

IN THE SUPREME COURT OF FLORIDA

TIFFANY ANN COLE,

Appellant,

v.

CASE NO. SC08-528

STATE OF FLORIDA,

Appellee.

_____ /

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The original record on appeal consists of fifteen volumes. Volumes 1 through 4 containing the records of the lower court will be references with the prefix "R" followed by the volume and page numbers. Volumes 5 through 15 contain the transcript of the trial and other proceedings and will be similarly designated with the prefix "T." Three separately bound and numbered volumes contain the exhibits introduced in the case. The exhibits are identified by the exhibit number assigned at trial. A two volume supplemental record containing additions motions and a portion of a hearing transcript are also separately bound and numbered. References to

the supplemental record will use the prefix "SR." An appendix to this brief contains a copy of the trial court's sentencing order.

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On August 18, 2005, a Duval County grand jury returned and indictment charging Bruce Nixon, Alan Wade, Michael Jackson and Tiffany Cole with two counts of first degree murder for the deaths of Carol Sumner and James Sumner between July 8th and July 15th of 2005. (R1:2-4) Additionally, the indictment charged two counts of armed robbery and two counts of armed kidnapping. (R1:2-4) The defendants were prosecuted separately, and Tiffany Cole proceeded to a jury trial with jury selection commencing on October 15, 2007. (T5:1,18) At trial, the prosecution pursued the two counts of murder and the lesser offenses of unarmed robbery and unarmed kidnapping on the remaining counts of the indictment. (T7:410-412; T12:1406-1411, 1426-1431; R1:147-149) On October 19, 2007, the jury returned guilty verdicts on all counts. (T12:1441-1444; R1:133-138) The verdicts for the two murder counts specifically noted they were based on premeditation and felony murder with robbery and/or kidnapping as the underlying felony. (R1:133-134) The court adjudged Cole guilty after the verdicts were returned. (T12:1444)

On November 29, 2007, the penalty phase of the trial commenced. (T14:1461) After hearing additional evidence, the jury recommended a death sentence for the two murders with a vote of 9 to 3. (R1:189-191; T15:1777) The court conducted a Spencer hearing on January 31, 2008. (R4:573) On March 6, 2008, Circuit Judge Michael Weatherby imposed a death sentence for the two murder counts, life imprisonment for the two kidnappings and 15 years imprisonment for the robberies. (R1: 275-284; R4:633-652) The court filed a sentencing order on March 6, 2008, setting forth reasons for imposing a death sentence. (R2:289-308) However, the court filed a corrected version of that order on April 1, 2008. (R3:465-484) A copy of the corrected sentencing order is attached to this brief as an appendix.

In his sentencing order imposing death, Judge Weatherby found seven aggravating circumstances: (1) previous conviction for a capital felony based on the contemporaneous conviction for the two homicides; (2) homicide committed during the commission of a kidnapping; (3) homicide was especially heinous, atrocious or cruel; (4) homicide was committed in a cold, calculated and premeditated manner; (5) homicide was committed for financial gain; (6) homicide was committed to avoid arrest; (7) the victims were particularly vulnerable due to advanced age or disability. (R3:465-477) In mitigation, the court found four statutory mitigating circumstances: (1) Cole had no significant history of prior

criminal activity (some weight); (2) Cole was an accomplice to the homicide committed by another and her participation was relatively minor (little weight); (3) Cole's age of 23 at the time of the crime (some weight); (4) Cole acted under the substantial domination of another (little weight). (R3: 477-479) The court found non-statutory mitigation as follows: (1) Cole's minimal involvement in the criminal activity (little weight) and Cole's minimal criminal history (some weight); (2) Cole's psychological problems (little weight); (3) Cole's model behavior while incarcerated awaiting trial and her likelihood of good adjustment to prison life (some weight); (4) Cole's family history of love and support and her caring for her younger siblings and her ill father (some weight); (5) Cole's history of alcohol and drug abuse and resulting personality changes (little weight); (6) Cole's positive character traits including a history of caring for others, good employment history, and her expressions of concern and remorse for the victims (some weight). (R3:479-482)

Tiffany Cole filed her notice of appeal to this Court on March 13, 2008. (R 2:316)

The Prosecution's Case

James Reginald Sumner and Carol Sumner moved from South Carolina near Charleston to Jacksonville in February 2005. (T7:490) James also used the name Reggie. Both of them were 61 years-old and in poor health. (T7:490, 493-495) Carol Sumner had liver

cancer, hepatitis C, diabetes and fibromyalgia. (T7:493-494) Reggie was a brittle diabetic and had recently broken a leg. (T7:494-495) Carol's daughter, Rhonda Alford, lived in Charleston, but she spoke to them every day by telephone. (T7:489,496-497) When Alford was unable to reach them by telephone for two days, starting on July 5, 2005, she became concerned. (T7:498) A sister-in-law who lived in Jacksonville, Elida Sumner, spoke to them by telephone on July 8th. (T7:511-513) Elida asked if they needed help moving a television. (T7:514) Carol said a friend from Charleston and her friend had been there and moved the television. (T7:514) Alford called the Jacksonville sheriff's office to check on the Sumners. (T7:498-499) She came to Jacksonville the next day. (T7:499)

Alford went inside the Sumners' house and found it to be in an unusual condition. (T7:499-502) There was food spread out all around the kitchen. (R7:500) The dog had been left unattended. (T7:500) Carol's Sumner's cell phone and day planner that she always carried were there. (T7:500) Reggie Sumner's cane and wheelchair were in the house. (T7:500) All of the Sumners' medications were still there. (T7:500) A number of latex gloves were strewn about on the kitchen floor. (T7:500) Alford also noticed that the tower portion of the computer was missing. (T7:501)

Detective David Meacham contacted the Sumner's bank and inquired about the account usage. (T7:529,533-534) There had been a number of ATM transaction totaling thousands dollars over the previous several days, starting on July 9, 2005. (T7:534, 536) The account had only rarely been accessed by ATM previously. (T7:534) Meacham identified the ATMs used around north Florida and obtained security videos of the transactions. (T7:534-535) The videos showed a male making the transactions and some videos showed him getting out of the passenger side of a silver Mazda RX-8 sports car. (T7:536-539) The detective knew the male was not Reggie Sumner. (T7:539) Meacham thought the new sports car seemed unusual given the amount of money being taken that totaled about \$5000. (T7:539-540) In order to aid the investigation, the detective asked the bank to keep the account open. (T7:541)

On July 12, 2005, Vindell Williams, and off-duty Jacksonville Sheriff's patrol officer, discovered the Sumners' Lincoln Towncar abandoned in Baker County. (T7:518-520) The car was located at the end of a dirt road near a small area of woods in the vicinity of Williams' house. (T7:520-521) He first noticed the car on July 10th, but he went back to the car on July 12th after hearing a report of a stolen car matching the description. (T7:521) Williams secure the car's location and radioed for the officer in charge. (T7:521-523) The windows of the car had been left open. (T8:682) Inside the vehicle, investigators found sand in the floorboard;

pieces of duct tape in the floorboard, the backseat and the trunk; four different type shovels in the trunk; and a cup. (T8:677-682) On the ground near the car, a five dollar bill stuck to a piece of duct tape was found. (T8:679)

After the discovery of the Lincoln, the Jacksonville Sheriff's Office received telephone calls the same day from someone identifying himself as James R. Sumner. (T7:542) Detective Meacham returned a call and recorded the conversation. (T7:542-565)(State Exhibit 23) During the conversation, Meacham spoke to a male who identified himself as James Sumner and a female who identified herself as Carol Sumner. (T7:542-543) Later in the investigation, Meacham identified these individuals as Michael Jackson and Tiffany Cole. (T7:542-543) Jackson, pretending to be James Sumner, said he and his wife were in Delaware for a funeral. (T7:545) A friend called him and said his Lincoln was missing from the garage and the house had been burglarized. (T7:545-547) He also inquired about the bank accounts because the ATM cards did not work. (T7:557) He understood the car had been found. (T7:549) Meacham inquired about names of family pets, the airline used to fly to Delaware, the name of the airport and the town in Delaware where they were staying. (T7:555, 559-564) Meacham determined that the town in Delaware did not exist and the airport mentioned handled only cargo flights. (T7:565) Meacham also spoke to Cole who pretended to be Carol Sumner. (T7:551-555) She spoke of

relatives in Charleston, gave Meacham her social security number and spoke about having cancer. (T7:551-555) Meacham testified that Michael Jackson carried off the conversation rather smoothly. (T7:579-580)

The telephone call to the sheriff's office was tracked to a cell phone in the name of David Jackson at a Charleston address. (T7:566-567; 590-593) Based on the cell towers usage, the cell number was linked to calls made in Jacksonville on July 8, 2005, in the vicinity of Reed Avenue between 9:49 and 10:15 p.m. (T7:596-T8:606) Another call at 12:50 a.m. was made using the cell tower in MacClenny. (T7:600; T8:604-606) The cell phone records showed a call was made to Triangle Rental Car. (T7:567-568) This rental car company had rented a silver Mazda RX-8 to Tiffany Cole, and the car was overdue. (T7:568) In the process of trying to recover the car, the company used a GPS tracking system in the car. (T7:568-569) The system did not track in real-time, but it did show where the car had been driven. (T7:568) One location was in Jacksonville near the Sumners' residence on the evening of July 8th. (T7:568-569) Another location showed the car was in the location of an ATM machine and at a time when someone using the Sumners' ATM card was photographed. (T7:569-570)

Janet Jackson was a friend and neighbor of Reggie and Carol Sumner. (T8:608-610) She saw a silver sports car parked at the Sumners' two or three times after July 4, 2005, including around

11:30 p.m. on July 8th. (T8:612-622) However, she never saw any person connected to the car. (T8:616)

Law enforcement authorities in Charleston located and arrested Michael Jackson, Alan Wade and Tiffany Cole. (T8:632-644) They occupied two motel rooms rented in Tiffany Cole's name. (T8:640) Jackson and Cole occupied one, and Alan Wade was in the second room. (T8:641-643) A search warrant executed for the rooms and Tiffany Cole's car, a green Chevy Lumina parked at the motel, revealed several items with the Sumners' name and property later identified as the Sumners'. (T8:644-659) Detective Meacham traveled to Charleston where he interviewed Tiffany Cole. (T8:754-T9:909)

Meacham obtained a recorded statement from Cole. (T8:759)(State Exhibit 42) During the interview, Cole began to tell Meacham about the crime. (T9:828) He confronted her with the fact that he thought she had talked to him on the telephone earlier. (T9:829) At that point, she admitted she had, but she had been told what to say. (T9:829) Cole stated she was not supposed to know everything that happened because she knew the Sumners. (T9:829) Committing thefts and hurting people was not something she did. (T9:830) Cole knew that Jackson and Wade were going to the Sumners' to get property and credit cards. (T9:830-831) Initially, Tiffany said she stayed at a motel room, and Mike and Alan came back with the property, credit cards and other paperwork from the Sumners. (T9:831-835) On further interrogation, Cole

again said she did not know everything that took place inside the Sumners' house, but she was told that they had been tied with duct tape. (T9:843) Tiffany stayed outside in the car with Jackson, and Wade and Wade's cousin, Bruce, went inside the house. (T9:843-846) Cole did not know Bruce's last name at that time, but she told Meacham he lived in MacClenny. (T9:843-844) This was the first information Meacham received about a fourth person being involved. (T9:944) Jackson also went inside. (T9:846) All four of them drove to the house in the silver car. (T9:847) When Cole was called on the cell phone, she returned to the house to pick them up. (T9:847-848)

On her return, Cole only picked up Jackson because Wade and Nixon were driving the Sumner's Lincoln. (T9:848-849) Cole stated that the four of them drove to a remote wooded area. (T9:854-859) Cole was driving the Mazda with Jackson as a passenger. (T9:854) Wade and Nixon were in the Lincoln, and Cole followed them to the woods. (T9:854) Jackson communicated with Nixon and Wade with a cell phone. (T9:854-855) During one of these conversations, Cole first overheard the information that the Sumners were inside the trunk of the Lincoln. (T9:855-856) After driving down a dirt road, Cole was directed to stop the Mazda and stay there, while Jackson, Wade and Nixon went further into the woods with the Lincoln. (T9:856-857) Cole could not see where they went in the woods since it was dark. (T9:857) Jackson would walk back and forth from the

road where Cole waited and the woods where they took the Lincoln. (T9: 856-857) Cole did not know what happened to the Sumners. (T9:858) The four of them left the area with both cars after about an hour. (T9:858) After a long drive, the Lincoln was abandoned. (T9:863-864, 866) Cole gave Meacham the best information she could about directions to the wooded area. (T9:859-863, 952)

After the crime, no one actually said the Sumners were dead -- - they did not talk about it. (T9:890) Cole thought they were dead, and the bodies would never be found in the remote woods. (T9:890) Jackson used the ATM machines to get money from the Sumners' account. (T9:878-881) They stayed a few days in Jacksonville, and then Jackson, Wade and Cole went to Charleston. (T9:884-886)

Before the crime, Cole stated the four of them had discussions about taking property from the Sumners, but there were no discussions about harming anyone. (T9:887) Cole told Meacham that she did make purchases for a variety of items they needed during the days leading up to the crime. (T9:871- 874, 915-917) None of them had any money, but she had a bank account, and she wrote bad checks to support them. (T9:872-874)

Later, Bruce Nixon was arrested, and he led law enforcement to the exact location of the burial site. (T10:1004-1006) Dr. Anthony Clark performed the autopsy on James Sumner and Carol Sumner.

(T10:1069, 1073-1101) Although Clark did not go to the burial site, he reviewed photographs taken during the exhumation of the bodies. (T10:1074-1075) He noted that the bodies were together in somewhat of a kneeling or sitting position at the time of burial. (T10:1091-1092) The bodies were showing modest decomposition. (T10:1077) Clark's external examination of the bodies revealed no obvious causes of death. (T10:1077-1089; 1086-1088) There were no signs of trauma or fractures. (T10:1080-1083, 1086-1087) The autopsy did confirm that both James and Carol Sumner suffered from osteoporosis. (T10:1087) Additionally, Carol Sumner had hepatitis C and liver problems. (T10:1086) Clark found no evidence of manual or ligature strangulation. (T10:1088-1089) An internal examination of the bodies showed evidence of mechanical obstruction of the airways that could have caused suffocation or smothering. (T10:1089-1090) In both, Clark found dirt in the airways, mouth, throat, in the trachea and esophagus. (T10:1093) These findings lead Clark to the conclusion that the victims were alive when placed in the hole and covered with dirt. (T10:1091-1097) Because the bodies were found in a kneeling position, Clark thought the weight of the dirt on them would have compressed the diaphragm making breathing more difficult. (T10:1090-1091) As the dirt reached the mouth and nose the soil would have obstructed the airways. (T10:1090-1091) Clark rendered an opinion that death for

both was homicide by mechanical asphyxia and smothering. (T10:1099-1100)

Bruce Nixon testified for the State at trial. (T9:962) He admitted that he participated in the murder of the Sumners in July 2005. (T9:963-964) The other participants in the offense were Alan Wade, Michael Jackson and Tiffany Cole. (T9:964) Nixon testified that his good friend, Alan Wade, asked him if he wanted to help rob someone. (T9:965-966) Wade came to Nixon's house driving a Mazda RX-8, and as the two of them drove around in the car, Wade mentioned getting money by a robbery. (T9:966) This occurred perhaps as much two weeks before Nixon became involved. (T9:966; T10:1014) Sometime later, Wade called Nixon and asked him to help him dig a hole. (T9:967) Wade was going to pay Nixon to help dig the hole. (T9:967) Nixon acquired four shovels. (T9:968) Alan Wade, Michael Jackson, and Tiffany Cole picked Nixon up in the Mazda RX-8. (T9:968) Nixon placed the shovels in the trunk of the car, and the four of them drove away looking for a location to dig the hole. (T9:968) The location selected was a wooded area near where Nixon lived, although he said he was not familiar with the exact road. (T10:1025-1026) After finding a location, Wade, Jackson and Nixon dug the hole while Cole held the flashlight. (T9:970-972) Based on the conversations they had in the car, they all knew the hole was for the robbery. (T9:970-971) However, Nixon did not know how the hole was to be used. (T10:1059)

Nixon did not know he was digging a grave. (T10:1017) On the drive back to Wade's house, Wade asked Jackson if Nixon could participate in the robbery, and Jackson agreed. (T9:973)

Nixon spent the next two days with Wade, Jackson and Cole. (T9:973) A day later, after the hole was dug, Nixon learned for the first time the robbery would include getting money from the Sumners' bank accounts and the death of the Sumners. (T9:974) Nixon said, at that time, all four of them were involved in the discussion about the death of the Sumners. (T9:974-976) He had no idea what the other three may or may not have discussed about killing the Sumners before that time. (T10:1059) At one point, Jackson said he would kill the Sumners by injecting them with a lethal dose of some medicine. (T10:1048-1049) There were discussions about the possible proceeds from the robbery in the amount of \$200,000. (T9:979) A day before the actual crime, the group talked about whether to go inside while the Sumners were home or wait for them to return. (T9:977) Cole knew they had physician appointments, since she had talked on the telephone with the Sumners. (T9:977) The decision was made for Wade and Nixon to enter the house. (T9:977) Jackson and Cole were to wait outside until the Sumners were secured with duct tape, including taping over their eyes, and then Jackson would enter and find the banking information. (T9:978) Jackson did not want the Sumners to be able to see him. (T10:1048) Wade was to carry the duct tape inside, and

Nixon was to carry the realistic-looking toy pistol. (T9:978-979)

There was no plan about what to do inside until they reached the house, and Jackson started directing them on what to do. (T10:1050)

Nixon and Wade entered the Sumners' home about 10:00 at night using the ruse of needing to use the telephone. (T9:980) Wade grabbed Reggie Sumner, and Nixon had the toy pistol. (T9:979, 980-981) The Sumners complied with the directions Nixon and Wade gave to them. (T9:981) The Sumners asked not to be hurt, and Nixon and Wade told them they would not hurt them. (T9:981) After binding the Sumners with duct tape and taking them to a bedroom, Nixon's job was to stay with them. (T9:981-983) Jackson entered the house, and he and Wade searched for property, credit cards, and banking information. (T9:983) Jackson, Nixon and Wade placed the Sumners in the trunk of the Lincoln that was parked in the garage. (T9:983-985) Jackson had trouble opening the trunk, and Nixon had to open it. (T9:983-984) Wade and Nixon left in the Lincoln. (T9:985) Jackson and Cole followed in the Mazda. (T9:985) They stopped to put gas in the Lincoln, and they made the trip to the wooded area where the hole had been dug. (T9:986)

When they reached the wooded area, they stopped the Lincoln in front of the gate leading into the woods. (T9:988) The Mazda stopped on the road. (T9:988) Jackson approached the Lincoln and told Nixon to open the trunk. (T9:988) At this point, Jackson, Wade and Nixon were present. (T9:990-991) Cole was with the Mazda

parked at the road. (T9:990-991) Jackson became angry when he saw that some of the duct tape over the Sumners' faces and eyes had come off. (T9:988) Jackson told Nixon to re-tape them to keep them from identifying Jackson. (T10:1058) Jackson also said it was a "mind thing" for him --- he did not want to see their eyes when he killed them. (T9:988-990) Nixon drove the Lincoln into the woods when Wade was unable to do so. (T9:990) Once they were at the hole, Jackson told Nixon to go back to the road with Cole. (T9:990-991) Jackson said, "Go watch Tiffany." (T10:1054) Nixon thought Jackson was afraid Cole would get in the car and leave. (T10:1055-1057)

After about 30 to 45 minutes, Wade drove the Lincoln out of the woods to the road. (T9:991) Jackson got into the Mazda with Cole. (T9:991-992) Jackson had a yellow note pad with the PIN codes obtained from the Sumners for the accounts. (T9:996) They drove to the location in Sanderson where the Lincoln was abandoned, and Jackson, Wade and Nixon wiped down the car. (T9:992-993) The four shovels were left in the trunk. (T9:992) They all left in the Mazda and went to a hotel. (T9:994-995) Before reaching the hotel, Jackson used an ATM and obtained money. (T9:997) Jackson, Wade and Cole went back to the Sumners' house and returned with some coins, a computer and other items. (T9:997-998) Nixon stayed in the hotel because he had hurt his knee. (T9:997-998) Nixon left the others the next day with \$200. (T9:999) Nixon also had the prescription medication, including pain pills, taken from the

