IN THE SUPREME COURT OF FLORIDA

LIONEL MILLER,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC08-287
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
444 Seabreeze Blvd., Suite 210
Daytona Beach, Florida 32118
(386) 252-3367
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

Rule 7.11, Florida Standard Jury Instruction Criminal 79
The Random House Dictionary of the English Language, p.1421 61

IN THE SUPREME COURT OF FLORIDA

LIONEL MILLER,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC08-287
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

PRELIMINARY STATEMENT

Counsel will refer to the appropriate volume number using a Roman numeral followed by the pertinent page number using Arabic numerals.

STATEMENT OF THE CASE

On May 16, 2006, the spring term grand jury returned an indictment charging Lionel Miller, the appellant, with the first-degree murder of Jerry Smith; the attempted first-degree murder of Larry Haydon; one count of burglary of a dwelling with a battery therein; and one count of attempted robbery with a deadly weapon. (III 334-37) On May 30, 2006, the state filed their notice of intent to seek the death penalty. (III 343)

Prior to trial, appellant filed numerous motions attacking the constitutionality of Florida's capital sentencing scheme based on both the federal and the state constitutions. (***See, e.g.,*** III 408-447; IV 514-535, 538-577, 642-645, 646-660; V 661-734, 810-25; VI 885-92, 893-900, 904-937, 938-968, 969-1006; VII 1107-1139, 1172-81) None of these challenges were successful. Appellant constantly and repeatedly renewed his objections to Florida's capital sentencing scheme throughout the proceedings below.

Appellant also filed a motion to suppress his statement made to police during interrogation. (V 779-80) Following a hearing, the trial court denied the motion. (I 131-89; V 1010-11)

A jury trial commenced on November 13, 2007. (X 1 through XVII 1313) During jury selection, the trial court granted the state's cause challenge of venireman Eddington over appellant's objection. (X 70-81)

During the guilt/innocence phase, trial counsel moved for a mistrial and repeatedly objected to any reference that the crimes occurred on Easter. (XIII 599-600, 685-87, 701; XIV 722, 852; XVII 1260-61) The trial court also allowed over objection testimony that the victim's son is a practicing local lawyer. (XIV 714-16) The motions were denied and the objections were overruled. Following deliberations, the jury found appellant guilty as charged on all four counts. (VIII 1241-45)

On November 26, 2007, a penalty phase commenced. (XVIII 1318; XIX 1621) The trial court overruled appellant's numerous objections to the state's evidence regarding appellant's prior violent felony conviction for manslaughter. (XVIII 1348-62)

At the charge conference of the penalty phase, the trial court overruled appellant's objection to the jury instruction on the witness elimination/avoid arrest aggravating factor. The trial court ruled there was sufficient evidence to justify a jury instruction. (XIX 1542-44) The prosecutor argued the circumstance, the trial judge instructed the jury, but ultimately rejected the factor as unproven. (IX 1411-12; XIX 1575-78, 1606) The jury recommended death by a vote of eleven to one. (XIX 1115-19; VIII 1268)

The trial court imposed a death sentence and found six aggravating factors. The court found:

(1) under a sentence of imprisonment (great weight);
(2) prior violent felony conviction (great weight);
(3) during the commission or attempted commission of robbery or burglary (great weight);
(4) especially heinous, atrocious, or cruel (great weight); and
(5) the victim was particularly vulnerable due to advanced age or disability (great weight).

(IX 1407-19) The trial court specifically rejected the aggravating factor dealing with witness elimination or avoiding arrest. (IX 1411-12) The trial court also rejected the "financial gain" aggravating circumstance, finding it duplicative of another aggravating factor. (IX 1412)

The trial court considered but rejected appellant's age (58) as a mitigating circumstance. (IX 1419-20) The trial court found the following mitigating circumstances established by the evidence:

(1) dysfunctional family (some weight);
(2) military service (little weight);
(3) cooperation with law enforcement (little weight);
(4) appellant's remorse (very little weight);
(5) appellant's antisocial personality disorder (little weight); and
(6) long history of substance abuse (some weight).

(IX 1420-24) The trial court specifically rejected as mitigation appellant's ability to perform well in prison. (IX 1421) The trial court sentenced appellant to three terms of "natural life" on the noncapital felonies. (IX

1426-59) Appellant filed a notice of appeal on February 18, 2008. This brief follows.

STATEMENT OF THE FACTS

GUILT/INNOCENCE PHASE

The Murder

Jerry Smith, the victim in this case, was an elderly woman suffering from Alzheimers. Although physically healthy, she suffered from memory problems. (XIII 621-23) She had moved into a home in the quiet neighborhood of Delaney Park in Orlando. Her son, Chris Smith, a local criminal defense lawyer, lived nearby with his family. On Easter Sunday, April 16, 2006, Jerry Smith had celebrated the holiday with her son and his family before returning to her home that evening. (XIV 717-23) Shortly before 9:00 p.m., the peace and quiet of an idyllic Easter was shattered.

Larry Haydon, Jerry Smith's neighbor, was walking his dog that evening. As he passed in front of Smith's home, he heard screams. He saw Smith struggling with a strange man in her living room. Haydon entered the front door and rushed to Smith's aid. Smith's attacker, who Haydon identified as Lionel Miller, the appellant, proceeded to stab Haydon in the chest with the fish filet knife that he wielded. Appellant's attack on Haydon allowed Smith to temporarily escape through her back door. Appellant

pursued Smith into the backyard where he apparently stabbed her and, in the process, cut himself before fleeing the neighborhood. (XIII 624-28)

Both Smith and Haydon ran next door for help. Smith's next-door neighbor, as well as other neighbors who heard the ruckus, summoned both medical and police assistance. (XIII 626-30, 673-78, 685-87, 701-705) Haydon subsequently recovered from his wounds, while Jerry Smith did not.

Jerry Smith died as a result of three stab wounds; one to the left back that went through the chest cavity and through the diaphragm into the spleen; a second wound to the interior right hip that penetrated the abdomen, nicked the colon and large intestine; and a third wound that went completely through her right arm. (XVI 1086-87) Following emergency surgery at the hospital, doctors pronounced Smith dead at approximately 11:00 p.m. (XVI 1085-86) Smith's body showed signs that were consistent with a struggle. (XVI 1087-94)

Physical evidence tied appellant to the scene of the crime. State forensic experts found one of appellant's fingerprints at Smith's home as well as blood on her dining room floor that appeared to match Miller's. (XVI 1033-49, 1059-60) Jerry Smith's jacket was found at Stephen Prange's house, where Prange testified that Miller left it. (XV 107-10, 1121)

Events Leading to the Murder

David Dempsey[1], a six-time convicted felon and crack addict, met Lionel "Mike" Miller, the appellant through a mutual friend. On Friday, April 14, 2006, Dempsey agreed to drive Miller in a search for a check that appellant expected in the mail[2]. During their search for the mailman along his route, the pair stopped and chatted with Jerry Smith, who was doing yard work at her house. The pair noticed that she wore a lot of jewelry, and that she seemed to suffer from some mental confusion. They decided that she would be an easy mark to rob. (XV 863-71)

On Saturday April 15, 2006, appellant and Dempsey woke up at the house where they were both staying. Appellant told Dempsey that he had spent all of his money on drugs, beer, and cigarettes the day before. Appellant asked Dempsey to drive him over to Jerry Smith's house so that he could rob her. Dempsey made excuses and left the crack house for the day. (XV 873-74) The scenario repeated itself the next day on Sunday morning. (XV 873-75) Dempsey again made excuses and expressed a desire to be no part of appellant's plan. (XV 875)

---

[1] Dempsey was on probation for dealing in stolen property at the time he testified. He had tested positive for drugs during his probationary period, but swore that he received no promises from the State of Florida in exchange for his testimony. (XV 871-73)

[2] Appellant had recently moved from his prior address.

After eating breakfast, Dempsey got back on the couch and took a nap. When he woke up, the appellant was no longer home. Around 9:00 that evening, appellant called Dempsey at the house and asked him to pick him up at a friend's[3] house. He also asked Dempsey to bring with him a denim, long-sleeved shirt from appellant's closet. When Dempsey picked appellant up at Steve's house, appellant got in the car and immediately changed his shirt. Dempsey did not notice any injuries at that time. The pair returned to the home that they shared and went to sleep. (XV 875-78) When Dempsey questioned him, appellant was vague about his activities that day. Appellant told Dempsey that some guy tried to be a hero and that his hero days were over. (XV 880) Later that night, Dempsey noticed that appellant had two bandages on his left arm and that they were saturated with blood. (XV 878-79)

A few days later, Dempsey became suspicious that Miller had attacked Smith. When he confronted Miller, appellant told Dempsey that everything that could go wrong did go wrong. (XV 879) Appellant warned Dempsey about telling anybody. (XV 880-82) Dempsey eventually called the police, who arrested appellant at the house. (XV 882-87)

---

[3] Miller had sought refuge at Stephen Prange's house. Miller told Prange he had been injured when two men mugged him. Prange subsequently reported Miller to police for the $5,000 reward. (XV 824-51)

Appellant's Statement

Following his arrest, on April 19, 2006, Officer Boren escorted the appellant from the back parking lot of the Orlando police station to an interview room. While waiting for the primary detective to conduct the interrogation, appellant asked for a cigarette and a Coke which Boren provided. After leaving appellant in the interview room for approximately twenty minutes, Boren returned to check on the appellant and to give him a pack of cigarettes. At that point, appellant told Boren that he normally did not talk to police without counsel, but that he was "tired of the life he was living and wanted to tell us everything that happened". Appellant wanted two things in return. Appellant asked to be placed in a cell by himself until the time of his execution. He also wanted his cell phone so that he could provide phone numbers of drug dealers to assist police in their arrest. (XV 974-78)

After appellant's conversation with Boren, Detectives Joel Wright and Mike Moreschi conducted an interview. After making reference to ***Miranda***[4] warnings read from a card[5], Lionel Miller stated that he understood the warnings and was willing to talk to police. Miller told the detectives that on April 14, 2006, he and David Dempsey attempted to track

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

down a mailman on his route so that Miller could get his unemployment check. Miller had been evicted from the residence where the check had been mailed. Before locating the mailman, the pair met Jerry Smith who was working in her front yard that day. After talking to Smith for several minutes, the pair realized that she had problems with her memory and seemed confused. They decided that she would be an easy mark for the theft of her jewelry. Miller opined that she would not be able to identify them because of her cognitive skills. The pair subsequently found the mailman, got the check, and got high smoking crack cocaine. The robbery was forgotten about until the following Sunday.

Two days later, Dempsey was unavailable to drive Miller to Smith's house, so he walked over intending to steal something of value. During the walk, Miller smoked crack cocaine and got high. He had no intention of hurting Smith. Smith invited Miller into her home, got him a glass of ice water, and discussed Key West as a travel destination. After a short chat, Miller grabbed Smith and threw her down on the couch. Smith screamed loudly when he asked for her rings. During the struggle, a neighbor heard the screams and attempted to come to Smith's aid. Miller was frightened

[5] The preamble and ***Miranda*** warnings were not recorded by the detectives.

that the neighbor would choke him using the belt he was carrying[6]. Miller also feared a return to prison if caught. Miller grabbed the fish filet knife[7] from his back pocket and stabbed the neighbor in the chest.

