IN THE SUPREME COURT OF FLORIDA

ANTHONY WELCH,)
)
)
Appellant,)
)
vs.) CASE NUMBER SC06-698
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

The original record on appeal comprises twenty-five consecutively numbered volumes. The pages of the first five volumes are numbered consecutively from one to 702. Volume six begins renumbering the pages sequentially from page one through 2396 which concludes volume twenty-five. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate pages.

In November, a supplemental record was filed with this Court. The supplemental record comprises four volumes numbered consecutively beginning with volume one. These page numbers are also numbered consecutively from one to 447. Counsel will refer to this portion of the record in the same way with the addition of

ASR@.

STATEMENT OF THE CASE

On January 1, 2001, the 2000 fall term grand jury returned an indictment charging Anthony Wayne Welch, the appellant, with two counts of first-degree premeditated murder, one count of robbery with a deadly weapon, one count of dealing in stolen property, and one count of grand theft. (I 151-53)

On December 22, 2000, following his arrest, Welch filed a notification of exercise of his constitutional rights. (I 116-117)

On January 26, 2004, appellant filed a motion to suppress physical evidence seized following his arrest. (II 251-255)

On June 9, 2004, the state and appellant filed a joint stipulation agreeing that the state of Florida would not offer appellant=s statements obtained during his interview at the time of his arrest This stipulation was based on a ***Miranda*** violation and did not address the voluntariness of the statement. Prosecutors agreed not to offer the statements at trial, unless appellant chose to testify. (II 270)

Appellant filed numerous motions attacking the constitutionality of Florida=s capital sentencing scheme. ***See, e.g.,*** (II 275-80, 284-99, 300-388, 393-95; III 407-12, 418-60; XXIII 89-90) These motions challenged the constitutionality on a variety of grounds including ***Ring v. Arizona***, 536 U.S. 584 (2002); the Fifth and Sixth Amendments as applied to the state by the Fourteenth Amendment; inadequate jury instructions; inadequate appellate review; and the admissibility of hearsay evidence at

the penalty phase. Prior to trial, the court granted appellant=s motion in limine excluding evidence that Kyoko Johnson was murdered on her birthday. (III 546-47; VI 15-18) During her testimony, the victim=s daughter-in-law mentioned that Kyoko was murdered on her birthday. (XVII 1341-42) Appellant moved for a mistrial, which the court ultimately denied. (XVII 1342-48) Additionally, the trial court overruled appellant=s initial objection when the prosecutor mentioned in opening statements that Rufus Johnson had undergone heart bypass surgery. (XVI 1236-37) When a subsequent witness testified to this fact, the trial court sustained appellant=s contemporaneous objection. (XVI 1292-93) The witness ultimately testified to that fact anyway. (XVI 1296)

Prior to trial, appellant filed a motion to suppress his statements to police officers made the night of his arrest. (III 494-95) Following a hearing, the trial court denied the motion. (III 525-33; SR II-IV)

During jury selection, the state exercised their first peremptory challenge on a woman. Appellant objected and requested a gender-neutral reason. The trial court ruled that a pattern of discrimination had not been established and did not require the prosecutor to state a reason. (XII 822-26)

During jury selection, the trial court denied several cause challenges requested by appellant. After exhausting all of his peremptory challenges, appellant requested more. The trial court allowed one additional peremptory challenge but denied any

additional requests. Appellant identified a jury who he would peremptorily challenge if allowed. (? XII 830-35; XIV 1044-48, 1052; XV 1206-14)

During trial, appellant objected to testimony that he had declined several offers of cocaine from his roommate in the months preceding the murders. Following a proffer, the trial court overruled the objection and allowed the testimony. (XVIII 1483-1503)

The trial court allowed the admission of several photographs over appellant=s relevance objection. (XVII 1408-20; XVIII 1549-64; XIX 1599-613, 625-26; State=s exhibits 8-12, 45-49, 61-71).

The trial court overruled appellant=s objections (improper argument) when the prosecutor argued during closing that justice requires the imposition of the death penalty.

Over appellant=s objection, the trial court instructed the jury as to the Aheightened premeditation@ aggravating factor. (XXIV 2164-78) Ultimately, the trial court rejected the applicability of this factor. (IV 671)

Following deliberations, the jury returned with unanimous recommendations that Andy Welch should die for each of the two murders. (IV 643-44)

On March 7, 2006, the trial court sentenced Welch to die for each of the two murders. (I 71-109; IV 666-88) The trial judge found three aggravating circumstances; (1) prior violent felony convictions (the contemporaneous convictions),

(2) during the commission of a robbery, and (3) especially heinous, atrocious, or cruel.

The trial court found three statutory mitigators applicable. These were:

> (1) Welch was under the influence of extreme mental or emotional disturbance;
> (2) Welch=s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;
> (3) Welch=s age of twenty two coupled with his immaturity.

(IV 673-75) The trial court found a total of nine nonstatutory mitigating circumstances, giving most little weight and a few factors Asome weight.@ (IV 675-79)

Appellant filed a timely notice of appeal on April 4, 2006. (IV 693) This brief follows.

STATEMENT OF THE FACTS

The Guilty Pleas

Appellant, Anthony Wayne Welch, pleaded guilty as charged to the two first-degree murders of Kyoko and Rufus Johnson, robbery with a deadly weapon, dealing in stolen property, and grand theft of a motor vehicle. (VII 70-85) Welch pled Astraight up@ to the outstanding charges without any consideration from the state. (VII 76-77) During the plea colloquy, Welch admitted that on December 14, 2000, he went to the Johnson residence with the intent to rob them. During the course of the robbery, he hit both victims, ultimately killing them. Using Rufus Johnson=s truck, Welch took stolen property from the house to his apartment. He pawned some of that property the following day. (VII 81)

Welch=s Confession

Although Welch initially denied any involvement to police, he ultimately confessed. (XX 1767-1844; State=s Exhibit 81) After that, Welch consistently admitted his involvement in the deaths of Mr. and Mrs. Johnson. He was also consistent in his denial of remembering details of the events that night.[1] (XXIII 2043-44) His memory failure corroborated his admitted heavy use of alcohol and cocaine

[1] A psychological test indicated that appellant was not malingering in his memory impairment. In other words, his inability to remember the details of the murders was genuine. (XXIII 2063-66)

for the week preceding the murders. (XXIII 2044)

Appellant went to the Johnson household with an extortion note[2] intending to rob them. (XXIII 2044) Welch remembered[3] the Johnsons sitting on the couch as he stood in front of them. After pacing for quite a while, Welch hit the Johnsons with a weapon until they fell to the floor and appeared to be dead. Welch did not remember exactly what type of weapon he used. Appellant remembered stealing a number of items from the household. (XXIII 2044) Appellant had very limited recollection of using a knife or a sword[4], the blunt objects, any movement of the victims, any tying of wrists, and any use of duct tape. (XXIII 2044-45) Welch had no explanation of how Kyoko=s body ended up in the bedroom while Rufus Johnson=s body remained on the floor in the living room. Welch did remember covering Kyoko=s mouth with duct tape to silence her praying. (XX 1767-1844; State=s Exhibit 81)

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[2] Welch remembered the note.

[3] Prior to the murders, Welch had been drinking heavily and had consumed a large quantity of cocaine.

[4] Welch did not bring a weapon to the house. He apparently armed himself with Rufus Johnson=s golf putter and some type of knife from the house.

The Murders

Andy Welch and his family had previously lived next door to Kyoko and Rufus Johnson. The Welches moved to a different neighborhood several years before the murders.

At the time of the murders, Andy Welch, the appellant, was sharing an apartment with Heather Ann Bartczak and her boyfriend, Joie Estevez. Bartczak and Welch had signed a joint lease for the apartment at the beginning of October, 2000. In December Bartczak discovered that appellant had not paid his share of the rent in November. Late fees accumulated which Bartczak paid. (XVIII 1474-81)

The day before the murders, Andy Welch had gone to the Johnsons= home. He needed a ride because his own vehicle broke down. Andy Welch returned to the Johnsons= home the following day.[5]

Andy Welch went to the Johnson home unarmed. He had written a fraudulent Aransom@ note in an attempt to extort $5000 from the Johnsons. The note claimed that Andy=s employer wanted Rufus Johnson dead. Andy proposed a scheme to avoid any bloodshed, but the Johnsons needed to give Andy the $5,000. When the

[5] The Johnsons= next door neighbor saw a young man who fit Welch=s description in their driveway that morning. During his brief observation, he did not notice Welch to be under the influence. (XVI 1270-87)

Johnsons were not forthcoming with the money, Welch apparently Alost it@. He armed himself with Rufus=s golf putter and beat the Johnsons to death. He recalled Rufus and Kyoko sitting on the couch as he stood in front of them. He remembered picking up some type of weapon, and hitting them several times until they fell to the floor and stopped moving. He did not recall cutting or stabbing the Johnsons. He also did not recall using a shoelace around Rufus=s neck. He did recall placing a piece of duct tape over Kyoko=s mouth so that he could not hear her praying. (XXIII 2044 ???)

Welch removed several appliances from the Johnson=s household. They included two televisions, a microwave oven, and a boat motor. He transported the stolen property using Rufus Johnson=s truck. He took some of the property to his apartment and also pawned some.

Welch was subsequently late for his date that night. He called his girlfriend several hours later and the two met at a Walmart in Melbourne. Welch explained that he been in a car accident. He appeared to be very pale and was trembling. (XVIII 1514-22) Other than that, Welch=s girlfriend did not notice anything else unusual about his behavior. She did believe that he was under the influence of drugs or alcohol. (XVIII 1522-23)

The Johnsons= relatives last spoke to them on December 14, 2000. Kyoko=s daughter-in-law, Nancy Johnson, spoke to her on the phone at approximately 6:00

p.m.[6] (XVII 1339-42) When their relatives could not reach the Johnsons for several days, they drove from their home in central Florida to the home of Kyoko and Rufus Johnson. They found the front door unlocked, walked in, and discovered the bodies of the Johnsons. They called the police who processed the crime scene and subsequently arrested Anthony Welch.

