IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC05-1301
LOWER TRIBUNAL CASE NO.: 02-5900 CF 10B

GERHARD HOJAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON DIRECT APPEAL FROM
THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Original Appeal comprises forty-six (46) volumes of transcripts with 3,138 consecutively numbered pages. Additionally, there are six (6) volumes of records numbered 1-107, 1 Volume of Exhibits and 1 Volume of the case print-out.

In Appellant's Initial Brief the following symbols are used to identify references:

A)	Transcripts are identified as:		
	Vol.	-	Volume
	T	-	Transcript
B)	R	-	Record
C)	Exhibits	-	Exhibit Number
D)	Appellant, Gerhard Hojan	-	HOJAN
E)	Victim, Barbara Nunn	-	Nunn

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TRIAL COURT ERRED WHEN IT FAILED TO FOLLOW PROCEDURES SET FORTH IN KOON V. DUGGER AND MUHAMMAD V. STATE DEPRIVING COURT OF ABILITY TO EFFECTIVELY CONSIDER MITIGATION EVIDENCE MAKING DEATH SENTENCE IMPROPER.

SUMMARY OF ARGUMENT

Appellant maintains that two (2) evidentiary errors require a new trial in his case. The Trial Court erroneously allowed, over timely and specific objection, the recorded statement of victim, Barbara Nunn, while she was being transported by ambulance to a helicopter pad for transport to a local hospital. The defense objected to the statement on the grounds of hearsay, but the Court overruled the objection on the basis of excited utterance. The defense was able to show that the victim was available and would be testifying. The statement was not an excited utterance since the victim had ample time to reflect prior to the statement and the recording was not a statement or excited utterance but rather an affirmative response to police interrogation. That is, it was more a statement of the police than the victim.

The Court also allowed, after timely and specific objection, Defendant's confession. Although detectives testified that the Defendant was read his Miranda Warnings, understood and waived them; nothing in the record evidences the precise warnings given, or any discussion with the Defendant prior to or during the administration of the rights. Police decided to record only the confession, but not the entire interrogation omitting approximately forty (40) minutes which included

the administration of Miranda Warnings. Police did not use a rights waiver form,

because as the detective stated - "I never use one." Ironically and telling, this same officer utilized consent to search forms after receiving consent to search Defendant's vehicle.

Appellant further contends that the Trial Court erred when it extended his waiver of the presentation of mitigation evidence to post trial motions challenging the constitutionality of the death penalty and procedures utilized to instruct the Jury. The Motion had to do with matters of law, the constitutionality of the death penalty, and procedural matters concerning jury instructions. The Court wrongfully interpreted the waiver of mitigation evidence to include these motions warranting a new penalty phase trial.

The Trial Court erred in refusing to modify jury instructions as defense counsel requested. The standard jury instructions denigrate the jury's role by diminishing the importance of that verdict and the necessity to have it identify and rule on aggravating circumstances. Appellant also challenges the constitutionality of the death penalty because it does not require notice of aggravating circumstances, does not require specific jury findings as to sentencing factors, permits a majority recommendation of death, improperly shifts the burden of proof and persuasion to the defense, and fails to adequately guide the jury's

discretion, thereby precluding Appellate review.

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Finally, the Court erred in the procedures utilized when conducting a **Koon** hearing for the determination of Defendant's voluntary , knowing and intelligent waiver of his right to present mitigation evidence. The Defendant's insistence on not presenting any mitigation evidence, does not extend to the proffer of the existence and content of mitigation evidence. The absence of proffer prevents the Appellate Court from evaluating the proportionality of the death sentence imposed in this case.

STATEMENT OF FACTS AND OF THE CASE

Appellant/Defendant, GERHARD HOJAN (hereinafter, "HOJAN") was charged in a nine (9) count indictment by the Grand Jury in and for the Seventeenth Judicial Circuit, Broward County, Florida with Two (2) Counts of First Degree Murder, One (1) Count of Attempted First Degree Murder, One (1) Count of Attempted First Degree Felony Murder, Three (3) Counts of Armed Kidnaping, and Two (2) Counts of Armed Robbery. (R,24-29) .

Trial began on September 30, 2003. On October 17, 2003, the Jury returned guilty verdicts on all counts (R 533-550). On November 24, 2003, the Jury voted 9-3 for recommendation of death in Counts I and II of the Indictment (R,781-782). On August 2, 2005, HOJAN was sentenced to death in Counts I and II and Life in prison in Counts III and V-IX; each sentence to run consecutively (R,934-958; 967-986). This Appeal follows (R,987).

I. GUILT PHASE

The facts of the case are derived from trial testimony. Surviving victim, Barbara Nunn (hereinafter, "NUNN"), testified that she was working as a cook at the Waffle House with Christina De La Rosa and Willie Absolu in the City

of Davie, Broward County, Florida. On March 11, 2003, at approximately 4:00 a.m., HOJAN and Co-Defendant, Jimmy Mickel, entered the restaurant and sat in a booth near the back. Nunn, who had worked with Jimmy Mickel and knew HOJAN as his friend, walked over to say hello. Nunn testified that she worked with Jimmy Mickel at the Waffle House in the past and he helped her get into a night club where Jimmy Mickel worked without having to pay. She knew both, HOJAN and Co-Defendant, Mickel. She further testified that she knew HOJAN not as Gerhard, but as "Chip" (Vol. 11, T 1399-1407).

NUNN told Christina De La Rosa to wait on HOJAN and Mickel, which she did. They ordered a waffle and Christina De La Rosa went to make it. When they finished eating, Jimmy Mickel got up and walked outside. A short time later, HOJAN got up and walked over to the cash register to pay his bill. Christina De La Rosa was there to collect the money. NUNN testified that shortly after HOJAN paid the bill, Jimmy Mickel re-entered the eatery. NUNN testified that Jimmy was "hugging the wall" that leads to the bathroom. She explained that upon re-entering, Mickel walked quickly and very close to the wall leading to the bathrooms (Vol 11. T 1409-1411).

NUNN testified that as she got up to tend to her work, she heard a clicking noise. She shifted her gaze to HOJAN ("Chip") and saw him holding a

gun. NUNN testified that she saw HOJAN'S hands and he was not wearing any gloves (Vol 12. T 1458). HOJAN ordered the three (3) employees to the back of the restaurant. NUNN, De La Rosa and Willy Absolu started walking towards the back of the restaurant to where the refrigerator/freezer was located. NUNN testified that when she was led to the back of the restaurant, she saw Jimmy Mickel back there with "clippers" in his hands. NUNN testified that she saw Jimmy Mickel snipping a padlock (Vol 11. T 1411-1414).

NUNN alleges that HOJAN made the three (3) employees walk to the back of the refrigerator and into the freezer. She described the freezer as having shelves on the inside and a big metal door which closed automatically. The door could be opened from the inside, but no one attempted to leave. After herding the employees into the freezer, HOJAN left, only to return a short time later to collect NUNN's cell phone (Vol 11. T 1416-1419).

NUNN alleged that HOJAN returned a second time demanding that the three (3) empty their pockets and place their belongings on a shelf near the freezer door. NUNN testified that she placed approximately Eighty-two Dollars ($82.00) and De La Rosa placed approximately Two Hundred Dollars ($200.00) on the shelf. NUNN stated that HOJAN demanded Willy Absolu turn over his wallet, but Willy Absolu claimed not to have a wallet on him. NUNN testified that

HOJAN took the money and left the freezer (Vol 11. T 1419-1422). Despite NUNN's testimony that Willy Absolu claimed not to have a wallet, Absolu's wallet was later found on the shelf in the freezer (Exhibits 58-59; Vol.Copies of Exhibits); (Vol 12. T 1647-1648).

NUNN began expressing fears that they would be killed because she knew and could identify Jimmy Mickel and HOJAN. She testified that Willy Absolu tried to assure them that everything would be all right. At that point, NUNN testified that HOJAN returned to the freezer and allegedly ordered everyone to turn around and get down on their knees (Vol 11. T 1423). She testified that Christina De La Rosa and Willy Absolu did as they were directed, but she refused. NUNN stated that she tried to talk to HOJAN. She tried to convince him that he did not have to do it. She testified that as the "gun" got closer to her, she moved her head erratically and then heard and felt a shot. She testified that she fell and could not recall anything after that until she regained consciousness (Vol 11. T 1424).