While Miller was dealing with her neighbor, Smith was able to run out the back door screaming. Miller eventually followed her outside. When Smith kept screaming, Miller "just lost it". All he wanted to silence her screams. Losing all control, Miller began stabbing her. "I don't even know where I stabbed her or how many times or anything." After Smith went silent for a minute, Miller ran back into the house before he realized he had also been cut and was bleeding profusely. He grabbed Smith's jacket and wrapped it around his arm to stop the bleeding. He then ran out the back door, jumped the fence, and somehow found a shortcut around the lake and out of the neighborhood. He fled empty-handed. Miller then went to his friend Steve's house, called Dempsey, and asked him to bring a shirt when he came to pick him up. (XVI 1133-52) After giving his statement to the detectives, they escorted Miller out of the police station in a traditional "perp walk." (XIV 817) Miller told the excited reporters that he did not mean to hurt "that woman."

---

[6] The "belt" was actually a dog leash.

[7] Miller carried the knife as a potential burglary tool.

PENALTY PHASE

The State's Case for Aggravation

The state presented evidence regarding appellant's prior violent felony convictions. Miller pleaded guilty in Oregon to manslaughter in 1976. The manslaughter conviction arose from an argument that Miller had with an acquaintance, Ed Huff-Smith. Huff-Smith was a tenant at the rooming house where Miller was living in Portland Oregon. Several days prior to the shooting, appellant and Huff-Smith argued about Huff-Smith's theft of Miller's paint thinner, which Miller had been huffing.

Miller and Huff-Smith argued again a few days later over an unrelated matter. During the physical altercation, appellant kicked Huff-Smith who then drove for a gun that was kept under the couch. Appellant was able to retrieve the gun first and shot Huff-Smith, who then ran from the dwelling before falling outside. Appellant dragged the victim back into the apartment where he quickly expired. In fear of his parole being violated, appellant unsuccessfully tried to hid the body in the closet. Admitting that he was confused and scared, appellant stole the victim's car and fled the scene. He was arrested after he inhaled lacquer thinner, passed out and ran off the road. (XVIII 1352-62, 1386-87) The state also presented testimony that appellant committed an armed robbery of a grocery store in Oregon. (XVIII 1416-26)

Appellant was still on parole at the time of Jerry Smith's murder. (XVIII 1338-45)

Victim Impact Evidence

The way that Jerry Smith died was her absolute worst nightmare. She was very afraid of crime in general, and burglaries in particular. Her family told her that she lived in a safe neighborhood and that nothing bad would ever happen to her in Delaney Park. They teased her about her cautiousness when it came to leaving her door locked. (VIII 1399, 1405)

Jerry Smith was a genteel, southern lady. She was an avid golfer, shopper, and traveler in her youth. She always kept a champion poodle as her pet. She moved from her home of thirty years in order to help her son raise his children. She spoiled her grandchildren terribly. She kept an immaculate house.

When she began to lose her memory, her son arranged for her to move into a home on his street. Jerry spent Easter Sunday, the day of her murder, with her family. The family went to church together and had Sunday brunch. She then watched her grandchildren play in the park.

Smith's death had a tremendous impact on her family. Her grandchildren are to young to understand what happened to their grandmother. Smith's daughter-in-law keeps imagining the last thoughts of

pain and fear that she must have suffered. Smith's sister became depressed and withdrawn and moved across the country to a different state. (XVIII 1395-1401) Jerry Smith and her sister spoke everyday on the phone. Although she had lived in Florida for fifty years, Smith's sister sold her home and returned to Tennessee because she could no longer stand to live in Florida after her sister's murder. (XVIII 1403)

Jerry Smith was a divorced woman who raised her son alone. She built a career in a title agency during a time when women in management were the exception. Having grown up in the depression, she learned to work hard and to be self-reliant. Smith's son, a local lawyer, could not begin to quantify or explain how the loss of his mother has impacted him and the rest of her family. One of her son's biggest regret was his inability to reach out and touch his mother one last time before the paramedics took her away never to be seen by him again. (XVIII 1402-5)

Appellant's Case in Mitigation

Lionel Miller had a very unstable family background. His mother drank heavily, used drugs, and abandoned him when he was very young. Miller was left with his stepfather, who ejected him from the house when Miller was approximately five years old. He eventually lived with his step-

grandmother from the ages of seven to thirteen.[8] This was the most stable period of his childhood. Unfortunately, she died when he was in reform school. After leaving reform school at age fifteen, Miller was left to fend for himself. (XIX 1442-1446)

Miller began using drugs at an early age.[9] As an adolescent, he used heroin, cocaine, alcohol, methamphetamine, and numerous other drugs. Throughout his incarcerations, Miller had been evaluated and diagnosed with polysubstance abuse or polysubstance dependance, as well as an antisocial personality disorder.[10] He spent the vast majority of his adult life in prison.[11] (XIX 1446-47) He went to prison for the first time at approximately at age sixteen. He was able to achieve only a seventh grade education, but did obtain his GED later in prison. (XIX 1446) There was no evidence that Miller had been disciplined in prison for any violent incidents. (XIX 1467)

---

[8] Miller's mother apparently died as a result of alcoholism. No one knew much about his biological father. (XIX 1415)

[9] Appellant's crack pipe was found at the scene of the crime. This would be consistent with the expert's opinion that Miller was addicted to and/or using crack cocaine at the time of the murder. (XIX 1496)

[10] While one can inherit an antisocial propensity, Miller's childhood background was also conducive to his development of an antisocial personality disorder. (XIX 1450)

[11] People with antisocial personality generally perform better in a structured environment like prison, rather than out in a free society. Appellant demonstrated this trait. (XIX 1452-53, 1505)

Drew Edwards, an expert in addictionology, explained the devastating effect of cocaine addiction. Long-term cocaine use leads to brain damage due to the release of neurotransmitters, particularly dopamine, the pleasure chemical. Addicts end up "chasing the high" just to feel normal rather than depressed and anxious. Addiction also affects the flight or fight response which is associated with impulsive actions. Cocaine increases one's angst and tension, thus leading to impulsive acts. Some addicts end up committing desperate acts in their attempt to get drugs.[12] (XIX 1471-79) In addition to crack cocaine, the appellant used lots of methamphetamine. Methamphetamine has a similar impact on the brain as cocaine. (XIX 1483)

Lionel Michael Miller had been diagnosed as polysubstance dependant since adolescence. He had also been diagnosed as suffering from an antisocial personality disorder. (XIX 1488) Miller began drinking alcohol frequently at the age of thirteen. At sixteen, he began using amphetamines. At age seventeen, he began smoking marijuana on a daily basis. At age eighteen, he began using barbiturates, specifically Seconal. At nineteen, he tried LSD which he used daily for a couple of years. At that same age, he tried hallucinogenic mushrooms (PCP), but did not like the

[12] Laboratory testing reveals that rats, as well as other animals prefer cocaine to food. Given the choice, the animals will consume cocaine until the point of death. (XIX 1486-87)

effect. He also began using crystal methamphetamine at that time. At age twenty-three, he discovered heroin which he enjoyed more than any other drug. He began injecting heroin on a daily basis. He subsequently advanced to injecting speed balls, a potent mixture of heroin and cocaine.[13] Miller also feigned pain so that doctors prescribed narcotics, which he then abused. In 1969, he began using inhalants, particularly a dry cleaning fluid called percoethylene. He also enjoyed sniffing glue and lacquer thinner, which he would inhale to the point of passing out. (XIX 1489-90)

In 1969, he began smoking hashish and opium. (XIX 1491) Miller used drugs, including inhalants, the day he was released from prison. (XIX 1491) When he was released, he weighed approximately 175 pounds. (XIX 1492) He began using crack cocaine which was not available prior to his incarceration. (XIX 1491) After his release from prison, appellant left Oregon and came to Florida. He lived with his brother and was drug-free for a while. After inheriting some money, Miller left his brother's residence and began smoking crack cocaine on a daily basis up to the day of his arrest. (XIX 1491) His weight had dropped to a low of 133 pounds the day he was arrested following Smith's murder. The dramatic weight loss was attributed to his crack cocaine addiction. (XIX 1492)

[13] This lethal concoction was the same type that killed John Belushi.

State's Rebuttal at the Penalty Phase

The state presented Jeffrey Danziger, a board-certified psychiatrist with subspecialities including addiction, geriatrics, and forensic psychiatry. Dr. Danziger evaluated Lionel Miller on April 7, 2007. (XIX 1509) Dr. Danziger's primary psychiatric diagnoses were (1) a polysubstance dependance which was in remission in the controlled setting of the jail; and (2) dysthymia, which is a long-term, low-level syndrome of depression. On axis II, the doctor diagnosed Miller with an antisocial personality disorder. On axis III (medical issues), Miller suffers from benign prostatic hypertrophy, and also tested positive for both hepatitis B and hepatitis C liver virus. On axis IV (current stressors), the obvious one is incarceration while facing capital murder charges. Finally, on axis V (which assesses current level of functioning psychiatric stress), Dr. Danziger gave Miller a 64 on a 100 scale. This would be consistent with mild anxiety and depressive symptoms, not unexpected given the severity of his current predicament. (XIX 1514-15)

> Dr. Danziger described the predominant feature of antisocial personality disorder as a pervasive pattern of disregard for and a violation of the rights of others. One qualifies for the diagnosis when one meets three of the seven criteria: (1) failure to perform social norms with respect to lawful behavior;
> (2) deceitfulness;

(3) impulsivity;
(4) irritability, aggressiveness, or repeated physical fights;
(5) reckless disregard for the safety of one's self or others;
(6) consistent irresponsibility; and
(7) lack of remorse.

