IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-2008

MICHAEL JAMES JACKSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

On direct review from a decision of the Circuit Court of the Fourth Judicial Circuit imposing a sentence of death

RYAN THOMAS TRUSKOSKI, ESQ.
RYAN THOMAS TRUSKOSKI, P.A.
FLORIDA BAR NO: 0144886
P.O. BOX 568005
ORLANDO, FL 32856-8005
(407) 841-7676

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

PREFACE

This is an appeal from a judgment and sentence imposing the death penalty from the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, the Honorable Michael Weatherby presiding. Michael James Jackson was the defendant in the trial court and will be referred to as "defendant" in this brief.

The State of Florida was the plaintiff in the trial court and will be referred to as "State" in this brief. The defendant is appealing his convictions and sentence of death. The record will be cited as [R. (page number)]. The trial transcripts will be cited as [Tr. (page number)].

STATEMENT OF THE CASE AND FACTS

After a jury trial the defendant was convicted of two counts of first degree murder in violation of Fla. Stat. § 782.04(1)(a), two counts of robbery in violation of Fla. Stat. § 812.13(2), and two counts of kidnapping in violation of Fla. Stat. § 787.01(1)(a)(2) & (1)(a)(3) [R. 228]. The defendant was sentenced to death for the murders, 15 years for the robberies and life imprisonment for the kidnappings, to run concurrently with one another [R. 231-236].

On July 6, 2005, Reggie and Carol Sumner were killed. The defendant and Bruce Kent Nixon, Jr., Tiffany Ann Cole, and Alan Lyndell Wade were the alleged killers. Mr. Nixon plead guilty. The defendant was tried first and convicted. Then Cole and Wade were tried and also sentenced to death. Their appeals are also pending with this court (SC08-528; SC08-573).

MOTION TO SUPPRESS

The defense filed a motion to suppress. The suppression hearing was held on May 1, 2007. Tr. 384-408. No testimony was taken as the facts were not in dispute. The law was in dispute.

The defense argued that when members of South Carolina law enforcement obtained a warrant to search the hotel room that the defendant and his girlfriend Tiffany Cole were staying in, the warrant did not include authority to open and search the locked safe within the hotel room [R. 90-92].

The property found in the safe was the Sumners' identification, credit cards, and very important papers. Tr. 384. The safe was locked and law enforcement obtained the code to open it from the hotel management. The warrant does not mention a safe. Tr. 387-88.

The defense argued that you have a reasonable expectation of privacy in your hotel room and there was no consent from anybody in the room to open the safe. Tr. 389, 391. The trial court ruled that the search of the safe was covered by the warrant. Tr. 395-97; 406-07.

The defense also argued that after the defendant was arrested and taken to the county jail in Charleston, he placed a number of telephone calls from the jail. The conversations were recorded, and the recordings were subsequently handed over to the Jacksonville Sheriff's Office [R. 92].

The defense argued that in order to legally and properly obtain those recordings from the jail, and then listen to them, members of law enforcement must obtain a warrant in conformity with South Carolina law and Charleston County jail

policy. This was confirmed by Detective James Rowan of the North Charleston Police Department during his deposition on January 18, 2006, page 60-61. No warrant was ever obtained for the recordings [R. 92].

As to whether Jacksonville Sheriff's Office needed a warrant, the State argued that Detective Rowan's belief about South Carolina law is not controlling. The State argued that no warrant was required. Tr. 397-399.

The trial court asked for the South Carolina statute and the defense stated that it was going by Detective Rowan's own admission. Tr. 399. The trial court stated that he was hesitant to make legal decisions based upon the testimony of police officers, so if you have some authority the court will be glad to review it. Tr. 405. None was provided. The trial court then denied the motion to suppress. Tr. 407.

MOTIONS IN LIMINE

The defense filed several motions in limine. The hearing was held on April 24, 2007. In motion in limine #2, the defense argued that the State was going to introduce evidence that the defendant offered to pay his cellmate to exchange wristbands with him and help him escape. The defense argued that this evidence was not relevant, and if the Court finds that it is, the probative value of this

evidence was substantially outweighed by its prejudicial effect, in violation of Fla. Stat. § 90.403. The trial court denied the motion [R. 84; 393-94].

In motion in limine #4, the defense argued that the State was going to introduce recordings of interviews the defendant had with law enforcement. In those interviews police made reference to statements that co-defendant Tiffany Cole made. The defense is not able to cross-examine Tiffany Cole, and therefore the State should redact these references from the recordings [R. 88].

The police told the defendant that Tiffany Cole made numerous inculpatory statements about him. The defense cannot cross-examine Cole to determine whether in fact she did make those statements. The jury is left with the impression that Cole did in fact make the statements, when it could have been a mere tactic made up by police in order to get the defendant to confess [R. 398-419]. The trial court denied the motion [R. 433-434].

TRIAL

In a side bar meeting with defense counsel and the defendant only, the defense said that their theory of the case was that the defendant participated in and committed the robberies, but that the subsequent kidnappings and murder were the independent and unforseen acts of the co-defendants. The defendant agreed with

this strategy. Tr. 415-416. Defense counsel made this argument to the jury. Tr. 467, 470.

Rhonda Alford, the daughter of Reggie and Carol Sumner, testified that her mother was 60 years-old and her step-father was 62 years-old. Tr. 477. They were of poor health. Tr. 480-482. The Sumners lived in South Carolina prior to moving to Jacksonville. Tr. 477. Tiffany Cole has family members that used to live near the Sumners in South Carolina. Tr. 478.

Alford last heard from her parents on July 5th, and reported them missing on July 10th. Tr. 485-86. On July 11th, Alford and law enforcement entered the home and the Sumners were missing. Tr. 486-87.

Officer Videll Williams of the Jacksonville Sheriff's Office testified that on July 10th, he saw the Sumner's Blue Lincoln Towncar in Sanderson, Florida. Tr. 508-510. Williams reported this on July 12th. Tr. 528.

Detective David Meacham learned that starting on the morning of July 9th, there was a lot of activity of the Sumner's ATM card. The frequent withdrawals occurred every day through July 13th. Tr. 522. Photos were obtained from the ATM machines and the defendant was making the withdrawals. Tr. 523. The defendant never tried to hide his appearance. Tr. 571.

In some of the pictures a photo of a Mazda RX-8 was taken and this car had been rented from Triange Rent A Car in South Carolina by Tiffany Cole, one of the co-defendants. Tr. 526, 567. The GPS on the rental car tracked the car as being in Jacksonville during the pertinent time frame. Tr. 567. The rental car company tracked an incoming phone call as being from the cell phone of David Jackson. Tr. 568.

It was subsequently learned that the defendant had been calling the police identifying himself as James Sumner. Tr. 529. These calls were recorded and played to the jury. Tr. 532-51. The defendant, purporting to be James Sumner, said that he was out of town and that he was having problems with his ATM card. A female voice also got on the phone and pretended to be Carol Sumner. Tr. 549. Meacham never believed that he was talking to the Sumners. Tr. 564. The defendant and Cole were eventually arrested in Charleston, South Carolina. Tr. 570.

U.S. Marshal David Alred testified that he tracked the cell phone that was used to Nextel. Tr. 578. The cell phone was registered to David Jackson in Charleston, South Carolina. Tr. 584. The defendant also went by this name. Cell phone towers tracked the phone to the area near the scene of the crime when the crime was alleged to have occurred. Tr. 584-594. A neighbor witnessed a car with

South Carolina plates near the Sumners' residence on multiple occasions a few days before the crime was committed. Tr. 617-21.

Evidence technician C.L. Conn testified that he helped recover the two bodies from the grave sight, which was in Charlton County, Georgia, about four miles north of the Florida-Georgia line. Tr. 636-640, 648. He also helped recover numerous items of evidence from the Sumner's car found in Sanderson, Florida. Tr. 652-655. The defendant's fingerprints were found on an unopened roll of clear plastic wrap that was found in the car. Tr. 901.

Conn also discovered items of mail addressed to the Sumners in the Mazda RX-8 vehicle. Tr. 657. Conn took possession of the items of evidence seized by the South Carolina authorities in the hotel rooms in Charleston. Tr. 661-663.

James Rowan, a detective for the North Charleston Police Department in South Carolina tracked down Tiffany Cole based upon the ATM photos of the Mazda RX-8 rental car. Tr. 685. Rowan was led to a hotel room in the Charleston area. Tr. 687. Two rooms had been rented in the name of Tiffany Cole and law enforcement found the defendant, Cole and Wade in the rooms. An ATM card was found in the defendant's pocket, belonging to the same bank as the Sumners'. There was no name on the card. Tr. 688-89.

In the room occupied by the defendant and Cole, law enforcement searched the locked safe after getting a search warrant and the code from management and discovered personal effects that had the Sumner's name on them, including their credit cards and checkbook. Tr. 692-94.

Detective Robert Mark Gupton testified that he interviewed the defendant while he was in custody in South Carolina. He first read the defendant his Miranda rights. Tr. 709-713, 728-729. The defendant said his full name was David Anthony Jackson. He said he used the name Michael as a street name and that his co-defendants knew him as Michael. Tr. 715, 732.

A recording of the conversation was played to the jury. The defendant said that he could tell the police where the two people were. Tr. 749-750. He said that he was with his girlfriend, Tiffany Cole, and that Wade and Nixon were the ones who kidnapped and buried the Sumners. Tr. 753-762, 774-776, 984.

The defendant said that the ATM card he had belonged to Wade's mother, and that Wade allowed him to make the withdrawals because his mother would not know his face. There was no name on the card. Tr. 762-766. All four of them drove out to the grave sight in a Mazda to see where Wade and Nixon had buried the bodies. Tr. 777-778. Wade and Nixon said that they were buried alive. Tr. 788.

The defendant offered to take a polygraph and to wear a wire in order to get Wade and Nixon to admit to all of this. Tr. 791-792, 795. The defendant said that he is only guilty of using the ATM card. Tr. 794, 1000. The defendant said he never called the sheriff's office pretending to be the Sumners. Tr. 866.

The defendant said he had an alibis, and that he was with Jill Kesinger. Tr. 1060-1061. Ms. Kesinger initially said she was with the defendant, but this later changed. Tr. 1062. Kesinger testified that the defendant asked her to lie and provide an alibis for him. Tr. 1098.

Detective Meacham returned to the stand and testified that the defendant, Cole and Wade were seen on Walmart video surveillance at different times buying the equipment needed to subdue the victims and bury the bodies. These receipts were found in the South Carolina hotel room. Tr. 925-927.

Robert Bailey testified that he shared a cell with the defendant and that the defendant said that a toy gun was used in the robbery and that the victims were bound and put into the back of the victims' car. Tr. 1123. The graves were pre-dug by Nixon and Wade. Tr. 1124. One of the co-defendants extracted the ATM pin code from the victims and then the defendant used the ATM card. Tr. 1125. The defendant told Bailey that he used a shovel to help bury the couple, and that the woman was alive because he heard her cough. Tr. 1126.

Co-defendant Bruce Nixon testified that he participated in the murder of the Sumners, along with the defendant, Cole and Wade. Tr. 1154. Nixon said that he, the defendant and Wade pre-dug the grave sight in advance of the murders. Tr. 1158. Cole was holding a flashlight for them. Tr. 1160.

The robbery was planned by them and as to what would happen to the Sumners, the defendant said he would take care of it. The defendant said he was going to give them a shot of medicine to make them die. Tr. 1162-63. The group bought gloves, duct tape and plastic wrap to carry out the crimes, and obtained a toy gun. The defendant was the one that called the shots during the planning process. Tr. 1164-65.

Nixon said that he and Wade went into the Sumner's home and bound the Sumners with duct tape and put duct tape over their eyes and mouth. Tr. 1169-72, 1175. Subsequently, the defendant entered the home and started searching for bank statements and ATM cards. Tr. 1173.

The Sumners were put in the trunk of their car and driven to the grave sight. Tr. 1178-79. Nixon walked away from the grave sight and left the defendant and Wade their with the Sumners. Tr. 1183. The defendant said that he got the PIN number for the ATM card from them and the defendant controlled the ATM card.

Tr. 1231. The defendant was the one with the plan and he was confident about it. Tr. 1233. Nixon eventually led police to the burial site. Tr. 1195.

Dr. Anthony Clark testified as to how the Sumners died. There were no head injuries or signs of blunt force trauma. Tr. 1266-67. The Sumners had dirt in their noses and in their mouths. Tr. 1266, 1270. They were smothered with dirt. Tr. 1273. They both died from mechanical obstruction of the airways from dirt, and the manner of death was homicide. Tr. 1274, 1295. There was no dirt in the lungs. Tr. 1294.

At the close of the State's case, the defense moved for a judgment of acquittal, and did not make any argument in support of the motion. The trial court denied the motion. Tr. 1304.

The defense did put on a case. Alex Griffis said that he was at a party with Bruce Nixon and Nixon said that he had buried people alive and killed them. Tr. 1320-22. Nixon never said that anyone helped him. Tr. 1323. Thomas Ackridge was at the same party and heard Nixon say the same thing. Tr. 1331.

The defendant testified that the plan was only to rob the Sumners. Tr. 1370-74. No one talked about killing anyone. Tr. 1376. Wade and Nixon went into the home while the defendant and Cole were outside. Wade and Nixon then drove off

in the Sumners car and the defendant did not know they were in the trunk. The defendant was told to follow them. Tr. 1378-79.

The defendant and Cole followed them up into Georgia. Wade and Nixon told them where to park and the defendant asked what they were doing. Subsequently, they called the defendant and told him to bring a flashlight over to where they were. Tr. 1381-82.

The defendant thought they were ditching the car, but when he walked up he heard Mrs. Sumner moan. The defendant was shocked and asked them what they were doing. The defendant walked back to where Cole was and he let Wade and Nixon continue what they were doing. Tr. 1381-83. The defendant admitted to calling the sheriff's office and impersonating Mr. Sumner. Tr. 1389. The defendant testified that he did not kidnap anyone and that he did not kill anyone. Tr. 1394.

The defense then rested. Tr. 1454. The motion for judgment of acquittal was renewed, without argument, and the trial court denied the motion. Tr. 1543-44. The jury was given an independent act instruction. Tr. 1455-56. The jury returned verdicts of guilt as charged on all six counts. Tr. 1596-97.

PENALTY PHASE

The defendant said that he spoke to his attorneys about the issue and that he was making the decision not to offer any mitigating evidence. He said he wants the jury to base its sentencing recommendation on the facts that came out at trial. Tr. 1613-14. The trial court said that the jury will hear about aggravating factors, but not any mitigating factors. The defendant said that his people could not benefit him. Tr. 1614-15.

The trial court cautioned the defendant that he will "cut off any leg" that he may have of the jury recommending a life sentence. The defendant said that evidence of mitigation will not help him. Tr. 1615-16. Defense counsel then proffered what evidence they were prepared to present as evidence of mitigation. Tr. 1616-22. The defendant said that he discussed all of this potential mitigation with his lawyers and he is satisfied with their representation. Tr. 1622-23.

The trial court told the defendant that he strongly recommends that the defendant put on evidence of mitigation. Tr. 1626. The defendant replied that he was sure that this was what he wanted to do. Tr. 1627. The trial court said that he will respect the defendant's decision and the trial court found that the decision was freely and voluntarily made and that he has been well-informed by counsel of the potential ramifications. Tr. 1627.

The defense did not put on any evidence during the penalty phase and the jury returned an advisory recommendation of death by a vote of 8 to 4, for both victims. Tr. 1685.

SPENCER HEARING AND SENTENCING

The *Spencer* hearing started on June 18, 2007. The defendant testified that what happened was a tragedy, but he did not plan or participate in any kidnapping or murder. The defendant told the victims that he was sorry for their loss, but that he cannot show remorse for something he did not do. Tr. 1722-23.

Defense counsel stated that the defendant has instructed them not to put on any evidence of mitigation. Tr. 1727. The trial court inquired with the defendant about his reasons for not doing this. The trial court said he was making a serious mistake by not doing this. The defendant said that he was absolutely certain that he did not want to present any evidence of mitigation. Tr. 1727-34.

The hearing was continued until August 7, 2007. The trial court gave the defendant another opportunity to present mitigation and defense counsel stated that the defendant had not changed his mind on the issue. Tr. 1762-63. The hearing was

continued until August 13, 2007. The defendant again declined to present any mitigation. Tr. 1764-65.

The imposition of sentence took place on August 29, 2007. The trial court imposed a sentence of death. Tr. 1808. The trial court found the following aggravating factors:

1. The defendant was previously convicted of a felony and was on probation at the time of the murders.

2. The defendant was previously convicted of another capital felony. This was established because the murders occurred contemporaneously.

3. The crime for which the defendant is to be sentenced was committed while the defendant was engaged in the crime of kidnapping.

4. The crime was especially heinous, atrocious or cruel. This was established because the Sumners were frail, in failing health, and were gagged and buried alive. The Court said it has a hard time coming up with a more painful and vile manner of death.

5. The crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. This was established because there was virtually no evidence which would even remotely indicate a pretense of moral or legal justification. The defendant also possessed heightened premeditation

by buying the equipment necessary to commit the crimes and having the graves dug in advance.

6. The crime was committed for financial gain. The defendant admitted that the original reason for the crimes was money.

7. The crime was committed to avoid or prevent a lawful arrest. The Sumners knew at least two of their killers and they were buried where no one would discover them. The surrounding circumstances lead to no other inference than the Sumners' deaths were to enable the defendant to avoid detection.

8. The victims were particularly vulnerable due to advanced age or disability. The fact that the Sumners were 60 and 61 years-old respectively, coupled with their extensive physical and medical disabilities, establishes this factor.

[R. 250-254].

The trial court considered evidence of mitigation, even though the defendant failed to present this evidence during the penalty phase. The trial court noted that it still gleaned mitigating evidence from the trial, the presentence investigation, letters in support of the defendant, and argument of counsel:

1. The defendant was only 23 years-old at the time of the crimes. This was only give "some weight" because nothing indicates that the defendant's age contributed to minimizing his participation in the murders. Also, the defendant has an articulate command of the English language and has full control of his faculties.

2. The defendant is amendable to rehabilitation and a productive life in prison. Even though there was no evidence to support this contention, viewing the case in the light most favorable to the defense, the court gave it "some weight."

3. The defendant's mother was a substance abuser. His parents abandoned him and he was raised by his grandmother. The defendant was a problem child in his elementary school years and was prescribed Ritalin for a period of time. Even there was no evidentiary support for these facts, if there was such evidence it would not explain or negate the defendant's guilt and therefore only "some weight" is afforded.

4. The defendant's prior criminal record, although extensive, contains no acts of violence, and therefore "some weight" is afforded.

[R. 254-258].

The trial court concluded that the aggravating factors far outweigh the mitigating factors and that death was warranted [R. 258]. The defendant timely filed his notice of appeal and his initial brief follows.

SUMMARY OF ARGUMENTS

The trial court erred in allowing illegally seized evidence and unduly prejudicial evidence into evidence. These four pre-trial rulings taken individually, and especially cumulatively, deprived the defendant of a fair trial in violation of the due process clauses of the Florida and United States Constitutions.

The defendant's sentence of death is impermissible because it is disproportionate and because the trial court gave "great weight" to the jury's recommendation even though the jury did not hear and was not instructed on the defendant's mitigation.

ARGUMENT 1: THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE KIDNAPPINGS AND MURDERS WERE NOT THE INDEPENDENT ACTS OF THE CO-DEFENDANTS

A de novo standard of review applies to the denial of motions for judgment of acquittal. The trial court's order will not be reversed on appeal if there is competent substantial evidence to support the jury's verdict. Arnold v. State, 892 So.2d 1172, 1173 (Fla. 5th DCA 2005). See also Pagan v. State, 830 So.2d 792, 803 (Fla. 2002) (holding the same). This Court is going to review this issue in any event.

As perpetrators of the underlying felony, cofelons are principals in any homicide committed to further or prosecute the initial common criminal design. Dell v. State, 661 So.2d 1305 (Fla. 3d DCA 1995). However, this Court has held that:

The "independent act" doctrine arises when one cofelon, who previously

participated in a common plan, does not participate in acts committed by his

cofelon, which fall outside of the original collaboration . . . Under these

limited circumstances, a defendant whose cofelon exceeds the scope of the original plan is exonerated from any punishment imposed as a result of the independent act.

Ray v. State, 755 So.2d 604, 609 (Fla. 2000) (citations and quotations omitted). See also Parker v. State, 458 So.2d 750 (Fla. 1984); Fla. Stnd. Crim. Jury Instr. 3.6(l).

The State failed to overcome the defense's evidence that the defendant only planned and agreed to commit a robbery and that the subsequent kidnapping and murder of the Sumners by his co-defendants was a surprise to him, was not foreseeable and was the independent act of his co-defendants which he did not participate in.

ARGUMENT 2: THE SEARCH OF THE LOCKED SAFE INSIDE THE DEFENDANT'S HOTEL ROOM SHOULD HAVE BEEN SUPPRESSED BECAUSE IT WAS OUTSIDE THE SCOPE OF THE SEARCH WARRANT

The standard of review for an appellate court to apply to a motion to suppress is whether the trial court's findings of fact are supported by competent substantial evidence. A trial court's application of the law to the facts is reviewed *de novo*. State v. Kindle, 782 So.2d 971 (Fla. 5th DCA 2001). See also Ornelas v. United States, 517 U.S. 690, 696-97, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

The facts of this issue are not in dispute, so therefore this Court's review is de novo. The legal question at issue is whether the search warrant for the hotel room covered the search of the locked safe within the hotel room.

Contraband not listed in a search warrant may only be seized if it is in plain view. State v. Ridgeway, 718 So.2d 318, 319-20 (Fla. 2d DCA 1998). The search warrant did not cover the locked safe. An additional warrant based upon probable cause was required.

ARGUMENT 3: THE RECORDINGS OF THE DEFENDANT MADE WHILE HE WAS IN JAIL IN SOUTH CAROLINA SHOULD HAVE BEEN SUPPRESSED BECAUSE FLORIDA LAW ENFORCEMENT DID NOT OBTAIN A WARRANT BEFORE OBTAINING THEM, IN

VIOLATION OF SOUTH CAROLINA LAW

As relayed above, the standard of review on this question of law is de novo. There is no factual dispute.

The Jacksonville Sheriff's Office took possession of and listened to recordings of telephone conversations the defendant had while he was in jail in South Carolina. The warrant requirement was jail policy and it was also required by South Carolina law. See South Carolina Code 1976, § 17-30-25(B)(2), which requires a warrant or a written certification that a warrant is not needed.

The failure of law enforcement to obtain the search warrant or any type of written certification requires suppression of the search under South Carolina law and normal Fourth Amendment exclusionary rule jurisprudence. See Wells v. State, 975 So.2d 1235, 1238 (Fla. 4th DCA 2008).

ARGUMENT 4: THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO INTRODUCE EVIDENCE THAT THE DEFENDANT SOLICITED HIS CELLMATE TO HELP HIM ESCAPE FROM JAIL

A trial court is granted broad discretion in determining the relevance of evidence and such a determination will not be disturbed on appeal absent an abuse of discretion. Jacobs v. State, 962 So.2d 934, 936 (Fla. 4th DCA 2007).

The State was allowed to introduce into evidence that the defendant attempted to solicit his cellmate to help him escape from jail. This testimony is completely irrelevant to this case. Relevant evidence is evidence tending to prove or disprove a material fact. See Fla. Stat. § 90.401. The fact that the defendant wanted to escape from jail had no bearing on his culpability for the crimes at issue.

Even if the evidence was technically relevant, its minimal relevance was outweighed by its prejudicial effect. See Fla. Stat. § 90.403. The defendant was not charged with escape so this testimony constituted an impermissible character attack about an uncharged crime. It was unfairly prejudicial collateral crime evidence. See Steverson v. State, 695 So.2d 687 (Fla. 1997) (The State cannot prove that the admission of a collateral crime, a shooting of a police officer four days after the crime, was not harmless beyond a reasonable doubt).

In the case at bar, the State cannot prove beyond a reasonable doubt that the testimony about the escape attempt was harmless. The introduction of this evidence created the real possibility that the defendant was convicted because he had a bad character, and because he attempted this other crime, and was not based on the actual facts of the case. Reversal is required.

ARGUMENT 5: THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO INTRODUCE INTO EVIDENCE RECORDINGS WHERE LAW ENFORCEMENT RELAYED WHAT A CO-DEFENDANT PURPORTEDLY SAID AND THE DEFENSE WAS NOT ABLE TO CROSS-EXAMINE THE CO-DEFENDANT

A trial court's ruling on the admissibility of evidence based upon the Confrontation Clause, is reviewed de novo. Milton v. State, 2008 WL 514996 at *2 (Fla. 1st DCA, February 28, 2008), *citing* Hernandez v. State, 946 So.2d 1270 (Fla. 2d DCA 2007).

The State was allowed to introduce recordings of conversations the defendant had with law enforcement, where law enforcement baited the defendant with what co-defendant Tiffany Cole allegedly said about his involvement in the crimes.

The admission of this evidence violated the defendant's Sixth Amendment right of cross-examination and confrontation, and the principles of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The statements at issue, if they were even made to begin with as compared to being a police ruse to induce the defendant to confess, were testimonial. Crawford states that statements made during police interrogations are testimonial. See Crawford, 541 U.S. at 52. There was also no prior opportunity to cross-examine Cole. Accordingly, Crawford is implicated.

The court in State v. Hernandez, 875 So.2d 1271, 1272-73 (Fla. 3d DCA 2004), held that the admission of a co-defendants statements during a

taped conversation he had with the defendant violated the Sixth Amendment Confrontation Clause because the defendant did not have the opportunity to cross-examine the co-defendant.

As held in Milton v. State, 2008 WL 514996 at *4 (Fla. 1st DCA, February 28, 2008), the defendant's rights under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), were violated. In Milton, the court reversed a conviction because the State created an impression with the jury that a co-defendant had incriminating evidence of the defendant's crimes, but the defense was unable to counter that impression because the co-defendant was not subject to cross-examination.

In the case at bar, the State was unfairly allowed to introduce evidence that a co-defendant admitted the defendant's involvement in the crime, but the co-defendant was not subject to cross-examination and confrontation. This unimpeachable evidence was highly prejudicial as it came from a co-defendant who was an alleged eyewitness to everything that happened. The State cannot meet its burden to prove that this error is harmless.

ARGUMENT 6: THE TRIAL COURT ERRED IN GIVING "GREAT WEIGHT" TO THE JURY'S ADVISORY

RECOMMENDATION WHEN THE DEFENDANT WAIVED HIS RIGHT TO PRESENT EVIDENCE OF MITIGATION BUT THE TRIAL COURT DID NOT PROVIDE AN ALTERNATIVE MEANS FOR THE JURY TO BE ADVISED OF AVAILABLE MITIGATING EVIDENCE

Consistent with Muhammed v. State, 782 So.2d 343, 361-363 (Fla. 2001), the case at bar must also be reversed because the defendant did not present any evidence of mitigation in front of the jury and the trial court did not provide an alternative means for the jury to be advised of the available mitigating evidence.

The Muhammed court held that the failure to present any evidence of mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way and that the case had to be reversed because the trial court gave "great weight" to their recommendation. Id. at 362.

In the case at bar, the jury was not sufficiently instructed or informed about the defendant's mitigation. Although the trial court went into all of the possible mitigating evidence on his own in his sentencing order (taken from the PSI, proffers from counsel, etc.), the jury was not privy to any of this information.

The trial court even stated that, "all they're going to hear from me is a list of aggravating circumstances." Tr. 1614. The trial court also repeatedly stated that the jury's recommendation will essentially be dispositive because there would be almost no way for the court to override their recommendation. Tr. 1615, 1624.

The trial court stated: "I am required to give what the jury recommends 'great weight'." The law requires this. Tr. 1623-24. Accordingly, this case carries the same concerns as Muhammed, and even more so because of the trial court's statement about the jury's recommendation being virtually dispositive.

If the State argues that this issue had to be preserved for appellate review by defense counsel, then the defendant received ineffective assistance of counsel in derogation of the Sixth Amendment – and this Court should review the issue as if it was fully preserved so as not to penalize the defendant.

Regardless, defense counsel were not required to go against the defendant's wishes and make sure the jury had sufficient evidence of mitigation. The trial court had an independent duty to give the jury's recommendation "very little" or "no weight at all," under the circumstances.

ARGUMENT 7: THIS COURT'S COMPARATIVE PROPORTIONALITY REVIEW OF SENTENCES OF DEATH IS UNCONSTITUTIONAL

PRESERVATION

The defense raised this issue below. The defense argued that the courts should consider all of the jury overrides as part of their proportionality review. The defense then put forth a list of cases where death was sought, but was not imposed by the jury [R. 213-215]. This is the crux of the constitutional challenge herein.

Regardless, preserving this issue in the trial court should not be required because proportionality review is not an issue in the trial court . There is nothing to "contemporaneously" object to. Further, circuit courts have no authority over how this Court reviews its capital cases.

If explicit preservation was required, then the defendant received ineffective assistance of trial counsel for not raising these precise arguments below. The defendant should not be penalized for his trial counsel's oversight and this Court should review this issue de novo.

The defense had nothing to lose and all to gain by making this challenge. The defendant was prejudiced because if this Court had a more expansive proportionality review his death sentence would be overturned.

Alternatively, this is a "facial challenge," which can be raised for the first time on appeal. It applies to every capital defendant. This Court's current proportionality review constitutes fundamental error because it reaches into the very heart of meaningful appellate review in every single capital case.

CONSTITUTIONALITY

In reviewing a sentence of death this Court must consider the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those other decisions. Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

This Court must consider the totality of the circumstances and compare it with other capital cases. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances. Woods at 990. See also Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003).

This Court generally only reviews cases in which a death sentence has been imposed and only expands its review when multiple defendants or participants are involved. This is legally insufficient because it is an insufficient body of evidence to determine whether death sentences are proportionate and pass constitutional muster.

The defendant hereby incorporates by reference Chapter 7 from the September 2006 ABA report, pages 207 to 212, and pages xxii to xxiii. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, September 17, 2006.

This Court's proportionality review should include a review of cases in which a death sentence was imposed, cases in which a death penalty was sought but was not imposed, and cases in which the death penalty could have been sought but was not. This Court should also make a comparison to death sentences in other states and in federal cases. The Constitution does not stop at the state line.

All of this criteria must be utilized to achieve both statewide and national uniformity, to ensure that death is not "unusual," and to ensure that a death sentence is not arbitrary. The failure to engage in this multi-faceted

analysis deprives every capital defendant of a meaningful proportionality review.

The current review violates equal protection, violates the due process clauses of the Florida and United States Constitutions, and results in cruel and unusual punishments in derogation of Article 1, Section 17 of the Florida Constitution and the Eighth Amendment. See Simmons v. State, 934 So.2d 1100, 1122 (Fla. 2006).

To pass constitutional muster, this Court must determine what level of aggravation is sufficiently low and what level of mitigation that is sufficiently high to raise concerns about arbitrariness and uniformity. This is impossible without objective empirical data about Florida's capital punishment system as a whole, and data from other jurisdictions as well. A defendant's chances of death should not vary based upon which jurisdictional border he has crossed. This goes for the county borders within Florida as well.

This Court should impose mandatory data collecting procedures consistent with the suggestions herein. The defendant hereby incorporates by reference: Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 St. Thomas Law Review. 299 (2004).

The ABA assessment team noted a trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 211.

The ABA Report noted, "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 212.

The shift in the affirmance rate and in the manner in which the proportionality review is conducted is evidence of arbitrariness. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. This Court's current limited scope of review presents an undue risk that death will be imposed in an arbitrary and discriminatory manner.

If this Court increased the body of evidence in its proportionality review, as suggested above, it would reverse the sentence of death in this case. This case is not consistent within Florida. See Lanzafame v. State, 751 So.2d 628 (Fla. 4th DCA 1999) (no death sentence for first degree

premeditated murder where the defendant, without provocation, hit the victim in the head with a baseball bat in excess of ten times).

This case is also not consistent with other states. See In re Elkins, 144 Cal.App.4th 475 (Cal. App. 1 2006) (defendant who was 19 years old when he robbed and killed his victim by repeatedly hitting him with a baseball bat did not receive a sentence of death, *and in fact was granted parole*). If this Court reviewed cases like this, it would be clear that the sentence of death in this case is disproportionate.

In sum, this Court should: (1) address whether this Court's current limited proportionality review passes constitutional muster – a subject which seems to be one of first impression for the Court; (2) adopt a more comprehensive review as suggested herein; and (3) apply the new comprehensive review to this case.

The United States Supreme Court has held that comparative proportionality review is not constitutionally required. See Pulley v. Harris, 465 U.S. 37, 44-54 (1984). Over time, this decision has proven itself to be violative of the Eighth and Fourteenth Amendments, and therefore should be overruled. See Tuilaepa v. California, 512 U.S. 967, 995 (1994) (J. Blackmun dissenting); Turner v. California, 498 U.S. 1053 (1991) (J. Marshall dissenting from denial of certiorari).

This Court does provide at least some form of comparative proportionality review. This decision places the extent of its review under the Constitutional microscope. See Evitts v. Lucey, 469 U.S. 387, 401 (1985) (when a State opts to act in a field with discretionary elements it must do so in accord with the dictates of the Constitution, and in particular, the due process clause).

This question is one of first impression for this Court. This is due to the fact that death penalty case law has evolved significantly over the last 8 years (since Ring) and now Florida stands alone on the fringe of what death penalty protections should be applied in a statutory scheme.

In sum, Florida has not followed the death penalty revolution, despite this Court's urging,[1] and therefore this Court must employ a more comprehensive comparative proportionality review to make up for it. Florida's death penalty scheme does not provide the necessary constitutional safeguards to allow this Court's proportionality review to be so narrow.

Florida is the only state that allows juries to find the existence of aggravating factors and allows the decision to impose death on a mere majority vote. There is also no assurance that the jurors are even agreeing on

[1] State v. Steele, 921 So.2d 538, 548-50 (Fla. 2005) ("need for legislative action" because Florida is the "outlier state."

the same aggravating factors. This Court is constitutionally required to undertake a more comprehensive review as a result.

The United States Supreme Court case law on this issue is pre-Ring and therefore is ripe for abrogation. Regardless, the high court specifically makes the holding that comparative proportionality review is not required when the State system at issue provides sufficient safeguards against arbitrariness. See Pulley v. Harris, 465 U.S. 37 (1984).

Florida's system does not satisfy this criteria. Florida does not provide sufficient safeguards given the recent changes in death penalty jurisprudence and new statutory capital schemes throughout the other states.

ARGUMENT 8: THE DEFENDANT'S SENTENCE OF DEATH IS DISPROPORTIONATE

It is axiomatic that the death penalty is reserved for only the most aggravated and the least mitigated of first degree murders. Woods v. State, 733 So.2d 980, 990 (Fla. 1999). This Court will review this issue in any event.

The defense filed sentencing memoranda, which are hereby incorporated by reference [R. 153; 223-227]. The defendant was only 23 years-old at the time of the crimes, he is able to live a productive life in

prison, he behaved well during court proceedings, and he has no history of violent crime. The horrible actions in this case were aberrant behavior.

The defendant's mother was a substance abuser and tried to sell him in exchange for drugs after he was born. His parents abandoned him and he was raised by his grandmother. The defendant has a strong and positive family relationship with her. The defendant was a problem child in his elementary school years and was prescribed Ritalin for a period of time.

This Court held in Johnson v. State, 720 So.2d 232, 238 (Fla. 1998), that even though this was a horrible and indefensible first-degree murder, it was disproportionate because, *inter alia*, the prior violent felony aggravator was not strong, the defendant was 22 at the time of the crime, had a troubled childhood, and was respectful to his parents and neighbors.

Significantly, the jury recommendation in the case at bar was a weak 8 to 4, and that was with them not even being instructed on or presented with any mitigation. Even though the trial court stated that it could not think of a more horrible way to die, the sentence of death was disproportionate. This is not one of the least mitigated cases.

ARGUMENT 9: FLORIDA'S DEATH PENALTY SCHEME VIOLATES

DUE PROCESS, THE SIXTH AMENDMENT AND *RING* *v. ARIZONA* AND ITS PROGENY

The defense filed motions to declare Florida's death penalty scheme unconstitutional and to attain special verdict forms from the jury [R. 34; 154; 156; 159]. The trial court denied all of the motions [R. 37; Tr. 1630-31]. These issues are strictly issues of law, therefore they are subject to de novo review.

The failure to have a special verdict has deprived the defendant of meaningful appellate review. See State v. Steele, 921 So.2d 538, 553 (Fla. 20005) (C.J. Pariente, dissenting in part). The failure to have detailed appellate review is a due process violation in and of itself.

How can a trial court and an appellate court accurately uphold a jury verdict where no one has any idea what the jury was thinking? If it is not necessary to know what the jury was thinking, then in Florida having a jury in a capital case is an empty formality, and this is not constitutionally acceptable.

Florida's death penalty scheme is unconstitutional on its face and as applied to the facts of this case. This issue was preserved in the lower court and is therefore an issue of law subject to de novo review.

The Sixth Amendment right to a jury trial and the right to due process of law embodied in both the Florida and United States Constitutions is violated by the mandates and implementation of Florida's statutory scheme and case law on attaining a conviction and sentence of death in a capital case.

Florida's death penalty scheme violates the Sixth Amendment and due process. See e.g. Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007); United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Based upon the reasoning and the logical extensions of these cases, permitting a jury to find death on less than a unanimous vote does not pass constitutional muster. Currently, precedent interpreting the U.S. Constitution is to the contrary. It is only a matter of time before this changes. Florida is the only state that allows the jury to find both the existence of aggravating circumstances and make a recommendation that the defendant receive the death penalty by majority vote.

The United States Supreme Court's continuing strengthening of the Sixth Amendment, and the principles of due process embodied therein, cast a dark shadow over Florida's death penalty system.

The concurring opinions of Justices Quince, Bell, Anstead, and Pariente in Coday v. State, 946 So.2d 988, 1009-1026 (Fla. 2006), are hereby incorporated by reference. See also State v. Steele, 921 So.2d 538 (Fla. 2005).

The defendant hereby specifically argues that the following Sixth Amendment, due process and other constitutional deficiencies invalidate the imposition of death in this case:

A. Because aggravating circumstances are elements of the offense under Florida law and Ring, they should have been charged in the indictment based upon a finding of probable cause by a grand jury and found by the jury beyond a reasonable doubt.

B. Ring and its progeny mandate that the jury, not the judge, make the necessary findings of fact to determine eligibility for the death penalty, and the ultimate question of whether death shall be imposed.

C. A special verdict form should have been submitted to the jury so that they could have made specific findings on each of the aggravating factors in this case. See State v. Steele, 921 So.2d 538, 552 (Fla. 2005) (J. Pariente dissenting in part). Currently, Florida allows a jury to return a death recommendation without a majority of the jury agreeing on a single aggravating factor – thereby condemning some unknown fraction of criminal defendants to serve an illegal sentence.

D. The Sixth Amendment requires juries to *unanimously* find the existence of aggravating factors and *unanimously* find that death should be imposed.

E. The requirement that the defendant must prove that the mitigating factors must outweigh the aggravating factors is unconstitutional burden shifting. It results in a presumption of death. The jury instructions in this case shifted the burden of proof to the defendant to prove that the death sentence was inappropriate and the same standard was employed by the sentencing judge. The jury should have been instructed that the aggravating factors must outweigh any mitigating factors.

F. The sentencing statute fails to provide a necessary standard for determining that aggravating circumstances "outweigh" mitigating factors, does not define "sufficient aggravating circumstances," and does not sufficiently define each of the aggravating circumstances. The jury instructions are unconstitutionally vague which results in inconsistent findings of death.

G. The procedure does not have the independent re-weighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

H. Florida's failure to follow Ring violates the defendant's equal protection rights because Florida is the only State in the nation that allows the death penalty to be imposed based upon a majority vote by the jury as to whether aggravating factors exist and as to the recommendation of death itself.

I. Florida's death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment.

Pursuant to all of the foregoing, Florida's death penalty scheme stands in violation of the Eighth Amendment, the Sixth Amendment, and the Fourteenth Amendment of the United States Constitution. As for the Florida Constitution (which provides more protection than its federal counterpart), the scheme violates equal protection, due process, and the proscription against cruel and unusual punishment.

Florida capital cases require a unanimous verdict by a jury of twelve. See Rule 3.270 and Rule 3.440, Fla. R. Crim. P. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held that, "because . . . enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense' . . . the Sixth Amendment requires that they be found by a jury.

The defendant's death sentence fails in the wake of Ring for a number of reasons. First, the jury recommended death by a margin of 8 to 4. Second, Ring requires that the jury, not the judge, make the findings needed to impose the death penalty. Those findings have not been made in the defendant's case. Third, Ring and Rules 3.270 and 3.440 require that the jury findings in a capital case be unanimous.

Florida law requires that capital crimes be charged by presentment or indictment of a grand jury. Fla. Const. Art. I, Section 15 (a)(1980). This Court has held that indictments need not state the aggravating circumstances upon which the State may rely to establish that a crime qualifies a defendant for the death penalty. State v. Sireci, 399 So.2d 964, 970 (Fla. 1981).

The jury's advisory recommendation does not specify what, if any, aggravating circumstances the jurors found to have been proved. Neither the consideration of an aggravating circumstance nor the return of the jury's advisory recommendation requires a unanimous vote of the jurors.

A death sentence is only authorized upon the finding of additional facts. Since, under Florida law, there is no requirement of a jury trial to determine the existence of those necessary facts, the Sixth Amendment is violated.

A literal reading of Florida's death penalty sentencing scheme (F.S. Section 921.141) indicates that the jury must, *before considering mitigating circumstances*, determine whether the aggravating circumstances are of sufficient magnitude to warrant the imposition of the death penalty.

In view of Apprendi and Ring, *supra*, the defendant's death sentence cannot stand because his jury did not unanimously recommend death and because it is impossible to know whether the jurors would have unanimously

found any specific aggravating circumstances. With an 8 to 4 vote, there is a high probability that the jury did not unanimously agree on the existence of any particular aggravating circumstance.

Given that this Court has already acknowledged in Steele that Florida's death sentencing statute *should* be revisited to require *some unanimity* in the jury's recommendation, and given that this Court has deferred to the legislature as best it can, and given the continuing lack of legislative action, the defendant submits that the trial court erred in not ruling that Florida's death penalty scheme is unconstitutional.

CONCLUSION

For all the foregoing arguments and authorities set forth herein, the Appellant/Defendant, MICHAEL JAMES JACKSON, respectfully requests this Honorable Court to reverse his convictions and release him forthwith or remand for a new trial/penalty phase, or reduce his sentence to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the OFFICE OF THE ATTORNEY GENERAL, Attn: Meredith Charbula, Esq., The Capital, PL-01, Tallahassee, Florida 32399-1050 on this 15th day of August 2008.

RYAN THOMAS TRUSKOSKI, ESQ.
RYAN THOMAS TRUSKOSKI, P.A.
Florida Bar No. 0144886
Appellate Attorney for Defendant
P.O. Box 568005
Orlando, FL 32856-8005
(407) 841-7676

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 15th day of August 2008.

RYAN THOMAS TRUSKOSKI, ESQ.
Appellate Attorney for Defendant