The Autopsies

[6] Nancy Johnson recalled that she last spoke to her on Kyoko=s birthday. (XVII 1342)

Kyoko Johnson died as a result of multiple blunt and sharp force injuries and strangulation. (XVIII 1566-68, 1589) Bruises to her forearms, arms, hands, ankles, feet, and shins were consistent with blunt force injury caused by kicks or punches. (XVIII 1566) The bruises were consistent with defensive wounds. They could have been caused by hands or feet or any hard, heavy object. (XVIII 1572-73, 1578) Kyoko had one deep, gaping wound to her forehead that was consistent with being inflicted by a sharp blade. Fractures implied severe force with a sharp object.[7] (XVIII 1568, 1581) Kyoko also suffered a gaping wound to the throat which cut through her windpipe[8] (XVIII 1569-70); and four deeply sized wounds on her face. A severe metaforce would be required to inflict these wounds. (XVIII 1573-75) There was evidence that Kyoko had duct tape placed over her mouth prior to the attack. (XVIII 1588-89)

Rufus Johnson suffered two different types of wounds, incisive and gaping. (XIX 1629) His face, neck, and head exhibited multiple lacerations consistent with slashing by a sharp edged instrument. (XIX 1629, 1632-42) The autopsy also revealed two puncture wounds to the face consistent with stabbing by the point of a

[7] The medical examiner opined that all of the wounds inflicted on Kyoko Johnson occurred while she was still alive. (XVIII 1568-69; XVIII 1575-80)

[8] This wound was also consistent with being inflicted by a weapon with a sharp edge. (XVIII 1586-87)

knife. (XIX 1639-40) The gaping wounds on Rufus Johnson=s face were consistent with a blunt heavy object and could have been inflicted by the golf putter kept in the home. (XIX 1629-30) Rufus Johnson=s body also showed furrow marks on his wrists which were consistent with the application of a ligature. During the autopsy the doctor found a shoelace embedded in the neck area. (XIX 1630-32) The medical examiner opined that at least some of Rufus Johnson=s wounds were consistent with defensive wounds. (XIX 1649)

The Stipulated Evidence

The trial court instructed the jury as to several stipulations. The handwritten ransom note recovered from Kyoko=s body was written by Andy Welch and had 21 of his fingerprints on it. The police seized numerous items belonging to the Johnsons from Welch=s apartment. The property included a microwave, a television, and a video cassette recorder. The police also seized clothing belonging to Welch that had traces of Rufus Johnson=s blood. Police seized other stolen property from Welch=s truck including several decorative oriental-style swords and a cordless phone. Clothing worn by Welch on the night of the murders had blood stains that were a statistical match for Rufus Johnson. A television and an outboard motor belonging to the Johnsons were pawned by Welch two days after the murder at a local shop. A golf club putter found in a retention pond near Welch=s apartment contained weak chemical indications for the possible presence of blood on the putter=s head. (XXI 1860-66)

The Crime Scene

A blood spatter expert investigated the scene of the murder the night the bodies were found. Rufus Johnson=s body was found on the floor of the living room in front of the couch. The expert concluded that Rufus Johnson was sitting on the couch when at least one blow was inflicted. At some point Rufus either slid down or was pulled down from the couch to a prone position on the floor. Multiple, forceful blows were administered, while he was in the prone position on the floor. (XX 1690-98)

Kyoko Johnson=s body was lying prone on the bed in the bedroom. Blood spatter evidence indicated that she remained in one position on the bed when she was beaten. (XX 1705-06) The expert opined that Kyoko was seated on the edge of the bed when some of her blood was shed. (XX 1707-9; 1712-13) An absence of blood led the blood spatter expert to believe that Kyoko=s ankles might have been covered with duct tape while she bled. (XX 1709-10) However, a scientific test indicated an absence of any physical evidence that Kyoko=s ankles were taped in any way. (XX 1717-19)

Evidence in Mitigation

Andy=s early years

Andy Welch was born prematurely, which one doctor termed Asignificant.@ (XXIII 2038-39) Lorna Welch described her son as normal, although he tended to be accident-prone. Appellant consistently described his family environment as somewhat

emotionally detached. Welch made good grades in elementary school, despite a problem with attentiveness. (XXIII 2039-40) Andy also demonstrated artistic ability. (XXIV 2235)

Andy Develops Kawasaki Disease

At the age of six, Andy began to wake up crying in the middle of the night. He ran a high fever, which ultimately led to his hospitalization. After several weeks, a specialist diagnosed Kawasaki disease.[9] Because of the unusual diagnosis, he was transferred to Shands Hospital in Gainesville, where he stayed for an additional three weeks. The recovery was a long arduous process. It was a full eight months following his discharge before Andy could walk again.[10] (XXI 1868-72; XXIII 2038; XXIV 2259-66) Subsequent neuropsychological test results indicated brain impairment, which could have been caused by the disease. (XXIII 2038-39)

Kawasaki=s disease can result in significant neurological complications that can result in brain injury. The experts believe that the disease causes inflamation of small arteries in the brain. As a result, there is significant likelihood in developing

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[9] Kawasaki=s disease is a very rare condition that can affect the brain. (XXII 1968) Kawasaki=s disease is characterized by a prolonged fever lasting four or five days at least. (XXII 1968) Other symptoms include coronary aneurysm and peeling skin. (XXII 1968)

[10] Andy=s concave chest never developed properly as a result of the illness. (XXI 1871)

neurological and behavioral problems. (XXII 1969-70) Dr. Wu concluded within a reasonable degree of medical certainty that the brain damage revealed by the PET scan would result in impairment and the ability to regulate aggression and to exercise proper judgment. (XXII 1970-71)

Andy=s Older Brother Commits Suicide

A second tragedy befell the Welch family when Andy was sixteen. Andy=s beloved older brother, Ricky, committed suicide. Andy, his mother, and his sister came home from school one day to find that Ricky had hanged himself. Andy was the first to actually discover the tragedy. He unsuccessfully attempted to revive Ricky.[11] (XXIII 2040; XXIV 2266-70).

Ricky=s suicide hit the Welch family hard. The family simply fell apart. (XXI 1873-77; XXIV 2219-21) Ricky=s suicide even altered the family=s eating habits. (XXIV 2272) Andy and his sister, Sandra[12] rebelled.[13] (XXIII 2131; XXIV2229-31,

[11] The doctors diagnosed post traumatic stress disorder resulting from Ricky=s suicide. (XXIII 2048-49)

[12] Sandra Welch remained damaged years later. At trial, she explained that she was prescribed medication for depression and anxiety. She was seeking a local therapist to continue treatment. (XXIV 2257-58)

[13]At the time of her testimony, Sandra was on two prescription medications for depression and anxiety. She was seeking a local therapist to continue treatment. (XXIV 2257-58)

2241-43) Andy and his sister began abusing drugs[14] and alcohol. Andy=s relationship with his parents went downhill.[15] He changed from a talkative teenager to a very quiet one.[16] (XXIV 2272) Andy refused to discuss the incident at all.[17] (XXIII 2130; XXIV 2221-23) Andy did not care about school anymore, and began getting into fights.[18] (XXI 1908-14; XXIV 2229-31, 2237-41) Formally a good student, Andy=s grades dropped dramatically. He eventually dropped out and got his GED later. (XXIV 2273-75) For the next six years, he drifted aimlessly from one job to another. (XXIII 2042; XXIV 2235-36, 2257-58)

About six months before the murders, appellant joined the navy only to be administratively discharged one month later. The navy psychiatrist diagnosed Welch with depression and alcohol abuse. (XXIII 2042-43)

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[14] The drugs included cocaine, heroin, and hallucinates. (XXI 1890-92; XXIII 2041; XXIV 2233-34, 2243-47)

[15] Andy=s girlfriend of two years testified that his parents kicked him out of the house Aconstantly.@ In high school, Andy intermittently lived with families other than his own. (XXI 1917-21)

[16] A few years later, Andy=s uncle hanged himself in his own mother=s (Andy=s grandmother) garage. Shortly thereafter, Andy=s aunt followed her husband to the grave with her own suicide. (XXI 1878-79)

[17] Sandra Welch, Andy=s sister, described Andy=s relationship with his brother, Ricky, as very close. AThey got along really well.@ (XXIV 2227)

[18] The children at school teased and taunted Andy about Ricky=s suicide. (XXI 1893; XXIV 2222)

Welch=s Brain Damage

Appellant had a history of multiple head trauma. (XXII 1968) The trauma was caused, in part, by fights when Welch was younger. People with head injuries can be more prone to developing disassociative syndrom. (XXII 1967)

One fight led to a particularly brutal beating of Andy by another boy. The boy put Andy in a chokehold until Andy was unconscious. The boy then kicked Andy in the head at least four times. Andy remained unconscious for several minutes. After regaining consciousness, Andy seemed confused. The children never told their parents about the fight. As a result, Andy never received any medical treatment for his injuries. (XXIV 2231-33)

Dr. Riebsame saw a history of explosive, aggressive behavior in Welch=s school, military and jail records. (XXIII 2047-48) Dr. Riebsame opined that this was probably caused by a combination of appellant=s psychological problems and his brain impairment. On the night of the murders, the appellant=s substance abuse was a factor as well. (XXIII 2048)

Dr. Riebsame could determine from the extent of the injuries inflicted on the Johnsons that appellant became explosively angry on the night of the murders. (XXIII 2054-55) Neurological test results confirmed that appellant reacts impulsively and makes impaired judgments during times of emotional stress. (XXIII 2057)

Dr. Riebsame=s diagnostic assessment concluded that appellant suffered from a

bipolar disorder reflecting periods of depression, anxiousness, and irritability. Appellant also suffers from a post traumatic stress disorder that can be traced back to his personal involvement in the discovery of his brother=s suicide. (XXIII 2072) Dr. Riebsame concluded that on the night of the murders, appellant was suffering from an extreme emotional disturbance that substantially impaired his ability to conform his conduct to the requirements of the law. (XXIII 2074-77) **Welch=s Mental and Emotional Levels**

Anthony Welch was twenty two years old at the time of the murders. (XXIII 2066-67) Around the time of the murders appellant had an overall mental age of fifteen. Dr. Riebsame hypothesized that appellant=s emotional and mental development stopped around the time of his brother=s suicide. (XXIII 2067) Testing also revealed that Andy operated at the level of a thirteen-year-old in his ability to engage in abstract reasoning and decision making. (XXIII 2068-69)

In the week prior to the murders, Dooley saw Andy at a sports bar. Andy appeared more than just intoxicated, he had a glazed look on his face and resembled a zombie. Dooley described talking to Andy that night like Atalking to a brick wall.@ (XXIII 2133)

The PET Scan

Dr. Joseph Wu, perhaps the preeminent expert in PET scans, participated in a PET scan of Andy=s brain. Dr. Wu concluded that Andy=s brain showed significant

asymmetry in the parietal cortex, the frontal lobe, the temporal lobe, and the occipital lobe. (XXII 1941-62) Dr. Wu found Andy=s brain damage to be consistent with a history of brain trauma, Kawasaki disease, or both. (XXII 1959-60) Andy=s PET scan was also consistent with bipolar disorder. (XXII 1964)

Dr. Wu explained how Andy=s brain abnormalities could affect his behavior. The frontal lobe is the source of language, socialization and civilizing judgment and behavior. (XXII 1862-64) Damage to one=s frontal lobe can result in significant impairment of the ability to exercise good judgment. (XXII 1963-64) Dr. Wu further explained that appellant=s use of stimulants such as cocaine could trigger a manic episode and/or a disassociative state. (XXII 1965-68) This would accounted for appellant=s lack of memory about the events that night.

SUMMARY OF THE ARGUMENTS

A new penalty phase is required because of irrelevant, prejudicial evidence. Over objection, the state presented testimony that appellant=s roommate had offered him cocaine several times and he had declined. Appellant=s refusal of cocaine from his roommate had no relevance in proving that he was not high on cocaine at the time of the murders. The introduction of this evidence improperly denigrated valid mitigation that Welch was on cocaine that night.

