IN THE

SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| RONNIE KEITH WILLIAMS, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. SC04-857 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |
| _____ | ) | |

# INITIAL BRIEF OF APPELLANT

CAREY HAUGHWOUT
Public Defender

JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407
Attorney for Ronnie Keith Williams
The Criminal Justice Building
421 Third Street/Sixth Floor
West Palm Beach, Florida 33401
(561) 355-7600; (561) 624-6560

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

AUTHORITIES CITED ..... v

PRELIMINARY STATEMENT ..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS ..... 2

SUMMARY OF THE ARGUMENT ..... 12

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING LISA DYKE'S OUT-OF-COURT STATEMENTS INTO EVIDENCE..... 15

1. LISA DYKE'S 911 STATEMENTS..... 17

A. Lisa Dyke's out-of-court statements do not qualify as excited utterances. ..... 18

B. Dyke's statement that Appellant raped her was not harmless. ..... 23

C. Dyke's statement that "Rodney" stabbed her was not harmless. ..... 24

2. STATEMENT TO OFFICER GILLESPIE ..... 25

A. *Crawford v. Washington*, 541 U.S. , 124 S.Ct. 1354 (2004)..... 25

B. Dyke's statements to Officer Gillespie do not constitute dying declarations either under historical or modern theory. ..... 27

C. Dyke's out-of-court statements to Officer Gillespie do not qualify as excited utterances. ..... 30

D. Statements to Gillespie were not harmless. 31

3. LISA DYKE'S STATEMENTS TO DETECTIVE JAMES AT THE HOSPITAL. ..... 31

A. *Crawford v. Washington* ..... 31

B. Dyke's statements to Detective James do not constitute dying declarations. ..... 32

C. Dyke's responses to Detective James do not qualify as excuted utterances. ..... 33

D. The statements to James were not harmless..... 33

POINT II

THE TRIAL COURT'S DEPARTURE FROM NEUTRALITY DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL. ..... 33

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO USE A TRANSCRIPT OF THE 911 TAPE CREATED BY THE STATE WHICH WAS NOT IN EVIDENCE. ..... 38

POINT IV

THE TRIAL COURT ERRED IN ALLOWING IN EVIDENCE THAT LISA DYKE WAS PREGNANT WHERE SUCH EVIDENCE WAS IRRELEVANT AND ANY RELEVANCY WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE ..... 40

POINT V

IT WAS FUNDAMENTAL ERROR TO SUBMIT A FELONY MURDER CASE TO THE JURY WHERE THE UNDISPUTED EVIDENCE REFUTED THAT THE DEATH OCCURRED DURING THE COMMISSION OF A FELONY..... 43

POINT VI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FELONY MURDER WITH SEXUAL BATTERY AS THE UNDERLYING FELONY

AND ON THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE OCCURRED DURING A SEXUAL BATTERY BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE SEXUAL BATTERY. ..... 46

POINT VII

THE TRIAL COURT ERRED IN ADMITTING THE CONCLUSION THAT LISA DYKE HAD BEEN RAPED..... 51

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF PREMEDITATION..... 54

POINT IX

IT WAS FUNDAMENTAL ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS. ..... 57

POINT X

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY. ..... 60

POINT XI

IT WAS REVERSIBLE ERROR TO FAIL TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE AS TO FELONY MURDER..... 62

POINT XII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT MUST REACH A UNANIMOUS VERDICT FINDING OF EITHER PREMEDITATED OR FELONY MURDER IN ORDER TO CONVICT OF MURDER IN THE FIRST DEGREE. ..... 64

POINT XIII

APPELLANT WAS DENIED HIS RIGHT TO A RELIABLE CAPITAL SENTENCING AND DUE PROCESS BY THE FAILURE TO INSTRUCT

THAT THE FACTFINDER MUST DETERMINE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES. 67

POINT XIV

INSTRUCTING THE JURY TO DETERMINE WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST THAT OUTWEIGH AGGRAVATING CIRCUMSTANCES PLACES A HIGHER BURDEN OF PERSUASION ON APPELLANT AND VIOLATES THE EIGHTH AMENDMENT REQUIREMENT THAT DEATH BE THE APPROPRIATE PUNISHMENT, FUNDAMENTAL FAIRNESS AND DUE PROCESS..... 70

POINT XV

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED..... 80

POINT XVI

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY. ..... 82

POINT XVII

THE JURY INSTRUCTING STATING THAT THE JURY IS TO ONLY CONSIDER MITIGATION AFTER IT IS REASONABLY CONVINCED OF ITS EXISTENCE IS IMPROPER. ..... 84

POINT XVIII

THE TRIAL COURT ERRED IN USING INDECENT ASSAULT AS THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE. ..... 85

POINT XIX

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL..... 87

POINT XX

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED... 88

POINT XXI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL WHERE ONE IS ELIGIBLE FOR THE DEATH PENALTY MERELY BY BEING CONVICTED FOR VIOLATING SECTION 782.04 OF THE FLORIDA STATUTES. ..... 90

POINT XXII

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR FURMAN v. GEORGIA, 408 U.S. 238, 313(1972). ..... 91

CONCLUSION..... 94

CERTIFICATE OF SERVICE ..... 94

CERTIFICATE OF FONT COMPLIANCE..... 95

AUTHORITIES CITED


CASES PAGE(S)

Alford v. State, 906 P.2d 714
(Nev. 1995) ..... 61

Almeida v. State, 784 So. 2d 922
(Fla. 1999) ..... 89

Arvelaez v. Butterworth, 738 So. 2d 326
(Fla. 1999) ..... 78

Asbury v. State, 765 So. 2d 965
(Fla. 4th DCA 2000) ..... 35

Beber v. State, 887 So. 2d 1248
(Fla. 2004) ..... 49

Beck v. Alabama, 447 U.S. 625
(1988) ..... 70

Blandenburg v. State, 890 So. 2d 267
(Fla. 1st DCA 2004) ..... 22

Bonifay v. State, 626 So. 2d 1310
(Fla. 1993) ..... 87

Borjas v. State, 790 So.2d 1114
(Fla. 4th DCA 2001) ..... 91

Bottoson v. Moore, 833 So.2d 693
(Fla. 2002) ..... 92

Brooks v. City of Birmingham, 488 So. 2d 19
(Ala. Appeals 1986) ..... 48, 52

Burger v. Kemp, 483 U.S. 776
(1987) ..... 70

Burr v. State, 550 So. 2d 444
(Fla. 1989) ..... 81

Cage v. Louisiana, 498 U.S. 39
(1990) ..... 79

Campbell-Eley v. State, 718 So. 2d 327
(Fla. 4th DCA 1998) ..... 42

Charlot v. State, 679 So. 2d 844
(Fla. 4th DCA 1996) ..... 19

Chastine v. Broome, 629 So. 2d 293
(Fla. 4th DA 1993) ..... 35

Cochran v. State, 547 So. 2d 928
(Fla. 1989) ..... 54

Cox v. State, 555 So. 2d 352
(Fla. 1990) ..... 47

Davis v. State, 90 So. 2d 629
(Fla. 1956) ..... 47

Deck v. Missouri, 544 U.S. ___
(2005) ..... 68

Deter v. Deter, 353 So. 2d 614
(Fla. 4th DCA 1977) ..... 37

Dixon v. State, 13 Fla. 636
(Fla. 1869) ..... 26

Dunn v. United States, 442 U.S. 100
(1979) ..... 91

Elam v. State, 636 So. 2d 1312
(Fla. 1994) ..... 86

Elledge v. State, 346 So. 2d 998
(Fla. 1977) ..... 70

Evans v. State, 831 So. 2d 808
(Fla. 2d DCA 2002) ..... 35

Evans v. State, 838 So. 2d 1090
(Fla. 2002) ..... 25

F.B. v. State, 852 So. 2d 226
(Fla. 2003) ..... 45

Farley v. State, 324 So. 2d 662
(Fla. 4th DCA 1975) ..... 48, 51

Fisher v. State, 715 So. 2d 950
(Fla. 1998) ..... 54

Fitzpatrick v. State, 527 So. 2d 809
(Fla. 1988) ..... 88

Francis v. Franklin, 471 U.S. 307
(1985) ..... 79

Furman v. Georgia, 408 U.S. 238,
92 S.Ct. 2726, 33 L.Ed.2d 346
(1972) ..... 67, 90, 92

Geralds v. State, 601 So. 2d 1157
(Fla. 1992) ..... 81

Givens v. Housewright, 786 F.2d 1378
(9th Cir. 1986) ..... 61

Government of Virgin Islands v. Pemberton, 813 F.2d 626
(3d Cir. 1987) ..... 61

Green v. State, 715 So. 2d 940
(Fla. 1998) ..... 56

Gregg v. Georgia, 428 U.S. 153
(1976) ..... 93

Griffin v. State, 705 So. 2d 572
(Fla. 4th DCA 1998 ..... 45

Hall v. State, 90 Fla. 719,
107 So. 246 (1925) ..... 47

Hamilton v. State, 547 So. 2d 630
(Fla. 1989) ..... 18

Hargrave v. State, 427 So. 2d 713
(Fla. 1983) ..... 36

Harris v. State, 647 So. 2d 206
(Fla. 1st DCA 1994) ..... 46

Hitchcock v. Dugger, 481 U.S. 393
(1987) ..... 85

Hoefert v. State, 617 So. 2d 1046
(Fla. 1993) ..... 54

Huff v. State, 622 So. 2d 982
(Fla. 1993) ..... 37

Hulsey v. Sargent, 868 F.Supp. 1090
(E.D. Ark. 1993) ..... 72

Hutchinson v. State, 882 So. 2d 943
(Fla. 2004) ..... 20, 22

In re: McMillan, 797 So. 2d 560
(Fla. 2001) ..... 35

In re: Winship, 397 U.S. 358
(1970) ..... 76, 77, 79

J.F. v. State, 718 So. 2d 251
(Fla. 4th DCA 1998) ..... 35

Jackson v. State, 599 So. 2d 103
(Fla. 1992) ..... 80

Jackson v. Virginia, 443 U.S. 307,
99 S.Ct. 2781, 61 L.Ed.2d 560
(1979) ..... 47

Johnston v. State, 863 So. 2d 271
(Fla. 2003) ..... 16, 51

Jones v. State, 569 So. 2d 1234
(Fla. 1990) ..... 50

Jurek v. Texas, 428 U.S. 262
(1976) ..... 93

Kirkland v. State, 684 So. 2d 732
(Fla. 1996) ..... 47, 55

Knight v. State, 338 So. 2d 201
(Fla. 1976) ..... 60

Lee v. State, 789 So. 2d 1105
(Fla. 4th DCA 2001) ..... 35

Lester v. State, 20 So. 232
(Fla. 1896) ..... 29

Lewek v. State, 702 So. 2d 527
(Fla. 4th DCA 1997) ..... 40

Lewis v. State, 398 So. 2d 432
(Fla. 1981) ..... 86

Libby v. State, 540 So. 2d 171
(Fla. 2d DCA 1989) ..... 48, 51

Lloyd v. State, 524 So. 2d 396
(Fla. 1988) ..... 80, 81

Lopez v. State, 888 So. 2d 693
(Fla. 1st DCA 2004) ..... 25

Lowenfield v. Phelps, 484 U.S. 231
(1988) ..... 93

Mahn v. State, 714 So. 2d 391
(Fla. 1998) ..... 86

Martinez v. State, 761 So. 2d 1074
(Fla. 2000) ..... 39

Mason v. State, 366 So. 2d 171
(Fla. 3d DCA 1979) ..... 36

McArthur v. State, 351 So. 2d 972
(Fla. 1977) ..... 47

McCrane v. State, 194 So. 2d 632
(Fla. 1940) ..... 29

McCray v. State, 416 So. 2d 804
(Fla. 1982) ..... 80

McFadden v. State, 732 So. 2d 1180
(Fla. 4th DCA 1999) ..... 35, 36

McGahagin v. State, 17 Fla. 665 (1880) ..... 61

McKenna v. State, 119 Fla. 526, 161 So. 561 (Fla. 1935) ..... 62

Mills v. Maryland, 486 U.S. 367 (1988) ..... 85

Mills v. State, 476 So. 2d 172 (Fla. 1985) ..... 88

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246 (1988) ..... 78

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975) ..... 76, 79, 80

Nardone v. State, 798 So. 2d 870 (Fla. 4th DCA 2001) ..... 16, 51

Nelson v. State, 543 So. 2d 1308 (Fla. 2d DCA 1989) ..... 45

Nichols v. State, 340 S.E.2d 654 (Ga. Appeals 1986) ..... 48, 52

Ohio v. Roberts, 100 S.Ct. 2531 (1980) ..... 25

Omelus v. State, 584 So. 2d 563 (Fla. 1991) ..... 50

Owens v. State, 593 So. 2d 1113 (Fla. 1st DCA 1992) ..... 61

Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So. 2d 232 (Fla. 4th DCA 1980) ..... 18, 28

Peek v. State, 488 So. 2d 52 (Fla. 1986) ..... 35

Penry v. Lynaugh, 109 S.Ct. 2934 (1989) ..... 85

People v. Cortes, 781 N.Y.S.2d 401
(N.Y. App. 2004) ..... 18

People v. Young, 814 P.2d 834
(Colo. 1991) ..... 71

Phelan v. State, 448 So. 2d 1256
(Fla. 4th DCA 1984) ..... 57

Pope v. State, 441 So. 2d 1073
(Fla. 1984) ..... 85

Porter v. State, 564 So. 2d 1060
(Fla. 1990) ..... 87

Porter v. State, 723 So. 2d 191
(Fla. 1998), cert. denied,
526 U.S. 1120 (1999) ..... 35

Rembert v. State, 445 So. 2d 337
(Fla. 1989) ..... 82

Ring v. Arizona, 536 U.S. 584
(2002)..... 91, 92

Russell v. United States, 369 U.S. 749,
82 S.Ct. 1038, 8 L.Ed.2d 249
(1962)..... 61

Sandstrom v. Montana, 442 U.S. 510
(1979)..... 79

Santos v. State, 591 So. 2d 160
(Fla. 1991) ..... 87

Scull v. State, 533 So. 2d 1137
(Fla. 1988) ..... 80

Scull v. State, 569 So. 2d 1251
(Fla. 1990) ..... 37, 38

Shepard v. United States, 290 U.S. 96,
54 S.Ct. 22, 78 L.Ed.2d 196
(1933)..... 28, 32, 78

Sheppard v. Rees, 909 F.2d 1234
(9th Cir. 1990) ..... 60

Slydell v. State, 792 So. 2d 667
(Fla. 4th DCA 2001) ..... 46

Smith v. State, 537 So. 2d 982
(Fla. 1989) ..... 84

Sparks v. State, 740 So. 2d 33
(Fla. 1st DCA 1999) ..... 35

Stanley v. State, 451 So. 2d 897
(Fla. 4th DCA 1984) ..... 39

State ex rel. Wentworth v. Coleman, 163 So. 316
(Fla. 1935) ..... 57

State v. Biegenwald, 106 N.J. 13,
524 A.2d 130 (N.J. 1987) ..... 71

State v. DiGuilio, 491 So. 2d 1129
(Fla. 1986) ..... 23, 38, 53

State v. Freber, 366 So. 2d 426
(Fla. 1978) ..... 25

State v. Gray, 435 So. 2d 816
(Fla. 1983) ..... 49

State v. Jano, 524 So. 2d 660
(Fla. 1988) ..... 19

State v. Kleypas, 272 Kan. 894,
40 P.3d 129 (Kan. 2001) ..... 72

State v. Larson, 389 N.W.2d 872
(Minn. 1986) ..... 48, 51

State v. Law, 559 So. 2d 187
(Fla. 1990) ..... 47

State v. Marsh, 278 Kan. 520,
102 P.3d 445 (Kan. 2004) ..... 73, 79

State v. Powers, 99 P.3d 1261
(Wash. App. 2004) ..... 18

State v. Reardon, 763 So. 2d 418
(Fla. 5th DCA 2000) ..... 66

State v. Rizo, 833 A.2d 363
(Conn. 2003) ..... 68

State v. Skolar, 692 So. 2d 309
(Fla. 5th DCA 1997) ..... 20

State v. Wood, 648 P.2d 71
(Utah 1981), cert. denied,
459 U.S. 980 (1982) ..... 68

Stephens v. State, 787 So. 2d 747
(Fla. 2001) ..... 43

Stirone v. United States, 361 U.S. 212,
80 S.Ct. 270, 4 L.Ed.2d 252
(1960) ..... 57, 59

Sumner v. Shuman, 483 U.S. 66,
107 S.Ct. 2716, 97 L.Ed.2d 56
(1987) ..... 68

Taylor v. State, 601 So. 2d 1304
(Fla. 4th DCA 1992) ..... 16, 51

Taylor v. State, 640 So. 2d 1127
(Fla. 1st DCA 1994) ..... 39

Teffeteller v. State, 439 So. 2d 840
(Fla. 1983) ..... 87

Terry v. State, 668 So. 2d 954
(Fla. 1996) ..... 82, 90

Terry v. State, 668 So. 2d 954
(Fla. 1996) ..... 89

Trotter v. State, 576 So.2d 691
(Fla. 1990) ..... 91

U.S. v. Jordan, 2003 WL 513501
(Colo. March 5, 2005) ..... 26, 27

United States v. Cruz-Valdez, 743 F.2d 1547
(11th Cir. 1984) ..... 57

United States v. Davis, 679 F.2d 845
(11th Cir. 1982) ..... 57

United States v. Miller, 105 S.Ct. 1811
(1985)..... 58

Watson v. Jago, 558 F.2d 330
(6th Cir. 1977) ..... 59

Williams v. State, 30 Fla. L. Weekly D1179
(Fla. 2nd DCA May 6, 2005) ..... 35

Wood v. State, 544 So. 2d 1004
(Fla. 1989)..... 37

Woodson v. North Carolina, 428 U.S. 280,
96 S.Ct. 2978, 49 L.Ed.2d 944
(1976)..... 67

Yohn v. State, 476 So. 2d 123
(Fla. 1985)..... 85

UNITED STATES CONSTITUTION

Fifth Amendment 23, 34, 40, 51, 60, 61, 64, 70, 79, 80, 86, 88

Sixth Amendment .....23, 34, 40, 51, 61, 64, 70, 79, 80, 86

Eighth Amendment ..... 40, 61, 70, 79, 80, 86, 88

Fourteenth Amendment 23, 34, 40, 51, 60, 61, 64, 70, 79, 80, 86, 88

FLORIDA CONSTITUTION

Article I, Section 2 .... 34, 40, 51, 61, 64, 70, 79, 80, 86

Article I, Section 9 23, 34, 40, 51, 61, 64, 70, 79, 80, 86, 88

Article I, Section 15 ..... 60

Article I, Section 15(a) ..... 57

Article I, Section 16 23, 34, 40, 51, 61, 64, 70, 79, 80, 86

Article I, Section 17 ..... 61, 70, 79, 80, 86, 88

Article I, Section 22 ..... 34, 40, 51, 64, 70, 79, 80

FLORIDA STATUTES

Section 90.804(3) ..... 26
Section 775.021(1) ..... 91
Section 782.04 ..... 90
Section 782.04(1)(a)1 (1997)..... 54
Section 921.001(1) ..... 84
Section 921.141 ..... 80
Section 921.141(2) & (3) ..... 80
Section 921.141(3) ..... 71, 82

OTHER AUTHORITY

McCormick On Evidence (2nd Ed.)
§ 297, ftnt. 9 ..... 18

## PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County. The parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal and will include transcripts of pretrial hearings (Vol. 1-6),

The symbol "T" will denote the Transcripts (Vol 7-22),

The symbol "SR" will denote the Supplemental Record on Appeal,

The symbol "A" will denote the Appendix to this brief.