NUNN testified that when she "woke up", she moved Willy Absolu's leg off of her and crawled out of the freezer. She did not see any blood, but felt wet. NUNN left the restaurant through the back door and made her way to a gas station next to the Waffle House. She testified that she rang a "doorbell" and the

attendant let her in. She said that she told the attendant not to let in a white male and a "large Mexican". (Vol 11. T 1426-1428).

Danish Kahn, the gas station attendant, testified that he was working in the back of the Shell Gas Station in the early morning hours of March 11, 2002, when he heard a banging at the front door to the station. He stated that he let Barbara Nunn in and saw her bleeding from the head. He testified that she came to the counter and fell to the floor screaming not to open the door, because two guys were trying to kill her, one Mexican and one white. Mr. Kahn said that he called 911 and made other calls to NUNN's family as she directed. Mr. Kahn testified that Ms. Nunn never identified the perpetrators by name nor did she ever indicate that she knew them (Vol 11. T 1310-1312; 1319-1320).

Shortly thereafter, police arrived. Firefighter/Paramedic Steven Cacciola responded to the Shell Gas Station and tended to Barbara Nunn. He testified that he saw NUNN sitting upright in a pool of blood. Nunn told the Paramedic that "Jimmy shot her, he used to work here". She further advised that Jimmy was with a big, fat Mexican. The Paramedic moved NUNN outside. She was transported by helicopter to the hospital (Vol 11. T 1323-1327).

NUNN testified that she recalled seeing a police officer at the Shell Gas Station. She said she told police that "Jimmy did it" because she could not

remember HOJAN'S name (Vol 11. T 1428-1430). Officer Patrick Donnelly testified that he took a statement from NUNN at the Shell Gas Station, and along the way to the hospital he recorded a statement. First she said that the former employee robbed the place. Then on tape, while being transported to the hospital, approximately 15-20 minutes later, she told Officer Donnelly that a big Mexican with Jimmy did the shooting (Vol 11. T 1350-1351).

Upon her arrival at the hospital, NUNN was treated in the emergency room by Technician Michael Herald. He assisted getting Ms. Nunn into a trauma room and observed a bullet fragment from the back of her head. He collected the fragment and turned it over to police (Vol 11 T 1335-1336). Officer Donnelly of the Davie Police Department collected the projectile (Vol 11. T 1379). Donnelly turned the projectile over to the Broward Sheriff's Office Crime Scene Investigator Shinaberry (Vol 11 T 1380).

At the scene, Davie Police Officer Lazaro Rodriguez, one of the first officers on the scene, entered the Waffle House. He noticed blood on the floor as he worked his way to the back of the restaurant. He testified that he found the victims, a white female and a black male, on the floor in the freezer. By the looks of things, he assumed they were dead. (Vol 10. T 1289-1290). The bodies of Christina De La Rosa and Willy Absolu were taken to the morgue where Doctor

Linda O'Neal performed the autopsies. She testified that Ms. De La Rosa sustained two gun shot wounds. One wound was to the left breast which penetrated to the spinal column and severed the spinal cord. The second shot was to the neck and severed the Carotid Artery. The Doctor opined that each wound was fatal in and of itself. Death came within a minute or two. Dr. O'Neal testified that Willy Absolu also sustained two gun shot wounds. The first was to the left arm and was considered a defensive wound. It would not have been fatal. The second wound was to the head and was fatal. She opined that death came to Mr. Absolu within a minute. (Vol 14. T 1746-1773).

Detective JoAnn Carter visited Barbara Nunn at the hospital approximately 14 hours after the incident. Detective Carter showed NUNN two (2) photo lineups. In the first photo lineup, the detective testified that NUNN picked out Hojan and identified him as the shooter, but at no time did Nunn identify him by name. The Detective then showed NUNN a second lineup and NUNN picked out Jimmy Mickel. The Detective testified that NUNN identified Mickel by name as the individual that came in to have breakfast and that he was a former employee of the Waffle House. (Vol 12 T 1492-1494).

Broward Sherrif's Office processed the scene and collected evidence at the Waffle House and other locations. Deputy Shineberry testified that he

photographed the Waffle House scene, collected latent fingerprints including dusting the freezer door, shoe prints, blood samples, and swabbed areas for DNA evidence. The Deputy also collected shell casings, shell fragments and pad locks which had been cut. He collected the projectile fragment given to him by Officer Donnelly which was removed from NUNN at the hospital. All the items collected were the sent to the Sherrif's Office Lab for testing (Vol 13. T 1531-1603). Authorities failed to match any of the tangible evidence collected to **HOJAN**. Diedra Bucknor, a fingerprint examiner testified that none of the fingerprints collected matched **HOJAN**. (Vol. 13 T 1665-1688). Detective Thomas Scott Hill, a footprint expert evaluated the footprint evidence collected at the Waffle House and did not find a match to **HOJAN** (Vol. 13. T 1689-1700). Donna Marchese, a DNA expert with the Sheriff's office, tested all the blood evidence, swabs, and clothing collected by detectives. She testified that there was no DNA evidence linking HOJAN to the crime or crime scene. (Vol 14 T 1732-1739).

After Jimmy Mickel was in custody, he directed detectives to the location of the gun. Davie Police Detective James Franquiz testified that he found the gun in bushes in Fort Lauderdale as directed by Mickel. (Vol 16 T 1937-1938, 1968-1969). **HOJAN** was arrested in Lee County, Florida by the Lee County Sheriff's Department. Detectives from Davie, Florida, traveled to Lee County and while

there Mirandized, **HOJAN** and took a recorded statement. (Vol 17 T 2006-2016).

The trial began on September 30, 2003. The jury was selected by stipulation of the State and defense after four (4) days of Voir Dire. (Vol 10 T 1209-1220**).** The Jury returned a Guilty verdict on all counts (R 533-550).

II. <u>PENALTY PHASE</u>

Prior to commencement of the penalty phase, defense counsel advised the Court that **HOJAN** was waiving presentation of any mitigation evidence. Counsel explained their efforts to change **HOJAN'S** mind, but without success. Counsel further advised that a competency exam was ordered and **HOJAN** was found to be competent. The Trial Court conducted an inquiry pursuant to **<u>Koon v. Dugger</u>, 619 So.2d 246 (FL 1993)** and **Muhammad v. State 782 So.2d 343 (FL 2001),** satisfying itself that HOJAN was competent and made a knowing and intelligent waiver of his right to present mitigation evidence during the penalty phase (Vol. 22; T 2502-2580). The State proceeded with its presentation of statutory aggravators. The jury returned a recommendation of Death in Counts I and II by a vote of 9-3 on November 24, 2003 (R 781-782). The Court appointed counsel to represent the Court and investigate mitigation evidence which the Court might consider in determining the proper sentence (R 787). On March 18, 2004, a **<u>Spencer</u>** Hearing began in accordance with **<u>Spencer v State</u>,** 615 So2d 688

(Fla 1993). Court appointed Counsel attempted to provide mitigation evidence without much success. (Vol 43 T 2990-2999). The hearing was held over three days which included April 1, 2004, and April 14, 2004 (Vol. 44 T 3071-3076 & Vol 45 T 3079-3082). On August 2, 2005, the Court read its findings into the record. The Court found six (6) Statutory Aggravators: Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence; the capital felony was committed while Defendant was engaged in the commission of, attempt to commit, or flight after committing the crime of Armed Kidnaping; the capital felony was committed for the purpose of avoiding or preventing lawful arrest; the capital felony was committed for financial gain; the capital felony was especially heinous, atrocious, and cruel; finally, the capital felony was committed in a cold, calculated and premeditated manner. The Court gave each aggravator great weight. The Court found the following statutory mitigators: the Defendant has no significant history of prior criminal activity; the age of the Defendant at the time of the crime; the Defendant acted under the substantial domination of another person; the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance; and, the capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his conduct to the requirements of law was substantially

impaired. The Courts gave each mitigator little weight or found that it did not apply do to a lack of evidence. The Court also examined the following non-statutory mitigators: Defendant suffered abuse as a child (not applicable); the Defendant was a good son, parent and provider (little weight); Defendant exhibited good behavior while in custody (little weight); Defendant has shown remorse (not applicable) (R967-986, Vol 46 T 3104-3133). The Court sentenced **HOJAN** to death on Counts I & II and to Life on Counts III & V-IX. Each sentence to run consecutively to the other Counts. (R 931-958, Vol 46 T 3133-3138). This Appeal follows (R987-988).