(XIX 1516-17) The disorder is characterized as a mental disorder, rather than a major mental illness such as schizophrenia or bipolar disorder. (XIX 1518)

Dr. Danziger was of the opinion that the murder was not committed while Miller was under the influence of an "extreme" mental or emotional disturbance. The doctor conceded that the jury must decide what "extreme" means. However, the doctor was of the opinion that the legal term refers to someone who is extremely psychotic, responding to hallucinations, suffering from some sort of delusional paranoid beliefs, or suffering from some sort of extreme mania. The doctor was of the opinion that the term applies only to active, major mental illness that significantly impacted the defendant's behavior. In his opinion, antisocial personality disorder is more of a lifelong character pathology rather than an extreme state of emotional disturbance. (XIX 1518-19)

During Danzigers' evaluation, appellant reported that, although incarcerated for much of his young adult life, he still managed to use

solvents, lacquer thinner, and dry cleaning fluid to get intoxicated. Miller told the doctor that there were times in prison that he did not have access to any intoxicants. (XIX 1519-20)

On the day of the murder, Miller used a number of different substances including marijuana, intravenous heroin, alcohol, and crack cocaine which he both smoked and injected. Because Miller did not indicate what time of the day that he used these drugs, Dr. Danziger could not determined whether or not Miller was actually under the influence of narcotics at the time of the murder. (XIX 1520)

Dr. Danziger opined that, at the time of the murder, appellant did have the capacity to appreciate the criminality and wrongfulness of his conduct. Miller told Danziger that he had met the victim earlier in the week and noted that she wore a lot of jewelry. Noticing her confusion and age, appellant believed that she might have difficulty in identifying him. Miller told Danziger that he went to Smith's house to steal her jewelry. He was not sure how Smith got stabbed, nor how he ended up stabbing himself. Miller was trying to get Smith's jewelry, heard her scream, pushed her down, heard sirens, and fled. (XIX 1521)

Part of the evaluation included appellant's social history. Miller was born on March 25, 1948 in Newport News, Virginia. He was raised by a

stepfather and grandmother. He never knew his biological father. His biological mother, Lola Mae Kinton abandoned him when he was only four years old. He was the youngest of three children born to his mother. The two older brothers are both half-brothers. Miller grew up in various places including Pennsylvania, Ohio, Indiana, and New York. He quit school in the seventh grade, although he got his GED while in prison. He also earned some junior college credits while incarcerated. Miller had some skills as a journeyman cabinetmaker, automobile body work, and an accounting certificate. (XIX 1512)

Miller never married and had not fathered any children. (XIX 1512) He enlisted in the army but was subsequently discharged because of a North Carolina criminal detainer. (XIX 1512-13, 1532-33) He had never been on social security disability. His most recent job was working for a company that put in light fixtures at retail stores. Miller was unemployed at the time of his arrest. He had been staying at a rental home with several other individuals in Orlando. (XIX 1513)

Miller and Dr. Danziger added up all of the time that Miller had been incarcerated. Since the age of eighteen (41 years ago at the time of trial), Miller had spent thirty-two years and three months in prison. Additionally, there was also time in county jails awaiting trial that added up to three

additional years. For the past forty-one years, since the age of eighteen, Miller had been behind bars approximately thirty-five of those years. (XIX 1513-14)

While in prison, Miller had been placed on two psycotrophic medications, Elavil, an older antidepressant, and Polixin, an older antipsychotic medication. Miller reported that he had been prescribed these because of problems with irritability and aggression. (XIX 1522) Dr. Danziger saw no evidence that Miller had ever exhibited any form of psychosis. (XIX 1522-23) Dr. Danziger conceded that Miller suffered from hallucinations while under the influence of industrial solids. (XIX 1522-23)

SUMMARY OF THE ARGUMENT

Appellant challenges his convictions and death sentence on various grounds. Error occurred during jury selection when venireman Eddington was excused for cause at the state's request. Although Eddington reserved the death penalty for the "worst of the worst" first-degree murders, he was clearly qualified to sit on a capital jury.

Appellant's statement to detectives following his arrest should have been excluded. The ***Miranda*** warnings were deficient. Police told appellant that he was entitled to a "free lawyer" prior to questioning. However, this left appellant with the impression that, once questioning began, the only way to obtain legal counsel was to hire a lawyer.

A person convicted of first-degree murder in Florida cannot lawfully be sentenced to death unless two factual findings are made pursuant to §775.082 and §921.141(3), Florida Statutes. ***Apprendi v. New Jersey*** holds that the Sixth and Fourteenth Amendments require that *every* fact upon which imposition of a sentence statutorily depends must be found to exist beyond a reasonable doubt by a jury. Florida due process further requires indictment, a 12-person jury and unanimity. Relying on the holding of ***Apprendi***, as applied to capital cases by ***Ring v. Arizona***, Miller timely and specifically asked the trial judge to provide these basis due process

guarantees. The judge first refused to preclude the death penalty even though the Indictment's failed to allege the facts needed to impose a death sentence in Florida. The judge next refused to use a special verdict form whereby a 12-person jury would have to unanimously make the findings required by §921.141(3), Florida Statutes in order to lawfully sentence Miller to death. Based on the denials of Due Process and Equal Protection over timely and specific objection, Miller's death sentence must be reversed and the matter remanded for imposition of a life sentence.

Appellant's guilt/innocence phase was unfair where the jury learned the irrelevant and prejudicial fact that the murder occurred on Easter Sunday. At appellant's penalty phase, the state introduced prejudicial details regarding Miller's prior violent felony convictions. This evidence was admitted over objection and rendered the penalty phase unfair.

At the penalty phase, the trial court instructed the jury on the witness elimination/avoid arrest aggravating circumstance over objection. Ultimately, the trial court concluded that the evidence did not support a finding of this aggravator. The prosecutor argued this circumstance during closing. The jury's death recommendation was unconstitutionally tainted as a result.

POINT I

THE TRIAL COURT ERRED IN GRANTING THE STATE'S CAUSE CHALLENGE OF VENIREMAN EDDINGTON BY ERRONEOUSLY RULING THAT EDDINGTON WAS NOT DEATH-QUALIFIED.

During individual and sequestered voir dire, the trial court and the lawyers questioned potential juror number 407, Eddington, who could only consider a vote for the death penalty in the "worst of the worst" type of case. This was clear error and a new trial is mandated. ***Amends V, VIII, and XIV, U.S. Const. and Art. I, §§ 9 and 16, Fla. Const.***

The following is the entire examination of potential juror Eddington followed by the parties' argument and the trial court's ruling.

> THE COURT: Okay. Do you have any opinions concerning the death penalty?
>
> JUROR BADGE 407: I don't believe in it.
>
> THE COURT: Okay. Now, you remember what I said earlier, the question is not whether or not you believe in it, or don't believe in it. The question is can you consider it, the imposition of the death penalty?
>
> JUROR BADGE 407: Um, it would be hard for me to do that.
>
> THE COURT: Okay. Is it philosophical or religious reasons?
>
> JUROR BADGE 407: Philosophically.
>
> THE COURT: Now, bearing that in mind, let me ask you this question. One of the things all jurors are asked to do is to lay

aside any personal opinions or philosophies they may have __ some people can do it, some people can't do it __ and decide that issue, if we get to that issue, solely on the facts and circumstances of this case and on the law as I instruct you. In other words, if the facts and circumstances of this case under the law would warrant a sentence of life imprisonment, without possibility of parole, could you vote to impose that sentence, sir?

JUROR BADGE 407: Life in prison, yes.

THE COURT: On the other hand, if the facts and circumstances of this case under the law would warrant a sentence of death, could you vote to impose that?

JUROR BADGE 407: It would be very difficult for me to do that.

THE COURT: I know it would be difficult, but could you do it.

JUROR BADGE 407: Um, I don't think I could.

THE COURT: Okay. Can you envision any circumstances under which you could vote to impose the sentence of death?

JUROR BADGE 407: Death, no.

THE COURT: And you feel strongly about that?

JUROR BADGE 407: Yes.

THE COURT: Okay. Are you saying __ and I don't want to put words in your mouth.

JUROR BADGE 407: Okay.

THE COURT: __ that you cannot consider both punishments equally and use the law in making that decision and not using your own personal opinions?

JUROR BADGE 407: I really don't think I could vote for the death penalty.

THE COURT: Okay. Ms. Wilkinson on behalf of the State, would you care to inquire?

MS. WILKINSON: No, Your Honor.

THE COURT: Mr. Henderson?

MR. HENDERSON: Mr. Edgington, let me ask you these questions just about the death penalty. Have you given much thought about it, in the past, about the death penalty?

JUROR BADGE 407: Just in general.

MR. HENDERSON: Okay. And if I understand you correctly, it's a philosophical problem?

JUROR BADGE 407: I just don't believe it in.

MR. HENDERSON: Would you agree with me that it's important in America that jury service include all people from all walks of life and with all different sorts of feelings?

JUROR BADGE 407: Correct.

MR. HENDERSON: And that someone who __ who cannot follow the law should not be on the jury, we can all agree with that?

JUROR BADGE 407: Um_hmm.

MR. HENDERSON: But in a situation where someone might have their own beliefs, their own values and can recognize them as such and recognize that it's important that I also be on the jury and I can, therefore, set my __ my thoughts aside and I can follow the instructions __

JUROR BADGE 407: Um_hmm.

MR. HENDERSON: __ and, therefore, I can serve on a jury. Can you see how important that would be?

JUROR BADGE 407: Yes.

MR. HENDERSON: Let me explain a little bit about how the death penalty works. In Florida, the judge is the one that actually imposes the sentence. What the jury is required to do is, one, determine whether a person is guilty or innocent. That's up front. And then, second, if they do find beyond a reasonable doubt that a person has committed first degree murder, then the jury would issue a recommendation to the judge about what the sentence should be, what the punishment should be, is it gonna be life imprisonment without parole or would it be the death penalty. Are you with me so far?

JUROR BADGE 407: Yes.

MR. HENDERSON: The determination about guilt or innocence, that has to be unanimous, all the jurors have to agree with that.

JUROR BADGE 407: Um_hmm.

MR. HENDERSON: The recommendation to the Court about hat the punishment should be for this person that committed first degree murder is not a unanimous vote by the jury, as Judge Perry instructed you before. It's __ it's __ if it's a six/six by the jury, then that would be a recommendation of life by the jury. So it's an individual vote by each particular juror where you would respect the rights and views of other jurors and they would respect your views. Okay? Do you understand?

JUROR BADGE 407: Um_hmm.

MR. HENDERSON: You would not be just thrown out there to make a decision. The law would be fairly specific as far as these are the factors that you could consider as aggravation, reasons that the death penalty should be imposed; and these are

the factors that society say should be considered to __ to dole out that punishment. There's also some considerations that are out there that are called mitigation circumstances, things that would be against imposition of the death penalty. Okay?

JUROR BADGE 407: Um_hmm.

MR. HENDERSON: The reasons to impose the death penalty, those aggravating circumstances, those are limited by law and Judge Perry would tell you if any of those factors might apply in this case and the decisions to impose the death penalty would be restricted closely by those aggravating circumstances. And as far as the process goes, it's not a counting process. It's not there's three aggravating circumstances, there's only two mitigating circumstances, therefore, it's a death recommendation. That's not the way it's set up. It's a weighing process to where the State puts on this evidence of the aggravating circumstances and the jurors would determine individually whether they exist; and then there's mitigation that's presented. It can come from anywhere. It could come from the defense. It could come from the State. And then as a prospective juror, as the juror, you would sit there and you would weigh those various considerations that you find have been sufficiently proved and then you would be able to make a recommendation to the Judge as to which of only two punishments are available and which ones should be imposed. Given that framework that you're able to weigh the considerations that are there and the aggravating circumstances are set forth by law, and then at this point you don't really know what they are but there are considerations out there that __ that if we reach that point, the State would say these are the reasons we believe that the death penalty should be imposed and they would have to prove those beyond a reasonable doubt, you would weigh any that you find against the mitigating circumstances that were there given that framework. Do you think you could fairly follow those
instructions and be a juror in this case?

JUROR BADGE 407: Even within the framework, it would be difficult for me to, like as you said each individual juror votes, it would be hard for me to vote for the death penalty.

MR. HENDERSON: And it should be. It should be difficult.

JUROR BADGE 407: Okay.

MR. HENDERSON: And that's not the problem. The problem is gonna be if there is no situation out there whatsoever, if there's no aggravating circumstances that you could ever imagine for __ Saddam Hussein or Osama Bin Laden, for any of those people, for Hitler, for people in society is gonna have a death penalty and, if we're gonna have laws, then that would be an inappropriate [sic] case **that you could say, okay, here, here's a guy that deserves the death penalty, I could do that under these circumstances. Can you envision that?**

JUROR BADGE 407: I can envision that.

MR. HENDERSON: There could be someone out there somewhere. So at this point you don't really know what the aggravating circumstances are, what the mitigating circumstances are.