## STATEMENT OF THE CASE

On March 4, 1993, Appellant, Ronnie Keith Williams, was charged by indictment with premeditated murder R1-2. Appellant was convicted and his conviction was reversed by this Court R3-18. Jury selection on his new trial began on January 26, 2004 T1. At the close of the state's case, and at the close of all the evidence, Appellant moved for a judgment of acquittal T1259-60,1406. Appellant's motions were denied T1262,1406. Appellant was found guilty of murder in the first degree R437.

The jury's recommendation was 10-2 for the death penalty T1717. On April 16, 2004, the trial court sentenced Appellant

to death R442-444,413-436,A. A timely notice of appeal was filed R445. This appeal follows.

## STATEMENT OF THE FACTS

## GUILT PHASE

Ruth Lawrence Ashly testified that in January of 1993 she lived at 801 Northeast 28th Street, Apartment 203, in Wilton Manors T822. Ashly resided with her son and Lisa Dyke T824. Appellant was Stephanie Lawrence's boyfriend T827. Appellant had been over to Ruth Ashly's apartment before T827. Appellant had been at Ruth Ashly's apartment on Saturday, January 23, 1993 T828-29. Ruth and Appellant had a disagreement T829. Ashly told Appellant not to return to the apartment T829. Appellant asked Ashly if she was going to tell her sister about the disagreement T830. Ashly said no T830. On January 25, 1993, there was a three-way telephone conversation among Appellant, Ashly and Stephanie Lawrence T831. Ashly told Stephanie about the disagreement between herself and Appellant T830-831. Ashly did not hear all of the conversation T838. Appellant was upset that his relationship with Stephanie might be ending T838. Ruth Ashly left for work on Tuesday, January 26, 1993, at 7:15 a.m. T826.

Stephanie Lawrence testified that she broke up with Appellant on January 25, 1993 T880. Lawrence had broken up with Appellant before T880. On the prior occasions, Lisa Dyke got Appellant and Lawrence back together T880. The breakup was due

to a dispute between Appellant and Ruth Ashly T881. Appellant told Lawrence that they could work it out T882. Lawrence told Appellant not to go around her sister's house T883. Appellant tried to page Lawrence 4 or 5 times T884. Lawrence's number was 584-7740 T884. Appellant had been to Ashly's apartment a number of times T886-887. Lawrence's brother had been dating Lisa Dyke T888. The brother moved out of town shortly after Dyke was killed T888.

Elena Gardner was a 911 operator for the Ft. Lauderdale Police Department in January of 1993 T861,864. A tape of a 911 call that Gardner received from Apartment 203 at 801 Northeast 28th Street was introduced into evidence T871,1479;SR66.

Officer Brian Gillespie of the City of Wilton Manors testified that he was dispatched to N.E. 8th Avenue, Apartment 203 at 8:33 a.m. T706,707,708. Gillespie knocked on the door of Apartment 203 T1380. He could hear a baby crying T714. Lisa Dyke answered the door T715. Dyke unlocked the door to let Gillespie inside T726-27. She was nude but then covered herself with some clothes T715. She was bleeding T715. There appeared to be a number of stab wounds to her body T715. Gillespie took her to a couch and began speaking to her T818. Paramedics began treatment T718. Gillespie asked her name and asked her what happened T717,719. Gillespie asked Dyke who harmed her and she

said, “Rodney” T7205. Gillespie asked Dyke who Rodney was T720. Dyke said that Rodney was Ruth’s sister’s boyfriend T720. Dyke also stated, “he raped me” T721.

Detective Robert Cerat testified that he arrived at the crime scene at 9:18 a.m. on January 26, 1993 T735-36. A knife was found with a red substance on it T754-55. Prints could not be lifted from the knife T776. There was a red substance on the bathroom door T753. There appeared to be a ridge of a print in the substance T754. Cerat collected the purple pants Dyke had when the officers entered the apartment T1462. Cerat collected woman’s underpants and shorts covered with a red substance T757. Twenty-six latent prints were lifted from the scene T804. There were no signs of a forced entry and the front door was the only point of entry T743,807.

Detective Daniel James testified that on January 26, 1993, he went to the hospital to see Lisa Dyke T913. James told Dyke to communicate by nodding up and down or sideways T915. Dyke was unable to speak due to tubes in her mouth T914. James had prepared a photo lineup and James asked Dyke if a person in the photos did this to her T920. Dyke nodded, “Yes.” Dyke tapped photo number 5 T920. On January 28, James photographed Dyke T924. James photographed wounds he suspected were bite marks T924. James photographed areas of the upper left chest, the

breast, arm, and back of shoulder T924. Dyke also pointed toward her groin area T925. James later photographed a cut on Appellant's hand T929. James was also at the scene when Gillespie was questioning Dyke and heard her say, "Ronnie did this to me, and he is Ruth's sister's boyfriend" T910. Dyke also said a phone number which turned out to belong to Julius Lawrence T910.

Detective Mark Suchomel lifted latent prints from the apartment T899-900.

Dr. Ronald Wright performed the autopsy on Lisa Dyke on February 14, 1993 T1136. Dyke had numerous stab wounds from medical procedures T1146. One wound preceded medical efforts T1146. There was a wound in the center of the chest through the chestbone T1146. It measured 4 inches from the skin T1148. Dyke had 6 stab wounds to the back T1152. They were knife wounds T1154. The wounds were consistent with exhibit 31 and a lot of other knives T 1156. There were "so-called defensive wounds" on the hands T1156. The labeling of these wounds does not mean that they were caused by a defensive action T1181. Dyke also had bitemarks on her body T1156-60.

Dr. Wright testified that the cause of death was the disease or injury which was initiated by the lethal chain of events which is multiple stab wounds T1173. Dyke was killed by

the healing process T1172. The brain does not work as well with the loss of blood T1176-77. The short and long term memory go T1177. Loss of blood affects understanding and communication T1177. Less than half the people with these wounds would not be conscious if not treated for these wounds for ½ hour T1179. A person under this condition could hallucinate T1180. People can say things that are not true due to this type of trauma T1181. Dyke was under a large number of medications T1188. She was on medication that would impact abilities to reason T1189. The measuring of the bitemarks was not done in a method to reduce distortion T1188. Without proper measuring there can be distortion which can result in the comparison being untrue T1186.

Latent fingerprint examiner Fred Boyd testified that he received 35 prints for examination in this case T1036. Three of the prints Boyd examined were of value for identification T1067. Two prints match Appellant T1034. There was one additional print of value which Boyd was unable to identify with anyone T1036,1042.

Officer David Jones testified that he went to Appellant's residence at 6:00 p.m. on January 26, 1993 T1058. Jones then went to the Crisis Center on 19$^{th}$ Street where he came into contact with Appellant T1058. Jones transported Appellant to

the police station T1060. When questioned by Jones, Appellant indicated that he knew Lisa Dyke T1063. Appellant denied that the had been over to her apartment T1063. When asked about a Band-Aid on his hand, Appellant said that he had cut his hand T1063. Appellant was arrested T1063. Dyke Died on February 14 T1064.

Kevin Noppinger, from the crime lab of the Broward County Sheriff's Office, testified that he examined clothing for the presence of blood stains T948. Noppinger received samples from both Lisa Dyke and Appellant T948. Noppinger did not find any evidence of seminal fluid on Dyke's panties T967,973.

Donna Marchese is a forensic serologist with the Broward County Sheriff's Office T1073-74. Marchese performed a DNA-RFLP analysis on numerous items T1076. The DNA on the dust ruffle and knife matched Lisa Dyke's T1100. The DNA from the sweatpants and child's shirt matched the DNA from Appellant T1100. Marchese was unable to get a DNA profile from the underwear or pants T1102. The frequency occurrence of a match of Appellant's DNA in the black population is 1 in 120 million T1107. Marchese admitted that mistakes happen in the Broward laboratory as recently happened T1120.

Dr. Martin Tracy testified that he is a professor of biology and in 1995 was asked to review the statistical

interpretation in this case T1198. He was never asked to interpret the initial data T1198. The DNA sizing in this case was within the window margin of error T1201. The data bases used had approximately 200 people in the Caucasian data base and approximately 200 people in the African American data base T1205. The frequency match of Appellant's DNA is 1 in 120 million T1208. The frequency match of Dyke's DNA is 1 in 2 billion T1208.

Dr. Richard Souviron is a dentist specializing in forensic dentistry T1217. Souviron was asked to become involved in this case by the prosecutor's office T1222. Souviron opined that: State's Exhibit 46 is a human bite mark on an arm; State's Exhibit 43 is a human bite mark on a back; State's Exhibit 45 is a bite mark T1226-1230. In Souviron's opinion within reasonable dental certainty the teeth of Appellant left the State's Exhibit 45 bite mark T1244. It was doubtful that the force used in the Styrofoam model used for comparison purposes was the same amount of force that was used T1243. The bite mark on the back versus the breast was different because of distortion G1249. In Souvirin's opinion the bite mark on the breast was made by Appellant T1251. The molds that Souviron used did not reflect the distortion in the photos of the bite marks T1255. Bite mark comparison is more positive on exclusion than inclusion

T1251.The difference between the bite mark on the victim and Appellant's teeth was based on distortion T1256. The American Board of Forensic Odontology sets guidelines for photo bite marks and analysis T1253. State's Exhibit 45 does not conform to those guidelines T1253. The purpose of the guidelines is to prevent or minimize distortion T1253.

Courtney Myloff lived in apartment 202 of Wilton Manors T846. At eight o'clock in the morning Myloff heard a female screaming for help from the next apartment #203 T850. The screaming lasted for 5 minutes T850. The screaming could have been less than 5 minutes T854. Police arrived 20 to 30 minutes after the screaming stopped T852. Myloff did not call the police T855.

Wanda Walters is a registered nurse who cared for Lisa Dyke at the Broward General Medical Center T993-93. Walters treated Dyke's upper left back wound, a thumb on her left hand, and her left groin area T994.

Elliot Matregrano is the director of medical records for Wexford Health services which provides medical care fo inmates at the Broward County Sheriff's Office T1286. The medical records of Appellant were placed into evidence T1286.

Clinita Lawrence testified that Appellant is her younger brother and he was living in her home in 1993 T1292. On the

morning of January 26, 1993, Appellant was very unlike himself – he was high T1294. Lawrence saw Appellant prior to leaving for work T1296. Lawrence usually leaves for work a little before 8 a.m. T1296. Lawrence heard her husband tell Appellant to feed the dog T1296. Appellant did not respond which is unusual T1296. Lawrence called to Appellant and asked why he did not get up T1297. There was no response T1297. Lawrence wondered what was going on T1298. Lawrence called out again and Appellant came out of his room T1300. Appellant looked as though he was hallucinating, he was talking out of his head, he was talking to the dog T1300. Appellant was so high he could barely stand up T1301. Lawrence asked what was wrong but could not get any response T1301. Lawrence did not want to leave Appellant in the condition he was in T1301-02. Lawrence took Appellant to a facility T1302. When they got there the facility people were waiting T1303. Appellant's pupils were dilated and his speech slurred T1312.

Appellant testified that he lived with his sister and her husband in 1993 T1329. Appellant considered them his mom and dad because they raised him T1330. Appellant was dating Stephanie Lawrence at that time T1330. Appellant had visited Ruth Lawrence's residence numerous times T1331. On January 25, Appellant, Stephanie and Ruth had a three-way telephone call

T1331. Stephanie wanted to terminate their relationship because of a disagreement Appellant and her sister were having T1332. Appellant was not upset with Ruth T1344. Appellant asked Stephanie to talk about it but she refused and hung up the phone T1333. Appellant called her again but received no response T1333. Appellant never spoke to her again T1333. Appellant was upset about the breakup but was not angry R1334. As a result of being upset Appellant drank and used drugs T1334. He drank a fifth of rum and coke T1334. He had crack cocaine, powder cocaine and weed T1334-35. Appellant laid down on his bed because he did not feel well T1335. The next morning he got up and drank more and finished off the drugs T1337. He did it in the backyard by the pool house T1338. Appellant remembers going to the house but does not know what happened after that T1338. Appellant next found himself in a facility and someone called his name T1338. Appellant was taken to the station and asked some questions T1338. Appellant was then put in the Broward County Jail infirmary for three days T1338. Appellant was given medication for drug and alcohol use T1338.

Michael Elwell testified that on January 26, 1993, he was the director of mental health services in Broward County including the facility at 19$^{th}$ Street T1394. It was a Baker Act

receiving facility T1397. One was not free to leave once admitted T1400.

**PENALTY PHASE**

Dr. James Ongley testified that in 1984 he was an Associate Medical Examiner and performed an autopsy on Gaynell Jeffrey T1566. Jeffrey died from multiple gunshot wounds T1570.

Appellant's prior convictions for indecent assault and second degree murder were introduced into evidence T1577-78.

Robin Jeffrey testified that she was Appellant's girlfriend in 1984 T1581. She broke up with Appellant T1582. Appellant tried to reunite but Jeffrey's sister intervened T1582.

Sybil Jeffrey French testified that on September 11, 1984, the family sat around and watched TV T1585-86. French never saw her sister Gaynell Jeffrey the next morning T1587. There was blood in the house and in the back seat of French's car T1587,1591.

Deputy D.P. Edwards testified that Appellant came to the residence of Kimberly Tynes and forced her in a room and told her he would kill her if she did not comply T1591-95. Appellant penetrated Tynes' vagina with his finger T1596. Tynes said she was in fear T1597.

Arthur Lewis is 39 years old and had known Appellant for all his life T1600. Appellant was the punching bag of the

neighborhood T1601. Appellant was always picked on and was always beat up T1601. He was made fun of and the beating never stopped T1601.

Clinita Lawrence testified that she is Appellant's sister T1613. Their mom died when Appellant was seven years old T1613. Appellant's father was never involved in his life T1614. Lawrence raised Appellant T1620. After their mother's death, they lived in an abandoned car for a while T1615. It was a convertible in the ghetto T1615. When it rained they got wet T1615. This went on for 3 months T1616. They sold bottles and cans to get by T1617. Clothing included things found in the trash T1618. Appellant was very afraid as a child T 1616. He was 10 years old in the 1st grade T1617. He did not do well in school T1617. Appellant was constantly picked on and beat on in school T1618-19. Appellant did not finish school T1619. Appellant had a very, very hard life T1619.

Herman Ruise testified that he is a correctional officer who supervised Appellant for 3 years T1631. Appellant got along with other inmates and stayed out of trouble T1630. Ruise never had a problem with Appellant T1629.

Dr. Michael Walczak is a doctor of psychology T1632. Dr. Walczak testified that Appellant had a troubled background T1634. After Appellant's mother died, Appellant lived with his

sister in the back of a car T1634. Appellant was very small and constantly abused in school T1634. Appellant did not have a mother and father to teach him right from wrong T1635. He did not have role models T1635. Appellant used alcohol and cocaine T1635. Appellant was able to hold a job but was always fired for stealing money to buy drugs T1636. The drugs Appellant took could affect his memory T1637. After the incident Appellant spent 3 days in a detox facility because they were concerned Appellant was having detox problems T1637. Dr. Walczak opined that Appellant was not able to function normally at the time of the offense due to being under the influence of a significant amount of intoxicants T1638.