The trial court committed reversible error in denying appellant=s motion to suppress and allowing the state to introduce Welch=s confession. Once he was in

custody, Welch terminated the interview. The state did not scrupulously honor his invocation of his right to remain silent. Police kept him at the station for an inordinate amount of time rather than transporting him to jail. Additionally, the agent reinitiated interrogation (by a statement designed to elicit admissions.) Police informed Welch of his rights the second time only after he had already been Abroken.@ Additionally, police did not immediately cease questioning when appellant invoked his right to remain silent. There was not a significant laspe of time between the first questioning and the second questioning. Additionally, the questioning both times related to the same offense and took place in the same location. The totality of the circumstances reveal that appellant=s subsequent waiver was not voluntary.

The trial court ruled in limine excluding evidence that Kyoko Johnson was murdered on her birthday. The prosecutor failed to warn his witnesses, and one witnesses testified that she last talked to Kyoko=s birthday which happened to be the day of her murder. Additionally, the jury inappropriately learned that Rufus Johnson was the survivor of heart surgery. This evidence was unfairly prejudicial rendering appellant=s death sentences constitutionally infirm. Similarly, goring photographs that were not relevant to any material fact should have also been excluded.

During jury selection, the state exercised its first peremptory challenge against a

woman. When defense counsel interposed a ***Neil***[19] objection, the trial court erroneously ruled that a pattern of discrimination had not been shown. As a result, the court did not require the state to offer a gender-neutral reason for the peremptory.

A second jury selection issue arose where the trial court erroneously denied a cause challenge on Juror Trevillian who favored the death penalty for these crimes. He believed that life imprisonment is a burden on taxpayers and that death was the preferred punishment.

The trial court also erroneously overruled appellant=s objections during the prosecutor=s closing argument. The prosecutor told the jury that justice required the imposition of the death penalty in this case. The prosecutor began his argument with that theme and concluded in a like vein.

The trial court also erroneously instructed the jury on the Aheightened premeditation@ aggravating circumstance. Defense counsel objected and argued that the evidence did not support the circumstance. In fact, the trial court rejected the application of the factor in the written findings of fact in support of the death penalty. Since the jury was instructed on an inapplicable factor, a new penalty phase is required.

The trial court also erred in allowing several witnesses testify concerning areas

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[19] ***Neil v. State***, 457 So.2d 481 (Fla. 1984).

beyond their expertise. The evidence related to blood spatter, blood transference, defensive wounds, and the presence/absence of blood indicating that the victims were bound.

Appellant proved a plethora of mitigating evidence. The three aggravating factors found by the trial court were not so substantial that they outweighed the mountain of mitigation. Appellant also challenges the constitutionality of Florida=s death sentencing scheme. The procedure violates the Sixth Amendment right to a jury trial . Additionally, the instructions improperly denigrate the role of the jury in deciding appellant=s fate.

POINT I

THE TRIAL COURT ERRED IN OVERRULING APPELLANT=S TIMELY OBJECTION AND ALLOWING THE STATE TO PRESENT IRRELEVANT EVIDENCE THAT WELCH HAD PREVIOUSLY DECLINED COCAINE WHEN OFFERED BY HIS ROOMMATES RESULTING IN AN UNWARRANTED DENIGRATION OF VALID MITIGATION THAT WELCH WAS HIGH ON COCAINE AT THE TIME OF THE MURDERS.

Heather Bartczak and her boyfriend Joie Estevez began sharing an apartment with Welch approximately ten weeks before the murders. (XVIII 1474-75) Heather testified that shortly before the murders, appellant had difficulty making his portion of the rent payment. (XVIII 1478-81) She also testified that appellant showed up at the apartment shortly after the murders with a microwave and a television set. (XVIII 1481-83) Additionally, following a proffer and over a timely relevance objection by defense counsel, the state presented Heather Bartczak=s testimony that she and her boyfriend, Joie Estevez, often used cocaine in the apartment that they shared with Welch. They frequently did so in Welch=s presence. On the four or five occasions that Heather offered cocaine to Welch, he declined. (XVIII 1502-3)

The admission or exclusion of evidence is generally a matter of discretion with the trial court. As such, abuse of discretion is the appellate standard of review. ***San Martin v. State***, 717 So. 2nd 462 (Fla. 1998). Appellant contends that the trial court

abused its discretion in allowing Heather Bartczak to testify that Anthony Welch had declined her offer of cocaine on a handful of occasions. That testimony had no relevance to any issue at hand. The state contended that the evidence was relevant to refute appellant=s confession to the police that he had been high on cocaine at the time of the murders:

> The particular statement we are concerned is the statements to law enforcement he had used a significant amount of cocaine prior to the actual offenses in this regard. We think that certainly that would go to impeach the statement, his use regarding the cocaine.
> We do believe that under the circumstances that is an indication that at least in terms of the controlled substances of cocaine, there was no cocaine; that he would not engage in the use of cocaine and it goes toward the aggravators and not the emotional or mental maladies.

(XVIII 1487-88)

Appellant=s Prior Refusal of Offers of Cocaine Had No Relevance.

The fact that Anthony Welch declined his roommates= offer of cocaine on a handful of occasions was not relevant to prove or disprove that he was not high on cocaine at the time of the murders. Heather candidly admitted that she, her boyfriend, and appellant used many other kinds of drugs, specifically ecstasy, marijuana, and alcohol. Her memory of appellant=s drug use in her presence was hazy at best. She believed that appellant used ecstasy and was fairly sure that she had shared marijuana with him in the past. She clearly remembered that all of them drank Aa lot of alcohol.@

The prosecutor appeared to believe that Welch would never turn down cocaine

if, in fact, he was a user. Neither logic nor law support this absurd conclusion.

Professor Ehrhardt writes:

> Evidence that a person has engaged in a particular type of conduct in the past is not, without more, admissible to prove that the person acted in the same way on the occasion in question. For example, evidence that a person has used drugs or alcohol in the past is not admissible to prove they were using drugs or alcohol on a subsequent occasion, unless evidence of the prior usage can be found to be a habit.

C. Ehrhardt, Florida Evidence, '406.1 (2006 Edition), citing ***Botte v. Pomeroy***, 497 So.2d 1275, 1278 (Fla. 4th DCA 1986). It makes even less sense that a person who has declined an offer of illicit drugs on a handful of occasions would **never** consume those illicit drugs on another occasion.

Even Heather Bartczak recognized the illogical nature of the state=s position. After the trial court ruled but before the jury returned, the trial court instructed the witness to listen carefully to the questions and answer them without elaboration. (XVIII 1497) The witness gratuitously stated:

> He may very well have done [cocaine] on the night that we are talking about, the night in question. I just wasn=t aware of that.
>
> THE COURT: I understand, ma=am. That is a valid issue, if they want to go into that, Ma=am.

(XVIII 1497-98) Despite this exchange, the trial court never did realize the irrationality of the state=s argument.

Appellant may have declined Heather=s offer of cocaine in the past for a variety of reasons.[20] He might have been afraid of cocaine and its effects at that time. His first experience with cocaine might have been during the time period immediately prior to the murders.[21] Welch may have been apprehensive about using cocaine in front of others, even his own roommates. He may have wanted to hide his cocaine use for fear that other, more straight-laced, friends or family might find out. He may have declined the offer of an expensive and illicit drug because he did not want to be indebted to Heather or Joie. He might have been afraid of developing a habit that he could not afford. The admission of the objectionable evidence had the effect of negating appellant=s claim that he was on a week-long drug and alcohol bender at the time of the murders.

Although appellant maintains there is **no** probative value, any **slight** probative value was substantially outweighed by the unfair prejudice. ***Section 90.403***, Florida Statutes (2000). ***Lane v. State***, 457 So.2d 586 (Fla 3rd DCA 1984), held that the trial court=s restriction of cross-examination of the state=s identification witnesses (who

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[20] Even Bartczak initially denied using illicit drugs despite the prosecutor=s assurances that there would be no legal repercussions. (XVIII 1493-95) At the time of her testimony, Bartczak faced up to fifteen years incarceration with two felony charges and five misdemeanors pending. (XVIII 1504, 1511-13)

[21] Defense counsel also objected based upon the fact that Heather=s testimony failed to establish a precise time frame. (XVIII 1486)

were selling marijuana prior to the robbery) was not an abuse of discretion. Precluding cross-examination of another witness who had previously undergone a mental evaluation with undisclosed results was also not error. The appellate court held that the minimal relevance, if any, was far outweighed by the prejudicial impact. ***See also People vs. McCommon,*** 399 N. E. 2nd 224 (Ill. 1st Dist. 1979)[The trial court did not abuse its discretion in refusing to permit defendant to cross-examine prosecution witness in regard to such witness=s use of narcotics. There was no evidence in the record that the witness was using narcotics at times relevant to the case.]

The State Successfully Excludes Other Evidence Showing Appellant Abused Drugs

The prosecutor fought tooth and nail to exclude and minimize evidence that Andy Welch was a drug/alcohol abuser. ***See, e.g.*** (XXIII 2141-43)[objection successfully excludes evidence of Welch=s rumored drug use.]; (XXI 1921-30)[during cross-examination of Andy=s best friend in high school, prosecutor elicits testimony that friend saw Welch drunk on weekends but did not see him ingest any other drugs.]; (XVI 1281-84)[state=s first witness, victims= next-door neighbor, testifies that Welch did not appear to be under the influence when he was spotted on the morning of the murders.]; (XVIII 1521-23)[upon meeting his girlfriend after the murder, she did not think that he was under the influence of drugs or alcohol, although she did indicate that he was very pale and was trembling]; (XVIII 1529)[prosecutor elicits

testimony that Welch=s girlfriend did not see him ingest any controlled substances nor overindulge in alcohol in the days **following** the murders.].

The Prosecutor Makes the Irrelevant Evidence a Feature of Closing Argument

The error in admitting the objectionable evidence was exacerbated by the prosecutor during his final summation. In closing, the prosecutor spent a great deal of time arguing that Welch was not under the influence of drugs, alcohol, or mental impairment during the murders. He argued there was no evidence, Aexcept from Mr. Welch=s own mouth...he has some drug or alcohol addiction@; Anot one bit of evidence from his friends or his family that he suffered some alcohol addiction...drug addition or anything...from his sister alone - - anything but the experimental use of powder cocaine....by the people who are closest to him. The people he lived with....saw no signs of drug addition or drug abuse....@. (XXV 2315-16) The prosecutor denigrated the testimony of one witness who had seen Welch drunk in a bar shortly before the murders.[22] (XXV 2316-17)

The prosecutor also belittled other incidents where Welch was impaired from alcohol or drugs. (XXV 2318-19) The prosecutor argued that Welch=s military records (which revealed that Welch drank a case of beer a day) were not worthy of belief.

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[22] Here the prosecutor actually mischaracterized the evidence. Dooley actually testified that Andy appeared to be **more** than just intoxicated. He had a glazed look like a zombie. Talking to Welch that night was like Atalking to a brick wall.@ (XXIII 2133)

(XXV 2323) The prosecutor took the jury step by step through appellant=s actions on the day of the murders. He contended that the deliberate nature of appellant=s actions were not characteristic of an impaired person. (XXV 2326-31)

The state brought the issue home by concluding closing argument:

> Even Ms. Heather Bartzcak who, ladies and gentlemen, she is a drug addicted lost soul. She knows what being addicted to cocaine is. She told you the truth about that. When you do cocaine if you got that on your back, you don=t turn it down.
>
> **Andy didn=t do it. He didn=t do cocaine**; and while she wanted to say that, yeah I know he=s done drugs, she can=t tell you when or what it was.
>
> You=re going to be asked - - I=m asking you to return a recommendation of death.

(XXV 2338)(Emphasis added.)

It is abundantly clear that the trial court erroneously allowed the jury to hear objectionable evidence that tended to refute appellant=s best mitigation, specifically that he was high on cocaine. The burden is on the state to prove beyond a reasonable doubt that the error did not contribute to the verdict. See ***State v. DiGuilio***, 491 So.2d 1129 (Florida 1986). In a penalty phase where the jury weighs the aggravating factors against the mitigating factors, this burden should be especially difficult to meet.

The Issue of Welch=s Drug Use was of Critical Importance to the Jury.

As fate would have it, the record reveals that the issue of Andy=s impairment on the night of the murders was of critical importance to the jury during their

deliberations. More than five hours after retiring to deliberate (XXV 2379, 2382), the jury returned with two questions. The jury asked for an explanation of the first instruction under mitigating circumstances. Specifically, the jury asked the court to explain Awas he impaired or was he not?@ (XXV 2382) The second question asked the court to define dissociative symptoms as listed under the eleventh proposed mitigating circumstance. (XXV 2382) Both parties agreed that the relevant evidence had been presented to the jury and, without objection, the trial court replied in writing that the court could not explain either circumstance further than it already had. The jury must rely on the evidence introduced to make a factual determination. (XXV 2385-86) Less than one hour later, the jury returned with two unanimous recommendations that Andy must die. (XXV 2386-91) A new penalty phase is required. ***Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, ' ' 9 and 16, Fla. Const.***

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT=S CAUSE CHALLENGE OF JUROR TREVILLIAN WHO CLEARLY BELIEVED THAT DEATH WAS THE APPROPRIATE PENALTY.

The standard for reviewing a trial judge's decision on a challenge for cause is abuse of discretion. ***Fernandez v. State,*** 730 So.2d 277(Fla. 1999) and ***Castro v. State***, 644 So.2d 987, 990 (Fla.1994). Trial judges must settle the query as to "whether the juror can lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given to him [or her] by the court." ***Lusk v. State***, 446 So.2d 1038, 1041 (Fla.1984). "When making this determination, the court must acknowledge that a 'juror's subsequent statements that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes.' " ***Rodas v. State***, 821 So.2d 1150, 1153 (Fla. 4th DCA 2002), review denied, 839 So.2d 700 (Fla.2003). "Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality." ***Williams v. State***, 638 So.2d 976, 979 (Fla. 4th DCA 1994), ***review denied***, 654 So.2d 920 (Fla.1995). A juror must be excused for cause if any

reasonable doubt exists as to whether the juror possesses an impartial state of mind. ***See Bryant v. State***, 656 So.2d ,426, 428(Fla. 1995).

In the instant case, the responses of prospective Juror Trevillian[23] reflected doubt about whether he could set aside his strong belief that death was the appropriate penalty, that life imprisonment was a burden on taxpayers, and that, if sentenced to life, Welch might be released someday. The statements by Juror Trevillian created more than a reasonable doubt about his ability to be fair and impartial. This juror should have been struck for cause, and the court erred in denying the appellant=s challenge for cause. ***Busby v. State***, 894 So.2d 88(Fla. 2005).

Defense counsel questioned Trevillian about the possibility of life imprisonment:

> MR. MCCARTHY: Suppose you are chosen for the jury. You have an alternative as life in prison. He is a relatively young man. We are talking decades. Would that affect your thought process in deciding whether that is a recommendation that you would make honestly?
>
> MR. TREVILLIAN: It is a recommendation. My gut feeling? Is that like I said earlier, I believe in the death penalty. I believe for a crime like this an individual deserves or has earned death....
>
> there is no closure for the family; and also it is a burden on the taxpayers. I don't know about the laws in Florida which might one day allow or its

[23] Juror Trevillian is a major and squadron commander in the United States Air Force. (IV 334-35; VI 679-83) The record also reflected that Trevillian did not have a ready smile. (VI 682)

governor or somebody to pardon an individual. I'm saying --

MR. MCCARTHY: You are saying maybe he can get out some day. The law says life means life.

MR. TREVILLIAN: I said the main reasons were he committed this crime and earned death by killing two people. He is going to be a burden on the taxpayers. The third reason is for closure for the family and the individuals who knew them....the death penalty for me would bring closure.

MR. MCCARTHY: It sounds like you have a problem with a recommendation of life in this case. You know he has admitted two killings. You know that. That is a given. We know that going in. Can you recommend honestly **B**

MR. TREVILLIAN: Sure. Like you said, this morning, present the details or they present details. If there is any limiting factors, sure, I can go for life in prison. I'm not saying it would be a hard sell.

MR. MCCARTHY: Would it be hard for somebody to convince you of that, a hard sell?

MR. TREVILLIAN: As long as they have the evidence.

MR. MCCARTHY: Whose burden would that be to convince you it should be life or death?

MR. TREVILLIAN: According to the discussions this morning, the State.

MR. MCCARTHY: Would it be a fair statement you are starting out it should be death until somebody convinces me otherwise?

MR. TREVILLIAN: That is a fair assessment, yes, sir.

MR. MCCARTHY: It would take somebody convincing you there is a reason not to give death in order for you to do that; would that be a fair statement?

MR. TREVILLIAN: I think it is a little bit extreme. If you break it down, yeah.

MR. MCCARTHY: There is no wrong answer. Nobody is wrong. I doubt there is anyone here that has an opinion that somebody else doesn't hope to say. There is nothing wrong with that he alternative you feel is a waste of money.

MR. TREVILLIAN: Sure do.

MR. MCCARTHY: With all that in mind your personal feelings -- it is sort of tough to follow the Judge's instruction. I know we all follow the law, and we want to do that and say that. Sometimes personal feelings can prevail, would you agree? Honestly.

(IX 376-79)(Emphasis added.)

MR. MCCARTHY: Let me put it just a different way. Can you tell us that beyond a reasonable doubt your personal feelings aren't what would control?

MR. TREVILLIAN: I've been in situations before where my entering argument has been changed, so if you are asking me can I be swayed? Sure.

MR. MCCARTHY: It would take some swaying.

MR. TREVILLIAN: (Nodding head.)
MR. MCCARTHY: Because you started out with the presumption it should be death, he has killed two people. That is your personal opinion.

MR. TREVILLIAN: Yes, it is.

MR. MCCARTHY: That is where we are starting with this despite what the Judge may have said or despite what Mr. Parker told you the law is, that is where you are starting.

MR. TREVILLIAN: No, I'm starting being in compliance with the law. Don't say I'm not following directions, sir. Like you said, everyone has an

opinion. I'm starting with my opinion.

MR. MCCARTHY: A strong opinion.

MR. TREVILLIAN: You can say that.

MR. MCCARTHY: An opinion that starts out death until somebody convinces you otherwise - -

MR. PARKER(prosecutor): Judge, with all due respect, argumentative.

THE COURT: Sustained.

(IX 382-83) Trevillian later raised his hand indicating that life without possibility of parole was not an adequate penalty. (IX 387-88)

The state attempted to rehabilitate Trevillian. After recognizing Trevillian=s Avery strong personal opinion@, the prosecutor asked if he would be able to follow the law because of his Astrong feelings.@ Trevillian responded:

> Like I said, I=ll be able to listen to the evidence. My personal feelings will not interfere with the process that have (sic) been explained by you.

(IX 391)

Appellant unsuccessfully challenged Trevillian for cause. (IX 401-403) In denying the challenge, the trial court placed great emphasis Trevillian=s repeated assertions that he could follow the law and the court=s instructions. Appellant later renewed his challenge to no avail. (XII 821-22) Noting the trial court=s previous rulings, Appellant ultimately used one of his precious peremptory challenges to remove Trevillian from the jury. (XII 830-31)

The appellant preserved this issue for review pursuant to ***Trotter v. State***, 576

So.2d 691 (Fla. 1990). Once appellant had exhausted all his peremptory challenges, appellant unsuccessfully requested additional peremptories to challenge Juror Fountaine[24] and Juror Foucault.[25] Ironically, Juror Fountaine was eventually stricken when the trial court eventually did grant one additional peremptory challenge.[26] The appellant made a timely objection to the jury panel. (XV 1213-14) Prior to the swearing of the jury, appellant identified a seated juror that he would have struck (Juror Foucalt) had the trial court granted an additional peremptory challenge. (XV 1213-14) Because an objectionable served on Welch=s jury, when a cause challenge

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[24] Fountaine favored the death penalty, believing it a deterent, but did not reach the threshold for a cause challenge. Fountaine ran a juvenile detention center for twenty years and was now retired, living in a trailer park. (XIV 1044-48)

[25] Juror Foucault believed in the death penalty and thought death was the proper penalty in most cases. She was happy to serve calling it her duty and privilege as an American citizen. (XIV 1052)

[26] Fountaine inadvertently had contact with the prosecutor and the evidence outside the courtroom. Although Fountaine assured everyone that he saw nothing, defense counsel nevertheless wanted him excused. (XV 1060-62, 1206-9)

was erroneously denied, Welch is entitled to a new trial. ***Amends. V, VI, VIII and XIV, U. S. Const.; Art. I, ' '9, 16, and 17, Fla. Const.***

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT=S MOTION TO SUPPRESS HIS STATEMENT WHERE LAW ENFORCEMENT DID NOT SCRUPULOUSLY HONOR HIS RIGHT TO REMAIN SILENT.

A. Standard of Review

This Court recently explained the standard of review for orders on motions to suppress:

> [A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.

Nelson v. State, 850 So.2d 514, 521 (Fla.2003) (quoting Connor v. State, 803 So.2d 598, 608 (Fla.2001).

B. Pertinent Facts[27]

Police found the extortion note written by Welch when they performed the

[27] These facts are culled from the trial court=s order denying Appellant=s motion to suppress as well as the hearing held on the motion. (III 525-33; SR II - IV)

autopsy on Kyoko Johnson. They also had evidence of phone calls made from the Johnson house to appellant=s girlfriend. The police conceded, with some reluctance, that Welch was their prime and only suspect. They concluded that they had sufficient probable cause to arrest him but wanted more, a confession.

Welch was stopped in the late evening hours while he was on a date. Although police and the state contended he was not in custody when he Aagreed@ to accompany the detectives to the police station to talk, the trial court found otherwise. The trial court concluded that Welch was in custody during the trip to the police station when he was escorted and placed in a small interview room.

Detectives advised Welch of his rights pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966). After a lengthy conversation during which the detectives ultimately accused Welch of the murders, Welch attempted to conclude the interview by stating that he did not wish to talk to them anymore. Although Agents Roberts and Wells tried to keep questioning Welch, he repeated his request to terminate the interview. Agent Roberts, admittedly frustrated and angry, instructed Agent Wells to arrest Welch before leaving the room. Wells handcuffed Welch=s hands behind his back. After inventorying some of Welch=s personal items, Wells left Welch alone in the small interview room.