JUROR BADGE 407: Sure.

MR. HENDERSON: Do you think you could follow the Court's instructions and follow the law in the case?

JUROR BADGE 407: Yes.

MR. HENDERSON: That's all I have, Your Honor.
THE COURT: Any additional questions?
MS. WILKINSON: Mr. Henderson just described to you someone like Hussein, Bin Laden and Hitler. Taking those out of the equation, you earlier stated you believe it would be difficult for you ever to impose the
death penalty. Do you believe that there's a circumstance in a murder – and I'm not talking about a terrorist, a mass murder or

genocide __ do you believe that there are circumstances that you would vote to impose the death penalty?

JUROR BADGE 407: No.

MS. WILKINSON: I have nothing further.

THE COURT: Okay. Just sit out there for a second.

JUROR BADGE 407: Okay.
(Juror leaves area.)

THE COURT: State?

MS. WILKINSON: Your Honor, the State would challenge him for cause based on the fact of his answer that he believes not only that it would be difficult – that he first said there would be no circumstances, but only until Mr. Henderson referred to people who are well into committing genocide, terrorism and killed massive amounts of people would he ever be able to consider __

THE COURT: Mr. Henderson?

MR. HENDERSON: The fact that it would be difficult for him is not gonna preclude him from being a fair and impartial juror. I believe he said he could follow the law given the framework that was provided to him and the instructions, he believed he could be fair and impartial in the case. And it should be difficult to impose the death penalty. But he did not say that it would be difficult to follow the law. So I see a distinction in those __ in those two and I submit that there's no proper challenge for cause under these circumstances and to strike Mr. Edgington is a denial for a right to a fair and impartial trial under the Sixth and Fourteenth Amendments.

THE COURT: Pursuant to Witt v. Wainwright, the United States Supreme Court decision, which basically stands for the proposition when one wavers and vacillates and cannot equally consider both punishments __ the juror Mr. Edgington

> indicated that he could not envision any situation that he would impose death. When questioned by the defense, he indicated that in the cases of Adolf Hitler, Saddam Hussein and Osama Bin Laden, the cases involving genocide and terrorism, that he could consider it. **Unfortunately, most death penalty cases do not fall within the purview of people who commit genocide or people who commit terrorism, that kill massive amounts of people**. He has been quite honest and straightforward indicating his inability to equally consider both as if the horse [sic] was on the __ shoe was on the other foot dealing with someone who totally believed in capital punishment and would impose it irregardless of whether or not there were mitigating circumstances. He would be excused for cause.

(X 70-81) Emphasis added.

The validity of a cause challenge is a mixed question of law and fact, on which a trial court's ruling will be overturned only for "manifest error." ***Fernandez v. State,*** 730 So.2d 277, 281 (Fla.1999). "Manifest error" is tantamount to an abuse of discretion. ***See Kimbrough v. State***, 700 So.2d 634, 638_39 (Fla.1997) (stating that court's determination of juror's competency "will not be overturned absent manifest error" and concluding that trial court did not abuse its discretion in excusing a juror for cause). "The trial judge has the duty to decide if a challenge for cause is proper, and this Court must give deference to the judge's determination of a prospective juror's qualifications." ***Castro v. State***, 644 So.2d 987, 989 (Fla.1994) (citing ***Wainwright v. Witt***, 469 U.S. 412, 426, (1985).

A potential juror may be excused "for cause" if the juror has a state of mind regarding the case "that will prevent the juror from acting with impartiality." § 913.03(10), Fla. Stat. (2006). In a capital case, this standard is met if a juror's views on the death penalty "prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions or oath." ***Fernandez***, 730 So.2d at 281. "A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind." ***Ault v. State***, 866 So.2d 674, 683 (Fla.2003).

Juror Eddington was clearly competent to serve on a capital jury. It is abundantly clear from the record that he could easily consider imposing a death sentence in the **right** first-degree murder case. That is the test, and that is as it should be. As a society, we certainly do not want a juror who would cavalierly consider death as the appropriate sanction for just **any** first-degree murder. Death is the ultimate sanction and should be meted out sparingly. Jurisprudence tells us that the death sentence is reserved for the "worst of the worst", i.e., the most aggravated and least mitigated first-degree murder. ***Terry v. State***, 668 So.2d 954, 965 (Fla. 1996). The ultimate sanction is reserved for the "worst of the worst". ***See Stephens v. State,*** 787 So.2d 747, 763 (Fla. 2001). Juror Eddington could envision

voting for a death penalty if a "worst of the worst" scenario is presented. The fact that neither Adolf Hitler, Saddam Hussein, nor Osama Bin Laden was on trial is of no import. Appellant is mystified by the trial judge's observation that it is "unfortunate" that most death penalty cases fail to involve terrorists who commit genocide.[14]

Most capital jurors are exposed to the death penalty only once in their lifetimes. They are usually ignorant of the process, the law, and the standards. Most do not even understand that the death penalty is only **potentially** applicable after a defendant is convicted of first-degree murder. Undersigned counsel has seen many a capital record that clearly demonstrates this fact. Several times, potential jurors have been asked to give an example of a case where they would not vote for death. Many times, undersigned counsel has read the following response to that question; "If it were self defense."

Given the right circumstances, Juror Eddington was ready, able, and willing to impose death. He was simply not willing to consider death for any ordinary murder. Eddington, like our jurisprudence teaches us, reserved the death penalty for the worst of the worst; the most aggravated and least

[14] This same trial judge expressed a similar sentiment regarding the application of the death penalty for premeditated murder. He stated that it

mitigated first-degree murders. The trial court's act of granting the state's cause challenge denied Lionel Miller his constitutional right to a fair trial with a fair cross-section of the community, albeit the death-qualified community. ***Amends VI, VIII, and XIV, U.S. Const.; Art. I §§ 9, 12, and 16, Fla. Const.***

---

was "unfortunate" that the death penalty was not "automatic" for premeditated murder. (X 103)

POINT II

MILLER'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE FACTS THAT MUST BE FOUND TO IMPOSE IT WERE NOT ALLEGED IN THE CHARGING DOCUMENT NOR WERE THEY UNANIMOUSLY FOUND TO EXIST BEYOND A REASONABLE DOUBT BY A 12-PERSON JURY.

Apprendi v. New Jersey, 530 U.S. 466 (2000) was firmly established long before this trial judge was asked to follow the law. A court is required to provide fundamental due process rights mandated by the United States Constitution. Authorization to do so does not come from the Legislature. It instead emanates from the Constitution itself. This trial judge was asked to provide basic due process rights guaranteed by the Florida Constitution and by Florida law. The judge refused because he believed he did not have the power to follow the law. Such continued delay in the administration of justice is wrong and it unnecessarily risks the efficacy of death sentences imposed after the expenditure of time, finite public resources and human emotion. It is time to correct this problem.[15]

[15] Matters of statutory construction and constitutional challenges are subject to *de novo* review on appeal since they are decisions of law. ***City of Jacksonville v. Cook***, 765 So.2d 289 (Fla. 1st DCA 2000).

Eight years ago, ***Apprendi*** held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." ***Apprendi***, 530 U.S., at 490. In the ***Apprendi***-related case that followed[16] the United States Supreme Court (hereinafter "COURT" to distinguish from this Honorable Court) analyzed the particular statutory scheme to determine whether procedural Due Process was provided when a judge imposed a particular sentence under that particular statutory scheme. Courts are supposed to require that statutes be enforced in accordance with the Constitution. ***Apprendi*** held nothing more. Other courts may do nothing less.

It is first here stressed that the minimal procedural due process requirements explained in ***Apprendi*** do *not* involve the Eighth Amendment because ***Apprendi*** expressly excluded capital sentencing schemes (and thus the Eighth Amendment) from its analysis. "***Apprendi***, 530 U.S. 466, 496

[16] The precursor to ***Apprendi*** involved a federal statute. See ***Jones v. United States***, 526 U.S. 227, 243 n.6 (1999) ("under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." ***Apprendi*** quoted the foregoing language and recognized that "The Fourteenth Amendment commands the same answer in this case involving *a state statute*." ***Apprendi***,

(2000) ("For reasons we have explained, the capital cases are not controlling[.]"). This distinction was not missed when Florida first declined to apply ***Apprendi*** to capital cases. See ***Mills v. Moore***, 786 So.2d 532, 537 (Fla. 2001) ("No court has extended ***Apprendi*** to capital sentencing schemes, and *the plain language of Apprendi indicates that the case is not intended to apply to capital schemes*.") (Emphasis added); ***Mills v. State***, 786 So.2d 547, 548 (Fla. 2001) ("We held that ***Apprendi*** is not applicable to this case *since the majority opinion in Apprendi indicates that Apprendi does not affect capital sentencing schemes*.") (Emphasis added); ***Mann v. Moore***, 794 So.2d 595, 599 (Fla. 2001); ***Card v. State***, 803 So.2d 613, 628 fn.13 (Fla. 2001).

Ring v. Arizona, 536 U.S. 584 (2002), however, makes these Florida decisions moot and any reasoning that precedes ***Ring*** wholly inapposite. ***Ring*** is neither a confusing nor a complex decision. It first extended the due process analysis contained in ***Apprendi*** to capital cases by expressly overruling that portion of ***Walton v. Arizona***, 497 U.S. 639 (1990) that allowed a death sentence to be imposed based on facts not found by a jury:

> ***Apprendi's*** reasoning is irreconcilable with ***Walton's*** holding in this regard, and today we overrule ***Walton*** in relevant part. *Capital*

---

520 U.S. at 476 (emphasis added). Thus its holding includes Due Process under the Fifth Amendment as also applied by the Fourteenth Amendment.

> *defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment*.

Ring v. Arizona, 536 U.S. at 588 (Emphasis added). ***Ring*** next observed that "*Under Arizona law*, Ring could not be sentenced to death, the maximum penalty for first-degree murder, unless further findings were made." ***Ring***, 536 U.S. at 592 (Emphasis added). The COURT then applied the ***Apprendi*** analysis to *Arizona* law and concluded that the additional finding of fact (the existence of "at least one" aggravating factor) upon which a death sentence is based in Arizona must be made by a jury beyond a reasonable doubt:

> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz., at 279, 25 P.3d, at 1151 (citing §13-703). This was so because, *in Arizona, a "death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt*." 200 Ariz., at 279, 25 P.3d, at 1151 (*citing §13-703*). The question presented is whether *that* aggravating factor may be found by the judge, *as Arizona law specifies*, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.

Ring, 536 U.S. at 597 (Emphasis added) (footnotes omitted).

Obviously, the specific analysis of the Arizona capital sentencing scheme cannot control what jury findings are required in other states unless the statutory schemes are identical. Simply said, the ***Apprendi*** analysis focuses on what factual findings are required to impose a particular sanction within a particular statutory scheme. ***Ring*** addressed Arizona's statutory scheme. Florida courts cannot look at Arizona's statutes to determine what findings must be made by the jury because Florida's statutory scheme is materially different than Arizona's.

Apprendi makes clear that courts may no longer blindly accept the notion that a legislature controls the entitlement to constitutional due process rights by labeling a crime to be a "capital" offense, a "life" felony, a "Class B" felony or a bologna sandwich. Such blindness by a court today is not deference to separation of powers – it is an abdication of duty and authority. Stated simply, legislatures enact laws. Courts enforce them consistent with the state and federal constitutions. The COURT has repeatedly made very clear that courts are not following the law if they uphold a sentence that is based on factual findings not made by a jury beyond a reasonable doubt. It is time for Florida to follow the law.