Dorthea Simmons testified that she was Appellant's next door neighbor T1609. Simmons thought Appellant was on drugs because of the way he was acting T1610. Simmons testified that after prison Appellant tried to help himself and tried to find work T1611.

Carter Powell is a corrections deputy who has known Appellant for 2 years T1605. Appellant has been a model prisoner T1606. He has caused no problems T1606. Appellant has no disciplinary reports T1606. Most of the conversations that Powell has had with Appellant have been about their common faith

in Jesus T1607. Carter has seen Appellant attend church services T1607.

## SUMMARY OF THE ARGUMENT

1. Out-of-court statements of Lisa Dyke were not admissible as hearsay exceptions involving excited utterances or dying declarations. Under the excited utterance exception if there is time for reflection it must be shown that the declarant did not engage in reflection. The state could not prove this. The fact that the declarant is excited will not overcome the lack of proof of reflection. Under the dying declaration exception, it must be shown that the declarant had an absence of all hope of living. The state did not prove this. Dyke did not testify in this case. The admission of the out-of-court statements violated Appellant's confrontation rights. The admission of the statements was not harmless. It was reversible error to admit the statements.

2. During the guilt phase, the trial judge took the role of the prosecutor in advocating for the admission of evidence against Appellant. The trial court also entered an order admitting this evidence before giving Appellant the opportunity to be heard. During the penalty phase the trial court once again took on the position of an advocate by advocating an aggravating circumstance never offered by the state. The trial

court's departure from neutrality deprived Appellant due process and a fair trial.

3. The jury was permitted to use a transcript of the 911 call, which was created by the state, over defense objection. The transcript editorialized and emphasized certain portions of the statement. The transcript also provided suggestions how to interpret certain words that were not clear on the tape. It was error to permit the jury to use the transcript.

4. Evidence was introduced that Lisa Dyke was pregnant. The pregnancy was irrelevant and its prejudicial effect was greater than its probative value. It was error to admit this evidence.

5. First degree felony murder requires that death occur prior to the end of the felony. It is undisputed that Lisa Dyke died long after (February 14, 1993) the felony had ended (January 26, 1993). It was fundamental error to submit felony murder to the jury.

6. There was insufficient evidence of sexual battery in this case. It was error to instruct the jury on felony murder with sexual battery as the underlying felony and on sexual battery in the penalty phase.

7. It was error to admit the out-of-court conclusion that Lisa Dyke was "raped." Statement as to the facts which constitute a rape are admissible, but the opinion or conclusion that someone had been raped is not admissible.

8. The state failed to prove premeditation. Thus, it was error to deny Appellant's motion for judgment of acquittal.

9. The Grand Jury never charged Appellant with felony murder. It is fundamental error to try a crime not charged by the Grand Jury.

10. The state gave no notice that it was proceeding on the theory of felony murder. It was error to allow the state to proceed on the charge of felony murder.

11. An instruction on presumption of innocence was not given as to felony murder. The failure to give such an instruction was reversible error.

12. The trial court erred in failing to instruct the jury that it must reach a unanimous verdict finding either premeditated or felony murder in order to convict in the first degree.

**PENALTY PHASE**

13. While civil cases involving money may permit the minimal burden of proof to be by the preponderance of the evidence, the certitude for deciding the severe and irrevocable

penalty of death must involve a greater burden. Recently other jurisdictions have mandated such a burden. Appellant was denied his right to a reliable capital sentencing and due process by the failure to instruct that the factfinder must determine beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

14. Recently, other jurisdictions have condemned the procedure of placing the burden of showing that mitigating circumstances outweigh aggravating circumstances. Instructing the jury to determine whether sufficient mitigating circumstances exist to outweigh aggravating circumstances places a higher burden of persuasion on Appellant and violates the Eight Amendment, Fundamental Fairness and Due Process.

15. The trial court erred in finding that the killing was cold, calculated and premeditated.

16. The trial court failed to make the required findings that "sufficient aggravating circumstances exist" to justify the death penalty. Thus, pursuant to § 921.14(3) the sentence of death must be vacated and a life sentence must be imposed.

17. The jury instruction stating that the jury only consider mitigation after it is "reasonably convinced" of its existence is improper.

18. For an offense to qualify for the prior violent felony aggravating circumstance, violence must be an inherent element of the felony. Because violence is not an inherent element of indecent assault, it was improper to use indecent assault as an aggravating circumstance.

19. It was error to find that the killing was especially heinous, atrocious and cruel.

20. The death penalty is not proportionally warranted here.

21. Florida's death penalty statute is unconstitutional where one is eligible for the death penalty merely by being convicted for violating § 782.04 of the Florida Statutes.

22. Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) and Furman v. Georgia, 408 U.S. 238, 313(1972).

## ARGUMENT

The following errors, separately or cumulatively, require reversal of the convictions and/or sentences at bar.

## POINT I

### THE TRIAL COURT ERRED IN ADMITTING LISA DYKE'S OUT-OF-COURT STATEMENTS INTO EVIDENCE.

A pretrial hearing was held on the admissibility of out-of-court statements made by Lisa Dyke during a 911 call, at the

crime scene, and at the hospital. Appellant moved to exclude the out-of-court statements R55-56,74-75;SR153,164-166. The trial court overruled the objections and held that the statements were admissible R320-332. Appellant renewed his motions at trial T664,718,859,867,910,915,917-918. The motions were denied and the statements were admitted into evidence T665,718,859,867,871-75,910,915,918. This was reversible error.

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, the rulings contrary to the evidence code constitute an abuse of discretion. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) (discretion "narrowly limited by the rules of evidence."); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001) (no discretion to make rulings contrary to evidence code); Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003).

Due to unique circumstances of this case the trial court's discretion was very narrow, if even exercised at all. The trial court entered its order prior to hearing argument of counsel SR154. The trial court admitted the evidence based on a theory not advanced by the parties. See Point II. Thus, the evidence as to the predicate for the theory was never developed. Under such circumstances there could not be a proper exercise of discretion. In addition, as will be discussed later the trial

court used the incorrect legal standard in analyzing the admissibility of evidence. Use of an incorrect standard is per se an abuse of discretion.

The content of the out-of-court statements were that Appellant was the person who stabbed Lisa Dyke and that he had raped her. Both types of statements were important to the state's case. The statement regarding the rape goes to prove the felony murder charge. It also is relevant to prove premeditation as it provides a potential reason for killing – to cover up the rape. It also might rebut any idea that the killing arose from any type of emotional dispute rather than premeditation.

A key issue in analyzing the admissibility of the out-of-court statements involves the declarant's state of mind. As one witness explained, Dyke's primary concern seemed to be letting authorities know who she felt was responsible for the attack:

> A: I can't say that she did not have concern for imminent death, but her concern at that point is, as far as I can remember, was to at least speak to the police officers to let them know who she felt possibly did this to her....

R518.

> Q. Did she express any concern for herself to you on that first day?
>
> A. At that time, I don't remember. I know she was concerned about the baby and she wanted to speak to the authorities.

R524. The introduction of the hearsay statements deprived Appellant of his right to confrontation, due process, and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under Sections 2, 9, 16 and 22 of the Florida Constitution. Each of the statements will be addressed individually.

**1. LISA DYKE'S 911 STATEMENTS**

After the incident, Dyke called her boyfriend (SR112,106), Julius Lawrence, showered and cleaned herself, and then called 911. During the 911 call, Dyke was asked what had happened. Dyke responded that Appellant had stabbed and raped her T1479. The trial court held that Dyke's out-of-court accusations were admissible as excited utterances R329.

A "911 call reporting a crime preserved on tape is a modern equivalent, made possible by technology, to the depositions taken by magistrates..." People v. Cortes, 781 N.Y.S.2d 401, 415 (N.Y. App. 2004); see also State v. Powers, 99 P.3d 1261 (Wash. App. 2004) (911 call to report domestic violence was testimonial). The introduction of the 911 tape violated Appellant's right to confrontation.

**A. Lisa Dyke's out-of-court statements do not qualify as excited utterances.**

Because the basis for the excited utterance exception has been historically in question,[1] the exception should be applied only where the requirements are clearly met. Moreover, it is well-settled that statutes are to be construed against the party claiming the statutory exception. Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So. 2d 232 (Fla. 4th DCA 1980).

The rationale for the excited utterance exception lies in the special reliability by excitement superseding the powers of reflection. See Hamilton v. State, 547 So. 2d 630 (Fla. 1989). The utterance is reliable because it is impelled, rather than the result of reflection. Lisa Dyke's statements should not have been admitted into evidence.

A statement does not become admissible as an excited utterance merely because the victim is in an excited state; the key is whether there is time for reflective thought:

> A statement as to what occurred does not become admissible merely because the victim is still in an excited state. If "the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." State v. Jano, 524 So. 2d 660, 662 (Fla. 1988) (quoting Edward W. Clearly, McCormic On Evidence, §

[1] As noted in McCormick On Evidence (2nd Ed.) § 297, ftnt. 9, the reliability serving as the basis for the exception may be outweighed by the distorting effect of the excitement.

> 297 at 856 (3d ed. 1984). See also Rogers v. State, 660 So. 2d at 240.

Charlot v. State, 679 So. 2d 844, 845 (Fla. 4th DCA 1996) (emphasis added). If there is time for reflective thought, the statement will not be admissible as an excited utterance unless there is proof that the declarant did not engage in reflective thought:

> Perhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process.

State v. Jano, 524 So. 2d 660, 662 (Fla. 1988).

The state never showed that Dyke's statements were excited utterances. This was for good reason. The state never sought to introduce Dyke's statements as excited utterances – it only sought to admit the statements as dying declarations. See R292-298;SR155. As a result certain necessary evidence was never introduced in order to properly determine the issue.

The 911 call was made approximately thirty (30) minutes after the event. The state must show that Dyke was continuously under the excitement caused by the event rather than becoming reexcited when later talking or thinking about the event. See State v. Jano, 524 So. 2d 660, 663 (Fla. 1988) ("The fact that a declarant long after the occurrence of a startling event once

again becomes excited in the course of telling about it would not permit the statement to be introduced as an excited utterance."); State v. Skolar, 692 So. 2d 309, 310 (Fla. 5th DCA 1997) (statement after startling event is not admissible "even though declarant once again becomes excited in the course of telling the event"). However, evidence regarding a phone call Dyke made to her boyfriend, Julius Lawrence, between the time of the attack and the 911 call, was never introduced. This is necessary evidence to show Dyke was under continuous stress caused by the event prior to the 911 call.

Without the evidence of what occurred during the 30 minutes between the event and the 911 call, particularly the phone conversation between Dyke and her boyfriend, the predicate for admissibility of the 911 call was not met. See Hutchinson v. State, 882 So. 2d 943 (Fla. 2004). In Hutchinson, a statement was held not to be admissible as an excited utterance where there was no evidence as to what occurred during the 30 minutes between the event and the phone call:

> In this case, the time between the startling event (the fight between Renee and Hutchinson) and the telephone conversation is not clearly ascertainable from the record. The most that can be said is that the fight probably occurred between 7 p.m. (the approximate time of Renee's conversation with another friend) and 7:30 pm. (the approximate time of Renee's conversation with Pruitt). Without more information, we can only speculate as to whether Renee engaged in *reflective* thought. However, this was a long enough

> time interval to permit reflective thought. "[W]here the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process." State v. Jano, 524 So. 2d 660, 661 (Fla. 1988) (quoting Edward W. Cleary, McCormick on Evidence, § 297, at 856 (3d ed. 1984)). There is no evidence in the record to show what occurred between the fight with Hutchinson and the phone call to Pruitt. Absent some evidence that Renee did not engage in reflective though, the statement to Pruitt cannot be admitted as an excited utterance.... See e.g. Rogers v. State, 660 So. 2d 237 (Fla. 1995) (finding that the victim had eight to ten minutes for reflective thought, but based on witness testimony regarding the victim's behavior during that time period, the victim did not engage in reflective thought, and the victim's statements were admissible as an excited utterance).

882 So. 2d at 951-952 (emphasis added).

Dyke called her boyfriend Lawrence after the attack but prior to making the 911 call. However, no evidence was presented as to what occurred during the call. The boyfriend's activity, or inactivity, was very suspicious. There is no evidence that Julius Lawrence indicated that Dyke was excited or in stress. Despite getting the call, there was no evidence that Lawrence responded by going to Dyke's apartment. Nor is there any evidence that he called 911 or police on her behalf. Apparently, Lawrence believed Dyke had the situation under control, and did not need help. Regardless, the point is that the state needed to introduce evidence of Dyke's phone

conversation with Lawrence in order to show that Dyke was continuously under the stress of the attack so as to shut down reflective thought. The state did not do so.

Also, as explained in Hutchinson, the fact that the declarant was crying, upset and excited at the time of the statement will not be sufficient to qualify the statements as excited utterances:

> The fact that Renee was crying when she called Pruitt is not, by itself, sufficient to demonstrate that Renee did not engage in reflective thought. "A statement as to what occurred does not become admissible merely because the victim is still in an excited state." Charlot v. State, 679 So. 2d 844, 845 (Fla. 4th DCA 1996). Because the record does not describe the fight between Renee and Hutchinson, or provide the time the fight was over, we have no evidence upon which to base a conclusion that Renee did not engage in reflective thought. Renee's statements to Pruitt are not, therefore, admissible under the excited utterance exception to the hearsay rule.

882 So. 2d at 952; see also Blandenburg v. State, 890 So. 2d 267 (Fla. 1st DCA 2004).

The evidence that was introduced showed more than enough time for reflective thought. See Hutchinson v. State, 882 So. 2d 943 (Fla. 2004) (30 minutes and no evidence declarant did not reflect); Blandenburg v. State, 890 So. 2d 267 (Fla. 1st DCA 2004) (statements 15 to 20 minutes after the event were not excited utterances even though officer testified declarant was

crying, upset and in pain where there was ample time for reflection).

Dyke's conversation with the 911 operator occurred after a phone call with Julius Lawrence and approximately 30 minutes after the event. This certainly is time enough for reflective thought. Also, Dyke actually engaged in a reflective thought process in conversing with the 911 operator. Dyke's reflective thought process included going back in her memory to collect phone numbers in an effort to identify the suspect SR69. Dyke's actions also show very reflective thought. After the attack, Dyke locked the door to her apartment T726-27. This shows reflective thought. When Officer Gillespie arrived Dyke had the presence of mind to try to exercise modesty by covering herself up SR96. This is reflective thought. The state argued that after the attack and before the police came, Dyke showered T1429. This is reflective thought. The state failed to show an excited utterance -- especially where there was evidence of ample time for reflective thought and there was evidence of actual reflective thought. It was error to allow the introduction of the hearsay statements.

The introduction of the hearsay statements deprived Appellant of his right to confrontation and due process under the Fifth, Sixth and Fourteenth Amendments to the United States

Constitution and under Article I, Sections 9 and 16 of the Florida Constitution.

### B. Dyke's statement that Appellant raped her was not harmless.

As beneficiary of the error, the state has the burden to prove beyond a reasonable doubt that the error "did not contribute to the verdict or, alternatively stated, that there is no possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986).

Dyke's statement that she was "raped" was particularly prejudicial – especially in light of the lack of evidence of sexual battery.[2] The prosecutor argued that Dyke's testimony that she was raped proved felony murder T1429. Thus, the error cannot be deemed harmless.

In addition, the statement regarding rape could contribute to a premeditation finding. The sexual battery provides a possible motive for the killing – covering up the sexual battery. In fact, the prosecutor specifically argued to the jury that Appellant had not intended to kill Dyke until after he had raped her:

[2] Even if this Court should disagree with Appellant's argument concerning the sufficiency of the evidence of sexual battery, it cannot be said that the evidence was so convincing that the hearsay rape statement would be harmless.

> ... I submit to you, ladies and gentlemen, and Lisa testified that he raped her, and you will hear it on the tape. You heard what she said, he raped me, I was raped ... and I submit to you, ladies and gentlemen, he raped her, and he raped her, **before he decided to kill her**.

T1428-29 (emphasis added).

If Appellant was the perpetrator, the evidence showed that he did not go to the residence with a weapon (the weapon came from the residence). The evidence did not show a plan to kill. There was no forced entry. Dyke was alive at the scene. No lethal wounds were inflicted. Dyke would eventually die 19 days later from infection, but not a wound itself. The trial court found that she was never unconscious. In fact, she was left ambulatory and was able to shower, lock the door, and make phone calls before calling 911. Leaving her ambulatory and able to seek aid is inconsistent with an intention to kill. This smacks of a crime of opportunity rather than a premeditated killing.

### C. Dyke's statement that "Rodney" stabbed her was not harmless.

Also, Dyke's out-of-court statement that "Rodney" had stabbed her was not harmless. Although the statement was not conclusive of guilt (accusing boyfriend Rodney whereas Appellant was ex-boyfriend Ronnie) such hearsay could still contribute to the verdict.

Other evidence does not render the error harmless. Other evidence may have contributed to the verdict, but the other evidence was not conclusive of guilt.[3] Regardless, the other evidence does not detract from the fact that it cannot be shown beyond a reasonable doubt that the out-of-court statements did not contribute to the verdict.