Agent Harrell entered the room several minutes later and proceeded to ask Welch for his personal information and filled out part of the arrest paperwork. Agent

Harrell was in and out of the room accomplishing this task for several minutes. When Harrell finished, he left Welch alone for approximately forty-five minutes.

Welch eventually became thirsty and knocked on the locked door. Agent Harrell returned and escorted Welch out of the room to the water cooler down the hall. Realizing that Welch could leave through the fire exits if he wanted, Harrell warned Welch that if he ran, he would shoot and kill him. Welch indicated that he understood.

At the water cooler, out of sight and sound of the recording equipment, Welch asked Agent Harrell what would happen to him next. Agent Harrell replied that he would be transported to the jail in due time. When Welch asked what would happen after he was jailed, Agent Harrell explained that he faced trial on two first-degree murders where he was looking at life imprisonment or the death penalty. Agent Harrell then gratuitously added that the police did not have Welch=s side of the story but, based on all of the other evidence, he could be found guilty. Agent Harrell testified that, at that point, appellant said he wanted to tell his side of the story.[28]

Agent Harrell and Welch returned to the interrogation room where they were joined by Agent Wells. Harrell again advised Welch of his rights and asked, AWhat do you want to say?@ Welch replied, AI don=t know what to say.@ Harrell told Welch to Ajust say it.@ (III 529) After several minutes of silence Welch finally began talking with the agents and answering their questions. He ultimately admitted to the murders as best he could remember.

In the order denying appellant=s motion to suppress,[29] the trial court found, as a matter of fact, that appellant was in custody and was not free to leave while being transported to the police station. Additionally, the trial court found that Welch was in

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[28] Appellant testified that Agent Harrell told him that if he did not confess, he would surely get the death penalty.

[29] The motion to suppress was filed July 8, 2005. (III 494-95)

custody during the first interview at the precinct. However, he was advised of his rights pursuant to ***Miranda***. Therefore any statements made during that interview were ruled admissible.[30] (III 530)

The trial court ultimately ruled that the conversation between Welch and Agent Harrell by the water cooler was not Ainappropriate.@ The court concluded that there was no credible evidence to indicate that Agent Harrell promised Welch anything in exchange for his cooperation. The trial court concluded that law enforcement did not violate appellant=s constitutional rights by conducting further interrogation. (III 532) Appellant renewed his objection when the state introduced the videotape at trial.[31] (XX 1751-54, 1761)

C. The State Failed to Scrupulously Honor Appellant=s Invocation of his Right to Remain Silent.[32]

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[30] Appellant made no incriminating statements during this interview and the state did not introduce any portion of that interview at trial.

[31] The trial court appeared to think that the issue was moot since appellant pleaded guilty. However, the court ultimately reiterated her prior ruling and allowed the introduction of the evidence.

[32] The government demonstrated a pattern of violating Welch=s constitutional rights in this case. After formal charges had been filed, counsel had been appointed, and Welch had filed a signed notification exercising his Sixth Amendment right to counsel, police obtained blood and hair samples from Welch in his jail cell. The trial court denied appellant=s efforts to suppress that evidence, concluding that the evidence was non-testimonial in nature. (II 251-53, 271-72; SR I 31-64) Although not raised as reversible error in this direct appeal, appellant contends that the violation is indicative of the state=s cavalier attitude regarding Welch=s constitutional rights.

In ***Michigan v. Mosley***, 423 U.S. 96, 104 (1975), the United States Supreme Court held that resolution of the question of the admissibility of statements obtained after a person in custody has invoked his or her right to remain silent depends upon whether the person's decision to assert his or her Aright to cut off questioning@ was Ascrupulously honored.@ In holding that no Miranda violation occurred in Mosley, the Court stated:

> This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

Mosley, 423 U.S. at 105-06.

This Court cited ***Mosley*** in ***Henry v. State***, 574 So.2d 66, 69 (Fla.1991), when analyzing the resumption of questioning on the same offense after invocation of the right to silence. This Court recognized that in ***Mosley*** the Supreme Court neither set out Aprecise guidelines@ for what constitutes scrupulous adherence to Miranda nor stated that Aany factor standing by itself would be dispositive of the issue.@ Id. at 69. However, ***Mosley*** recognized five factors as relevant:

> First, Mosley was informed of his rights both times before questioning began. Second, the officer immediately ceased questioning when Mosley unequivocally said he did not want to talk about the burglaries. Third, there was a significant lapse of time between the questioning on the burglary and the questioning on the homicide. Fourth, the second episode of questioning took place in a different location. Fifth, the second episode involved a different crime.

Id. (Emphasis added.) In ***Henry***, this Court determined that variance as to one or more of the five factors was not dispositive, and therefore applied a totality of the circumstances approach.

Applying ***Mosley*** and ***Henry*** to the instant facts lead to the inescapable conclusion that police did not scrupulously honor Welch=s invocation of his right to remain silent. Police initially ignored Welch=s request to determinate the interview. Therefore, they did not Aimmediately cease@ questioning, even though Welch unequivocally stated that he did not want to talk anymore. There was no significant lapse of time between the first interview and the second interview (an hour at most). The second interview was in the same location. In fact, appellant contended below that the police deliberately failed to transport Welch to the jail after he terminated the first interview. The second interview involved the same crime rather than a different crime. Hence, the only ***Mosley*** factor that was arguably present in appellant=s case was the first one (***Miranda*** rights). However, in the next portion of this point,

appellant disputes that factor.

D. Agent Harrell=s Statement That They did not Have Welch=s ASide of the Story@ Constituted a Reinitiation of Interrogation in Violation of Appellant=s Constitutional Rights. Welch=s Subsequent Waiver was not Voluntary.

The State must establish, by a preponderance of the evidence, that the waiver of Miranda rights is knowing, intelligent, and voluntary. ***See Colorado v. Connelly***, 479 U.S. 157, 168 (1986); ***see also Ramirez v. State***, 739 So.2d 568, 575 (Fla.1999). Whether Miranda rights were validly waived must be ascertained from two separate inquiries:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the Atotality of the circumstances surrounding the interrogation@ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Ramirez, 739 So.2d at 575 (quoting ***Moran v. Burbine***, 475 U.S. 412, 421(1986)). AThe >totality of the circumstances= to be considered in determining whether a waiver of Miranda warnings is valid based on the two-pronged approach of ***Moran*** may include factors that are also considered in determining whether the confession itself is voluntary.@ ***Id***.

Further police-initiated questioning of a person in custody is not absolutely foreclosed if he or she invokes the right to remain silent but not the right to counsel. This Court implicitly recognized the distinction between assertion of the two rights in ***Traylor v. State***, 596 So.2d 957, 966 (Fla.1992):

> [I]f the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop. If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.

Id. at 966.

Appellant submits that Agent Harrell=s statement (we don=t have your side of the story) constituted interrogation. Interrogation can be either express questioning or Aits functional equivalent.)@ ***Rhode Island v. Innis***, 446 U.S. 291, 300-301 (1980). The statement was conduct that Agent Harrell should have known was reasonably likely to elicit an incriminating response. Therefore, Agent Harrell=s statement was the functional equivalent of interrogation in violation of ***Miranda***. ***Id.*** Welch=s subsequent waiver of ***Miranda*** statements to police were therefore obtained in violation of his constitutional rights. ***Amends. V, VI, and XIV U.S. Const.*** The

resulting death sentence is unconstitutional. ***Amend. V, U.S. Const.***

POINT IV

APPELLANT=S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM, WHERE THE JURY=S RECOMMENDATION WAS TAINTED BY INFLAMMATORY EVIDENCE THAT ONE VICTIM WAS KILLED ON HER BIRTHDAY AND THE OTHER VICTIM WAS A CARDIAC PATIENT.

On the day commemorating her sixty-fifth birthday, Kyoko Johnson was brutally murdered in her home. Appellant filed a pretrial motion in limine seeking to exclude this extraneous, irrelevant, and highly prejudicial fact. (III 546-47) The state did not have any opposition to the motion, which the trial court prudently granted. (VI 15-18)

For some reason, the state used a relative of the victims to establish the date of death.[33] Nancy Johnson, the victims= daughter-in-law, testified that she last talked to her mother-in-law, Kyoko, on December 14th at approximately 6:00 p.m.

> Q. Did you actually have an opportunity to try and contact them on the 14th at approximately six o=clock. p.m.
>
> A. Yes, sir, I did.
>
> Q. Were you able to actually contact and speak with them at that time?

[33] Counsel reminds this Honorable Court that appellant pleaded guilty as charged to all counts.

A. Yes, I did.

Q. Who did you actually speak with or did you speak with both Rufus and Kyoko?

A. I believe I spoke just with Kyoko.

Q. How long did you and Kyoko talk with one another at that time?

A. Maybe about ten, fifteen minutes. **It was her birthday**, so I was - -

MR. LANNING: Object.

MR. MCCARTHY: May we approach, Judge.

THE COURT: Counsel approach.

(XVII 1341-1342) At the bench, defense counsel moved for a mistrial. Everyone agreed that the testimony violated the trial court=s pretrial ruling granting appellant=s motion in limine that excluded this very prejudicial information. All parties agreed that the state did not intentionally elicit the witness=s answer. However, the prosecutor accepted blame for his failure to advise the witness to avoid this very subject. (XVII 1342-45) In considering appellant=s motion for mistrial, the trial judge recognized that her ultimate denial of the motion would be an issue raised on direct appeal.[34] (XVII 1346) The trial court obviously strongly considered declaring a mistrial after the state=s

[34] The grant or denial of a motion for mistrial is generally within a trial court=s discretion. ***Cole v. State***, 701 So.2d 845 (Fla. 1997).

blunder.[35] The trial court took a short recess to take the motion under advisement prior to ruling:

> THE COURT: All right. First of all, it's clear that the State didn't elicit this information in violation of the order granted by the Court on the Motion in Limine regarding the deceased's birthday.
>
> Secondly, it's unclear whether or not the jurors had made the connection yet about the fact that it was her birthday and being the likely day that she was killed.
>
> Third, if I do a curative instruction now, it is likely to bring more attention to that fact than if I give some sort of a curative instruction later.
>
> At this point I think it is important that Mr. Parker, that you instruct all of your witnesses to be very careful about this issue because if it is brought up again I will have no recourse other than to grant the motion for mistrial.
>
> At this time I'm going to deny the Motion for Mistrial and go forward with the strict admonishment that the witnesses may not again bring up the issue or the fact that it was her birthday.
>
> If they do so then a renewed motion for mistrial in all likelihood be granted. (sic)

(XVII 1347-48)

[35] The trial court discussed the difficulty of future scheduling of a retrial in light of her crowded schedule. (XVII 1347)

In addition to the sympathetic and unfairly prejudicial mention of Kyoko=s birthday, irrelevant and unfairly prejudicial evidence regarding Rufus Johnson was also heard by the jury. During opening statement, the prosecutor mentioned that Rufus Johnson had undergone heart bypass surgery. The trial court overruled appellant=s objection (lack of relevance and evidence of a nonstatutory aggravating factor). (XVI 1236-37) The state contended that the evidence was relevant to prove identity where Rufus Johnson=s face was beaten beyond all recognition.[36] The state=s first witness was the Johnson=s next-door neighbor who testified that he, like Rufus Johnson, was also a cardiac patient who had undergone open heart surgery. Both bore the distinctive scar on their leg from the removal of a vein to complete the bypass. (XVI 1270-73)

Dennie Askins, the Johnson=s son-in-law was the second state witness. (XVI 1292-93) The trial court finally sustained appellant=s objection to the reiteration of Rufus Johnson=s cardiac patient status.[37] In spite of the trial court=s ruling, the

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[36] Appellant points out that Johnson=s identity, like the time of death, was not a material fact, especially since Welch pleaded guilty as charged.

[37] Counsel was baffled by the trial court=s reversal of her previous stance.

witness testified about Rufus Johnson=s heart procedure anyway. (XVI 1296)

The Evidence Was Irrelevant and Unfairly Prejudicial.

All parties below agreed and this Court must accept that the unfortunate fact that Kyoko Johnson was brutally murdered on her birthday had absolutely no relevance to the determination of the appropriate sentence. The fact that Rufus Johnson was a survivor of a heart bypass operation was similarly irrelevant. The entire focus of a penalty phase should be to properly weigh the aggravating factors set forth by statute and the mitigating circumstances proved up by the defense. A dispassionate weighing of evidence, as difficult as that is in capital cases, should sift the most aggravated and least mitigated first-degree murders from the Agarden variety@ of first-degree murders.

Florida law attempts to exclude or, at least minimize evidence that unfairly prejudices a defendant. ***Welty v. State***, 402 So.2d 1159 (Fla. 1981) pointed out that, in a murder prosecution, the identification of the victim by a family member is not permissible, where unrelated, credible witnesses are available. The basis of this rule is to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt or, in this case, the issue of the appropriate

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Defense counsel objected on the same basis, i.e., lack of relevance and the contention that the evidence constituted nonstatutory aggravation. (XVI 1294-95)

penalty. The major function of the corresponding federal rule has been to exclude matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial value. ***United States v. King***, 713 F.2d 627, 631 (11 Cir. 1983). Indeed, Aunfair prejudice@ within the context of the rule means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. ***Westley v. State***, 416 So.2d 18, 19 (Fla. 1st DCA 1982); ***See also Vaczek v. State***, 477 So.2d 1034 (Fla. 5th DCA 1985)[In an attempted first-degree murder case, evidence was elicited that, at the time of the stabbing, the victim was pregnant. Despite the fact that the trial court sustained the object on and gave a curative instruction, the appellate court reversed for a new trial.]

Appellant submits that the crimes for which he pleaded guilty were prejudicial enough by their very nature. When he faced the jury for a decision whether he should be executed or should live out his life in prison without possibility of parole, the allowance of irrelevant and inflammatory evidence such as was permitted in the case at bar resulted in a depravation of appellant=s constitutional right to a fair trial. ***Amends. V, VI, VIII, and XIV, U.S. Const.; Art.I, ' ' 9 and 16, Fla. Const.***

POINT V

THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE PROSECUTOR TO GIVE A GENDER-NEUTRAL REASON FOR THE STATE=S FIRST PEREMPTORY CHALLENGE OF A FEMALE JUROR.

During the exercise of peremptory challenges, the prosecutor struck Ms. Napolitano. Defense counsel immediately objected and citing the appropriate cases, asked for a nongender basis.@ The trial judge pointed out that the challenge was the state=s Avery first.@ Defense counsel pointed out that gender is a specific group and a nongender reason is required. The state contended that a pattern of discrimination was required. Defense counsel correctly maintained that case law does not require a pattern. Defense counsel also disputed the trial court=s statement that the strike must be exercised on the only female (for example) on the panel, pointing out that was not the case here. The trial court asked for case authority, and defense counsel cited ***Abshire v. State***, 642 So.2d 542 (Fla. 1994). The trial court asked for authority that a neutral reason is required for the first peremptory challenge. (XII 822-26) Defense counsel replied:

> MR. MCCARTHY: Judge, I don=t have the case in front of me. It doesn=t have the pattern that helps show if there has been a pattern of it, it helps whoever is objecting to the peremptories is inappropriate. It buttresses the challenge for the peremptory but it is not for - -
> THE COURT: I=m not going to require that on the State=s first strike.

(XII 825-26) The trial court clearly misapprehended the legal requirements by insisting that a pattern of discrimination is required before a neutral reason must be given.

In ***Melbourne v. State***, 679 So.2d 759, 764 (Fla. 1996), this Court held that peremptory strikes are presumed to be exercised in a nondiscriminatory manner. A party objecting to the other side=s use of a peremptory on racial grounds must: (a) make a timely objection on that basis, (b) show that the venire person is a member of a distinct racial group, and (c) request that the court ask the striking party its reason for that strike. That is the first step that must be taken. In ***Abshire v. State***, 642 So.2d 542, 544 (Fla. 1994), this Court extended ***Melbourne,*** holding that the Equal Protection Clause of our federal constitution prohibits gender-based peremptory challenges. ***Abshire v. State***, 642 So.2d 542, 544 (Fla. 1994). This Court specifically rejected the notion that all members of a protected class have to be struck in order for reversible error to occur. This Court stated that the fact that women were seated on the jury is Aof no moment,@ because neither number alone or the fact the a member of a minority has been seated is dispositive.[38] ***See Id.; See also Wallace v. State***, 889 So.2d 928 (Fla. 4th DCA 2004). The trial court misapprehended the law on this issue. No pattern is required. ***Id.*** The trial court=s ruling was clearly erroneous. A new trial

[38] This Court should apply a Aclearly erroneous@ standard of review in this case.

is required.

A pattern of strikes need not be demonstrated for a trial court=s duty to conduct an inquiry into the state=s reasons for the excusable of a minority member is triggered. ***Bowden v. State***, 588 So.2d 225 (Fla. 1991). ***See also Reynolds v. State***, 576 So.2d 1300 (Fla. 1991). This Court has held that a new trial is required in all cases where a ***Neil*** inquiry is required and not held. ***State v. Johans***, 613 So.2d 1319 (Fla. 1993). ***See also Marshall v. State***, 640 So.2d 84 (Fla. 2nd DCA 1994). A hearing conducted after trial is over would be untimely. ***Id.*** The trial court=s ruling violated appellant=s constitutional right to equal protection. ***Batson v. Kentucky***, 476 U.S. 79 (1986). Therefore this Court has no choice but to vacate appellant=s death sentences and remand for a new penalty phase.

Melbourne v. State, 679 So.2d 759 (Fla. 1996).

POINT VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT=S TIMELY AND SPECIFIC OBJECTION WHEN THE PROSECUTOR IMPROPERLY ARGUED THAT JUSTICE REQUIRED THE IMPOSITION OF THE DEATH PENALTY.

During closing argument, the prosecutor began his argument as follows:

> ...Let me start by saying that in such an event as you have witnessed as jurors no one wins. No winners in this. As you go through the evidence, and you apply the law keep that in mind. **Justice requires in this case the imposition of the death penalty.**

(XXV 2303-4) Defense counsel immediately objected at sidebar, pointed out:

> Judge, we object to that, it is improper closing there is no requirement to be justice [sic] or anything else for the imposition of the death penalty and move to strike that. We request the Court instruct the Jury there is no requirement for the death penalty.
>
> MR. PARKER[prosecutor]: It is argument, Judge, and certainly I will go through and explain that. It is argument under these circumstances that they are acutely aware that your instructions is [sic] what will guide them.
>
> THE COURT: I will overrule the objection as to argument.

(XXV 2304)

Unchastised and unrepentant with *carte blanche* in hand, the prosecutor wrapped up his final summation by asking the jury for justice by returning a recommendation of death.

> [Prosecutor]: There is no requirement that you recommend death. The law doesn't require that, but **I would argue that justice does. Justice demands it.**
>
> MR. MCCARTHY[defense counsel]: Judge, we would object. Again, no requirement in any way, shape or form for the imposition of the death penalty. That is an improper statement.
>
> THE COURT: Overrule your objection. This is the State's argument.
>
> MR. MCCARTHY: Also, Judge he was expressing his personal opinion as to his request. We ask to strike that.
>
> THE COURT: Overrule your objection, and deny your motion.
>
> MR. PARKER[prosecutor]: **Justice**. When you look at the pictures, and you are going to see them, you are going to see photos of the Defendant with his family...And it's going to tug at the heart....I ask that when you are considering those photographs and those specific items that we not forget in the Johnson home. **Don't forget what happened because if you do we won't have justice here.** Thank you, Judge.

(XXV 2339-40) Obviously realizing the futility, defense counsel did not object to the last sentence in the prosecutor's argument.

Demanding justice for the victim is not proper argument. This type of argument has been repeatedly condemned by Florida courts. ***See, e.g., Servis v. State***, 855 So.2d 1190 (Fla. 5th DCA 2003); ***Thornton v. State***, 767 So.2d 1286 (Fla. 5th DCA 2000); ***Blackburn v. State***, 447 So.2d 424 (Fla. 5th DCA 1984). It has long

been recognized that misconduct by a prosecuting attorney in closing argument may be grounds for reversing a conviction (or in this case, a sentence). ***Berger v. United States***, 295 U.S. 78 (1934). The Eighth Amendment=s proscription against cruel and unusual gives rise to a special Aneed for reliability in the determination that death is the appropriate punishment@ in any capital case. ***Johnson v. Mississippi***, 486 U.S. 578, 584(1988). Additionally, the prosecutor=s argument in this case could be construed as his Apersonal opinion@ about the appropriateness of the death penalty in this particular case. ***Brooks v. Kemp***, 762 F.2d 1383, 1408(11th Cir. *en banc* 1985). Indeed, defense counsel also objected on that particular ground. (XXV 2339)

Apparently neither the trial judge nor the prosecutor at appellant=s penalty phase was aware of the well-settled law regarding this offensive type of argument. Appellant did not even bother to move for a mistrial, since the trial court overruled his repeated objections. A motion for mistrial would have been useless. The jury heard at least part of the exchange and heard the judge give her stamp of approval for this offensive and improper argument. Rulings regarding closing arguments are reviewed under a abuse of discretion standard. ***Moore v. State***, 701 So.2d 545 (Fla. 1997). The trial court clearly abused its discretion in overruling appellant=s timely and specific objections. A new penalty phase is required. The jury=s recommendations were unconstitutionally tainted by the inappropriate consideration of justices for the victims.

Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, ' ' 9, 16, and 17, Fla. Const.

POINT VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, OVER TIMELY AND SPECIFIC OBJECTION, ON THE HEIGHTENED PREMEDITATION AGGRAVATING CIRCUMSTANCE WHERE IT WAS NOT SUPPORTED BY ANY QUANTUM OF EVIDENCE AND WAS ULTIMATELY REJECTED BY THE TRIAL COURT.

At the charge conference, defense counsel objected to any jury instruction on the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (XXIV 2164-78) Defense counsel vociferously objected and provided authority from this Court that defined the requisite cool, calm, reflection required before this particular aggravating factor can be deemed present. The trial court overruled the objections and allowed the state to argue the presence of this aggravating circumstance and instructed the jury as well.

In her findings of fact in supporting the death penalty, the trial court rejected the applicability of this aggravating factor as to each of the two murders. The court wrote:

> There is some evidence that the Defendant acted in a cold and calculated manner. The defendant went to the Johnson home with the intent to, at least, rob the Johnsons. The medical examiner testified that both victims were bound and the Defendant admitted he taped Kyoko Johnson=s mouth. Furthermore, after the murders, the defendant cleaned himself up in the victims= bathroom, took

> property from the home, and drove Mr. Johnson=s truck to meet with a girlfriend. There is also no evidence showing the Defendant had a pretense of moral or legal justification. However, it has not been proven that the Defendant killed Mr. Johnson after a period of cool and clam reflection, or that the Defendant exhibited heightened premeditation before killing Rufus Johnson. This aggravating circumstance has not been proven beyond all reasonable doubt. The
> Court has not considered this aggravating circumstance.

(IV 671) The trial court reached a similar, although more brief conclusion in rejecting the circumstance Kyoko Johnson=s murder. (IV 672)

A trial court may give a requested jury instruction on a aggravating circumstance if the evidence adduced at trial is legally sufficient to support a finding of that circumstance. ***Diaz v. State***, 860 So.2d 960 (Fla. 2003). Aggravating circumstances must be proven beyond a reasonable doubt. ***Fla. Std. Jury Instr. Crim.*** 7.11. Although aggravating circumstances can be proven by circumstantial evidence, the evidence must be competent and substantial. ***Hunter v. State***, 660 So.2d 244 (Fla. 1995).

A trial court=s ruling on whether an aggravating circumstance has been proven is a mixed question of law and fact. The trial court=s finding of an aggravating circumstance will not be disturbed on appeal as long as the correct law was applied by the trial court, and the record contains competent, substantial evidence to support the aggravating circumstance. Welch=s trial judge rejected this particular aggravating

circumstance, he had instructed the jury and allowed the state to argue the applicability. In general, a trial court=s ruling on jury instructions is reviewed under an abuse of discretion standard. ***See, e.g., Bozeman v. State***, 714 So.2d 570 (Fla. 1998). Appellant submits, since an aggravating factor must be proven beyond a reasonable doubt, the trial court=s ruling on this issue below should be reviewed like a denial of a judgment of acquittal. As such, the standard of review would be *de novo*. ***See, e.g., State v. Williams***, 742 So.2d 509 (Fla. 1st DCA 1999). Additionally, incomplete and misleading jury instruction on elements of the crime, similar to the aggravating factors in a capital case, is reviewed as fundamental error. ***See, e.g., Hubbard v. State***, 751 So.2d 771 (Fla. 5th DCA 2000). Welch=s death sentence, based in part on erroneous jury instructions is unconstitutional.

POINT VIII

THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY PHOTOGRAPHS WHICH WERE OVERLY GRUESOME AND NOT RELEVANT TO ANY CONTESTED ISSUE.

Dr. Sajid Quaiser testified at the penalty phase for the state. (XVIII 1536 et seq.) Dr. Quaiser performed both autopsies in this case. Over defense objection, the state introduced six photographs[39] depicting the victims= substantial and gruesome injuries. (State=s Exhibits 8-12, 45-49, 61-71; XVII 1408-20; XVIII 1549-64; XIX 1599-1613, 1625-26) Unfortunately, the bodies of Rufus and Kyoko Johnson remained in the house for several days before they were discovered. As a result, the decomposition was visible in several of the photographs. The objectionable evidence was presented at the penalty phase where the state=s evidence should be limited to establishing aggravating circumstances. The state contended that the photographs depicted the severity of the victims injuries which supported the HAC aggravating factor. The extent of the injuries did not tend to prove that the murders were HAC. The medical examiner could not determine the sequence of injuries. (XIX 1620-24) It is just as likely that the initial blows rendered the victims unconscious. In that state, they would have felt no pain. (XIX 1653-64, 1667-71, 1674-76)

[39] Appellant did not object to all the photographs, only to a few that were overtly gruesome, cumulative, or not relevant to any material issue.

The admission[40] of this evidence denied appellant due process of law guaranteed by Article I, Sections 2,9,12,16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The photographs had no relevance to any issue in the case. Any possible relevance of this evidence is outweighed by its prejudice. '90.403, Fla. Stat. (2004).

The test for the admissibility of a photo of the murder victim is relevance, not necessity. ***Ruiz v. State***, 743 So. 2d 1, 8 (Fla. 1999). The determination of the admissibility of such photos is within the sound discretion of the trial court and will not disturbed on appeal in the absence of abuse. ***Id***. In ***Ruiz***, this Court found error in the penalty phase admission of a two by three feet blow-up of a photo showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. ***Id***.

This Court has outlined the standard for the admission of potentially prejudicial photo:

> To be relevant, a photo of the deceased victim must be probative of an issue <u>that is in dispute</u>. In the present case, the medical examiner testified that the photo was relevant to show the trajectory of the bullet and nature of the injuries. Neither of these points, however, was in dispute.

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[40] ***San Martin v. State***, 717 So.2d 462 (Fla. 1998).

Admission of the inflammatory photo thus was gratuitous.

Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999). (Emphasis in original.) (Footnote omitted.) In a footnote, this Court quoted ***McCormick on Evidence***, 773 (John Williams Strong ed., 4th Ed. 1992):

> There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. (Footnote omitted.)

Almeida v. State, 748 So.2d at 929 (n.17).

Great care should be taken prior to waving ghastly pictures in front of lay jurors who may never have seen anything similar before in their lives. The idea of a trial is not that jurors should regurgitate at the evidence, but that they should make a reasoned, informed decision as to guilt (or in appellant=s case, penalty). In this case, it is clear that Anthony Welch was:

> denied a fair trial when the court allowed a gruesome, color photograph of the deceased=s massive head wound to go to the jury. ...In this case, the photograph which was admitted could serve no purpose other than to inflame and prejudice the jury in the grossest manner.

People v. Garlick, 360 N.E. 2d 1121, 1126-27 (1977).

POINT IX

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. ***See, e.g., Terry v. State***, 668 So.2d 954, 965 (Fla. 1996); ***Tillman v. State***, 591 So.2d 167, 169 (Fla. 1991). Such a review in this case demonstrates that the death sentence is not proportional and must be reversed. ***Art. I, ' ' 9, 16, and 17, Fla. Const.***; ***Amends. VIII and XIV, U.S. Const.***

In sentencing Welch to death on each of the two counts of first-degree murder, the trial court found three aggravating factors applicable. The trial court properly rejected the state=s argument that the murders were committed in a cold, calculated, and premeditated manner. (IV 666-773) The trial court found that the evidence supported and accepted three separate statutory mitigating factors:

> (1) That Welch was under the influence of extreme mental or emotional disturbance (little weight);
> (2) Welch=s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (little weight); and
> (3) Although Welch had a chronological age of twenty two at the time of the murders, there was evidence that he had a mental and emotional age of fifteen and a reason age thirteen. The trial court thus concluded that Welch was

> somewhat immature for his age when he committed the crimes (some weight).

(IV 673-75) In dealing with the evidence of nonstatutory mitigation circumstances, the trial court found the following:

> (1) Welch suffered from alcohol and drug abuse (little weight);
> (2) Welch was affected by the suicides of his brother and uncle (some weight);
> (3) Post traumatic stress syndrome (some weight);
> (4) Welch suffers from bipolar disorder (some weight);
> (5) Welch received no psychological treatment prior to the commission of the crimes (little weight);
> (6) Welch suffers from neuro-psychological abnormalities as evidence by a abnormal brain scan (little weight);
> (7) Welch suffers from dissociative symptoms (little weight);
> (8) Welch=s mental, emotional, and abstract reason age was that of a fifteen-year-old child (little weight);
> (9) Welch admitted his guilt and pleaded guilty as charged (little weight).

(IV 673-79) In spite of the plethora of valid mitigation, including both statutory mitigating factors, the trial court inappropriately weighed the evidence and concluded that death was the appropriate penalty for each of the murders. (IV 679-81)

The aggravation in this case was not overwhelming. Two of the aggravating factors were Astatus-type@ circumstances, i.e., the contemporaneous violent conviction for each death sentence was the contemporaneous murder of the other victim that night. The second aggravating circumstance during the commission of a felony, i.e., a

robbery, was also the product of the unfortunate circumstances that evening. (IV 668-69) The only valid aggravating circumstance that should be given great weight is the trial courts finding that the murders were especially heinous, atrocious, or cruel. That is the only aggravating factor that truly sets apart, if indeed it does, these first-degree murders from the Agarden variety@ first-degree murder.

Comparable or More Egregious Cases Where Death Sentence Was Disproportionate

On many other occasions, this Court has held a death sentence disproportionate when there is evidence that the defendant=s mental illness was the causal factor in the crimes. The cases discussed below where this court reversed the death sentences are comparable to this case. Andy Welch=s death sentences must also be reversed as disproportionate.

1. ***Knowles v. State***, 632 So.2d 62 (Fla. 1993). Knowles was thirty eight at the time of the homicides. After an afternoon of drinking beer and huffing toluene, Knowles went to his father=s trailer and obtained a .22 rifle. He then went next door where he shot and killed a ten-year-old girl, Carrie Woods, who was waiting for guests to arrive for her birthday party, he did not know the girl. Knowles walked back to his father=s trailer as his father entered his truck. Knowles pulled his father out of the truck and shot his father two times in the head. Knowles took the truck and drove 250 miles to a friend=s house to whom Knowles admitted to shooting

Aa bunch of people@ and his father. Six weeks earlier, Knowles told someone that his father had a surprise coming and he was going to blow him away. Those who saw Knowles the afternoon of the homicides said he was Atorn up@ and Acompletely gone.@ A mental health expert said Knowles suffered neurological problems due to abuse of alcohol and solvents. He was intoxicated and in an acute psychotic state at the time of the crimes. Another expert agreed with the opinion that Knowles suffered organic brain damage and was intoxicated at the time. Both experts said that Knowles did not have the ability to premeditate the homicides. The jury rejected both the insanity and intoxication defenses. This Court reduced the conviction for the murder of the girl to second degree murder. Additionally, this Court held invalid the findings that the father=s murder was to avoid arrest and during a robbery based on the taking of the truck. The trial court=s rejection of the statutory mental mitigating circumstances was found to be improper. Only the prior violent felony aggravator based on the contemporaneous conviction for the murder of the girl remained. In reversing the death sentence, this Court found the death sentence disproportionate:

> The only other claim we need to address is Knowles claim that death is not warranted in this case. Since we have held both the during the course of a robbery and the avoid arrest aggravating factors invalid, the only aggravating factor that can be considered in connection with Alfred Knowles murder is the contemporaneous conviction for murder of Carrie Woods. In light of the bizarre circumstances surrounding the two murders and the substantial unrebutted mitigation established in this case, we

agree that death is not proportionately warranted.

Knowles, 632 So.2d at 67.

2. ***McKinney v. State***, 579 So.2d 80 (Fla. 1991). McKinney was convicted of murder, unlawful display of a weapon, armed robbery, armed burglary, armed kidnapping and grand theft. The victim stopped his rental car to ask directions when he was abducted, robbed and killed by seven gunshot wounds. During the penalty phase, experts testified that McKinney had mental impairments including organic brain damage, borderline intelligence, and drug and alcohol abuse. The trial court found that McKinney had no significant history of prior criminal activity. This Court found invalid the aggravating circumstances of heinous, atrocious or cruel and cold, calculated, and premeditated, leaving only the aggravating circumstance that the homicide was committed during the commission of violent felonies. This Court concluded the death sentence was disproportionate.

3. ***Besaraba v. State***, 656 So.2d 441 (Fla. 1995). A local bus driver told Besaraba to get off the bus for drinking alcohol. Besaraba left the bus, but he went to another bus stop and waited for the same bus to stop there about a half-hour later. Besaraba pulled a handgun and fired into the side of the bus. He walked to the front of the bus and killed the driver. He also shot a passenger in the back, killing him. After leaving the bus, Besaraba went to a car stopped at a red light, ordered the driver out, shot the driver three times in the back, and took the car. The driver survived. A

jury convicted Besaraba of two counts of first degree murder, attempted murder, robbery, and possession of a firearm. The court found two aggravating circumstances, i.e., previous conviction of another capital felony and the homicide was committed in a cold, calculated and premeditated manner. This Court concluded the CCP circumstance was not proven. Mitigation included no significant prior criminal history, the crime committed while under extreme mental or emotional disturbance, and nonstatutory mitigation. The evidence showed that Besaraba suffered childhood deprivation and suffered mental illness which included paranoid behavior, delusion and hallucinations. He also was alcoholic, abused drugs and had various physical illnesses. This court reversed the death sentences as disproportionate.

4. ***Santos v. State***, 629 So.2d 838 (Fla. 1994). Santos shot to death his long-time girlfriend and their 22-month-old daughter. There had been emotional distress in the relationship between Santos and his girlfriend. Initially, Santos was found incompetent to stand trial. He was later convicted and sentenced to death for both murders. This Court held invalid the HAC and CCP aggravating factors which left one aggravator for a violent felony conviction related to the homicides. ***See, Santos v. State***, 591 So.2d 160 (Fla. 1991)(reversing for to the trial court to properly consider mitigation). In mitigation, the State conceded that the two statutory mental mitigators applied and that Santos had no significant prior criminal activity. Santos had a history of childhood abuse and the experts noted that he slipped into psychotic

episodes during emotional stress. This Court held both of the death sentences disproportionate:

> There can be no possible conclusion other than that death is not proportionally warranted here, because the mitigation is far weightier than any conceivable case for aggravation that may exist here.

Santos, 629 So.2d at 840.

5. ***White v. State***, 616 So.2d 21 (Fla. 1993). White and his former girlfriend, Melinda Scantling, had some altercations after the end of the relationship resulting in a restraining order on White. A few months later, White broke into Scantling=s apartment and attacked her companion with a crowbar. White was subdued and arrested. While still detained in jail, White told another inmate that if released on bond he was going to kill Scantling. The next day after White=s release, he redeemed a shotgun he had earlier pawned. He approached Scantling in a parking lot as she left work around 5:00 p.m. and killed her in front of eyewitnesses. White told one of the eyewitnesses, AI told you so@ and then he drove away. The following day he was arrested, and while in jail three days later, a psychiatrist interviewed him. White told the psychiatrist that during the six days preceding the homicide, he had consumed five ounces of cocaine, heroin, valium, and over 50 marijuana cigarettes. A friend testified that he saw White smoking crack cocaine and taking valiums between 3:30 and 4:30 p.m. The

psychiatrist said that White was exhibiting withdrawal symptoms consistent with a six-day drug binge and that White was under extreme mental and emotional disturbance and his capacity to appreciate the criminality of is conduct was impaired at the time of the homicide. Other evidence confirmed White=s history of drug addiction and that his addiction had intensified during the time before the homicide. This Court held the CCP aggravating factor was invalid, leaving only the prior violent felony convictions for the burglary and assault occurring a few days before the murder as aggravators. Mitigation included the statutory mental mitigators and some nonstatutory factors. This Court reversed the death sentence as disproportionate.

6. ***Farinas v. State***, 569 So.2d 425 (Fla. 1990). Farinas was convicted of the shooting death of his estranged girlfriend, Elsidia Landin, who was also the mother of his child. Angry over the belief that Landin had reported to the police that Farinas was harassing her and her family, Farinas followed Landin=s car occupied by Landin and her sister. He approached Landin=s stopped car, reached inside and took the keys. Over Landin=s and her sister=s pleas, Farinas took Landin from her car and left with her in his car. At a stoplight, Landin jumped from the car and ran screaming for help. Farinas shot her in the lower back immediately paralyzing her from the waist down. He then approached her as she lay on the ground, and after his gun jammed three times, he shot her twice in the head. Two aggravating circumstances were approved: homicide during a kidnaping and burglary, and HAC. The trial court found that

Farinas was under mental and emotional disturbance but that it was not extreme. There was evidence that Farinas was intensely jealous, obsessed with having the victim return to live with him and they were having a heated, emotional confrontation. This Court held the death sentence was disproportionate.

7. ***DeAngelo v. State***, 616 So.2d 440 (Fla. 1993). DeAngelo murdered Mary Anne Price who rented a mobile home with DeAngelo and his wife, Joy. DeAngelo and Price had frequent arguments about Price=s drug use, drinking, failing to pay rent and promiscuous life-style. One time, DeAngelo forced Joy to accompany him to Price=s room where she lay passed out and directed Joy to put a blanket over Price=s head as DeAngelo strangled her. However, after a few minutes, DeAngelo backed out of the plan. He told his wife not to tell anyone. A few days later, DeAngelo did go into Price=s room and strangled her both manually and with a ligature. This Court approved the cold, calculated and premeditated aggravating circumstance. Although the State argued that the trial court should have found the HAC factor, this Court rejected the argument because the evidence was that the victim may have been unconscious before the strangulation. The mitigation included that DeAngelo suffered from brain damage, hallucinations, delusional paranoid beliefs and mood disorders. This Court held the death sentence was disproportionate.

8. ***Kramer v. State***, 619 So.2d 274 (Fla. 1993). Kramer was convicted of murder for the beating death of Walter Edward Traskos. The body was found along

the interstate and had evidence of a beating with a blunt object. A large rock was near the body. Kramer said he threw a rock at the victim after the victim pulled a knife. The victim=s injuries indicated he had been attacked while in a passive position. In aggravation, the trial court found: (1) a prior conviction for a violent felony (an attempted murder) and (2) the homicide was heinous, atrocious or cruel. The mitigation included: (1) Kramer was under the influence of emotional stress; (2) Kramer=s capacity to conform his conduct was severely impaired; (3) alcoholism and drug abuse; (4) model prisoner. This Court held
the death sentence was disproportionate.

Andy Welch=s death sentence is disproportionate. Welch was twenty-two at the time of the murders. Despite his chronological age, Welch was clearly immature, which the trial court accepted as mitigating. (IV 678) All of the mental health experts agreed, and the trial court found, that Andy Welch was operating under the influence of an extreme mental or emotional disturbance (including bipolar disorder, post traumatic stress disorder, symptoms of dissociation, and substance abuse) at the time of the murders. (IV 673-74) The trial court inappropriately gave little weight to this extraordinarily important statutory mitigator. (IV 674) The trial court did so based on appellant=s Aintentional and deliberate@ actions on the night of the murders. (IV 674) Based on similar reasoning (appellant=s Aactions were rational@), the trial court also gave little weight to the valid mitigating factor that Welch=s capacity to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (IV 674-75) The trial court=s conclusion flies in the face of her acceptance that the unrefuted evidence established this mitigating circumstance. In order words, the trial court=s written conclusions about the weight to be given to the factor (Welch=s actions were rational that night) inherently contradict her finding of this factor.

The trial court similarly and inexplicably gave mere lip service to the extensive nonstatutory mitigation proven up by appellant. Although the trial court found that the evidence supported that Welch abused alcohol and drugs, the court gave little weight to this factor. Additionally, the trial court inexplicably omitted any reference to the fact that Andy Welch confessed to the police that he had consumed a large quantity of cocaine prior to the murders.[41] (IV 675-76) The trial court also gave only some weight to the fact that Welch suffers from bipolar disorder which the experts testified

[41] The trial court did recite the evidence that proved that Welch was drinking heavily and using illegal drugs the week of the murders. Additionally, Welch=s mother testified that his behavior was erratic. (IV 676)

can cause a person to lose control over their behavior especially when triggered by substance abuse.[42] (IV 677)

In spite of the testimony that clearly established the enormous impact of his brother=s suicide, the trial court gave only some weight to the rash of familial suicide and the resulting post traumatic stress syndrome experience by Andy Welch. (IV 676-77) Additionally, the one action that could have helped Welch (receiving psychological treatment for his problems) was accepted but given only little weight. (IV 677) The trial court stated no reason whatsoever in giving only little weight to this Aundisputed fact@. (IV 677) Similarly, the trial court gives only **Avery** little weight@ to the undisputed evidence that Welch admitted his guilt and pleaded guilty to all the crimes as charged. (IV 678) Once again, the trial court gives no reasoning for this inappropriate weighing of valid mitigation.

Two of the three aggravating circumstances found by the trial court were the necessary product of the crimes committed that night. They do not truly separate

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[42] The trial court also gave only little weight to evidence that Welch=s brain was damaged. Incredibly, the court did not find Welch=s abnormal brain scan to be mitigating Aunder the circumstances of this case.@ The court cited Welch=s Arational behavior at the time of the murders@ and appropriate behavior in court. (IV 677-78)

these murders from the norm of first-degree murders. Under this Court=s recent decisions, the evidence probably supports a finding that the murders were especially heinous, atrocious, or cruel. Nevertheless, this particular aggravating factor was the result of appellant=s mental problems which were exacerbated that night by his drug use. Weight against the extraordinary mitigation in this case, life without possibility of parole is the more appropriate sentence for Andy Welch. ***Amends. VIII & XIV, U.S. Const.; Art. I, ' ' 9 & 17, Fla. Const.***

POINT X

FLORIDA=S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida=s Capital Sentencing Scheme. ***See, e.g.,*** (I 15-20, 40-42, 64-65; II 275-80, 300-310, 316-60, 393-95; III 514-21; VI 5-13, 21-22; VII 101-2) None of the challenges were successful and Andy Welch was ultimately sentenced to death. Most challenges were based on a denial of Welch=s Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge. ***See, e.g.,*** (VII 139, VIII 249-51, 326; IX 376; XVI

1226-27; XXV 2364-65, 2376-77, etc.)

Appellant also acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute=s continued validity, because the United States Supreme Court previously upheld Florida=s statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

Appellant recognizes that both jury recommendations for his death sentences were unanimous. However, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury=s Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their

decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were Asufficient@ aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in ***Bottosom*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida=s statute. This Court should vacate appellant=s death sentences and remand for imposition of life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV, U.S. Const.; Art. I, ' ' 9, 16, and 17.***

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate appellant=s death sentences and remand for a new penalty phase. Alternatively, appellant asks this Court to remand for the imposition of two life sentences or to simply declare Florida=s death sentencing scheme to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Charles Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Anthony Welch, #E02957, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 8th day of December, 2006.

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CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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CHRISTOPHER S. QUARLES
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