Specifically, in ***Blakely v. Washington***, 542 U.S 296 (2004), the COURT invalidated a 53-month sentence because the factual finding

required to impose it was not made in accordance with Due Process. The State argued that Blakely's 53-month sentence was permissible because Blakely had been convicted of a class "B" felony that was punishable by 10 years. The COURT disagreed because a factual finding by the judge after the jury verdict issued was yet required to deviate from the standard sentence. "The 'maximum sentence' is no more 10 years here than it was 20 years in ***Apprendi*** (because that is what the judge could have imposed upon finding a hate crime) or death in ***Ring*** (because that is what the judge could have imposed upon finding an aggravator)." ***Blakely***, 542 U.S. at 304. The COURT in ***Blakely*** explained this fully and unequivocally:

> In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no ***Apprendi*** violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in §9A.20.021(1)(b). Our precedents make clear, however, that the "statutory maximum" for ***Apprendi*** purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See ***Ring***, ***supra***, at 602 ("The maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting ***Apprendi***, ***supra***, at 483)); ***Harris v. United States***, 536 U.S. 545, 563 (2002) (plurality

> opinion) (same); cf. ***Apprendi, supra***, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," ***Bishop, supra***, §87, at 55, and the judge exceeds his proper authority.

Blakely, 542 U.S. at 303-304 (Emphasis in original).

The COURT next applied ***Apprendi*** to the federal sentencing guidelines in ***United States v. Booker***, 543 U.S. 220 (2005), where sentences being imposed were obviously less than the maximum specified by the United States Code yet they were based on additional factual findings that followed a conviction. The COURT reaffirmed the holding set forth in ***Apprendi*** and again very clearly explained what due process requires:

> Accordingly, we reaffirm our holding in ***Apprendi****:* Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

United States v. Booker, 543 U.S. 220, 244 (2005). The COURT avoided holding the entire federal sentencing guidelines unconstitutional by striking only the portion of the statute that made the guidelines mandatory, pointing out that, "Ours, of course, is not the last word: The ball now lies in

Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, *compatible with the Constitution*, that Congress judges best for the federal system of justice." ***Booker***, 543 U.S. at 265 (emphasis added). Again, the Legislature was responsible for enacting laws. The COURT's concern was its duty to enforce the Constitution.

More recently, in ***Cunningham v. California***, 549 U.S. 270 (2007), the COURT invalidated California's determinate sentencing statutes. That opinion is unequivocal: "This Court has repeatedly held that, under the Sixth Amendment, *any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence*." ***Cunningham***, 549 U.S. at 281 (2007) (Emphasis added) (citations omitted). These cases leave no room for discussion.

Miller cited the foregoing cases from the highest court in America and repeatedly asked that they be followed. By refusing, "the judge exceed[ed] his proper authority." ***Blakely***, 542 U.S. at 304. In short, reversal of Miller's death sentence and imposition of a life sentence are required for each and all of the following violations of basic due process that occurred over timely objection:

A: DENIAL OF MILLER'S MOTION TO PRECLUDE THE DEATH PENALTY DUE TO THE FAILURE OF THE INDICTMENT TO ALLEGE A CRIME PUNISHABLE BY THE DEATH PENALTY -

Article I, section 15(a) of the Florida Constitution guarantees the right to indictment for a capital crime. Florida law requires that the charging document contain allegations of all facts necessary to impose a particular punishment. This is true even as to a mandatory sentence that is less than the "statutory maximum" sanction for the offense of which the defendant stands convicted. E.g., ***Lane v. State***, 33 996 So.2d 226 (Fla. 4th DCA 2008) (due process is violated where a person receives a mandatory sentence for discharging a firearm when the information alleges only that he "carried" it); ***Jackson v. State***, 852 So.2d 941, 944-45 (Fla. 4th DCA 2003) (same); ***McEachern v. State***, 388 So.2d 244, 246-48 (Fla. 5th DCA 1980) (though supported by evidence, conviction must be reversed "[s]ince he was not so charged, [and] we can only assume that the State did not intend to charge him with the higher degree of the crime, though we fail to understand why it was done."); ***State v. Dye***, 346 So.2d 538, 541 (Fla. 1977) (An information must allege each essential element of a crime and no essential element should be left to inference).

Count I of Miller's indictment charged the crime of premeditated murder as follows:

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the County of Orange, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County or Orange, upon their oaths do present that Lionel Miller, on the 16th day of April, 2006, in Orange County, Florida, in violation of Florida Statute 782.04(1) and 775.087(1), from a premeditated design to effect the death of Jerry Smith, a human being, did unlawfully kill Jerry Smith, and that during the commission of the offense, Lionel Miller, did use a weapon, to-wit: a cutting instrument.

(III 334) Miller's indictment failed to contain any language that tracked or otherwise referred to §775.082 and §921.141, Florida Statutes and there is no indication that the grand jury considered and applied that legislation.

A premeditated murder is deemed to be first-degree murder and a capital[17] felony by §782.04, Florida Statutes, but it is not punishable by death because imposition of capital punishment under Florida's capital sentencing scheme requires that additional findings of fact be made *after* a defendant is convicted of premeditated murder. Specifically, §775.082, Florida Statutes (with emphasis added in pertinent parts) states:

> **775.082. Penalties; applicability of sentencing structures; mandatory, minimum sentences for certain reoffenders previously released from prison.**

[17] In Florida, an offense that the Legislature labels a "capital" offense is not if imposition of the death penalty is not a possibility. See ***Rusaw v. State***, 451 U.S. 469, 470 (Fla. 1984) ("This Court has long held that a capital crime is one where death is a possible penalty.") (citing ***Donaldson v. Sack***, 265 So.2d 499 (Fla. 1972)).

(1) A person *who has been convicted* of a capital felony shall be punished by death *if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court* that such person shall be punished by death, *otherwise such person shall be punished by life imprisonment* and shall be ineligible for parole.

The plain language of §775.082 thus requires that, for a death sentence to be authorized, findings of fact must be made under §921.141 for "a person *who has been convicted*" of a capital felony. By the statute's own terms the death penalty requires additional findings to be made in accordance with "the procedure set forth in §921.141." It could not be clearer that ***Apprendi*** and ***Ring*** apply because further findings of fact are required for imposition of a death sentence for "a person who has been convicted" of first degree murder.

The ***Apprendi*** analysis therefore turns to the statute that specifies what precise findings must be made. The answer is found in Section 921.141(3), Florida Statutes, which in pertinent part (with emphasis added) plainly states without ambiguity the following:

§ 921.141(3).

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, *but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:*

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

> *(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances*.

In *each* case in which the court imposes the death sentence, the determination of the court *shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings*. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

The statute says that there are only two sentences that may be imposed on a person found guilty of a capital felony. If no findings are made, a life sentence without possibility of parole must be imposed. If a death sentence is to be imposed, the statute patently and plainly requires "specific written findings of fact" (plural) to support a death sentence. It plainly requires that "findings" (plural) be made that "a" and "b" exist. Those are the findings required by ***Apprendi***.

Not only does §921.141(3) require that both "a" and "b" be found, §921.141(3)(a) requires that *at least two* aggravating circumstances be found to exist. This necessarily follows because the statute requires that "sufficient aggravating circumstances (plural) exist." This language is not ambiguous and it is not susceptible to being interpreted to mean "one or more" circumstance. For the State to allege the existence of a crime that is punishable by the death penalty under §§775.082 and 921.141(3), Florida Statutes, it must contain those factual allegations required by these two

statutes, that is, that "sufficient aggravating circumstances exist as enumerated in subsection (5)" and that "insufficient mitigating circumstances exist to outweigh the aggravating circumstances.

Florida requires that the charging document contain an allegation of "every essential element" of the crime to be punished:

> The first issue in this case is whether the information charging Price with the crime of sexual battery on a physically incapacitated person was fatally defective. Due process of law requires the State to allege every essential element when charging a violation of law to provide the accused with sufficient notice of the allegations against him. Art, I, §9, Fla. Const.; ***M.F. v. State***, 583 So.2d 1383,l 1386-87 (Fla. 1991). There is a denial of due process when there is a conviction on a charge not made in the information or indictment. ***See Gray v. State***, 435 So.2d at 818; ***see also, Thornville v. Alabama,*** 310 U.S. 88, 60 L..Ed.2d 735, 84 L.Ed.2d 1093 (1940); ***De Jonge v. Oregon***, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). For an information to sufficiently charge a crime it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged. ***See Rosin v. Anderson***, 155 Fla. 673, 21 So.2d 143, 144 (Fla. 1945). Generally the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial. *See* Gray, 435 So.2d 818 (citing ***Lackos v. State***, 339 So.2d 217 (Fla. 1976).

Price v. State, 995 So.2d 401, 404 (Fla. 2008). Any argument that "sentencing factors" do not have to be alleged in the charging document

ignores ***Apprendi***, ***Jones***, ***Blakely***, and Florida cases such as ***Insko v. State***, 969 So.2d 992 (Fla. 2007), ***Lane***, ***supra***, ***Price***, ***supra*** and ***Jackson***, ***supra***.

Miller was here charged in Count I with premeditated murder. The absence of any language in the indictment that qualified Miller for the death penalty was timely and specifically pointed out to the judge. That defect could easily have been timely corrected. Indeed, that is stated rationale for requiring specific objections to be timely made to a trial court. See ***Harrell v. State***, 894 So.2d 935, 940 (Fla. 2005); ***Castor v. State***, 365 So.2d 701, 703 (Fla. 1978). This judge was expressly shown controlling authority that facts required to be proved under ***Apprendi*** must also be properly charged:

> As we noted earlier, ***Apprendi*** renders moot most discussions of whether a particular fact is an element of the crime or a potential sentencing enhancement. Both must now be submitted to the jury and found beyond a reasonable doubt. Whether a fact is an element, however, remains important to whether it must be alleged in indictments and informations.

Insko v. State, 969 So.2d 992, 997 (Fla. 2007). The judge ruled, however, that he had no authority to follow the law plainly stated in ***Insko***. (II 244-270) In doing so, he committed reversible error.

Insko ultimately held that the defendant waived the ***Apprendi*** issue by failing to timely object to it. That same result applies to all now convicted of a capital crime who failed to timely object and specifically argue that she

was not eligible for the death penalty because their indictment failed to allege the specific criteria required by §775.082 and §921.141(3), Florida Statutes. In addition to allegations that track §782.04, the charging document must also allege that "sufficient aggravating circumstances exist as enumerated in§921.141(5)" and that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." The precise argument is not that the indictment failed to allege particular aggravating circumstances. Here, Miller timely objected and sought to have that error corrected. The error could have and should have been timely corrected if the grand jury agreed with the State's contention. The preserved error now requires reversal of the death sentence and imposition of a life sentence, for not only were those statutory factual findings not alleged, they were not found in accordance with due process and the law over timely and specific objection.