**2. STATEMENT TO OFFICER GILLESPIE**

Officer Gillespie went to Lisa Dyke's apartment to investigate the stabbing SR72. When Dyke first opened the door she had the presence of mind to try to conceal the fact she was naked SR74,86. Gillespie questioned Dyke while paramedics treated her SR81. When Dyke indicated that she was afraid she was going to die, Gillespie reassured her and told her, "You are not going to die" SR81. Paramedics also gave her encouragement SR82.

The primary purpose of making hearsay inadmissible is because such statements are not subject to confrontation. State v. Freber, 366 So. 2d 426 (Fla. 1978). The hearsay rule is

[3] For example, Dyke's statement at the hospital consisted of "nodding" when asked questions. Dyke never demonstrated the ability to shake her head. Thus, the hospital statements may have been far from conclusive in the eyes of the jury – even though they may have contributed to the verdict.

inextricably intertwined with the Confrontation Clause of the Sixth Amendment. Ohio v. Roberts, 100 S.Ct. 2531 (1980); Evans v. State, 838 So. 2d 1090, note 5 (Fla. 2002) (hearsay rule and right of confrontation are so closely related that hearsay objection was sufficient to assert confrontation issue). In the present case Dyke's statements to Gillespie abridged Appellant's right to confrontation and did not fall within any hearsay exception.

### A. *Crawford v. Washington*, 541 U.S. , 124 S.Ct. 1354 (2004).

Crawford holds that if an out-of-court statement from a non-testifying witness is testimonial it may not be admitted against a criminal defendant. Dyke's statements to Gillespie during his investigation were clearly testimonial. See Lopez v. State, 888 So. 2d 693, 700 (Fla. 1st DCA 2004). Gillespie came to the residence to investigate and he gathered information. The information Gillespie gathered in his investigation was used to arrest Appellant.

While the statements to Gillespie were testimonial, in Crawford the Court left open the question as to whether testimonial dying declarations were admissible.

In Crawford the Court rejected the claim that judicial evaluation of reliability is sufficient to determine

reliability. Cross-examination is required to show the reliability of testimonial evidence.

The lone basis for even considering testimonial dying declarations to be admissible is possibly based on its historical admissibility. However, Appellant submits that the dying declaration used historically is far different than the dying declaration of today. Historically the dying declaration was considered extremely reliable because it was made as if "under solemn oath to God at the time of reckoning" and thus "declarations of a dying person were considered equivalent to the evidence of a living witness under oath before God." U.S. v. Jordan, 2003 WL 513501 (Colo. March 5, 2005) at *3; Dixon v. State, 13 Fla. 636 (Fla. 1869) (declaration made "when every hope of this world is gone" ... "A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court"). The declaration was admissible only in a homicide case to show the mortal blow and by whom it was committed.

The dying declaration today is not based on the same premise. It does not matter if the declarant is God fearing or believes that his final words are under oath to God. The declaration is no longer limited to homicide cases, but is admissible even in civil cases. § 90.804(3). The modern dying

declaration simply is not the same as the earlier historical dying declaration. The only court to have analyzed the change in the dying declaration has concluded that they are not excepted from the umbrella of Crawford. See U.S. v. Jordan, 2005 WL 513501 (D. Colo. March 5, 2005).

While the need for confrontation may not have been as vital due to the reliability of a historical dying declaration with its oath to God, this is no longer true today. In this case the declaration was that a current boyfriend "Rodney" was the perpetrator (versus "Ronnie" who was an ex-boyfriend). The declaration also included a conclusory statement that a rape occurred. These statements are not so reliable that there would be no utility of confrontation.

**B. Dyke's statements to Officer Gillespie do not constitute dying declarations either under historical or modern theory.**

Assuming arguendo that the modern day testimonial dying declarations do not violate the dictates of Crawford, the statements by Dyke to Officer Gillespie do not constitute dying declarations. Because the modern day testimonial dying declarations have little of the reliability of their historical predecessor, they should be strictly construed.

- **Dyke's statements to Officer Gillespie would not meet the historical requirements for dying declarations.**

As noted above, dying declaration were historically admissible because God-fearing people would not dare lie before meeting their maker and treated their statement as an oath before God. At bar, there was no evidence that Dyke was a religious person or that she even believed in God. There was no evidence that she felt as if she were under an oath-like obligation. It is the state's burden, as proponents of the out-of-court statements, to lay a foundation that the dying declarations had the basis that existed at common law. The state failed to do so.

! **Dyke's statements to Officer Gillespie did not qualify as dying declarations under present law**.

It is well-settled that statutes are to be construed against the party claiming the statutory exception. Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So. 2d 232 (Fla. 4th DCA 1980).

Belief or fear of death by the declarant will not be sufficient to qualify a statement as a dying declaration – there must be an absence of all hope of living. In Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed.2d 196 (1933), the United States Supreme Court held that the victim's statement that "... she was not going to get well; she was going to die"

was not a sufficient predicate for a dying declaration because, even though it indicated a fear or belief of death, it did not indicate an abandonment of all hope of recovery:

> To make out a dying declaration, the declarant must have spoken without hope of recovery and in the shadow of impending death.... Nothing in the condition of the patient of May 22 gives fair support to the conclusion that hope had then been lost. She may have thought she was going to die and have said so to her nurse, but this was consistent with hope, which could not have been put aside without more to quench it.... Fear or even belief that illness will end in death will not avail itself to make a dying declaration. There must be a settled hopeless expectation....

54 S.Ct. at 23-24 (emphasis added).

For a statement to qualify as a dying declaration the declarant must: 1) know that death was imminent and inevitable and; 2) there must be absence of all hope of recovery:

> Dying declarations in cases of homicide form an exception to the rule against the admissibility of hearsay evidence. The law regards the declarant, when in the presence of imminent and inevitable death, as being under as solemn an inspiration to tell the truth as though he were pledged thereto by oath. To render such declaration admissible, however, the court must be satisfied that the deceased declarant, at the time of their utterance, knew that his death was imminent and inevitable, and that he entertained no hope whatever of recovery. This absence of all hope of recovery, and appreciation by the declarant of his speedy and inevitable death, are a preliminary foundation that must always be laid to make such declarations admissible.

McCrane v. State, 194 So. 2d 632, 636 (Fla. 1940) (quoting from Lester v. State, 20 So. 232, 233 (Fla. 1896)).

The state did not show, and the trial court did not find, that Dyke had no hope of recovery. In fact, the evidence showed that Officer Gillespie gave Dyke hope of recovery ("you are not going to die" SR81) and the paramedics also gave Dyke words of encouragement SR82. The paramedics treated Dyke while Officer Gillespie questioned her SR84.

Having made the statements during treatment designed to bring about recovery does not show no hope of recovery, it shows the opposite -- that there was hope for recovery.

Although Dyke was being treated at the time of the statements, this court made it clear in McCrane, supra, that the declarant's physical condition is not the deciding factor in the dying declaration issue, but the key is whether the thought of any hope had been eliminated from the declarant's mind:

> The matter to be decided is not altogether what the real condition of the declarant was. It must be shown that the declarant was, in extremis, near to impending death; but although this may be clearly show, if it appears that the declarant did not realize that condition, and in spite of what was apparent to others, he entertained the thought or hope that he would recover or that death was not yet imminent or close at hand, his declaration would not be admissible in evidence as a dying declaration, though it might be admissible if made in the presence of the accused.

194 So. 2d at 636 (emphasis added). Thus, the reassurances to Dyke due to her treatment that there would be recovery does not

constitute the required predicate that Dyke thought that all hope was lost and that death was imminent.

### C. Dyke's out-of-court statements to Officer Gillespie do not qualify as excited utterances.

As discussed earlier, if there is time for reflective thought the out-of-court statements will not be admissible unless there is actual proof that the declarant did not engage in reflective thought. Also, the declarant must be continuously under the excitement and not reexcited in telling about the event. See Pages 19-24 of Initial Brief. In this case, there was time for reflective thought – thirty minutes after the event and after two phone calls to Julius Lawrence and 911. There was no proof that Dyke never engaged in reflective thought during this period. In fact, Julius Lawrence was never called by the state to show that Dyke did not engage in reflective thought. Dyke actually engaged in a reflective thought process in conversing with the 911 operator. The same is true was to the statement to Gillespie. The reflective thought process included going back in her memory to collect phone numbers to identify the suspect. When Gillespie arrived Dyke had the presence of mind to try to exercise modesty by covering herself up SR86. This is reflective thought. Dyke locked her door and showered after the attack. This is reflective thought. The state failed

to prove that this qualified as an excited utterance – especially where there was evidence of ample time for reflective thought and there was evidence of actual reflective thought.

**D. Statements to Gillespie were not harmless.**

Clearly, the statements to Gillespie were presented as evidence against Appellant and it cannot be said beyond a reasonable doubt that the error did not contribute to the verdict. It was error to allow the introduction of the hearsay statements.

**3. LISA DYKE'S STATEMENTS TO DETECTIVE JAMES AT THE HOSPITAL.**

Dyke was transported to the hospital after her phone calls to Julius Lawrence and 911 and after she was interviewed by Officer Gillespie at the crime scene. Approximately 11 hours after the incident Dyke gave a statement to Detective James that Appellant was the attacker.[4] The next day in response to questions by Detective James, Dyke indicated that Appellant had bitten her T924-925.

The statements were admitted as either dying declarations or excited utterances. It was reversible error to admit these statements.

[4] At the time James interviewed Dyke she could not speak. Her statements were in the form of nodding in response to questions by Detective James. James testified that Dyke identified Appellant as her attacker T920.

### A. ***Crawford v. Washington***

Dyke's statements to questioning by Detective James clearly constituted testimonial statements under Crawford. In fact, before the questioning, Dyke made it clear that she wanted to tell the police about the attack:

> A. I can't say that she did not have concern for imminent death, but her concern at that point is, as far as I can remember, was to at least speak to the police officers to let them know who she felt possibly did this to her....

T 518.

> Q. Did she express any concern for herself on that first day?
>
> A. At that time, I don't remember. I know she was concerned about the baby and she wanted to speak to the authorities.

T524.

Under Crawford, the testimonial out-of-court statements by Dyke should not have been admitted.

### B. Dyke's statements to Detective James do not constitute dying declarations.

As explained earlier, for a statement to qualify as a dying declaration all hope of living must be lost and even a fear or belief of death will not suffice. Shepard, id. The state did not make such a showing. Nurse Walters testified that she explained the treatment to Dyke and reassured her R476,493. Walters reassured Dyke to make her feel like she was not going

to die R488. Walters never conveyed that Dyke was not going to make it R488. Walters did not recall whether Dyke had an imminent fear she was going to die R495-97. Nurse Chestnut testified that Dyke would write notes about wanting to speak to authorities R504, and that Dyke did not express fear of dying R515.

### C. Dyke's responses to Detective James do not qualify as excuted utterances.

As detailed earlier, a statement will not be admissible as an excited utterance merely because the declarant is in an excited state. There must be no time for reflection.

Here, Dyke's responses to Detective James were 11 hours after the incident. There was plenty of time for reflection.[5] In fact, Dyke had reflected and requested to speak with authorities about the incident. The system of "nodding" in response to questions is not a form of excited utterance. In fact, the system of nodding as a response to questions only has value if Dyke is actually reflecting. It cannot legitimately be said that the responses to James were excited utterances.

[5] During the 11 hours, Dyke called her boyfriend, called 911, was questioned by Officer Gillespie and had a number of conversations with people at the hospital.

### D. The statements to James were not harmless.

It cannot be said beyond a reasonable doubt that Dyke's out-of-court statements to Detective James did not contribute to the verdict. The statement to James was the simple, unqualified piece of evidence that Appellant was the perpetrator. It was unequivocal as opposed to statements accusing "Rodney." Without doubt, this evidence would have contributed to the verdict and cannot be considered harmless.

## POINT II

## THE TRIAL COURT'S DEPARTURE FROM NEUTRALITY DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

The trial court departed from his neutral role at least twice during the guilt phase. The trial court entered an order deciding an issue before giving Appellant an opportunity to be heard. The trial court also took the role of the prosecution in advocating for the admission of evidence against Appellant. During the penalty phase the trial court once again left its neutral position and went on to advocate and find an aggravating circumstance (CCP) that the prosecution had never asked for nor advocated at any time. The trial court's actions denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 9, 16, 22, Fla. Const.

The key evidence in this case was the out-of-court statements of Lisa Dyke. The state and defense offered evidence as to the admissibility of this evidence. The trial court set a hearing to give the parties an opportunity to be heard as to the admissibility of the statements.

Prior to the hearing the trial court informed the parties that it had already written its order on the admissibility of the statements SR154. The trial court did indicate that it would listen to arguments and <u>if somebody swayed his mind</u> he would "deal with it" SR154. Deciding the issue prior to giving Appellant an opportunity to be heard denied Appellant due process and a fair trial.

The state's sole argument for the admission of Dyke's out-of-court statements was that they were admissible as dying declarations. The trial court's order found that statements (during the 911 call, to Officer Gillespie, and at the hospital) were admissible as excited utterances R329.[6] The trial court's act of acting as prosecutor by creating and advocating a ground for admissibility of the out-of-court statements, that was never advocated by the state, is an even more egregious than not

[6] The trial court's order also indicated that the statements to Gillespie and at the hospital were dying declarations.

giving Appellant an opportunity to be heard prior to reaching a decision on the issue.

"The requirement of judicial impartiality is at the core of our system of criminal justice." McFadden v. State, 732 So. 2d 1180, 1184 (Fla. 4th DCA 1999). "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge." In re: McMillan, 797 So. 2d 560, 571 (Fla. 2001); Peek v. State, 488 So. 2d 52, 56 (Fla. 1986). The trial court does not have the discretion to abandon its cold neutrality.[7]

"The trial judge serves as the neutral arbiter in the proceedings and must not enter the fray by giving 'tips' to either side." Chastine v. Broome, 629 So. 2d 293, 295 (Fla. 4th DA 1993) (trial judge passed note to the prosecutor making suggestion regarding prosecutor's cross-examination of witnesses). The trial judge may not depart from neutrality by prompting the prosecution to present certain evidence or take certain actions. See Williams v. State, 30 Fla. L. Weekly D1179 (Fla. 2nd DCA May 6, 2005); Evans v. State, 831 So. 2d 808 (Fla. 2d DCA 2002); Lyles v. State, 742 So. 2d 842, 843 (Fla. 2d DCA 1999); Lee v. State, 789 So. 2d 1105, 1107 (Fla. 4th DCA 2001);

[7] Whether a trial judge acted with the requisite impartiality is a question of law reviewed de novo. Porter v. State, 723 So. 2d 191, 196 (Fla. 1998), cert. denied, 526 U.S. 1120 (1999).

Asbury v. State, 765 So. 2d 965, 966 (Fla. 4th DCA 2000); Sparks v. State, 740 So. 2d 33, 36-37 (Fla. 1st DCA 1999); J.F. v. State, 718 So. 2d 251, 252 (Fla. 4th DCA 1998).

In this case the trial court did not merely give "tips" or prompt the state to take certain actions. Instead, the trial court directly, without any involvement by the state, took on the role of the prosecutor by creating the theory for the admissibility of the out-of-court statements.

In the penalty phase of the case the trial court did not merely rule on the aggravating circumstances offered and argued by the prosecution. Instead, the trial court again acted as prosecutor by analyzing and finding an aggravating circumstance (CCP) that was never offered nor advocated by the state -- despite many opportunities for the state to do so. This denied Appellant of due process and a fair and reliable sentencing.

"Simply stated, the trial judge's conduct crossed the line of obstensible neutrality and impartiality and operated to deny the defendant due process by depriving him of the appearance of an unbiased magistrate and an impartial trier of fact." McFadden v. State, 732 So. 2d 1180, 1185 (Fla. 4th DCA 1999).

In addition, by deciding the issue before allowing the defense to present its position to the trial court, Appellant had been denied due process – the opportunity to be heard. See

Mason v. State, 366 So. 2d 171, 172 (Fla. 3d DCA 1979) (allowing defendant to present its position after decision is made does not constitute an opportunity to be heard).

The denial of the opportunity to be heard is the type of denial of due process which constitutes fundamental error which may be reviewed despite the lack of objection. Fundamental error includes error which rises to the level of the denial of due process. Hargrave v. State, 427 So. 2d 713 (Fla. 1983). Denial of due process by denying the opportunity to be heard is fundamental error. Wood v. State, 544 So. 2d 1004 (Fla. 1989); Deter v. Deter, 353 So. 2d 614, 617 (Fla. 4th DCA 1977) (failure to meet due process requirements in criminal contempt case constitutes fundamental error). As noted in Wood, supra, the very heart of due process is adequate notice and a meaningful hearing:

> Our opinion in *Jenkins* is founded upon constitutional rights of due process and the most basic requirements of adequate notice and meaningful hearing prior to the termination of substantive rights or some other state-enforced penalty.... This holding goes to the very heart of the requirements of due process clauses of our state and federal constitutions. The denial of these basic constitutional rights constitutes fundamental error.... Unfortunately, costs are sometimes incorrectly assessed against defendants. It is the rights of these persons whom the due process clause seeks to protect, and it is fundamental error for a court to fail to protect those rights. Without adequate notice and a meaningful hearing, a court has no way of knowing who should pay costs and who should not. Without adequate notice and a meaningful

> hearing, the requirements of due process have not been met.

544 So. 2d at 1006 (emphasis added); see also Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990).

In Huff v. State, 622 So. 2d 982 (Fla. 1993), this Court rejected the state's arguments that the violation of procedural due process by itself, where the trial court reaches a decision prior to giving the defense an opportunity to be heard, is not harmful in itself and places form over substance:

> The State further argues that Huff has only addressed the procedural improprieties and has not presented any specific objections to the contents of the order and thus has not demonstrated that reversal on this issue would serve any purpose. In effect, the State seems to argue that Huff's claim puts form over substance. We do not agree. When a procedural error reaches the level of a due process violation, it becomes a matter of substance ... the overriding concern is "the appearance of the impartiality of the tribunal," rather than actual prejudice.

622 So. 2d at 984 (emphasis added); see also Scull v. State, 569 So. 2e 1251, 1252 (Fla. 1990) (appearance of irregularity permeates proceedings to justify suspicion of unfairness so that denial of procedural due process was itself as prejudicial as actual bias would be).

Also, the error of the trial court in reaching its decision prior to giving Appellant the opportunity to be heard cannot be deemed harmless because it cannot be shown beyond a reasonable doubt that the evidence and argument could not have influenced

the trial court in reaching its decision. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

## POINT III

**THE TRIAL COURT ERRED IN ALLOWING THE JURY TO USE A TRANSCRIPT OF THE 911 TAPE CREATED BY THE STATE WHICH WAS NOT IN EVIDENCE.**

Over Appellant's objections T859-60,869-70, the jury was given a transcript of the 911 tape T870-71;SR;A. This was reversible error.

Appellant objected to the transcript of the 911 tape because it editorialized and emphasized certain portions of the statement T869-70. For example, Appellant pointed to the fact that the transcript utilized exclamation points to emphasize Dyke's pregnancy T869-70 (which Appellant had moved to exclude from evidence – See Point VII):

> L: 584-7940. Mam, I'm pregnant. I need hurry.
> P: You're pregnant? How long in the pregnancy are you?
> L: Seven and three weeks.
> P: Three weeks?
> L: **Seven months and three weeks!!**

Supplemental Record (emphasis added). There is nothing authorizing the prosecution to place its emphasis of the case before the jury in such a manner. The use of the transcript in such a manner denied Appellant due process and a fair trial.

Appellant also objected that the transcript was not accurate and invaded the province of the jury in suggesting how

to interpret certain portions of the transcript that are not clear – for example, whether Dyke was referring to "Rodney" or "Ronnie" as her attacker T859-60. The trial court did instruct the jury that the tape took precedent over the transcript where there was a "conflict" T870-71. However, the problem is that, due to the lack of clarity of the tape, the listener may not realize that the transcript is at variance with the tape.

Demonstrative aids may be used at trial as an aid to a jury's understanding, but only if the exhibits are accurate. Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994).

In Martinez v. State, 761 So. 2d 1074 (Fla. 2000), this Court noted that the cautionary instruction is not useful under the circumstances presented here:

> In this regard, although the trial court should provide jurors with cautionary instructions, we also note that such instructions are "only viable when the tape is clear enough for a juror to detect that the tape is at variance with the transcript." Robinson, 707 F.2d at 878.

761 So. 2d at 1087. Also, as noted in Stanley v. State, 451 So. 2d 897 (Fla. 4th DCA 1984), a transcript should not interpret for the jury what is contained in a tape where there is a dispute:

> We caution trial courts in the future, however, not to allow the use of transcripts when tape recordings are admitted into evidence, especially where the contents of the tape recordings are in dispute, as was the case here. Rather, it should be left to the jury to determine what is contained in the tapes without the intervention of a transcriber.

451 So. 2d at 898.

Under these circumstances while the listener will not pick up on the conflict due to the lack of clarity – the transcript will suggest the interpretation. Thus, it was error to allow the jury to utilize the transcript. The error denied Appellant due process and a fair trial.

## POINT IV

**THE TRIAL COURT ERRED IN ALLOWING IN EVIDENCE THAT LISA DYKE WAS PREGNANT WHERE SUCH EVIDENCE WAS IRRELEVANT AND ANY RELEVANCY WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE.**

Over Appellant's objection (T664,725,1677), the prosecution introduced into evidence, through a 911 tape, that Lisa Dyke was pregnant at the time of the attack T872,1479.

Appellant objected that the pregnancy was irrelevant and that its prejudicial effect was greater than its probative value T664,725,1677. The pregnancy did not relate to any elements of the charge or any aggravating circumstances, but was still admitted into evidence. The trial court overruled the objection T665,1678. Such evidence denied Appellant due process and a fair trial and reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amend., U.S. Const.; Art, 1, §§ 2, 9, 16, 22, Fla. Const.

In a murder case the pregnancy is irrelevant to any material fact in issue. This is clear from Lewek v. State, 702 So. 2d 527 (Fla. 4th DCA 1997), which involved a vehicular homicide case where the pregnancy, and the due date, were presented to the jury and the appellate court held that such evidence was irrelevant and should have been excluded because it neither proved nor disproved any material fact in the case:

> ... we conclude that the evidence of the victim's pregnancy was irrelevant because it neither proves nor disproves any material issue in the case, and as such, it should have been excluded. See § 90.401.
>
> A third trial witness, Lisa's mother, testified not only about the fact that Lisa was pregnant, but also about her due date.

702 So. 2d at 534. The court also held that the trial court's instruction to the jury that the pregnancy and due date were not to be considered could not cure the prejudice caused by the evidence and that such evidence "was unduly prejudicial and could only be calculated to play upon the jury's passions":

> Prior to deliberation, the trial court instructed the jury that Lisa's "pregnancy condition or the term of her pregnancy have no relevance to this case and are not to be considered by you in your deliberations." It is obvious from this instruction to the jury that the trial court essentially reversed its earlier position on the admissibility of Lisa's pregnancy and came to the conclusion that neither the victim's pregnant condition nor the due date of her pregnancy was relevant. Contrary to the State's argument, given the unduly inflammatory nature of the testimony of Lisa's mother, no instruction to the jury could cure the prejudice. As the Fifth District noted when

> considering a similar question, the evidence regarding Lisa' pregnancy is so inflammatory and so prejudicial that only a mistrial could have been the proper remedy. Vaczek v. State, 477 So. 2d 1034 (Fla. 5th DCA 1985). Not only did the introduction of the term date of Lisa's pregnancy violate a portion of the trial court's own ruling in limine, but such testimony was unduly prejudicial and could only be calculated to play upon the jury's passions and evoke sympathy for the tragic victims of the accident. Consequently, we agree with the Defendant's contention that the curative instruction was insufficient and that the trial court erred in not declaring a mistrial.

702 So. 2d at 534 (emphasis added). In Vaczek v. State, 477 So. 2d 1034 (Fla. 5th DCA 1985), in an attempted first degree murder case evidence was elicited that at the time of the stabbing the victim was pregnant. Despite sustaining the objection to this evidence, and a curative instruction that the pregnancy was not an issue in the case, the appellate court reversed for a new trial. See also Campbell-Eley v. State, 718 So. 2d 327 (Fla. 4th DCA 1998) (explaining the prejudicial impact that pregnancy of victim can have upon jury and reversing for failure to allow voir dire into how it would impact potential jurors where the pregnancy would be elicited).

Clearly, the unfair prejudicial impact of the pregnancy outweighed whatever minimal probative value it had and it was reversible error to admit such evidence. The error cannot legitimately be deemed harmless.

As mentioned previously, there were weaknesses in the prosecution's theories of premeditation and felony murder. The unduly prejudicial evidence can play upon the jury's passions and sway the jury in the way they evaluate or weigh evidence. As explained in Points V and VI, there are problems with the felony murder theory. There were also problems with premeditation (see Point VIII). If Appellant was the perpetrator, the evidence showed that he did not go to the residence with a weapon (the weapon came from the residence). The evidence did not show a plan to kill. There was no forced entry. Dyke was alive at the scene. No lethal wounds were inflicted. Dyke would eventually die 19 days later from infection, but not a wound itself. The trial court found that she was never unconscious. In fact, she was left ambulatory and was able to shower, lock the door, and make phone calls before calling 911. Leaving her ambulatory and able to seek aid is inconsistent with an intention to kill.

The evidence in this case did not render the error harmless. This cause must be remanded for a new trial. The pregnancy would also be prejudicial in the penalty phase.

## POINT V

**IT WAS FUNDAMENTAL ERROR TO SUBMIT A FELONY MURDER CASE TO THE JURY WHERE THE UNDISPUTED EVIDENCE REFUTED THAT THE DEATH OCCURRED DURING THE COMMISSION OF A FELONY.**

First degree felony murder requires that death occur prior to the end of the felony. It is undisputed that Lisa Dyke died long after the felony had ended. It was fundamental error to submit felony murder to the jury. Appellant's conviction and sentence must be vacated.

First degree felony murder requires that "the death occur as a consequence of and while" the defendant was engaged in the commission or attempted commission of an enumerated felony or while "escaping the immediate scene" of the felony. Standard Jury Instructions 7.3 ("Felony Murder-First Degree"). The jury was instructed that the death occurred while Appellant was engaged in the commission of a sexual battery T1492.

In Stephens v. State, 787 So. 2d 747 (Fla. 2001), a child was kidnapped and later found dead inside a car. The issue for sufficiency of first degree felony murder was whether the death occurred before or after the felony had been completed. This Court ruled that because it could not be said that the kidnapping ceased prior to the child's death the evidence was sufficient to support first degree felony murder:

> Moreover, the evidence in this case supports a finding that the murder was committed during the course of a felony. Stephens entered a plea of guilty to the charge of armed kidnapping. The only question, therefore, is whether the kidnapping had ended prior to the death of the victim. The victim of the kidnapping was Sparrow III, a three-year old child. Stephens took the child from the house where the

> robberies occurred after the other occupants were herded to the bathroom. He put the child in the dark green Kia and drove to a location that was not communicated to anyone. Prior to leaving the house, Stephens indicated he would leave the child at the corner if he was not followed. The Kia was left parked on the sunny side of a street with the doors closed and the windows up. The car was not located for approximately seven hours after it was driven from the scene of the other crimes.
>
> This was a three-year old child who was left in an automobile with the windows and doors closed. Earlier, the child had observed his kidnapper as he brandished a gun and threatened the other members of the household. Under these circumstances it cannot be said that the kidnapping had ceased prior to the child's death since the child, based on his age and the totality of the circumstances, was never at a place of safety before he died. Cf. State v. Stouffer, 352 Md. 97, 721 A.2d 207 (1998) (finding a continuing kidnapping where the victim's liberty was never restored prior to his death).
>
> Because the death occurred during the commission of the kidnapping, there is competent substantial evidence to support a conviction for first-degree felony murder.

787 So. 2d at 754 (emphasis added).

Unlike in Stephens, in the present case it is undisputed that death occurred long after any alleged sexual battery had ceased. It is undisputed that the alleged sexual battery began and ended on January 26, 1993. Lisa Dyke died on February 14, 1993 T1064. Thus, unlike in Stephens, the alleged felony ceased long before (January 26, 1993) the death occurred (February 14,

1993) and the state's evidence refuted first-degree felony murder.

The error was fundamental. It is true that defense counsel never specifically argued the ground advanced in this point. However, as explained above, the state's own theory and evidence refuted the possibility of first-degree felony murder. Thus, the error was fundamental. E.g. F.B. v. State, 852 So. 2d 226 (Fla. 2003); Griffin v. State, 705 So. 2d 572 (Fla. 4th DCA 1998).

In F.B. v. State, 852 So. 2d 226, 230-31 (Fla. 2003), this court wrote that "an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved." Among the cases cited by the supreme court with favor in this regard was Griffin v. State, 705 So. 2d 572 (Fla. 4th DCA 1998). There, the evidence showed that the confinement of a child was merely incidental to the crime of robbery, so that this Court found that a conviction for kidnapping was fundamental error, writing:

> "We find that appellant's conviction for kidnapping Victoria Linn was fundamentally erroneous because it is a conviction for a crime that did not take place. A conviction is fundamentally erroneous when the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law."

Id. at 754.

In F.B., the supreme court also cited Nelson v. State, 543 So. 2d 1308 (Fla. 2d DCA 1989) for the same proposition. In Nelson, the court reversed a conviction for resisting an officer without violence where the record showed that Nelson ran from an officer who was acting on a mere hunch. It wrote at page 1309 (e.s.):

> The state argues that this issue was not preserved for appeal because Nelson failed to raise this ground in his motions for judgment of acquittal. Generally, a defendant must articulate the correct grounds in a motion for judgment of acquittal in order for an appellate court to review the issue. Johnson v. State, 478 So. 2d 885 (Fla. 3d DCA 1985), cause dismissed, 488 So. 2d 830 (Fla. 1986). This case, however, is not the usual failure of proof case. Instead, this is a situation where Nelson's conduct did not constitute the crime of resisting an officer. Even though this issue was not raised in the trial court, it would be fundamental error not to correct on appeal a situation where Nelson stands convicted of a crime that never occurred. See Dydek v. State, 400 So. 2d 1255 (Fla. 2d DCA 1981); Williams v. State, 516 So. 2d 975 (Fla. 5th DCA 1987) (en banc), review denied, 525 So. 2d 881 (Fla. 1988). Accordingly, we reverse Nelson's judgment and sentence for resisting an officer without violence.

See also Harris v. State, 647 So. 2d 206, 208 (Fla. 1st DCA 1994) ("Conviction of a crime which did not take place is a fundamental error, which the appellate court should correct even when no timely objection or motion for acquittal was made below.").

Slydell v. State, 792 So. 2d 667 (Fla. 4th DCA 2001) is similar to Nelson. In Slydell, this Court found fundamental error under Griffin and reversed a conviction for resisting an officer without violence where the record showed that there was no lawful justification for the officers' actions so that they were not engaged in the lawful performance of their duties.

This cause must be reversed and remanded for a new trial. This error would also be harmful as to the penalty phase and sentencing.

## POINT VI

**THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON FELONY MURDER WITH SEXUAL BATTERY AS THE UNDERLYING FELONY AND ON THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE OCCURRED DURING A SEXUAL BATTERY BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE SEXUAL BATTERY.**

Appellant moved to prohibit submission of the charge of felony murder with sexual battery as the underlying felony to the jury T1356,1259. The trial court overruled Appellant's motion T1405,1259.

There was insufficient evidence of sexual battery. Appellant should not have had to argue that he never sexually battered Lisa Dyke and the court erred in denying his motion because the evidence never established to a "subjective state of near certitude" that Appellant sexually battered Lisa Dyke.

Jackson v. Virginia, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979).

There are special rules of review when the state has to rely on circumstantial evidence to prove guilt:

> One accuse[d] of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence.

Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977); State v. Law, 559 So. 2d 187 (Fla. 1990). "Circumstantial evidence must lead 'to a reasonable and moral certainty'" of sexual intercourse. Kirkland v. State, 684 So. 2d 732, 734 (Fla. 1996) ("We have stated that such a motion should be granted unless the State can 'present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.'"); see also Hall v. State, 90 Fla. 719, 729, 107 So. 246, 247 (1925). Cox v. State, 555 So. 2d 352, 353 (Fla. 1990). Suspicions, even strong suspicions of the defendant's guilt are insufficient, as a matter of law, to support a conviction. Id.

Thus, if we resolve whether conflicts exist in the evidence in favor of the state, as we must, what proof did the state present showing the defendant's guilt? Not enough.

The foremost piece of evidence is Lisa Dyke's statement in the 911 call that Ronnie Williams "raped" her. It is doubtful that such a statement is admissible.[8] More importantly, the impact of this statement as far as sufficiency of the evidence was negligible. By the very nature of a witness' function, a witness is to testify to factual matters and not to legal matters. State v. Larson, 389 N.W.2d 872, 876 (Minn. 1986). The testimony or statement concluding that one has been raped is opinion testimony as to a legal matter rather than testimony as to a factual matter. State v. Larson, 389 N.W.2d 872, 876 (Minn. 1986) (victim's letter indicating that defendant's conduct did not constitute criminal sexual conduct was merely a legal conclusion rather than factual testimony and thus was of no probative value and was inadmissible); Farley v. State, 324 So. 2d 662, 663-664 (Fla. 4th DCA 1975) (error to admit conclusion prosecutrix had been raped -- "such an opinion is not permissible"); Libby v. State, 540 So. 2d 171 (Fla. 2d DCA 1989) (no error in excluding opinion "as to whether the defendant committed the lewd acts"); Nichols v. State, 340 S.E.2d 654 (Ga.

[8] See Point VII.

Appeals 1986) (reversible error to allow opinion in physician's report that "this is rape"); Brooks v. City of Birmingham, 488 So. 2d 19 (Ala. Appeals 1986) (error to admit victim's testimony that phone calls were "harassing or obscene" where defendant was on trial for making such phone calls).

The mere accusation of rape does not amount to factual proof of the elements of sexual battery. There is no certainty of what factually occurred when a witness says she has been raped. Maybe she had her clothes torn off and was treated in a rough manner and it would not be surprising that while in an emotional state she would say she has been raped. Terms such as "raped" and "robbed" have uncertain and ambiguous meanings when used by laymen. For example, many times people indicate that they have returned to their home only to find that they have been "robbed" when actually their house had been burglarized. Obviously, their statements about being "robbed" would not be sufficient to support a robbery charge. Likewise, in this case, the victim's statement that she had been "raped" is not sufficient to support a charge of sexual battery.

It should be noted that if the charging document had merely accused Appellant of "rape" without stating the essential elements of sexual battery, it would not be sufficient to bring Appellant to trial for sexual battery. See e.g. State v. Gray,

435 So. 2d 816 (Fla. 1983) (if charging document fails to allege essential elements of the crime it fails to charge the crime). Certainly, if the statement that the victim had been raped is not sufficient to allege the crime of sexual battery, it cannot be deemed sufficient to prove the crime of sexual battery.

In addition, a conviction cannot be based solely on an unsworn out-of-court statement:

> "to allow the state to use as its sole evidence of the commission of the crime charged such prior unsworn, out of court statements which were not subject to cross-examination by the defendant [would] violate[] the [defendant's] sixth amendment right to confrontation and cross-examination." Id. (quoting with approval Jaggers v. State, 536 So. 2d 321, 325 (Fla. 2d DCA 1988)).

Beber v. State, 887 So. 2d 1248, 1252 (Fla. 2004).

In the present case, the sole evidence of sexual battery was

Dyke's unsworn, out-of-court statement.[9] The lack of reliability of unsworn out-of-court statements has been made clear by Crawford which holds that confrontation is the only method of ensuring reliability.

The only other evidence used by the state were bite marks and the fact that the victim was nude when the police arrived. Bite mark evidence is not proof of sexual battery. Sexual

[9] The trial court found that other evidence did not show a sexual battery T1390.

battery involves vaginal, anal or oral penetration. Sexual battery is not defined as biting a person. Nor is the fact that the victim was nude proof of sexual battery. Sexual battery is not defined as taking the clothes off someone. In fact, the evidence in this case, if anything, is inconsistent with the crime of sexual battery. There was no trauma to the victim's sexual organs to demonstrate sexual battery. There was no semen to indicate any sexual battery. There simply was no evidence to show that a sexual battery occurred. The evidence showed a killing but not a sexual battery.

Appellant's conviction must be reversed due to insufficient evidence. In addition, this Court should also remand for a new sentencing because in imposing the death sentence the trial court found the aggravator that the killing occurred during the course of a felony -- sexual battery. In addition, the jury was given the instruction on this aggravator over defense objection T1667. This Court has recognized that erroneous jury instructions on aggravating circumstances may taint a jury's penalty recommendation. Omelus v. State, 584 So. 2d 563 (Fla. 1991); Jones v. State, 569 So. 2d 1234 (Fla. 1990). Accordingly, the death sentence at bar should be reversed at least, if not the conviction as well.

## POINT VII

**THE TRIAL COURT ERRED IN ADMITTING THE CONCLUSION THAT LISA DYKE HAD BEEN RAPED.**

Over Appellant's objection T664, the prosecution was permitted to introduce Lisa Dyke's out-of-court conclusion that she had been "raped". This was reversible error and denied Appellant his right to due process and a fair trial. Fifth, Sixth, Fourteenth Amends., U.S. Const., Art. I, §§ 2, 9, 16, 22, Fla. Const.

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, the rulings contrary to the evidence code or caselaw constitute an abuse of discretion. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4th DCA 1992) (discre-tion "narrowly limited by the rules of evidence."); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4th DCA 2001) (no discretion to make rulings contrary to evidence code); Johnston v. State, 863 So. 2d 271, 278 (Fla. 2003).

By the very nature of a witness's function, a witness is to testify to factual matters and not to legal matters. State v. Larson, 389 N.W.2d 872, 876 (Minn. 1986). The testimony or statement concluding that one has been raped is opinion testimony as to a legal matter rather than testimony as to a

factual matter. State v. Larson, 389 N.W.2d 872, 876 (Minn. 1986) (victim's letter indicating that defendant's conduct did not constitute criminal sexual conduct was merely a legal conclusion rather than factual testimony and thus was of no probative value and was inadmissible); Farley v. State, 324 So. 2d 662, 663-664 (Fla. 4th DCA 1975) (error to admit conclusion prosecutrix had been raped -- "such an opinion is not permissible"); Libby v. State, 540 So. 2d 171 (Fla. 2d DCA 1989) (no error in excluding opinion "as to whether the defendant committed the lewd acts"); Nichols v. State, 340 S.E.2d 654 (Ga. Appeals 1986) (reversible error to allow opinion in physician's report that "this is rape"); Brooks v. City of Birmingham, 488 So. 2d 19 (Ala. Appeals 1986) (error to admit victim's testimony that phone calls were "harassing or obscene" where defendant was on trial for making such phone calls).

Statements as to the facts of a rape or robbery are admissible,[10] but due to the ambiguity and lack of qualification of a lay witness, an opinion that someone had been raped or robbed would not be admissible.

[10] For example, testimony that the defendant used force to penetrate the victim with his penis or that the defendant had a firearm and threatened to shoot the victim if she did not give him money.

The mere accusation of rape does not amount to factual proof of the elements of sexual battery. There is no certainty of what factually occurred when a witness says she has been raped. Maybe she had her clothes torn off and was treated in a rough manner and it would not be surprising that while in an emotional state she would say she has been raped. Terms such as "raped" and "robbed" have uncertain and ambiguous meanings when used by laymen. For example, many times people indicate that they have returned to their home only to find that they have been "robbed" when actually their house had been burglarized. Obviously, their statements about being "robbed" would not be sufficient to support a robbery charge. Likewise, in this case, the victim's statement that she had been "raped" is not sufficient to support a charge of sexual battery. Ambiguous conclusions by a lay witness are too misleading and ambiguous to be admissible.

The state has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In the present case, it cannot be said beyond a reasonable doubt that the error did not contribute to the verdict.

There was a serious question of a first degree or second degree murder having occurred. Obviously, the error could have

contributed to some jurors finding felony murder. This is especially true where there was no evidence of felony murder. See Points V and VI. Because the error could have contributed to the felony murder theory the error cannot be deemed harmless.[11]

In addition, the improper evidence could have contributed to any finding of premeditation. The improper evidence could be used to speculate a motive for the killing. Also, the evidence of premeditation was very weak, if not non-existent. See Point VIII. For example, there was no evidence of a plan to kill. There was no sign of forced entry. The perpetrator was invited inside.[12] Instead, it is most likely that Appellant went over to the residence to seek aid in reconciling with is girlfriend. This is consistent with a lack of premeditation. Appellant could have lost control and acted out in an emotional frenzy. This is consistent with a lack of premeditation. The weapon came from the victim's residence rather than having been procured ahead of time. This is consistent with a lack of premeditation.

---

[11] The jury was given alternative theories of first degree murder (premeditation and felony murder) but was not instructed that the alternative theory had to be found unanimously. See Point XII.

[12] The state did not even consider burglary as a charge because there was no intent to commit an offense at the time of entry.

The victim was left alive at the scene. The trial court found that she was never unconscious. In fact, the victim was left ambulatory and was able to undress, examine herself, lock the door to the residence and make phone calls before calling 911. The jury could find that leaving the victim ambulatory and able to seek aid and was inconsistent with the intention to kill the victim. The error cannot be deemed harmless. This cause must be reversed and remanded for a new trial.

## POINT VIII

**THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF PREMEDITATION.**

Appellant was convicted of premeditated murder in violation of § 782.04(1)(a)1, Fla. Stat. (1997), which provides:

> The unlawful killing of a human being ... [w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being ... is murder in the first degree and constitutes a capital felony, punishable as provided in s.775.082.

Appellant moved for a judgment of acquittal on the ground the state failed to prove the element of premeditation T1260,1406. The trial court denied the motion T1262,1406. Denial was error.

Premeditation is more than a mere intent to kill; it is a fully formed purpose to kill. Fisher v. State, 715 So. 2d 950 (Fla. 1998). Premeditation may be proved by circumstantial evidence. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993).

However, premeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. Cochran v. State, 547 So. 2d 928 (Fla. 1989). If the state's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained.

In the present case, the state sought to prove premeditation by circumstantial evidence. However, very little is known about the killing. There was no evidence of a plan to kill. The weapon was not brought to the residence. There was no forced entry. No lethal wounds were inflicted. Dyke died 19 days later from infection, but not from the wound itself. The trial court found that the victim was never unconscious. In fact, she was left ambulatory and was able to shower, lock the door, and make phone calls before calling 911. Leaving her ambulatory and able to seek aid is inconsistent with an intention to kill. The present case is not unlike others that have been reversed due to insufficient evidence of premeditation – except there is less evidence in this case.

In Kirkland v. State, 684 So. 2d 732 (Fla. 1996), the state asserted that evidence of numerous stab wounds, blunt trauma, use of both a cane and a knife, and the defendant being sexually tempted by the victim was sufficient for premeditation.

Kirkland, at 734-735. This Court found, however, that this evidence was insufficient for premeditation because: (1) "there was no suggestion that Kirkland exhibited, mentioned, or even possessed, an intent to kill the victim at any time prior to the actual homicide"; (2) "there were no witnesses to the events immediately preceding the homicide"; (3) "there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide"; and (4) "the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." Id. at 735. The exact same is true in the present case. This Court reversed Kirkland's first degree murder conviction.

In Green v. State, 715 So. 2d 940 (Fla. 1998), this Court found that the evidence did not support that the murder was committed with a premeditated design. In Green, the victim was stabbed three times, beaten, and manually strangled to death. Id. at 941. In addition, witnesses overheard Green say the afternoon before the murder that "I'll get even with that bitch, I'll kill her." Id. at 942. This Court found this insufficient evidence of premeditation:

> There were no witnesses to the events immediately preceding the homicide. Although Kulick had been stabbed three times, no weapon was recovered and there was no testimony regarding Green's possession of a knife. Moreover, there was little, if any, evidence

> that Green committed the homicide according to a preconceived plan.

Green, 715 So. 2d at 944.

The evidence of premeditation in the instant case is even less compelling than that found insufficient in the above cases. The most reasonable hypothesis to be drawn from the evidence in this case is that killing was done in an emotional frenzy without a premeditated design to kill. Because the state's evidence does not exclude this hypothesis, this Court must reverse Appellant's judgment and sentence and remand with instructions to enter judgment and sentence for second degree murder.

## POINT IX

**IT WAS FUNDAMENTAL ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.**

Article I, Section 15(a) of the Florida Constitution provides in pertinent part:

> No person shall be tried for capital crime without presentment or indictment by a grand jury....

The Fifth Amendment to the United States Constitution has the exact same requirement with regard to charging a capital crime.

The Grand Jury merely charged Appellant with premeditated murder R1-2.

Despite the fact that the Grand Jury never charged felony murder, the jury was instructed on felony murder T1492-93, and the prosecutor argued for conviction on a theory of felony murder T1415. Proceeding on the felony murder theory constituted a constructive amendment of the indictment. See e.g. United States v. Davis, 679 F.2d 845, 851 (11th Cir. 1982) (constructive amendment occurs by jury instructions and evidence expanding the case beyond what is specifically charged); United States v. Cruz-Valdez, 743 F.2d 1547, 1553 (11th Cir. 1984).

Only the Grand Jury has the authority to amend an indictment. State ex rel. Wentworth v. Coleman, 163 So. 316 (Fla. 1935); Phelan v. State, 448 So. 2d 1256 (Fla. 4th DCA 1984). There is no jurisdiction to present a theory different than that charged by the Grand Jury. Florida's Grand Jury Clause is identical to the Grand Jury Clause of the United States Constitution.

In Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Court noted that the Federal Constitution's Grand Jury Clause prohibits amendment of an indictment by anyone other than the grand jury. In Stirone the Grand Jury Clause was violated even though there was no formal

amendment of the indictment. The indictment was, "in effect," amended by the prosecutor's presentation of evidence and the trial court's charge to the jury which broadened the possible basis for conviction:

> And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

80 S.Ct. at 273. The Court went on to state the importance of the Grand Jury Clause protection from broadening what the Grand Jury specifically expressed in its indictment:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

80 S.Ct. at 270-271. The Court made it clear that <u>while there may be several methods of committing an offense</u>, <u>conviction may be only based on the method alleged in the indictment</u>:

> The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

80 S.Ct. at 271. Later, in United States v. Miller, 105 S.Ct. 1811 (1985), the Court reiterated that it matters not that multiple methods of committing the offense are proceeded on by prosecution as long as they are all alleged in the indictment:

> The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means committing the same crime.

105 S.Ct. at 1815 (emphasis added).

As in Stirone, supra, the Grand Jury Clause was violated in this case where the indictment by the Grand Jury charged only one method (premeditation in this case), for violation of a particular law, but there was a constructive amendment of the indictment by instructing the jury on a different method (felony-murder in this case) for violation of a particular law. In Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), the court noted that a constructive amendment of an indictment, which only alleged premeditated murder, by adding a felony-murder theory would violate the Grand Jury Clause. However, the court eventually reversed the conviction on the basis that the

constructive amendment violated the right to fair notice. 558 F.2d at 338.[13]

In Stirone, supra, the Supreme Court made clear that reversal was necessary due to the unauthorized constructive amendment which added a second method of proving the offense which might have been the basis for conviction and which would constitute a conviction on a charge that was never made by the grand jury:

> Here, as in the Bain case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under it s charge this might have been the basis upon which the trial jury convicted on a charge the grand jury never made against him. This was fatal error. Cf. Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; DeJonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.
>
> Reversed.

80 S.Ct. at 274 (emphasis added). Likewise, reversal is necessary here due to the unauthorized amendment of the indictment which violated the Grand Jury Clause. Art. I, Section 15, Florida Constitution; Fifth and Fourteenth Amendments, United States Constitution. Appellant's conviction and sentence for murder in the first degree must be reversed.

---

[13] Unlike in Florida, Ohio law permits amendment of indictments by others than the grand jury. 558 F.2d at 337.

## POINT X

**THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY.**

The indictment in this case only charged premeditated murder R1-2. Defense counsel filed a motion for the prosecution to disclose whether it was proceeding under a felony-murder theory R235. The trial court denied this motion SR62. The jury was instructed on the theory of felony-murder (sexual battery).

It was the prosecution's strategy to not reveal to Appellant that he would be liable on a charge of felony murder. Nor would Appellant be aware of such a charge where the Grand Jury did not charge felony murder.

The instant case is different from Knight v. State, 338 So. 2d 201 (Fla. 1976) in that it involves the prosecutor deliberately trying to strategically ambush the defense. Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1990) (reversing where charging document did not charge felony murder and prosecutor hid the fact felony murder was a theory of the case until the charge conference).[14]

[14] This Court should also reconsider its decision in Knight. See Alford v. State, 906 P.2d 714 (Nev. 1995) (overruling prior precedent which held that felony-murder need not be specifically alleged) and in light of Ring.

This lack of notice denied Appellant due process of law and the effective assistance of counsel. Article I, Sections 2, 9, 16, and 17, Fla. Const.; Fifth, Sixth, Eighth, and Fourteenth Amendments, U.S. Const.

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defendant against. Russell v. United States, 369 U.S. 749, 763-69, 82 S.Ct. 1038, 8 L.Ed.2d 249 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1380-81 (9th Cir. 1986). In Givens, the Ninth circuit held that it was a Sixth Amendment violation to allow a jury instruction and prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony-murder) where the information charged willful murder (analogous to Florida's premeditated murder).

The first-degree murder conviction must be reduced to second-degree murder. If the Court rejects Appellant's argument, a new trial is required as we cannot know if one or more of the jurors relied on felony-murder. See McGahagin v. State, 17 Fla. 665 (1880); Owens v. State, 593 So. 2d 1113 (Fla. 1st DCA 1992).

## POINT XI

**IT WAS REVERSIBLE ERROR TO FAIL TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE AS TO FELONY MURDER.**

The trial court instructed the jury that the presumption of innocence applied to the allegations in the indictment:

> The defendant has entered a plea of not guilty. This means you must presume or believe that the defendant is innocent. The presumption stays with the Defendant, as to each material allegation in the indictment, through each stage of the trial, unless it has been overcome by the evidence, to the exclusion of and beyond a reasonable doubt.

T1500 (emphasis added).

Felony murder was not alleged in the indictment. Thus, the trial court did not instruct the jury that the presumption of innocence applied to the charge of felony murder. This was error.[15]

In McKenna v. State, 119 Fla. 526, 161 So. 561 (Fla. 1935), failure to give the instruction on presumption of innocence was held to be reversible error despite the lack of request or objection by the defense:

[15] When reviewing a trial court's jury instructions, the standard of review "turns on the nature of the error alleged." United States v. Knapp, 1209 F.3d 928, 930 (9th Cir. 1997), cert. denied, 522 U.S. 968, 118 S.Ct. 417, 1139 L.Ed.2d 319 (1997). The instant issue involves a pure question of law thus review is de novo.

Rehearing was granted in this case after opinion filed for consideration of the single question as to whether or not the failure of the trial court to charge the jury concerning the law of the presumption of innocence without there being a special request for such charge constitutes reversible error. The rule is thoroughly established both in the United States and Great Britain that one charged with a criminal offense is in law presumed to be innocent, and that presumption obtains in favor of the accused through out every stage of the trial until his guilt has been proven to the exclusion of every reasonable doubt. This presumption of law should be explained to every jury empaneled to try a criminal case, and, if a charge to that effect is requested by the defendant and refused by the trial court, such refusal would constitute reversible error.

* * *

DAVIS, Justice (concurring specially).
I realize quite well that in this case the rule has been handed down without qualification from judge to judge, year after year, to the general effect that no judgment will be reversed in this court because of the failure of a trial judge to give a particular charge to the jury, unless the substance of the charge omitted was specifically requested to be given, was refused, and proper exception taken to such refusal at the time thereof.

But this rule, like many other rules that we have ofttimes 'parroted' without qualification, is subject to the limitation of that broader and more general rule of appellate practice to the effect that fundamental error on the face of the record in a case brought to this court on appeal or writ of error can and will be noticed and the judgment or decree reversed therefor (although no exception was taken to it in the lower court), where such fundamental error is subsequently called to the appellate court's attention and clearly demonstrates that the trial court departed from the essential requirements of the law in the particulars complained of, whether its action was originally complained of as error in the court below or not. (citations omitted).

> I think the failure of a trial judge to instruct a trial jury that the defendant in a criminal prosecution is presumed to be innocent and that such presumption continues and abides with him throughout every stage of the trial until overcome by competent evidence sufficient to establish his guilt to the essential requirements of a fair and impartial trial such as is required by the state and Federal Constitutions, and renders the resultant judgment subject to reversal therefor, even though the point is not raised until the case is presented in an appellate court.
>
> * * *
>
> A charge on the subject of reasonable doubt alone is therefore incomplete and misleading, unless the jury is further instructed in connection with it that any reasonable doubt on their part must take into consideration an original presumption of the defendant's innocence as opposed to any conclusion of guilt to be drawn from the state's evidence. Otherwise the jury would be left with the privilege of concluding beyond a reasonable doubt that the defendant must be guilty because a grand jury has indicted him on the basis of testimony adduced before it, or because the defendant has failed to rebut evidence tending to show guilt by affirmative evidence of his innocence offered at this trial. Would the last-named method of procedure on the jury's part be an adherence to the essential requirements of a constitutional jury trial?
>
> I think it is the inescapable duty of a trial judge in a criminal case to instruct the jury as to the essential and indispensable rules of law which must govern the jury's disposition of the case, whether he is request5ed to do so or not, and that a failure to do so constitutes a denial of a fair trial, and is therefore fundamental error. Compare Young v. State, 74 Neb. 346, 104 N.W. 867, 2 L. R. A. (N.S.) 66.

161 So. 2d at 562-565 (emphasis added).

The failure to instruct the jury on the presumption of innocence as to felony murder was reversible error which denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 9, 16, 22, Fla. Const. Appellant's conviction and sentence must be reversed and his cause remanded for a new trial.

## POINT XII

**THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT MUST REACH A UNANIMOUS VERDICT FINDING OF EITHER PREMEDITATED OR FELONY MURDER IN ORDER TO CONVICT OF MURDER IN THE FIRST DEGREE.**

The trial court instructed the jury that it must reach a unanimous verdict in order to convict Appellant of murder in the first degree T1506,1508. However, the trial court did not instruct the jury that they must unanimously find either premeditation or felony murder. The failure to do so was reversible error and denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U.S. Const., Art. I, §§ 2, 9, 16, 22, Fla. Const.

The jury must be instructed that they must unanimously find either premeditation or felony murder in order to convict a defendant of murder in the first degree:

> In Valentine v. State, 688 So. 2d 313 (Fla. 1996), the supreme court was concerned with a conviction for attempted first degree murder in which the jury may have determined the defendant was guilty of attempted premeditated murder or attempted felony murder. The problem in Valentine was that one of the options would

have resulted in an invalid conviction since attempted felony murder was no longer a crime in Florida. The court held that if a verdict is supportable on two grounds, one of which is invalid, and it is impossible to tell which ground the jury selected, the verdict must be set aside and a new trial ordered. See also Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). Although burglary with a battery and burglary while armed are both valid offenses, Valentine suggests, and Torna v. State, 742 So. 2d 366 (Fla. 3d DCA 1999), directly holds, that when a general verdict makes it impossible for the court to determine which of two options the jury determined to exist, the court must construe the verdict as finding the option most favorable to the defendant. This is consistent with the policy behind section 775.021(11), Florida Statutes. Valentine, of course, indicates that if a single offense can be committed on either of two theories, and each theory is valid, then the jury may convict on alternative proof (as opposed to returning an alternative verdict) without indicating which theory it found to exist.[1] First degree murder is such a crime and the jury may convict with a general verdict without disclosing whether it found premeditation or felony murder. See Jordan v. State, 694 So. 2d 708, 712 (Fla. 1997), in which the court upheld a general verdict of first degree murder even though the verdict "did not indicate the theory upon which the conviction rested." See also San Martin v. State, 717 So. 2d 462 (Fla. 1998), in which the court, even though there was insufficient evidence to prove premeditation, upheld the general verdict because the jury could have convicted the defendant under the felony murder theory. The important point about these cases is that the court assumes that the jury agreed on the same theory, not a mix and match combination. In neither case did the court consider what would happen if it appears that some of the jurors found premeditation but not felony murder and some of the jurors found felony murder without premeditation.

[1] There is no problem the a general verdict to a charge which can be committed in alternative ways so long as the jurors all agree on the same alternative. For example, in first degree murder

> which can be committed either by felony murder or premeditation, a general verdict has been held acceptable. Indeed, if we assume the jury followed the court's instructions, then we should assume that each of the jurors agreed on the same alternative theory to support the general verdict. However, these statutory alternative methods of committing first degree murder are not, at least in the contemplation of the legislature, "mix and match." If the State charged only premeditated murder and half of the jurors were not convinced, an acquittal would follow; similarly, if the State charged only felony murder and half the jurors were not convinced, an acquittal would follow. If follows, therefore, that if the State charges first degree murder based on the alternative methods of committing the crime and the jury returns an alternative verdict which, in effect, says that although we cannot all agree that the defendant committed either felony murder or premeditated murder but we do all agree that he committed one or the other, the law should not permit the defendant's execution when there is less than a unanimous verdict on either theory on which the alternative verdict might be based.

State v. Reardon, 763 So. 2d 418, 421-422 (Fla. 5th DCA 2000) (Harris, J., concurring, in part, dissenting, in part) (emphasis added). In this case the jury circled both the premeditation an felony murder findings R382.[16] However, the jury was never instructed that they must unanimously find premeditation or felony murder. The trial court indicated that by checking off

[16] The check off does not indicate that all 12 jurors concurred in the finding. Nine could find premeditation while 3 found felony murder. The jury was not instructed that all 12 jurors, or even a bare majority of the jurors, must unanimously find premeditation or unanimously find felony murder.

both choices it was unclear how much of the decision was based on felony murder T1383. Thus, Appellant's conviction and sentence must be reversed.

## PENALTY PHASE

## POINT XIII

**APPELLANT WAS DENIED HIS RIGHT TO A RELIABLE CAPITAL SENTENCING AND DUE PROCESS BY THE FAILURE TO INSTRUCT THAT THE FACTFINDER MUST DETERMINE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES.**

Appellant challenged the preponderance standard for determining whether the sentence of death is appropriate (mitigators must outweigh aggravators) R99,101;T664,1702. The trial court overruled the objection SR62;T665,1702. This was reversible error.

The reliability of determining that death is the appropriate sentence depends on certitude.

In civil cases involving monetary disputes the burden of proof is by the preponderance of the evidence. The risk of error is almost equally shared by the litigants.

In criminal cases because liberty is at stake, society demands much more reliability and certitude. The burden of proof is beyond a reasonable doubt.

The death penalty is unique in its severity and irrevocable natuer.[17] A higher degree of certitude must be required for its imposition.[18] Thus, the factfinder must determine that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.

As recently as Deck v. Missouri, 544 U.S. ___ (2005), the United States Supreme Court has emphasized there is just as critical a need for reliability in decision making in the penalty phase as in the guilt phase:

> Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the "'severity'" and "'finality'" of the sanction, is no less important than the decision about guilt. Monge v. California, 524 U.S. 721, 732 (1998) (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977))....  Neither is accuracy in making that decision any less critical.  The Court has

[17] "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however, long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).... "The death penalty differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basis purpose of criminal justice. And it is unique, finally in its absolute renunciation of all that is embodies in our concept of humanity." Furman v. Georgia, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

[18] The Eight Amendment requires "heightened reliability ... in the determination whether the death penalty is appropriate...." Sumner v. Shuman, 483 U.S. 66, 72, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

> stressed the "accruate need" for reliable decisionmaking when the death penalty is at issue.

544 U.S. ___, Slip opinion at 9.

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

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

648 P.2d at 83-84.

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

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

833 A.2d at 407 (emphasis added). The court recognized that the greater certitude lessened the risk of error that is practically unreviewable on appeal:

> ... in making the determination that the aggravating factors outweigh the mitigating factors and that the

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

833 A.2d at 403 (emphasis added). Finally, the court reversed the death sentence for failure to instruct that the aggravators must outweigh the mitigators beyond a reasonable doubt:

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

833 A.2d at 410-411. Likewise, the factfinder in this case must have been persuaded beyond a reasonable doubt that the aggravators outweighed the mitigators. Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution; Fifth, Sixth,

Eighth and Fourteenth Amendments to the United States Constitution. Appellant's sentence must be vacated.

## POINT XIV

### INSTRUCTING THE JURY TO DETERMINE WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST THAT OUTWEIGH AGGRAVATING CIRCUMSTANCES PLACES A HIGHER BURDEN OF PERSUASION ON APPELLANT AND VIOLATES THE EIGHTH AMENDMENT REQUIREMENT THAT DEATH BE THE APPROPRIATE PUNISHMENT, FUNDAMENTAL FAIRNESS AND DUE PROCESS.

Prior to trial Appellant objected to the penalty phase jury instruction that the jury determine whether sufficient mitigating circumstances exist that outweigh aggravating circumstances R99,101;T664,1702. The trial court overruled the objections SR62;T665,1702. The weighing equation was given to the jury and utilized by the trial court T1705;R427. This was reversible error and violates the reliability requirement for the death penalty, fundamental fairness, and Due Process under Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Heightened standards of due process apply to imposition of the death penalty due to the severity, uniqueness and finality of that sanction. Elledge v. State, 346 So. 2d 998 (Fla. 1977); Beck v. Alabama, 447 U.S. 625, 638 (1988). See Burger v. Kemp, 483 U.S. 776, 785 (1987) (A court's "duty to search for

constitutional error with painstaking care is never more exacting than it is in a capital case.").

The statute and jury instructions direct the judge and jury to perform the following analysis to determine whether a sentence of life imprisonment or the death penalty should be imposed:

> (a) that sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Section 921.141(3), Florida Statutes (emphasis added).

In People v. Young, 814 P.2d 834 (Colo. 1991), the Colorado Supreme Court held that the statutory weighing equation, which favored death if there were insufficient mitigating factors to outweigh the statutory aggravating factors, could result in an unreliable death sentence when mitigating and aggravating factors are equal and thus is unconstitutional:

> The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury cannot determine with reliability and certainty that the death sentence is appropriate under the standards established by the legislature. A statute that requires a death penalty to be imposed in such circumstances without the necessity for further deliberations, as does section 16-11-103(2)(b)(III), is fundamentally at odds with the requirement that the procedure produce a certain and reliable conclusion that the death sentence should be imposed. That such a result is mandated by statute rather than arrived at

> by a jury adds nothing to the reliability of the death sentence. The legislature has committed the function of weighing aggravators and mitigators to the jury. A jury determination that such factors are in equipoise means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded inconclusive results. A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. Accordingly, we conclude that the statute contravenes the prohibition of cruel and unusual punishments under article II, section 20, of the Colorado Constitution, and deprives the defendant of due process of law under article II, section 25, of that constitution.

814 P.2d. at 845 (emphasis added).

In State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (N.J. 1987), the court held that a death sentence was improper where instruction provided for death when the aggravating factors are not outweighed by the mitigating factors:

> The error concerns the jury's function in balancing aggravating factors against mitigating factors, a function that leads directly to its ultimate life or death decision. Its effect was to allow a death sentence without a finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. We hold that such a finding was required by the Act at the time of defendant's trial as a matter of fundamental fairness and that its absence mandates reversal and retrial of the penalty decision. Legislative policy also mandates this result, as indicated by the 1985 amendments to the Act; those amendments, furthermore, provide an independent basis for this result.

524 So. 2d at 130 (emphasis added).

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

> If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be obligated to impose the death sentence since the mitigating circumstances would not be found to outweigh the aggravating. The requirement that the aggravating circumstances justify the sentence of death, which could easily be (and was probably intended to be) construed as an independent inquiry (satisfied by a single finding of an aggravating circumstance) would not cure the presumption created by the equation.

868 F.Supp. at 1101 (emphasis added).

Finally, in State v. Kleypas, 272 Kan. 894, 40 P.3d 129 (Kan. 2001), the Kansas Supreme Court reversed a death sentence due to the instruction regarding mitigating circumstances outweighing aggravating circumstances:

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

> jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional.

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

> In Kleypas, we first held that the weighing equation of K.S.A. 21-4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments. We avoided striking the statute down as unconstitutional on its face only by construing it to mean the opposite of what it said, i.e., to require aggravating circumstances to outweigh mitigating circumstances. 272 Kan. 894, Syl. ¶¶ 45-48. This reasoning compelled us to vacate Kleypas' death sentence and remand the case for reconsideration of the death penalty under proper instructions on the weighing equation. 272 Kan. 894, Syl. ¶ 49.
>
> * * *
>
> Here, Marsh correctly notes, and the State concedes, that Kleypas requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our Kleypas decision that saved the statute through judicial construction must be overruled. We agree.

* * *

In short, the United States Supreme Court is willing to exercise its power to construe statutes in a constitutional manner to save legislative enactment rather than strike it down. However, both the United States Supreme Court and this court have acknowledged that the power to construe away constitutional infirmity is limited. "'Statutes should be construed to avoid constitutional questions, but this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature.'" Salinas v. United States, 522 U.S. 52, 59-60, 139 L.Ed.2d 352, 118 S.Ct. 469 (1997). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." United States v. Locke, 471 U.S. 84, 96, 96 L.Ed.2d 64, 105 S.Ct. 1785 (1985). The maxim cannot apply where the statute itself is unambiguous. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494, 149 L.Ed.2d 722, 121 S.Ct. 1711 (2001).

* * *

These cases make plain that the avoidance doctrine is applied appropriately only when a statute is ambiguous, vague, or overbroad. The doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute. The court's function is to interpret legislation, no rewrite it. State v. Beard, 197 Kan. 275, 278, 416 P.2d 783 (1966); Patrick v. Haskell County, 105 Kan. 153, 181 Pac. 611 (1919).

* * *

We conclude that the second holding of Kleypas – that the equipoise provision could be rescued by application of the avoidance doctrine – is not salvageable under the doctrine of stare decisis. That holding of Kleypas is overruled. Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation

> like the one facing us here. Kleypas' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not clearly erroneous; as a constitutional adjudication; it encroached upon the power of the legislature.
>
> Our decision today to confine the application of the avoidance doctrine to appropriate circumstances recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the legislature's job, no ours. This decision does more in the long run to preserve separation of powers, enhance respect for judicial review, and further predictability in the law than all the indiscriminate adherence to stare decisis can ever hope to do.

102 P.3d 457-465 (emphasis added).

Likewise, Appellant's death sentence should be reversed because the jury was instructed that unless mitigating circumstances outweigh aggravating circumstances the sentence should be death.

In addition to the lack of reliability and certitude when equipoise exists, the instruction that death is the sentence unless the mitigators outweigh the aggravators unconstitutionally creates a presumption that the death sentence is appropriate.

The fact that neither the statute nor the standard jury instructions use the word "presumption" has no significance, where the effect of the statute and standard jury instruction is

to create a presumption that death is the proper sentence. The ability of a defendant to "rebut" that presumption does not make the statute and jury instructions constitutional, where the burden of persuasion cast upon the defendant is higher to prove that a life sentence is justified than was on the State to initially prove that the death penalty is the proper sentence. The initial determination made that death is appropriate is based solely on consideration of the aggravating circumstances and expressly excludes the consideration of mitigating considerations.

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

Functionally, Florida's statute and standard jury instruction are equivalent to the procedure condemned in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975). Mullaney ruled that the procedure in Maine denied Due Process where the State had only to prove that an intentional and unlawful homicide occurred, and the defendant then bore the burden of proving "by a fair preponderance of the evidence that

he acted in the heat of passion on sudden provocation" to avoid punishment for committing murder as opposed to manslaughter. Mullaney, 95 S.Ct. at 1883. The United States Supreme Court ruled that it is fair to cast the burden of producing evidence on the defendant to place an ultimate fact in issue but, consistent with In re: Winship, 397 U.S. 358 (1970), Due Process and the right to a jury trial require that the State ultimately bear the burden of persuasion beyond a reasonable doubt. "The safe-guards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." Mullaney, 95 S.Ct. at 1890.

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

Mullaney,95 S.Ct. at 1890.

The importance of the State bearing the burden of persuasion beyond a reasonable doubt of the ultimate issue in question was explained in both Mullaney and In re: Winship, supra. The requirement that the government bear the burden of persuasion beyond a reasonable doubt is a component of

fundamental fairness that serves as a cornerstone for public acceptance of the outcome of the trial:

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

Mullaney, 95 S.Ct. at 1890. Additionally, due to the uniqueness of the severity and finality of capital punishment, Due Process compels that heightened scrutiny of the procedures be given as to both the conviction and sentencing of a defendant in order to achieve the requisite reliability:

> Even assuming, however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in Bullington, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Because the death penalty is unique "in both its severity and its finality," id., at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio,

> 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1988) (emphasis added). The Constitution also requires reliable fact finding in the context of capital punishment. See Arvelaez v. Butterworth, 738 So. 2d 326, 326-27 (Fla. 1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner ...") (emphasis added). The reliability of a death sentence is constitutionally deficient when the burden of persuasion as to the propriety of the imposition of the death sentence is cast upon the defendant rather than the state. The constitutional requirement of reliability is founded in the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

By mandating that the defendant prove that the mitigating circumstances "outweigh" the aggravating circumstances, Section 921.141(3), Fla. Stat., Florida's capital sentencing procedure casts the burden of persuasion on the defendant to prove that a

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

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

"mitigating circumstances exist that outweigh the aggravating circumstances."

As written by the Florida Legislature and as applied through the standard jury instructions, an unconstitutional burden of persuasion is placed on the defendant in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and, Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the holdings of In re Winship, supra, and Mullaney v. Wilbur, supra. See also, State v. Marsh, supra. As worded, the standard instructions dilute the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. See Cage v. Louisiana, 498 U.S. 39 (1990) and Sandstrom v. Montana, 442 U.S. 510 (1979). The fact that the instructions might reasonably be interpreted as casting the burden of persuasion on the defendant denies due process. Francis v. Franklin, 471 U.S. 307 (1985); In re Winship, supra; Mullaney v. Wilbur, supra; State v. Marsh, supra. Simply said, the standard jury instructions and Section 921.141(2) & (3), Florida Statutes, are unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United Stats Constitution and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution. The death sentence erroneously imposed here must

be reversed and Section 921.141, Florida Statutes, must be ruled unconstitutional.

## POINT XV

### THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

The aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner, hereinafter "CCP", was not shown beyond a reasonable doubt in this case. This aggravator "ordinarily applies in those murders which are characterized as executions or contract murders." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). While such examples are not deemed to be all-inclusive, they do represent the type of heightened premeditation and coldness required for the CCP aggravator. The instant case meets neither the spirit nor the literal requirements for this aggravator.

In order for this aggravating circumstance to apply, "heightened premeditation" is required. Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992). That is, the defendant must have had "a careful plan or prearranged design" to kill. Id. A suspicion of heightened premeditation will not be sufficient. Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988). This aggravator must be proven beyond a reasonable doubt. Lloyd,

supra, at 403 (although evidence might create “suspicion” of a contract killing, the fact was not established beyond a reasonable doubt.

The trial court’s order on CCP first notes that, “... the State has proven from the evidence, beyond and to the exclusion of every reasonable doubt” that the killing was CCP R418. The fact is that the State neither advocated nor endorsed a CCP finding.

The trial court’s hypothesis of CCP is pure speculation unsupported by the evidence. The trial court found CCP based on the belief that Appellant had planned to kill Ruth Lawrence to send his ex-girlfriend “a message” but ended up killing Dyke R421. There simply was no evidence of such a plan.

The trial court speculated that Appellant’s prior second degree murder conviction where he allegedly “devised and carried out a plan” to kill showed heightened premeditation in this case. This reasoning is flawed. There was no evidence of heightened premeditation, or even regular premeditation, during the prior felony – that is why it was a second degree murder and a not a first degree murder. The trial court erred in using something for which Appellant had been acquitted to find an aggravating circumstance. See Burr v. State, 550 So. 2d 444 (Fla. 1989).

It is pure speculation that there was any planned killing. The State's theory of the case – that Appellant planned to convince Dyke to help him reunite with his ex-girlfriend at least has some logic,[19] and it refutes CCP. Given this reasonable hypothesis which excludes CCP, it was error to find CCP. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992) (where evidence "susceptible to .. divergent interpretations" aggravator should not have been found).

## POINT XVI

### THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

The legislature has made it clear under § 921.141(3) of the Florida Statues that if the trial court is to sentence a defendant to death it "shall set forth in writing its findings" that (1) sufficient aggravating circumstances exist to justify the death penalty and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances.[20] The

[19] Dyke had helped Appellant reunite with Stephanie Lawrence in the past.

[20] This Court has also recognized that both of these circumstances must exist to uphold the death penalty. See Rembert v. State, 445 So. 2d 337, 340 (Fla. 1989) (sentence reduced to life even though trial court had found no mitigating circumstances and this Court upheld one aggravating circumstance); Terry v. State, 668 So. 2d 954 (Fla. 1996) (reduced to life where two aggravators were not sufficient for death even where no mitigation).

legislature directed in § 941.141(3) that if the trial court "does not make the findings requiring the death sentence" within 30 days -- a life sentence must be imposed.[21] In this case, the trial court did file the sentencing order within 30 days, however, the order does not contain "the findings requiring death." Thus, Appellant's death sentence must be vacated.

As noted above, there are two specific findings "requiring the death sentence." One is a finding that "sufficient

---

[21] § 921.141(3) reads as follows:

> (3) Findings in support of sentence of death. -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall be set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> > (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> >
> > (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

aggravating circumstances exist" to justify the death sentence. The trial court never made this required finding -- instead it skipped this step and merely weighed the aggravating circumstances against the mitigating circumstances:

> 27. WEIGHING BY THE COURT: The Court after carefully considering the statutory aggravating circumstances which have been proven by the State beyond any reasonable doubt, and the statutory and non-statutory mitigating circumstances reflected by the evidence, being ever mindful that a human life is at stake, finds as did the jury in its 10-2 recommendation to the Court, that the three Statutory Aggravators which have been proven by the State beyond a reasonable doubt are entitled to great weight. The Court finds that these Statutory Aggravating Circumstances are not outweighed by the statutory and non-statutory mitigating evidence, which the Court assigns only slight weight.
>
> IT IS HEREBY ORDERED AND ADJUDGED, that the Defendant, RONNIE KEITH WILLIAMS, is hereby sentenced to death.

R427. The trial court did not make a finding that "sufficient aggravating circumstances exist." The failure to make the required finding that sufficient aggravating circumstances exist requires vacating the death sentence and imposition of a life sentence.

## POINT XVII

**THE JURY INSTRUCTING STATING THAT THE JURY IS TO ONLY CONSIDER MITIGATION AFTER IT IS REASONABLY CONVINCED OF ITS EXISTENCE IS IMPROPER.**

Section 921.141 provides no standard for the proof of mitigating evidence. The jury instruction committee, apparently out of the blue, has promulgated an instruction that the jury is to consider only mitigation after being "reasonably convinced" of its existence. This instruction is improper for three reasons: (a) it invades the province of the Legislature; (b) it is an incorrect statement of Florida law; and (c) it unconstitutionally limits the consideration of mitigating evidence.

(a) Article 2, section 3 of the Florida Constitution forbids the judiciary from exercising the powers of the Legislature.

The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. Section 921.001(1), Florida Statutes; Smith v. State, 537 So. 2d 982 (Fla. 1989) (sentencing guidelines).

Despite the fact that the Florida Legislature put no restrictions on the consideration of mitigating evidence, the Standard Jury Instruction Committee placed such a restriction by the promulgation of the "reasonably convinced" standard. Hence the "reasonably convinced" standard is unconstitutional for

violating the Florida Constitution's separation of powers.[22] Florida law places no restriction on consideration of mitigation. By placing a "reasonably convinced" restriction, the instruction is contrary to Florida law.[23] Also, by placing a high degree of restriction where none exists by statute, the jury instruction is contrary to the constitutional requirement that all mitigating evidence be considered and it imposes an unconstitutionally high standard of proof.

The state and federal constitutions require that all mitigating evidence be considered. Hitchcock v. Dugger, 481 U.S. 393 (1987). Any jury instruction that prevents consideration of all mitigating evidence is unconstitutional. Mills v. Maryland, 486 U.S. 367 (1988). Full consideration of mitigating evidence is essential in a capital case; the jury

---

[22] The promulgation of the "reasonably convinced" standard by the jury instruction committee also violates the Cruel and Unusual Punishment Clauses of the state and federal constitutions. A death penalty statute is constitutional only to the extent that it reflects the reasoned judgment by the people through their duly elected representatives in the Legislature. Gregg. Here, we have a major provision of Florida's death penalty scheme substantially rewritten by a little known committee of lawyers.

[23] Adoption of standard instructions by the supreme court does not necessarily mean that the instructions correctly state the law. Yohn v. State, 476 So. 2d 123, 127 (Fla. 1985) (promulgation of standard instructions does not mean they are necessarily correct; standard jury instruction on insanity proper). See also Pope v. State, 441 So. 2d 1073 (Fla. 1984) (standard instruction on "heinous, atrocious or cruel").

must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. Penry v. Lynaugh, 109 S.Ct. 2934 (1989).

## POINT XVIII

### THE TRIAL COURT ERRED IN USING INDECENT ASSAULT AS THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE.

In finding the prior violent felony aggravating circumstance the trial court indicated that the state had proven that Appellant had been previously convicted of an indecent assault R414.

Appellant had objected to using the indecent assault as an aggravating circumstance T1666. In order for an offense to qualify as a prior violent felony, violence must be an inherent element of the offense. Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994). Violence is not an inherent element of indecent assault. It was error to let the state present evidence and argument respecting the indecent assault as a prior violent felony.

Obviously all criminal activity involves some threat of violence, however remote. Strict construction of the statute requires that the circumstance apply only to felonies which are life-threatening. See Lewis v. State, 398 So. 2d 432, 438 (Fla.

1981) ((5)(b) "refers to life-threatening crimes in which the perpetrator comes indirect contact with a human victim." Citing cases.). In Mahn v. State, 714 So. 2d 391 (Fla. 1998), this Court made it clear that robbery is not a prior violent felony because that circumstance is limited to "life-threatening" felonies:

> Mahn argues that the trial court erroneously found his 1992 robbery conviction to support the prior violent felony aggravating circumstance. As we stated in Lewis v. State, 389 So. 2d 432, 438 (Fla. 1981), the finding of a prior violent felony conviction aggravator only attaches "to life-threatening crimes in which the perpetrator comes in direct contact with the human victim."[7]
>
> [7] We have also recently held in Robinson v. State, 692 So. 2d 883 (Fla. 1997), that purse snatching is not a crime of violence sufficient to constitute robbery.

Likewise, in this case, indecent assault is not a life-threatening felony and therefore does not qualify as a prior violent felony. Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 2, 9, 16 and 17, Fla. Const. It was error to find the prior violent felony circumstance based on the indecent assault.

## POINT XIX

## THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Any murder could be characterized as heinous, atrocious or cruel (hereinafter "HAC"). However, to avoid such an overbroad and unconstitutional application of HAC, restrictions have been placed on the HAC aggravator. It is well-settled that the especially HAC aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering. Eg. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) (hypothesis consistent with crime not "meant to be deliberately and extraordinarily painful" and thus not HAC); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991).

For example, in Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993), this Court recognized that the crime was "vile and senseless" where the victim unsuccessfully begged for his life the there were multiple wounds, but held that especially HAC did not apply because the record did not demonstrate that Bonifay intended to inflict a high degree of pain or to torture the victim. In Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), HAC did not apply as there was "no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victim."

The trial court never found any intent by Appellant to cause prolonged pain and suffering in this case. Instead, the

trial court's finding of HAC was solely based on the fear and pain of the victim. However, as explained in Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), the suffering of the victim is not HAC as it does not set the murder apart from the norm of capital felonies:

> The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this sense murder apart from the norm of capital felonies.

It is the intentional design of the perpetrator to torture or inflict pain rather than the pain itself which HAC is designed to cover. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985) (whether victim lingers is pure fortuity, the intent of the wrongdoer is what needs to be examined). Here, the trial court did not find that Appellant had an intentional design to torture or inflict pain. The evidence showed a frenzied attack which is inconsistent with HAC. Thus, it was error to rely on the HAC aggravator.

Once the aggravating circumstance of HAC is eliminated, it cannot be said beyond a reasonable doubt that the jury's recommendation, or the trial judge's decision, would be the same. Especially in light of the mitigation present in this case.

The error of finding HAC denied Appellant due process and a fair trial, reliable sentencing contrary to Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

## POINT XX

## THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Proportionality review is a consideration of the "totality of circumstances in a case," and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 956 (Fla. 1996). See also Almeida v. State, 784 So. 2d 922, 933 (Fla. 1999) (proportionality review requires that circumstances be both the most aggravated and least mitigated for death penalty to stand).

In this case it cannot be said that this is a situation where the least mitigating circumstances exist. Evidence was presented that Appellant had a deprived childhood, was on drugs on the day of the offense, and would be a model prisoner.

Appellant never knew his father and was 7 years old when his mother died T1613-14. Appellant was raised on the streets by his sister T1615-1620. They lived on the street in an abandoned car for a long time T1615. They took clothing from the trash T1618. Appellant did not start school (1st grade) until the age of 10 T1617. Appellant was constantly picked on at school T1618-19. He was afraid as a child T1616.

Appellant had an addiction to crack cocaine T1635. Appellant was on drugs on the day of the incident T1610,1334,1337. Clinita Ashly took Appellant to the Nineteenth Street Crisis Center. Dorthea Simmons also testified that -- based on the way he was acting -- it appeared that Appellant was on drugs on the day of the incident T1610.

As for Appellant's ability to adjust to incarceration, Carter Powell, a corrections deputy who has known Appellant for 2 years, testified that Appellant has been a "model prisoner" with no disciplinary reports T1606. Powell noted Appellant's religious devotion T1607.

The evidence of Appellant's deprived childhood, being on drugs on the day of the incident, and status as a model prisoner, takes this out of the "least mitigating" class of cases for which the death penalty is reserved.

In addition, it should be noted that although the cause of the killing was stabbing -- the actual circumstances surrounding the stabbing were unclear. The circumstances of what actually occurred were a matter of conjecture. In Terry v. State, 668 So. 2d 954 (Fla. 1996), despite the existence of two aggravating circumstances (including prior violent felony) and very minimal mitigation, this Court reduced the sentence to life imprisonment noting that the circumstances surrounding the offense were unclear.

Under the totality of the circumstances of this case it cannot be said that this is one of the most aggravated and least mitigated cases for which the death penalty is reserved. Appellant's death sentence must be vacated.

## POINT XXI

### FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL WHERE ONE IS ELIGIBLE FOR THE DEATH PENALTY MERELY BY BEING CONVICTED FOR VIOLATING § 782.04 OF THE FLORIDA STATUTES.

It may be claimed that in Florida one becomes eligible for the death penalty by a mere finding of guilt under § 782.04 of the Florida Statutes. If this is true, Florida's death penalty statute is unconstitutional because aggravating circumstances must be found to make one eligible for the death penalty under the United States Constitution. See Furman v. Georgia, 408 U.S. 238 (1972).

Thus, Appellant's sentence is unconstitutional and must be reversed and remanded for imposition of a life sentence.

## POINT XXII

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

Assuming, that this Court rejects Appellant's argument in Point XX because Florida does require an aggravating circumstance for one to become eligible for the death penalty, the death penalty sentence in this cause violates Ring v. Arizona. SR60-61.

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

aggravating circumstances exist" to support a death sentence, and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Hence, to obtain a death sentence, there must be "sufficient aggravating circumstances" and insufficient mitigating circumstances to outweigh them. Under the statutory and constitutional rule of strict construction of criminal statutes,[24] a defendant is not eligible for a death sentence unless there are "sufficient aggravating circumstances" and insufficient mitigation to overcome them.

Under Ring v. Arizona, 536 U.S. 584 (2002), the question of death eligibility must be determined beyond a reasonable doubt by a jury pursuant to the Jury and Due Process Clauses. The jury determination must be unanimous. There must also be notice of aggravating factors in the charging document. The jury proceeding under section 921.141 does not comport with the requirements of the Jury and Due Process Clauses of the state and federal constitutions because the jury renders an advisory non-unanimous verdict at which it is not required to make the

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

eligibility determination by proof beyond a reasonable doubt and the normal rules of evidence do not apply. Nor is proper notice given. Hence, Florida's death penalty sentencing scheme is unconstitutional, and this Court should vacate appellant's death sentence.

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

Further, so far as Bottoson stands for the proposition that a conviction for first degree murder without more makes the defendant death eligible, it renders Florida's death sentencing scheme unconstitutional under the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Under Furman v. Georgia, 408 U.S. 238, 313 (1972), there must be a narrowing of the category of death eligible persons. Cf. Jurek v. Texas, 428 U.S. 262, 276 (1976) (statute constitutional because by "narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a

death sentence may even be considered"); Gregg v. Georgia, 428 U.S. 153, 196-97 (1976); Lowenfield v. Phelps, 484 U.S. 231, 245 (1988) (constitutionally required "narrowing function" occurred when jury found defendant guilty of three murders under death-eligibility requirement that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person": "There is no question but that the Louisiana scheme narrows the class of death-eligible murderers").

This issue presents a pure question of law subject to de novo review. This Court should reverse appellant's death sentence and remand for imposition of a life sentence.

## CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender

JEFFREY L. ANDERSON
Assistant Public Defender
15th Judicial Circuit of Florida
Florida Bar No. 374407
Attorney for Ronnie Keith Williams
The Criminal Justice Building
421 Third Street/Sixth Floor
West Palm Beach, Florida 33401
(561) 355-7600; (561) 624-6560

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief has been furnished to LESLIE CAMPBELL, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of June, 2005.

Attorney for Ronnie Keith Williams

**CERTIFICATE OF FONT COMPLIANCE**

Counsel hereby certifies that the instant brief has been prepared with Courier New 12-point font.

JEFFREY L. ANDERSON
Assistant Public Defender

IN THE

SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| RONNIE KEITH WILLIAMS, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. SC04-857 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |

# APPENDIX

## INITIAL BRIEF OF APPELLANT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the Initial Brief has been furnished to LESLIE CAMPBELL, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this _____ day of June, 2005.

Attorney for Ronnie Keith Williams