IN THE SUPREME COURT OF FLORIDA

PINKNEY CARTER,

Appellant,

v.

Case No. **SC06-156**
L.T. No. 04-730 CFA

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **DUVAL** COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This is a capital case arising from Duval County in which the Appellant, Pinkney "Chip" Carter, was convicted of three counts of first degree murder and sentenced to death for two of the homicides. He received a life sentence for the third death.

The record on appeal is about 4,000 pages long and is contained in 24 volumes. References to it will be in the form of "vol. no. R page no." For example, "16 R 1334" refers to page number 1334 that is found in volume 16.

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Duval County on January 20, 2004 charged the defendant, Pinkney "Chip" Carter with three counts of first-degree murder (1 R 12-13). Later, Carter filed the following motions or notices that have relevance to this appeal:

1. Motion to prohibit instruction on aggravating factors 5(h) and 5(i) (1 R 29). Granted as to 5(h). Denied as to 5(i). (1 R 31).

2. Motion for special verdict (1 R 32). Granted.[1]

3. Motion to prohibit argument and/or instruction concerning first-degree felony murder (1 R 44). Denied (1 R 53).

4. Motion to dismiss and to declare death not a possible penalty and to declare sections 782.04 and 921.141, Florida Statutes, unconstitutional for a variety of reasons (2 R 212-224). Denied (2 R 226).

5. Motion to declare Florida's capital sentencing procedure unconstitutional under Ring v. Arizona. (2 R 239). Denied (2 R 255).

6. Motion to prohibit the State of Florida from seeking the death penalty (2 R 323). Denied (2 R 327).

[1] Appellate counsel cannot find a record reference where the lower court explicitly granted the defendant's request. He assumes it did so because the jury returned specific verdicts for each victim as to whether the defendant committed the murder with premeditation and/or felony murder (4 R 548, 551, 554).

7. Notice of waiver of mitigating circumstance 921.141(6)(a) and motion in limine (3 R 423). Denied (3 R 429).

8. Defense requested jury instruction on circumstantial evidence (3 R 465). Denied. (3 R 466).

9. Defendant's requested jury instruction on voluntary intoxication. (3 R 467). Denied (3 R 469).

10. Defense requested jury instruction on heat of passion (3 R 470, 471) Denied (3 R 472).

11. Defendant's motion to declare Section 775.051, Florida Statutes, unconstitutional on its face and as applied in this case (3 R 473). Denied (3 R 492).

Carter proceeded to trial before Judge Lance Day, and the jury returned guilty verdicts, as charged, on all three counts (4 R 548-554). In each case, the jury specifically found the murders to have been committed with premeditation and during a burglary. It also found that Carter had used a firearm that caused the deaths in each count. The court denied the defendant's motion for new trial (4 R 557, 564).

Carter proceeded to the penalty phase part of the trial. Before that began, he filed a "Motion to prohibit instruction on the felony murder aggravating circumstance," (4 R 573), which the court denied. (4 R 575).

After hearing more evidence, argument, and instructions on the law, the jury returned the following recommendations:

1. As to Glenn Pafford: death by a vote of 9 to 3 (4 R 640).

2. As to Elizabeth Smith Reed: death by a vote of 8 to 4 (4R 642).

3. As to Courtney Nicole Smith: Life (4 R 645).

The court followed the recommendations, and it sentenced Carter to death for the murders of Pafford and Reed, and life without parole for the murder of Smith (4 R 720-725). In justifying the deaths sentences, it found as to both Pafford and Reed:

1. The defendant had been previously convicted of another capital felony, i.e. the murders of Reed and Smith, or Pafford and Smith.

2. The murder was committed during the course of a burglary

3. The murder was cold, calculated, and premeditated without any pretense of moral or legal justification.

(4 R 694-702, 702-706),

In mitigation, the court determined none of the statutory mitigators applied, but it found and uniformly gave "some weight" to each of the following nonstatutory mitigators:

> 1. The Defendant was raised in a broken home with a deprived childhood, but he was able to rise above it and become successful as a high school student and as an adult.

2. The Defendant was an above-average achiever in high school, junior college, and college.

3. The Defendant was elected president of a prestigious major club on campus at Oklahoma State University and worked with that club to help others.

4. The Defendant enlisted and had a distinguished military record in the United States Air Force for almost four years.

5. The Defendant has been a good employee for many years. He has a consistent work record from a very young age and also has been a supervisor over other people.

6. The Defendant has been a good son to both his father and mother in spite of the fact that his father abandoned him as a child. He had the strength to reconcile with his father when he became an adult.

7. The Defendant has been a good brother to Steve Carter, Mike Carter, and Cindy Starling, and he protected Ms. Starling during their early years.

8. The Defendant saved a child's life when he was working as a lifeguard in Georgia.

9. The Defendant has been a loyal friend to many people and made friends easily.

10. The Defendant has formed an especially close relationship with his nephew, Jacob.

11. The Defendant worked for a living in Kentucky while he was avoiding the police after committing this offense.

12. The Defendant has the potential to be a productive inmate. This is demonstrated by the way he acted towards other inmates in the Duval County Jail.

13. The Defendant has the support of his family and friends who continue to love him.

14. Society can be protected by life sentences without parole.

15. The Defendant offered to plead guilty as charged for three consecutive life sentences.

16. The Defendant resisted adopting the racist traits of his father and has had positive race relations throughout his life.

17. The Defendant's prior relationship with Elizabeth Reed and her children.

(4 R 707-716)

The court, in justifying its death sentences also said, "On balance, the aggravating circumstances in this case far outweigh the mitigating circumstances.... This Court further finds that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed." (4 R 717)

This appeal follows.

STATEMENT OF THE FACTS

I. The Carter-Reed relationship

Pinkney "Chip" Carter and Elizabeth "Liz" Reed Smith met in July 1998 at a Publix Supermarket in Jacksonville where they worked (16 R 1494). Reed was married with four children, but she had separated from her husband earlier that year (16 R 1494). Sometime later, Carter and Reed began dating (14 R 1194-96), and in the fall of that year they began living together along with her four children, ages 14, 12, 6, 4 (13 R 883-84, 16 R 1496). Carter was 44 or 45 years old (16 R 1490). They stayed at Reed's or another apartment for several months. In 1999 Reed, with a significant amount of financial help from Carter, bought a 3 bedroom 2 bath house on Barkwood Drive home in Jacksonville (13 R 976, 16 R 1497-98).

They lived there for more than two years (13 R 927, 15 R 1208, 17 R 1564-66), during which time her divorce became final (16 R 1497-98), and Carter continued to help with the house payments. He also painted the house and laid carpet and tile in it (16 R 1503).

Carter and Reed had a good relationship during this time (13 R 928). Not only did the defendant love Reed, he enjoyed her children, and wanted to build a family with them. The did things together (13 R 928), such as going on trips to Universal studios, Disney World, Busch Gardens, and Six Flags over Georgia (16 R 1499). He bonded with Richard, Reed's oldest son, by taking him hunting in Georgia (13 R 913-14) and going to his baseball games (13 R 955). They spent Christmas, Thanksgiving, and Easter together (13 R 929). In June 2000, Carter took Reed and her children on a cruise to the Bahamas with Carter's sister, Cynthia Starling (17 R 1641-42) with whom they quickly became friends, and Liz and her children became a part of Carter's extended family.

Of course, Chip and Liz had arguments from time to time. They would break up, but they always got back together (13 R 911, 14 R 1194-96).[2] During the separations they remained friends; indeed, they were more than best friends (15 R 1209-10), and the impression one gets is that they wanted to be a family. They

[2] Also, there is some evidence that despite Carter's efforts with Courtney, Reed's oldest daughter, he made little headway gaining her friendship (13 R 949).

never had a final separation; instead they remained close, and talked about getting back together. Liz never told Carter to stay away (15 R 1208-10, 17 R 1571), and during their times apart, he frequently called her on the telephone, and she likewise also called him (13 R 390, 16 R 1484-85). They saw each other often, though away from the children to keep them from becoming confused about the relationship (16 R 1500) Carter, according to his sister, was not depressed (15 R 1211), and he wanted to make the relationship work.

During this time Reed had serious financial problems. In the fall of 2001 she fell three months behind in the mortgage payments on the Barkwood Drive home. Fortunately, by January, 2002, she and Carter had reconciled, and he moved back into the house, and immediately paid the delinquent mortgage amounts as well as the current month's bill (16 R 1501, 1503). In total, he gave the bank $2800 (17 R 1633-34). Within a month he also had made Liz the sole beneficiary of his life insurance policy (16 R 1504, 17 R 1629-30). Finally, after they had gotten back together, he asked her to marry him, and he gave her a 1-carat diamond ring, which she accepted (16 R 1504). In April and May, they went on a cruise together, which he paid for, and which they enjoyed (16 R 1505).

Yet, things had changed. In May he moved out again, Liz called off the engagement, and returned his ring (16 R 1510-11). Carter moved in with his mother, and lived in an upstairs apartment (14 R 1171; 16 R 1510-11). But, as

before, they apparently could not live apart, and Carter, at least, considered this latest move only a trial separation. (16 R 1510-11). As he said, "I still loved her, … wanted to be with her, but you know, we had a difference of opinion." (16 R 1511)

Indeed, she again had not cleanly broken off with Carter, and she would come to his house on Sundays and Wednesdays-their days off and have sex with him (16 R 1512-13). "That was our normal thing whenever she came over." (16 R 1519)

Yet, things were different. Reed apparently was moving on to other men, and Carter learned by June or July 2002 that she was seeing Glenn Pafford, a "very nice gentleman" who managed the Publix where she worked (13 R 884, 14 R 1198, 16 R 1516, 17 R 1571). Indeed, by July 2002 she had been dating him for a couple of months (13 R 884). Jealous, Carter watched the Barkwood Drive house and saw Pafford's truck parked there (16 R 1515). About this time, Reed's next door neighbor found Carter in his yard (14 R 1137). When confronted, he had no weapon (14 R 1146), and he said he was only cutting through the neighbor's yard. He then went to his truck and drove away (14 R 1144).146). A few days later, someone saw Carter walking around neighborhood (14 R 1153), get into his truck, and drive away (14 R 1156).

Notwithstanding Reed also seeing Pafford, she visited with Carter on Sunday July 20, and they had sex as usual. She was happy and in a good mood (14 R 1185). Before leaving, she agreed to meet him at the Malabar, a bar or restaurant, on Tuesday July 22 (16 R 1521). She also gave him some prescription strength antidepressant pills (16 R 1520-21). [3]

On Tuesday, she never showed up for the date (16 R 1522). Suspicious and jealous (17 R 1522-25, 1583), Carter drove by the house and saw not only her car, but Pafford's truck. He left and went home (16 R 1522).

Depressed, hurt, and confused, Carter did not know what was going on. He took the pills Reed had given him and drank 4-5 glasses of whiskey (16 R 1523-25). He had been up since the previous night, well over 30 hours but could not get to sleep (16 R 1523-24, 17 R 1622). He began having unusual thoughts (16 R 1523-25), and he asked himself "Why did she make a date and not show up and why was she seeing Glen Pafford and still coming over and having intimate relations with me, and I just wanted to know why?" (16 R 1523-25)

II. The Murders

About 11:30 p.m. Carter called Reed. Her 14 year old son, Richard, answered the phone and told him his mother was not there (13 R 887, 920-21; 14 R

[3] Reed had prescriptions for Prozac and Fluoxitine-both antidepressants (22 R 2581).

1122) . Having just driven by, Carter knew that was a lie, and she was not being honest with him (17 R 1584, 1600).[4]

Jealous and wanting answers, Carter got back into his truck and drove to Reed's house (17 R 1583). Unfortunately, as he got out of the truck at her house, he took with him a .22 caliber rifle he kept in the back seat of his truck.[5] He did so because "I didn't want her to tell me, no, she's not going to talk to me. I wanted her to talk to me." (16 R 1526) He had, as he would later testify, no intent to shoot anyone (17 R 1588-89), but wanted to use the gun as a way to get answers, "Only if I had to." (17 R 1602)

As he approached the home, Pafford and Reed came outside, and it looked like he was about to leave.

> Well, as I was approaching the door, it was real dark, and the door came open, and Mr. Pafford walked out, and Liz Reed was standing in the door at that time. . . .I heard Liz Reed tell Mr. Pafford, "I hope you get to feeling better tomorrow." … And then I asked Liz Reed, I said, "Liz, why are you still coming to see me if you're seeing Mr. Pafford too?" And then Mr. Pafford said, "Are you still seeing him?" And Liz Reed said, "No," and she did like I was crazy, a motion like I was crazy. And then Mr. Pafford said, "Do you want me to stay?" . . . And Liz Reed said, "No, I just want both of you to leave." . . .I told her I'm not leaving until I get some answers. She already had opened it, but

[4] When Carter called Reed, she told her son that she did not want to talk to him (13 R 888).

[5] Carter had bought the rifle in December 1977 while stationed with the Air Force in Oklahoma. It was a loaded16 shot semi automatic rifle (15 R 1315, 16 R 1350, 1352) that already had one round in the chamber (17 R 1561-62).

she opened it more for me to come in, and I'm not sure if she opened it for Mr. Pafford too, but I know he came in.

(17 R 1532-33)

As quoted, it was "real dark," and Carter was unsure sure if porch light was on (14 R1025). Because of that neither Pafford nor Reed saw the rifle, which the defendant was holding by his side to hide as much as possible (17 R 1593). Pafford came in, laid his shoes on a couch but kept his car keys in his hand (13 R 987; 15 R 1213; 17 R 1532-33, 1593).