B: DENIAL OF MILLER'S DEMAND THAT A 12-PERSON JURY UNANIMOUSLY DETERMINE BEYOND A REASONABLE DOUBT WHETHER "SUFFICIENT AGGRAVATING CIRCUMSTANCES EXIST AS ENUMERATED IN SUBSECTION (5)" AND WHETHER "THERE ARE INSUFFICIENT MITIGATING CIRCUMSTANCES TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES" –

Respectfully, Florida was in good company but on treacherous footing when the basic procedural Due Process requirements recognized in ***Apprendi*** were not immediately extended to Florida's capital sentencing

scheme. That could have been, and with perfect hindsight should have been, required if solely under the Florida Constitution. See ***Traylor v. State***, 596 So.2d 957, 962 (Fla. 1992) ("In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.") (citing Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L.Rev. 707, 709 (1983)). Unfortunately, Florida declined to so rule and that opportunity to follow the law was lost. See ***Mills v. Moore***, 786 So.2d 532, 537 (Fla. 2001).

A second opportunity occurred two years later when the United States Supreme Court unequivocally held that "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." ***Ring***, at 589. Rather than embrace that basic holding, however, Florida needlessly[18] deferred to the United States Supreme Court

[18] The basic Due Process protections guaranteed by the Sixth and Fourteenth Amendments could yet have been fully recognized and implemented under article I, sections 2, 9, 16 and 22 of the Florida Constitution without any affront to the authority of the United States Supreme Court, that freely embraces the belief that the federal constitution sets the floor of due process, whereas the state constitution sets the ceiling. See ***Danforth v. Minnesota***, 552 U.S. ___, ___, 128 S.Ct. 1029, 1045 (2008) (The remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. "Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'")

to enforce the law in Florida. See ***Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002) ***King v. Moore***, 831 So.2d 143 (Fla. 2002).[19] The inaction that followed has been reminiscent of Wile E. Coyote being suspended in air past the edge of the cliff while smoke trails from a sputtering ACME rocket.

Indeed, three years after ***Ring***, Florida had yet to conclusively apply ***Apprendi*** to its death penalty cases. It suggested that maybe it would be a good idea for its Legislature to revisit Florida's death penalty statute, but otherwise the Florida Supreme Court erroneously opined that "[e]ven if ***Ring*** did apply in Florida – an issue we have yet to conclusively decide – we read it as requiring only that the jury make the finding of 'an element of a greater offense.' That finding would be that at least one aggravator exists – not that a specific one does." ***State v. Steele***, 921 So.2d 538, 546 (Fla. 2005). This tracks the position erroneously stated in ***Doorbal v. State***, 837 So.2d 940 (Fla. 2003) that also fails to acknowledge Florida statutory law:

> On rehearing, Doorbal has asserted that Florida's capital sentencing scheme violates both the United States and Florida Constitutions under

[19] The results in ***Bottoson*** & ***King***, both post-conviction cases, were ultimately correct because ***Apprendi*** did not then and does not now apply retroactively. It is for that very reason that, in all post-conviction cases decided by this Court that deny ***Apprendi***-related claims, other reasons posited as to why ***Apprendi*** and/or ***Ring*** issues fail in Florida are pure dicta. It should not need pointing out to this Court that the denial of certiorari review by an appellate court is <u>not</u> a ruling on the merits of the issue presented.

> the holding of ***Ring v. Arizona***, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in ***Bottoson v. Moore***, 833 So.2d 693 (Fla.2002), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and ***King v. Moore***, 831 So.2d 143 (Fla.2002), ***cert. denied***, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Doorbal is likewise not entitled to relief on this claim. Of note, Doorbal argues that his death sentences were unconstitutionally imposed because Florida's capital sentencing scheme violates the United States and Florida Constitutions by failing to require *that aggravating circumstances* be enumerated and charged in the indictment and by further failing to require specific, *unanimous jury findings of aggravating circumstances*. These arguments must fail because here, one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnaping, robbery, and attempted murder of Schiller. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional.

Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003). The issues identified above and addressed in ***Doorbal*** are not those advanced by Miller. If the same argument now presented has been rejected, respectfully, the Florida Supreme Court is violating the separation of powers proscription found in article II, section 3 of the Florida Constitution by effectively rewriting

Florida's unambiguous capital sentencing statutes. Miller's appeal now provides yet another opportunity to correctly apply ***Apprendi***.

Specifically, Doorbal apparently argued that due process under ***Ring*** required a unanimous jury finding of the specific aggravating circumstances that otherwise had to have been alleged in the indictment. That is NOT Miller's argument. Instead, Miller argues that ***Apprendi***, applied by ***Ring***, explains that he is entitled under the Sixth and Fourteenth Amendments to a jury finding beyond a reasonable doubt of any fact upon which imposition of the death penalty depends. Florida law requires unanimity, a twelve person jury and indictment in a capital case. The "facts" that are to be found under Florida's capital sentencing scheme is not the existence of any particular aggravating circumstance but instead the findings affirmatively set forth by the Florida Legislature in §921.141(3)(a)&(b), Florida Statutes.

Miller argues that, under Florida law, a capital defendant has due process rights to a 12-person jury, a unanimous verdict, and to be charged by a valid indictment. Art. I, §§ 15(a) & 22, Florida Constitution; §913.10, Florida Statutes; Motion to Call Circuit Judge to Bench, 8 Fla. 459 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous."). Miller contends that Due Process under the state constitution is violated if Florida courts violate the separation of powers proscription

contained in article II, §3 of the Florida Constitution, which in turn constitutes a denial of due process under the Fourteenth Amendment to the United States Constitution. ***Hicks v. Oklahoma***, 447 U.S. 343, 346 (1980).

Florida has often pointed out that, to preserve an argument for appeal, the same argument presented on appeal must first be presented to the lower court. ***Johnson v. State***, 969 So.2d 938, 954 (Fla. 2007) (issue not preserved for appeal "because the grounds for reversal argued on appeal are not the same as those raised in the objection below."); ***Reynolds v. State***, 934 So.2d 1128, 1140 (Fla. 2006) (same); ***Steinhorst v. State***, 412 So.2d 332, 338 (Fla. 1982) (same). Undersigned counsel has found no case from this Court that addresses or otherwise rejects the arguments Miller made to the trial judge and repeats here. Therefore, the arguments at this point necessarily rest on ***Apprendi***, ***Ring***, ***Blakely***, ***Booker*** and ***Cunningham***.

The cases from this Court that address and reject the ***Apprendi*** claims previously made by others are next addressed to demonstrate that 1) they do not address the precise argument heretofore made, and 2) by not applying ***Apprendi*** correctly in death penalty cases, Florida courts are violating the separation of powers proscription, denying due process and denying equal protection of law. It bears pointing out that the argument made by Miller is also <u>not</u> the same argument rejected in ***Hildwin v. Florida***, 490 U.S. 638,

109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which also focused on the particular aggravating circumstances rather than the statutory requirement that there be "sufficient aggravating circumstances" and "insufficient mitigating circumstances to outweigh the aggravating circumstances."

C: FLORIDA'S DEATH PENALTY IS APPLIED IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION AND THE SEPARATION OF POWERS PROSCRIPTION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 2, 9, 15(a), 16 AND 22 OF THE FLORIDA CONSTITUTION AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION –

The holding in ***Apprendi*** is clear. Respectfully, Florida's scattershot adherence to ***Apprendi*** is not. Remarkably, eight years after ***Apprendi*** and six years after ***Ring***, Florida has yet to expressly require that death penalty trials provide the Due Process protections guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Assuming that politeness to the United States Supreme Court trumps the constitutional right to have a jury find eligibility for the death penalty in accordance with the procedures unequivocally required by the federal Constitution, Florida could yet, but has not, provided those same procedural due process rights under article I, sections 2, 9, 15(a), 16 and 22 of the Florida Constitution.

Miller argued that Florida's capital sentencing scheme requires findings of "sufficient aggravating circumstances" and "insufficient

mitigating circumstances" and that those facts must be alleged in his indictment and unanimously found to exist beyond a reasonable doubt by a 12-person jury. The denial of these basic guarantees, Miller submits, denied him Due Process under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution. Miller pointed out to the trial judge that Florida affirmatively prohibits[20] trial judges from using a special verdict form that details juror findings concerning aggravating circumstances but stressed that did not interfere with the findings that must be made concerning "sufficient aggravating circumstances" and "insufficient mitigating circumstances." (I 117). He pointed out that, by requiring only "one or more" aggravating circumstances to support a death sentence Florida is interpreting an unambiguous statute in violation of the separation of powers proscription contained in article II, section 3 of the Florida Constitution. He further argued (I 108-19) that the denial of these rights denies Due Process violates under the Fourteenth Amendment to the United States Constitution, and also denies Equal Protection under the Fourteenth Amendment because Florida *does* provide those same due process rights recognized in ***Apprendi*** to criminal defendants who are not charged with first-degree murder. E.g.,

[20] ***State v. Steele***, 921 So.2d 538, 548 (Fla. 2005) ("We hold that a trial court departs from the essential requirements of law in a death penalty case by

Galindez v. State, 955 So.2d 517 (Fla. 2007) ("we hold that harmless error analysis applies to *Apprendi* and *Blakely* error.**"**); ***Insko***, ***supra***. (same). Failing to timely apply ***Apprendi*** at the trial court level in capital cases only to then hold the error to be "harmless" is a distortion of Florida statutory law that also violates those Constitutional rights.

More specifically, Florida does not apply ***Apprendi*** to death penalty cases and instead prohibits trial judges from using special verdict forms to demonstrate the jury's findings as to *individual* aggravating circumstances. ***Steele***, ***supra***. The Court then refuses to grant meaningful relief on appeal by ruling that ***Ring*** [sic] "is satisfied" if the jury found the existence of a contemporaneous violent felony that is treated under Florida law as a *prior* violent felony ***e.g***. ***Deparvine v. State***, 33 Fla.L.Weekly S784 (Fla. Sept. 29, 2008) ("Deparvine's claim is without merit since it is undisputed that he has prior felony convictions and this Court has held that the existence of such convictions as aggravating factors moots any claim under ***Ring***."); ***Salazar v. State***, 991 So.2d 364 (Fla. 2008) ("***Ring*** is satisfied in this case because the trial court applied the prior violent felony conviction aggravator based on Salazar's conviction for the contemporaneous attempted murder of Ronze Cummings."). ***See also***, ***Duest v. State***, 855 So.2d 33, 49 (Fla. 2003) ("We

---

using a penalty phase special verdict form that details the jurors'

have previously rejected claims under *Apprendi* and *Ring* in cases involving the aggravating factor of a previous conviction of a felony involving violence."); ***Doorbal v. State***, 837 So.2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). ***Ring*** is not the issue. ***Apprendi*** is. Florida statutory law does not authorize the death penalty if "one or more" aggravating circumstances exist. That is a fiction created by appellate decisions in violation of article II, section 3 of the Florida Constitution.