ISSUE I

TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS OVER ADMISSION OF BARBARA NUNN'S RECORDED STATEMENT AS EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

The Trial Court erred when it overruled defense objections and admitted victim, Barbara Nunn's, recorded statement as excited utterance exception to the Hearsay Rule.

Davie Police Officer Patrick Donnelly was one of the first officials to respond to the Shell Gas Station where Barbara Nunn (NUNN) had taken refuge. (Vol. 11 , T1350-1351). The police officer had a brief conversation with NUNN, but testified that she was mumbling. "I could hardly understand her." The officer was able to discern from NUNN that an ex-employee came in and robbed the place. She only mentioned that the ex-employee was with a big Mexican (Vol. 11, T1152-1153). Thereafter, NUNN was moved to an ambulance.

On Voir Dire, the defense attempted to establish a time line for each stage of the officer's encounter. Officer Donnelly estimated that approximately fifteen (15) minutes or more elapsed before he started taping NUNN'S responses to the officer's questions. (Vol. 11, T1363-1369).

During the taped statement, it is an unknown officer, identified only as

Officer 2, who elicits the testimony against HOJAN.

> Officer 2: "...Okay, who did the shooting? Was it, was it Jimmy or was it the Mexican?"
>
> NUNN: "The Mexican."
>
> OFFICER 2: "The Mexican did the shooting"?
>
> NUNN: "Yes, yes."
>
> (Vol. 11, T1360).

Officer Donnelly testified that he believed the other official was the paramedic (Vol. 11, T1369). The paramedic is never identified and does not testify. The only paramedic who testified was Steven Caciola, and nowhere in his testimony does he advise that he traveled with NUNN in the ambulance to the helicopter (Vol. 11, T 1323-1334).

The defense objected to the admissibility of the statement on the basis that it was impermissible hearsay and that the victim was present and would be testifying. Defense counsel argued that it was not an excited utterance since no time line could be established between the incident and the taped statement, and the majority of the responses were simply affirmation of gratuitous police questions. (Vol. 11, T 1369-1370).

The Court inquired which statements the State was seeking to introduce;

"Those statement where she says yes to the officer or what she, herself, is describing". (Vol. 11, T1370-1371). The State argued that it is seeking to admit the entire statements as an excited utterance citing **Conley v. State, 592 So2d 723 (Fla 1st DCA 1992).** The Court overruled the objection and allowed the recorded statement to be played to the jury (Vol. 11, T1376-1377).

The Court reviews evidentiary rulings for abuse of discretion. **Johnson v. State, 863 So.2d 271, 278 (Fla 2003),** and by the principles of stare decisis. A Trial Court's ruling constitutes an abuse of discretion if it is based on an erroneous view of the law or a clearly erroneous assessment of the evidence. **Cooter & Gell v. Hartmax Corp., 496 US 384, 405; 110 S.Ct. 2447, 110 L.Ed. 2nd 359 (1990).**

Section 90.803(2), Florida Statutes, (Evidence Code), excepts excited utterances from the hearsay rule even when the declarant is available to testify.

The Statute defines an excited utterances as:

> "A Statement or excited utterance related to a startling event or condition made while the declarant was under the stress of the excitement or condition."

In **Johnson v. State 969 So.2d 938 (Fla 2007)**, this Court set out three (3) criteria for the admission or applicability of an excited utterance. The Court held that a statement is an excited utterance under **§§90.803(2)** if it was made:

1. Regarding an event startling enough to cause nervous excitements.

2. Before there was time to contrive or misrepresent.

3. While the person was under the stress or excitement caused by the event.

Johnson, id @ 949.

While time is an important factor in determining whether statements are part of events (res gestae), spontaneity of utterance is probably most controlling. **Monorea v. State**, **412 So.2d 443 (Fla 5th DCA 1982)**. The test is not whether hearsay testimony is admissible; test is whether hearsay exception is applicable. **Hunt v. State, 429 So.2d 811 (Fla 2nd DCA 1983)**. In this case, the excited utterance is not applicable.

First, the State's reliance on **Conley v. State, 592 So.2d 723 (Fla 1st DCA 1992)**, is distinguishable. In **Conley**, the victim of a rape was "crying hysterically" when police officer arrived on scene and gave her statements, she told police that she was raped by a man called Mad Dog. **Id @ 727**. NUNN's recorded statement occurred well after her police encounter. The gas station attendant testified that NUNN gave him telephone numbers to dial to her sister's house in North Miami and her Mother's house in Iowa (Vol. II, T1311-1312, 1429). The fact that NUNN could recall the telephone number and give them to the attendant evidences her ability to reflect on things unrelated to the incident. The telephone numbers were called and NUNN had the opportunity to converse with family

members before police arrived. This is evidence of additional reflective thought. Additionally, NUNN originally told the attendant that “Jimmy did it", she did not tell him that the Mexican did the shooting or that she could not remember his name (Vol. 11, T1316-1320). Lastly, it was a Police Officer who was asking questions: “Mexican did the shooting, right”? NUNN would answer affirmatively to all such questions. NUNN was not making a statement when her responses were being recorded, NUNN was merely responding to the Police Officer's statements (Vol. 11, T1360).

In **Williams v. State, 967 So.2d 735 (Fla 2007),** a case in which the declarant made a 911emergency call and identified her assailant, the Court held that if sufficient time had passed for reflective thought, the proponent for admission of declarant’s statement under excited utterance exception to the hearsay rule must show that “reflective thought” [emphasis added] did not occur.

Id @ 748.

In every case where appellate courts have reviewed the admissibility of an excited utterance, it was the declarant who was making the statement. In this case, police officers are presenting their interpretation of facts obtained from a number of different sources to the declarant and attempting to use her responses as her statement of the factual scenario. That is not an excited utterance because a third

party is reflecting, analyzing, processing and deducing information for the declarant. In **Hutchinson v. State, 882 So.2d 943 (Fla 2004)**. the Court distinguishes between a contemporaneous statement and an excited utterance. The Court held that an excited utterance must be made before there is time for reflection and that utterance relates to the event and includes acts, statement, occurrences, and circumstances. **id @ 951**. NUNN was not performing any acts, did not make a statement, describe an occurrence or a circumstance. She was merely responding to the police officer's statements.

HOJAN is not challenging the utterances which took place in the gas station. The challenges are to those statements made by police and which resulted in nothing more than passive concurrence. The admissibility of the recorded statements was extremely prejudicial because it served to clarify the confusion surrounding NUNN's statement that "Jimmy did it", while in the gas station. After NUNN talked to her family, NUNN declared "the Mexican did the shooting". There is no dispute that NUNN knew Jimmy Mickel and knew he worked security at a local nightclub. It could have been that she was afraid of Mickel or feared retribution if she identified him as the shooter. There was time for reflective thought which could have produced any result.

NUNN as the only survivor, could have identified anyone without challenge

and anyone she did identify would be virtually powerless to challenge the identification. For these reasons, admissibility of the statement as an excited utterance exception to the hearsay rule is extremely prejudicial. If the statement was excluded, the jury would then have to decipher through the myriad of versions describing the event that NUNN offered to those attending to her needs in the gas station.

In **State v. DeGuillio, 491 So.2d 1129 (Fla 1986)**, the Court set out the standard by which to determine whether error is harmless based upon reasonable doubt criteria. In this instance, the error is not harmless. NUNN's taped statement was extremely prejudicial in that it served to clarify the roles of each perpetrator. The Statement does not reflect NUNN's recantation of events, but acts as an affirmation of police officials' interpretation of her earlier comments.

For these reasons, the judgment and sentence should be vacated and HOJAN afforded a new trial.

ISSUE II

THE TRIAL COURT ERRED WHEN IT RULED HOJAN'S MITIGATION WAIVER WAS A WAIVER OF DEATH PENALTY MOTIONS.

The Trial Court erred when it ruled that Defendant's death penalty motions were waived on the basis that HOJAN's waiver of mitigation evidence included death penalty arguments. The motions have nothing to do with mitigation, but are constitutional challenges to the validity of the death penalty. The Trial Court erred when it found that Defendant's death penalty challenges constituted mitigation under existing case law and precedent.

After the guilt phase and prior to commencement of the penalty phase, HOJAN advised the Court that he was waiving presentation of mitigation evidence and had instructed his attorneys to do nothing during the penalty phase.

The Trial Court relied on an inquiry required by **Koon v. Dugger, 619 So.2d 246 (Fla 1993)** and **Muhammad v. State, 782 So.2d 343 (Fla 2001)**, for determination that HOJAN was making a knowing and intelligent waiver of his right to present mitigation evidence. The second part of the **Koon** inquiry requires the Court to have counsel advise it of the existence of mitigation evidence and then proffer to the Court what that evidence is. **Koon id @ 250**. However, neither

Koon nor **Muhammad** extends the waiver beyond the presentation of mitigation evidence to the jury. The Court specifically asks HOJAN what he understands he is waiving. The Court asks:

> Court:"Fair question, what are you giving up?"
>
> HOJAN: "I am asking that they (Counsel), don't present any mitigation. I am asking that they don't bring anyone forward on my behalf."
>
> Counsel: "And the end result being?"
>
> HOJAN: "The death penalty."

(Vol. 22, T2519).

Nowhere during that exchange is HOJAN extending the waiver to post trial motions challenging the constitutionality of the death penalty and other post trial issues. Subsequently, the Court extends its inquiry to include post trial motions. The Judge presumes that HOJAN's waiver of mitigation includes a waiver of post trial motions and advises HOJAN that his actions include waiver of these motions (Vol. 22, T2542-2560).

Penalty phase and death penalty motions are legal arguments based on the constitutionality of the respective statutes and argued to the Court not the jury. As the Court notes, some of these motions were filed pretrial and ruled upon (Rec.

Vol. 2, R194-254). However, the Record demonstrates that post trial motions filed, although similar in form and substance to pretrial motions, were modified and updated requiring additional review. The Court's inclusion of the post trial motions as part of HOJAN's mitigation waiver impermissibly extended the reach of mitigation beyond its intended limitations. Evidence is mitigation in the penalty of a capital murder case if in fairness or in totality of Defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed. **Spann v. State, 657 So.d2d 845 (Fla 2003)**. Nowhere in the definition of mitigation are post trial motions challenging issues outside the scope of mitigation identified or included. The Trial Court erred by including post trial motions in HOJAN's waiver of mitigation and further erred when it advised him that waiver of mitigation included the penalty phase motions.

Since the motions raised constitutional challenges to Florida's Capital Murder Statutes, they may be raised for the first time on Appeal. In **Farina v. State, 937 So.2d 612 (Fla 2006)**, the Court reaffirmed the principle that the sole exception to the rule that a Defendant present error to the Trial Court in order to preserve it for appellate review, is fundament error. The Court's action in declaring HOJAN's challenge to the constitutionality of the death sentence waived, denied Defendant due process and therefore, violated fundamental fairness in

HOJAN's sentencing scheme. **Harvey v. State, 848 So.2d 1060 (Fla 2003)**; and **Maddox v. State, 760 So.2d 89 (Fla 2000)**. HOJAN had a fundamental right to have defense counsel's motions to declare the Florida's Capital Sentencing scheme unconstitutional heard. Moreover, the Judge's determination that this and all other post trial motions were waived violated HOJAN's Sixth Amendment right to effective counsel on the issue of the constitutionality of Florida's Death Penalty Statues, which is fundamental error that can never be found harmless. **Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993)**.

This Court should overturn HOJAN's death sentence and remand for a new penalty phase with full argument on all penalty phase motions prior to presentation of penalty phase evidence to an advisory jury.

ISSUE III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENT CONFESSING TO CRIMES CHARGED.

Police learned that HOJAN had traveled to Lehigh Acres, Florida, to visit his Father. Davie Police Detectives notified the Lee County Sheriff's Department that HOJAN may be in Lehigh Acres; provided the address to HOJAN's father's house; the make, description and license plate number of the vehicle police believed HOJAN was driving; and requested Lee County Sheriff's Deputies surveil the address to see if HOJAN'S truck was there (Vol. 34, T2811-2812).

At approximately 11:30 p.m., on March 11, 2002, detectives teletyped the Sheriff in Lee County that probable cause existed to arrest HOJAN. At approximately 12:45 a.m., on March 12, 2002, Lee County Deputies observed HOJAN leaving the home in Lehigh Acres with his Father, conducted a traffic stop and took HOJAN into custody. HOJAN was brought to a substation in Lee County where he awaited arrival of detectives from the Davie Police Department (Vol. 34, T2811-2819, 2825).

Upon their arrival at the Lee County Sheriff's Substation, Davie

Police Detectives Robert Anton and James Kiso, met with HOJAN's father, Gerhard Hojan, Sr. Detectives obtains consent to search Mr. Hojan's home and executed a consent form provided by the detectives.

Detectives Anton and Kiso then met with HOJAN and secured consent to search his vehicle. Police provided HOJAN with a consent form which he executed, allowing for the search (Vol. 34, T2828). Detectives next turned their attention to interviewing HOJAN. Despite having a tape recorder, the Detectives decided not to use it for the first forty (40) minutes of the interview. Detective Anton testified that he read HOJAN his Miranda Rights from a prepared text, but did not record the reading or HOJAN's affirmative responses indicating he understood and waived each right. Detective Anton did not provide HOJAN with a right's waiver form testifying that "he never used them." (Vol. 34, T2871).

The interrogation of HOJAN was not recorded or videotaped. Detective Anton testified that HOJAN initially denied any involvement in the homicides. The Detective took no notes of the interview. After awhile, Detective Anton testified that he told HOJAN that there was a survivor and HOJAN allegedly confessed. After approximately forty (40) minutes of questioning without video or other recording device, without any notes of any kind, Detective Anton went to his car and retrieved his tape recorder and took a recorded statement

(Vol. 34, T2872-2880).

The taped statement does not reiterate the rights read to HOJAN, only that rights were read and waived. Although there is a detailed explanation about perjury. There is not so much as a cursory review of the rights actually read to HOJAN (Vol. 34, T2838-2840). The defense filed a Motion to Suppress HOJAN's statement (R268-271). In his Motion, HOJAN argues that detectives failed to advise him of the reasons for his arrest in violation of §901.17, Florida Statutes (1987); Defendant was not promptly transported to Broward County so as to afford him an opportunity to appear before a Magistrate in violation of §901.15, Florida Statutes (1997), and detectives spent nearly two (2) hours with HOJAN elapsed between HOJAN's arrest and taped statement allowing detectives to overcome his free will. On September 2, 2003, a hearing was held (Vol. 34), whereupon the Court denied the Motion to Suppress (Vol. 34, T2889-2890).

It is well settled in Florida Jurisprudence that death is different, but what exactly does that mean? It means that a death sentence must be imposed reliably, consistently, and proportionately.

There is no written order reflecting Trial Court's ruling denying HOJAN's Motion to Suppress.

Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347

(1987); Eutsy v. State, 541 So.2d 1143 (Fla 1989).

In **Cook v. State, 792 So.2d 1197 (Fla 2001),** Justice Pariente wrote in a concurring opinion:

> "The 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. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate sentence.

Cook id @ 1206 and citing to Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 40 L.Ed.2d 944 (1976).

The reliability addressed by Justice Pariante extends beyond reliability that death is the appropriate sentence, but to the reliability of the processes utilized to gather evidence necessary for prosecution. In the same sense that a crime scene is photographed for purposes of obtaining a visual record of the evidence thereby maintaining the integrity of the investigation, so too must Miranda Warnings and its waiver be recorded to preserve the veracity of their administration.

For too long have police interrogations been cloaked in secrecy affording law enforcement unfettered discretion in the utilization, application, and administration of Miranda Warnings and the extraction of confession. See ***"Police Interrogation of Arrested Persons, A Skeptical View***" **Bernard Weisberg, 52 J.**

Crim. L. Criminology and Political Science 21, 45 (1961); also see *"Equal Justice in the Gatehouses and Mansions of American Criminal Procedure"* in Y. Kamisar, et al., *"Criminal Justice in Our Time"* 85-87 (1965), citing Weisberg and maintaining that no rule pertaining to warnings or waivers of rights would amount to anything unless police interrogations were stripped of their characteristic secrecy.

South Florida, in general, and Broward County, in particular, have a notorious and well documented history of abuses in the methodology used by law enforcement in both the administration of Miranda Warnings, a knowing and intelligent waiver of these rights and extraction of confessions. An excellent example of secret interrogations gone awry is the case of **Townsend v. State, 420 So.2d 615 (Fla 4th DCA 1982)**. Jerry Frank Townsend was arrested for a rape which took place in Miami. In the course of that investigation and interrogation after Miranda Warnings were given and waived, Townsend confessed to two murders in Broward County, including the killings of a thirteen year old girl. When police were finished with Mr. Townsend, he confessed to six (6) murders and one rape. Only the confessions were recorded. In all, Jerry Frank Townsend was convicted and sentenced to six life sentences. After 22 years in prison, DNA cleared Mr. Townsend of all charges. Townsend's cognitive limitations were not a

concern to the police or the Courts. The only thing that mattered was his confessions. See: ***"False Confessions by Defendants with Cognitive Limitations,*** **Innocent Project; www.InnocentProject.Org.**

In December, 2002, the Miami Herald Newspaper spotlighted a problem of false confessions obtained by the Broward County Sheriff's Office. **DeMarco and deVise *Spotlight on False Confessions, Tape Police Interrogations,* Miami Herald @ A1 (December 24, 2002)**. Also see **DeMarco and deVise *Police Ignored Glaring Defects in Murder Cases* DeMarco and de Vise, Miami Herald @ A1 (December 23, 2002); DeMarco and deVise , *Zealous Grilling by Police Tainted in 38 Murder Cases,* Miami Herald @ A1 (December 23, 2002).**

The series prompted the Broward County State Attorney's Office to pressure local police agencies to tape interrogations. The Fort Lauderdale Police Department agreed and announced plans to tape all interrogations, from start to finish. Within several days, the Broward Sheriff's Office announced plans to tape all police interrogations. This was followed by announcements in Miami-Dade County would follow suit. **McGuire, *Taped Police Interrogations Gain Momentum in Florida,* Chicago Tribune @ C1 (March 8, 2003)(2003WL 15976343); DeMarco and deVise, *Fort Lauderdale to Tape All Homicide***

***Interrogations*, Miami Herald @ A1 (2003 WL 2573734); McMahon and Friedberg, *Sheriff to Tape Felony Inquiries*, Sun-Sentinel (February 11, 2003(2003 WL 11555119); and DeMarco and deVise, *Miami Police Plan to Videotape interrogations*, Miami Herald (February 13, 2003)(2003 WL 13342381)**. However, despite this powerful call for taping interrogations, there appears to be no one listening at the Davie Police Department. During testimony on September 2, 2003, Detective Anton still had never seen or used something as simple as a Rights Waiver Form. (Vol. 34, T2870-2871).

The call for taping confessions is a localized movement, but has gained national attention in order to preserve the integrity of the judicial process in criminal cases. The Omaha World Herald wrote an editorial titled: ***Reforming the Death Penalty in Illinois, Taping Should Protect Police as well as Murder Suspects* 2003 WL 5277097.** The San Antonio Express News also printed an editorial in August 2003, titled: ***Taping Interrogations Would Promote Justice*, 2003 WL 58416751;** and the Hartford Courant made its views known in an editorial titled: ***Videotape Homicide Confessions* 2003 WL 59294938**. In view of the technical advances in audio and video technology, no confession in a murder case should be admitted in evidence unless there is a recording evidencing the entire interrogation process, including the administration, acknowledged

understanding, and waiver of Miranda Rights. If death is truly to be different, then the integrity of the process can only be maintained with a well documented and recording of the process utilized to obtain a confession.

It is equally well documented that Broward County had serious deficiencies in the sufficiency of its Miranda Warnings. In **Bridges v. Washington, 532 U.S. 1034 (2001),** the United States Supreme Court took note that Fort Lauderdale's Police Departments Miranda Warnings were deficient because it failed to advise a Defendant of his/her rights to counsel during questioning. The Court took no action on the defective warnings, but put local authorities on notice that if the deficiency was not corrected, the Court may have to act.

This warning by the Country's highest Court went unheeded. In **Roberts v. State, 874 So.2d 1225 (Fla 4th DCA 2004)**, **reviewed denied State v. West, 892 So.2d 1014 (Fla 2005)**, the Fourth District held that the failure to advise of the right to the presence of counsel during questioning were inadequate to advise a Defendant of his constitutional rights making admission of videotaped statement reversible error. Also see **Martin v. State**, **921 So.2d 697 (Fla 4th DCA 2006)**. The Court receded from the strict interpretation it gave as to the sufficiency of Miranda Warnings in **Canete v. State, 921 So.2d 687 (Fla 4th DCA 2006)** when

the Court held that the exact words prescribed by Miranda did not have to be given if their functional equivalent were provided. The Court, citing **California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.2d 696 (1981)** held that verbatim wording of Miranda is not required as long as the warnings given adequately fulfills Miranda's substantive requirements. **Canete, id @ 688**.

However, of noteworthy merit in every case cited, from **Bridges**, **Roberts**, **Martin**, and **Canete**, there was documented and/or recorded evidence of the content and administration of the Miranda Warnings. Of course, in this case, there absolutely nothing evidencing the colloquy between police and Defendant which would clear our conscience that the Miranda Warnings given were sufficient, adequate, or presented in such a manner and to fully advise an individual of his/her constitutional rights. Of course, a simple waiver form would have resolved this issue, but this Detective had never seen one. Apparently, in Davie, Florida, it is more important to demonstrate evidence of consent in the search of an automobile or home than it is to evidence administration of Miranda Warnings.

Detective Anton testified that he did not bring the tape recorder in to the interrogation room initially because the Detective finds the tape recorder intrusive. It may be that it is obstructive. Again, if death is to be different, the

adequacy of something as fundamental as Miranda Warnings, cannot be based simply on the characteristics and representations of one person without some form of objective corroboration.

The admission of the confession was beyond a doubt extremely prejudicial to the Defendant requiring reversal of his conviction, reversal of the Order denying the Motion to Suppress Defendant's statement, and ordering a new trial. **State v. DiGuilio, 491 So.2d 1129 (Fla 1986); State v. Taylor, 557 So.2d 138 (Fla 1st DCA 1990); Brooks v. State, 558 So.2d 929 (Fla 3rd DCA 1990)**.

ISSUE IV

THE FLORIDA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY.

Defense counsel moved to bar imposition of the death penalty on the grounds that Florida's capital sentencing procedure is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments and the decision in Ring v. Arizona, 536 U.S. 584 (2002) (R87-96). The Court waived hearing on the Motion based upon HOJAN's decision to waive presentation of mitigation evidence. (Vol. 22, T2536-2561). The Court sentenced HOJAN to death for the murders of Christina De La Rosa and Willy Absolu finding six (6) statutory aggravators: 1. The Defendant was previously convicted of

another Capital Felony or a felony involving the use or threat of violence to the person, the contemporaneous murders and attempted murder (Vol. 46 T3107); 2. The capital felony was committed while the Defendant was engaged in the commission of Armed Kidnaping (Vol. 46 T3108); 3. The capital felony was committed for the purpose of avoiding lawful arrest (Vol. 46 T3109); 4. The capital felony was committed for pecuniary gain (Vol. 46 T3111); 5. The capital felony was especially heinous, atrocious, or cruel (Vol. 46 T3113); 6. The capital felony was committed in a cold, calculated and premeditated matter (Vol. 46 T3117).

The question presented by this appeal is whether the Florida death penalty statute, **921.141, Florida Statutes** (1997), is unconstitutional because it violates the Sixth Amendment as interpreted by the United States Supreme Court in **Ring v. Arizona, 536 U.S. at 609 (2002)**, requiring

aggravating circumstances which are necessary for the imposition of a death sentence to be found by a jury.[1] This is a pure question of law, so the standard of review is *de novo*. State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla 2001); Armstrong v. Harris, 773 So.2d 7, 11 (Fla 2000).

Respectfully, this Court has erroneously rejected arguments that the decision in Ring renders the Florida death penalty statute unconstitutional under the mistaken belief that this Court is bound by the United States Supreme Court's decisions in Hildwin v. State, 490 U.S. 638 (1989), Spaziano v. Florida, 468 U.S. 447 (1984), Barclay v. Florida, 463 U.S. 939 (1983), and Proffitt v. Florida, 428 U.S. (1976), upholding death penalty the statute. See Bottoson v. Moore, 833 So.2d 693, 695 n.4 (Fla),

[1]There is one exception to this rule. The Judge along may find an aggravating circumstance based on past convictions. **Ring at 597 n.4; Almendarez-Torres v. United States, 523 U.S. 224 (1998)**; **Duest v. State**, **855 So.2d 33, 48 (Fla 2003).**

cert. Denied, 537 U.S. 1070 (2002); King v. Moore, 831 So.2d 143, 144, n.4 (Fla 2002); cert. Denied, 537 U.S. 657 (2002).

In both, Bottoson and King, this Court quoted Rodriquez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989), wherein it was held that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions; Bottoson, *id* @ 695; King *id* @ 144-145. Moreover, this Court continued to rely upon its decisions in Bottoson and King to reject claims for relief pursuant to Ring. See, e.g., Duest v. State, 855 So.2d 33, 48 (Fla 2003). The flaw in this Court's reasoning is that Ring does not belong to a separate line of decisions apart from those upholding the Florida death penalty statute. Instead, Ring is

the most recent decision of the United States Supreme Court in a line of cases beginning with Proffit in which the Court has addressed the constitutional validity of judicial findings of aggravating circumstances in capital cases. Ring is especially significant because it expressly overrules this Court's prior precedent on the precise issue presented by this case.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Court did not address the requirements of the Sixth Amendment; instead, the Court was concerned with whether the Florida capital sentencing statute violated the Eighth Amendment by providing for the arbitrary and capricious imposition of the death penalty. Nonetheless, the Court rejected Proffitt's complaint that the Judge, rather than the Jury, made the findings of aggravating and mitigating circumstances to support a death sentence: "This Court has never suggested that jury sentencing is constitutionally impaired." Id @ 252,

Barclay v. Florida, 463 U.S. 939 (1983), where the Supreme Court approved the Trial Court's finding of non-statutory aggravating circumstances. That decision did not address the question of whether the Judge or Jury must be the finder of fact for aggravating circumstances.

In Spaziano v. Florida, 468 U.S. 447 (1984), the Petitioner argued that to allow a Judge to override a jury life recommendation and impose a death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. The Court rejected each of those arguments. The Court specifically held that the Sixth Amendment does not guarantee the right to a jury determination of the appropriate punishment. *Id @ 459*. Hildwin v. Florida, 490 U.S. 638 (1989), was the first in a line of cases to directly rule on the question presented here; that is, whether the Sixth Amendment requires a jury finding of aggravating circumstances necessary to impose the

death penalty. The Court began its analysis by observing that the Sixth Amendment "does not forbid the Judge to make the written findings that authorize imposition of a death sentence *when the Jury unanimously recommends the death sentence."* *Id @ 640* (emphasis added). The Court cited to **McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986)**, for the proposition that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." **Hildwin @ 640**. The Court concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *ID @ 640-641*.

In **Walton v. Arizona, 497 U.S. 639, 648 (1990)**, the Court relied upon and cited its holdings in **Hildwin**, upholding the Arizona capital sentencing statute. That statutes did not provide for any jury participation in

the capital sentencing process, and required the trial judge to hear the evidence, make findings of fact regarding the aggravating and mitigating circumstances, and determine the appropriate sentence. The Court explained its understanding of the Florida capital sentencing process, upheld in Hildwin:

> "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the Trial Judge. A Florida trial court no more has the assistance of a Jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

Walton, @ 648.

The Court rejected Walton's claim that aggravating circumstances were elements of the offense which must be found by a Jury:

> "[W]e cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a Jury to determine the existence of such circumstances."

Id @ 649.

However, in Ring v. Arizona, 536 U.S. 584, 588 (2002), the Court expressly overruled its decision in Walton. By overruling Walton, the Court necessarily overruled Hildwin because Hildwin was the principal basis for the Walton decision. Thus, Appellant is not asking this Court to overrule the United States Supreme Court's decision in Hildwin; that Court has already done so.

This Court is required to follow the United States Supreme Court's interpretation of the Sixth Amendment. Under the Court's interpretation, the Sixth Amendment requires a Jury to find the existence of aggravating circumstances necessary for the imposition of the death penalty. As this Court recognized in State v. Dixon, 283 So.2d 1, 9 (Fla 1973), the

statutory aggravating circumstances "actually define those crimes...to which the death penalty is applicable in the absence of mitigating circumstances." The death penalty is not permitted where no valid aggravating circumstance exist. Elam v. State, 636 So.2 1312, 1314-15 (Fla 1994); Banda v. State, 536 So.2d 221, 225 (Fla 1988), cert. Denied, 489 U.S. 1087 (1989). Because findings of aggravating circumstances are necessary to the imposition of the death penalty under the Florida death penalty statute, the Sixth Amendment, as interpreted in Ring requires those findings to be made by a Jury. Yet, Section 921.141, Florida Statutes, requires the finding of aggravating circumstances to be made by the sentencing Judge instead of a Jury. As the United States Supreme Court recognized in Walton, @ 648, "A Florida Trial Court no more has the assistance of a Jury's findings of fact with respect to sentencing issues than does a Trial Judge in Arizona."

Therefore, **Section 921.141, Florida Statutes,** is just as unconstitutional under the Sixth Amendment as the Arizona capital sentencing statute.

This Court has held that there is no **Ring** violation when the aggravating circumstances found by the Judge include acts committed during the course of a felony and prior conviction of a capital or violent felony. **Robinson v. State, 865 So.2d 1259, 1265 (Fla 2004); Owen v. Crosby, 854 So.2d 182, 193 (Fla 2003).** However, under the United States Supreme Court's analysis of death sentencing systems, Florida is categorized as a "weighing" State. **Parker v. Dugger, 498 U.S. 308, 318 (1991).** In a weighing State, when the sentencing body is told to weigh an invalid factor in its decision, a reviewing Court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional

harmless-error analysis or reweighing at the Trial or Appellate level suffices to guarantee that the Defendant received an individualized sentence. Stringer v. Black, 503 U.S. 222, 232 (1992).

In this case, the sentencing Judge found six aggravating circumstances, none of which constituted prior convictions which he was permitted to find pursuant to Ring. Because Ring requires a Jury to find all aggravating circumstances other than those based upon the Defendant's prior conviction record, the Judge's finding of all six aggravators was constitutionally invalid. Thus, the Judge placed a thumb on death's side of the scale. This Court cannot assume that the thumb made no difference in the Judge's weighing process when determining the sentence to be imposed. Instead, this Court must engage in constitutional harmless error analysis.

This Court adopted the United States Supreme Court's harmless

error analysis for constitutional error set forth in Chapman v. California, 386 U.S. 18, 24 (1967), in State v. DiGuilio, 491 So.2d 1129, 1134-35 (Fla 1986), and recently reaffirmed DiGuilio in Williams v. State, 863 So.2d 1189 (Fla 2003). This Court explained: the test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probably than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the Appellate Court to substitute itself for the Trier of Fact by simply weighing the evidence. The focus is on the effect of the error on the Trier of Fact. The question is whether there is a reasonable possibility that the error affected the sentence. The burden to show the error was harmless must remain on the State. If the Appellate Court cannot say beyond a reasonable doubt that the error did not affect the sentence, then the error is by definition harmful. *Id @ 1189-1190 (quoting*

Diguilio @ 1139). This is especially true because the heinous, atrocious, or cruel factor is one of the most serious aggravating factors. See Cox v. State, 819 So.2d 705 723 (Fla 2002). The death sentences must be vacated, and this case must be remanded for entry of life sentences or a new penalty trial in which HOJAN is accorded his Sixth Amendment right to have the Jury determine whether the prosecution proves the existence of aggravating circumstances beyond a reasonable doubt.

ISSUE V

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES, DOES NOT REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS, PERMITS A MAJORITY RECOMMENDATION OF DEATH, IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, AND FAILS TO ADEQUATELY GUIDE THE JURY'S DISCRETION, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

The U.S. Supreme Court recently held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal Defendant is exposed."

Apprendi v. New Jersey, 530 U.S. 46, 120 S.Ct. 2348, 2355 (2000), quoting **Jones v. United States, 526 U.S. 227, 252-53 (1999).** Wherein the Court based its decision both in the traditional role of the Jury under the Sixth Amendment and principles of due process, the Court made clear that:

> "[I]f a Defendant faces punishment beyond that provided by Statute when an offense is committed under certain circumstances but not others...it necessarily follows that the Defendant should not, at the moment the State is put to proof of those circumstances-be deprived of protections that have, until that point unquestionably attached."
>
> **Id @ 2359.**

These essential protections include (1) notice of the government's intent to establish facts that will enhance the Defendant's sentence (2) determination by a Jury that (3) such facts have been established by the government beyond a reasonable doubt. **Id @ 2362-63; Jones, 526 U.S. @ 231.** While the majorities in **Apprendi** and **Jones** attempted to distinguish capital sentencing schemes, the distinction is not logically tenable, as the dissenters in **Jones** noted:

> "If it is constitutionally impermissible to allow a Judge's finding to increase the maximum punishment for car jacking by 10 years, it is not clear why a Judge's finding may increase the maximum punishment for murder from imprisonment to death.

Jones, 526 U.S. @ 272 (Kennedy, J., dissenting); see also **Apprendi, 530 U.S. 466 (2000) 120 S.Ct. @ 2388 ("If the Court does not intend to overrule Walton v. Arizona, 497 U.S. 639 (1990),** one would be hard-pressed to tell from the [majority] opinion.")**(O'Connor, J., dissenting).** As Justice Kennedy anticipated, the majority's ruling compels a reexamination of the Court's capital jurisprudence regarding the roles of Judge and Jury. **Jones, 526 U.S. 272.**

Florida's capital sentencing scheme, like the hate crimes statute at issue in **Apprendi**, exposes a Defendant to enhanced punishment-death rather than life imprisonment-when a murder is committed "under certain circumstances but

not others." **Id @ 2359**. Indeed, this Court has emphasized that "[t]he aggravating circumstances" in Florida law "actually define those crimes...to which the death penalty is applicable..." **State v. Dixon, 283 So.2d 1, 8 (Fla 1973)**. While this Court properly recognized in **Dixon** that individual aggravating circumstances must be proven beyond a reasonable doubt, it has thus far failed to apply other due process requirements, as outlined in **Apprendi**, to the capital sentencing scheme.

Thus, under Florida law (1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the Jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a Defendant's eligibility for the death penalty; (3) there is no requirement of Jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the State is not required to prove the appropriateness of the death penalty beyond a reasonable doubt. As to each of the preceding sections, the following sets out in greater detail the constitutional infirmities with this Capital scheme:

1) Notice. Under Florida law, in contravention of basic due process principles, the State is not required to provide notice of the aggravating circumstances it intends to prove at the penalty phase. See, e.g., **Vining v. State, 637 So.2d 921, 927 (Fla 1994)**. In other contexts, however, this Court has

properly recognized that punishment-related facts must be charged, presented to a Jury, and proven beyond a reasonable doubt, in a separate punishment determination proceeding. See, **State v. Harbaugh**, **754 So.2d 691 (Fla 2000) (felony DUI); State v. Overfelt, 457 So.2d 1385 (Fla 1984)(sentencing enhancement for use of a firearm)**.

2) Specific Jury Findings. Although the sentencing jury is instructed to determine whether individual aggravating circumstances have been established beyond a reasonable doubt, it is not required to make any specific findings regarding the existence of particular aggravators, only to make a recommendation as to the ultimate questions of punishment. The Jury is thus a "black box" that renders a life or death decision without disclosing its reasoning. **Apprendi** logically compels the conclusion that a sentencing jury must make findings regarding the existence of individual aggravating circumstances. Two of the four aggravating circumstances at issue in this case (HAC and CCP), like the biased motive factor in **Apprendi**, involve "[t]he Defendant's intent in committing a crime," a consideration that "is perhaps as close as one might hope to come to a core criminal offense 'element'", requiring a jury's determination. See **Apprendi, 120 S.Ct.@2364.**

Even if **Apprendi** did not compel jury findings regarding every

aggravator, its logic would appear, at a minimum, to require a jury finding of death eligibility. Again, as the dissenters in **Jones** and **Apprendi** noted, the Defendant could not be sentenced to death under the Arizona statute at issue in **Walton**, "unless the Trial Judge found at least one of the enumerated aggravating factors." **Jones, 526 U.S. @ 272 (dissenting opinion); accord Apprendi, 120 S.Ct. @ 2388 (O'Connor, J., dissenting)**. Precisely the same is true in Florida. See **§ 921.141 (2)(b)(1997)**. The **Jones** majority attempted to distinguish **Hildwin v. State, 490 U.S. 638, 640 (1989)**, on the grounds that a Florida Jury implicitly finds the existence of the necessary aggravating circumstances when it recommends a sentence of death. **526 U.S. @250-51**. This, however, leaves no record of which aggravators the Jury did or did not find. Moreover, if the Jury recommends life, there is no jury finding implicit or otherwise regarding the existence of any aggravating circumstances. Consequently, in an override case, the Defendant's sentence is increased from life to death based solely upon judicial findings of fact, in violation of the Defendant's due process and jury trial rights.

Hildwin does not, moreover, address the Eighth Amendment concerns raised by the absence of any mechanism for determining which aggravating and mitigating circumstances the Jury relied upon in sentencing. See **Combs v. State**, 525 So.2d 853, 859 (1988)(Shaw, J., specially concurring)(lacking of jury findings,

combined with **Tedder** deference, raises serious arbitrariness problem); cf. **Parker v. Dugger, 498 U.S. 308, 321(1991)**(emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

Jury Unanimity. The Supreme Court has never specifically addressed whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. See **Johnson v. Louisiana, 406 U.S. 356 (1972)(upholding 9:3 verdicts in serious felonies); Apodaca v. Oregon, 406 U.S. 404 (1972)(upholding verdicts of 10:2 and 11:1 in non-capital felonies); Burch v. Louisiana, 441 U.S. 130 (1979)(six person jury must be unanimous)**. The Court took pains to note that **Apodaca** was a non-capital case. See **Burch, 441 U.S. @ 136**.

Florida law requires unanimity at the guilt/innocence stage of a capital case. See e.g., **Williams v. State, 438 So.2d 781 (Fla 1983); Jones v. State, 92 So.2d 261 (Fla 1956)**. Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, a non-unanimous death verdict violated due process and the protection against cruel and/or unusual punishment guaranteed by the United States and Florida

Constitutions.

4) Burden and Standard of Proof. **Apprendi** reaffirmed that the due process prohibition on burden-shifting enunciated in **Mullaney v. Wilbur, 421 U.S. 684 (1975)**, and the reasonable doubt standard apply to the determination of sentence enhancements. **120 S.Ct. @ 2362, 2359, 2364**. Florida's capital sentencing statute violated these constitutional requirements by placing the burden on the **Defendant** to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." **§921.141(2)(b), (3)(b), Florida Statutes (1993);** see also **Dixon, 283 So.2d @ 9**. The plain meaning of this language requires imposition of a death sentence if the aggravating and mitigating evidence is in equipoise. This impermissibly relieves the State of its burden to prove, beyond a reasonable doubt, that death is the appropriate sentence. The burden-shifting instruction also "vitiates the individualized sentencing determination required by the Eighth Amendment." See **Jackson v. Dugger, 837 F.2d 1469, 1473(11th Cir.), cert. Denied, 486 U.S. 1026 (1988)(instruction that advised jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more...mitigating circumstances" violated Eighth Amendment).**

Additionally, there remains continuing confusion among Jurors

regarding their role in the sentencing scheme. In this case, despite dubious instructions from the Court that the death penalty "is only a sentence that can be imposed if the Jury finds the Defendant guilty of Murder in the First Degree. Other than those two counts, the Jury does not participate in the sentencing scheme." The Court instruction was in response to a question from a prospective jury that if the Defendant was found not guilty on any count, "does that mean you don't have to recommend the death penalty?" (Vol. 7, T922). In another instance, the Court advised the prospective jury that it does not sentence someone to death, it only recommends. (Vol. 8, T1005). The instruction minimized the Jury's role leading them to believe that a death sentence recommendation is simply an exercise, because its is the Judge who makes the decision. This results in an abdication of their responsibility as Jurors to the Court, and thereby a deprivation of Defendant's right to a complete trial by jury. This is called the Private Slovak Syndrome.

Private Eddie Slovak was a World War II soldier Court-Martialed for desertion and sentenced to death. Slovak was stationed in France and told his superiors that he was afraid to fight. If forced to, he would run away. He was the only U.S. deserter ever sentenced to death. From his Judge at his Court-Martial, all through the chain of command, each affirmation of his sentence was upheld on the

belief that someone higher up the chain would reverse. No one in authority wanted to accept responsibility for communing his sentence. He was executed by firing squad in 1942. Despite thousands of Court-Martials for soldiers charged with desertion, only Slovak was sentenced to death. Ironically, he was executed because he was afraid to die. ***"The Execution of Private Slovak***, Huie, Knoff Publications, 1954.

In much the same situation, Jurors in capital cases are alleviated of the same responsibilities as the Military authorities handling the Slovak case. Someone else will make the ultimate decision, minimizing the Juror's role in the punishment recommended. This is contrary to the dictates of **Apprendi**.

For the reasons stated above, Defendant HOJAN'S sentence of Death should be vacated with instructions to sentence him to life or alternatively, order a new penalty phase trial.

ISSUE VI

TRIAL COURT ERRED WHEN IT FAILED TO FOLLOW PROCEDURES SET FORTH IN KOON V. DUGGER, AND MUHAMMAD V. STATE DEPRIVING COURT OF ABILITY TO EFFECTIVELY CONSIDER MITIGATION EVIDENCE MAKING DEATH SENTENCE IMPROPER.

In **Koon v. Dugger, 619 So.2d 246 (Fla 1993)** and **Muhammad v. State, 782 So.2d 343 (Fla 2001)**, this Court set forth procedures the Court must take to determine a Defendant's knowing and intelligent waiver of the presentation of all mitigating evidence.

In **Koon**, the Court set out prospective procedures that the Trial Court must follow in order to insure a the Defendant makes a knowing and intelligent waiver of his right to present mitigation. The Court held that when a Defendant, against his counsel's advise, refuses to permit the presentation of mitigating evidence, the following must occur:

1. Counsel must inform the Court on the Record of Defendant's decision;
2. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented; and
3. What the evidence would be.

Koon @ 250.

Nowhere in the **Koon** opinion does it state that Defendant can control or can waive a proffer to the Court of what mitigation existed. In the case at bar, once the Court was advised of HOJAN's decision to waive presentation of mitigation, the Court immediately began the inquiry set forth in **Koon** (Vol. 22, T2502, et seq.). In compliance with the second part of the **Koon** requirements, the Court requests counsel place on the Record whether mitigation evidence existed, and if so, proffer to the Court what that mitigation evidence would be, the Court was advised that HOJAN objected to such a proffer (Vol. 22, T2507-2508). As a solution, the Court offers to seal mitigation evidence and place it in the Court file and after assuring HOJAN that the Jury will not hear or see the evidence, HOJAN responds, "then that would be no problem." (Vol. 22, T2870).

Subsequently, defense counsel points out to HOJAN the contradiction in his assertions that no mitigating evidence be presented, but approving the mitigation evidence collected and placing it under seal with the understanding that "a Judge somewhere will eventually review it." (Vol. 22, T2521). HOJAN then inquires whether he can stop the attorney from placing the sealed packet in the file. HOJAN is advised by counsel, "it's up to you." (**Id @ 2521**).

Contrary to counsel's advise to HOJAN, **Koon** is clear that penalty phase counsel will proffer to the Court what mitigating evidence exists. **Koon**

does not leave it to the discretion of the objecting party. **Koon @ 250**.

In **Muhammad v. State, 782 So.2d 343 (Fla 2001)**, this Court held that a Trial Judge has a duty to consider all mitigation evidence contained anywhere in the Record to the extent it is believable and uncontroverted. Citing **Farr v. State, 621 So.2d 1368, 1369 (Fla 1993)**, this requirement remains necessary even when Defendant wants the Court to consider no mitigation evidence. **Farr**, **id @ 1369**.

The Court erred in this case when it allowed HOJAN to prohibit his counsel from proffering to the Court the nature and extent of mitigating evidence. By doing so, the Court could not consider mitigation evidence in the Record because it agreed to exclude it. Additionally, the Court allowed HOJAN to exclude a sealed package containing mitigation evidence for review by the Supreme Court (Vol. 46, T3105). The Trial Court's actions gave rise to many irregularities in the sentencing process; to wit,

Jury

1) Trial Court has discretion to either require a jury recommendation, or may proceed to sentence the Defendant without such advisory jury recommendations. **State v. Carr, 336 So.2d 358, 359 (Fla 1996)**. Trial Court chose to utilize advisory jury.

2) The Trial Court told the jury on several occasions during voir dire that the Jury's recommendation would be given "great weight" (Vol. 8, T1022).

3. Prior to the penalty phase, the Court tells the Jury that their verdict will be given "due consideration". However, the Court then goes on to say "that it is only under rare circumstances that the Court would impose a sentence other than what you recommend." (Vol. 23, T2598). This implies that the Jury's recommendation will be given great weight.

4. The Court's sentencing order makes no mention what weight the Court gave the Jury's recommendation.

5. Jury heard no mitigation evidence.

Since the Court told the Jury that it will rarely sentence a Defendant other than what the Jury recommends, it is safe to assume that the Court followed the Jury recommendation giving great weight to their recommendation. It is reversible error to give great weight to the Jury's recommendation in light of Defendant's refusal to present mitigation evidence. **Muhammad**, **id @ 361-362**.

Court Counsel

1. The Court appointed counsel to represent the Court in determining mitigation evidence from whatever source (Vol. 36, T2-3)(R787).

2. Defense counsel filed a witness and supplemental witness list in anticipation of mitigation evidence (R570, 764, respectively). The witness lists provide eight (8) mitigation witnesses, but only two (2) were called by court counsel - the parents of Gerhard Hojan who had to be compelled to testify. Despite a Rule to Show Cause, the Court did not compel the Mother to actually testify as it could have with its contempt power.

3. The Court appointed a psychologist to review mitigation evidence, but did no research on Defendant, reviewed no records, interviewed no witnesses, and spent most of his time criticizing another psychologist tests which the Court did not permit into evidence (Vol. 43, et seq.).

4. Court counsel obtained no records, obtained no reports, did not review or have his expert review other psychologists who evaluated Defendant, and conducted no investigation into Defendant's background, except a feeble attempt to obtain childhood medical records.

5. If the Court considered a PSI, it is not discussed on the Record (Vol.

46, et seq.).

The attempt to obtain mitigation for the Court to consider resulted in a superficial effort by the Court and its attorney. Little, if anything, was done except for a cursory review of obvious mitigation or that provided by the State.

In **Muhammad**, the Court held that a Defendant who waives mitigation, cannot argue that the Court's representation failed to ascertain and/or find mitigation evidence. **id @ 363**.

In order to properly facilitate the Appellate Court's inherent obligation to review death penalty procedure, it becomes incumbent on the Trial Court to expend every effort to research and investigate the existence of mitigation despite Defendant's opposition. Failing to do so deprived this Court of the ability to fully review the proportionately of the death sentence and thereby, tainting the reliability of our capital sentencing scheme.

For these reasons stated herein, this Court should vacate Defendant's death sentence and remand for a new penalty phase.

CONCLUSION

Based upon the foregoing arguments in the issues presented, Appellant, GERHARD HOJAN, respectfully prays that this Honorable Court vacate the death penalty, reverse his conviction for first degree murder as set forth in Issues, I, II and III herein, and remand for a new trial on the merits.

Appellant further prays that this Honorable Court vacate his sentence of death for the reasons set out in Issues IV, V and VI and remand with instructions for a new penalty phase or alternatively, remand with instructions that Appellant be sentenced to life imprisonment.

CERTIFICATION OF FONT

I HEREBY CERTIFY that the Font Size used in this Initial Brief is Times New Roman, 14 Font.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished this _____day of February, 2008, to the Office of the Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and to the Assistant Attorney General Lisa Marie Lerner, Office of the Attorney General, 1515 North Flagler Drive - Ninth Floor, West Palm Beach, Florida 33401.

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