Once inside, Reed saw the gun and grabbed it with both hands (17 R 1618) and tried to pull it from Carter. They struggled (17 R 1534) as Courtney, the 16-year-old daughter, came into the living room. She quickly retreated down the hallway to her room (17 R 1534). Richard, who was in his room, heard a single shot then a female saying, "Call 911. Oh my God, Call 911" (13 R 890, 15 R 1233). He thought it sounded like his sister (13 R 890, 15 R 1243), but it could have been his mother who called for help, and he later admitted he was confused who it was (15 R 1229, 1236, 1242-43). Richard had heard no arguing (13 R 923) or doors slamming (13 R 924).

Courtney had been hit in the head with a single shot (14 R 1107-1108). She was not dead, and her body was in the hallway leading to the living room (13 R 893).

Before Richard left his room, Liz had run to Courtney, and in a moment, Carter shot her twice in the head (17 R 1534-35). He did not know why he did that, and it had happened so quickly she had not had time to put up her hands to defend herself. (14 R 1103-1104, 17 R 1535, 1755-57)

Pafford, who stood by the front door with his keys in hand the entire time, was shot three times at close range (17 R 1536, 1578, 1558, 1577).[6] At trial, Carter said he did not why he shot Pafford (17 R 1572). He was simply confused and having thoughts he had not had before. Just in a matter of seconds everything happened.

Carter left the house and returned to where he was living. Richard called 911 (13 R 897). A rescue unit responded and took Courtney's body to a hospital where she died two days later. (13 R 965; 14 R 1107).[7] Reed and Pafford died instantly.

When Carter got home, he wrote two suicide notes (14 R 1177, 1180, 15 R 1228), intending to kill himself (17 R 1539-40). But, lacking nerve, he fled to the Mexican border in Texas. On the way, he stopped in Valdosta, Lake City, and Tallahassee to sleep and get money and gas (15 R 1256-58, 17 R 1539-40). He

[6] He also had no defensive wounds (14 R 1096).
[7] She had no defensive wounds (14 R 1111).

also stole a license plate from a friend's car that had been rarely driven in the last several years (15 R 1265, 1267).

By August 5th, the defendant was at the Rio Grande River in Texas (15 R 1273-75, 17 R 1541-42). He left his truck on the American side, threw the murder weapon in the river, and tried to cross into Mexico, but the Mexican military stopped and arrested him (15 R 1304, 1306). He was released some days later, and eventually he wandered into the Central American countries of Belize, Guatemala, and Honduras (17 R 1541-42). He tried to survive there, but could not, so he returned to the United States (17 R 1623). He worked in Illinois, and in Kentucky he had a job as a roofer under an assumed name. (17 R 1542). He let his hair grow out, but did nothing else to disguise himself (17 R 1624-25). Eventually, he was arrested (16 R 1402, 1407), and at that time he had no guns (16 R 1407, 1410).

III. Who is Chip Carter?

Pinkney "Chip" Carter was 47 years old in 2002. Born in Georgia in 1954, he was the second of four children of Pinkney Winton "P.W." Carter and Lena Geneva Carter. She was 14 or 15 when they married(20 R 2203-2204), but marriage never sat particularly well with P.W. He acted as if single and was, for lack of a better word, a womanizer (20 R 2203-04), and he frequently left his wife and children for long periods. Although the father of three boys and a girl, he

provided scant, sporadic support, either financially or emotionally (20 R 2203-2205). When home, which was mercifully rare, he was very strict and quick tempered (20 R 2205). He terrorized his children (20 R 2223-24) and beat his wife (20 R 2205).[8]

Lena, though seen by her children as a good mother (20 R 2206), was very subservient to and scared of P.W. In time, however, they divorced, and the mother and children's lives, while never very happy became even more bleak. What little money he spent on his family while married stopped after the divorce (20 R 2220), and Chip Carter's brothers and sisters were reduced to working in the school cafeterias for free lunches (20 R 2233), scrounging underneath car seats for lost change (20 R 2221), and living in a house where the utilities were frequently turned off. (20 R 2221). As Cynthia Starling, Carter's sister explained, "We were just trying to survive . . .Our frame of reference was just trying to survive." (20 R 2263). They were very, very poor (21 R 2377).

Out of this extreme poverty, however, the children, less the father, remained close, not only to each other, but to their mother as well, even when Lena's mental health broke and she had to be hospitalized (22 R 2212). Indeed, at the time of the murders, Carter lived with her and his brother (16 R 1510-11)

[8] One time, Carter had broken his arm. When P.W. learned of this, "He just picked him [Carter] up by his ears and slung him on the bed and that was it for the night. . . .The following morning he had to have medical attention." (20 R 2223)

P.W. eventually remarried, and that is notable only because he destroyed his new wife's family in much the same way as he had done his and Lena's. Laura Lee, the new wife, apparently had money, and more than that, she welcomed Chip and his brothers and sister as part of her family (20 R 2235). But that was not enough. P.W. continued his mean, violent ways, beating Laura and her children (21 R 2443, 2460, 2463). Like Chip and his brothers and sister, Lee's children were always afraid (21 R 2445, 2461) and lived in a day to day terror of the man (21 R 2447).

Single, and with four children to raise, Lena mentally collapsed, and eventually she became so ill that she tried to commit suicide and at times "couldn't hardly think." (20 R 2240; 21R 2373, 2293). Eventually she was committed to Georgia's hospital for the mentally ill (20 R 2239-40), and in time she recovered enough to leave and get a job at a garment factory where she worked for 20 years as an inspector (20 R 2253; 21 R 2386, 2387).

Yet, if she was well enough to work, her judgment remained impaired because when she remarried, her new husband, besides being an alcoholic (20 R 2242) was, like her first husband, abusive, mean, and a racist (20 R 2244).

Despite the terror of these two fathers, Carter turned out well. He was "just a good kid," who seemed to have been well-raised (21 R 2423, 2437). He was a good friend that people liked being around (22 R 2512). He was never an "A"

student (21 R 2417, 22 R 2577-78), and he graduated from high school with a C+ average (22 R 2578).

If he was average academically, he was similarly a football player with no apparent athletic prowess (21 R 2422). Yet, he was popular and very active in a myriad of high school clubs and activities, ranging from football and baseball to Science and 4H clubs (21 R 2405). More than 30 years after his graduation, teachers remembered Carter as a popular student who never presented any problems, and he was always respectful to them and other parents (21 R 2314, 2389, 2399, 2414, 2429, 2435).

Following high school, Carter enlisted in the Air Force. He spent almost four years in the military, and he left with an honorable discharge so he could go to college (16 R 1494, 21 R 2318). All his evaluations ranked him in the top five percent of other airmen (21 R 23187), noting, among other things, that his behavior on and off duty reflected a high degree of integrity (21 R 2328), and he was very dependable and reliable (21 R 2329). The reports recommended his promotion, and he left the Air Force as a sergeant (21 R 2328, 2330) .

Carter attended two Oklahoma colleges from 1978-82, (16 R 1494), doing well but never graduating (22 R 2504, 2578-79, 22 R 2579). As with his high school teachers, some of the college instructors remembered him, not for any academic genius, but for his ability to make people feel good, his leadership of

major clubs, integrity, and leadership, and his dependability (21 R 2478; 22 R 2488-89, 22 R 2501).

While in college,[9] he worked in grocery stores, and he regularly put in forty plus hour work weeks (16 R 1494; 22 R 2507). In time, he moved into management positions, and his evaluations noted that he was a very good employee, a "ball of fire," very motivated, positive, honest, and trustworthy (22 R 2509). Indeed, in a store that could have as many as 100 employees working at any time, he ran the entire operation without supervision (22 R 2511). Obviously, he liked his job very much (22 R 2510).

From 1983-1992 he worked at Albertson's and Safeway grocery stores, and the same pattern emerged (22 R 2496, 2549). He put in long hours and soon moved into management (22 R 2496, 2550), being trusted with the unsupervised care of the store and money (22 R 2496-97)

Between stints as a grocer in the early 90s, he worked for a canteen that provided food service for 2-3,000 people. After a while he ran the entire business,

[9] Carter has worked since he was 15 (16 R 1494), and he has social security wages from 1978-2002 (22 R 2572).

which included collecting money. At the same time, he also had a part-time job for a tree service (22 R 2523-24). As usual, he was an excellent employee.[10]

In June 1998, Publix grocery stores hired him, and he worked there until July 2002 (16 R 1494; 22 R 2557).[11] His evaluations began echoing what his earlier employers had said. He had outstanding skills of ordering, merchandising and inventory control (22 R 2558). He led by example on a daily basis and was an extraordinarily hard worker who always did a good job, and did the seemingly impossible (22 R 2559, 2602). He never had any confrontations with customers (22 R 2589, 2597), and he always got along with employees (22 R 2599). Fellow employees and those whom he supervised said he was a good listener, very fair, and patient (22 R 2609-11). He was authorized to be in the money room.

After his arrest and while waiting to be tried, Carter comforted other, much younger inmates of the Duval County Jail. In particular, he made friends with a mentally retarded and incompetent inmate, making him laugh at times (22 R 2666). "I am slow. I can't learn like them. (22 R 2662-63) "It just made me feel better that he always tell me I'm going to go home. I was scared all the time (22 R 2665).

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[10] During this same time, he also helped build houses for Habitat for Humanity. (22 R 2525)

[11] At the time of the murders, Carter was a team leader for the store's night shift (16 R 1492), and supervised 7-8 people (22 R 2609).

Another inmate, 19, was in jail facing a charge of attempted murder. He felt lost, like giving up, and that his life was over. He wanted to kill himself, but Carter, talking to him through a vent, encouraged him to stay in school and "positive stuff, ... like ... the Bible, religious stuff," and not to give up (22 R 2674-77). That buoyed him.

Eighteen-year-old Jimmy Chemm was looking at 35 years in prison for committing a 1st degree murder when he was 16 years. He also talked to Carter while he awaited trial (23 R 2695). Despite this inmate's misery of being in jail and torments of conscience, Carter taught his fellow inmate "valuable lessons that you don't learn in school -- it's never too late as long as you have breath. It's never too late but tomorrow is never promised ... he really uplifts me."

And besides these three inmates he helped others (22 R 2696), and did so with more than words. Often he sent books, magazines, newspapers (22 R 2697), and Chemm, for one, considered that the defendant made him a better inmate (22 R 2698).

SUMMARY OF THE ARGUMENTS

ISSUE I. Evidence produced at trial showed that Carter was intoxicated when he killed Reed, Pafford, and Smith, yet the trial court, following the command of Section 775.051, Fla. Stat. (2000), refused to instruct the jury on voluntary intoxication as a defense to the specific intent crime of first-degree

murder. That statute denied him his Due Process right (under the Fourteenth Amendment and Article I, Section 9 of the Florida Constitution) to present a defense. It completely eliminated his right to present, and for the jury to consider, evidence that was undeniably reliable as to his mental state on the night of the murders. That was error because Florida has recognized voluntary intoxication as a defense to specific intent crimes from its earliest days as a State, so any diminution or elimination of it offends at least this State's constitutional guarantee of due process of law. The justification for this statute, deterrence to drunks, also pales in this case when compared to the reasons Carter wanted it admitted and argued-to avoid a death sentence.

ISSUE II. This Court has provided the analytical framework a trial court should use when deciding if the "cold, calculated, and premeditated" aggravator applies. The judge in this case ignored that guidance, and instead, its sentencing order merely listed the facts it found supported justified this aggravator. By only reciting those facts without any analysis, he failed to render the order unmistakably clear, as this Court has required of all orders sentencing a defendant to death.

Beyond that problem, the court's findings show that the murders of Reed and Pafford were neither cold, calculated nor premeditated, as this Court has defined those words.

ISSUE III. The court justified sentencing Carter to death because he had committed the murders during the course of a burglary. But, after legislature redefined that crime in 2000, it has such an expansive reach that using it as a justification for imposing death no longer "genuinely narrows" the class of capital defendants eligible for a death sentence.

ISSUE IV. In sentencing Carter to death for the murders of Liz Reed and Glenn Pafford, the court found that he had killed them while he was engaged in a burglary, and he had been previously convicted of another capital felony. As to both aggravators, it found not only that each one deserved great weight, "any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed." That was error because the same jury that recommended a death sentence for the Pafford and Reed killings considered the same aggravators as they applied to the death of Courtney Smith and recommended a life sentence. Obviously, by its life verdict, the jury did not give those two aggravators much weight, and certainly not enough to outweigh the mitigation, either singly or when combed. Thus, the trial court erred in giving them so much weight.

ISSUE V. The court's order sentencing Carter to death for the murders of Elizabeth Reed and Glenn Pafford and life for the murder of Courtney Smith is 25

pages long. It presents an admirable recitation of the facts supporting the aggravating and mitigating factors it found. It fails, however, in two critical respects. First, although it acknowledged that the jury recommended a life sentence for the murder of 16-year-old Courtney Smith, it never considered that verdict when it sentenced Carter to death for the murders of Liz Reed and Glenn Pafford. That is troubling because the trial court should have given the life recommendation great weight when it considered sentencing Carter to death for the Reed and Pafford homicides. Instead, it never mentioned that jury verdict as a mitigating factor. Moreover, when it said that any of the aggravators, which applied to Smith's killing as well as the other two, justified, by themselves, a death sentence, it simply failed to explain why that was true, particularly when those same aggravators applied to Smith's death.

Second, the court never considered, in total, the massive amount of mitigation the defendant had presented. That is, it did an admirable job cataloging the mitigation he had offered during the sentencing phase of his trial. It never, however, went beyond that and said, as a separate mitigating factor, what all this individual mitigation meant. In short, the court saw the trees, but missed the forest, it recognized the notes, but ignored the song.

ISSUE VI. After Carter killed the three victims, he fled to Mexico, was arrested, and eventually ended in a Mexican jail for illegally entering Mexico. In

order to get Carter into Florida's custody, the Fourth Judicial Circuit State Attorney wrote a letter to the Mexican Consulate in Orlando promising not to execute him if Mexico would return him to the United States for trial. Apparently, before they got the letter, Mexican officials released Carter, and months later he was arrested in Kentucky and returned to Jacksonville. Although the State never had to fulfill its promise not to execute Carter, the State should be estopped from seeking his death because of its earlier announced willingness to spare him a death sentence. Florida's death penalty statute and decisions from this Court have shown that the State has a strong aversion and prejudice to executing persons guilty of first-degree murders. This Court should continue this "anti-death" bias by declaring that once the State, for whatever reason, and under whatever conditions, has announced it is willing to forgo executing the defendant, it should be bound or estopped from later reneging on that promise.

ISSUE VII. This Court wrongly avoided the issues presented by Ring v. Arizona, 536 U.S. 584 (2002), in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Because Ring was an Aintervening development of the law@ this Court could determine its affects on Florida=s death penalty scheme without incurring the wrath of the United States Supreme Court, as this Court was leery of doing in those two state cases. When it conducts that

examination, this Court should conclude that Ring requires at least unanimous jury recommendations of death. This Court should also find that even though the defendant may have a single valid aggravator, Ring still has relevance to the constitutionality of his death sentence.

ISSUE VIII. Within the space of four pages of the court=s penalty phase instructions, the trial judge told the jury eleven times that its recommendation was just that, a recommendation. Doing so diminished the role of the jury in sentencing the defendant to death, and that was error.

ISSUE I

THE COURT ERRED IN DECLARING SECTION 775.051, FLA. STAT. (2002), CONSTITUTIONAL AND REFUSING TO LET CARTER ARGUE THAT HIS VOLUNTARY INTOXICATION PREVENTED HIM FROM FORMING THE NECESSARY INTENT TO COMMIT FIRST-DEGREE PREMEDITATED OR FELONY MURDER, A VIOLATION OF HIS RIGHT TO PRESENT EVIDENCE IN HIS BEHALF, A VIOLATION OF THE FOURTEENTH AMENTMEND TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION

This case is not a Perry Mason "whodunit." From the beginning Carter admitted he had killed Elizabeth Reed, Glenn Pafford, and Courtney Smith (9 R 4). He had only one defense to the three charges of first-degree murder. He was so intoxicated on the night he killed the three victims that he never formed the

premeditated intent to commit first-degree murder. Specifically, in the hours before the murders he had drunk 4-5 glasses of whiskey and swallowed several anti-depressant pills Liz Reed had given him (16 R 1520-21, 1523-25).[12]

Section 75.051, Fla. Stat. (2002), however, prevented him from arguing that traditional defense and having the jury instructed on it:

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

Facing the issue straight on, Carter asked the court to declare the statute unconstitutional (3 R 473-74), and he further asked it to instruct the jury during the guilt phase of his trial on voluntary intoxication and "heat of passion." (3 R 467, 470) The court denied the motion (3 R 492) and the requested jury instructions (3 R 469, 472). It erred in those rulings, and, because this issue involves only a matter of law, this Court should review it de novo.

[12] At trial, Carter said that he had also not gotten any sleep in over 30 hours (16 R 1523-24). As a result of that and the alcohol and drugs, he was having strange thoughts (16 R 1523-25).

The question presented asks whether the State can deliberately or purposely prevent a defendant charged with first-degree murder and facing execution the opportunity to argue that because of his voluntary intoxication he lacked the necessary mental state or mens rea to be guilty of first-degree murder.[13]

I. Montana v. Egelhoff

The leading case in this area is the United States Supreme Court opinion, Montana v. Egelhoff, 518 U.S. 37 (1996), a decision that so badly split the court that only a law school professor would find it illuminating. In that case, the State charged Egelhoff with "'purposely' or 'knowingly' causing the death of another human being." In Florida, the State would have charged him with first-degree premeditated murder. He wanted to argue that he was drunk at the time he had committed the homicides, but the Montana legislature had passed a law similar to Section 775.051 that precluded him from raising a voluntary intoxication defense:

[13] In this case, the State argued, and the jury found, that Carter was guilty of first-degree premeditated murder and felony murder, the underlying murder being burglary (4 R 548, 551, 554). The underlying felony for the burglary was "assault, aggravated assault, battery, aggravated battery, or murder." (19 R 1924). The assaults and batteries, however, merged with the murder because the single acts that were the assaults and batteries also were the acts that resulted in the murders. As such, they merged with the more serious allegation. Brooks v. State, 918 So.2d 181 (Fla. 2005). Thus, the underlying felony for the burglary was murder, and the underlying felony for the felony murder allegation was burglary. These maddeningly circular allegations emphasizes that premeditation formed the only basis for finding Carter guilty of the three murders.

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

Section 45-2-203, Montana Code Annotated. (Emphasis supplied.)

The Montana Supreme Court reversed Egelhoff's subsequent murder convictions relying, in part, on Chambers v. Mississippi, 410 U.S. 284, 294 (1973), which stands for the proposition that a defendant has a due process right "to a fair opportunity to defend against the State's accusations."

When the nation's high court reviewed the case, they reversed the Montana Supreme Court's decision, but no majority united on a rationale for doing so. Instead the plurality had to rely on Justice Ginsberg's concurring opinion for the necessary fifth vote, but she agreed only with their result and not its reasoning.

A. The plurality's approach. Justice Scalia, writing for the plurality, made two points. First, states have the almost exclusive right to define crimes, and as such those definitions remain largely immune from federal review. Egelhoff at 44. Thus, Fourteenth Amendment Due Process challenges succeed if the questioned law "offends some principal of justice so rooted in the traditions our

people as to be ranked as fundamental." Egelhoff at p 43. (Quoting, Patterson v. New York, 432 U.S. 197, 201-202. (1977)).

Second, whether Montana's voluntary intoxication law violated our national sense of fairness required an historical examination of national attitudes towards a person's drunkenness as a defense to criminal activity. From the perspective of the nation's Supreme Court, that tradition became the "primary guide" in determining whether the principle in question was fundamental. Id.

Justice Scalia had a problem, though, because a large majority of states for well over 100 years had recognized voluntary intoxication as at least a partial defense to certain criminal acts. However, when he pushed, the mists of history parted to reveal that the common law history from the mid 16th to the early 19th centuries, prohibited a defendant from claiming his drunkenness as negating his intention to commit specific intent crime. After that, as mentioned, about 80% of the states rejected that harsh evidentiary rule and allowed the defendant to present such evidence and argue it as reducing his culpability for certain crimes that required a high level of deliberation to commit. Moreover, this "new common law," Scalia argued, has eroded because the older rule has "considerable justification," primarily that it deters drunken, irresponsible behavior, and holds those who drink responsible for what they do. Id at 49. In short,

> Although the rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to mens rea has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as a fundamental, especially since it displaces a lengthy common-law tradition which remains supported by valid justifications.

Id. at 52.[14]

Justice Scalia's history of the voluntary intoxication defense is misleading, at least insofar as it relates to murders because it is incomplete. In her dissent in Egelhoff, Justice O'Connor pointed out that in the 19th century legislatures began to refine the definition of murder. They did so because juries regularly, or at least with some disturbing frequency, voted to acquit persons who had obviously committed a homicide. Woodson v. North Carolina, 428 U.S. 280, 289-93 (1976). Although the defendant may have deliberately killed someone, what he or she had done was not a death worthy offense, so juries acquitted him or her of common law murder rather than finding them guilty and thus guaranteeing their execution. Hence, to ensure that killers were convicted of some level of homicide and punished, states graded homicides, or, as in Florida, they divided murder into degrees. Id. at 290-91. The most serious murders required the highest level of

[14] Dividing common law murder into degrees also is of "recent vintage," and States made these fine distinctions because juries consistently refused to find defendants guilty of common law murder, knowing that he or she faced an automatic death sentence. Woodson v. North Carolina, 428 U.S. 280, 289-94 (19776)

intention to kill. Hence, in this State, defendants who commit first-degree murder must have more than simply an intent to kill; they must have a fully formed intent to do so that existed for some appreciable time before the homicide. Fla. Std Instr. (Crim.) 6.2. That is, he or she must have had a premeditated intent to kill. Lesser degrees of murder required a lesser or general intent to kill.

Thus, voluntary intoxication defense arose about the same time as legislatures created distinctions about murder. If the most serious murders required the highest level of contemplation, and experience showed that those who were drunk lack that elevated mental capacity, simple fairness required them to be able to present evidence that because of their intoxication, they lacked the premeditated intent to kill. Persons who were so intoxicated they could not think straight could not fully form any murderous intentions. But drunkenness was never a complete defense to murder. Instead, when proven it defeats only a claim that the defendant could form the specific, heightened intent to kill. As to general intent crimes, such as second degree murder, it is no defense. Thus, the "old common law" rule that Justice Scalia recognized is alive and well generally, and in Florida, in particular. Only when the State wants killers who commit premeditated murders put to death, a very narrow class of persons, Zant v. Stephens, 456 U.S. 410 (1982), does that the law recognizes the equally narrow voluntary intoxication defense. Indeed, it does so precisely to keep the class of persons eligible for a

death sentence small, Lowenfield v. Phelps, 484 U.S. 231, 246 (1988)(Narrowing of class of persons eligible for a death sentence can be done at the guilt determination phase of the trial.), and without a voluntary intoxication defense, jurors may very well continue the historical practice of acquitting defendants guilty of first-degree murder rather than subjecting him or her to a death sentence. Beck v. Alabama, 447 U.S. 625 (1980).

Moreover, if we do more than Justice Scalia did, and examine the competing interests in a capital case, we must look at more than the reasons for excluding evidence of voluntary intoxication. That is, we must also consider why a defendant might want evidence of his intoxication admitted, and in this case, Carter has the most desperate of all: He wants to avoid being executed. Thus, if the State wants to convict drunks without allowing them to present and argue their drunkenness as a deterrence to other drunks, this reason must be balanced against the equally valid justification for admitting this evidence. The defendant wants to avoid a death sentence. In view of the extraordinary demands this Court and the United States Supreme Court have placed on States over the past forty years to ensure only the most deserving are sentenced to death, the speculative deterrence of excluding the only defense a person might have pales to the specific, cold reality of his or her execution.

B. The Egelhoff dissenter's approach. Justice O'Connor, writing for the four person dissent in Egelhoff emphasized what the plurality had dismissed. "[T]he State may not first determine the elements of the crime it wishes to punish, and then thwart the accused's defense by categorically disallowing the very evidence that would prove him innocent." Egelhoff at 68. For her, the Fourteenth Amendment's due process promise meant that defendant should have a "fair opportunity to present a defense" and the State has no right to declare as inadmissible the very evidence that would weaken or defeat its case. That is, if the purpose of the law excluding undeniably relevant evidence of, say, a defendant's mental state, prevents the defendant from presenting a defense or it makes the State's task of convicting easier, such law violates the defendant's due process right to be heard and to present a defense. On the other hand, laws barring the jury from hearing or considering relevant evidence pass constitutional due process scrutiny if their effect (and not their purpose) excludes that proof. They are so because their purposes are other than to defeat the defendant's efforts to defend himself. For example, privileges, such as the husband/wife privilege, Section 90.504, Fla. Stat. (2002), illustrate this point. Its purpose is to protect marital harmony although its effect may be to deny admitting relevant evidence

favorable to the defendant in a specific case. See, Ehrhardt, Florida Evidence, section 504.1 (2006 edition).[15]

In a first-degree murder prosecution the legislature has required the prosecution to prove a special, heightened form of intent-premeditation- in order to convict. Evidence of the defendant's drunkenness refutes that element. Laws such as that in Egelhoff and section 775.051 have the specific purpose of precluding him from presenting evidence of and arguing that his drunkenness prevented him from forming the necessary premeditation. They have the sole purpose of raising a universal exclusion of any evidence of any defendant's intoxication. They prevent him from presenting evidence that is critical and undeniably relevant to his mental condition, which is often, as in this case, the only contested issue the jury should have had to decide.

Moreover, by excluding any defense of intoxication, the trial, which is, after all, a search for the truth, deliberately and intentionally avoids the very evidence that would illuminate the defendant's mental state. Indeed, criminal trials in this State withstand public censure and are legitimate only because they have "survived the crucible of meaningful adversarial testing." Egelhoff at 66, quoting

[15] On the other hand, it may also help the defendant in a case where it works to prevent, say, a wife from giving incriminating testimony about her husband's criminal activities. The privilege's purpose, therefore, is neutral although its effect, in a specific case, may work to the defendant's advantage or disadvantage. Such cannot be said of the voluntary intoxication defense. It always hurts him.

Crane v. Kentucky, 476 U.S. 683, 690-91 (1986). Without a full test of the State's case, without the defendant being able to give his "best shot" for acquittal, the legitimacy of any subsequent conviction is suspect. Id.

Hence, under the Egelhoff's dissenters equally valid argument as the plurality's, the court should have admitted Carter's evidence of intoxication.

II. The State Constitutional Due Process Clause.

Justice Scalia's opinion has a limited reach because he acknowledged that he wrote as a member of the United States Supreme Court. He recognized that federal courts have a very limited right to intrude into the administration of a state's criminal justice system. Hence, he, and the dissent for that matter, examined the history of voluntary intoxication as a defense from the national vantage point of the Fourteenth Amendment's Due Process clause. Carter, on the other hand, has challenged the constitutionality of section 775.051 not only from that perspective, but also on a state constitutional level by invoking the State's Due Process clause found in Article I, Section 9 of the state constitution. In his motion to declare Section 775.051 unconstitutional, (3 R 473-76) he cited Barrett v. State, 862 So.2d 44 (Fla. 2nd DCA 2003), and argued it was wrongly decided (18 R 1683-84). In that case, the Second District rejected Barrett's claim that Section 775.051 was an

evidentiary rule, and not a redefinition of mens rea element of criminal offenses, a position only Justice Ginsberg championed in her concurring opinion in Egelhoff.[16]

> In summary, we reject Barrett's due process argument and affirm his conviction and sentence for the following reasons: (1) the due process language contained in the United States and Florida Constitutions is comparable, and there is no basis to conclude that the Florida Constitution provides greater protections to Barrett than does the United States Constitution in relation to the elimination of voluntary intoxication as a defense to a criminal offense; and (2) the due process analysis in *Egelhoff* applies equally under the Florida and United States Constitutions.

Id. at 48.

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[16] Justice Ginsberg provided the crucial fifth vote to reverse the Montana Supreme Court's decision, but she took a distinctly different approach from that of the plurality. For her, "The Court divides in this case on a question of characterization." That is, if the Montana law is an evidentiary rule to keep out exculpatory evidence then it offends due process. On the other hand, if it redefines the mental-state element of the offense it does not because states and their legislatures have the almost exclusive right to define crimes and their elements She concluded that the Montana statute merely redefined out of existence voluntary intoxication as a defense "Defining Mens rea to eliminate the exculpatory value of voluntary intoxication does not offend a 'fundamental principle of justice,' given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today." Id. at 58-59. In Barrett, cited above, the Second District said that Section 775.051, using Justice Ginsberg's analysis in Egelhoff, "effects substantive change in the definition of mens rea, and it is not simply an evidentiary rule." Id. at 48. First, only Justice Ginsberg liked that analysis. No other member of the nation's high court followed her, so the Second District stands on shaky ground to have rejected Barrett's argument relying on the opinion of a single justice, particularly when the other 8 were even divided into other camps that had no tents even vaguely similar to hers. Second, as the Barrett court recognized, Section 775.051 "also addresses procedural matters by excluding, at trial, evidence of voluntary intoxication." Barrett, at 48. Yet, for no other reason than fiat, it declares that law substantive.

The Second District is wrong . Although Article I, Section 9[17] is virtually identical to the Fourteenth Amendment's Due Process clause, id, at 47, the court erred when it decided that "there is no basis to conclude that the Florida Constitution provides greater protections to Barrett than does the United States Constitution." Id. at 48. In Traylor v. State, 596 So.2d 957 (Fla. 1992), this Court explicitly held that under Article I section 9 had a broader scope that its Fourteenth Amendment cousin. "In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling." Traylor, at 962. Traylor, thus, clearly refuted the Second District's holding that Article I, Section 9's Due Process clause had no further reach than the guarantee found in the Fourteenth Amendment's Due Process clause.

This means, therefore, that Egelhoff's Fourteenth Amendment analysis, while interesting in its diversity, remains only that. Interesting. This Court has no obligation to follow it, and should not.

If we, however, accept Justice Scalia's and O'Connor's observation that a due process analysis in determining fundamental rights is "historical practice," Egelhoff, at p. 43, then in interpreting the State's due process provisions found in

[17] "No person shall be deprived of life, liberty, or property without due process of law. . ."

Article I, Section 9, we should look to the history of the voluntary intoxication defense in this State.

Contrary to the practices in England, and the United States, as a whole until the early 19th century, Florida has always recognized that defense, but only for specific intent crimes. In Garner v. Florida, 28 Fla. 113, 9 So. 835 (Fla. 1891), the earliest decision from this Court on the voluntary intoxication defense, it recognized it, but only for first-degree murder and other specific intent crimes. Linehan v. State, 442 So.2d 244, 253 f.n. 4 (Fla. 2nd DCA 1983). State law has never allowed it as a defense for the lesser, general intent crime of second degree murder.

> Where a premeditated design to effect the death of the person killed, or of some human being, is essential to the offense murder in the first-degree, which it is in this state, drunkenness or intoxication, though voluntary, is relative evidence to be considered by the jury as affecting the capacity of the accused, at the time of the killing, to form a premeditated design to effect the death of the person killed or any human being.

Garner at 155-156.

Thus, for more than a hundred years, and until the legislature enacted Section 75.051, that was the law of this State .[18]

[18] The only exception arose in 1979 when this Court declared that when manslaughter while the defendant was drunk and driving was a strict liability offense. That is, the defendant's intoxication was no defense, even if there was no proximate cause relationship between the intoxication and the resulting death.

This Court has also grappled with the voluntary intoxication defense when it tried to sort out the distinction between specific and general intent crimes. See, e.g., Linehan v. State, 476 So.2d 1262 (Fla. 1985). Crimes have been so differentiated solely because those requiring a specific intent, such as murder and burglary, permit a defense of voluntary intoxication, whereas defendants charged with a general intent crime cannot argue they were too intoxicated to form the requisite intent. Interestingly, Justice Harding suggested that "if this Court were to ever consider eliminating the distinction between specific and general intent crimes, it should also consider abolishing the defense of voluntary intoxication except as it applies to first-degree premeditated murder." Frey v. State, 708 So.2d 918, 920 (Fla. 1988)(Harding, concurring. Emphasis supplied.). Consequently, even if Section 775.051 abolished the defense of intoxication, this Court should hold that it remains a viable defense for that special form of heightened, deliberate intent. Premeditation. Such a limitation follows Justice Scalia's analysis of the "new common law" by holding the defense of no relevance to common law murders like second degree murder, but applicable to the special class of homicides for which a defendant could be sentenced to death-first-degree murder.

Baker v. State, 377 So. 2d (Fla. 1979). That changed in 1986 when the legislature amended section 316.913 to require such a connection. Magaw v. State, 537 So. 2d 564 (Fla. 1989)

Moreover, Florida's common law history regarding voluntary intoxication shows that that defense has been accepted and applied at least to first-degree murders. It is a "fundamental principle of justice" in this State, and section 775.051 offends that long standing law. Egelhoff, at p. 2025. Thus, under either a state or federal Due Process analysis, voluntary intoxication is a legitimate defense and should remain so.

This Court should, therefore, declare Section 775.051, Fla. Stat. (2000), unconstitutional to the extent that it prevents a defendant charged with first-degree murder and facing a sentence of death from presenting evidence of and arguing that his intoxication prevented him from forming the premeditated intent to murder.

ISSUE II

THE COURT ERRED IN FINDING CARTER COMMITTED THE MURDERS OF ELIZABETH REED AND GLENN PAFFORD IN A COLD, CALCULATED, AND PREMEDITATED MANNER BECAUSE 1. ITS ORDER LACKS THE UNMISTABLE CLARITY THIS COURT HAS REQUIRED, AND 2. THE EVIDENCE FAILS TO SUPPORT THIS AGGRAVATOR, A VIOLATION OF CARTER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Justifying death sentences for the murders of Glenn Pafford and Elizabeth Reed, the trial court found them to be cold, calculated, and premeditated without any pretense of moral or legal justification (4 R 699-701, 703-705). It made

separate findings for each victim, but they have the same recitation of the facts leading up to the murder. They differ only in the description of the shots that killed each victim.

Two problems arise from the trial court's finding the CCP aggravator applied to these murders. First, its order lacks the "unmistakable clarity" this Court has required death sentencing orders have. Mann v. State, 420 So.2d 578 (Fla. 1982). Second, under the facts of this case, neither murder was cold, calculated, and premeditated. This Court should review these issues under an abuse of discretion standard of review.

A. The requirement of unmistakable clarity in sentencing orders.

While an "abuse of discretion" standard of review controls the resolution of this issue the discretion given sentencing courts in capital cases is much narrower than that normally granted judges in non-capital sentencing. First, Section 921.141(3), Florida Statutes (2002), requires capital sentencing judges to provide written findings justifying a death sentence :

> 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 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.

(Emphasis supplied.)

Second, because this Court can affirm a man's death with only a few keystrokes it applies a close, careful scrutiny of orders sentencing him to die making sure they fully justify the State killing one of its citizens. Indeed, because of this unique duty, the United States Supreme Court has required a heightened level of due process scrutiny in capital sentencings. Barclay v. Florida, 463 U.S. 939, 950-51 (1983).

Third, if this Court is to do a careful review of the sentencing order, the trial court must clearly present its findings that justify death. There is nothing much to review, in short, if the trial court simply Xeroxes Section 921.141, Fla. Stat. (2002), and then puts a check by the aggravating and mitigating factors that apply in a particular case. Hence, sentencing orders must show with "unmistakable clarity" how the lower court exercised its discretion, not simply to make this Court's job easier, but to, paradoxically, show how it used so little discretion. State v. Dixon, 283 So.2d 1,10 (Fla. 1973)("Thus, the discretion charged in Furman v. Georgia, Supra, can be controlled and channeled until the sentencing

process becomes a matter of reasoned judgment rather than an exercise in discretion at all.") In short, the sentencing court's order should so clearly justify a death sentence that no one of sound judgment would disagree.

This Court has aided a trial judge faced with the daunting task of exercising its limited discretion when it seeks to justify the taking of a human life particularly as it applies the cold, calculated, and premeditated aggravating factor. Specifically, in Jackson v. State, 645 So.2d 84, 89 (Fla. 1994), and most recently in Lynch v. State, 841 So.2d 362, 372 (Fla. 2003), this Court provided the analytical approach for the sentencing judge to use:

> Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), ...that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), ... that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So.2d 85, 89 (Fla. 1994); accord, Lynch v. State, 841 So.2d 362 (Fla. 2003)(Citations omitted, emphasis in opinion.)

In this case, the trial court ignored that guide.[19] Instead, it simply gave a selective version of the facts of the murders without any analysis of how they

[19] The State's sentencing memorandum cited Jackson, and it specifically mentioned the "four factors which the State had to establish to prove this aggravator." (4 R 671)

somehow showed the murders to be cold, calculated, and premeditated. Hence, it left that task for appellate counsel to do, but that approach requires that counsel find facts and make the argument he thinks supports the CCP aggravator and then argue why they do not do so. Of course, the State may have a different analysis, which, of course, Carter can refute in his Reply Brief. This Court, however, may disagree with Carter's and the State's analysis, relying instead on facts and an analysis far different from that which Carter or the State made, and one for which he has had no opportunity to refute. In an area of the law which pays particular attention to the heightened niceties of due process such vagueness, brevity, and omissions in a sentencing order, may deny a capital defendant due process of law. C.f., Childers v. State, 933 So. 2d 628 (Fla. 1st DCA 2006)(Kahn, dissenting.)(Criticizing the "Tipsy Coachman Rule" that a trial court's order may be affirmed if it was right for any reason.)

In this case, the trial judge ignored the analytical approach presented by this Court in Jackson. Had it used it, Carter would not have to cull through the lower court's findings on this aggravator, and speculate about what ones fit each category before he could attack his findings. Instead, had it followed Jackson the lower court would have had to examine each factor, the coldness, the calculation, and the premeditation to determine if the facts supported a finding of each of those aspects of this aggravator. Doing that would have produced a more detailed,

reviewable order than the bland, nonspecific "Statement of the Facts" analysis tact taken here. Moreover, and much more significant, had it done the Jackson analysis, it would have concluded that the murders of Pafford and Reed were neither cold nor calculated, nor premeditated.

Thus, the trial court's order, before any Jackson type analysis is attempted, fails to meet the strict due process requirements the legislature, this court, and the United States Supreme Court have imposed on sentencers in capital cases.

B. FACTS FROM THE COURT'S SENTENCING ORDER

1. Facts common to both murders

    a. 10 -14 days before the murder, Carter is found in the next door neighbor's yard and flees when the neighbor begins to use a telephone.
    b. Carter admitted he was in the man's yard because he was jealous of Pafford seeing Reed and wanted to confirm if that was true and Pafford was at her house.
    c. Four and Five days before the murders, another neighbor saw Carter's truck parked on his street. He also saw a man who looked like Carter look in his direction and then at a telephone pole. Five minutes later the man drove away.
    d. About 9 p.m. on July 23 Carter drove by Reed's house and saw Reed's and Pafford's cars parked there.
    e. About 11:15 that night Carter called Reed, and her son said she was not home. Actually, she was home, but she did not want to talk to Carter.
    f. Carter went to Reed's house with a loaded .22 caliber rifle.
    g. He took the rifle to prevent Reed from talking to him, and to ensure she would answer his questions about their relationship.
    h. Carter hid the rifle against his leg.
    i. His finger was on the trigger.

j. Carter told Reed and Pafford that he was not going to leave until he got answers about their relationship.
k. When Reed saw the rifle she grabbed it.
l. A struggle ensued during which time a shot was fired, and Courtney was unintentionally hit once in the head.
m. Carter, an admitted "good shot," intentionally shot Reed twice in the head.
n. Carter intentionally shot Pafford three times in the head, one of which was at point blank range.
o. After the shootings, Carter drove away in his truck.

(4 R 699-701, 704-705)

2. Facts about the three gunshot wounds suffered by Pafford

a. The first shot fractured Pafford's jaw and hit the spine at level C-3. He may have been standing when that shot was fired.
b. The second shot was to the top, back portion of Pafford's head to the front part of the brain, indicating that he was almost in a kneeling position when shot.
c. The third shot, at close range, entered the right jaw and traveled to the left side of his head, as if Pafford's body were on the ground when shot.
d.

(4 R 701-702)

3. Facts about the two gunshot wounds suffered by Reed.

a. Both shots entered the area of the left ear.
b. The first shot went from left to right, and from the back to the front of her head. She was probably standing when shot.
c. The second shot went from left to right, stopping somewhere in the middle of the brain. She was probably standing when shot.
d. Both wounds were fatal.

(4 R 705-706)

C. The <u>Jackson</u> Analysis.

Under the Jackson analysis, the murders were neither, cold, calculated, nor premeditated, as this Court has defined and applied those words in the CCP context.

1. COLD. Execution-style killings are, almost by definition, the prototypical example of cold murders. Walls v. State, 641 So.2d 381, 388 (Fla. 1994). In Lynch v. State, 841 So.2d 362 (Fla. 2003), the defendant shot his victim one or two times, waited five minutes, then coldly killed her by shooting her in the back of the head. She never resisted, nor did she provoke the killing. Instead, Lynch killed her as a result of his calm reflection, and not as the result of an emotional frenzy or fit of rage, or while he was under the influence of drugs or alcohol.

In this case, the facts the trial court presented justifying this aggravator fail to support any finding that Carter coldly killed either Reed or Pafford. To the contrary, both were killed almost immediately after Reed let him into the house and saw his rifle. They briefly struggled over the gun, and during the tugging and pulling Carter unintentionally shot Courtney Smith. Immediately after, he shot Reed and then turned the rifle on Pafford. The entire tragedy took only seconds and was done with almost no thought. Carter never shot Reed or Pafford once to incapacitate, once to disable, again to paralyze, and yet again to finally kill. McCoy v. State, 853 So.2d 396, 407-408 (Fla. 2003). Instead, he fired all the

shots quickly, within seconds, and never delayed or waited for minutes to finish the murders. Turner v. State, 530 So.2d 45, 51 (Fla. 1987)(Murder is CCP when Turner stopped his assault and waited for the police to pass before resuming it.) All of the wounds were fatal (14 R 1091, 1102-1103), and significantly none of the victims had any defensive wounds (14 R 1096, 1106, 1111), evidence that none of them had much, if any, time to react to the rush of events.

As the court noted, Carter said he was jealous of Pafford and wanted answers regarding their relationship. Yet, this emotional turmoil negates the idea that he coldly plotted the murder of both people. Walls v. State, 641 So.2d 381, 387-88 (Fla. 1994)(CCP inapplicable to "heated" murders of passion involving a loss of emotional control.) To the contrary, other uncontroverted facts show that Carter had understandable reasons to want to talk to Reed, and her obvious snubbing of his efforts only made him more determined to clarify a situation she had muddied.

That is, Reed and Carter had lived together for several years, and while they had had some rough times, they had also had a happy, satisfying relationship. Or, at least, Carter was happy, and wanted to make it work In 2001, when they split, Carter still wanted to live with Reed. She, on the other hand, was less enthusiastic (14 R 1128), but by January 2002, she had fallen at least three months behind in her mortgage payments (16 R 1502-1503, 1632-34). Carter rescued her from

losing the house by paying the those missed months and the January bill as well (16 R 1502-1503). She welcomed him back to the Barkwood house, and in his mind, their relationship resumed where he had left off. He even took Reed on a cruise, and when they returned in early May, they were engaged (16 R 1504-1505). Those happy times soon ended, however, and by the end of May she had returned his ring, and he had moved out. But, Reed continued to hold out hope, because she visited him regularly on Wednesdays and Sundays during which time they as often had sexual relations. Indeed, the Sunday before the Wednesday murders, she happily met him, and they had sex as usual. She also agreed to a Tuesday date. But by then, she had changed her mind again, and without telling him, she skipped the rendezvous; instead she entertained Glenn Pafford, the older Publix grocery store manager, in the house Carter had lived in just two months earlier. Adding to his obvious, understandable confusion, she now did not want to talk with him because when he called at 11:30 p.m. on Tuesday, she told her son to tell him, she was not there. That, he knew was an obvious lie because he had been by her house only a few hours earlier and seen not only her car there, but Pafford's as well (16 R 1523-25).

Thus, by Tuesday evening, he was sad, hurt, and confused about his relationship with Reed. Making the situation worse, he had drunk several glasses of whiskey and taken the antidepressants Reed had given him. Unable to sleep,

and now having thoughts he had never had before, he rushed to her house, determined to get to answer because he was, understandably enough, confused about what she wanted to do. Reed, by blowing hot one day and cold the next, would have confused a sober person, but by midnight Tuesday, Carter was in an emotional frenzy sustained by drugs and alcohol. Obviously, he was not thinking straight, and what he did was completely out of character for him.

The murders, thus, arose from the emotional roller coaster ride of the previous two days. Yet, even then, Carter drove to Barkwood house, only wanting to get answers to his questions and not to kill Reed and Pafford, coldly or otherwise. Indeed, even the court's selective facts in its findings justifying the CCP aggravator show that the first short was unintentionally fired, Carter wanted only to get "answers about their relationship," and murder was never a part of any plan he had, or the answer to his questions.

In contrast, the defendant in Diaz v. State, 860 So.2d 960 (Fla. 2003), tried to kill his estranged lover but end up killing her father. He had not seen her for a month, and several days before the murder he had impatiently bought a gun and ammunition. This Court rejected Diaz' contention that he had killed the father in an emotional frenzy. "The murder occurred more than one month after Diaz had last spoken with Lissa. The attenuation between this contact and the murder shows

that Diaz's decision to confront Lissa on October 28 was not prompted by a sudden, emotional reaction to the status of their relationship" Id. at 970.

In contrast, in this case, by early Tuesday evening, Carter had legitimate reasons to believe his relationship with Reed was on the mend. They had had sex on Sunday, and she had also agreed to meet him for a date on Tuesday. That feeling dampened by 9 p.m. when she failed to keep it, and it deteriorated further when he drove by her house and saw her car parked next to Pafford's. Instead of the earlier euphoria, Carter now felt confused, angry, and jealous when she refused to talk with him when he called at 11:30, and that refusal prompted him to drive to her house to force her to give him answers to his questions. Thus, unlike Diaz, Carter acted immediately to resolve his confusion, and he brought a gun he had bought a quarter century earlier and kept loaded in his truck.

Thus, because the murders were not committed in an execution style but were the product of a clouded, confused, and angry mind, the court should not have found he killed either Pafford or Reed coldly. Their deaths exhibited no cold, "deliberate ruthlessness" for which this aggravator clearly applies See Zack v. State, 753 So.2d 9, 21 (Fla. 2000); Jennings v. State, 718 So.2d 144, 152 (Fla. 1998).

2. CALCULATED. Under Jackson's analysis, a CCP murder must also be "calculated." That is , **"**the defendant have had a careful plan or prearranged

design to commit murder before the fatal incident." Proof of this high level planning comes from evidence such as getting a gun in advance, a lack of resistance by the victim, preparations for the killing, and the appearance that it was a "routine" killing. Farina v. State, 801 So.2d 44 (Fla. 2001).

In this case, the court's sentencing order noted Carter watched Reed's house days and weeks before the murders, and "looked at a telephone pole."[20] He also grabbed the .22 caliber rifle with him after he had parked his truck at the Brookwood Drive house. But unlike the defendants in other calculated murders, Carter's watching Reed showed no evidence he wanted to kill her. Even bringing the .22 caliber weapon exhibits no advanced planning. That is, Carter bought the rifle in 1977, and he routinely kept the weapon fully loaded in his truck. Unlike the defendant in Dennis v. State, 817 So.2d 741, 765-66 (Fla. 2002), he never took any "pains to obtain and use a weapon that could not be traced to him." The gun simply was handy, and as he climbed out of his truck he grabbed it. Compare, Diaz v. State, 860 So.2d 960 (Fla. 2003) (Diaz buys a gun from a pawn shop several days before the murder, but he is obviously frustrated and angry by the three day waiting period and the further delay for a records check.)

[20] Looking at the telephone pole apparently had relevance because it showed that Carter may have intended to cut the telephone wires going to Reed's house, thus preventing her from calling for help. But, Reed had a cell phone, a fact Carter must have known because he had regularly called it (16 R 1478-79).

That the struggle for the gun occurred almost immediately after Carter had entered Reed's house also shows a lack of planning, and the court's finding that he unintentionally killed Courtney only strengthens the argument that Carter never carefully planned to kill anyone. Chamberlain v. State, 881 So.2d 1087, 1107 (Fla. 2004). In Ibar v. State, 31 Fla. L. Weekly S149 (Fla. March 9, 2006), this Court found that Ibar and his associates calculatedly killed their victims because "the murders were not committed immediately upon the intruders' entrance to the home, [] the victims were tied up, and [] Sucharski was beaten for more than twenty minutes, [and] it is evident that the defendants could have left the scene before killing the three victims. Thus, the calculated element of CCP is met."

In contrast, Carter killed his victims almost immediately after he had come inside and struggled with Reed over the gun. Of course, as in Ibar, Carter could have "left the scene before the killing," but that can be said of all murderers. That phrase means that the defendant planned to kill his victims, and that is evident by his failing to leave after he had robbed, raped, or committed some other crime. In this case, neither the court's findings supporting the CCP aggravator nor any other evidence in the record shows that Carter went into Reed's house intending to kill anyone or commit some other crime. He drove to Reed's house only to get answers to the legitimate questions he had about their relationship. Thus, because the struggle for the gun, the unintentional shooting, and the other killings happened

so quickly, Carter had no opportunity to leave the scene before the killing, at least as this Court has used that phrase.

In Lynch v. State, 841 So. 2d 362, 372-73 (Fla. 2003) , this Court found that Lynch had committed the murder of his former girlfriend and her daughter in a cold, calculated, and premeditated manner.

> As to the "calculated" element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of "calculated" is supported. . . .Here, Lynch possessed three handguns as he traveled to Morgan's apartment where, after shooting her at least four times near the entrance, he then waited approximately five to seven minutes before shooting her again in the back of the head, execution-style. Lynch clearly had time to reflect upon these events before firing the final shots; in fact he purposely used a different weapon to shoot her in the head than he had used to inflict the initial wounds

Id. at 372-73 (citations omitted.)

Unlike Lynch, Carter never deliberately took his rifle to Reed's house. It happened to be in his truck because that was where he kept it (16 R 1523-25). Likewise, the events from the time he approached Reed as she bid Pafford good night to the final shots unfolded in a brief, unbroken sequence, and quickly got out of Carter's control, even though he had the gun. Once they began, the defendant never had even a brief moment to reflect on what he was doing, and none of the court's findings or even any other evidence in the record suggests prior planning to kill Reed or Pafford. Hence, the murder was not "calculated."

3. Premeditated. People who intentionally kill others do not necessarily have the required intent to be guilty of first-degree murder. To commit a murder of that seriousness, they need to have a premeditated intent to do so. That is, as the standard jury instructions explain, "Killing with premeditation is killing after consciously deciding to do so." Fla. Std. Instr. (Crim.) 7.2. In order for the CCP aggravator to apply, moreover, defendants need more than the premeditation required for them to be guilty of first-degree murder. They need a "heightened" premeditation. That is, "[D]eliberate ruthlessness is necessary to raise. . . premeditation above that generally required for premeditated first-degree murder." Buzia v. State, 926 So. 2d 1203 (Fla. 2006)(Internal quotation marks omitted.) Defendants have shown this deliberate ruthlessness in several ways, but some especially standout:

1. They could have left the crime scene but, instead, stayed to murder. For example, in Alston v. State, 723 So.2d 148, 162 (Fla. 1998), Alston, after kidnapping and robbing his victim, could have let him go. Instead, he kept him and forced him to contemplate his own death.

Likewise, making the murder a "drawn out affair," also makes it CCP. In Buzia, the defendant beat one victim and then murdered another. The interval between the beating and murder gave the defendant enough time to renounce any further violence. Instead, he used it to "perfect his plan of attack toward Charles

Kersch," the murder victim.. Fennie v. State, 648 So.2d 95, 99 (Fla. 1994); Lynch v. State, 841 So.2d 362, 372 (Fla. 2003).

2. Similarly, they prolong the murder by, for example, taking victims to a remote site and heightening their terror by telling them how they are going to kill them. Walls v. State 641 So.2d 381, 388 (Fla. 1994).

3. Getting a weapon, though bringing a gun to the crime scene by itself is generally insufficient to elevate the defendant's intent to the level necessary for the CCP aggravator to apply. Thompson v. State, 647 So.2d 824 (Fla. 1994); Richardson v. State, 604 So.2d 1107 (Fla. 1992). Similarly, shooting the victim several times, by itself, does not establish the heightened premeditation necessary for this aggravator.

4. The lack of resistance by the victim, and shooting him or her in the back of the head. Anderson v. State, 863 So.2d 169, 176-77 (Fla. 2003).

5. Taking victims to another, usually remote, location, or holding them for a long time. Knight v. State, 746 So.2d 423, 436 (Fla. 1998)(Long journey gave Knight enough time to coldly and calmly decide to kill.). Connor v. State, 803 So.2d 598, 611 (Fla. 2001)(Connor holds the victim for a day before killing her.)

In this case, the only findings the trial court made on the CCP aggravator that have relevance to the "premeditated" aspect were 1. That Carter brought a loaded rifle to Reed's house, 2. He hid it against his leg. 3. His finger was on the

trigger. 4. Reed and Carter struggled for the rifle after she had grabbed it. 5. He intentionally shot Reed twice and Pafford three times, and all shots were to the head. 6. That Reed was probably standing when shot. 7. That Pafford was probably standing when first shot and was shot two times more as he fell to the ground. Yet, these facts fail to prove the Carter coldly killed Reed and Pafford.

For example, that Carter brought a loaded gun to Reed's house, hid it, and had his finger on the trigger, provides insufficient evidence of the required heightened premeditation. Thompson, Richardson. Similarly the number of shots fired does little to show Carter had any extraordinarily strong intent to kill anyone. Hamilton v. State, 547 So.2d 630 (Fla. 1989)(multiple wounds to two victims); Caruthers v. State, 465 So.2d 496 (Fla. 1985)(victim shot three times.); Blanco v. State, 452 So.2d 520 (Fla. 1984)(victim shot seven times.). On the other hand, the struggle tends to negate any idea that Carter ruthlessly and deliberately planned to kill anyone.

If the court's findings show little of any heightened premeditation, other facts omitted from the sentencing order further weaken any justification for finding Carter committed these murders with a heightened premeditation. First, the killings occurred quickly and without interruption. After driving to her house, he left his truck, Reed invited him in, they had the struggle, and Carter then shot three people. All this quickly happened within seconds and as one episode.

Unlike, Knight or Walls, Carter neither took the victims on any long journey nor "toyed" with them for any long time. Knight v. State, 746 So.2d 423, 436 (Fla. 1998); Walls v. State, 641 So.2d 381, 388 (Fla. 1994). Instead, their murders occurred very quickly, and neither victim could have been aware of their impending deaths for more than a few seconds. Indeed, it is doubtful, Reed ever had any time to realize Carter was going to shoot her, and Pafford may have known that for maybe one or two seconds.[21]

Of course, Carter could have "left the scene" by never having come there, but not really. That is, he had to see Reed, as the trial court found, to get answers to his questions about their relationship Reed. Unlike Alston, who accomplished his robbery before he killed his victim and therefore could have left, Alston, supra, Carter never satisfied the reason he came to her house. He never got his answers because she saw the rifle, they struggled for it, it fired hitting Courtney, and Carter then shot Reed and Pafford. Of course, after killing Reed, Carter had no need to kill Pafford, since any questions about the relationship had become moot. But that rationale is something lawyers and judges would realize in the cool reflection of an office or chambers rather than in the drunken, drugged, and confused heat of the moment.

[21] Each of the shots to Reed and Pafford were fatal.

Thus, Carter never had the heightened premeditation this Court has required to justify the CCP aggravator.

The trial court's order, and indeed the facts in this record, simply cannot support any conclusion that the murders of Reed and Pafford were cold, calculated, and premeditated. The CCP aggravator, hence, has no application to this case.

If so, then this Court must reverse Carter's two death sentences and remand, not for a new sentencing hearing, but for imposition of life sentences in both cases. This conclusion follows from the jury's recommendation of life for the murder of Courtney Smith.

Without any dispute, the following two aggravators applied to the murders of Courtney, Elizabeth Reed, and Glenn Pafford:

1. Carter committed the murder during the course of a burglary
2. Carter has prior convictions for the murders of Courtney Smith, Elizabeth Reed, and Glenn Pafford

(4 R 697-698, 702)

The State argued, and the court found that the CCP aggravator applied the Reed and Pafford homicides, but, as just argued, that was incorrect. The State also argued, and the court instructed the jury on the avoid lawful arrest aggravator, Section 921.141(5)(e), Fla. Stat. (2000), as it applied to Courtney (24 R 2942). The jury, by its life recommendation, either rejected it or found its weight, along with the two uncontested aggravators, failed to outweigh the substantial mitigation

Carter had presented. But the life recommendation also meant that the only two aggravators that applied to all three murders were also of insufficient consideration to, by themselves, justify a death sentence. The CCP aggravator, in the jury's mind carried the day for the State. It, not the other aggravators, tipped the scales in favor of death. But, as just argued, the State presented legally insufficient evidence to justify a finding that the CCP aggravator applied to the murders of Reed and Pafford. If so, then the remaining aggravators are the same ones the jury rejected as being sufficiently significant to sustain a death recommendation as to Courtney. Thus, giving the jury's recommendation of life for the murder of Courtney Smith "great weight" means that this Court must reduce the death sentences for the murders of Reed and Pafford to life in prison because the same aggravation and mitigation applies to each murder. Any distinction that somehow separates Smith's death from that of Pafford and Reed would be so strained as to become illogical.

This Court, therefore, must reverse the trial court's sentences of death for the murders of Elizabeth Reed and Glenn Pafford, and remand with instructions that it impose life sentences for both homicides, or remand for it to resentence Carter.

ISSUE III

THE COURT ERRED AS A MATTER OF LAW IN INSTRUCTING THE JURY AND FINDING THAT CARTER COMMITTED THE MURDERS DURING THE COURSE OF A BURGLARY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State charged Carter with three counts of first-degree premeditated murder (1 R 12-13). It argued, as the law allowed, he had committed those homicides during a burglary even though it had neither charged him with that offense nor alleged he murdered three people while engaged in a burglary (1 R 12-13). Moreover, when it defined burglary, it said the underlying offense was "assault, battery, aggravated assault, aggravated batter and or murder." (19 R 1924). Despite this circular definition, the jury specifically found that the defendant had committed the three murders with premeditation and in the course of a burglary (19 R 1955-56).

During the sentencing part of Carter's capital trial, the court instructed the jury on the aggravating factors it could find to justify a death sentence, one of them being that Carter murdered the three victims during the course of a burglary (24 R 2938, 2940, 2942). That is, the felony murder became an aggravating factor that without more, could justify sentencing him to death. State v. Dixon, 283 So.2d 1 (Fla. 1973). Indeed, the trial court found that this aggravator outweighed

all the substantial mitigation Carter had presented, and by itself justified imposition of a death sentence.

> The testimony conclusively establishes that the Defendant unlawfully entered and/or unlawfully remained in the dwelling of Ms. Reed with the intent to commit at minimum an assault therein. . . . This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(4 R 698-99, 703)

* * *

> On balance, the aggravating circumstances in this case far outweigh the mitigating circumstance. . . . .The Court further finds that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed.

(4 R 717)

The court erred, as a matter of law, in finding Carter committed the murders during a burglary, and this Court should review this issue de novo.

The Florida legislature reenacted the state's death penalty statute in 1972, and at that time, it provided that murders committed in the course of a limited number of violent felonies justified imposing a death sentence.

> Fla. Stat. s 921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony constitutes not only a capital felony under Fla. Stat. s 782.04(1), F.S.A., but also an aggravated capital felony. Such a determination is, in the opinion of this Court, reasonable.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

Burglary, as then defined was an aggravator under this law, and it posed a problem because it was not inherently a crime of violence. Mann v. State, 420 So.2d 578 (Fla. 1982)(Burglary, standing alone, is not a crime of violence so as to qualify as a crime of violence under Section 921.141(5)(b), Florida. Statutes 1979)). Only when the State could show that the offense which the defendant wanted to commit after he or she had broken into some place was one of violence, could this aggravator apply. Mann v. State, 453 So.2d 784 (Fla. 1984).

The felony murder aggravator, however, still presented constitutional problems as Florida's death penalty scheme evolved. Specifically, those factors which separate the killer who commits a first-degree murder from one who commits a death worthy first-degree murder must "genuinely narrow" that latter class of defendants.

> For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S., at 195, n. 46, 96 S.Ct., at 2935, n. 46. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 876-77 (1983)(Footnotes omitted.)

Defendants facing a death sentence argued that if the aggravating factors must "genuinely narrow" the class of defendants guilty of first-degree murder, the felony murder aggravator did not do that. Anyone guilty of first-degree felony murder automatically had at least one aggravator that, without more, justified imposing a death sentence.

In Blanco v. State, 706 So.2d 7, 11 (Fla. 1997), this Court rejected that argument, and it found the felony murder aggravator passed constitutional scrutiny as it "genuinely narrowed" the class of persons eligible for a death sentence. It did this because the list a felonies that made a defendant death worthy was smaller than that which made him or her guilty of capital felony murder.

> Eligibility for this aggravating circumstance is not automatic: The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. See Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See generally White v. State, 403 So.2d 331 (Fla.1981).

Blanco v. State, 706 So.2d 7, 11 (Fla. 1997)(footnotes omitted.)

Disagreeing with this approach, Justice Anstead argued that the felony murder aggravator does not "genuinely narrow" the class of convicted killers eligible for a death sentence.

> The concept of narrowing requires that once it has been established that a defendant is guilty of first-degree murder the sentencer may properly consider only additional factors, termed aggravators, that genuinely narrow the class of convicted murderers who may be eligible for the death penalty. For example, if a person is guilty of premeditated murder and is shown to have been guilty of *additional* aggravating misconduct, then he becomes part of a narrower, less numerous class of persons eligible for the death penalty. But a person convicted of felony murder who then has the same felony used against her as an aggravator does *not* become a member of a smaller group. Rather, the felony aggravator used there would make the entire larger group of felony murderers automatically eligible for the death penalty without proof of any additional aggravating misconduct. Hence, the felony aggravator serves no legitimate narrowing function in such a case.

Id. at 12. (Anstead, specially concurring. Emphasis in opinion.)

Blanco thus exhibits two approaches members of this Court have used to resolve the questions about the limiting effect of the felony murder aggravating factor. Recent changes in the definition of burglary show that this Court must once again look at the felony murder aggravator, but not from the perspective of the opinions in Blanco , to consider whether that offense "genuinely narrows" the class of first-degree murderers who commit burglaries who are eligible for a death sentence.

In 2000 this Court decided Delgado v. State, 776 So.2d 233 (Fla. 2000). In that decision, it reversed the defendant's convictions for first-degree felony murder, the underlying felony being burglary, because the victims had invited Delgado into their home. Said in terms of then Section 810.02, Fla. Stat. (2000),

they had consented to him coming into their house. Because they had welcomed him into their home, there was no stealthy entry or a nonconsensual remaining inside, as required by that law. Hence, he had not committed a burglary. "In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent." Id. at 241. This Court specifically rejected the argument that a victim who invites another into his or her house implicitly revoked that consent when the defendant committed a crime inside. Id. at 237-39.

The Florida legislature, reacting to that holding, passed legislation that specifically overruled Delgado. Section 810.015, Fla. Stat. (2001). It redefined burglary so as to remove consent as a defense for certain forcible felonies.

> For offenses committed after July 1, 2001, "burglary" means:
>
> 1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
> 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
> a. Surreptitiously, with the intent to commit an offense therein;
> b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
> c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

Under the revised Section 810.02, a defendant can commit a burglary notwithstanding any explicit or implied consent the victim may have given him or

her to enter the dwelling, structure, or other place, if he or she commits certain forcible felonies once inside. In other words, whenever the defendant commits a particularly violent crime in, say a house, he or she cannot claim the victim gave their consent to enter or remain inside as a defense to a burglary charge. Hence, a defendant who kills his victim inside the victim's home, automatically has committed not only a burglary but a first-degree murder as well. "The possibility exists that many homicides could be elevated to first-degree murder, merely because the killing was committed indoors."[22] Delgado, cited above at 239.

Thus, under this revised definition of burglary Carter clearly had no defense to the uncharged allegation that he had committed a burglary of Liz Reed's house even though Ms Reed invited him inside the house that. Once there, he committed three first-degree felony murders when he shot his three victims.[23]

Although the defendant may have had no defense to that felony murder allegation in the guilt phase, the constitutional requirement that the felony murder aggravator must "genuinely narrow" the class of persons eligible for a death sentence precludes its application in the penalty phase of his trial.

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[22] Not simply indoors but inside a car or on the curtilage. Baker v. State, 622 So.2d 1333 (Fla. 1st DCA 1993).

[23] But for the change in the statute, Carter would have had an arguable defense that he had committed only a second-degree murder of Courtney. Knowles v. State, 632 So.2d 62, 66 (Fla. 1993).

That is, even though Carter acknowledges this Court's holding in Blanco, and Justice Anstead's approach in the same case, the felony murder aggravator, when burglary is the underlying felony, fails to genuinely narrow the class of persons eligible for a death sentence. In other words, a felony that, under either majority's or Justice Anstead's, arguments in Blanco might justify the felony murder aggravator, might also be so broadly defined that it does not "genuinely narrow" the class of person eligible for a death sentence. That is what happened after the 2000 revision or redefinition of burglary. People who enter a home or other building, automatically commit a burglary if they also commit a violent felony such as murder inside. Such an expansive definition of burglary, however legitimate it may be for determining guilt, does not "genuinely narrow" the class of person eligible for a death sentence. To the contrary, it expands the group to include almost every killer, an accomplishment obviously at odds with the developments in death penalty law.

In short, first-degree felony murder, when burglary is the underlying felony, and murder is the predicate offense for the burglary, became a strict liability offense, and one for which the defendant is eligible for execution.

This Court found this argument "persuasive" in Delgado. In footnote 3 of the majority's opinion, it quoted Justice Almons dissent in Davis v. State, 737

So.2d 480, 484-86 (Ala. 1999)(Almon, J. dissenting)(Footnote and citations omitted):

> As to the burglary/murder conviction, the majority of this Court is allowing a murder conviction to be made capital by allowing a jury to draw an inference of an implied revocation of a privilege to remain. Is an inference of an implied revocation a basis on which to " 'genuinely narrow' the class of persons eligible for the death penalty so that capital punishment is reserved for the most egregious crimes"? ....
>
> The inferences that the majority is allowing concern me. Essentially, a defendant is being "guessed" into a capital conviction ...

Similarly, here, after the legislature eliminated consent as a defense to burglary for murder, Carter became eligible for a death sentence simply because he entered Reed's house. Answering Justice Almon's rhetorical question, defining burglary as broadly as the revised Section 810.02 does, fails to "genuinely narrow" the class of persons eligible for a death sentence. Hence, even though the legislature could redefine burglary as it did in 2001, the United States Constitution prevents it from making Carter, and every other defendant who enters a car, house, or lawn with the owner's consent and kills inside, automatically eligible for a death sentence. If the aggravating factors as defined in Section 921.141(5), Florida Statutes (2006), withstand constitutional scrutiny because they "genuinely narrow" the class of persons eligible for a death sentence, then every aspect of those factors, including the definition of the felonies a capital defendant can commit

during the course of a murder that makes him or her eligible for execution, must also "genuinely narrow" that class. In this case, Section 810.02 does not, and this Court must find the lower court erred in instructing the jury that they could consider the murder committed during the course of a burglary as an aggravating factor. It must also find that the court erred when it found, as an aggravating factor, that Carter committed the murder during the course of a burglary.

ISSUE IV

THE COURT ERRED IN GIVING GREAT WEIGHT TO THE AGGRAVATING FACTORS 1) THAT CARTER COMMITTED THE MURDERS IN THE COURSE OF COMMITTING A BURGLARY, AND 2) THAT HE HAS A PRIOR CONVICTION FOR A VIOLENT FELONY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Carter to death for the murders of Liz Reed and Glenn Pafford, the court found that he had killed them while he was engaged in a burglary, and he had been previously convicted of another capital felony. Sections 921.141(5)(b) and (d), Florida Statutes (2002)(4 R 697-99, 702-703). As to both aggravators, it found they each deserved great weight. "This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case." (4 R 702). In fact, it considered these aggravators to be so significant that it also found that "any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed." (4 R 717) In light of the jury's life recommendation for the murder of Courtney Smith, the court gave those two aggravators far more weight than they deserved. This Court should review this issue under an abuse of discretion standard. Sexton v. State, 775 So.2d 923, 934 (Fla. 2000).

This Court's opinion in Buzia v. State, 926 So.2d 1203 (Fla. 2006), controls this issue. In that case, this Court said:

> In his fifth claim, Buzia challenges the weight assigned to the aggravating circumstances and argues that the death penalty is not appropriate. The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard. Sexton v. State, 775 So.2d 923, 934 (Fla.2000). "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." Huff v. State, 569 So.2d 1247, 1249 (Fla.1990) (quoting Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980)). We affirm the weight accorded an aggravator if based on competent, substantial evidence. Sexton, 775 So.2d at 934. Here, the trial court assigned great weight the prior violent felony, avoid-arrest, HAC, and CCP aggravators. As discussed above, competent, substantial evidence supports the court's finding of these aggravators. We find no abuse of discretion

Buzia at p. 1216.

The analysis, thus, requires this Court to examine the evidence and determine if no reasonable man would adopt the view taken by the court. Normally, as in Buzia, this Court examines the evidence, and if competent, substantial evidence supports the court's finding of the aggravators it pronounces, as it did in Buzia, no abuse of discretion.

In this case, this Court need not do that. Carter admits that the trial court correctly found the felony murder and prior violent felony conviction aggravators. However, he disagrees with both of the lower court's conclusions that they should be given great weight and either one of them, by themselves, outweigh the sum of

all the mitigation he had presented. He says this because reasonable men and women in this case disagreed with those assessments.

The jury, which by definition, consists of reasonable citizens, recommended the court impose a life sentence for the murder of Courtney Smith. Significantly, two of the aggravators it considered and rejected as having sufficient weight to tip the balance in favor of death were the same ones the trial court said, by themselves, justified imposition of a death sentence. Thus, the court erred in giving these aggravators such great weight, and this Court should reverse the trial court's judgment and sentence and remand for a new sentencing hearing so it can, in light of the mitigation presented and the jury's life recommendation, properly assess the weight they deserve.

ISSUE V

THE COURT'S SENTENCING ORDER LACKS THAT UNMISTAKEABLE CLARITY THIS COURT HAS DEMANDED SUCH ORDERS HAVE WHEN THEY FIND THE DEFENDANT DESERVES TO BE SENTENCED TO DEATH, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The court's order sentencing Carter to death for the murders of Elizabeth Reed and Glenn Pafford and life for the murder of Courtney Smith is 25 pages long. It presents an admirable recitation of the facts supporting the aggravating and mitigating factors it found. It fails, however, in two critical respects. First, although it acknowledged that the jury recommended a life sentence for the murder

of 16 year old Courtney Smith, it never considered that verdict when it sentenced Carter to death for the murders of Liz Reed and Glenn Pafford. Second, the court never considered, in total, the massive amount of mitigation the defendant had presented. That is, it did an admirable job cataloging the mitigation he had offered during the sentencing phase of his trial. It never, however, went beyond that and considered, as a separate mitigating factor, what all this individual mitigation meant. In short, the court saw the trees, but missed the forest; it recognized the notes, but could not hear the song. As such, it abused the very limited discretion it has in matters of capital sentencing, and this Court, applying a very limited abuse of discretion standard, should reverse the trial court's sentencing order and remand for resentencing.

These failures are significant for two reasons. First, this Court does not find facts, the trial court does. Lucas v. State, 568 So.2d 18, 24 (Fla. 1990). Second, because this Court reviews trial court sentencing orders imposing death, it has demanded that they be of "unmistakable clarity." Mann v. State, 420 So.2d 578, 581 (Fla. 1982) As this Court said in Mann, "The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found.. . ." An order sentencing a man to die should be so clear that this ultimate punishment was the "the result of

reasoned judgment." Lucas, cited above at p. 24. Here, for two reasons, this Court cannot say that happened in this case.

1. **Failure to consider the jury's recommendation of life for Courtney Smith.**

   In the sentencing order's conclusion, the court said:

   > The jury was fully justified in its 9-to-3 recommendation that the death penalty be imposed upon the Defendant for his murder of Glenn Pafford. The jury was fully justified in its 8-to-4 recommendation that the death penalty be imposed upon the Defendant for his murder of Elizabeth Reed. The jury was fully justified in its recommendation that life imprisonment without the possibility of parole be imposed upon the Defendant for his murder of Courtney Smith
   >
   > This Court further finds that any of the considered aggravating circumstances found in this case, stand alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed.

(4 R 717)

In Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court said that the sentencing judge in a capital case must give great weight to the jury's recommendation, whether it is life or death. This usually means that unless the trial court can articulate some strong reasons to ignore that verdict, it must follow it. E.g., Burr v. State, 266 So.2d 1051 (Fla. 1985). (Doubt as to the defendant's guilt cannot justify a jury's life recommendation.) Accordingly, in recent years this Court has tended to reverse death sentences where the jury has recommended

life, if it can find any reasonable basis on which it could have based that verdict. E.g., Ramirez v. State, 810 So.2d 836 (Fla. 2001).

But, if the sentencing court must give "great weight" to the jury's recommendation, does that verdict have any bearing or relevance to the sentence the trial court imposes in cases, such as this, where there are multiple murders, and death recommendations for the other homicides? This Court conducts a proportionality review specifically to ensure that death is imposed only when the murder is both the most aggravated and least mitigated. Taylor v. State, 31 Fla. L. Weekly S429 (Fla. June 29, 2006). When it does this, it compares the case at bar with other, factually similar cases, and determines if, when so compared, a death sentence remains warranted. Whether a trial court has a similar proportionality analysis is uncertain, but in a case such as this one it should, at least, have explained why the jury recommendation of life for one victim had no relevance to the death sentence for the others. Here, as the quoted part of the sentencing order makes clear, the trial court made no such analysis; instead it considered the death of Courtney Smith as a separate case from that of Liz Reed and Glenn Pafford. Yet, their deaths were inseparably connected, and all three murders occurred as close to simultaneously as possible.

That is, they happened within seconds of each other, and Courtney was probably killed first. Significantly, the jury specifically found that Carter had

killed her, her mother, and Pafford with premeditation and during the course of a burglary (4 R 548, 551, 554). This means that it found that the daughter's murder was not done accidentally or simply during the course of a burglary. Carter had the premeditated intent to kill her, just as he had the premeditated intent to kill Reed and Pafford.

Similarly, two of the three aggravators the court found justifying executing the defendant applied to each murder, including Courtney's. That is, Carter committed the homicides during the course of a burglary, and he had prior convictions for a violent felony(the murders).

The court distinguished Courtney's killing from the other two by finding the cold, calculated, and premeditated aggravator applied to the murders of her mother and Pafford, but the State never pressed for that aggravator to apply to her death (23 R 2776). Instead, the prosecutor claimed that Carter killed her to avoid lawful arrest. He never said it applied to the other two homicides.

The other factual distinction was that Courtney, who was 16, was a still only child, and it is, therefore, surprising that the jury recommended life for her death. One naturally has less sympathy for a child killer, and death recommendations and sentences are much more understandable and defensible. Zakzrewski v. State, 717 So.2d 488 (Fla. 1998).

Now, what makes the court's sentencing order troubling is that the trial judge said, "that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed." (4 R 717) That conclusion, however, has no justification because the jury recommended life for Courtney, yet the felony murder and prior conviction aggravator applied with as much strength to her death as it did to the other two. Thus, it is obvious the trial court never considered the meaning or implications of the life recommendation when it sentenced Carter to death.

Had it done so, it would have explained more carefully and fully and with more evident reasoned judgment than it showed in its sentencing order why the CCP aggravator, by itself, justified a death sentence. Without any sort of that reasoning, this Court has to provide it, or guess at what the court would have said. Yet, this Court has expressly held that it does not find facts, it only reviews them. As such, it is not this Court's function to provide the reasons or justification the trial judge omitted. Hence, the court's sentencing order in this case lacks the unmistakable clarity required of orders sentencing a defendant to death.

2. The failure to consider the mitigation as a whole.

Without any argument, the trial court did an admirable job listing and discussing the extensive mitigation Carter presented. Similarly, the defendant

has no legal objection to the court's finding that each offered piece of mitigation was legitimately such, and that it assigned "some weight" to each aspect of the defendant's life and character. His problem comes from the obvious fact that that is all the court did. It never considered the sum of what Carter offered as itself mitigation.

When one reads the defendant's case for mitigation, he or she is first struck with how much there is-about 600 pages worth. Carter presented evidence of his early childhood, including evidence of his abusive and neglectful father, his depressed and mentally ill mother. Through witnesses he told of the extreme poverty he and his brothers and sister lived in, and the pervasive uncertainty he lived as a child.

Carter established that he somehow grew out of that disastrous childhood, and that about the time he was a junior in high school he began to flower. He became active in sports, clubs, and other school activities. People liked him, and teachers, even 30 years, later remembered him. He was not a stellar student or outstanding athlete; in fact, he was very much average in both categories. Nevertheless, people recalled who he was because of who he was. There was something special about him.

The defendant then presented evidence of his military career, his achievements, and the Air Force's recognition that it should try to retain this airman.

After his honorable discharge, Carter went to college, and immediately began repeating the patterns that had emerged in high school and were exhibited in the Air Force. He was an average student, but he stood out in extracurricular clubs, although maybe not sports (he went to school, after all, in Oklahoma). He was elected president of important organizations and again professors tended to remember him.

Now, if Carter's academic career was unspectacular, his working life exhibited a person who not only worked, but liked to work long, hard hours. Indeed, since he was 15 he had continuously been employed, if not in the Air Force, then in the supermarket industry. And there, like in the military and in school, he rose in the esteem of his employers and fellow workers. Store managers quickly made him their assistant and trusted him with running the store in their absence, and they had no qualms about letting him handle the money.

But even working more than 40 hours a week was not enough for Carter, and he had, on occasion, other jobs. In short, Carter liked to work and earn his way in life.

But, Carter did more than work, he tried to build others around him. With Reed and her children, he wanted a family. He took them on vacations. Richard, Liz Reed's son, went hunting with him. He brought them to get togethers with his brothers and sister.

More than simply wanting to build family ties, Carter sought to lift and encourage others around him, even when he was in jail. Reduced to talking to other inmates through ventilation ducts, he encouraged boys facing a life in prison to have faith, to not give up.

Now, all this the trial court found as mitigation, and gave it some weight, but it never stepped back and tried to see what it all meant. It was as if it saw the trees but not the forest, or could recognize the notes but not the melody.

Thus, it is understandable that the court, when it looked at this mitigation, individually, or even in total (4 R 717), said the aggravation outweighed it. By themselves, the mitigating pieces of evidence hardly move one to have much sympathy for Carter. All right, so his father did not hug him much, so what? Admittedly he did well in the Air Force, but so do most airmen. And that he considered Liz Reed and her children his family is so ho hum. Nothing he presented grabs you and says "Give him life." We have no significant history of craziness, no bizarre behavior, nor any evidence of major brain damage.

But Carter's evidence is more subtle. It is just as compelling as an extreme emotional disturbance, and it is just as obvious, but not to one looking for a "knockout" blow type of mitigating factor. Instead, as one reads Carter's evidence, the totality of his life, the summation of all the individual, inconsequential, mitigation begins to add up. And it continues to do so until the molehill of insignificant mitigation has become a mountainous reason for imposing a life sentence.

That is, the picture that emerges from Carter's evidence is one of an "everyman," Joe Lunchbucket, or average American citizen. He is not an Einstein, Picasso, or Lance Armstrong. On the other hand, he is also not Ted Bundy or the hundreds of other death row defendants. He is indistinguishable from the millions of people who get up in the morning, go to work, and want only what is best for their families. They are not generals, CEOs, or Presidents of multinational companies. Except for 15 seconds of his life, Carter represents the best of working class America, and that is what the trial court failed to consider-Carter's life as a whole, as a sum and more, of the individual parts.

Now, the trial court's failure to make any effort to do that type of examination is particularly troubling in light of the jury's death recommendations. That is, only 9 of the 12 jurors thought death was

appropriate for Pafford's murder and only 8 of them thought he should die for Reed's murder. Had they unanimously recommended death then the trial court's failure could, perhaps, have been excused. Instead, a third and a fourth of the jurors saw the mitigation as the summation of the parts and decided that he should spend the rest of his life in prison. Indeed for a significant number, it was so important that it outweighed not only the admitted felony murder and prior conviction aggravators, but also the CCP factor.

Thus, with these tepid death recommendations, the court should have considered them with more caution. Indeed, it is hard to understand how it could find that any of the aggravators would have outweighed all the mitigation. This unjustified conclusion, in light of the jury's vote of life for Courtney and its much less than unanimous death recommendations for Reed and Pafford, casts the entire sentencing order into doubt. The court simply did not exhibit that reasoned judgment this Court expects of judges sentencing someone to death. Or, at least, its conclusions raise enough questions that this Court must conclude that it lacks that unmistakable clarity this Court has required. As such, the court's sentencing order, again, lacks the clarity required to justify a death sentence.

Thus, the trial court's two errors make its sentencing order sufficiently unreliable that this Court should reverse it and remand for a new sentencing hearing.

ISSUE VI

THE COURT ERRED IN REFUSING TO REQUIRE THE STATE TO FOLLOW THE PROMISE IT HAD MADE TO THE MEXICAN GOVERNMENT THAT IT WOULD NOT SEEK A DEATH SENTENCE IF IT RELEASED CARTER INTO THE STATE'S CUSTODY, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

After Carter killed the three victims in this case he fled to and eventually ended up on the American side of the Rio Grande River in Texas. He tried to enter Mexico, but the Mexican army arrested him (15 R 1304-1306). Shortly, the prosecutor in this case learned of his detention, and it sought to have the defendant returned to the State's custody. Mexico, however, apparently refused to do so because it knew that Carter faced a death sentence if convicted of those three homicides. Eager to prosecute him, the Fourth Circuit State Attorney wrote a letter to the Mexican Consulate in Orlando:

> October 14, 2000
>
> Ms Luz-Elena Bueno Zirion
> Mexican Consulate
> 100 West Washington Avenue
> Orland, Fl. 32081
>
> Dear Ms. Bueno Zirion:
>
> Pursuant to your request I am writing this letter to officially inform Mexico that on behalf of the State of Florida, I will agree t not seek the death penalty if Mr. Carter is captures by any official of the Mexican government and turned over to the United State for prosecution.

> I want to make it clear that I am doing this reluctantly, at your request as a representative of Mexico, because I understand that this is the only way your government will attempt to help us in finding, capturing and turning over Mr. Carter for prosecution regarding three murders he committed in Florida and for which there is an outstanding arrest warrant.
>
> Thank you again for your assistance, and please let me or my assistant Bernie de la Rianda, know if there is anything else that you need.
>
> Very truly yours,
>
> Harry L. Shorstein

(2 R 326)

Although the letter was delivered, apparently it got to the appropriate Mexican authorities too late because by the time they got it, they had released Carter (17 R 1541-42). He went further south, stayed in Central America for a while, but, unable to earn a living he returned to the United States. He was arrested in Kentucky and returned to Jacksonville where he was charged with three counts of first-degree murder. He also was subject to execution if found guilty of any of those murders

Sometime later Carter filed a "Motion to prohibit the State of Florida from Seeking the Death Penalty," (2 R 323-26). The court, after hearing argument on the motion, denied it (2 R 327).

In light of the State's announced willingness to spare the defendant a death sentence in order to secure his return to Florida, it is unfair for it to now insist

that he can be sentenced to death just because he is no longer in Mexico's custody. As this is purely a legal issue, this Court should review this issue under a de novo standard of review.

Florida, although it has long had a death penalty statute, also has had a strong aversion to imposing it. Indeed, rulings of this Court have clearly demonstrated an "anti-death penalty" bias. For example, if the jury ties 6-6 in its recommendation of whether the defendant should live or die, this Court has said that is the same as a life recommendation. See, Craig v. State, 410 So.2d 857 (Fla. 1987). Aggravating factors must be proven beyond a reasonable doubt, but mitigation need only be established by the greater weight or preponderance of the evidence. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Bryant v. State, 785 So.2d 822 (Fla. 2001). This Court has also said that Section 921.141(5), Florida Statutes (2000), provides an exclusive list of aggravating factors that can justify a death sentence, Purdy v. State, 343 So.2d 4, 7 (Fla. 1977), a holding at odds with rulings from the United States Supreme Court. See, Barclay v. Florida, 463 U.S. 939, 950-51 (1983). Likewise, this Court's decision in Tedder v. State, 322 So.2d 908 (Fla. 1975), that the sentencing judge must give great weight to the jury's life recommendation, runs counter to what the national high court has ruled. Harris v. Alabama, 513 U.S. 504 (1995). This Court conducts a proportionality review even though under

the United States Constitution, it is not required. Pulley v. Harris, 465 U.S. 37 (1984).

Carter now asks this Court to continue the "anti-death" bias by ruling that once the prosecution has announced, however reluctantly, it is willing to forgo executing the defendant, it should be bound or estopped to later renege on that promise. Under the heightened standards of due process applicable in death penalty cases, Eddings v. Oklahoma, 455 U.S. 104 (1982), that is only right and fair.

Carter, therefore, respectfully asks this honorable Court to reverse the trial court's order sentencing him to death, and remand with instructions that it impose sentences of life in prison for the murders of Elizabeth Reed and Glenn Pafford.

ISSUE VII

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO. 2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO. 2D 403 (FLA. 2002).

To be blunt, this Court wrongly rejected Linroy Bottoson=s and Amos King=s arguments when it concluded that the United States Supreme Court=s decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida=s death penalty scheme. Because this argument involves only matters of law, this Court should review it de novo.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination Aof any fact on which the legislature conditions@ an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So.2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002), this Court rejected all Ring challenges by simply noting that the nation=s high court had upheld Florida=s capital sentencing statute several times, and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida=s capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of Airreconcilable conflict@ in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> 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.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriques d Quijas, has a notable exception. If there is an Aintervening development in the law@ this Court can determine that impact on Florida=s administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
>
> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the Aintervening development of the law@ exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.). The question, therefore, focuses on whether

Ring is such an Aintervening development in the law@ that this Court can re-examine the constitutionality of this state=s death penalty law in light of that in decision.

The answer obviously is that it a major decision whose seismic ripples have been felt not only in the United States Supreme Court=s death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona=s capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled A>where the necessity and propriety of doing so has been established.=@ Ring, cited above at p. 608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring=s impact on Florida=s death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring=s fundamental holding. ABlind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring.@

Bottoson, cited above at p. 725. Justice Anstead views Ring as Aas the most significant death penalty decision from the United States Supreme Court in the past thirty years,@ and he believes the court Ahonor bound to apply Ring=s interpretation of the requirements of the Sixth Amendment to Florida=s death penalty scheme.@ Duest v. State, 855 So.2d 33 (Fla. 2003) (Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the Adeath penalty schemes of virtually all states.@).[24] Justice Pariente agrees with Justice Anstead Athat Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme.@ Id. at p. 719. Justice Shaw concludes that Ring, therefore, has a direct impact on Florida=s capital sentencing statute.@ Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

[24] Justices Quince, Lewis and Pariente agree that Athere are deficiencies in our current death penalty sentencing instructions.@ Id. at 702, 723, 731.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson=s serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson=s and King=s claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that Anew rules generally should not be applied retroactively to cases on collateral review.@ Teague v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by the nation=s high court refutes Justice Wells= conclusion that if Florida=s capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v.Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant=s efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida=s death scheme as a hybrid, and thus different from

Arizona=s method of sentencing defendant=s to death, it may simply have not wanted to deal with a post conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring. While noting several similarities between Arizona=s and Florida=s death penalty statutes, he also found Aseveral distinctions.@)

There is, therefore, no reason to believe the United States Supreme Court will accept this Court=s invitation to reconsider this State=s death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State=s death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death.

When it does, this Court should consider the following issues:

1. Justice Pariente=s position that no Ring problem exists if Aone of the aggravating circumstances found by the trial court was a prior violent felony conviction.@ Lawrence v. State, 846 So.2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge=s decision to impose death under section 921.141, Florida Statutes (2002).. . . [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has >never suggested that jury sentencing is required=.. . .I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring.) In this case, the trial court found three aggravating factors, at least one of which would have satisfied her criteria. That is, a jury had found him guilty of burglary and sexual battery.

Justice Anstead has rejected Justice Pariente=s partial solution to the Ring problem, and Carter adopts it as his response to her position.

> In effect, the Court=s decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, AThe question, however, under Ring is whether a trial court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence.@ (Emphasis in opinion.)

2. Unanimous jury recommendations and specific findings by it. Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida=s death penalty scheme, can only recommend death. The trial judge, giving that verdict Agreat weight,@ imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing

scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama[25], Florida allows a non unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, Carter=s death sentence may be unconstitutional. Bottoson, cited above, at 714 (Shaw, concurring in result only); Butler v. State, 842 So.2d 817 (Fla. 2003)(Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non capital cases to justify its capital sentencing procedure would be troublesome in light of this Court=s declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth

[25] Alabama, like Florida, allows juries to return a nonunanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendations. SB449.

Amendment=s fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person=s life is at stake that voice should unanimously declare the defendant should die.

This approval of a non unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations AThe eleven-to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty. See Anderson v. State, 841 So. 2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence)@ Lawrence v. State, 846 So.2d 440 (Fla. 2003); Butler v. State, 842 So.2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003)(Pariente, dissenting); Bottoson v. Moore, 833 So.2d 693, 709 (Fla. 2002)(Anstead, dissenting).

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida=s death penalty scheme. It should also reverse Carter=s sentence of death and remand for a new sentencing trial.

ISSUE VIII

THE TRIAL COURT ERRED IN REPEATEDLY INSTRUCTING THE JURY THAT THEIR RECOMMENDATION WAS JUST THAT, A RECOMMENDATION, A VIOLATION OF CARTER=S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Before the penalty phase jury heard any testimony regarding what aggravating and mitigating factors existed, after they had heard all the evidence, and after the court had instructed the jury on the relevant law, Carter objected to the penalty phase instructions because they diminished the role of the jury in sentencing the defendant to death (3 R 425, 6 R 10774-75). The court denied that complaint (3 R 429). This request took legal strength from the United State Supreme Court=s opinion in Caldwell v. Mississippi, 472 U.S. 320 (1985). In that case, A[T]he State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.@ 472 U.S. at 341. This one involves a pure question of law, which should be reviewed de novo.

This Court has repeatedly and recently held that the standard penalty phase jury instructions comply with Caldwell. AThis Court will note that the Florida Standard Jury Instructions have been determined to be in compliance with the requirements of Caldwell. Burns v. State, 699 So.2d 646, 654 (Fla.1997); Sochor v. State, 619 So.2d 285, 291-92 (Fla.1993); Thomas v. State, 838 So.2d 535 (Fl. 2003).

Despite these rulings, Carter asks this Court to reconsider its rulings in those cases in light of Justices Lewis=s and Pariente=s concurring opinion in Bottoson v. Moore, 833 So.2d 693, 723, 731-34 (Fla. 2002). In that case, Justice Lewis had great trouble approving those instructions because of their Atendency to minimize the role of the jury,@ and the trial court=s added explanation of Florida=s death penalty scheme. AI question whether a jury in situations such as this can have the proper sense of responsibility with regard to finding aggravating factors or the true importance of such findings as now emphasized in Ring [v. Arizona, 536 U.S. 584 (2002)].@ Id. Justice Pariente, likewise, has concluded that Athe fact that the jury

was told that its role is advisory presents additional concerns in light of Ring . . .@ Butler v. State, 842 So.2d 817, 837 footnote 10 (Fla. 2003)(Pariente, concurring)

Carter asks this Court to listen to Justice Lewis= and Pariente=s arguments. In this case, it has particular resonance because within the space of five pages, the jury was told eleven times that their sentence was merely advisory (24 R 2936-37, 2947-49). When the judge repeatedly, repeatedly, repeatedly let them know that he had the responsibility to sentence Carter, never told them that it had to give Agreat weight@ to their decision, and said that they need not reach a unanimous decision on what to recommend, then Justice Lewis= concerns raises to the point of prophesy. Tedder v. State, 322 So.2d 908 (Fla. 1975). The jury instructions used in the penalty phase portion of a capital trial generally and in this case specifically fail to eliminate the Caldwell problem.

This Court should reverse Carter=s sentence of death and remand for a new sentencing hearing using jury instructions that properly emphasizes their crucial role as one of the co-sentencers in this capital case. See, Espinosa v. Florida, 525 U.S. 1079 (1992).

CONCLUSION

Based on the arguments presented here, the Appellant, Pinkney Carter, respectfully asks this Court to do one of the following: 1. Reverse the trial court's judgment and sentence and remand for a new trial. 2. Reverse the trial court's sentence of death and remand for imposition of a life sentence. 3. Reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury, or 4. Reverse the trial court's sentence of death and remand for a new sentencing hearing before the judge only.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to , Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050, and to appellant, **PINKNEY CARTER**, #127513, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this _____ day of August, 2006.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.210(a)(2), this brief was typed in Times New Roman 14 point.

Respectfully submitted,

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_____

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