The existence of "one or more" aggravating circumstance(s) is NOT the "specific findings" required by §921.141(3), Florida Statutes. Rather, the statute requires both that "*sufficient* aggravating circumstances" exist and that "*insufficient* mitigating circumstances exist to outweigh the aggravating circumstances." An appellate ruling that due process is satisfied because a jury found a contemporaneous felony elevates one circumstance above all others and effectively renders the other meaningless. The terms "sufficient" and "insufficient" connote a weighing process, not a mere finding of the

---

determination concerning aggravating factors found by the jury.")

existence of one factor. That is so basic that it was immediately perceived and affirmatively explained in ***State v. Dixon***, 283 So.2d 1, 10 (Fla. 1973):

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

"Sufficient" is synonymous with "adequate, enough and ample. The Unabridged Edition of ***The Random House Dictionary of the English Language***, p.1421 defines "sufficient" as "adequate for the purpose; enough." The commonly-understood meaning of sufficient is not "one or more." That language is contained in Arizona's death penalty statutory scheme. Florida cannot use Arizona law to resolve Florida Due Process issues framed by Florida statutes and if the Florida Legislature had intended for "one or more" aggravating circumstances to justify the death penalty it presumably would have said so. Florida is ignoring the plain language of the controlling statute. Florida is denying the right to due process as to the factors that determine the eligibility of a convicted first-degree murderer to be punished by death. This delay in the administration of justice violates

article I, section 21 of the Florida Constitution and denies Due Process under the Fourteenth Amendment to the United States Constitution.

Florida's position that a jury's determination of the existence of one aggravating circumstance satisfies ***Ring*** is a violation of article II, section 3 of the Florida Constitution. The analysis of Arizona law in ***Ring*** is of no import outside of the State of Arizona unless the statutes of other states are identical. Florida's statute is not identical to the Arizona death penalty statutes. Specifically, the Arizona statute analyzed in ***Ring*** provided:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact **finds one or more** of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.

Ariz.Rev.Stat. Ann, §13.703(E) (emphasis added). The emphasized statutory language was the basis of the COURT'S ***Apprendi*** analysis:

> Under Arizona law, Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made. The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by § 13-703." Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001). The cross-referenced section, § 13-703, directs the judge who presided at trial to "conduct a separate

> sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances ... for the purpose of determining the sentence to be imposed." § 13-703(C) (West Supp.2001). The statute further instructs: "The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." *Ibid.*
>
> At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated "aggravating circumstances" and any "mitigating circumstances." **The State's law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance** and "there are no mitigating circumstances sufficiently substantial to call for leniency." § 13-703(F).

Ring v. Arizona, 536 U.S. 584, 592-593 (2002) (Emphasis added) (footnotes omitted). The "one or more" language in ***Ring*** pertains to the corresponding language contained in the Arizona Revised Statute. It is not a pronouncement of a constitutional litmus test applicable outside of Arizona.

In Florida, to sentence a person who has been convicted of first-degree murder to the death penalty, two additional "findings" must be made under Section 921.141(3), Florida Statutes:

> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Section 921.141(3), Florida Statutes. The statute is not ambiguous and it does not authorize the death penalty if "one or more" factors exist.

Yet, in well over[21] 50 direct appeals of death sentences, Florida has rejected claims that Florida's death penalty is being unconstitutionally applied under ***Apprendi*** and/or ***Ring***. Miller first notes that the arguments apparently raised in those cases focused exclusively on the existence of a particular aggravating circumstance. Those are NOT the positions advanced by Miller. Instead, Miller contends that he is entitled as a matter of Due Process to be properly charged and for a 12-person jury to unanimously determine beyond a reasonable doubt the existence of the facts that render him eligible for the death penalty in Florida under §921.141(3)(a)&(b), Florida Statutes. That precise argument has not been addressed in any of the prior decisions and decisions that address arguments concerning individual aggravating circumstances are simply not controlling.

A person such as Franklin whose jury unanimously recommended the death penalty was provided due process under ***Apprendi*** because to make that unanimous recommendation the jury made the statutorily required findings. So, too, the defendants who did not timely raise the issue now presented by Miller cannot receive relief because the issue was waived by

not being specifically presented and because ***Apprendi*** will not be applied retroactively. Simply said, Miller's death sentence must be reversed and a life sentence without possibility of parole imposed because his jury did not unanimously find beyond a reasonable doubt that sufficient aggravating circumstances exist as enumerated in subsection 5, nor did they unanimously decide that insufficient mitigating circumstances exist to outweigh the aggravating circumstances. These specific things, over timely objection, were neither properly alleged nor proven in accordance with due process. It is time to correct the flaws with Florida's death penalty to the extent that they can be judicially corrected. The Legislature simply does not have to authorize a court to require compliance with the state and federal constitutions. The Constitution itself is all the authorization needed for a court to require due process.

---

[21] See ***Franklin v. State***, 965 So.2d 79, 101-102 (Fla. 2007) ("In over fifty cases since ***Ring's*** release, this Court has rejected similar ***Ring*** claims."

POINT III

IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE STATEMENT WHERE ***MIRANDA***[22] WARNINGS WERE DEFICIENT REGARDING APPELLANT'S RIGHT TO FREE COUNSEL ONCE QUESTIONING BEGAN.

Following his arrest, police escorted the appellant to police headquarters where he was placed in an interrogation room. Although the warnings regarding his constitutional rights were not recorded, the detectives made reference to them at the beginning of the taped interrogation. At the suppression hearing, the detectives testified that warnings were given pursuant to a ***Miranda*** card. Detective Joel Wright read the following:

> You have the right to remain silent. Do you understand? Anything you say may be used against you in court. Do you understand? You have the right to talk to a lawyer before and during questioning. Do you understand? If you cannot afford a lawyer and want one, one will be provided for you before questioning without charge. Do you understand? Has anyone threatened you or promised you anything to get you to talk to me?

(I 146)

Counsel below argued that the above warnings were deficient where they did not advise appellant that he had a right to a free lawyer **even after**

[22] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

questioning began. Trial counsel contended that appellant believed that once he voluntarily consented to and began the interview, his right to a "free" lawyer dissipated. In this respect, appellant's constitutional rights were violated when his subsequent statement was introduced at his trial that resulted in his sentence to death.[23] Amend. V and XIV, U.S. Const.; and Art. I, §§9 and 16, Fla. Const.

In ***State v. Powell***, 998 So.2d 531 (Fla. 2008) this Court approved the holding of the Second District Court of Appeal in ***Powell v. State,*** 969 So.2d 1060 (Fla. 2nd DCA 2007). This Court answered the following certified question in the affimative:

> DOES THE FAILURE TO PROVIDE EXPRESS ADVICE OF THE RIGHT TO THE PRESENCE OF COUNSEL DURING QUESTIONING VITIATE MIRANDA WARNINGS WHICH ADVISE OF BOTH (A) THE RIGHT TO TALK TO A LAWYER "BEFORE QUESTIONING AND (B)THE "RIGHT TO USE" THE RIGHT TO CONSULT A LAWYER "AT ANY TIME" DURING QUESTIONING?

State v. Powell, 998 So.2d 531 (Fla. 2008). Both this Court and the Second District Court of Appeal recognized that advising a suspect that he "has the right 'to talk to a lawyer **before answering...any of our questions'**

[23] Although a trial court's ruling on a motion to suppress has a presumption of correctness, this Court must independently review mixed questions of law

constitutes a narrower and less functional warning than that required by Miranda." ***Powell***, 969 So.2d at 1064. ***Miranda*** requires that a suspect be "clearly informed of his right to have a lawyer with him during questioning. As ***Powell*** recognized, "the right to talk to or consult with an attorney before questioning is not identical to the right to the presence of an attorney during questioning." ***Powell***, 969 So.2d at 1067.

The ***Miranda*** warnings given to Powell were:

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Powell, 969 So.2d at 1064.

Because Powell was not clearly informed of his right to the presence of counsel **during** the custodial interrogation, this Court agreed with the Second District and answered the certified question in the affirmative. This Court also agreed with the Second District that to advise a suspect that he has the right "to talk to a lawyer before answering any of our questions" constitutes a narrower and less functional warning than that required by

---

and fact that ultimately determine constitutional issues. ***Nelson v. State,***

Miranda. Both ***Miranda*** and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer **present** during questioning. ***State v. Powell***, 998 So.2d 531, 542 (Fla. 2008).

The ***Miranda*** warnings given to Miller were deficient in a slightly different respect. Detective Wright told Miller that if he could not afford a lawyer and wanted one, one would be provided for him "before questioning without charge." (I 146) As trial counsel argued below, this language could have easily been misunderstood by a criminal suspect. Although he was told he had the right to talk to a lawyer "before and during" questioning, he was told that if he could not afford a lawyer and wanted one, one would be provided "before questioning without charge." Miller may have started the interview without counsel, before realizing in mid-statement that he wanted a lawyer, but could not afford one. Although it may appear to be a subtle semantic difference, appellant contends that it is a distinction no finer than the improper language disapproved in ***Powell***. The trial court's categorical rejection of this argument has resulted in reversible error. Appellant anticipates that the state may attempt to meet their burden regarding harmless error by showing that appellant's statement to police did not contribute to the jury's verdict. Because of the details of the attack,

---

850 So.2d 514, 521 (Fla. 2003).

appellant points out that the state's burden will be much more difficult regarding the penalty phase. A new trial is mandated.

POINT IV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTIONS WHEN WITNESSES REFERRED TO THE FACT THAT THE MURDER OCCURRED ON EASTER SUNDAY, AND THAT THE VICTIM'S SON IS A LAWYER, BOTH IRRELEVANT AND PREJUDICIAL CIRCUMSTANCES, RESULTING IN A DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Trial counsel moved for mistrial and repeatedly objected to any reference that the crimes occurred on Easter. ***See, e.g.,*** (XIII 599-600, 685-87, 701; XIV 722, 852; XVI 1127-32; XVII 1260-61). The trial court ruled that the fact that the murder occurred on Easter Sunday was simply a fact of the case which was not prejudicial. Additionally, appellant objected to Chris White, the victim's son, testifying that he was a lawyer by profession. (XIV 714-16) Counsel argued that the jury might get the idea that the appellant was guilty based, in part, on this irrelevant fact. The trial court overruled the objection and allowed the testimony. Appellant contended below and maintains on appeal that both of these particular facts are completely

irrelevant to any issue at trial. Any slight probative value is substantially outweighed by unfair prejudice.[24] §90.403, Fla. Stat. (2006)

Florida law attempts to exclude or, at least minimize evidence that unfairly prejudices a defendant. ***Welty v. State***, 402 So.2d 1159 (Fla. 1981) pointed out that, in a murder prosecution, the identification of the victim by a family member is not permissible, where unrelated, credible witnesses are available. The basis of this rule is to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt and, in this case, the issue of the appropriate penalty. The major function of the corresponding federal rule has been to exclude matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial value. ***United States v. King***, 713 F.2d 627, 631 (11 Cir. 1983). Indeed, "unfair prejudice" within the context of the rule means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. ***Westley v. State***, 416 So.2d 18, 19 (Fla. 1st DCA 1982); ***See also Vaczek v. State***, 477 So.2d 1034 (Fla. 5th DCA 1985)[In an attempted first-degree murder case, evidence was elicited that, at the time of the stabbing, the victim was pregnant. Despite the fact that the

[24] The admission or exclusion of evidence is subject to an abuse of discretion standard of review. ***San Martin v. State***, 717 So.2d 462 (Fla. 1998).

trial court sustained the objection and gave a curative instruction, the appellate court reversed for a new trial.]

