere with this power under State v. Bloom, 497 So.2d 2 (Fla.1986). The capital prosecutor enjoys a special right under State v. Bloom, and this right carries responsibility. The concerns regarding judicial plea bargaining in Wilson are shifted to the capital prosecutor.

The court could not have sentenced appellant to death if the state had elected not to seek a death sentence. The state sought the death sentence after appellant invoked his constitutional right to a jury trial. The state may not seek a death penalty because a defendant has invoked his constitutional rights.

> 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.

Appellant relies on his initial brief except to note that: As appellee says in its initial brief, the judge's final instructions told the jury that the aggravating circumstances

must outweigh the mitigating circumstances. The judge's preliminary instructions at the start of the penalty phase, however, told the jury that it had to determine "whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any." T34 2782. Under this circumstance, it is impossible to say which standard the jury used. Regardless, the statute says that the mitigators must outweigh the aggravators, and the judge denied appellant's arguments that this burden was improper. R3 255; R4 283.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Reply Brief has been furnished to Leslie Campbell, Assistant Attorney General, Ninth Floor, 1550 North Flagler Drive, West Palm Beach, Florida, 33401-2299 by courier 10 May, 2006.

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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