IN THE SUPREME COURT OF FLORIDA

RICHARD KNIGHT,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC07-841**
STATE OF FLORIDA,	)	**L.T. NO. 01-14055 CF 10A**
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit in and
for Broward County, Florida

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PRELIMINARY STATEMENT

Appellant, Richard Knight ("Knight"), was the defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Appellee, State of Florida ("State"), was the plaintiff.

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References to the Supplemental Record on Appeal Transcripts will be designated by the symbol "R. Supp." followed the appropriate volume number; the symbol "T" followed by the appropriate page number(s), together encased in parentheses.

References to the Trial Transcript will be designated by the symbol "V" followed the appropriate volume number; the symbol "T" followed by the appropriate page number(s), together encased in parentheses.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction to review the judgment and sentence of a trial court imposing the death penalty. Article V, § 3(b)(1), Florida Constitution; Rule 9.030(a)(1)(A)(1), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

Appellant, Richard Knight ("Knight"), was charged by Indictment on August 15, 2001, alleging that on June 28, 2000, Knight unlawfully and feloniously and from a premeditated design to effect the death of a human being, Odessia Donna Marie Stephens, killed and murdered the said Odessia Donna Marie Stephens, by stabbing her, against the form of the statute in such case pursuant to Section 782.04(1) of the Florida Statutes (Count I), and that on the same date Knight did the same to Hanessia Mullings (Count II) (R.1 4-5). Knight entered pleas of not guilty (R.1 6) and the State gave Notice of intent to seek the death penalty (R.1 10).

Knight's public defenders and special appointed public defenders filed numerous pretrial Motions over the next five years until the case came to trial on March 13, 2006. Knight filed his "Motion to Declare Florida's Death Penalty Statute Unconstitutional Based on the Clear Mandate of the United States Supreme Court Decision in *Ring v. Arizona*" (R.5 802-824), which the trial Court denied (R.2 181).

Following jury selection where nearly 200 potential jurors participated in voir dire, the jury was sworn in on March 22, 2006 (V.19 T 2137). On March 23, 2006, Knight moved to disqualify the jury panel and for a mistrial based on the jury's exposure to Knight's being handcuffed and shackled during the course of the trial (V.44 T 300) and, following an evidentiary hearing (V.44 T 213-300), Knight's motion for mistrial was denied (V.44 T 311). Before the State presented its opening statement, the Defendant renewed his Motion for a mistrial (V.20 T 2152).

The State, during its opening statement told the jury that on June 28, 2000, a 911 call was made at 12:21 a.m. from an upstairs apartment in the building where the victims lived (V.20 T 2214). Police Officers arrived on the scene and noticed that a bedroom window of apartment 101 was open (V.20 T 2215). An Officer saw Knight and Knight told her he was out jogging (V.20 T 2216). Inside the apartment, Officers found Odessia Stephens and Hennesia Mullings who had both been brutally stabbed (V.20 T 2217).

The State informed the jury that Hans Mullings was Hennesia's father and Odessia's partner. Hans and Odessia allowed Knight to live with them. Knight's

relationship with Odessia was strained, and Knight was told to move out of the apartment (V.20 T 2218).

The State told the jury that when the police searched the apartment, they found Knight's clothes with blood on them. Also, the boxer shorts that Knight was wearing the time of his arrest contained Odessia's blood (V.20 T 2218). The clothing found underneath the bathroom sink showed Odessia's, Hanessia's and Knight's blood (V.20 T 2219). In addition, Knight's DNA was found under Odessia's fingernails (V.20 T 2219).

The Defense told the jury during its opening statement that the person who lived in the apartment above 101 heard a young girl saying "No daddy" (V.20 T 2220). The Defense told the jury that no prints were identifiable on the suspected murder weapons (V.20 T 2222). Knight was in the vicinity of the crime when police arrived (V.20 T 2223).

The State's first witness, Rosemary Parisi, testified that she awoke when she heard thumping and cries from two females. (V.21 T 2242-44). Ms. Parisi testified that she went onto her back balcony and still heard frantic crying (V.21 T 2248).

She testified she heard the words: “Oh Daddy, oh Daddy” (V.21 T 2249). Ms. Parisi testified that she believed it was moments between when police arrived and when the crying stopped (V.21 T 2251).

During cross examination, the Defense brought out that Ms. Parisi testified during her deposition that she had heard the screen door open, but she couldn’t see who opened it (V.21 T 2261).

Over the Defendant’s objection, the Court allowed the jury to hear that during Ms. Parisi’s deposition, she testified that it was her impression that the cry for “daddy” was a cry for help by a trapped person who needed help (V.21 T 2266-67). Ms. Parisi testified at trial that she never heard the person cry for “help” (V.21 T 2271).

Coral Springs Officer Vincent Sachs testified he arrived first at the scene (V.21 T 2274). Officer Sachs initially saw a small opening in a window with no screen and a light emanating from the room (V.21 T 2278-81). Thereafter, Officer Sachs said that same window which was ajar was fully open and the light was off (V.21 T 2281). Officer Sachs points his flashlight into the apartment and saw

reddish stains on the carpet leading to front door (V.21 T 2283). While Officer Sachs was investigating outside the building, Knight approached his partner (V.21 T 2285). Knight told the partner that he was out for jog. Officer Sachs testified that Knight was wearing slacks and dress shoes (V.21 T 2285). Officer Sachs also testified that Knight appeared wet but not from sweating (V.21 T 2287). Officers knocked at the door of the apartment building, but no one answered (V.21 T 2289). Officer Sachs entered the building through a screen door and saw a child lying in a fetal position (V.21 T 2291-92). Officer Sachs assisted another Officer enter the apartment through the open window. Once Officer Sachs was inside the apartment, he saw a female lying in the dining room. Officer Sachs testified that he saw no signs of robbery or ransacking (V.21 T 2300-02).

The Defense brought out on cross examination that Officer Sachs had recently resigned from Coral Springs PD after being accused of falsifying police reports (V.21 T 2322). Officer Sachs testified that he failed to document in his report that Knight was wet on the night of the incident (V.21 T 2330, 34).

Coral Springs Police Officer Natalie Cohen Mocny testified that Knight approached her when she was outside of the apartment and told her that he lived

there. She testified that Knight also told her that he was taking a run, but that it appeared to her that he had just taken a shower. The Officer also testified that Knight was about a 100 yards away from open window when she first noticed him (V.21 T 2346). The Officer took no pictures of Knight at the scene (V.21 T 2358).

Officer Amy Allen testified that she climbed through the open window to open the apartment front door and that she saw a deceased black female (V.21 T 2362).

Kevin Adams testified that he lifted the latent prints from the apartment, took pictures of the carpeting, took clippings from Knight's hair and found a knife under Odessia's body (V.22 T 2411, 2424; V.23 T 2471, 2474-75). Adams testified that he did not recall processing any towels with blood, and that he did not process the screened-in area outside of the apartment (V.23 T 2506-2510).

Trudi-Kaye Edmund testified that she knew Knight from school and from mutual friends, and that she had a phone conversation with Knight on June 27, 2000, around 11 p.m. (V. 23 T 2525). She testified that she had a 20 minute conversation with Knight, and that she heard the din of pots and pans clanging (V.

23 T 2529). Edmund testified that Knight told her he was cooking and babysitting (V. 23 T 2529, 2531). Edmund testified that she heard a young girl laughing, and that the young girl did not sound distressed (V. 23 T 2531). Edmund testified that she spoke with a little girl who mistook Edmund for her mommy (V. 23 T 2529). Edmund testified that she had an argument with Knight, and that she ended the conversation by telling him not to call her anymore (V. 23 T 2544).

Monica Simms-Dagniewska, who was the adopted sister of Odessia Stephens, testified that she went to the apartment after the murders and that she did not notice any items of value missing (V. 23 T 2550).

Barbara Haydu, a Coral Springs Police Officer, testified that she went to Kinko's to obtain the surveillance tape and corroborated Hans Mullings' alibi on the night of the murders (V. 24 T 2582).

Robert Oehler, a Plantation Police Officer, testified that he took standard palm prints of Knight (V. 24 T 2586).

Hans Mullings testified that he lived at the apartment with Odessia and Hannesia, and that Knight was adopted by his aunt (V. 24 T 2590). He testified that the relationship between Knight and Odessia became strained due to various reasons – that Knight was dating Victoria Martino, that Knight failed to pay rent, and that Knight was incurring long distance charges which he failed to pay (V. 24 T 2600-01). He testified that Knight broke a window in the apartment (V. 24 T 2606). Mullings testified that the boxers found at the apartment were not his (V. 24 T 2649). Explaining his whereabouts on the night of the murders, Mullings testified that he went to Kinko's late on the night of June 27, after which time he went to his friend Sean's house, dropped his brother off at their parent's home, and then dropped another one of his friends off at home (V. 25 T 2667-68). Mullings testified that when he arrived at the apartment, he saw police and assumed it was for Knight because Knight had outstanding traffic warrants (V. 25 T 2669).

On cross examination, Mullings testified that he was unaware that Knight was babysitting Hannesia on the night of the murders (V. 25 T 2679). Mullings testified that, after the murders, he told the police that he was threatened in early June by a woman named Toni, whose car was towed from the nightclub he operated (V. 25 T 2695). Mullings testified that Knight routinely wore jean shorts

underneath his pants and that he recognized the shirt recovered from the apartment as one Knight often wore (V. 25 T 2700-01).

During redirect examination, Hans Mullings testified in the jury's presence that Knight had a "violent background" (V.25 T 2709). Mullings' comment ("I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something because I know Richard's violent background") concerned his reaction to having arrived and observing crime scene tape wrapped around the residence (V.25 T 2709). Though the defense objection to this testimony was sustained and the jury was asked to disregard the comment, the defense pointed out "[t]here's no way they can disregard that" (V.25 T 2710), moving for a mistrial (V.26 T 2752-2781), which the trial court denied (V.26 T 2781).

Joan Menke, a crime scene technician and 30-year veteran of the Coral Springs Police Department, testified that she took pictures of Knight at the police station, and that Knight had scrapes on his chest and cuts on his left hand (V. 25 T 2736-37). Menke also verified that the boxers found in the bathroom and the boxers Knight was wearing were made by the same company (V. 25 T 2741-42). She testified that fingerprints of Odessia and Hannesia were taken at autopsy, and

verified that oral and blood samples were taken from Victoria Martino (V. 26 T 2817). She testified that Odessia appeared to have defensive wounds (V. 26 T 2828). Menke acknowledged that the print left on one of the knife blades was unidentified as of the time of trial (V. 26 T 2848).

Between the presentation of Menke's testimony, the court held a hearing regarding the Defense's Motion for Mistrial. The defense argued that the State elicited Mullings' prejudicial statements during its case-in-chief and not as rebuttal (V. 26 T 2755). The Defense contended that Mullings' description of his reaction to seeing the police tape further suggested bad character to the jury and reinforced the need to grant a mistrial (V. 26 T 2758). The court ruled that Mullings' comment was "nebulous" and denied the Defense's Motion for Mistrial (V. 26 T 2777-81).

Claudine Carter Pereira is Coral Springs' supervisor of latent print analysis (V. 26 T 2878-79). She testified to receiving a total of 13 latent prints, and that she fingerprinted Knight (V. 26 T 2880-82). She testified to finding a print matching Martino on the exterior of the northeast back door of the apartment (V. 26 T 2899),

and that she found an unidentified print of value on one of the knives (V. 26 T 2904).

Detective Terry Gattis, a crime scene investigator with Broward Sheriff's Office, testified to having processed the knives found in the apartment, and to having taken swabs from Knight (V. 27 T 2924-25).

Coral Springs Detective Doug Williams was the lead investigator on the case (V. 27 T 2938). He authenticated that certain items of clothing were taken from Knight, and testified that there were no signs of forced entry in the apartment (V. 27 T 2938-40). Det. Williams testified that his officers had found a garbage bag in the dumpster near the apartment which contained knives and which was linked to apartment 305, which was in the same building as Mullings' apartment; he testified that there was no connection between the bag and the crime (V. 27 T 2948-49). He testified that he received a diagram of the apartment from Stephen Whitsett on July 27, 2000, and that he gave a copy of his investigation file to the State Attorney two weeks before Knight was Indicted (V. 27 T 2960). Det. Williams testified that he made no promises to Whitsett in exchange for his cooperation (V. 27 T 2965).

Kevin Noppinger, a serologist with Broward Sheriff's Office, testified that he received oral swabs from Knight, Mullings, Martino, Dagniewska, and Melanie Robinson (V. 27 T 2987), and that he received various samples from the apartment for testing (V. 27 T 2990). Noppinger testified that the blood on the boxers had a mixture of Odessia and Knight's DNA, and that another portion had a mixture of Odessia's and Hannesia's blood (V. 26 T 3012-13). Noppinger testified that a sample from the shirt found in the bathroom had Odessia's DNA on it, and that the jean shorts found in the bathroom had a mixture of Odessia's and Hannesia's DNA (V. 27 T 3015-16). He testified that no foreign DNA was found in Knight's hair (V. 27 T 3021). Noppinger testified that a blood sample taken from the clothes that Knight had on at the time of detention had Knight's DNA, and that a portion of the shirt had a major profile consistent with Knight, and a minor profile consistent with Odessia (V. 27 T 3023-24). He further testified that the DNA found on the shower curtain contained a mixture of Odessia's and Martino's blood (V. 26 T 3031). Noppinger testified that Knight's fingernails had a minor DNA profile of Odessia's DNA and that Odessia's fingernails had a minor DNA profile of Knight (V. 27 T 3032-34). Noppinger testified that he packaged 15 samples for analysis at Bode Technology Group, because Broward Sheriff's Office lacked the capability to conduct mitochondrial DNA testing (V. 28 T 3055; 3068).

Martin Tracey, a Florida International University biology professor, testified that he reviewed Noppinger's DNA report (V. 29 T 3134-35). Tracey testified that the stains on the boxers matched Odessia and Hannesia's standards (V. 29 T 3137-38; 3144). Tracey corroborated that the DNA found on the shower curtain matched Hannesia and Martino (V. 29 T 3152). Tracey testified that the DNA mixture found on Knight's shirt likely belonged to the victims (V. 29 T 3153-54). Tracey testified that the DNA material on Knight's boxers matched Odessia and Hannesia (V. 29 T 3162-63).

Stephen Whitsett testified that he was incarcerated at Broward County Jail when he met Knight on June 29, 2000 (V. 29 T 3202). Stephens testified that Knight confessed to him about the murders, and that Knight drew a diagram of the apartment in order to explain the events (V. 29 T 3212-16). On cross examination, Whitsett admitted to having been involved in a prison break (V. 29 T 3263).

Faith Patterson, an analyst with Bode Technology Group, testified that she received the samples sent to her by Noppinger (V. 31 T 3293). Patterson testified that neither the victims nor Knight could be excluded from the tested samples (V. 31 T 3302).

When the State began questioning State DNA expert McElfresh of Bode Technology concerning his comparisons of foreign DNA in a mixture found in two samples from the crime scene (a pair of blue jean shorts and a pair of boxers) with standards taken from a minor, Victoria Martino, the latter of which had not previously been sent to the State expert's lab, the defense called for a sidebar and objected, asserting a discovery violation and moving for a mistrial, which the trial court initially overruled without holding a *Richardson* hearing (V.31 T 3342; 3347-3355). McElfresh then testified that, based on his new comparisons of the foreign DNA in the mixture with the standards from Martino recently supplied to him, that Knight could not be excluded from the samples (V.31 T 3355-3369; 3375). Asked on cross whether his lab had ever analyzed Martino's DNA, McElfresh replied that it had not (V.31 T 3372). Asked when he was first given Martino's DNA standards, he replied "Approximately two weeks ago" (V.31 T 3372). McElfresh agreed on cross that his lab had previously excluded Knight from the samples (V.31 T 3382).

The following morning the defense renewed its objection and Motion for mistrial in the following manner:

MR. EVAN BARON: Your Honor, yesterday, the State called one of their witnesses, Doctor McElfresh from Bode Technology. I believe I have his name correct. If it's not McElfresh, it's close to it. As the Court may recall, prior to that, the other individual who was employed with Bode Technology has, basically, testified that two items of clothing that were found in the bathroom, two tests that were done, one of the boxer shorts and one of the denim jeans, excluded Richard Knight. The DNA excluded him. That was a report that was given over to defense counsel. That's the report defense counsel relied on. Dr. McElfresh, who had not filed any report in this case, but who was listed as a witness, proceeded to get on the witness stand and indicate, basically, because he was given new information that was included in the mix, because, originally, the only information Bode had was the standards of Richard Knight, Odessa Stephens and Hanessia Mullings, he added Victoria Martino to the mix and low and behold he got a different conclusion, which are two items of evidence that was originally at his lab, that he was in charge of at the time. He indicated that those two items were excluded. He now indicated that Richard Knight was not excluded and even went to the point of saying that the

probability of exclusion (sic), I believe, ninety-eight or ninety-nine percent, which is a drastic change in regards to that information. My first notion is to renew my motion for mistrial. I believe based on that evidence that that was a discovery violation. There was, basically – and again, Doctor McElfresh indicated that that information had come to him within two weeks. That means that information was provided to him after we picked a jury or were in the process of picking a jury. We had no information any additional work had been done by any of the expert witnesses, was never given that information, and, as a result, we were given information yesterday that we never had before, could not prepare. And most importantly, I would suggest, we were never able to provide this to our expert, Doctor Norah Rudin. She relied on the reports that were given to us, that we had given to her. Based on the reports she had, it was our belief there was no reason to call her because, basically, from what I understand, she could not get on the stand and disagree with anything. Last night, after Doctor McElfresh's testimony, I e-mailed Doctor Rudin and, basically, told her, as limited as I could, without having a transcript in front of me,

what had taken place, and I gave her exactly why he had changed and she had all the DNA profiles, as well.

THE COURT: She had Veronica's too.

MR. EVAN BARON: Victoria.

THE COURT (JUDGE E. O'CONNOR): Victoria's.

MR. EVAN BARON: Yes. And I asked her if she could find the time to please, basically, include Victoria Martino in the mix and see exactly what comes up. And, basically, again with the limited information she had, is what I told her, she believes that the conclusions that Doctor McElfresh gave are improper conclusions. She does not agree with them any longer. So now we have a situation where my expert, because of new information that was never given to me or given to her until yesterday, has reached a conclusion contrary to one of the State's experts. And I believe it's a very crucial issue in this case. So we are left in a situation where the State has presented

> evidence to the jury. I was not – I was not prepared to cross examine. I did the best I could, but because of the fact I did not have that information, could not review with my expert, never had that opportunity, basically, that information went before the jury, it was never given to us ahead of time, and so for that reason, we are now requesting and renewing our motion for mistrial.

(V.32 T 3441-3445).

The Assistant State Attorney responded that the samples from which the new expert opinion testimony was formed had been produced to the defense, and stated:

> THE STATE: And it wasn't the doctor that came up with this theory, it was me that came up [with] the theory. It's not like there's some new information. It's looking at the information that's available.

(V.32 T 3445).

The State agreed, however, that the original Bode Technology expert's report had excluded Knight from the pair of blue jean shorts found in the

residence's bathroom (V.32 T 3448-3449). The State argued that any discovery violation arising from the undisclosed comparisons was not willful, but inadvertent and not prejudicial:

> I ask you to find there was no discovery violation. And further, that if the reviewing court might think there was a discovery violation, it was not willful, but inadvertent and not prejudicial in light of the fact that the information existed and had existed since the standard for Victoria Martino was done.

(V.32 T 3454).

The defense responded that the newly contrary expert opinion testimony propagated by the State two weeks earlier and never provided to the defense was a discovery violation and was intentional:

> MR. EVAN BARON: I think Mr. Loe knew he was going to say something opposite yesterday.
>
> THE COURT: To what?

> MR. EVAN BARON: To his own lab report than what was said earlier. That Richard was excluded.

(V.32 T 3459).

The trial court's ruling on the asserted discovery violation was ambiguous:

> THE COURT: Okay. We're sort of having a *Richardson* hearing backwards here. Based on everything that I know, I don't believe there's a discovery violation.
>
> * * *
>
> THE COURT: Okay. I don't believe the violation was inadvertent.

(V.32 T 3459-3460).

The trial court found that any violation was not substantial (V.32 T 3461), and found that the State's conduct did not prejudice the defense's ability to prepare for trial (V.32 T 3461), yet offered the defense time to prepare (V.32 T 3462), although there were substantial logistical problems preventing the defense expert from evaluating the newly arising expert opinion testimony in relation to the DNA

evidence, from preparing to testify and from appearing in court to testify for the defense (V.32 T 3462-3464; V.33 T 3488-3496).

The State's closing argument both reminded jurors of, and quoted from, State DNA expert McElfresh's testimony that, according to Dr. McElfresh's newly presented findings, "the probability of excluding somebody in that mixture, if they were going to be excluded in the Caucasian population, was 99.998 percent, 99.999 percent in the African-American population, and the same in the Hispanic population" (V.34 T 3546-3549, 3564, 3570-3571).

Dr. Lance Davis, Broward's assistant medical examiner, testified that he performed the autopsies on the victims (V. 31 T 3391-92). Dr. Davis testified that Hannesia had five stab wounds, and that Odessia had multiple stab wounds (V. 31 T 3396-97). Dr. Davis testified that Odessia had ligature marks on her neck (V. 31 T 3400). Dr. Davis also testified that Hannesia had bruises on her neck consistent with strangulation (V. 31 T 3416). Dr. Davis testified that he believed the attack first occurred in the bedroom, and that Odessia stumbled to the living room (V. 31 T 3420-21).

The Defense renewed its Motion for Mistrial and requested a JOA arguing there was no evidence of premeditation (V. 32 T 3466-69). The Defense addressed its expert's availability and its concerns that she did not have and could not have reviewed the State's discovery (V. 33 T 3486-3500). The Defense rested its case (V. 34 T 3510).

Following Closing arguments, the Court instructed the jury and it began deliberating their verdict. The jury rendered a verdict of guilty on Counts I and II (V. 36 T 3665-66). Thereafter, the Court adjudicated Knight guilty and proceeded to conduct a penalty phase. (V. 36 T 3669).

After the guilt phase verdict and prior to the start of the penalty phase of trial, Knight moved the trial court for an order to strike the original panel and seat a new jury panel for the purposes of the penalty phase based on Mr. Mullings' comment in the jury's presence during the guilt phase proceedings that Mullings knew Knight had a "violent background" (V.48 T 495-506). Knight's trial counsel explained the basis for this motion as follows:

DEFENSE COUNSEL: So here what we're faced with is a similar scenario wherein the jury already heard that character evidence. They heard the testimony of Mr. Mullings who indicated that Knight has bad character, prior violent background. This is as was indicated previously. I'll reiterate it now, just to refresh your memory, it is bad character evidence that goes to no aggravating factor. It would be irrelevant for the State to introduce this type of evidence in the penalty phase absent a door being somehow opened. Now, what we have is a situation where I have to make a decision, if this jury remains, do I want to place into evidence his good character at the risk of opening the door to bad character. Well, the bad character is already here. The bad character evidence has already been admitted into this case. We cannot presume that the jury would disregard something like that.

(V.48 T 498).

The trial court denied the defense motion for a new jury panel, stating: "There was no indications to the violent nature of the testimony" (V.48 T 506).

Prior to the commencement of the penalty phase, the State sought Discovery of Knight's medical records from Jamaica, and from his neuropsychologist, Dr. Mittenberg (V. 46 T 380). With respect to his jail medical records, Knight asserted that he was effectively coerced into signing a Medical Release, citing the court's insinuation that a failure to sign the Release would be deemed a waiver of mental mitigation (V. 48 T 516-518). Knight objected to Discovery of his cranial MRI, arguing that it constituted attorney work-product (V. 48 T 507). Knight also moved to preclude the State from calling Dr. Kagan (V. 48 T 519). Finding that Knight had put his mental condition at issue, the court reaffirmed its Order that the Defense tender Knight's MRI to the State, and denied Knight's Motion to Preclude the State from Calling Dr. Kagan (V. 48 T 520).

Knight objected to Discovery of the raw data Dr. Mittenberg collected, citing ethical precepts that preclude psychologists from submitting such data to non-licensed individuals (V. 46 T 396). Dr. Mittenberg proferred testimony that "[i]f the tests, the tests themselves, became public knowledge, that invalidates the test and it can no longer be used validly" (V. 46 T 415). The court ordered that the State be given Dr. Mittenberg's raw data on the grounds that "ultimately, Mr. Loe is going to get to see all the raw data" (V. 46 T 401).

Knight moved to limit the scope of the psychological examination the State sought to conduct, arguing that questioning him about his state of mind on the night of the murders would fall outside the scope of the Defense's case, which was that Knight suffered from brain damage (V. 47 T 475-477). The court denied Knight's Motion to Limit the Scope of the State's Psychological Examination (V. 47 T 482).

At deposition, Dr. Mittenberg expressed concern to the State that he might have a conflict, given that he had previously worked with Dr. Lori Butts, a forensic expert retained by the State (V. 49 T 539). Dr. Mittenberg had had recent conversations with Dr. Butts, and had learned that Dr. Butts was retained on Knight's case (V. 49 T 542). Dr. Mittenberg was concerned that Dr. Butts had unscrupulously gleaned information from him that would be prejudicial to Knight's case, because she had asked him whether the results of various diagnostic examinations could be explained by factors other than brain damage, such as a learning disability (V. 49 T 542-543). Dr. Butts testified to having had recent conversations with Dr. Mittenberg, but insisted that the conversations pertained to unrelated cases on which she was working (V. 49 T 555-556).

In an effort to limit the undue prejudice of Victim Impact Statements, Knight moved to present them to the jury via videotape (V. 49 T 575). The court denied Knight's Motion, as well as denying Knight's alternative Motion that the Victim Impact Proceedings Be Videotaped (V. 49 T 579).

On numerous occasions, Knight asserted that he was effectively forced into offering good character evidence to the jury, in order to neutralize the prejudicial effect of Hans Mullings' "violent background" testimony (V. 50 T 664). The court impugned Knight's position:

> THE COURT: And so it is clear to the Court that the defense, understandably, is making this one small statement made by Mr. Mullings in front of the jury, which mentioned his violent – quote, violent background, and which was stricken, and the jury was told to ignore it, that the defense is using that statement in order to create yet another – create not only that issue on appeal, but to take that issue and buttress is so that it uses it, even though it's been stricken, it uses that defense – or that – that particular statement to suggest that somehow it's highly important and that you have been blocked into a

corner and that you, therefore, have to put in this bad character evidence.

MR. SAMUEL HALPERN: Good character.

THE COURT: I'm sorry, good character evidence. As you know, if the good character evidence comes in, a plethora of bad character evidence comes in which paints your client – when you weigh both of them out – it paints your client in a much, much worse position than it does – at least from what I've heard so far … but it paints him in a much worse position than if it were just left as not putting in any good character and then somehow opening the flood gates to put in bad character. And it seems to me this is just a bootstrap argument so that you have – you can come back on appeal and say oh, we had to do this, and put this evidence in … The Court finds that this is clearly a tactical decision.

(V. 50 T 665-667).

Knight sought permission to argue to the jury that lingering doubt existed as to the Heinous, Atrocious, and Cruel (HAC) aggravator (V. 50 T 657-661). Given that both Victoria Martino's and Hannesia Mullings' blood was found on the shower curtain, Knight contended that he should be able to argue to the jury that he "was [possibly] a principal and not the actual perpetrator" (V. 50 T 661). The court denied Knight's Motion (V. 50 T 677).

In proposing jury instructions regarding the determination of aggravators, Knight argued that "the jury must unanimously find an aggravating circumstance," citing the U.S. Supreme Court's decision in *Ring* (V. 50 T 681-682). The Court denied Knight's proposal (V. 50 T 683). Knight renewed his objection on the authority of *Ring*, but the court reaffirmed its prior ruling (V. 50 T 717).

The court denied a number of Knight's proposed jury instructions, including a request to strike the word "substantially" from the instruction addressing the degree to which Knight's ability to appreciate the criminality of his conduct was impaired (V. 50 T 707-709), a request to strike language instructing the jury to consider Knight's state of mind with respect to the HAC aggravator (V. 50 T 689-

690), and a request that the jury be instructed that it *must*, instead of *may*, consider mitigating factors if it finds them (V. 50 T 715).

Knight called six penalty-phase witnesses. Joscelyn Walker, a Knight family friend from Jamaica and Knight's former teacher, testified that Knight was a loving boy who was well-respected in the community (V. 51 T 727-728). Mr. Walker testified to a specific incident in school in which Knight and another boy almost fought, after which time Knight banged his head against the wall in frustration (V. 51 T 732). Finally, Mr. Walker testified that he would have referred Knight to a psychologist or counselor due to his behavior, if the school had had such resources at the time of the incident (V. 51 T 767).

Joscelyn Gopie was Knight's former high-school art teacher, who testified that Knight was an enthusiastic student who excelled in art and was otherwise a pleasant young man (V. 52 T 781-782). Mr. Gopie testified that he was shocked by the charges against Knight (V. 52 T 784).

Barbara Weatherly, whose daughter was Knight's fiancé in Jamaica (V. 52 T 794), testified that Knight had asked for permission to date her daughter (V. 52 T

796). Ms. Weatherly described an incident in which Knight, after arriving at their house, fell gravely ill (V. 52 T 798-801). Ms. Weatherly described how Knight foamed at the mouth, how his eyes were glazed over and rolling in the back of his head, and how she and her daughter took him to the hospital because "it seemed like he was going to die on us …. (V. 52 T 800-802).

Dr. Jon Allen Kotler testified that he took a PET scan of Knight's brain (V. 52 T 814), and indicated that Knight complained of headaches, blurred vision, and dizziness (V. 52 T 817). Dr. Kotler testified that the PET scan showed reduced activity in certain areas of the brain (V. 52 T 818), and that Knight's right temporal lobe exhibited "reduced metabolic activity" (V. 52 T 828) which suggested a "functional disturbance" (V. 52 T 834). Dr. Kotler testified that "based upon reading many many of these [PET scans], this is abnormal" (V. 52 T 834). Given the knowledge that Knight suffered from seizures, Dr. Kotler testified that he would suspect the seizure disorder originated from the right side of Knight's brain (V. 52 T 881-882).

During Dr. Kotler's testimony, at sidebar, the Defense first informed the court that Dr. Mittenberg had brought his attorney, David Bogenschutz, to the

proceedings and was prepared to invoke his Fifth Amendment rights in lieu of testifying (V. 52 T 865).

Stan Davis knew Knight and his family from Jamaica, and testified that Knight was a loving son who helped his father tend to their garden and perform other tasks after his father had suffered a leg amputation (V. 52 T 892). Mr. Davis was also a former co-worker of Knight, and he testified to an incident in which Knight had fallen from a scaffold, hitting his head on the ground and losing consciousness for minutes (V. 52 T 895-896). Mr. Davis testified that after the fall, Knight's concentration and memory were diminished (V. 52 T 897-898).

Mr. Bogenschutz informed the court that Dr. Mittenberg was emotionally distressed, and that he had returned from the hospital suffering from "exhaustion, and sleep deprivation" (V. 53 T 915). Mr. Halpern informed the court that Dr. Mittenberg had been consuming large amounts of whiskey, and that he was taking anti-anxiety medication (V. 53 T 919-920). Mr. Halpern informed the court that Dr. Mittenberg expressed to him that he would be unable to endure the emotional rigors of cross-examination, and would "totally crumble" (V. 53 T 918).

Due to Dr. Mittenberg's inability to testify, Knight moved for a mistrial, arguing that he had only learned of Dr. Mittenberg's problem during his deposition and that the court would be risking reversal on grounds of ineffective assistance of counsel by virtue of defense counsel's inability to present mental mitigation testimony (V. 53 T 922). The court denied Knight's Motion for Mistrial, offering this colloquial rationale: "The defense is the one that picked this witness. As my daddy used to say, you made your bed now you can sleep in it" (V. 53 T 928). The court did, however, grant a continuation (V. 53 T 928-929). Knight renewed his Motion for Mistrial, but it was again denied (V. 53 T 985-986).

To counter defense counsel's contention that it would need a six-month recess in which to retest Knight, Dr. Butts testified for the State that a psychologist can rely – and indeed frequently does rely – on existing test results to render an opinion as to the functioning of an individual's brain (V. 54 T 1006).

Four days before the jury rendered its Advisory Verdict, the court held a hearing on Knight's Motion for Mistrial (R. Supp. 30). Defense counsel argued that he had told the jury in opening that he would prove Knight had brain damage (R. Supp. 30 T 6-7). Defense counsel argued that Dr. Mittenberg's testimony was

critical to understanding Knight's impulsive, violent behavior (R. Supp. 30 T 9). Defense counsel explained to the court that Dr. Mittenberg's credibility was irreparably damaged and could therefore not be called as a witness (R. Supp. 30 T 12-13). Defense counsel refuted the notion that the court had earlier assured him that it would prohibit the State from asking Dr. Mittenberg questions for which he would need to invoke the Fifth Amendment (R. Supp. 30 T 15-16).

In explaining to the court why Knight had not secured another neuropsychologist, Defense counsel stated that he could not use the experts he had consulted with after Dr. Mittenberg's meltdown (R. Supp. 30 T 19), and that Knight could not be immediately retested because "there's a practice that would taint – the reliability of repeated neuropsychological testing. You must wait a minimum of six months before retesting" (R. Supp. 30 T 21-22).

The State responded by analogizing to a situation in which a defense attorney tells the jury on opening that it intends to present an alibi defense, only to later find out that the alibi defense is unviable (R. Supp. 30 T 32-33). The State argued that a mistrial was not warranted because Dr. Mittenberg's issues were the result of neither the State's nor the court's action (R. Supp. 30 T 33).

Valerie Rivera was the private investigator who travelled to Jamaica to interview witnesses for the Defense (V. 54 T 1038-1039). Ms. Rivera relayed a number of stories centering on Knight's life in Jamaica. Ms. Rivera testified that Susan Knight, who is Knight's sister-in-law, told her that Knight used to babysit her kids, and that Knight was a good person with identity issues stemming from his adoption and his unknown origins (V. 54 T 1040). Ms. Rivera testified that Knight's best friend, Leonard Brown, was shocked to hear about the murders (V. 54 T 1045). Ms. Rivera testified that Knight's fiancé, Kesha Weatherly, described Knight as "honest, loving, kind, caring, and helpful," (V. 54 T 1048), and that Kesha Weatherly was aware of two separate incidents in which Knight suffered a seizure, including the episode attested to by Barbara Weatherly (V. 54 T 1048). Ms. Rivera relayed the story of Knight's abandonment as a toddler (V. 54 T 1052-1053), and conducted interviews with his brothers and sister, who described Knight as a good sibling (V. 54 T 1054-1055).

Before closing arguments, Knight reaffirmed his decision to not testify (V. 55 T 1096).

At closing, the State argued for the finding of four statutory aggravators: (1) that the death of each victim was contemporaneous with another capital felony; (2) that Hannesia Mullings was under twelve years old when she was killed; (3) that the crimes were atrocious, heinous, and cruel; (4) and that Hannesia Mullings was killed to evade capture or detection in the murder of Odessia Stephens (V. 55 T 1105-1106). The State argued that Knight's brain asymmetry is not indicative of any specific pathology, that it neither explained nor excused Knight's actions, and that it had presented evidence that Knight's PET and MRI scans were normal (V. 55 T 1109-1110). Finally, the State argued that Mr. Whitsett, the jailhouse law clerk who testified against Knight, corroborated many details of the crime that only one who was intimately familiar with the case would know (V. 55 T 1125-1128).

The Defense argued that the statutory aggravators must be proved beyond a reasonable doubt (V. 55 T 1130). The Defense argued that the HAC aggravator did not apply because the evidence suggested that the perpetrator was in a rage, was emotionally distraught, and was unable to deliberate the consequences of his actions (V. 55 T 1131). The Defense further argued that there was no evidence presented that he killed Hannesia Mullings to evade capture, as there was no evidence tending to prove the order in which the two victims were killed, only

speculation on the State's part (V. 55 T 1132-1133). The Defense highlighted Knight's upbringing and the myriad positive connections he had with those around him, juxtaposing his entire life with the one night of the murders (V. 55 T 1133-1135). The Defense argued that, because no one knows Knight's biological parents, and because no one knows what may have happened to him in his infancy, people are only left to speculate as to why he has a temper (V. 55 T 1136). The Defense argued that there is substantial evidence that Knight has mental problems, given his susceptibility to seizures, his falling and hitting his head, and his PET scan, which showed he had an abnormal, asymmetrical brain (V. 55 T 1136-1139). The Defense emphasized that Dr. Kotler has only classified one PET scan as abnormal – that of Knight's (V. 55 T 1138). The Defense reiterated that no motive existed for these crimes, except that Knight had a mental breakdown (V. 55 T 1141-1142).

The jury voted 12-0 in favor of recommending a Sentence of Death as to each of Counts I and II of the Indictment (V.55 T 1164-1165). Knight was sentenced to death for the murder of Odessia Donna Marie Stephens and to death for the murder of Hanessia Mullings (V.37 T 3706; 3729).

Aggravating factors found by the trial court as to Count I of the Indictment included: (1) The Defendant was previously convicted of another capital felony involving the use or threat of violence to the person (great weight); and (2) The capital felony was heinous, atrocious or cruel (great weight) (V.37 T 3708-3710).

The aggravating factors considered by the trial court as to Count II included: (1) The Defendant was previously convicted of another capital felony involving the use or threat of violence to the person (great weight); (2) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody (not established); (3) The capital felony was especially heinous, atrocious or cruel (great weight); (4) The victim of a capital felony was a person less than 12 years of age (great weight) (V.37 3711-3713).

Statutory mitigating factors considered by the trial court in its sentencing order included: (1) No significant history of prior criminal activity (not established); (2) The capital felony was committed while the Defendant was under the influence of extreme mental or emotiona1 disturbance and the capacity of the Defendant to appreciate the criminality of his conduct or to confirm his conduct to

the requirements of law was substantially impaired (not established); (3) The age of Defendant (not established) (V.37 T 3713-3723).

Non-Statutory mitigating factors considered by the trial court were as follows: (1) At the time of the offense, the Defendant was acting on impulse and his ability to exercise good judgment was impaired (not established); (2) The Defendant had a good upbringing (slight weight); (3) The Defendant continues to express his love and compassion for his family (moderate weight); (4) The Defendant attended high school and excelled in art (little weight); (5) The Defendant was admired by the children in the neighborhood and highly thought of by adults (little weight); (6) The Defendant was a valuable employee at playmate Construction in Jamaica (little weight); (7) The Defendant was a good worker at various jobs and was gainfully employed at the time of the offense (little weight); (8) The Defendant did not plan to commit the offenses in advance and the murders were the result of an impulse and a frenzied state of mind (not established); (9) The Defendant demonstrated appropriate courtroom behavior (little weight); and (10) The Defendant is capable of forming loving relationships with family members and friends (moderate weight) (V.37 T 3723-3727).

The trial court conducted a proportionality review and found that the death penalty was an appropriate sentence (V.37 3727-3728). Knight was sentenced to death on each of the two counts of the Indictment (V.37 T 3706; 3729).

Knight filed a Notice of Appeal on May 7, 2007.

This Initial Brief follows.[1]

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[1] The Defendant sought to preserve several issues that are not raised in this Direct appeal due to lack of merit or which were rendered moot by ineffective assistance of counsel. For example, in the guilt phase of the trial, a Defense Motion in Limine was granted to exclude a police tape, after which State's witness Mullings testified that he saw the tape. The Defense moved for a Mistrial despite the fact that the contents of the video tape were not introduced during the trial. Further, a JOA Motion argued by the Defense did not reflect why the evidence did not establish the need for jury deliberation, and a Defense Motion for Mistrial made during the penalty phase following the Defense opening statement where the Defense attorney promised to present evidence of neuropsychological damage, was properly denied due to absence of improper State action. Additionally, numerous boilerplate Motions pertaining to the death penalty were summarily denied in accordance with Florida Supreme Court opinions.

SUMMARY OF ARGUMENT

I. The trial court abused its discretion in denying a mistrial based on witness Mullings' testimony that he knew Knight has a "violent background."

II. The trial court abused its discretion in refusing to grant a mistrial based on jurors' having been exposed to the fact that Knight had been wearing both handcuffs and leg shackles during the guilt phase of jury trial.

III. The trial court erred in ruling that no discovery violation occurred and in refusing to grant a mistrial when the State's DNA expert gave a new opinion, undisclosed prior to trial, that did not exclude Knight as a donor of key DNA evidence from which the expert's lab had earlier excluded Knight.

IV. The trial court erred in refusing to seat a new jury for the penalty phase based on witness Mullings' comment in the jury's presence during the guilt phase proceedings that Mullings knew Knight had a "violent background."

V. This Court should find section 921.141(5)(i), Florida Statutes violates the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Ring v. Arizona.*

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED ON FAMILY WITNESS MULLINGS' COMMENT IN JURORS' PRESENCE THAT HE KNEW KNIGHT TO HAVE A "VIOLENT BACKGROUND"

Hans Mullings, the victims' surviving husband and father, commented in the jury's presence that Mullings knew Richard Knight to have a "violent background" (V.25 T 2709). Mullings' comment was as follows: "I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something *because I know Richard's violent background*." (V.25 T 2709) (emphasis added).

This comment came in the context of Mr Mullings' first reaction to having arrived to observe crime scene tape wrapped around the residence where the murders occurred (V.25 T 2709). Though the defense objection to this testimony was sustained and the jury was asked to disregard the comment, the defense pointed out "[t]here's no way they can disregard that" (V.25 T 2710), moving for a mistrial (V.26 T 2752-2781), which the trial court denied (V.26 T 2781).

Both the Sixth Amendment and Art. I, § 16(a), Fla. Const., guarantee an accused the right to a fair trial, *i.e.,* a dispassionate review of the evidence by an

impartial jury. Jurors at bar, however, were exposed to testimony by the victims' father and husband respectively which (in combination with the handcuffing and shackling discussed in Point II, *infra*) placed in jurors' minds the unfairly prejudicial notion that Knight had a violent character, rendering his trial unfair.

Knight was entitled to a mistrial upon his timely motion.[2] Though the trial court later instructed jurors to disregard the testimony, the damage was done.

The bell could not be "un-rung." As succinctly put in *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir.1962): "If you throw a skunk into the jury box, you can't instruct the jury not to smell it." Here, the prejudice went to the heart of Knight's defense--that he was not the killer. Mr. Mullings, however, had already testified that Knight had a violent background, suggesting Knight had caused his mate's and daughter's deaths, which reasonably left in jurors' minds the sneaking suspicion that Knight was a violent person capable of committing the murders.

The trial court's instruction to disregard the testimony did not dispel jurors' reasonable belief that Knight was, for reasons known more clearly to Mr. Mullings

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[2] In *Henderson v. State*, 789 So.2d 1016 (Fla. 2nd DCA 2000), by way of comparison, a defendant convicted of robbery with a firearm while wearing a mask was entitled to a mistrial based on a victim's improper testimony that the defendant knew what he was doing and had done it before. See also *Cooper v. State*, 659 So.2d 442 Fla. 2nd DCA 1995) (victim's comment that defendant's daughter had told him that the defendant had raped her was so prejudicial as to warrant mistrial).

than to the jury, that, although this testimony had no relevance to Knight's guilt, there was something else Mullings knew about Knight's "violent background" that made him immediately assume it was Knight who had committed the offenses.

The victim's inflammatory testimony was one of those skunks lobbed into the jury box that no amount of perfume could dispel. See *Superior Industries, Int'l v. Faulk*, 695 So.2d 376, 379 (Fla. 5th DCA 1997); *Walt Disney World v. Blalock*, 640 So.2d 1156, 1158 (Fla. 5th DCA 1994). It rendered the trial fundamentally unfair and Knight--who has maintained his actual innocence of committing the offenses--should be afforded a new trial.

As the Second District Court of Appeals noted in *Henderson v. State*, 789 So.2d 1016 (Fla. 2nd DCA 2000):

> "A motion for mistrial should be granted when it is necessary to ensure that the defendant receives a fair trial." *Cornatezer v. State*, 736 So.2d 1217, 1218 (Fla. 5th DCA 1999). See also *Power v. State*, 605 So.2d 856, 861 (Fla.1992). The improper admission of evidence concerning a defendant's prior criminal history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court. *Cornatezer*, 736 So.2d at 1218. When any curative instruction would be insufficient, the trial court should grant a mistrial."

Henderson v. State, 789 So.2d at 1018.

It is axiomatic that unless a defendant places his character in issue it may not be attacked by the State. §§ 90.404(1)(a), Fla. Stat. (classifying as inadmissible evidence that is relevant solely to prove bad character or propensity). Because "[e]vidence of any crime committed by a defendant, other than the crime for which the defendant is on trial, is inadmissible in a criminal case[,]" *Brooks v. State*, 868 So. 2d 643, 644 (Fla. 2d DCA 2004); *Cornatezer v. State*, 736 So. 2d 1217, 1218 (Fla. 5th DCA 1999), its admission, when not properly noticed as potential *Williams*-rule evidence or used as impeachment evidence, is the type of error that is fundamental. *Bush v. State*, 690 So. 2d 670 (Fla. 1st DCA 1997).

In *Brooks*, supra, the defendant was charged with two counts of aggravated battery with a deadly weapon on Rosa, his former wife, and his daughter. "Rosa's non-responsive answer to the prosecutor's question implied that Brooks had been sent to prison twice--once in connection with a prior incident of domestic violence. . . .This testimony was improper and unfairly prejudicial to Brooks." *Brooks*, 868 So.2d at 644. As the court noted, "[t]he admission of evidence concerning a defendant's prior criminal history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court." Id. (citing *Henderson v. State*, 789 So. 2d 1016, 1018 (Fla. 2d DCA 2000). See also

Cuthbertson v. State, 623 So.2d 778 (Fla. 4th DCA 1993) (Defendant entitled to mistrial by State witness' testimony on direct examination that witness knew defendant's girlfriend as she had aided "in the past when he's robbing" as the testimony referred to prior irrelevant criminal acts and prejudice was not cured by poll of the jury to determine whether jurors had heard objectionable testimony); *Donaldson v. State*, 369 So.2d 691 (Fla. 1979) (where defendant had not placed his character into evidence in prosecution for unlawful battery by use of deadly weapon, it was error to admit evidence that defendant had beaten his wife before inasmuch as such evidence was offered to show guilt of crime of assault with which defendant was charged by showing his propensity to commit violent acts); *Thomas v. State*, 701 So.2d 891 (Fla. 1st DCA 1997) (in trial for attempted murder of fellow inmate, evidence defendant housed in a cell reserved for "more violent inmates" was inadmissible as "[t]his is precisely the type of character evidence that section 90.404(1) of the Florida Evidence Code is intended to prohibit.").

Mr. Mullings' gratuitous testimony on direct examination by the State that Knight had a "violent background" was improper and unfairly prejudicial, and could not have had anything other than a "devastating impact" upon the jury. *Harris v. State*, 427 So.2d 234, 235 (Fla. 3d DCA 1983).

The prospect of the State submitting evidence to the jury in a violent felony prosecution that the defendant had previously engaged in unrelated violence is so vital to the trial's outcome that it is generally the focus of defense counsel's trial strategy. In order, for example, to avoid the likely emphasis that jurors will place on such evidence, defendants often decline to exercise their right to testify or, moreover, to introduce independent evidence of their good character so that evidence of any prior violent conduct cannot be introduced by the State.

The improper introduction of evidence concerning the defendant's prior violent background in a violent felony prosecution is oftentimes far too unfairly prejudicial for the jury to disregard, notwithstanding the issuance of a curative instruction. *Cornatezer*, 736 So. 2d at 1218. Accord *Gore v. State*, 719 So. 2d 1197, 1199-1200 (Fla. 1998). This is just such a case. Because the State cannot establish that this error was harmless beyond a reasonable doubt, *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), this Court should reverse and remand Knight's Judgments of Conviction and Sentences of Death, ordering a new trial.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED ON JURORS' HAVING BEEN EXPOSED TO THE FACT THAT KNIGHT HAD BEEN WEARING BOTH HANDCUFFS AND LEG SHACKLES DURING THE GUILT PHASE OF JURY TRIAL.

During the guilt phase of jury trial, Knight moved to disqualify the jury panel and moved for a mistrial based on the jury's exposure to Knight's being handcuffed and shackled (V.44 T 300). Following an evidentiary hearing (V.44 T 213-300), Knight's motion for mistrial was denied (V.44 T 311).

A criminal defendant cannot be compelled to stand trial in prison garb because it could impair the defendant's presumption of innocence, which is a basic component of the fundamental constitutional right to a fair trial. See *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Torres-Arboledo v. State,* 524 So.2d 403 (Fla.1988). Placing the defendant in restraints such as shackles or handcuffs can also affect the defendant's presumption of innocence, but under proper circumstances this risk may be outweighed by the trial court's obligation to maintain safety and security in the courtroom. See *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Diaz v. State,* 513 So.2d 1045

(Fla.1987). See also *Cramer v. State*, 843 So.2d 372, 373 (Fla. 2nd DCA 2003) (defense counsel's failure to object to defendant's trial wearing shackles and jumpsuit may constitute ineffective assistance of counsel).

Knight asserts he was unfairly prejudiced by this spectacle because, though there was no evidence that he posed a particular security or safety threat in the jail or courtroom, when the jury saw him in shackles, they were led to believe that the trial court possessed some evidence of Knight's future dangerousness and uncontrollable behavior, implying death would be the only appropriate penalty.

The United States Supreme Court's opinion in *Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding," *Id.* at 633, 125 S.Ct. 2007, applies with added force in the present case, particularly in light of the fact that the visible shackling at bar occurred during the *guilt* phase of jury trial, necessarily also spilling over also into the penalty phase of jury trial, requiring reversal of Knight's ill-obtained Judgments of Conviction and Sentences of Death.

III.

THE TRIAL COURT ERRED IN RULING THAT NO DISCOVERY VIOLATION OCCURRED AND IN REFUSING TO GRANT A MISTRIAL WHEN THE STATE'S DNA EXPERT GAVE A NEW OPINION UNDISCLOSED PRIOR TO TRIAL THAT DID NOT EXCLUDE KNIGHT AS A DONOR OF KEY DNA EVIDENCE FROM WHICH THE EXPERT'S LAB EARLIER EXCLUDED KNIGHT.

Florida Rule of Criminal Procedure 3.220 requires the State to disclose any evidence it intends to use at trial. The State's duty is continuing, Fla. R. Crim. P. 3.220(j), and applies to all witnesses and evidence. *Smith v. State*, 500 So.2d 125, 126-27 (Fla. 1986); *Hicks v. State*, 400 So.2d 955 (Fla. 1981).

If, during the course of the proceedings, it is brought to the attention of a trial court that the State has failed to comply with the rules of discovery, the court must conduct a hearing to determine whether the state's violation was: (1) inadvertent or willful, (2) whether the violation was trivial or substantial, and (3) what effect, if any, the violation had upon the ability of the defendant to prepare adequately for trial. *Richardson v. State*, 246 So.2d 771, 775 (Fla. 1971). Only after the court has made a sufficient inquiry into all of the surrounding circumstances may it exercise its discretion to determine whether the State's noncompliance with the rule resulted

in harm or prejudice to the defendant, thereby requiring the imposition of sanctions, such as excluding the evidence or, where it has already come in, mistrial. *Id.* at 775.

When the State began questioning State DNA expert McElfresh concerning his comparisons of foreign DNA in a mixture found in two samples from the crime scene (a pair of blue jean shorts and a pair of boxers) with standards taken from a minor, Victoria Martino, the latter of which standards had not previously been sent to McElfresh's lab, the defense objected, asserting a discovery violation and moving for mistrial, which the trial court initially overruled without holding a *Richardson* hearing (V.31 T 3342; 3347-3355). Dr. McElfresh then testified, based on his new comparisons of the foreign DNA in the mixture with the standards from Ms. Martino recently supplied to him, that Knight could not be excluded from the samples (V.31 T 3355-3369; 3375). Asked on cross whether his lab had ever analyzed Ms. Martino's DNA, Dr. McElfresh replied that it had not (V.31 T 3372). Asked when he was first given Ms. Martino's DNA standards, he replied: "Approximately two weeks ago" (V.31 T 3372). Mr. McElfresh agreed on cross that his lab had previously excluded Knight from the samples (V.31 T 3382).

The next day, Knight renewed his motion for mistrial (V.32 T 3441-3445), which the court denied (V.32 T 3459-3460) ("We're sort of having a *Richardson*

hearing backwards here. Based on everything that I know, I don't believe there's a discovery violation. . . . Okay. I don't believe the violation was inadvertent.").

It was, however, the Assistant State Attorney himself, rather than the expert, who had originally conceived of this newly contrary and incriminating expert opinion testimony without disclosing it to the defense (V.32 T 3445).

There were two facets to this discovery violation: (1) the State gave Knight's counsel what appeared to be a complete DNA comparison prior to trial; and (2) the prosecutor then ordered that further DNA comparisons be done without any notice to the defense. Based on the discovery the State produced prior to trial, defense counsel relied on a defense involving excluded DNA. At trial, however, the prosecutor disclosed new DNA comparisons that ambushed the defense position.

The opinions in *Brown v. State,* 579 So. 2d 760 (Fla. 1st DCA 1991); *Smith v. State,* 499 So. 2d 912 (Fla. 1st DCA 1986); *Hasty v. State,* 599 So. 2d 186, 189 (Fla. 5th DCA 1992); and *Raffone v. State,* 483 So. 2d 761 (Fla. 4th DCA 1986), all illustrate the principle that a discovery violation occurs where the prosecutor tenders what appears to be a complete analysis, lulling the defense into relying on that discovery, but then ambushes the defense with an additional analysis.

The prosecutor's conduct in providing Knight's defense counsel with DNA expert opinion discovery, without any indication or hint that it was not complete, leaving the defense with the false impression that the DNA obtained from the blue jean shorts and boxers found at the crime scene would exclude Knight, only to spring forth at trial with a directly opposite expert opinion after ordering additional analysis undisclosed to Knight's counsel, was a discovery violation that unfairly prejudiced the defense. Though the trial court properly held "I don't believe the violation was inadvertent" (V.32 T 3459-3460), the trial court erred in finding no discovery violation, erred in finding the violation was not substantial, erred in finding the violation did not prejudice the defense's preparation for trial, and erred in failing to grant a mistrial after its unheralded introduction into evidence.

The impact of the discovery violation in this particular case was to lead jurors to reasonably believe Knight's defense attorney had lied to them about evidence in this circumstantial case. In response to the State's remark in opening statement that "[t]he clothing that was found underneath the bathroom sink in the bathroom that Richard Knight used had *his* blood on it, the mother Odessias blood on it, and the daughter Hanessia's blood on it" (V.20 T 2218-2219), Knight's attorney told jurors in opening statement that the blood on the clothing found in the

bathroom belonged to the victims: “You'll hear that, in fact, there was blood from both of the victims found on Richard Knight's clothing” (V.20 T 2222). Though Knight’s attorney’s omission of any mention in opening statement of *Knight’s* blood on the jean shorts the State contended were Knight’s was made in reliance on DNA reports from the State expert’s lab excluding Knight, which the defense had received from the State pretrial, jurors may reasonably have perceived, after hearing the newly injected contrary testimony, that Knight’s attorney’s failure to mention Knight’s DNA on the clothing was an intentional, material concealment of powerful evidence against his client. It was only *after* opening statements that Knight’s attorney learned of the State expert’s new testimony that Knight could *not* be excluded from these samples. The introduction of this evidence at trial made Knight's counsel look like a liar in the eyes of the jury.

The destruction of an attorney's credibility before a jury is devastating. This is especially true in a circumstantial evidence case such as this, where jurors rely on the attorneys to explain the evidence and inferences that may be drawn. Here, jurors would reasonably conclude that if they could not believe Knight’s counsel about a straight-forward piece of evidence, they could not trust his arguments as to how other evidence, and inferences therefrom, should be evaluated.

It cannot reasonably be said that this discovery violation was harmless. In the absence of any eyewitness or directly damning physical evidence independent of the DNA, this evidence became crucial to Knight's defense that he was not the killer and that perhaps Hanessia's father, Hans Mullings, himself had committed the acts in light of upstairs neighbor Rosemary Parisi's testimony that she had told police, after calling 911, that she had heard two young girls shouting, and then screaming: "No, no, no, daddy, no, no, no, daddy, daddy" (V.21 T 2258-2259).[3]

The State's closing argument both reminded jurors of, and quoted from, State DNA expert McElfresh's testimony, undisclosed to the defense before trial, that "the probability of excluding somebody in that mixture, if they were going to be excluded in the Caucasian population, was 99.998 percent, 99.999 percent in the African-American population, and the same in the Hispanic population" (V.34 T 3546-3549, 3564, 3570-3571). To these same probabilities, this case should be reversed and remanded for a new trial excluding such unfairly prejudicial tactics.

[3] Upstairs neighbor Rosemary Parisi, who had originally called 911, continued her testimony in this regard that she had told police: ". . . but it didn't give me an impression that they were calling for help" (V.21 T 2259).

IV.

THE TRIAL COURT ERRED IN REFUSING TO SEAT A NEW JURY PANEL FOR PURPOSES OF THE PENALTY PHASE OF TRIAL BASED ON FAMILY WITNESS MULLINGS' COMMENT IN THE JURY'S PRESENCE DURING THE GUILT PHASE PROCEEDINGS THAT MULLINGS KNEW KNIGHT HAD A "VIOLENT BACKGROUND."

After the guilt phase verdicts had been returned, Knight's counsel moved the trial court for an order disqualifying the seated jury and requiring the seating of a new jury panel for purposes of the penalty phase based on the victims' family witness Hans Mullings' comment in the jury's presence during the guilt phase that Mullings knew Knight to have what Mullings termed a "violent background" (V.48 T 495-506). The objectionable comment, uttered by the victims' father and husband respectively on direct, was made as follows: "I was just assuming that, truthfully, probably Odessia and Richard got into an argument or something *because I know Richard's violent background*." (V.25 T 2709) (emphasis added).

The trial court denied the defense motion to seat a new jury panel for the penalty phase, stating: "There was no indications to the violent nature of the testimony" (V.48 T 506). For the reasons set forth more particularly in Point I,

supra, family witness Mullings' "violent background" testimony during the guilt phase of trial reasonably prejudiced the jury well into the penalty phase of trial by placing in jurors' minds the sneaking suspicion that Knight had a longstanding violent character, compromising the jury's impartiality and rendering the penalty phase of trial fundamentally unfair.

Whereas Florida law appears devoid of any opinion on point with the denial of a new penalty phase jury based on a guilt phase witness' testimony that the defendant has a violent background, the same principles set forth in Point I, *supra*, apply here, where such bad character testimony results in fundamental unfairness—particularly where the testimony comes from the murder victims' own father and husband—as fundamental fairness is "the touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

This case should therefore be reversed and remanded for a new penalty phase proceeding in the absence of such inflammatory and unfairly prejudicial "violent background" character testimony.

V.

FLORIDA'S DEATH SENTENCING STATUTE BOTH VIOLATES THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IGNORES THE UNITED STATES SUPREME COURT'S OPINION IN *RING V. ARIZONA*.

Knight filed his "Motion to Declare Florida's Death Penalty Statute Unconstitutional Based on the Clear Mandate of the United States Supreme Court Decision in *Ring v. Arizona*" (R.5 802-824), which the trial court denied (R.2 181). Before deliberations began in the penalty phase, the trial court instructed jurors, as is the standard instruction in Florida trial courts: "As you have been told, the final decision as to what penalty shall be imposed is the responsibility of the Judge, however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence" (V.55 T 1145-1146). After the jury returned advisory sentences (V.55 T 1164-1165), it was the trial court, rather than the jury, that sentenced Knight to death (V.37 T 3706; 3729). The authority for this practice in Florida is section 921.141(5)(i), Florida Statutes.

During the course of the proceedings, Knight's trial counsel challenged the constitutionality of Florida's Capital Sentencing Scheme. None of the challenges

were successful and Knight was ultimately sentenced to death. Some challenges were based on a denial of Knight's Sixth Amendment rights as interpreted by *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428 (2002). Jurors were instructed that the ultimate decision on the appropriate sentence was solely the province of the judge.

Whereas Knight acknowledges this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment, *Ring* raises serious doubts about the statute's constitutionality. The United States Supreme Court has, moreover, denied certiorari review of Florida's Capital Sentencing Scheme on Sixth Amendment challenges under *Ring*, *e.g. Bottoson v. Moore,* 833 So.2d 693 (Fla. 2002), *cert. denied,* 537 U.S. 1070 (2002); *King v. Moore,* 831 So.2d 143 (Fla. 2002) *cert. denied,* 537 U.S. 1069 (2002), effectively leaving the issue open.

Though Knight's trial judge instructed jurors that the ultimate decision on an appropriate sentence was the sole responsibility of the trial judge, *Ring v. Arizona* is the law of the land and the jury's Sixth Amendment role was diminished by these instructions in contravention of *Caldwell v. Mississippi,* 472 U.S. 320 (1985).

Because the jury did not make specific findings as to each of the aggravating and mitigating factors, we cannot determine at this point whether the jury was

unanimous in their decisions on the applicability of *each* aggravating and *each* mitigating factor, nor can we be certain whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

The capital sentencing scheme utilized to sentence Knight to death was unconstitutional and deprived Knight of his rights to a jury trial and due process under the Sixth Amendment to the United States Constitution. The role of the jury provided for in Florida's Capital Sentencing Scheme, and in Knight's capital trial, fails to provide the necessary Sixth Amendment safeguards mandated by *Ring v. Arizona,* and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348 (2000).

Ring extended the holding of *Apprendi* to capital sentencing schemes by overruling *Walton v. Arizona,* 497 U.S. 639 (1990). The *Ring* Court held Arizona's capital sentencing scheme unconstitutional "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring,* 497 U.S. at 2443.

The jury in Knight's case was clearly instructed they were not the ultimate sentencer and that their role was limited to issuing a recommendation and advisory opinion to the judge, who was the sole person responsible for sentencing. As

Knight was never found guilty *beyond a reasonable doubt* by a unanimous jury on *each* aggravating factor of capital murder, his death sentence should be vacated.

In *Bottoson* and *King*, this Court revisited its holding in *Mills v. Moore,* 786 So.2d 532 (2001), addressing the concerns raised by *Ring* and its impact upon Florida's capital sentencing structure. The *Bottoson* and *Mills* decisions resulted in each Florida Supreme Court Justice rendering a separate opinion. In both cases, a plurality *per curiam* opinion announced the result denying relief in those cases. In each of the cases, four justices wrote separate opinions specifically declining to join the *per curiam* opinion, "concur[ring] in result only," *Bottoson,* 833 So.2d at 694-695; *King,* 831 So.2d at 145, based on facts germane to those particular cases.

This serious constitutional issue is not dead, and the United States Supreme Court's interpretation of the Sixth Amendment to the United States Constitution in *Ring v. Arizona,* that only a jury may make the elemental findings necessary to impose a sentence of death, should no longer be frustrated or ignored.

Though "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be determined by a jury like any other element of an offense, *Ring,* at 2443 (quoting *Apprendi,* 530 U.S. at 494, n. 19), Florida law does not require the jury to reach a

verdict on any of the factual determinations required before a death sentence may be imposed. Florida's death penalty scheme does not require a jury verdict, but a mere "advisory sentence" which a single person, the trial judge, may then deign to take into account in finding the defendant guilty of the death penalty, in derogation of the Sixth Amendment and the very basis for our jury system.

Knight asks this Court to revisit its position in *Bottosom* and *King* because *Ring* presents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's Death Penalty statute. This Court should find section 921.141(5)(i), Florida Statutes violates the Sixth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Ring v. Arizona*, and vacate Knight's death sentences, remanding for imposition of life imprisonment without the possibility of parole.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for a new trial, penalty phase proceeding, and/or resentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Assistant State Attorney Tony Loe, 201 S.E. 6th Street, Suite 675, Fort Lauderdale, FL 33301, (2) Assistant Attorney General Lisa-Marie Krause Lerner, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and (3) Mr. Richard Knight, #L36345, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, this 7th day of December, 2009.

CERTIFICATE OF FONT AND TYPE SIZE

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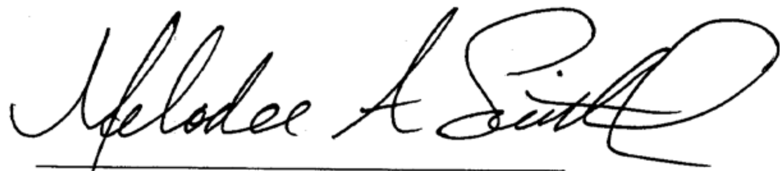

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