It cannot be denied that Chris White's status as a lawyer was completely irrelevant to the issues at hand. Likewise and even more prejudicial, the fact that the murder occurred on Easter Sunday is completely irrelevant. This Court must decide whether the prejudice mandates a new trial. Appellant contends that it does. In our predominately Judeo-Christian society, Easter is a hallowed day on most people's calendars. Also, like police officers, a large segment of our population still respects and admires lawyers. Appellant cannot clearly demonstrate prejudice. Appellant submits that prejudice should be presumed.

Appellant submits that the crimes for with which he was charged were prejudicial enough by their very nature. When he faced the jury, the allowance of irrelevant and inflammatory evidence such as was permitted in the case at bar resulted in a depravation of appellant's constitutional right to a fair trial. Amends. V, VI, VIII, and XIV, U.S. Const.; Art.I, §§ 9 and 16, Fla. Const.

POINT V

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF CONFUSING, IRRELEVANT, AND PREJUDICIAL DETAILS OF A PRIOR VIOLENT FELONY, DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL AND RENDERING HIS DEATH SENTENCE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

In a penalty phase proceeding the jury and the court may hear and consider as an aggravating circumstance evidence that the defendant was previously convicted of a felony involving the use or threat of violence. §921.141 (5)(b), Fla. Stat. This aggravator has been held to be one of the "most weighty in Florida's sentencing calculus." ***Sireci v. Moore***, 825 So.2d 882 (Fla. 2002); ***Elledge v. State***, 346 So.2d 998 (Fla. 1977). While the state may present testimony giving some details of the prior felonies, this circumstance is strictly limited to actual convictions for violent felonies. ***Id***.; ***Perry v. State***, 395 So.2d 170, 174-75 (Fla.1981); ***Provence v. State***, 337 So.2d 783 (Fla.1976). The admission or exclusion of evidence is generally a matter of discretion with the trial court. As such, abuse of discretion is the appellate standard of review. ***San Martin v. State***, 717 So. 2d 462 (Fla. 1998).

The state sought to prove details regarding appellant's Oregon manslaughter conviction from thirty years before. Appellant had no

objection to the state producing evidence of the conviction itself. Appellant did object to the state's testimony and evidence regarding details of the conviction. The state of Oregon initially charged appellant with a higher degree of homicide. Appellant ultimately entered a negotiated plea to manslaughter, a lesser offense, with a stipulated factual basis. Appellant objected to the state going beyond the stipulated factual basis and the offense appellant pled to by offering evidence that proved a higher degree and more severe offense. (XVIII 1348-52)

The trial court overruled the objection and allowed the testimony in evidence that went well beyond the stipulated factual basis for the manslaughter plea. Instead, the jury heard that appellant had threatened to kill the victim several days before his actual death. Instead of a death that arose from mutual combat, the jury instead got the distinct impression that appellant had a committed a premeditated murder in Oregon thirty years before. (XVIII 1358-62)

Specifically, the boarding house manager testified that, several days before Huff-Smith's death, the manager heard him arguing with the appellant. Appellant accused Huff-Smith of stealing his lacquer thinner (which appellant was using to get high). Huff-Smith stole the lacquer thinner and threw it off of a bridge. This apparently angered appellant and

he threatened to kill Huff-Smith. Several days later, Huff-Smith died at the hands of the appellant. (XVIII 1360-62) To allow these matters before the jury and the judge in determining the appropriate sentence was error as a matter of law or, at least, a palpable abuse of discretion which renders Miller's sentence constitutionally infirm.

Clearly, the death penalty statute expressly limits what may be considered concerning a defendant's prior criminal record to only those offenses for which "the defendant was previously convicted." ***Perry v. State, supra; Provence v. State, supra.*** Miller was not convicted of premeditated murder thirty years ago in Oregon. This evidence was therefore not properly the subject of the sentencer's attention. The evidence cannot be used as the basis for this aggravator. ***Id***.; ***Alvord v. Wainwright***, 564 F.Supp. 459, 483 (D.C. Fla. 1983), ***rev'd on other grounds***, ***Alvord v. Wainwright***, 725 F.2d 1282 (11th Cir. 1984). The death sentence here, based in part on these improper considerations, must be vacated.

POINT VI

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

At the charge conference, defense counsel objected to any jury instruction on the aggravating circumstance that the murder was committed to eliminate a witness. (XIX 1542-44) Defense counsel objected citing authority from this Court holding this aggravator applicable only when the sole or dominant motive is to eliminate a witness. The trial court overruled the objections and allowed the state to argue the presence of this aggravating circumstance and instructed the jury as well:

> Four, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. When the victim is not a police officer, the primary or dominant motive must be to eliminate the witness or that the State's proof must be very strong to find this aggravating factor.

(XIX 1606)

In the findings of fact supporting the death penalty, the trial court subsequently rejected the applicability of this aggravating factor. The court wrote:

"To establish the avoid arrest aggravating factor where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." ***Connor v. State***, 803 So.2d 598, 610 (Fla. 2001) ***See also Alston v. State***, 723 So.2d 1489 (Fla. 1998). "Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. Likewise, the mere fact that the victim knew and could identify [the] defendant, without more, is insufficient to prove this aggravator." ***Looney v. State***, 803 So.2d 656, 676 (Fla. 2001)(citation omitted.) ***See also Consalvo v. State***, 697 So.2d 805 (Fla. 1996).

The State contends that the evidence supports this factor. The state cites to the defendant's statements to the police in which he stated that he did not want to go back to prison and that "when I went out the back door that Jerry wasn't she, she started screaming again and screaming, and screaming and, and I could hear the other neighbors saying something and ah, and ah I was just asking her to be quiet, and then ah, all I wanted her to do is at that point was to be quiet." Later he told detectives, "I just lost it man and ah I was just I don't know I guess because the knife was in my hand already, I guess that was the way I decided to stop her from screaming, I don't know." In ***Cook v. State***, 542 So.2d 964 (Fla. 1989), the Florida Supreme Court held that the fact that the defendant shot the victim to keep her quiet because she was yelling and screaming was insufficient to support the finding that the victim was killed to avoid arrest. The Court stated that "[t]he facts of the case indicate that [the defendant] shot instinctively, not with a calculated plan to eliminate [the victim] as a witness." ***Id. at 970***.

> In this case, Jerry Smith did not know th defendant, Lionel Miller. The sad truth about this senseless and horrible crime was that Jerry Smith was targeted by the defendant because he felt that she would not remember him due to her poor memory. This Court cannot find beyond a reasonable doubt that the sole or dominant motive for the murder of Jerry smith was to eliminate her as a witness.
> The record does not support the finding of this aggravating factor. The Court does not find this aggravating factor present.

(IX 1411-12)

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

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

instructed the jury and allowed the state to argue the applicability. The prosecutor took advantage of the court's ruling in closing argument:

> And then he comes to the circumstances -- and you've heard a lot in the trial that the defendant, I lost it, I didn't intend to kill her, I didn't go over there to hurt her.
> But you also heard his actions at the time. First of all, ladies and gentlemen, this is not a pocketknife. This is a serious weapon. And that's what the defendant had strapped on when he went over there. And when Larry Haydon came to her rescue, and Miss Smith saw the defendant going after Larry Haydon, she ran out to the back. What do we know about that backyard? The backyard is huge. And Mr. Smith could have easily -- Mr. Miller could have easily run on by. If he was just there to rob her, if he was there not to hurt her, if he was there just to get whatever he could get to sell for crack cocaine, as soon as Larry came to her rescue, he could have left. But he didn't. He chose to stab Larry Haydon in the chest. A direct blow. And after he tussled with Larry Haydon, he ran out after Ms. Smith. And what does he say about that? Well, ladies and gentlemen, he said plenty. He told Dave Dempsey that Larry Haydon would be a hero no more. He told Detective Wright and Detective Moreschi, I don't want to go to jail, I don't want to go back to prison. He told Detective Wright and Detective Moreschi, I just wanted her to be quiet and I started stabbing her. I just lost it, man. I just -- I don't know, I guess because the knife was in my hand already, I guess -- I guess that was I decided to stop her from screaming. He also said, and when I went out the back door that Jerry wasn't -- she started screaming again and screaming and screaming and I could hear the other neighbors saying something, and I was just asking her to

be quiet, and then all I wanted her to do at that point was to be quiet. Lionel Michael Miller silenced Jerry Smith and he silenced her from being a witness. You can look at the circumstances, you can look at his actions, you can look at what he said, what he told Dave Dempsey about Mr. Haydon not being a hero anymore, what he told the detectives. You can look at all of those statements. And you also can listen to the defendant's statements. Now, the judge will tell you that the elimination of a witness is actually avoiding a lawful arrest. And if it is not a law enforcement officer, you must see if it is the sole or dominant motive in killing Jerry Smith. What other reason was there? I mean, his own words, how many times can the defendant say he just wanted to silence her? The neighbors were coming. He hand selected her because he believed she would not be able to remember it, she wouldn't be able to identify him. She resisted a little more than he thought she would. But when it got to that backyard, he could have ran off, he could have hopped over the fence, which is what he did, but only after he stabbed her not once, not twice, but three times. And he stabbed her at the moment he's saying he hears the neighbors, because not only has Mr. Haydon come to her rescue, but at this point Jerry has screamed enough, he's concerned about the other neighbors. Ladies and gentlemen, you met some of those neighbors. They were gonna come to Jerry Smith's rescue. The defendant silenced her. He ran off. He ran to get help. Ran to Steve Prange's. Got Dave Dempsey to come. Got Dave Dempsey to take him away. In fact, told Dave Dempsey, get gas somewhere further away. And when Dave Dempsey is confronting him with the newspaper article that Dave knows that the defendant has killed Jerry Smith, tells Dave, you need to keep quiet. Ladies and gentlemen, it wasn't just to stab her and taking property, because

> the moment that he chose and made a decision to kill her was when she wouldn't stop screaming and he can hear the neighbors. Mr. Miller didn't want to go to jail. He didn't want to go back to prison. It's clear that he's absconded from his parole. The defendant eliminated the witness, the person that he thought it would be so easy with. Ladies and gentlemen, the State of Florida has proven to you that aggravating circumstance beyond a reasonable doubt. Mr. Miller had a lot of choices in that backyard. The choice to kill Jerry Smith was to keep himself out of custody.

(XIX 1575-78)

> In general, a trial court's ruling on jury instructions is reviewed under an abuse of discretion standard. ***See, e.g., Bozeman v. State***, 714 So.2d 570 (Fla. 1998). However, in ***Stringer v. Black,*** 503 U.S. 222, 232 (1992), the Supreme Court addressed the role of the reviewing court when the sentencing body is told to weigh an invalid factor in its decision: [A] reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Miller's death sentence based, in part, on erroneous jury instructions is unconstitutional. The erroneous instruction coupled with the prosecutor's argument during the jury's weighing process placed an extra thumb on the scale.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate appellant's convictions and sentences and remand for a new trial as to Points I, III and IV. As for Point II, this Court should vacate appellant's death sentence and remand for the imposition of life imprisonment without the possibility of parole. In the alternative, this Court should declare Florida's capital sentencing scheme to be unconstitutional. As for Points V and VI, this Court should vacate appellant's death sentence, remand for a new penalty phase, or for imposition of a life sentence.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32118
(386) 252-3367
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Assistant Attorney General Lisa Marie Lerner, 1515 N. Flagler Drive, West Palm Beach, FL 33401 and mailed to Mr. Lionel Miller, #025171, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 10th day of March, 2009.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER