IN THE SUPREME COURT OF FLORIDA

JOHN TROY,	:	
Appellant,	:	
vs.	:	Case No. SC04-332
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant, JOHN TROY, was initially charged by indictment in Sarasota County on October 11, 2001 with first degree murder of Bonnie Carroll, armed burglary, and armed robbery (1/13-16). A fourth count, alleging attempted sexual battery of Ms. Carroll, was subsequently added (SR1/44-55). Appellant was separately charged by information in Sarasota County on November 6, 2001 with aggravated battery, armed burglary, armed kidnapping, and armed robbery of Tracie Burchette (SR1/40-43). After a sequence of events in which various counts were consolidated, nolle prossed, amended, added, dismissed, and refiled (see 1/13-16, 35-38; 2/242-54, 324-31; 3/389-90, 483, 503-05, 556, 562-63; 4/677-78, 707-11, 717, 719-20, 722-23; 11/112-36, 164; 19/1179; SR1/2-11, 44-61), the case proceeded to trial in August 2003, on all eight counts arising from the Carroll and Burchette cases, before Circuit Judge Lee E. Haworth and a jury. Appellant was convicted as charged on all counts (5/867-69; 26/229-31). After the penalty phase of the trial, the jury by a vote of 11-1 recommended the death penalty (6/1013; 35/3476), and on January 23, 2004, Judge Haworth imposed a sentence of death for the murder conviction, sentences of life imprisonment on five other counts, and prison terms of thirty and fifteen years on the two remaining counts (10/ 1623-4; 36/3549-69).

STATEMENT OF THE FACTS

Prior to trial, defense counsel moved to declare Section 775.051, Florida Statutes – in which the legislature (effective October 1, 1999) abrogated the defense of voluntary intoxication and provided that evidence of a defendant's voluntary intoxication is inadmissible to negate specific intent or to show insanity at the time of the offense - - unconstitutional on due process and equal protection grounds (3/486-89, 510-13; 11/141-154). Counsel proffered that, if allowed, he would present evidence that appellant was severely intoxicated on the evening of the homicide, and would request a voluntary intoxication instruction (11/143). The trial court denied the motion (3/556; 11/154, 164-65).

At the outset of the trial, with appellant's consent, defense counsel informed the trial judge (and the jury in his opening statement) that appellant acknowledged his guilt of the charged crimes involving Tracie Burchette, and also that he was the person responsible for the death of Bonnie Carroll (19/1239-45). Appellant was contesting only the charge of first-degree murder, on the basis that it was neither premeditated nor committed during the perpetration of any of the enumerated felonies (19/1239, 1242, 1244-45; see 25/2102-04, 2109-19). Defense counsel noted to the trial court that if the court had ruled differently on his various pretrial

motions, his approach might have been different (19/1239-40).

The state established, through the testimony of the associate medical examiner, Dr. Michael Hunter, that Bonnie Carroll died from multiple (44) stab wounds (20/1389-91, 1453, 1457-58, see 20/1396-44). She also sustained several blunt force injuries and bruising to the face and head (20/ 1391-96, 1453). A piece of fabric was wedged in the back of her mouth, and a portion of cloth was tied loosely around her neck (20/ 1345-46, 1352-53, 1356-59, 1394, 1426-27). Dr. Hunter could not substantiate strangulation as a contributing cause of death, but neither could he completely rule it out (20/1352-56, 1461-62).[1] No semen was found, either by visual observation or subsequent processing of swabs (20/1365-66, 1462-63; 21/1493-94). There were two very small areas of vascular dilation on her external genitalia, but no internal injuries to that area (20/1361-62, 1451-52, 1463-64). [Evidence relating to the charge of attempted sexual battery is set forth in more detail in Issue II, infra].

The state's evidence pertaining to the circumstances of the Carroll and Burchette crimes is set forth in the trial court's sentencing order (10/1626-1630) as follows (with record citations added by appellate counsel):

[1] Dr. Hunter did not observe any of the bruising to the neck, nor any of the internal injuries to structures such as the hyoid bone, thyroid cartilage, or cricoid cartilage, which would ordinarily be associated with strangulation (20/1355-56). He did find petechial hemorrhages in the eyes, which is consistent with strangulation but is also consistent with other causes, including the positioning of a dead body (20/1354, 1462).

At around 5:30 p.m. on September 12, 2001, the nude and lifeless body of Bonnie Carroll was found in her apartment bedroom by her mother, Debbie Ortiz. Ms. Carroll was a twenty year old single parent who lived alone with her two year old daughter, Cynthia, in the Timberchase Apartment complex in Sarasota. The last time Ms. Ortiz had seen her daughter alive was about 11:15 p.m., September 11, 2001, when Bonnie left Mrs. Ortiz's home with Cynthia to drive home. (20/1296-1310; 21/1513).

Upon discovering the body, Mrs. Ortiz went to Cynthia's bedroom where she found the toddler alive and well in her crib. The police were called and forensic teams started their work. (20/1310-13).

John Troy was also a resident of Timberchase Apartments. He lived there with his mother, Debra Troy, his girlfriend, Marilyn Brooks, and Ms. Brooks' young daughter, Lydia. The Brooks had moved in with Troy and his mother about a week before the murder. Before moving to Timberchase, John and Mrs. Troy had stayed for a short time with a friend of Debra's, Tracie Burchette. (22/ 1694-97, 1745; 24/1907-10).

John and Marilyn first had contact as pen pals when Troy was in prison in north Florida. Their relationship ripened into a romantic one which led to an agreement to live together when he got out. Troy was released from the Florida prison system on or about July 25, 2001. He was placed on conditional release for two years. He was also on parole

status out of Tennessee. (penalty phase evidence, 27/2356-60, 2382-84; 32/2959-62, 2967-68).

Upon his release in late July, 2001, Troy met with Sandy Hotwagner, a Sarasota DOC Correctional Probation Specialist. At that time he signed documents pledging not to use illegal drugs, to obey the law, and to submit to random drug testing. Given his extensive history of drug use, he was also required to participate in substance abuse therapy in a group setting. (penalty phase evidence, 27/ 2348-55, 2362).

During his initial interview with the probation officer, Troy admitted he had used marijuana while incarcerated. She told him she would not hold that against him this time, but if he tested positive for illegal substances again he would be going back to prison. In due course, a drug test was scheduled for the evening of September 11. On that date, he tested positive for cocaine at the First Step facility in downtown Sarasota. His drug counselor told him to expect to be re-incarcerated soon. (penalty phase evidence, 27/ 2362-66, 2373; 28/2391-95).

When he returned to his residence after the drug test, he got into a series of arguments with Marilyn. First, she was mad because he had taken an inordinate amount of time to get home from First Step. Around this time defendant placed on a long distance call to his grandfather in Tennessee, asking for money to help get his car out of a repair shop. Then he and Marilyn quarreled about other things. Troy left the apartment saying he was going to walk to the local

convenience store to get something to drink, a trip that should have taken no more than 20 minutes. Instead, he was gone for over an hour. (22/1700-06, 1748).

Upon his return this time, Marilyn, who was watching and waiting for him, confronted Troy, angrily accusing him of lying about where he was going. One word led to another until Marilyn announced she was leaving. She grabbed her child and was on the way out when he succeeded in calming her down, convincing her to stay. Then Troy announced he was going for a walk to the small lake in the complex. She said she was going to bed; he said he would wake her up when he got back. He never returned. When he left he took a kitchen knife with him. (22/1706-15, 1718-19, 1748, 1763-64).

At 10:00 that evening, Troy called his friend Frankie Lacasso to say that he would be dropping by. Frankie lived with Melanie Kozak. Ms. Kozak and Troy had been acquaintances for about a month. The two had supplied cocaine to one another and had ingested cocaine in each other's presence on several recent occasions. This would be Troy's third trip that day to their house. There would be a total of four. Three before the murder and one after, in the early morning hours of September 12. The first visit had been at about 5:30 p.m., the second at around 7:30 p.m. (22/ 1697-98, 1728-29; 23/1820-40).

On the third occasion Troy arrived on foot at the Lacasso-Kozak residence between 10:30 p.m. and 11:00 p.m. During this

visit, Troy asked Kozak to supply him with a cocaine syringe. She agreed, and the two had a conversation about his plan to go to Tennessee the next morning to stay with his grandfather. (23/1827-32, 1838).

The next time she sees him is at 2:00 a.m., September 12, when he returns to her home bearing some scratches on the right side of his face. He says he received them when he got into a fight with his girlfriend and she threw an ashtray at him. He arrived at the Kozak residence in a vehicle later identified as belonging to Bonnie Carroll. During this visit Troy appeared completely normal, he displayed no evidence of hyper anxiety or agitation, and he displayed no aggressive behavior toward her. The two decided to go out and buy some more cocaine using $40.00 Troy said he got from a neighbor. They drove to a local drug dealer, Kozak bought the narcotics, and they returned to her house where they cooked and injected the drug. (23/1832-39).

About 12:30 a.m. on September 12, Karen Curry, a resident of Timberchase Apartments and a mere acquaintance of John Troy, found him pounding on her apartment's rear sliding glass doors. He wanted to talk to her. She was surprised, shocked and alarmed. She told him to go away. He complied but she promptly called 911 to report the incident. (After his arrest defendant told Marilyn Brooks he went to Curry's apartment to ask for a ride.) (19/1253-68; 1273-82; 22/1720-21).

It is between the time of the defendant's confrontation with

Ms. Curry and the return to the Kozak residence around 2:00 a.m. that the homicide occurs. After he was arrested, Troy told his mother that he was out walking when Bonnie Carroll came home. He asked her for a ride to the store and they rode around a while. Then he said she invited him to her apartment. (22/1733; 23/1842-43; 24/1926-27).

Troy and Bonnie Carroll were slight acquaintances. Once, when Marilyn Brooks was leaving Sarasota after visiting Troy, her car broke down on the interstate. She called Troy to ask fro help and he, in turn, asked Bonnie Carroll to assist. She provided transportation. Other than that, there had been little in the way of social contact between the two. (22/1722-24, 1733, 1746-48).

In explaining his behavior in Bonnie Carroll's apartment that night, Troy gave somewhat similar stories to his mother and girl-friend. [Footnote omitted]. He told Debra Troy once inside Bonnie Carroll's apartment the two of them had drinks, some marijuana, and got high. At some point she started bad-mouthing Marilyn Brooks. They started arguing. Soon it turned into a physical struggle. He mentioned something about Bonnie breaking a glass. Because she was struggling with him, he had to tie her up. To keep her quiet he put a scarf in her mouth. He said he stabbed her while they were struggling. He did not mention her being nude. According to the account given Mrs. Troy, he said he took what he thought was Bonnie's car key, but when he got to the vehicle he found it was not the right one.

He went back to the apartment and dumped her purse on the floor. There he located the correct key and a $20 bill which he kept. He admitted taking a knife from his mother's apartment, something he blamed on paranoia caused by his cocaine use. (24/1926-33).

His story to Marilyn Brooks was more detailed. He said when he arrived at Timberchase with Bonnie Carroll police were at the complex. (Unknown to Bonnie, they were investigating the 911 call made earlier by her neighbor, Karen Curry.) Troy got out of Bonnie's car, went directly into her apartment and into the bedroom where he stayed for a while. The two of them smoked some marijuana. During this interval Ms. Carroll made some kind of romantic overture to him but he wasn't interested. The affray between them started when she made a rude comment about Brooks. He told her "to shut her fucking mouth." He grabbed her hard by the chin to force her to be quiet. She kept on making noise. There ensued a physical struggle which included fist fighting. At one point he tied her up in the bathroom, not to hurt her, he said, but to allow him to get out of the apartment. She got loose and they brawled some more. He denied having sex with the victim and he never mentioned to Marilyn Brooks that Bonnie was unclothed. He says he snapped and blacked out. He denied taking any money from the victim. It was Brooks' impression that he didn't need any money. She was unaware of his drug use and would not have condoned it. (22/1732-43, 1751, 1754-58, 1766-68).

After leaving Timberchase Apartments Troy went to Kozak's house, did some cocaine, drove around some more, finally deciding to pay a visit to family friend, Tracie Burchette. Troy and his mother had stayed with Ms. Burchette for about a week in August, 2001, before their apartment in Timberchase became available. Burchette, a psychiatric nurse, and Debra Troy, a Registered Nurse, were co-workers at Costal Recovery Center in Sarasota. After the Troys moved to their apartment, John attempted to borrow some money from her but she refused, having not been repaid an earlier loan. She also had declined to let him borrow her car. (22/1725-26; 23/1832-39, 1851-58; 24/1908-10).

On the morning of September 12, defendant parks Bonnie Carroll's car a couple of streets away from the Burchette residence. He walks to her back yard, picks up a 2 x 4 board and then goes to the front door. When Burchette answers the door, with the board hidden, he tells her his car broke down on the way to work and asks to use her phone. She invites him in and gives him access to the phone, where he pretends to call a friend for a ride. They engage in small talk, have a conversation about the tragic national events of September 11, drink some coffee, and read the newspaper while waiting for the ride to appear. He appeared perfectly normal, with no obvious signs of stress, nervousness or mental impairment. (23/1845-46, 1859-65).

After about 15 minutes, Troy asks if he could use her

computer. He goes into the office where it is located but complains that the computer is not on. Thinking that odd, Burchette goes to the computer, leans down to turn it on -- at which time she is attacked from behind with a force so violent she thought the roof had collapsed. She realizes she is being battered by John Troy. The attack is savage and repetitive with John wielding the 2 x 4 board like a bat across her head and body. She screams at the top of her lungs, tries to defend herself and to ward off the blows, losing fingernails on both hands and breaking her knuckles. Her arms are cut and her head is bleeding profusely. She suffers a skull fracture. The victim, thinking she is about to die, focuses on trying to scrape as much identifying DNA evidence as she can from his body. She screams at him to stop. Finally he says he will, if she quits yelling. (23/1865-73, 1883-84; 24/1905-06).

He tell Burchette he has done something really bad. He says he needs her money and her car, that he is going to leave and kill himself. She responds by saying she would try to help him, that she was his mother's best friend, that she would get him a lawyer. Troy leaves the room, quickly returns with her purse and demands her ATM pin number. She gives him a number which he writes on his hand. He then ties her hands and feet using a lamp cord and laptop extension, and gags her with electrical tape. Her head is wrapped so many times with tape she thought she would suffocate if he looped it one more time around her mouth. He says he will call someone in a

hour to rescue her. She hears her car starting to leave the garage. However, defendant returns, having forgotten to steal a jar of coins. Using the keys from her purse, he drives off in her Camaro convertible. (23/ 1873-81, 1887; 24/1892-93).

Initially, Troy leaves Burchette's house traveling east toward Arcadia. He attempts to use Burchette's ATM card at a Sun Trust Bank in Arcadia at 8:24 a.m. However, she had given him a bogus PIN number and he obtained no cash. He then heads south on Interstate 75 in the direction of Naples. Along the way he picks up a woman along the side of the road who appeared to be a crack head. He asked her where he could get a gun so he could kill himself. (23/1876-77; 24/1893, 1937-40).

In the meantime, Tracie Burchette, still bound and gagged, had managed to call 911 and to make her way outside to the driveway where in her bloody condition she was spotted by a neighbor. Police were called and a description of Troy and the missing vehicle dispatched to area law enforcement agencies. (23/1846-51, 1881-83; 24/1902).

Based on probable cause obtained from Tracie Burchette, Troy was stopped in Naples by the local police mid-afternoon on September 12. He was driving Burchette's Camaro and was in the company of a female companion. After questioning her, law enforcement officers were able to locate the 2 x 4 wood bludgeon used in the Burchette assault. Defendant had discarded it along the highway near Ft. Myers. DNA analysis later disclosed the

blood of Tracie Burchette on the object. (21/1497; 23/1804-10; 24/1951-58, 1966-76, 1982, 1989-90).

[Paragraph relating to appellant's concession of guilt in Burchette crimes omitted].

At the time of his arrest, Troy was wearing a pair of tennis shoes, blue jeans, a t-shirt, and a baseball cap. Pursuant to a trial stipulation regarding DNA evidence, the parties agreed the blue jeans tested positive for blood of both Bonnie Carroll and Tracie Burchette. The t-shirt showed Burchette's blood, and the shoes contained the blood of Bonnie Carroll. Material removed from Bonnie Carroll's fingernails disclosed a mixture of defendant's and her DNA. (21/1494-96, 1520; 22/ 1637-38; 23/1805; 24/1980-81, 1984-85).

Two pieces of broken glass were recovered from the homicide victim's bedroom and tested for DNA. One piece, containing her blood, was found lying on the bra of the victim, partially under her. The other piece was found to the left of the victim's body on the floor. It tested positive for Troy's blood. (21/1496, 1520, 1555-61).

A bladeless knife handle was recovered from the counter of the east bathroom of Bonnie Carroll's apartment. It contained the blood of defendant and the victim. Her blood was also found on an intact steak knife on her bedroom floor. (21/1496-97, 1545-46, 1579-81, 1583).

The defense, in its case and on cross-examination of

state witnesses, introduced physical evidence, photographs, and testimony to corroborate appellant's statements (introduced in the state's case) that he was in Bonnie Carroll's apartment by invitation, that the two of them were socializing prior to the argument which culminated in her murder, and that appellant was using drugs while inside the apartment (see 20/1327-28, 1460; 21/1543; 22/ 1622-28, 1652-55, 1732-35, 1751; 24/1927, 1996-2003).[2] There was no evidence of any forced entry into the apartment (22/1639).

In the penalty phase of the trial, the state introduced evidence of four prior felony convictions (three May 1990 armed robberies in the Florida panhandle and a Tennessee aggravated assault with a weapon), in addition to the four contemporaneous convictions arising from the Tracie Burchette case (28/2396-2417); appellant's conditional release status in Florida and his parole status from Tennessee (27/2348-57, 2357-60, 2381-84); and three victim impact statements (28/2422-30).

The defense's penalty phase presentation, as counsel explained in his opening statement, focused on three main issues: (1) appellant's background, childhood, and adolescence; (2) his behavior and adjustment in prison and his potential for rehabilitation and positive contribution if

[2] These items included, inter alia, an ashtray from the coffee table with a cigarette butt in it, a bottle opener, a Heinenken bottle cap, a Publix water bottle with Bonnie's fingerprint on it, a box of Marlboro Lights beside some suspected marijuana, a bong, and a spoon which tested positive for cocaine

sentenced to life imprisonment; and (3) the combination of events which occurred on September 11, 2001 which resulted in appellant's explosion of violent rage (see 27/2322, 2327, 2332). In addition to numerous family members and other witnesses who testified about various aspects of appellant's life history, the defense called Dr. Michael Maher, a clinical and forensic psychiatrist, who gave expert opinion testimony concerning the effects of (1) instability, physical abuse, and emotional neglect in appellant's childhood (32/ 2992-92, 2997); (2) the incident at age 13 when he was sexually molested by an adult male teacher, and his humiliation and ostracism after he was a key witness at the teacher's high-publicity trial (32/2992-99, 3001-03, 3026; see also the testimony of other witnesses regarding these events at 29/ 2575-76, 2597-98; 30/2697-80, 2687-89, 2737-62, 2771-75, 2799-2800; 31/2877, 2880,; 33/3166, 3180-81; 34/3233-36; S2/166-69); (3) appellant's arrested psychological development ("essentially [he] has throughout his life continued to function on an adolescent level") (32/3005); (4) his lifelong depressive illness (32/ 3003-05, 3014, 3026); (5) his chronic drug abuse and addiction from an early age (32/2997-98, 3006-12, 3018, 3025-26); (6) the series of stressful occurrences on the night of the charged crimes which contributed to appellant's volatile mental state (32/3022); and (7) his acute intoxication at the time of the homicide (32/ 3022-26).

residue (24/1996-2003).

Regarding the statutory mental mitigating circumstances, Dr. Maher concluded that appellant's capacity to appreciate the criminality of his conduct was "very severely impaired" (32/3023-24), and that he was experiencing a level of mental and emotional distress which was "certainly of a severe nature" (32/3025-26).

The trial judge, in his order imposing the death penalty, found four aggravating circumstances: (1) especially heinous, atrocious, or cruel (HAC) (10/1630-32); (2) prior and contemporaneous violent felony convictions (10/1632-33); (3) under sentence of imprisonment (10/1633-34); and (4) homicide occurred during the commission or attempt to commit a robbery and a sexual battery (10/1634-35).[3] The judge assigned great weight to HAC, and considerable weight to the three others (10/1632-35, 1645-46).

The trial judge found both of the statutory mental mitigating circumstances, according great weight to impaired capacity,[4] and moderate weight to extreme mental or emotional disturbance (10/ 636-39, 1646; 36/3564). The judge found fifteen nonstatutory mitigating factors established by the evidence, but he gave each of these little weight; among these

[3] Regarding the avoiding lawful arrest aggravator urged by the state, which the judge expressly declined to find as a matter of law (10/1635-36), see Issue III, infra

[4] In his written sentencing order, the judge stated at one point that he gave "great weight to the fact that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" (10/1646). At another place in the order he said he gave this mitigator "considerable weight" (10/1639). In his oral

are (1) appellant's dysfunctional family background (e.g., an unstable home life; an emotionally distant, hot-tempered, physically abusive father; a drug-using mother; and numerous instances of domestic violence by the father against the mother, two subsequent stepmothers, appellant's younger half-brother, and appellant himself (10/1639-40);[5] (2) appellant's positive personal characteristics and actions (including protecting a correctional officer who was a friend during a potentially violent jail incident in Tennessee (10/ 1640; see 29/2624, 2650-54); (3) appellant was sexually molested during his early teens and was stigmatized in his hometown after testifying in court (10/1640-44);[6] (4) his history of alcohol abuse and severe drug abuse starting in his early teens, and his diagnosis of having a "triple addiction" to alcohol, cocaine, and marijuana (10/1641);[7] (5) his lifelong history of mental and emotional problems (10/1641);[8] (6) his potential for rehabilitation, value to others inside of prison, and contributions he can make if sentenc-

pronouncement of sentence, he said he "assigned [it] great weight" (36/3564).

[5] Regarding domestic violence, and specific incidents thereof, see 29/2567-71, 2600-01; 30/2824-29; 31/2894; 33/3160-61, 3176-78; 34/3224-25.

[6] See 29/2575-76, 2597-98; 30/2679-80, 2687-89, 2737-62, 2667-75, 2799-2800; 31/1877, 2880; 32/2993-3004, 3020; 33/3166, 3180; 34/3233-36; S2/166-69.

[7] See 29/2573-75; 30/2690-91; 31/2870-71, 2886, 2889-94; 32/3009-10, 3978; 33/3105-15, 3132-39; 34/3279-80, 3236-37, 3264l S2/170-75, 179.

[8] See 29/2576-79, 2604; 31/2889-90, 2894-95; 33/3201-04; 34/3211, 3264, 3238-39; S1/94-98; S2/213.

ed to life imprisonment (10/ 1642);[9] and (7) his expressions of remorse (10/1644-45).[10]

[9] See 28/2537-41; 29/2586-87, 2633-35; 30/2711-15, 2717, 2776, 2799, 3804; 31/2836-42, 2348-52, 2859-62; 32/2976-78, 2984-85,3005,3020; 33/3145-51,3168.

[10] Other nonstatutory mitigators included (8) good behavior in jail awaiting trial and in the courtroom;(9) offer to plead guilty to all charges;(10) difficulty adjusting to life outside prison; (11) appellant is the father of three children for whom he cares; (12) cooperation with the police at time of prior arrest; (13) appellant is intelligent and has obtained his G.E.D.; (14) his legal skills; and (15) his capacity to assist other inmates and correctional officers if sentenced to life imprisonment (10/1642-45).

SUMMARY OF THE ARGUMENT

The Florida statute which precluded appellant from asserting a defense of voluntary intoxication is constitutionally invalid, because it operates as an evidentiary proscription rather than a redefinition of mens re [Issue I].

The state failed to present evidence inconsistent with the reasonable hypothesis that no attempted sexual battery occurred; therefore, a judgment of acquittal should have been granted on that charge [Issue II].

The denial of appellant's right of allocution before the cosentencing jury, especially when coupled with the impermissible chilling of his right to testify, deprived him of a fair penalty hearing and violated due process [Issue III].

The exclusion of the proffered testimony of DOC official Michael Galemore violated the Eighth and Fourteenth Amendments, especially because the subject matter (the conditions of confinement and the availability of drugs in prison) was initially raised by the prosecutor in her cross-examination of defense witnesses [Issue IV].

The trial court erroneously denied the defense's requested instruction on the statutory mitigating factor of age, because the evidence established appllant's emotional immaturity and arrested psychological development at the level

of a teenager [Issue V].

The trial court misapplied Florida law in his stated belief that he was required to impose a death sentence if, as he concluded, the aggravating factors far outweighed the mitigating factors [Issue VI].

Florida's death penalty statute is constitutionally invalid because it does not require the findings of each aggravating factor to be made by the jury [Issue VII].

ARGUMENT

ISSUE I

SECTION 775.051, FLORIDA STATUTES, WHICH PROVIDES THAT (WITH THE EXCEPTION OF DRUGS USED PURSUANT TO A LAWFULLY ISSUED PRESCRIPTION) VOLUNTARY INTOXICATION CAUSED BY ALCOHOL OR CONTROLLED SUBSTANCES AS DESCRIBED IN CHAPTER 893 IS NOT A DEFENSE TO ANY CRIMINAL OFFENSE, AND THAT EVIDENCE OF A DEFENDANT'S VOLUNTARY INTOXICATION IS INADMIS-SIBLE TO SHOW LACK OF SPECIFIC INTENT OR INSANITY, VIOLATES DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Prior to trial, the defense moved to declare Section 775.051, Florida Statutes – in which the legislature (effective October 1, 1999)[11] purported to abrogate the defense of

[11] See Lewis v. State, 817 So. 2d 933 (Fla. 4th DCA 2002); Gibbs v. State, __So. 2d __ (Fla. 4th DCA 2004) [29 FLW D2461] [2004 WL 2452475].

voluntary intoxication and provided that evidence of a defendant's voluntary intoxi-cation is inadmissible to negate specific intent or to show insanity at the time of the offense -- unconstitutional on state and federal due process and equal protection grounds (3/486-89, 510-13; 11/141-54). Defense counsel acknowledged that the Fourth District Court of Appeal in Cuc v. State, 834 So. 2d 378 (Fla. 4th DCA 2003) had upheld the constitutionality of the statute, relying on the United States Supreme Court's 5-4 decision in Montana v. Egelhoff, 518 U.S. 37, 116 S. Ct. 2013, 135 L.Ed.2d 361 (1996)(3/ 487; 11/ 145, see 148-51).[12] However, defense counsel pointed out that Florida's statute is substantially different than Montana's, and that Justice Ginsburg's concurring opinion was the swing vote in Egelhoff (3/487, 511; 11/142-43). In the framework of Justice Ginsburg's analysis, defense counsel contended that Florida's statute, unlike Montana's, is an evidentiary proscription rather than a redefinition of mens re, and therefore violative of due process, and (because of the exception for voluntary intoxication caused by use of lawfully prescribed drugs) equal protection as well (3/486-88, 510-12; 11/142-48). Counsel represented that, if allowed to do so, he would introduce evidence that on the evening of September 11, 2001, appellant injected cocaine and heroin,

[12] See also Barrett v. State, 862 So. 2d 44 (Fla. 2d DCA 2003) (rejecting state constitutional argument); Hammond v. State, 864 So. 2d 586 (Fla. 3d DCA 2004) (following Cuc and Barrett).

smoked marijuana, drank alcohol, and was extremely intoxicated at the time of the homicide (3/488; 11/143). Counsel further stated that he would request a jury instruction on voluntary intoxication (3/488; 11/143). The trial court denied the motion to declare the statute unconstitutional (3/556; 11/154, 164-65).[13] Consequently, the prospective jurors during voir dire were told ad nauseam (as the prosecutor put it in his closing argument emphasizing the same thing, 25/2070) over defense objection (15/623-27) that voluntary intoxication is not a defense.[14] In the jury charge at the end of the trial the judge instructed the jurors that it is not a defense (26/2204). [Undersigned appellate counsel is raising this issue only with regard to the Bonnie Carroll case. With regard to the charges involving Tracie Burchette, after consultation with trial counsel and appellant and with appellant's consent, the undersigned is waiving this issue].

Of the four charges in the Carroll case, three of them (first degree murder, burglary, and armed robbery) are specific intent offenses, and if committed prior to October 1, 1999 – or after that date if appellant is correct in his argument that §775.051 is constitutionally invalid – voluntary

[13] As a pure question of law, the standard of review is de novo. See Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000); State v. Glatzmayer, 789 So. 2d 297, 301-02 n.7 (Fla. 2001); Dickerson v. State, 783 So. 2d 1144, 1146 (Fla. 5th DCA 2002).

[14] 15/616-27; 16/682-86, 764-65, 771, 781,786, 789, 791-92; 17/871, 883-84, 893, 897-98, 902, 905-06, 908-09, 912, 916, 918-19, 920; 18/985, 989, 994, 999-1000, 1004, 1007, 1016, 1021, 1023, 1027.

intoxication would be an available defense. See e.g. Griggs v. State, 821 So. 2d 1139 (Fla. 4th DCA 2002) (first degree murder and armed robbery); Carter v. State, 801 So. 2d 113 (Fla. 2d DCA 2001) (robbery and burglary); Craig v. State, 769 So. 2d 1087 (Fla. 2d DCA 2000) (robbery); Straitwell v. State, 834 So. 2d 918 (Fla. 2d DCA 2003) (burglary).[15]

The Montana statute which was before the U.S. Supreme Court in Egelhoff – Mont.Code.Ann. §45-2-203 – provides:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, injected or otherwise ingested the substance causing the condition.

(3/513).[16]

Note that the Montana statute does not use the term "voluntary" intoxication; rather it refers to "a person who is in an intoxicated condition", and the sole exception goes to

[15] Voluntary intoxication would not have been a defense to the general intent crime of attempted sexual battery. Holland v. State, 773 So. 2d 1065, 1071 (Fla. 2000); see generally Linehan v. State, 476 So. 2d 1262 (Fla. 1985). However, for the reasons discussed in Issue II, infra, the evidence of an attempted sexual battery was legally insufficient to withstand appellant's motion for judgment of acquittal.

[16] The text of the Montana statute is set forth in Elkins, Voluntary Intoxication in Florida: Public Policy Versus Due Process and Why Florida's Intoxication Statute Cannot Withstand a Constitutional Challenge, 14 St. Thomas L. Rev. 233 (Fall 2001), at p.234, n.7.

the defendant's state of mind (mens re); i.e., if he was unaware when he used the substance that it was an intoxicating substance. In other words, the Montana statute amounts to an across-the-board removal of voluntary intoxication from the mens re inquiry, but it retains the exception for involuntary intoxication.[17]

In Egelhoff a sharply divided Court upheld the Montana statute against a constitutional challenge. The four-Justice plurality, in an opinion authored by Justice Scalia and joined by Justices Rehnquist, Kennedy, and Thomas, found no due process problem, concluding that the voluntary intoxication defense is of "too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications today." Montana v. Egelhoff, supra, 518 U.S. at 51, see 39-56 (plurality opinion). The four-Justice dissent, written by Justice O'Connor and joined by Justices Stevens, Souter, and Breyer, concluded that the statute's blanket exclusion of a category of evidence which would allow the accused to negate the mental-state element of a charged offense does violate the due process clause, and that in determining whether a

[17] Florida courts have recognized that a defendant's consumption of drugs or medications which he did not know were intoxicating can give rise to a defense of involuntary intoxication. See e.g. Boswell v. State, 610 So. 2d 670 (Fla. 4th DCA 1992); Brancaccio v. State, 698 So. 2d 597 (Fla. 4th DCA 1997); Carter v. State, 710 So. 2d 110 (Fla. 4th DCA 1998); Devers-Lopez v. State, 710 So. 2d 720 (Fla. 4th DCA 1998); cf. Vaivada v. State, 870 So. 2d 197 (Fla. 1st DCA 2004). Since nothing in §775.051 addresses the question of involuntary intox-

fundamental principle of justice has been violated, consideration should be given not only to historical development but also to the constitutional guarantee "that a defendant has a right to a fair opportunity to put forward his defense, in adversarial testing where the State must prove the elements of the offense beyond a reasonable doubt." Montana v. Egelhoff, supra, 518 U.S. at 62, 71, see 61-73 (dissenting opinion of Justice O'Connor). In addition to joining Justice O'Connor's opinion, Justice Breyer (joined by Justice Stevens) and Justice Souter also wrote separate dissenting opinions. All four of the dissenters agreed with the plurality (and the concurring opinion of Justice Ginsburg) that states have the power to redefine the elements of criminal offenses, including mens re. See State v. Birdsall, 960 P. 2d 729, 734-35 (Hawaii 1998). However, the dissenters concluded that the Montana statute, as interpreted by that state's Supreme Court, had not accomplished a redefinition of mens re, but rather amounted to "an evidentiary provision that not only excluded a category of evidence from consideration, namely, voluntary intoxication, but relieved the prosecution from having to prove mental state beyond a reasonable doubt." See Birdsall, at 960 P. 2d at 734. It is this combination of effects which, in the dissenters' view, violates due process. Montana v. Egelhoff, 518 U.S. at 62 (O'Connor, J., dissenting); see Birdsall, 960 P. 2d at 734.

ication, it remains a valid defense when supported by the evidence.

The crucial "swing vote" in Egelhoff was that of Justice Ginsburg. See Potier v. State, 68 S.W. 3d 657, 660-61 n.17 (Tex.Crim.App. 2002) (succinctly breaking down the Egelhoff vote as four justices holding that Montana statute was an evidentiary rule which did not deny due process, four justices holding that it was an evidentiary rule which did deny due process, and one justice – Ginsburg – holding that it did not deny due process because it was not a evidentiary rule). See also State v. Fanning, 939 S.W. 2d 941, 946 n.7 (Mo.App.W.D. 1997). Justice Ginsburg reasoned that if the effect of the Montana statute §45-2-203 was to keep out relevant, exculpatory evidence pertaining to a required mental state element of the offense, then it indeed violated due process. If, on the other hand, §45-2-203 "is, instead, a redefinition of the mental-state element of the offense", then due process would not be abridged, since (as all nine justices agreed) a state legislature has the authority to identify the elements of the offenses it wishes to punish "and to exclude evidence irrelevant to the crime it has defined." Montana v. Egelhoff, supra, 518 U.S. at 57 (Ginsburg, J., concurring). So the outcome of Egelhoff turned on whether the Montana statute operated (as the four dissenters believed) as an evidentiary proscription blocking the accused from negating the required mens re, or whether it was instead a fullscale redefinition of mens re. Justice Ginsburg agreed with Montana and its amici that §45-2-203 "extract[s] the entire subject of voluntary

intoxication from the mens re inquiry . . . thereby rendering evidence of voluntary intoxication logically irrelevant to proof of the requisite mental state". Montana v. Egelhoff, 518 U.S. at 58 (Ginsburg, J., concurring); see State v. Birdsall, supra, 960 P. 2d at 734. Based on that analysis, Justice Ginsburg cast the deciding vote to uphold the Montana statute.

However, the Florida statute whose constitutionality is at issue in the instant case is significantly different from the Montana statute, and it is fundamentally flawed in ways which make it more than probable that at least five justices, based on their reasoning in Egelhoff, would find that it does not redefine the required mental state for criminal offenses, and that it does violate due process. See, generally, Elkins, Voluntary Intoxication in Florida: Public Policy Versus Due Process and Why Florida's Intoxication Statute Cannot Withstand a Constitutional Challenge, 14 St. Thomas L. Rev. 233 (Fall 2001).

Montana's statute is straightforward and applies across-the-board. It does not refer to admissibility or inadmissibility of evidence, nor is it dependent on the particular intoxicating substances used to produce a state of intoxication. It simply states that "[a] person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the exis-

tence of a mental state which is an element of the offense . . ." § Mont. Code Ann. §45-2-203. The sole exception is when the defendant proves he was unaware that the substance he consumed was an intoxicating substance, i.e., involuntary intoxication. Thus, as Justice Ginsburg emphasized, the Montana statute removed the entire subject of voluntary intoxication from the mens re inquiry, and effectively redefined the required mental state.

Florida's statute fails to do that. It reads:

> 775.051. Voluntary intoxication; not a defense; evidence not admissible for certain purposes; exception
>
> Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substances as described in chapter 893 is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02.

Unlike the Montana statute, Florida's does not uniformly provide that a defendant's voluntary intoxication is legally irrelevant to his mental state; it depends on the substance

used and (in the case of controlled substances under chapter 893) it may even depend on the legal status of a prescription. Under the plain and unambiguous language for the Florida statute, it applies only when the voluntary intoxication resulted from the consumption, injection, or other use of alcohol or (with the "lawful prescription issued by a practitioner" exception) a controlled substance as described in chapter 893. The statute, by it very terms, does not apply to a defendant who voluntarily becomes intoxicated by "huffing" or otherwise ingesting chemical solvents (such as paint, glue, kerosene, nitrous oxide, and a wide variety of common and esoteric substances which fall into this category of frequently abused chemical products). [These substances are lawful to possess and use, but it is a second degree misdemeanor (or, in the case of nitrous oxide in an amount of more than 16 grams, a third degree felony) to inhale or ingest certain enumerated harmful chemical substances -- or possess them with that intent -- for the purpose of inducing a condition of intoxication. Florida Statutes, Section 877.111]. Florida's DUI statute, for example, applies to persons driving a vehicle when "under the influence of alcoholic beverages, <u>any chemical substance set forth in s. 877.111</u>, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired." Florida Statutes, §316.193(1)(a). [Emphasis supplied].

The voluntary intoxication defense is available when a defendant's intoxication was produced by chemical agents. For example, in Mullin v. State, 425 So. 2d 219 (Fla. 2d DCA 1983), the defendant appeared "high" at the time of his arrest and had two tubes of glue in his possession, one spent and the other unopened. He contended that he was unable to remember any of the events which transpired on the afternoon and evening of the charged crimes. The trial court, granting the state's motion in limine, excluded testimony regarding the defendant's prior abuse of volatile intoxicants and his prior behavior after sniffing glue, and excluded the testimony of the defense's expert medical witness concerning the effects of inhalation of volatile hydrocarbons. The appellate court reversed, holding that the consolidation of separately charged offenses (one a specific intent crime, the other a general intent crime) without notice on the morning of trial was prejudicial error:

> For the two crimes charged, the defenses might well have been different. The defense of voluntary intoxication by inhalation of volatile hydrocarbons, offered by appellant, would possibly negate the specific intent necessary for kidnapping but not the general intent necessary for sexual battery. Thus, appellant's strategy of whether to testify concerning voluntary intoxication may well have been prejudiced by the untimely consolidation below.
>
> Additionally, we note no support for the lower court's

> exclusion of testimony regarding appellant's condition. Appellant's expert witness, a neurologist, was qualified to testify to the medical effects of sniffing glue and other hydrocarbons upon human behavior if he knew the effects. Appellant's testimony of his prior abuse, if relevant to the above medical opinion, would also be admissible to establish a voluntary intoxication defense to the specific intent crime.

Mullin v. State, 425 So. 2d at 220.

By its plain and unambiguous language, Section 775.051 only prohibits a defense of voluntary intoxication when the defendant's state of intoxication was caused by the use of alcohol or a controlled substance as enumerated in chapter 893. [This stands in contrast to the Montana statute which removes voluntary intoxication from the mens re inquiry for any person in an intoxicated condition who became intoxicated voluntarily]. A glue sniffer such as Patrick Brian Mullin, or any other Florida defendant who became intoxicated by huffing or otherwise ingesting chemical substances not controlled under chapter 893, still has the defense of voluntary intoxication available to him after October 1, 1999, and he can introduce evidence to negate the specific intent element of a criminal charge, while a defendant whose intoxication was caused by alcohol (also a substance whose possession and use is ordinarily lawful) or controlled drugs cannot. This is an arbitrary and irrational distinction which violates

substantive due process and equal protection [see e.g. Rollins v. State, 354 So. 2d 61 (Fla. 1978); Moore v. Thompson, 126 So. 2d 543 (Fla. 1960); Mikell v. Henderson, 63 So. 2d 508 (Fla. 1953)]. But at least as significantly it also demonstrates that §775.051 does not amount to a redefinition of the mental state element of specific intent criminal offenses, nor does it extract the entire subject of voluntary intoxication from the mens re inquiry as the Montana statute did. It does not render evidence of voluntary intoxication "logically irrelevant to proof of the requisite mental state" [see Montana v. Egelhoff, 518 U.S. at 58 (Ginsburg, J., concurring]; it simply has the unconstitutional effect of arbitrarily prohibiting most but not all voluntarily intoxicated defendants from introducing evidence to negate the requisite mental state.

Similarly, the express exception in the Florida statute for voluntary intoxication caused by a controlled substance used "pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s. 893.02" may have little or nothing to do with the defendant's mens re. As defined in Black's Law Dictionary (7th Ed 1999), mens re is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime." Whether a particular prescription is lawful or not may depend on whether a person holding himself out as a physician, dentist, or osteopath was in fact properly licensed

under chapter 458, 466, or 459. See Fla. Stat. §893.02(19). The lawfulness of a prescription may depend on whether the practitioner was acting in good faith and in the course of his professional practice [Fla. Stat. §893.05(1); see e.g. State v. Weeks, 335 So. 2d 274 (Fla. 1976); Cilento v. State, 377 So. 2d 663 (Fla. 1979); State v. Vinson, 298 So. 2d 5050 (Fla. 2d DCA 1974); State v. Vinson, 320 So. 2d 50 (Fla. 2d DCA 1975)], and it may even depend on whether the controlled substance is properly labeled [§893.05(2)]. Significantly, Section 775.051 does not create an exception allowing a voluntary intoxication defense based on the defendant's belief that the substance was lawfully prescribed (which might go to the defendant's mens re). Thus, once again, it appears that the Florida statute does not redefine the mental state element for specific intent crimes, but merely erects a bar preventing some, but not all, voluntarily intoxicated defendants from negating the mental state element.

In addition, it amounts to an arbitrary and unreasonable distinction which violates substantive due process and equal protection, since one substance whose possession and use is ordinarily lawful (even to the point of intoxication unless accompanied by some other misbehavior) – alcohol – is covered by the statute; a second set of substances whose possession and use is ordinarily lawful (except for purposes of intoxication) -- chemicals such as those described in 877.111 -- is not covered by the statute; while a third set of

substances whose possession and use is lawful under certain circumstances – controlled substances prescribed by a practitioner – may or may not be covered by the statute depending on factors which may have nothing to do with the defendant's state of mind. See Rollins v. State, supra; Moore v. Thompson, supra; Mikell v. Henderson, supra. (See 3/510-12; 11/ 144-48).

The state may contend that the legislature's failure to make §775.051 applicable to all voluntarily intoxicated defendants regardless of the particular substance which produced the intoxication, and/or its specific failure to include intoxication caused by harmful chemical substances as described in §877.111, was an oversight. That may or may not be true (since the legislature was aware enough to include §877.111 in the DUI statute), but even assuming arguendo that it was an oversight, this Court cannot fix it or rewrite it without violating the principle of separation of powers. As this Court recognized in Lamont v. State, 610 So. 2d 435, 437 (Fla. 1992):

> Where . . . the language of a statute is clear and unambiguous the language should be given effect without resort to extrinsic guides to construction. As we have repeatedly noted,
>
> > "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart

> from the plain meaning of the language which is free from ambiguity."
>
> St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982) (quoting Van Pelt v. Hillard, 75 Fl.a 792, 798, 78 So. 693, 694 (1918)). We have made clear that
>
> > penal statutes must be strictly construed according to their letter . . . . Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.
>
> Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991) (citations omitted).

See also Gifford v. State, 744 So. 2d 1046, 1047 (Fla. 4th DCA 1999); Velasquez v. State, 657 So. 2d 1218, 1219 (Fla. 5th DCA 1995) ("Although some might argue this was a mere legislative drafting oversight, we are bound to give criminal statutes a strict construction. Unless the Legislature clearly defines a particular act as a certain kind of crime, we cannot declare it so by judicial construction. This policy applies to the application of enhanced punishment statutes as well as substantive criminal laws").

Since the state will undoubtedly contend that the legislature intended §775.051 to be a substantive redefinition of the mental state element of all specific intent criminal offenses, this Court cannot rewrite it to correct its consti-

tutional defects which resulted in the legislature's failure to extract the entire subject of voluntary intoxication from the mens re inquiry. If, on the other hand, it is not an attempted substantive redefinition but merely an evidentiary bar, then it violates due process for that reason.

A final indication that §775.051 is an unconstitutional evidentiary proscription is that, unlike the Montana statute narrowly upheld in Egelhoff, the Florida statute twice expressly refers to the inadmissibility of evidence of voluntary intoxication caused by alcohol or controlled substances, and provides that such evidence is not only inadmissible to negate specific intent but is also inadmissible to show that the defendant was insane at the time of the offense. Surely this cannot be viewed as a "redefinition" of the mental state required to establish legal insanity. Florida has long used the "M'Naughten Rule" as the test for insanity [see e.g. Patton v. State, 878 So. 2d 368, 374-75 (Fla. 2004)], and while there is no defense of temporary insanity based on a particular episode of intoxication, it is a permissible defense for a defendant to show that his long-term and continued use of intoxicants produced "a fixed and settled frenzy or insanity either permanent or intermittent." Kiley v. State, 860 So. 2d 509, 511 n.3; Gray v. State, 731 So. 2d 816, 818 n.1; Cirack v. State, 201 So. 2d 706, 709 (Fla. 1967). §775.051 does not abolish or redefine the insanity

defense, but it does appear to erect a bar to the introduction of intoxication evidence to establish it.

For all of the above reasons, appellant submits that at least a majority of five (if not all nine) Justices of the U.S. Supreme Court would distinguish §775.051 from the Montana statute which was before them in Egelhoff, and would hold that it violates the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. Further, appellant submits that §775.051 violates the due process and equal protection guarantees of Article I, sections 2, 9, and 16 of the Florida Constitution. Appellant's convictions of armed burglary, armed robbery, and first degree murder (based on premeditation, or on felony murder predicated on burglary and/or robbery) cannot constitutionally be upheld.

ISSUE II

THE CIRCUMSTANTIAL EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE THE CHARGE OF ATTEMPTED SEXUAL BATTERY; THE TRIAL COURT ERRED IN (1) DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THAT COUNT; (2) FINDING ATTEMPTED SEXUAL BATTERY AS AN AGGRAVATING FACTOR; AND (3) IN BOTH THE JOA RULING AND THE SENTENCING ORDER MISCHARACTERIZING THE ASSOCIATE MEDICAL EXAMINER'S TESTIMONY.

A conviction based on circumstantial evidence cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Where circumstantial

evidence is consistent with two (or more) interpretations, one indicating guilt and the other innocence, the case is legally insufficient to go to the jury. State v. Law, 559 So. 2d 187 (Fla. 1989). [The standard of review is de novo. See Pagan v. State, 830 So. 2d 792, 803 (Fl. 2002)]. In the instant case, the charge of attempted sexual battery was premised on the crime scene evidence, as interpreted by the associate medical examiner, Dr. Hunter. The trial judge, in denying appellant's motion for judgment of acquittal, mischaracterized Dr. Hunter's testimony as having "reached a conclusion medically that there was an attempted sexual battery" (25/2038; See also 10/1635), when in fact Dr. Hunter simply testified that the circumstances of the crime scene were consistent with an attempted sexual battery (20/1366, 1466-67). The question, however, is more properly framed as whether the crime scene evidence was inconsistent with a frenzied rage homicide committed without an attempted sexual battery.

The evidence established that the victim, Bonnie Carroll, died of multiple (44) stab wounds, and also sustained blunt force injuries and bruising to the face and head (20/1389-96, 1453, 1457-58). The injuries would have taken some time to inflict, but they were consistent with someone who was acting in a frenzy (20/ 1454, 1465-66, 1468-69). A piece of fabric (cut from a black dress) was wedged in the back of her mouth, and a portion of cloth was tied loosely around her neck (20/ 1345-46, 1352-53, 1356-59, 1394, 1426-27; 21/1572-77; 22/1672-

78). [Dr. Hunter could neither substantiate, nor completely rule out, strangulation as a contributing cause of death (20/1352-56, 1461-62)]. Ms. Carroll's body was on the bedroom floor, naked; a bra with a piece of glass in it and a pair of underwear (turned inside out) were near the body (20/1341; 21/1544-45, 1554-58). Dresser drawers were (uncharacteristically) open (20/1342, 1449-50; 21/1544-45, 1547-50, 1554-58, 1564-65, 1596-99). In the adjacent bathroom were the black dress from which the gag had been cut, and a magenta dress which had been cut from sleeve to sleeve on the back upper (shoulder) part of the garment (21/1572-78; 22/1672-83). No semen was found, either by visual observation at the scene, or in the subsequent processing of swabs (20/1365-66, 1462-63; 21/1493-94). Dr. Hunter found two "hyperemias" on Ms. Carroll's external genitalia, which he described as "very small areas of just vascular dilation; it's discoloration which resulted in these blood vessels somewhat dilating. They are very small and there aren't internal injuries associated with this" (20/1361). These, according to Dr. Hunter, were consistent with "a forceful act such as the perpetrator's penis or fingers coming into contact with the victim's vaginal area" (20/1362), but were also consistent with injuries occurring during a "tussle", and with certain gynecological conditions (20/1463-64). Dr. Hunter agreed that he was not telling the jury that the hyperemias had to be a penetration injury from sexual assault (20/1464). There was also some

small, faint bruising on both thighs, above the knees, which could be consistent with fingertips, and could be consistent with someone forcefully holding her legs (20/1361, 1363).

The prosecutor asked Dr. Hunter:

> What other pieces of evidence or other things did you find that were consistent with a sexual battery having been attempted or completed?
>
> A. Well, you know, once again, we don't work in a closed box of just having the victim as the autopsy. At the scene, this is an individual who is nude. This is an individual who we see evidence that she has some ligature which is present about one of her wrists, and "ligature" means that something has been present and tied and something restraining her wrist that leaves a particular pattern that I'm able to identify and interpret.
>
> So I think all these changes, the fact that she's nude, she has evidence that she's been bound, she has injury, very minor injury but injury nevertheless on the external genitalia, and she had injuries of the legs, very small minor-type injuries, but I think those are all factors that I take in account in a case like this, saying, you know, those would be consistent with sexual assault.
>
> Q. Doctor, I'm going to give you some additional factors and ask you about those. If you were to learn that the clothing that was worn by the victim had been cut off of her and was in close proximity to her bed, having been cut with a knife, would that also be a factor, in your opinion, as to whether a sexual battery had

> been attempted or completed in this case?
>
> A. Yes.
>
> Q. What about if you were to learn that her underwear was in close proximity to her body and inside out, as if it was pulled off of her, would that be a factor in your opinion?
>
> A. Yes.
>
> Q. What about a bra being out or near her body at the time that it was found: would that be a factor in your opinion?
>
> A. You know, once again, if it had been forcefully removed, such as, you know, being cut, I would say yes; otherwise, just the fact it's present in that location really doesn't, you know, make a lot of difference to me.

(20/1363-65)(emphasis supplied).

After Dr. Hunter agreed that the absence of semen does not automatically mean that no sexual battery was attempted or completed (20/1365-66), the prosecutor asked him:

> Q. In this particular case, given all the factors that you've talked about regarding the victim, the way she was found, the injuries that you found, in your medical opinion, <u>are all these factors consistent</u> with someone attempting to sexually batter this victim before she was killed?
>
> A. <u>I think it's consistent, yes</u>.

(20/1366)(emphasis supplied).

Indisputably, the state proved that the circumstances were consistent with an attempted sexual battery. That is not the issue. The question, as posed earlier, is whether the state proved that the circumstances were inconsistent with a reasonable hypothesis that appellant, in committing this homicide, did so without attempting to commit a sexual battery on Ms. Carroll.[18] See State v. Law, supra. The evidence shows that the victim may have been bound (at least one wrist); she was gagged, forcibly undressed,[19] beaten, possibly (or possibly not) choked, and repeatedly stabbed with two different knives. Various articles of clothing and underwear were strewn around the bedroom and bathroom. At least two dresses and an electric fan cord had been cut, possibly to be used as bindings (though it is not clear that all of the cuttings were actually used in this manner). Given the evidence indicating a frenzied attack and considered in light of Dr. Hunter's testimony, it follows that the two very small areas of vascular dilation in Ms. Carroll's external genital area, as

[18] As alleged in the charging document, and as the trial court instructed the jury, the state had to prove that appellant either (1) attempted to penetrate or have union with Ms. Carroll's vagina with his penis, or (2) attempted to penetrate her vagina with his finger[s] or an object (26/2193; S1/52).

[19] The evidence does not conclusively show that the magenta dress was cut off of the victim (as opposed to just having been cut, as the black dress and electrical cord were), because the state presented no evidence that she was wearing that dress on the night of the crime. Her mother testified that Bonnie did not go to work on September 11 because her employer had closed the firm for the day. Bonnie and her daughter Cynthia had come over for dinner, watched a movie, and left around 11:15 p.m. (20/1300-03). The mother described what her granddaughter Cynthia was wearing (20/1304, 1310-11), but she was never asked (and did not volunteer) what Bonnie was wearing. [Note also that

well as the small, faint bruising on her thighs, could easily have occurred during the struggle as appellant removed her underwear, without any attempt on his part to penetrate her vagina with his penis, finger[s], or an object, or to have union with her vagina with his penis. In other words, the forcible undressing of a murder victim during a protracted rage attack such as occurred here does not necessarily prove that an attempted sexual battery occurred. [It might indicate a psychosexual component, such as a desire to see the victim naked, or to humiliate her, or to express anger at her for "bad-mouthing" appellant's girlfriend with whom he'd just had a devastating argument, but that does not necessarily mean he attempted penetration or union].

The trial judge, in denying appellant's motion for judgment of acquittal, misconstrued Dr. Hunter's testimony in a critically important way which prevented him from properly applying the State v. Law standard. The judge stated:

> On the question of the attempted sexual battery, it is true there's no evidence of semen or actual penetration, but when you summarize the facts as observed by the medical examiner, who I have to point out had reached a conclusion medically that there was an attempted sexual battery based upon his experience and training and his observation of the evidence as he knew it from a forensic standpoint as a pathologist, no

the magenta dress was found in the back of the bathroom along with the black dress (21/1577-78), not in the bedroom near the underwear].

> single one of these facts were conclusive, but together they form the pattern that helped support the medical examiner's opinion.

(25/2038).

Proving that this was no mere slip of the tongue, the judge repeated the error in his order sentencing appellant to death:

> While there may be other explanations for these injuries [the hyperemias on the external genitalia and small bruises on the inner thighs], taken together with all the evidence it was the medical examiner's opinion that she had experienced an attempted sexual battery before she was killed.

(10/1635).

Dr. Hunter never expressed any such medical conclusion or opinion. Instead what he testified – and the distinction is crucial under the circumstantial evidence standard – it that, in his opinion , these very minor injuries and the other crime scene evidence were consistent with an attempted sexual battery (20/ 1366, see 1363-65). And that, in turn, is legally insufficient to prove the crime unless the state also proved -- as it failed to do here -- that the circumstances were also inconsistent with any reasonable hypothesis that the homicide occurred without an attempted sexual battery.

Thus, the trial court's errors in denying the motion for JOA and in finding attempted sexual battery as an aggravating factor were compounded, and perhaps caused, by his misunderstanding of Dr. Hunter's testimony. See Diaz v. State, 860 So. 2d 960, 927 (Fla. 2003) (trial court's mischaracterization of medical examiner's testimony re HAC aggravator).

The cases cited by the prosecutor in opposing the motion for judgment of acquittal (25/2032-34) are distinguishable. The evidence in Rhodes v. State, 638 So. 2d 920, 926 (Fla. 1994) included admissions by the defendant to several witnesses that the murder victim had resisted his sexual advances. See also Gudinas v. State, 693 So. 2d 953, 962-63 (Fla. 1997) (eyewitness testimony that defendant had followed victim to her car, tried to forcibly enter car on three separate occasions, and attempted to smash the driver's side window while yelling, "I want to f___ you." In Barwick v. State, 660 So. 2d 685, 695 (Fla. 1995), there was a semen stain on the comforter found wrapped around the victim's body, and Barwick was within the two percent of the population who could have left the stain. [In the instant case, while it is true that the absence of any semen at the scene or in any of the swabs taken from the victim's body may not conclusively prove that there was no attempted or completed sexual battery, this certainly is an aspect of the circumstantial evidence which is consistent with the reasonable hypothesis that the

murder occurred without an attempt to commit a sexual battery].

Most distinguishable of all is State v. Ortiz, 766 So. 2d 1137 (Fla. 3d DCA 2000)(see 25/2034), because that is a case which does not involve trial evidence; rather, it concerns a pre-trial motion to dismiss pursuant to Fla. R. Crim. P. 3.190(c)(4). A (c)(4) motion is akin to a motion for summary judgment in a civil case, and to counter a (c)(4) motion the state is not obliged to produce evidence which would be legally sufficient to sustain a conviction. State v. Ortiz, supra, 766 So. 2d at 1142; State v. Miller, 710 So. 2d 686 (Fla. 2d DCA 1998); State v. Bonebright, 742 So. 2d 290 (Fla. 1st DCA 1998); State v. Palaveda, 745 So. 2d 1026 (Fla. 2d DCA 1999); State v. Dickerson, 811 So. 2d 744, 747 (Fla. 2d DCA 2002); State v. Burrell, 819 So. 2d 181 (Fla. 2d DCA 2002). "Moreover, if the state's evidence is all circumstantial, whether it excludes all reasonable hypotheses of innocence may only be decided at trial, after all of the evidence has been presented." State v. Ortiz, supra, 766 So. 2d at 1142, quoting Bonebright, 742 So. 2d at 291; see also Dickerson, 811 So. 2d at 747; Burrell, 819 So. 2d at 182; State v. Giralt, 871 So. 2d 983, 985 (Fla. 3d DCA 2004). In Ortiz the defense contended in its (c)(4) motion to dismiss that both medical examiners had found no physical or medical evidence of a completed or attempted sexual battery; while the prosecution filed a traverse disputing the defense's assertion, citing the

crime scene evidence as well as "portions of Dr. Lew's testimony wherein she agreed with the conclusions of deputy chief medical examiner, Dr. Wetli" that there were indications from the investigation and autopsy that a rape may have occurred or been attempted." 766 So. 2d at 1140-41.

When material allegations in a (c)(4) motion are denied or disputed by the state in a traverse, the trial court must deny the motion to dismiss. Fla. R. Crim. P. 3.190(d); see e.g. State v. Diaz, 627 So. 2d 1314 (Fla. 2d DCA 1993); State v. Lukas, 652 So. 2d 1166 (Fla. 2d DCA 1995); Brinkley v. State, 874 So. 2d 1199 (Fla. 5th DCA 2004). That is all the Ortiz case stands for. Whether the circumstantial evidence in Ortiz (whatever it may have been by the time the case went to trial, if it went to trial) was sufficient to survive a motion for judgment of acquittal under the State v. Law standard is an entirely different question; one which may not be determined on a (c)(4) motion. Ortiz; Bonebright; Dickerson; Burrell; Giralt.

Appellant's conviction of attempted sexual battery, the use of this conviction in support of an aggravating factor, and his conviction of first degree murder on a theory of felony murder with attempted sexual battery as the predicate felony[20] must be reversed.

[20] The first degree murder conviction cannot be sustained on a theory of premeditation, or on the predicate felonies of burglary or robbery, because appellant was unconstitutionally deprived of a voluntary intoxication defense, and the right to present evidence in support thereof, as to these specific

ISSUE III

APPELLANT WAS DEPRIVED OF A FAIR PENALTY HEARING AND DUE PROCESS OF LAW WHEN THE TRIAL COURT (1) DENIED HIS REQUEST TO EXERCISE HIS RIGHT OF ALLOCUTION FOR THE PURPOSE OF EXPRESSING HIS REMORSE BEFORE THE CO-SENTENCING JURY; (2) IMPERMISSIBILY CHILLED APPELLANT'S RIGHT TO TESTIFY UNDER OATH CONCERNING HIS REMORSE (AND ALSO TO PRESENT OTHER EVIDENCE OF REMORSE) BY REFUSING TO RULE THAT THIS WOULD NOT "OPEN THE DOOR" FOR THE STATE TO INTRODUCE BEFORE THE JURY THE DETAILS OF THE CRIME (INCLUDING A NEW AGGRAVATOR OF WITNESS ELIMINATION) FROM AN UNCONSTITUTIONALLY OBTAINED CONFESSION; AND (3) ALLOWED THE STATE TO INTRODUCE THE SUPPRESSED CONFESSON IN THE SPENCER HEARING.

A. Factual Developments

Prior to trial, the defense moved to suppress in-custody statements made by appellant to Sarasota police detectives Grodoski and Wildtraut on a variety of state and federal constitutional grounds (2/194-96). Based on a stipulated statement of facts, and on the state's concession that "the current state of the law requires suppression of the statement" (2/232), the trial court found that the statements were obtained in violation of appellant's Fifth Amendment right to counsel, and ruled "[a]ccordingly, the Defendant's

intent offenses. See Issue I supra.

confession will be suppressed and can only be used for impeachment purposes should the Defendant testify in any hearing in the matter" (2/228-31).

Shortly before the trial, the defense filed a motion to enforce the right of allocution before the jury in the event of a penalty phase:

> By allocution, the Defendant means that he has a right to make a brief, unsworn address to the jury. Such an address would be made only after conviction, and only to the jury that will decide whether the Defendant is sentenced to life imprisonment or to death. There would be no cross examination of the Defendant following his allocution.
>
> The Defendant's allocution would not be for the purpose of introducing additional facts or to challenge his guilt. Rather, allocution might encompass statements of remorse, insight, and plans for the future, or a plea for mercy.

(3/504).

Defense counsel acknowledged that appellant's allocution would be limited to the subjects mentioned above (3/505). He asserted both a constitutional and a common-law basis for his right to stand before the sentencing authority and, in his own voice, present an unsworn statement in mitigation (3/504-05), and further contended that the subject matter of the proposed allocution constituted valid mitigation which, under the Eighth and Fourteenth Amendment principles of Lockett v. Ohio,

438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), the jury may not be blocked from considering (3/504).

At an August 15, 2003 hearing just before the trial commenced, the trial judge asked:

> What's your concept? I know what allocution is. I know the history of it. As a matter of fact, I studied it prior to this because it has really ancient historical antecedents and it's pretty interesting history in itself.
>
> So just let me ask, what would be your plan here in this case? Are you gonna, you know, you call him up and he doesn't have to be sworn and he makes a statement on the things that you've mentioned in your motion?

(19/1168-69).

Defense counsel answered yes, subject to the supervision of the court (19/1169). He cited a New Jersey death penalty case, State v. Zola, 548 A. 2d 1022, 1046 (N.J. 1988), in which the state Supreme Court permitted "the narrowly-defined right of a capital defendant to make a brief unsworn statement in mitigation to the jury at the close of the presentation of evidence in the penalty phase." [The Zola court made it clear that allocution was limited to allowing the jury to hear from the defendant's voice that he is "an individual capable of feeling and expressing remorse and of demonstrating some

measure of hope for the future."[21] 548 So. 2d at 1046. As long as the defendant confines himself to the proper scope of allocution, traditional impeachment is not justified, but if he strays into areas of disputed or exculpatory facts, the state may impeach him, 548 So. 2d at 1046. The Zola court also recognized – a concern which will later come to a head in the instant case – that absent a right of allocution a capital defendant may be dissuaded from offering testimony from the witness stand for fear of being cross-examined about previously inadmissible evidence. 548 A. 2d at 1046].

The trial judge questioned whether New Jersey is an "advisory verdict" state (19/1169):

> I mean, so you know where I'm headed with this, I'm a little interested in whether or not – I mean, typically the allocution is made to the magistrate who's making the decision of life or death. Here you're arguing for it to be make to the panel that's making an advisory verdict. I'm just wondering if any of the cases that you have there address that point?

(19/1169) (emphasis supplied).

Defense counsel was unaware of any case specifically addressing the right of allocution in the context of the four

[21] Quoting Sullivan, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation", 15 N.M. L.Rev. 41 (1985).

states where the jury and judge are co-sentencers.[22] He stated:

> What I was looking for is that clearly in Florida, as you point out, the defendant definitely has the right to make a statement to Your Honor. The question is, does that right extend to making a statement to the jury. And it's my position that since at minimum the jury is the co-sentencer in this case, that the right should be so extended.

(19/1170) (emphasis supplied).

The prosecutor pointed out that "New Jersey is . . . not an advisory state, but that the jury actually does sentencing in death cases. So that would distinguish the New Jersey case cited by Mr. Tebrugge" (19/1173):

> We believe the law is clear in Florida that if he wants to allo-cute, he can allocute before Your Honor because the jury is only making a recommendation, and if he wants to testify before that jury, that he should be subject to cross-examination.

(19/1176) (emphasis supplied).

The prosecutor further argued, "it is essential that if he [appellant] does speak before the jury, we have an opportunity to cross-examine him because the Court is aware that in the confession that was ultimately suppressed by Your

[22] These jurisdictions are Florida, Delaware, Indiana, and Alabama. The Delaware cases of Shelton v. State, 744 So. 2d 465 (Del. Supr. 1999) and Capano v. State, 781 A. 2d 556 (Del. Supr. 2001) are discussed in Part B of

Honor in the prior hearing, the defendant does talk about slicing Bonnie Carroll's throat specifically to eliminate her as a witness, which we think is a very strong aggravator" (19/1176). He contended that it would be unfair and outside the framework of the law to allow appellant "to express positions of remorse and whatever else was listed, insight and plans of the future or plea for mercy, when in fact that would not be the whole story" (19/1176-77).

The trial judge denied the motion for allocution (11/1177; 4/747).

The defense's request for allocution was renewed on several occasions during the penalty phase. When the judge asked defense counsel whether he expected appellant to testify, counsel proffered his allocution (26/2284). The judge replied:

> Well, I wasn't talking allocution. You know, if we do a Spencer hearing or something like that, but -- I was talking about in this portion. Are you trying to --
>
> MR. TEBRUGGE [defense counsel]: Well, I feel very strongly, as you know, that it should be allowed in this portion, because you have to follow what the jury decides. So it doesn't do us a heck of a lot of good to just do it in front of you later on.
>
> THE COURT: I think the issue is testifying versus proffer. I

this issue.

> mean, I don't think anybody is going to --- you're not going to object to him calling his client are you?
>
> MS. RIVA [prosecutor]: I don't understand the question. If he calls his client to testify?
>
> THE COURT: Yeah.
>
> MS. RIVA: No.
>
> MR. TEBRUGGE: I think that that's unlikely to happen, Your Honor, because obviously no matter what the defendant says, the cross-examination is devastating, and I cannot allow that to happen. So as much as the defendant would like to express his remorse to everyone, I simply cannot allow it, if there will be cross-examination.
>
> THE COURT: Okay. Well, if your plan is to make a proffer, in light of my ruling prohibiting allocution, at this stage of the proceeding, I'll allow you to make that for the record. But I'm not inclined to change my ruling about propriety of that in the penalty phase, absent his actually taking the stand and testifying.[23]

(26/2284-85)

Defense counsel then raised a related issue. He proffered that he would like to call one of the detectives who took the

[23] Subsequently in the penalty phase a written document entitled Mitigation Proffer was filed in open court, specifying inter alia the denial of allocution ("The Defendant's intent was to address the jury and express his feelings of shame and remorse for the crimes he committed"), and the defense's inability to elicit testimony concerning his remorse without risking "opening the door" to cross-examination as to the details of the inadmissible confession (6/986; see 34/3265-67).

confession to testify that appellant (1) confessed without hesitation, and (2) expressed remorse, but "[w]hat I do not wish to do, however, is to open the door to the prosecution . . . being allowed to introduce the substance of the confession if I called the witness to ask those two questions" (26/2286). Counsel sought from the court an advisory ruling on whether those two questions would open the door for the state to cross-examine the detective as to the substance of the confession (26/2285-87). The judge asked:

> Well, I haven't seen – what's the balance of the statement? What was in the statement other than that?
>
> MR. TEBRUGGE [defense counsel]: Exquisite [explicit?] details of the crime.
>
> MS. RIVA [prosecutor]: Oh, yes. And the State's position, Judge would be that certainly would open the door. What is confessed without hesitation, what does than mean, and expression of remorse, and I think the detectives would have quite a bit to say about that. The main portion of the statement that is harmful to the defendant is his admission that he did in fact go back and eliminate Bonnie Carroll as a witness. He had a recognition that she could be a witness against him and he went back and eliminated her. We would, at various stages of the defenses case, should questions be asked along these lines, be seeking to have that open the door to the confession.

(27/2287).

The judge declined to give a definitive ruling, but he made a number of comments indicating that it would be "kind of dangerous" (26/288) for the defense to put on the testimony: "I don't see how you can call them for that limited purpose and not open the door for the questioning. So if I was asked to rule today on it, I mean, it could change, but I would think that they would have a good shot at bringing in the other evidence" (26/2287-88); "[I]f I were asked to rule today without more, I would say I might be inclined to allow it" (26/2288); "Well, all I can tell you is, you know, it seems to me that it could quite possibly open the door" (26/2289).

The question came up yet again a week later in the penalty phase with another witness, appellant's mother Debra Troy. Defense counsel said:

> Judge, I have four questions for the witness that I wanted to proffer before I ask them. The questions are as follows:
>
> After the crime when you spoke with John, did he acknowledge his guilt to you? Did he express remorse for his behavior? Did he express concern for the victim's family? Did [he] express remorse for what he had done to Tracie Burchette? I anticipate that the answer to all four of those questions would be, yes. And I would not proceed any further. I think that by now the Court is aware of some of my concerns in asking these questions. So I wanted to know the position of the State Attorney and the Court

before I ventured into that territory.

MS. RIVA [prosecutor]: Judge, the State Attorney's position would be that that would open the door to questioning about his statements. And I mean, again, we have this, did he confess, he's denied certain elements.

MR. TEBRUGGE: No, it was not confess, it was did he acknowledge his guilt. Or I could put it, did he acknowledge his responsibility.

MS. RIVA: Judge, the basic feeling is that he's going to open the door to the Defendant's statements, Defendant's given statements to law enforcement concerning this. It's unfair to bring through one witness and give the full picture of his true state of mind. His true lack or remorse or --

MR. TEBRUGGE: Judge, during his statement to the detective, the prosecuting attorney, I'm sure, will acknowledge that he repeatedly expressed his remorse.

MS. RIVA: And I will say this, the detective would say it was not said in a sad or remorseful way. He just said the words he was sorry but, again, that would open the door to the detective's reaction to what he was saying and how he was saying it.

THE COURT: You want to introduce those questions?

MR. TEBRUGGE: I'm seeking to but I'm concerned about the State Attorney's position.

THE COURT: Well, I can't rule on that until I hear what they what they want to do but I don't have a problem with you asking those questions.

MR. TEBRUGGE: Judge, the problem I'm placed in is that I can't ask those questions then. And the only thing I can do to help the Court out is direct your attention to Florida Statute 921.141 that says, while the rules of evidence are relaxed in the penalty phase, that does not allow for the admission of any evidence obtained in violation of the United States Constitution.

THE COURT: Well, I understand that. I haven't ruled. But what she wants to present in the way of rebuttal evidence would come in. I'm saying that you're allowed to present the testimony of remorse through this witness to those statements. Now, to hear argument on whether that opens it up or not, I don't have a problem with you getting that information and, you know, you can consider the constitutional arguments, but, you know, I think that's just a decision you're going to have to make.

MR. TEBRUGGE: Well, based upon that, Judge, I feel like I'm unable in good conscience to ask the questions, even though I feel that they are significantly mitigating. I simply cannot expose my client to the risk of having the prosecuting attorney then go on in detail about all aspects of the offense.

MS. RIVA: Judge, can I add to the record in this regard? Because my argument would be not just to law enforcement but in terms of remorse this Defendant

> did blame the crimes on the victim to his mom, too, in the statement.
>
> THE COURT: Well --
>
> MS. RIVA: To a certain extent.[24]
>
> THE COURT: So that it's clear, I'm not ruling you would be able to introduce the statement from the police officers. And it may not be the situation where the doors open that wide. But I'm not going to make a preliminary ruling on that. I'll have to have the Defense make a decision as to whether they want to introduce Ms. Troy's testimony. It's your call, Mr. Tebrugge.
>
> MR. TEBRUGGE: Well, like I say, Judge, based upon that I'm going to stay away from the area, Judge.

(34/3253-56)(emphasis supplied).

A few moments later, the judge conducted a colloquy with appellant, advising him that he had an "absolute constitutional right to testify here today" and also that he had an "absolute right not to testify" (34/3267):

> It is your right to testify or not testify as to the issues relating to the penalty mitigating circumstances. No one

[24] The prosecutor is apparently referring to appellant's explanations to his mother Debra and his girlfriend Marilyn as to what started the argument that led to the physical attack. [Both of those statements were introduced by the state on direct examination of Debra and Marilyn in the guilt phase]. The substance is that Bonnie had invited him in; they had drinks and smoked marijuana; Bonnie made a romantic overture to him but he wasn't interested, and the affray began when Bonnie "bad-mouthed" Marilyn. See 10/1628; 22/1732-35; 24/1927-28, 1931.

could make that decision except yourself. So, again, I'm going to encourage you to consult with your attorney and listen to your attorneys' advice in regard to whether it's appropriate for you and advisable to testify. But I have to remind you that the decision to testify or not testify is yours alone.

I understand the State has some rebuttal evidence. And I will ask you again or I will ask your attorney to let me know if you've changed your mind, but he tells me you're not going to do it at this point. I just need to hear it from you. Is it your decision not to testify today?

THE DEFENDANT: After conferring with him I made the decision not to testify; however, I would like a chance to express the shame and remorse that I feel over the incident with both of the cases to the jury.

THE COURT: Well, that's something that your attorneys can consider putting you on the stand for that, I suppose, if that's what they want to do. They're may be some hazards in doing that but you can consult with them and let me know if that's what you want to do.

Is that your intent, Mr. Tebrugge, to have him testify on those points?

MR. TEBRUGGE: Judge, we've obviously had lengthy discussions on this point and I don't intend to re-argue them now. But Mr. Troy and I had talked repeatedly about an allocution before the jury. Mr. Troy is prepared at this moment to allocute, but it's my understanding that the Court

> would not allow it in the form in which I had requested it to be presented.
>
> THE COURT: Well, so it's clear, Mr. Troy, you would be allowed to get on the stand, take an oath and say whatever you want to say in that respect. However, that may very well allow the State to ask certain questions of you, which may or may not be helpful to your case, and, frankly, I can't evaluate that because I'm not in possession of all the information, but I'm not going to allow you at this stage to stand in front of a jury not subject to cross-examination and state your feelings about what happened. You may get a chance to do that in front of a judge at some point, but we're not there, and so it's inappropriate, I rule, to do that at this stage.

(34/3268-69)(emphasis supplied).

Accordingly, appellant did not take the stand. What he and his counsel feared most in the penalty phase – "impeachment" of his testimony expressing remorse (or the testimony of other witnesses regarding his prior expressions of remorse) with the full details of the suppressed confession – came to pass in the November 21, 2003 Spencer hearing. The defense called two witnesses to testify before the judge alone; the second of these was Detective Gregory Grodoski. When defense counsel asked Detective Grodoski whether, in providing a statement, appellant had ever denied that he was

responsible for Bonnie Carroll's death, the prosecutor objected on hearsay grounds and also asserted:

> Judge, as the Court recalls, this statement by the defendant was suppressed by a court order pursuant to the defendant's own motion to suppress. Now the defense is asking to elicit statements from the statement given by his client that would be helpful to him in his case specifically with regard to the nonstatutory mitigator of remorse, and I believe that is where the defense is going with this. Any my position on that, Judge, is if the defense is allowed to go into this statement to pull out a nonstatutory mitigator, the State feels that would then open the door for the State to be allowed to get into the statement, because there is a statutory aggravator of elimination of a witness that is contained within the statement given by the defendant.

(36/3502-03).

The judge overruled the hearsay objection (36/3504), and Detective Grodoski then answered two questions asked by defense counsel: (1) "[A]t any time did Mr. Troy deny responsibility for causing the death of Bonnie Carroll?" "No, he did not", and (2) (after his memory was refreshed with his report) "At any time did Mr. Troy express to you that he was remorseful for his actions?" "Yes" (36/3504-05). Defense counsel then said, "That's all the questions I have for the detective" (36/3505), and the floodgates opened. The prosecutor got up

for cross-examination and asked Detective Grodoski whether appellant “talk[ed] about the crime itself and what had occurred according to him during this murder?” (36/3505). When defense counsel objected on the ground that this was outside the scope of direct examination, the prosecutor reasserted that the door had been opened, and that under “the rule of completeness” the state should be allowed to extract a portion of the statement to establish a statutory aggravator (witness elimination) just as the defense had been allowed to extract a portion of the statement to establish a nonstatutory mitigator (remorse) (36/3505-06). Defense counsel pointed out that he had very deliberately limited his examination of Detective Grodoski to the two above questions, and had not gone into any of the facts of the offense or details of the confession (36/3506). The trial court, however, ruled that the door was opened “for a substantive response by the State as to what the content of the alleged confession was”, and he allowed the state’s proposed line of questioning (36/3507). The prosecutor then proceeded, through her cross-examination of Detective Grodoski, to elicit the details of the murder of Bonnie Carroll as contained in the previously suppressed confession (36/3508-14), including statements indicating that appellant was thinking she would call the police, and if he didn’t eliminate her as a witness his 17 months for a drug violation would turn into 17 years (36/3509, 3514).

[In another twist, by the time the judge imposed the death sentence on January 23, 2004 he was no longer sure his ruling opening the door to the suppressed confession was right (though he was not sure it was wrong either), and therefore "in an admitted abundance of caution, and solely as a matter of law" the judge disregarded the testimony of Detective Grodoski concerning the factual details of the confession and declined to find the witness eliminator aggravator (10/1635-36)].

At the end of the Spencer hearing, appellant finally was able to speak (to the judge and to Tracie Burchette) and said what he had wanted to say before the jury:

> Tracie, I am really thankful that you came here so I can tell you face to face how deeply ashamed I am for what I did to you.
>
> I just need a second.
>
> Shortly after you and I became acquainted, I described you to my grandfather as quite possibly the nicest person I ever met. I hope with all my heart that what I did to you doesn't change the way you view the world and that you will always be the sweet and caring person that you were when you and I met.
>
> I ask myself all the time how this could have happened and I can't explain it. All I can do is tell you that I'm truly sorry. That's all.

(36/3544-45).

He then said to the judge:

> From the beginning of this it's always been my intention to take full responsibility for what I did. In fact, I had mixed emotions about even getting the confession suppressed with my attorney. I never thought myself capable of taking another person's life, but I did take a life and I'm responsible for Bonnie's death. I did it and I'm ashamed of it. I'm really sorry for all the grief that I caused.
>
> I can't give an explanation for what I did, but I can tell you that I do know in my heart that I wasn't myself that night. I'm not proud of the way I lived my life. You heard all the people. You know the way I lived my life. I'm not proud of that. I'll be the first to admit that I had chances and I didn't take advantage of them and I really regret many of the choices I made.
>
> You know, since my arrest I spent many, many months struggling with this, wondering how this could have happened, how I could have done something so horrible. I hate what I did. I hate it. I'm ashamed of it. I regret it. I'm sorry. I do still believe that I'm capable of helping some people to not make some of the mistakes that I made. I honestly believe that. I may even be able to prevent something like this from happening again, and that's the only reason that I can give you for considering to sentencing me to a life sentence rather than a death. That's all.

(36/3545-46).

B. Allocution

Under Florida's capital sentencing law, the penalty-phase jury actively participates in the life-or-death decision as co-sentencer. Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1983); Jackson v. State, 648 So. 2d 85, 94 (Fla. 1994); Walls v. State, 641 So. 2d 381, 387 n.3 (Fla. 1994); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003); see also Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) (Quince, J., concurring). The requirements of the Eighth Amendment and the due process clause of the Fourteenth Amendment apply to the jury's weighing of aggravating and mitigating factors at least as much as they apply to the judge's weighing process. See Johnson v. Singletary, supra. [It is for this reason that the constitutional principle recognized in such decisions as Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); and Skipper v. South Carolina, 476 U.S. 1 (1986) that the sentencer may not be prevented from consider-ing relevant mitigating evidence applies to the Florida penalty jury and not just the judge. See Hitchcock v. Dugger, 481 U.S. 393 (1987)]. The critical importance of the jury is accentuated by the U.S. Supreme Court's recognition in Ring v. Arizona, 536 U.S. 584 (2002) that capital sentencing by the judge alone violates the Sixth Amendment. Assuming arguendo

that Florida's capital sentencing scheme is constitutionally permissible[25] [but see Issue VII, infra, arguing to the contrary], the law requires the trial judge to give great weight to the jury's penalty verdict.[26] It is part of the jury's role to reflect the conscience of the community at the time of the trial. Weaver v. State, __ So. 2d __ (Fla. 2004) [29 FLW S801] [2004 WL 2922143]; Keen v. State, 775 So. 2d 263, 283 (Fla. 2000). As the judge in the instant case accurately instructed the jury, "it is only under rare circumstances that the court could impose a sentence other than what you recommend" (35/3438). In fact, if the jury in the instant case had recommended life imprisonment, the judge would have been required under Florida law (i.e., the Tedder standard for life overrides)[27] to impose a life sentence, since the evidence established both of the mental mitigators, as well as a great deal of nonstatutory mitigation encompassing appellant's life history. See Santos v. State, 629 So. 2d 839, 840 (Fla. 1994)(impaired capacity and extreme mental or emotional disturbance are two of the weightiest mitigators in Florida capital sentencing), and see e.g. Hansbrough v. State, 509 So.

[25] Although this Court has rejected the contention that Ring invalidates Florida's death penalty, see e.g. Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), the U.S. Supreme Court has not yet addressed Ring's applicability to the four "hybrid" states (Florida, Delaware, Indiana, and Alabama) where the judge and jury are co-sentencers.

[26] See e.g. Stone v. State, 378 So. 2d 765, 772 (Fla. 1979); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003).

[27] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), as discussed in Weaver v. State, supra, and Keen v. State, supra, 775 So. 2d at 282-87.

2d 1081, 1086-87 (Fla. 1987) and Holsworth v. State, 522 So. 2d 348, 353-54 (Fla. 1988) re application of the Tedder standard where there is substantial mitigating evidence. As this Court unambiguously stated in Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992) (quoted in Keen, 775 So. 2d at 285, n.21):

> Under Florida law, the role of the jury is one of great importance, and this is no less true in the penalty phase of a capital trial. Tedder. Juries are at the very core of our Anglo-American system of justice, which brings the citizens themselves into the decision-making process. We choose juries to serve as democratic representatives of the community, expressing the community will regarding the penalty to be imposed. A judge cannot ignore this expression of the public will except under the Tedder standard adopted in 1975 and consistently reaffirmed since then.

If the jury represents the conscience of the community, who better to assess the sincerity of a capital defendant's expression of remorse or to decide whether it warrants sparing his life? Remorse is defined as "a gnawing distress arising from a sense of guilt for past wrongs (as injuries done to others)" [Beasley v. State, 774 So.2d 649, 672 (Fla. 2000), quoting Webster's Third New International Dictionary 1921 (1993)], and it is a recognized mitigating circumstance under Florida law. See Parker v. State, 643 So. 2d 1032, 1035 (Fla.

1994) ("Jurors also may consider remorse or repentance"); Stevens v. State, supra, 613 So. 2d at 403; Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The initial legal question in this compound Point on Appeal is not whether Florida recognizes a defendant's right to allocution (it does),[28] or whether the right to allocution applies to capital sentencing in Florida (again, it does),[29] but rather the question is when – and, more importantly, before whom – does the defendant get the opportunity to allocute? Since, under Florida law, (1) the jury is the co-sentencer and represents the conscience of the community; (2) the jury's penalty verdict is based on weighing the mitigating factors (including remorse) against the aggravating factors; and (3) the jury's verdict for life or death is entitled to great weight and – except in the rarest cases – when it recommends life the judge must follow the jury's recommendation, appellant submits that when a Florida capital defendant requests allocution before the jury, he must be afforded that opportunity.[30] As defense counsel said to the judge in the instant case:

[28] See e.g. Eutsey v. State, 383 So. 2d 219, 115 (Fla. 1980); Adams v. State, 376 So. 2d 47, 56 (Fla. 1st DCA 1979); Ventura v. State, 741 So. 2d 1187 (Fla. 3d DCA 1999); Davenport v. State, 787 So. 2d 32 (Fla. 2d DCA 2001); Barlow v. State, 784 So. 2d 482 (Fla. 4th DCA 2001).

[29] See Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993); Jackson v. State, 767 So. 2d 1156, 1160 (Fla. 2000).

[30] As a pure question of law, the standard of review is de novo. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2002); State v. Glatzmayer, 789 So. 2d 297, 301-02 n.7; see also United States v. Taylor, 11 F. 3d 149, 151 (11th Cir. 1994).

> . . . I feel very strongly . . . that it should be allowed in this portion, because you have to follow what the jury decides. So it doesn't do us a heck of a lot of good to just do it in front of you later on.

(26/2284).

See United States v. Chong, 104 F. Supp. 1232, 1234 (D. Hawaii 1999) (holding that federal capital defendant was entitled to allocution before sentencing jury, and stating that a right to allocute before the judge alone "would be an empty formality").

There is a split of authority as to whether the right of allocution is constitutionally based.[31] Compare Boardman v. Estelle, 957 F. 2d 1523, 1525-30 (9th Cir. 1992) (finding a denial of due process) and United States v. Chong, supra, 104 F. Supp. 1234-36 (defendant in capital case possesses a constitutional right to allocution under due process clause) with United States v. Hall, 152 F. 3d 381 (5th Cir. 1998) (rejecting the due process claim). In Shelton v. State, 744 A. 2d 465, 495 (Del. Supr. 1999), the Delaware Supreme Court declined to decide whether the Eighth and Fourteenth Amendments provide a right of a capital defendant to allocution before the jury [Delaware being a "hybrid" or jury

[31] Courts are all over the map on this. See Shelton v. State, 744 A. 2d 465, 492-95 (Del. Supr. 1999) ("[W]e are suprised by the lack of uniformity" among the federal courts and state jurisdictions).

co-sentencing state whose death penalty statute is patterned after Florida's],[32] in view of its holding that the right was established under state law. Noting the right of allocution's "deep roots" in the common law, 744 A. 2d at 494, the Delaware court wrote:

> Presently, allocution serves two purposes: "First, it reflects our commonly-held belief that our civilization should afford every defendant an opportunity to ask for mercy. Second, it permits a defendant to impress a jury with his or her feelings of remorse." Put another way, allocution is necessary because it affords "an opportunity for the jury to learn about the `whole person'" and "it bespeaks our common humanity that a defendant not be sentenced to death by a jury `which has never heard the sound of his voice.'" [footnotes omitted].

Shelton v. State, supra, 744 A. 2d at 492; Capano v. State, 781 A. 2d 556, 661 (Del. Supr. 2001).

See also State v. Nelson, 803 A. 2d 1, 31 (N.J. 2002) ("The purpose of allocution is to allow a defendant to express remorse; it is a proper function of the jury to asses that remorse").

In DeShields v. Snyder, 829 F. Supp. 676, 692 (D. Del. 1992), the court recognized the split of authority among the federal circuits and observed:

[32] See State v. Cohen, 604 A. 2d 846, 851 n.4 (Del. Supr. 1992); Garden v. State, 844 A. 2d 311, 313 (Del. Supr. 2004).

> The predominant factor distinguishing the cases on either side of this issue is whether the defendant has made an affirmative request to speak or not. The Fourth, Fifth, Ninth and Eleventh Circuits, under those circumstances have found a constitutional dimension present with regard to a defendant's right to allocution. See Boardman v. Estelle, 957 F. 2d 1523, 1530 (9th Cir. 1992) (Constitutional right attaches only when the defendant makes an affirmative request to speak); United States v. Moree, 928 F. 2d 654, 656 (5th Cir. 1991); United States v. Jackson, 923 F. 2d 1494, 1496 (11th Cir. 1991); 923 F. 2d 1494, 1496 (11th Cir. 1991); Ashe v. North Carolina, 586 F. 2d 334 (4th Cir. 1978). The Fifth, Sixth and Eleventh Circuits have all decided cases where they have held that no constitutional right to allocution exists. United States v. Coffey, 871 F. 39, 40 (6th Cir. 1989) (no constitutional basis for allocution); United States v. Prince, 868 F. 2d 1379, 1396 (5th Cir.), cert. Denied, 493 U.S. 932, 110 S. Ct. 321, 107 L. Ed. 2d 312 (1989) (where defendant did not make a request to address the Court then there is no constitutional violation); United States v. Fleming, 849 F. 2d 568, 569 (11th Cir. 1988).

In the instant case, appellant through counsel repeatedly requested the opportunity to allocute before the sentencing jury, in a written pre-trial motion, a pre-trial hearing, and throughout the penalty phase. When the judge conducted a colloquy with appellant personally, concerning his "absolute

right" to testify or not to testify, appellant stated that after conferring with his attorney about the dangers involved he had made the decision not to testify; "however, I would like a chance to express the shame and remorse that I feel over the incident with both of the cases to the jury" (34/3268). Therefore, if a due process violation results from the denial of the defendant's affirmative request, then a due process violation surely occurred here.

The scope of a capital defendant's right to allocute before the jury is certainly not unlimited; defense counsel recognized this, and the statement of remorse which appellant wanted to express to the jury was well within the proper bounds [See 36/3544-46, statement made to judge and Tracie Burchette at Spencer hearing]. See State v. Zola, 548 A. 2d 1022, 1044 (N.J. 1988), in which the Supreme Court of New Jersey (noting that other states such as Washington and Maryland had adopted similar procedures permitting allocution before the jury in capital cases) said:

> The State is wisely concerned that defendant not be permitted to lie with impunity to a jury that is attempting to reach a rational fact-based conclusion on whether he shall live or die. The defendant recognizes this concern and seeks no more than the right to stand before the jury and ask in his own voice that he be spared. He would not be permitted to rebut any facts in evidence, to deny his guilt, or indeed, to voice an expression of remorse that contradicts evi-dentiary facts.

See also, regarding the scope of allocution, Capano v. State, supra, 781 A. 2d at 666-68; Echavarria v. State, 839 P. 2d 589, 595-96 (Nev. 1992).

The Ohio Supreme Court in State v. Reynolds, 687 N.E. 2d 1358, 1372-73 (Ohio 1998) recognized that "[t]he penalty phase in a capital case is not a substitute for a defendant's right of allocution." [Reynolds was permitted to make an unsworn statement to the penalty jury, and he addressed the judge by way of letter, so there was no prejudicial error]. One of the main reasons why the defendant's right to take the stand and testify subject to cross-examination is an inadequate substitute for his right of allocution is especially germane to the instant case [see Part C of this Point on Appeal] and was emphasized in United States v. Chong, supra, 104 F. Supp. at 1236:

> [this] Court is not so sanguine that the right to allocute can be equated with the opportunity to testify under oath and subject to cross examination. The Court observes that the fear of cross-examination might compel capital defendants to forego addressing the jury and offering pleas for mercy, expressions of remorse, or some explanation that might warrant a sentence other than death.

The same concern was recognized in State v. Zola, supra, 548 A. 2d at 1046, noting that one of the reasons a capital

defendant may elect not to testify is because of concern that he might be examined about previously inadmissible evidence.

In the instant case, after appellant's requests to allocute before the jury was denied, the state aggressively made it clear that if appellant were to take the stand and testify concerning his remorse and shame, or if he were even to introduce prior statements of remorse made to his mother and to the detectives, the state would cross-examine appellant and the other witnesses with the details of the crime contained in the suppressed confession. When defense counsel proffered that the proposed testimony would be limited to remorse and whether appellant had acknowledged responsibility for Ms. Carroll's murder, the trial judge declined to assure him that this would not "open the door" to the suppressed confession, and in fact – throughout the penalty phase – made comments strongly indicating that in all probability he would rule that the door was opened. Appellant could choose to testify at his own risk; defense counsel could introduce the other witnesses' testimony at appellant's risk; but, as counsel made it clear, it was a risk he just could not afford to take. Therefore, the scenario foreseen in Chong and Zola actually occurred in the instant case, and illustrates why appellant's right to allocution before the jury was so important.

The only rationale put forward by the prosecutor and the trial judge for denying allocution before the jury is the

concept that the judge is "the magistrate who's making the decision of life or death" (19/1169), and that "the jury is only making a recommendation" which is advisory in nature (19/1169, 1173, 1176). For the reasons previously discussed, that rationale is simply wrong under Florida law, not to mention the constitutional principle of Ring v. Arizona.

To sum up, under the totality of the circumstances –- including the facts that (1) a Florida penalty jury is the co-sentencer and represents the conscience of the community; (2) if the jury had recommended life in this case, its verdict would have determined the sentence imposed since an override could not have been sustained under the Tedder standard; (3) appellant and defense counsel repeatedly requested the opportunity to allocute before the jury to express remorse; and (4) appellant's well-founded fear of being improperly cross-examined with an unconstitutionally obtained confession (which would, inter alia, have enabled the state to establish a new aggravating circumstance not otherwise supported by the evidence) prevented him from testifying and from introducing other evidence of remorse – the trial court's denial of allocution before the jury deprived appellant of a fair penalty hearing and due process of the law under the Eighth and Fourteenth Amendments.[33]

[33] Alternatively, appellant requests that this Court reach the same conclusion under state law, as the Delaware Supreme Court based its holding in

C. The Specter of Improper Impeachment

In opposing appellant's request for allocution before the jury, the prosecutor said:

> We believe the law is clear in Florida that if he wants to allocute, he can allocute before Your Honor because the jury is only making a recommendation, and if he wants to testify before that jury, that he should be subject to cross-examination.

(19/1176)(emphasis supplied).

Apart from the prosecutor's minimization of the jury's role, his statement that any testimony given by appellant before the jury should be subject to cross-examination presupposes proper cross-examination. In the instant case, it was the constant threat of improper (i.e. far beyond the scope of direct) and unlawful (in violation of the Fifth Amendment and the express provision in Fla. Stat. §921.141(1) that evidence secured in violation of the state or federal Constitutions is inadmissible in a death penalty proceeding) cross-examination which was used to put appellant in a position where he could not risk exercising his constitutional right to testify. It is a violation of due process, and compromises the fundamental fairness of the proceeding, to needlessly penalize a defendant's exercise of a constitutional right (especially one as important as the right to be heard,

Shelton.

see Rock v. Arkansas, 483 U.S. 44, 51-52 (1987)), or to put him between the proverbial "rock and a hard place" by unfairly forcing him to choose between two equally important constitutional rights. See Merritt v. State, 523 So. 2d 573, 574 (Fla. 1988); Turner v. State, 851 So. 2d 276, 279 (Fla. 4th DCA 2003); Simmons v. United States, 390 U.S. 377, 392-94 (1968); United States v. Jackson, 390 U.S. 570, 581-82 (1968). Such a Hobson's choice is especially egregious in a death penalty case, where the fairness and reliability of the proceeding receives special scrutiny under the Eighth and Fourteenth Amendments. See Lockett v. Ohio, 438 U.S. 586 (1978); Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

So there is no mistake about it, appellant recognizes that a defendant who takes the stand in the penalty phase is subject to cross-examination and impeachment like any other witness. The problem here is that there was absolutely no legal justification for the threatened impeachment. The prosecutor, after successfully blocking appellant's request to allocute before the jury, repeatedly made it clear every time appellant tried to introduce testimonial evidence of his remorse (through his own testimony and that of other witnesses) that she would if permitted introduce the suppressed confession in all its detail, including statements to establish a new aggravator of witness elimination. The judge, in turn, repeatedly made it clear that he saw no reason why the door wouldn't be open for impeachment with the

suppressed confession, and in light of that appellant and defense counsel could proceed at their own risk. [However, the judge refused to make a definitive ruling that the door had been opened until such time as counsel took the irremediable step of actually calling the witness and eliciting the testimony establishing remorse. Undersigned counsel submits that that is kind of like telling someone that (if he wishes) he may dive into a drained pool. Undoubtedly there are situations where a trial judge would have to hear a witness' testimony on direct (either as evidence before the jury or in a testimonial proffer) in its entirety in order to determine whether or how far the door was open for otherwise inadmissible evidence to be introduced as impeachment. This – however – is not such a case. Defense counsel couldn't have been clearer about what the testimony would be; appellant wanted to express his remorse and shame to the jury, and that the other witnesses would be asked whether he had expressed remorse and whether he had acknowledged his responsibility for Ms. Carroll's murder. If defense counsel had to actually call appellant or Detective Grodoski, or ask Debra Troy these questions, in order to obtain a definitive ruling, what was going to change? (Other than the fact that, as illustrated by what happened in the Spencer hearing, it would then be too late to close the floodgates)].

As defense counsel pointed out, Florida's death penalty statute specifically prohibits the introduction of unconstitu-

tionally obtained evidence (34/3255). As possible justifications for its "opening the door" rationale, the state may rely on the Harris v. New York, 401 U.S. 222 (1971) exception, and/or the "rule of completeness" (see 36/3505-06). However, neither of these theories applies in this case, or remotely justifies what happened.

In Harris v. New York, supra, the U.S. Supreme Court held that a defendant's statement which has been suppressed due to Miranda or other constitutional violations (as opposed to being an involuntary confession) may nevertheless be admissible for impeachment purposes as a prior inconsistent statement. The basis of the exception is that the right of a defendant to testify in his own behalf cannot be construed to include a right to commit perjury. 401 U.S. at 225. Therefore:

> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Harris v. New York, 401 U.S. at 226, quoted in Nowlin v. State, 346 So. 2d 1020, 1023 (Fla. 1977).

See also Rogers v. State, 844 So. 2d 728, 732 (Fla. 5th DCA 2003) (purpose of Harris exception is to prevent perjury; therefore, statement procured in violation of Miranda may "be

used to impeach a testifying defendant in the same manner as any other prior consistent statement").

The most basic and obvious requirement of a prior inconsistent statement is that it be inconsistent. See e.g. State v. Smith, 573 So. 2d 306, 312-13 (Fla. 1990); Hills v. State, 428 So. 2d 318 (Fla. 1st DCA 1983); Alexander v. Bird Road Ranch and Stables, Inc., 599 So. 2d 229 (Fla. 3d DCA 1992); and see Ehrhardt, Florida Evidence (2004 ed.) §608.4, p.489 ("A prior statement of a witness is admissible to impeach credibility only if it is in fact inconsistent with the trial testimony").

Thus, as the Third DCA held in reversing for a new trial in Wright v. State, 427 So. 2d 326 (Fla. 3d DCA 1983), the state cannot use a suppressed confession to impeach a testifying defendant when the statements in the confession are not inconsistent with the defendant's testimony.

In the instant case, the details of the murder, or the fact that appellant at the time of his arrest admitted to witness elimination as a motive, are not inconsistent with the possibility of remorse even at that time, and they are certainly not inconsistent with genuine feelings of remorse and shame by the time of the trial. Absent any statements which would qualify as "prior inconsistent statements", the Harris v. New York exception could not apply.

As far as the "rule of completeness", the purpose of that doctrine is "to avoid the potential for creating misleading

impressions by taking statements out of context." Larzelere v. State, 676 So. 2d 394, 401 (Fla. 1996); see Mendoza v. State, 700 So. 2d 670, 673 (Fla. 1997); Evans v. State, 808 So. 2d 92, 103 (Fla. 2001); Gutierrez v. State, 747 So. 2d 429, 431 (Fla. 4th DCA 1999); Miller v. State, 780 So. 2d 277, 280 (Fla. 3d DCA 2001). The "rule of completeness", which is codified in Fla. Stat. §90.108, only applies to written or recorded statements (including tape recordings), and does not apply to conversations and unrecorded interviews. See Christopher v. State, 583 So. 2d 642, 645-46 (Fla. 1991); Hoffman v. State, 708 So. 2d 962, 966 (Fla. 5th DCA 1998); Ehrhardt, Florida Evidence, §90.108, p. 48-50. There is a related concept, referred to as the "doctrine of curative admissibility", which (in circumstances very different from the instant case) may apply to unrecorded conversations or interviews; however:

> The doctrine of curative admissibility "rests upon the necessity or removing prejudice in the interest of fairness. . . . and [I]ntroduction of otherwise inadmissible evidence under the shield of this doctrine is permitted only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." United States v. Winston, 447 F. 2d 1236, 1240 (D.C. Cir. 1971) [other citations omitted].

Guerrero v. State, 532 So. 2d 75, 77 (Fla. 3d DCA 1988)(emphasis supplied).

See Ehrhardt, Florida Evidence (2004 ed.), §108.1, p.51; Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992).

If appellant had been permitted to exercise his right to allocution to express to the jury (as he eventually did before the judge alone) the remorse and shame he feels for his crimes against Bonnie Carroll and Tracie Burchette, the state would have suffered no unfair prejudice. If, instead, appellant had been permitted to take the stand and testify before the jury – without fear of unlawful and devastating impeachment – about his remorse and shame, then the harmful effect of the denial of allocution would have been ameliorated, and the state would have suffered no unfair prejudice. The threat of the suppressed confession was not to correct a "misleading impression." It was a win/win situation for the prosecution; either appellant would be deterred from taking the stand (and even from asking other witnesses about remorse), or else the graphic details of the confession as well as a whole new aggravator would come into evidence.

The very limited questioning proposed by defense counsel [see Ramirez v. State, 739 So. 2d 568, 579-81 (Fla. 1999); Pacheco v. State, 698 Sol 2d 593, 595 (Fla. 2d DCA 1997); Barone v. State, 841 So. 2d 653, 655 (Fla. 2d DCA 2003)] could not remotely have "opened the door" for the state to elicit the details of an illegally obtained confession. The

resulting, and completely unnecessary, constitutional Hobson's choice between his rights to testify [Rock v. Arkansas] and to present evidence of the mitigating circumstance of remorse [see e.g. Lockett v. Ohio] on the one hand, and his right not to be sentenced to death on the basis (in part) of a confession obtained in violation of his right to counsel on the other, deprived appellant of due process and a fair penalty hearing.

D. Harmful Error

The combined effect of the sequence of events was to deprive appellant of his right to be heard. After having blocked appellant at every turn from speaking to the jury or introducing evidence of his remorse, the state can now be expected to argue, in effect, that it doesn't matter because the outcome would have been the same. How the state can know that is one question. Why the prosecutor saw fit to try the penalty phase the way she did is another. Plainly she must have believed that appellant's allocution or testimony might well have an impact on the jury's decision whether he should live or die; otherwise, why did she pull out all the stops to prevent it? See Gunn v. State, 78 Fl. 599, 83 So. 511 (1919); Farnell v. State, 214 So. 2d 753, 764 (Fla. 2d DCA 1968).

Because the right to be heard is so basic and fundamental an element of due process, see Rock v. Arkansas, 483 U.S. 4,

51-52 (1987), it is appellant's position that the combination of judicial actions which effectively deprived him of this right is not amenable to "harmless error" analysis, and amounts to structural error. The Supreme Court of Louisiana has reached a similar conclusion. State v. Dauzart, 769 So. 2d 1206, 1210-11 (La. 2000); State v. Hampton, 818 So. 2d 720, 727-30 (La. 2002); see State v. Thompson, 852 So. 2d 552, 556-58 (La. App. 4th Cir. 2002). [See also Windom v. State, 886 So. 2d 915, 949 (Fla. 2004) (Cantero, J., concurring), citing Neder v. United States, 527 U.S. 1, 8-9 (1999) for the proposition that structural error "is a limited class of constitutional error that renders a trial fundamentally unfair, such that the trial cannot reliably serve as the basis for the determination of guilt or innocence or for criminal punishment"]. Even if not viewed in terms of structural error, however, the state cannot satisfy the constitutional harmless error standard of Chapman v. California, 386 U.S. 18 (1967) and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), because it cannot show beyond a reasonable doubt that hearing appellant from the witness stand or by allocution would have had no impact on the jury's deliberations or its penalty verdict.

Appellant's death sentence must be reversed and the case remanded for a new penalty hearing that comports with the requirements of due process.

ISSUE IV

THE TRIAL COURT'S EXCLUSION OF THE TESTIMONY OF MICHAEL GALEMORE VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR AND RELIABLE PENALTY HEARING AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Introduction

The trial court excluded over objection the testimony of defense witness Michael Galemore, an assistant warden with the Florida Department of Corrections (30/2726-31, 2762-67; 6/986; 34/3265). In so doing, he violated the precepts of the Eighth and Fourteenth Amendments, because –- in the evidentiary context in which it was sought to be presented –- Galemore's testimony (1) was relevant to the mitigating factor of appellant's potential for rehabilitation and positive contribution in a structured prison environment; (2) was made even more relevant by the prosecutor's earlier cross-examination of the defense's lay witnesses, in which he denigrated their testimony by emphasizing their lack of first-hand knowledge of the conditions of confinement, and (3) was essential to rebut the prosecutor's repeated suggestion that appellant – if sentenced to life imprisonment – would just go back to using drugs.

Defense counsel proffered that Mr. Galemore's testimony would address, inter alia, the issue of drugs in the prison, and the fact that appellant, if sentenced to life without

parole, would be in what is known as “close custody”, in which he would be supervised in a particular fashion, he would have to follow the rules, and he would have to work (30/2727). The prosecutor objected, expressing the view that the proposed testimony did not support any statutory or nonstatutory mitigators (30/2729-30). Defense counsel pointed out that the state had continuously suggested that appellant would just go back to using drugs in prison, and Mr. Galemore was going to address the very strong measures DOC takes to keep drugs out of the prison, though acknowledging that small amounts do get in from time to time (30/ 2729, 2766). The judge (with the state’s agreement) accepted the proffer “as being a substantial recitation of what the witness would have testified to had he been permitted to do so” (30/2766-67).[34]

B. The Applicable Law

A defendant’s potential for rehabilitation and productivity in a structured prison environment is a valid nonstatutory mitigating circumstance. See Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Stevens v. State, 552 So. 2d 1082, 1085 (Fla. 1989); Torres-Arboleda v. Dugger, 636 So. 2d 1321,

[34] The standard of review is abuse of discretion, limited by the rules of evidence [Nardone, 798 So. 2d at 874; Hinojosa, 857 So. 2d at 309-10], and by constitutional requirements [see e.g. Skipper v. South Carolina, 476 U.S. 1 (1986) and Simmons v. South Carolina, 512 U.S. 154 (1994)].

1325 (Fla. 1994). "Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skipper v. South Carolina, 476 U.S. 1, 5 (1986). See also Ford v. State, 802 So. 2d 1121, 1136 n.37 (Fla. 2001) ("[w]here the defendant is well-suited to imprisonment, life imprisonment may serve as a viable alternative to death, but where the defendant poses a threat to prison personnel and fellow inmates, life imprisonment may be viewed less favorably"). The American Bar Association performance standards for capital defense – standards which have been recognized by the U.S. Supreme Court as "guides to determining what is reasonable" in evaluating ineffective assistance of counsel claims, see Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2536-37 (2003) – provide that in deciding which witnesses and evidence to prepare in the penalty phase, counsel should consider including "[w]itnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(F)(3.)(published at 31 Hofstra L. Rev. 913, 1055-56 (Summer 2003)) (see 30/2728).

In addition to the Eighth Amendment principle that the sentencer must not be prevented from considering relevant mitigating evidence [see e.g. Lockett v. Ohio, 438b U&.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v.

South Carolina, supra], a capital defendant's right to introduce evidence in rebuttal of the evidence, inferences, or arguments put forward by the state may independently provide a basis for the defense to inform the jury about the conditions under which a life sentence would be served. See Skipper v. South Carolina, 476 U.S. at 5 n.1 (Where prosecutor in closing argument urged the jury to return a death sentence in part because Skipper "could not be trusted to behave if he were simply returned to prison", it is not only the rule of Lockett and Eddings which requires that the defense be allowed to introduce evidence on this point, but also the elemental due process requirement that he not be sentenced to death on the basis of information which he had no opportunity to rebut). See also the concurring opinion of Justice Powell (jointed by Chief Justice Burger and Justice Rehnquist) in Skipper, 476 U.S. at 9-11 (disagreeing with the majority's Lockett analysis, but agreeing that the exclusion of proffered testimony about Skipper's good behavior in jail after his arrest violated due process because it was offered in rebuttal of evidence adduced by the prosecutor in cross-examination (and emphasized in closing argument)); Simmons v. South Carolina, 512 U.S. 154, 164, 168-69 (1994).

C. The Evidentiary Context

In the instant case, in her penalty phase opening statement, the prosecutor told the jury that it would hear about an aggravated assault with a deadly weapon committed by appellant during a prior prison term:

> You will learn that while he was in prison, he was purchasing drugs in prison in Tennessee. And the people from whom he was purchasing the drugs sort of, I don't know what you want to call it, blackmailed him, bribed him, what have you. Anyway, the people indicated he hadn't paid for the drugs, and he owed more money for the drugs. So you're going to learn that the defendant, in sort of a preemptive strike, attacked the person who he claims was trying to get more money out of him for these drugs than he had already paid for in prison.

(27/2316).

[The state subsequently introduced (in its case in chief, prior to the defense proffered testimony of Michael Galemore) the Tennessee conviction of aggravated assault with a deadly weapon (28/2416-17; S1/86-87; S2/209), as well as the testimony of a Tennessee parole supervisor that the assault involved another inmate; appellant received a three year sentence on top of what he was already serving, and he was on parole for this at the time of the crimes for which he was presently on trial (27/2379-80). The defense later introduced, to ameliorate the impact of the Tennessee incident, an investigative summary indicating that (1) Troy

admitted to stabbing the other inmate to prevent a threatened homosexual attack, and (2) that, according to the corrections officer, Troy's statement that he did not want to hurt the other inmate very much, but was just trying to get his attention so he wouldn't be bothered anymore, appeared to be accurate because Troy would have been able if he chose to deliver a much more serious blow with the weapon he used (33/3197; 34/ 3213; see 35/3409)].

Defense counsel, in his opening statement, told the jury that he would present evidence in three main categories of mitigation (27/2322), the second of which was to show that appellant, whose criminal history has been the product of his longstanding drug addiction and who had never before committed any act remotely similar to his violent explosion on September 11, 2001, responds well to a structured environment when he is away from drugs (27/2332, see 2327-32).

[During the penalty phase, in support of this area of mitigation, the defense introduced the testimony of five correctional officers, a jail nurse, a fellow inmate, five family members, a former teacher, and the psychiatrist Dr. Maher (28/2537-41; 29/ 2586-87, 2633-35; 30/2682, 2776, 2799, 2804; 31/2836-42, 2848-52, 2859-62; 32/2976-78, 2984-85; 3005, 3020; 33/3145-51, 3168, as well as prison records indicating good adjustment and behavior (33/3195; 34/3264), and appellant's letters from prison to his grandfather (30/2711-17). Dr. Maher testified that appellant -– who is severely

addicted to cocaine and other substances (see 30/3006-14) -- responds well to a highly structured environment if he can be kept free from the influence of drugs (32/3005, 3019-20). Another witness, Joey Dale, was a childhood friend of appellant who years later – after they went their separate ways – became a corrections officer in the jail in their hometown. Appellant, as it turned out was an inmate there. Dale told the jury of an incident when appellant saved him from a harrowing and violent attack by other inmates after he (Dale) had tried unsuccessfully to break up a racial fight (29/2639-55, see 10/1640). Dale further testified that, by physically intervening to help a guard, appellant put himself at risk of retaliation by other inmates (29/2653-54)].

The defense's second witness (after the Sarasota jail nurse) to speak on the subject was appellant's father, John Troy VI, who testified about his son:

> Since [he] became an adult, I have always felt more comfortable and at ease and felt that he was safe, and others while he was in this completely very tightly controlled environment. And I have always felt that he's prospered in that environment. I think many of the good things that he has done have been in that environment. I know he's been helpful to other inmates. I know he's helped people change and get their lives turned around. And I just know that because of his terrible drug addiction that he's best placed in a situation where he cannot have – make those things available to him.

(29/2586-87).

On cross-examination, the prosecutor asked Mr. Troy if it was true that his son is still an addict, and still potentially going to make the choice to use drugs (29/2610-11). Mr. Troy acknowledged that this was true (29/2611). Then the prosecutor asked:

> You have talked about your son being in prison in the structure of prison. Now, you really don't have any first hand information about the prison system and what happens in prison or in a prison setting, do you?
>
> A. No.

(29/2615).

After questioning Mr. Troy about his knowledge of the Tennessee assault incident, the prosecutor asked:

> Are you – you had also talked about that he would finally – if he were in prison, be drug free, and is that your impression that an inmate wouldn't be able to get drugs in prison?
>
> A. That would definitely be my impression, yes.
>
> Q. Were you aware that your son had made admissions to his conditional release officer here in Florida that before he got released just in July, while he was in prison, that he celebrated that release with marijuana in prison, did you know that?
>
> A. I did not.

(29/2615-16).

The next example of this line of cross-examination was appellant's sister, Natalie Wallace, who testified on direct that her brother could definitely make positive contributions if allowed to live the rest of his life in prison (29/2633-35).

On cross, the prosecutor pointed out, "And as for what you believe your brother's value would be in the prison system, you've never been to prison, so you really don't know how prison works, isn't that true?" (29/2638). The prosecutor also asked Ms. Wallace if she was aware that there are drugs in prison (29/2638).

Appellant's grandmother, Hilda Troy, was the next witness to be impeached on cross in the same manner:

> MS. RIVA [prosecutor]: In terms of his incarceration in the time he's been incarcerated, you don't have any personal knowledge as to what happens in the prison system, is that fair to say?
>
> A. Yes, ma'am.
>
> Q. And anything you've heard about what goes on in prison is just that, something someone has told you, correct?
>
> A. That would be true.
>
> Q. And do you have any knowledge as to whether your grandson has had the ability to use drugs while he's been in prison?

A. I wouldn't have any knowledge of that.

(30/2695-96)

D. The Exclusion of Galemore's Testimony Violated The Eighth and Fourteenth Amendments

It is in this evidentiary context that defense counsel proffered the testimony of the DOC's Michael Galemore. Since the prosecutor kept impeaching the defense's lay witnesses with their lack of first-hand information about the prison system and how it actually operates, who better to call than a DOC witness who does have that information? Since the prosecutor kept insinuating that appellant, if sentenced to life imprisonment instead of being put to death, would just go back to using drugs like he had during prior terms of incarceration, it became imperative for defense counsel to show the jury that he would now be in a much more restrictive and supervised type of confinement – "close custody" as Galemore would have explained it – and his potential access to the drugs to which he had long been addicted would be greatly reduced. In other words, even assuming arguendo that the conditions of confinement in the event of a life sentence were not initially relevant, the prosecutor made them relevant when she repeatedly belittled three defense witnesses' testimony concerning appellant's potential for rehabilitation and

positive contributions by emphasizing their lack of knowledge of the conditions of confinement. [Ironically, in the same penalty proceeding in which she successfully argued a wildly overbroad theory of "opening the door" to an unconstitutionally obtained confession, the prosecutor in this instance clearly did open the door for defense testimony addressing the conditions of confinement by first (and repeatedly) bringing up the subject herself].

Florida's Evidence Code, §90.401, defines relevant evidence as "evidence tending to prove or disprove a material fact." See Ehrhardt, Florida Evidence (2004 Ed.), §401.1, p.116-17 ("In order for evidence to be relevant, it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action"); see e.g. Amoros v. State, 531 So. 2d 1256, 1259-60 (Fla. 1988); Stephens v. State, 787 So. 2d 747, 759 (Fla. 2001). Given that definition, the testimony of a DOC official that a defendant sentenced to life without parole would be in "close custody", subject to stricter supervision than a normal inmate and with greatly reduced access to drugs and other contraband, while not in and of itself a mitigating factor, is nevertheless relevant to the mitigating factor of amenability to rehabilitation and productivity in a structured prison setting; i.e. it establishes that the setting will in fact be structured. Therefore, as implicitly recognized by the ABA guidelines, the fact that a life-sentenced defendant will be

closely supervised is something a capital jury needs to know in order to determine whether life imprisonment is a viable alternative to death. Since a defendant has an Eighth Amendment right "to place before the sentencer relevant evidence in mitigation of punishment", Skipper v. South Carolina, supra, 476 U.S. at 4 (emphasis supplied), the trial court's ruling excluding Galemore's testimony would have been error of constitutional dimension even if it has not been the prosecutor who first placed the issues of the conditions of confinement and the availability of drugs in prison before the jury.

The magnitude of the error was greatly compounded here, however, by the fact that the exclusion of Galemore's testimony also prevented the defense from rebutting the prosecutor's damaging inferences; inferences which could easily have persuaded the jury to disregard or give little weight to one of the defense's main areas of mitigation. For reasons similar to those recognized in Simmons v. South Carolina, supra, 512 U.S., at 164-69, and by both the six-Justice majority and the three concurring Justices in Skipper v. South Carolina, supra, 476 U.S. at 5, n.1 and 9-12, appellant's Fourteenth Amendment due process rights were abridged by his inability to rebut the prosecutor's inferences.

The evidence in this penalty proceeding overwhelmingly established that appellant has (and has long had) a serious

drug addiction which has been the catalyst for most of his emotional turmoil and history of criminal behavior, including his unprecedented explosion of violence against Bonnie Carroll and Tracie Burchette on September 11, 2001. The prosecutor's suggestion – which appellant was effectively blocked from rebutting – that he would just go back to using drugs if sentenced to life imprisonment could easily have been a contributing factor in the jury's decision to recommend death instead. The state cannot prove beyond a reasonable doubt that the constitutional error had no impact [see Chapman v. California, supra; State v. DiGuilio, supra], so appellant's death sentence must be reversed for a new jury penalty proceeding.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCE OF AGE, WHERE THE REQUESTED INSTRUCTION WAS SUPPORTED BY EXPERT TESTIMONY THAT APPELLANT IS PSYCHOLOGICALLY AND EMOTIONALLY A TEENAGER.

The trial court is required by law to instruct the jury on all mitigating circumstances for which evidence has been presented and a request is made. Stewart v. State, 558 So. 2d 416, 420-21 (Fla. 1990); Campbell v. State, 679 So. 2d 720, 726 (Fla. 1996). As long as there is some evidentiary basis for the requested mitigator, the judge may not inject into the

jury's deliberations his own view of whether the mitigator should be found:

> If the [jury's] advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Stewart v. State, supra, 558 So. 2d at 421, quoting Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986) (emphasis in Floyd opinion) and Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976).

With regard to the statutory mitigating factor of age, there is no bright line cut-off age. Campbell v. State, supra, 679 So. 2d at 726; Peek v. State, 395 So. 2d 492, 498 (Fla. 1980); Foster v. State, 778 So. 2d 906, 920 (Fla. 2000). Unless the defendant is very young, chronological age alone means little and may not support an instruction on the mitigator. Campbell, 679 So. 2d at 726. Where, on the other hand, the defendant's age – "whether youthful, middle-aged, or aged"[35] – is linked with some other characteristic such as mental or emotional immaturity,[36] senility,[37] or lack of

[35] Blackwood v. State, 777 So. 2d 399, 410 (Fla. 2000).

[36] See Campbell, 679 So. 2d at 726; Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988); contrast Sims v.

criminal history,[38] a jury instruction on the statutory mitigating factor should be given if requested. Campbell, 679 So. 2d at 726.

In the instant case, unquestionably, appellant's chronological age (31 at the time of the crime) alone would not have supported a jury instruction. However, as defense counsel pointed out in requesting the instruction (34/3324-25), there was more. The psychiatrist, Dr. Maher, testified that, as a result in part of appellant having been molested by an adult during his early teens and then being doubly traumatized by the humiliation of having to testify about this experience, appellant became chronically depressed and his psychological and emotional development was arrested (32/2993-3005, 3019-20). According to Dr. Maher, appellant has throughout his life functioned on an adolescent level (32/3005). Dr. Maher further opined that the reason appellant's psychiatric hospitalization and substance abuse treatments have been unsuccessful is because of this lack of mature psychological development; "we're still dealing with an individual who is psychologically and emotionally a teenager" 32/3019).

A trial court's decision to give or withhold a requested jury instruction is ordinarily reviewable under an abuse of discretion standard, but:

State, 681 So. 2d 1112, 1117 (Fla. 1996).

[37] See Echols v. State, 484 So. 2d 568, 575 (Fla. 1985).

> [i]n a criminal proceeding the discretion of the trial court in this regard is rather narrow, however, because a criminal defendant is entitled to have the jury instructed on his or her theory of defense if there is any evidence to support this theory, and so long as the theory is recognized as valid under the law of the state.

Worley v. State, 848 So. 2d 491, 492 (Fla. 5th DCA 2003).

In a capital penalty proceeding, the defendant's "theory of defense" is necessarily predicated on the mitigating circumstances, and – as recognized in Campbell, Stewart, Floyd, and Cooper – the trial court may not preempt the jurors' function by predetermining which mitigating factors they may consider. Since there was reliable and unrebutted evidence that appellant's psychological and emotional development was stunted in his early teens, and his maturity level is that of an adolescent, the denial of the requested instruction was prejudicial error.

ISSUE VI

THE TRIAL COURT ERRED IN HIS STATED BELIEF THAT FLORIDA LAW REQUIRED HIM TO IMPOSE A DEATH SENTENCE IN THIS CASE.

In his order sentencing appellant to death, the trial court led off his Conclusion with the following statement:

[38] See Burns v. State, 699 So. 2d 646, 648 n.4 (Fla. 1997); Blackwood v. State, supra, 777 So. 2d at 410.

> On balance the court has concluded the aggravating circumstances far outweigh the mitigating ones beyond and to the exclusion of any reasonable doubt, and that Florida law requires the death penalty to be imposed.

(10/1645) (emphasis supplied).

This is the same error which resulted in reversal for resentencing in Smith v. State, 866 So. 2d 51, 67 (Fla. 2004). Under Florida law, regardless of the equation of aggravating and mitigating circumstances, the penalty jury, the trial court, and the Supreme Court remain free to exercise reasoned judgment to recommend or impose a sentence of life imprisonment, or to reduce a sentence to life. Smith v. State, supra, 866 So. 2d at 67; Cox v. State, 819 So. 2d 705, 717 (Fla. 2002); Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). The harmfulness of the court's misapplication of law in the instant case is even more evident than in Smith, where there were no statutory mitigators found, and the five nonstatutory mitigators were given little or very little weight. 866 So. 2d 56. In the instant case, in contrast, both of the statutory mental mitigators were found; impaired capacity was accorded great or considerable weight (10/1639, 1646, see 36/ 3564), and extreme mental or emotional disturbance was given moderate weight (10/1637).[39] Since these

[39] Numerous nonstatutory mitigating factors were also found; these, like the five in Smith, were given little weight.

are two of the most significant mitigating factors under Florida law [Santos v. State, 629 So. 2d 838, 840 (Fla. 1994)], it cannot be determined beyond a reasonable doubt whether the trial court would have considered imposing a sentence of life imprisonment if he had understood that the law permitted it. Smith, 866 So. 2d at 67. Therefore, as in Smith, this Court should remand for resentencing and a hearing in accord with Jackson v. State, 767 So. 2d 1156, 1160-61 (Fla. 2000).

ISSUE VII

FLORIDA'S DEATH PENALTY STATUTE, AND THE PROCEDURE BY WHICH APPELLANT WAS SENTENCED TO DEATH, ARE CONSTITUTIONALLY INVALID.

In light of the constitutional principles recognized in Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), Florida's death penalty statute and procedure are constitutionally invalid.[40] The United States Supreme Court in Ring – overruling its prior decision in Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) – held that a death sentence may not be based on findings of aggravating factors made by the trial court alone. Ring "effectively declare[d] five States' capital sentencing

[40] Assuming without conceding that preservation is necessary where the facial constitutionality of Florida's capital sentencing statute is at issue, defense counsel in the instant case unsuccessfully raised the Ring issue in numerous contexts. (See 1/111-22, 129-32; 3/469-73; 4/607, 747; 11/138-40, 164; 19/1166-68, 1177-79; 34/3298, 3305; 35/3449, 3471-75).

schemes unconstitutional" [Ring, 536 U.S. at 621 (O'Connor, J., dissenting)], and cast serious doubt on the constitutional viability of at least four other states' capital murder statutes. These are the "hybrid" capital sentencing schemes – used in Florida, Delaware, Indiana, and Alabama – where the trial judge and jury are "cosentencers". See Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). Under Florida's statute, the jury reaches a penalty verdict which is accorded great weight by the judge and is usually determinative of the outcome, but the jury as a whole makes no specific findings as to aggravating (or mitigating) factors, nor is jury unanimity required as to the aggravating factors. It is the judge who makes the findings of the statutory aggravating circumstances.

As cogently stated by Justice Anstead, dissenting in Conde v. State, 860 So. 2d 930, 959-60 (Fla. 2002):

> It would be a cruel joke, indeed, if the important aggravators actually relied on by the trial court were not subject to Ring's holding that acts used to impose a death sentence cannot be determined by the trial court alone. The Ring opinion, however, focused on substance, not form, in its analysis and holding, issuing a strong message that facts used to aggravate any sentence, and especially a death sentence, must be found by a jury.

Appellant acknowledges that Justice Anstead's view is not the prevailing view on this Court. [See e.g. Jones v. State, 845 So. 2d 55, 74 (Fla. 2003); and Justice Cantero's concurring opinion in Windom v. State, 886 So. 2d 915, 937-38 (Fla. 2004), in which he summarizes the individual Justices' positions on Ring]. However, appellant submits that Justice Anstead's view is the correct one, and that it will ultimately be vindicated by the U.S. Supreme Court.

Since Florida's capital sentencing statute requires that the findings of aggravating factors – which are the essential elements defining those cases to which a death sentence may be applicable – are to be made by the trial judge, it is invalid under Ring, and appellant's death sentence imposed pursuant to that statutory procedure cannot constitutionally be carried out.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests this Court to grant the following relief:

Reverse the convictions of first degree murder, robbery, and burglary (in the Carroll case), and remand for a new trial [Issue I].

Reverse the conviction of attempted sexual battery and remand for discharge [Issue II].

Reverse the death sentence and remand for a new penalty proceeding before a newly empaneled jury [Issues III, IV, V, and VII].

Reverse the death sentence and remand for resentencing [Issue VI].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Landry, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of February, 2005.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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