Sumners. (T9:999) He went to a party the next day where he was drinking and using and sharing the pills. (T9:999-1000)

Nixon admitted that, at first, he lied to the police. (T10:1004-1005) He was afraid of getting in trouble. (T10:1005) Later, he did take the police to the burial site. (T10:1005) A video of Nixon with the police at the burial site showed Nixon crying. (T10:1005-1006) He admitted that the reason he was crying was because he realized the trouble he was the facing. (T10:1006) Nixon said his plea agreement was for a sentence of 52 years to life in prison with the actual sentence to be determined by Judge Weatherby. (T10:1006-1008)

On cross-examination, defense counsel asked Nixon about his plea agreement, specifically if he knew that the judge could actually impose a sentence of less than 52 years. (T10:1011) Defense counsel asked:

[MR. TILL]: And Judge Weatherby the better you testify he could go down below that 52 years to life, can't he?

(T10:1011) The prosecutor objected, and Judge Weatherby immediately, in front of the jury, admonished defense counsel stating, "That's absolutely not the case, Mr. Till." (T10:1011)

At a later bench conference, defense counsel raised the terms of the plea agreement, and at that point, the prosecutor and the judge acknowledged that the agreement did, indeed, give Judge

Weatherby the latitude to sentence below the 52 years. (T10:1042-1044) Defense counsel was permitted to ask Nixon about the agreement allowing a sentence less than 52 years. (T10:1045) At a later date, Judge Weatherby actually sentenced Nixon to 45 years in prison as the court acknowledged in the sentencing order in this case. (R3:465)

The Defense Case

Alec Griffis attended a party at sometime after July 8, 2005, that Bruce Nixon also attended. (T10:1110-1113) At the party, Nixon bragged that he had killed someone by burying them alive. (T10:1114) Griffis testified that Nixon showed no remorse. (T10:1117) Nixon arrived about 12:30 a.m., and he carried a plastic bag of prescription pills for the party. (T10:1113) During the party, Nixon also bragged that he was going to get \$20,000.00, flashed several \$20 bills, and said that he intended to buy a new car. (T10:1114) A few days later, Griffis read about the discovery of two bodies found buried, and he called law enforcement about Nixon. (T10:1115-1116)

Shirley Duncan is Tiffany Cole's mother. (T10:1121-1122) David Duncan, Sr. was Tiffany's father. (T10:1124) Although Shirley Duncan was divorced from Tiffany's father, she and Tiffany attended to him during the time leading up to the homicides because he had terminal cancer. (T10:1124) Duncan was friends with Reggie and Carol Sumner. (T10:1125) Duncan died shortly after Tiffany Cole's

arrest. (T10:1128) Tiffany was one of the heirs to Duncan's \$416,000 estate. (T10:1128)

Tiffany Cole testified about her meeting Michael Jackson and the events leading to the homicides. (T10:1152) During the weekend of May 14-15, 2005, Cole and two friends went to Myrtle Beach. (T10:1162) She met Michael Jackson in the lobby of the hotel, and he ended up joining Tiffany and her friends during the weekend. (T10:1164) Jackson had no money and no car. (T10:1164) Cole said she and Jackson made it clear to one another that they were merely having a fun relationship for a time. (T10:1164) On June 4, 2005, Jackson asked Cole to go the Jacksonville to see his friend, Alan Wade. (T10:1165) They drove Cole's green, Chevrolet Lumina to Jacksonville, they spent some time with Wade, and they returned to Charleston on the same day. (T10:1165-1166) On June 13, 2005, Jackson again appears and had a large amount of money, as much as \$10,000. (T10:1167-1168) He said the money was from the sale of some property. (T10:1169) Jackson gave Cole \$1000 to rent a car, and she rented the Mazda RX-8. (T10:1167-1168) During this time, Alan Wade came to Charleston on the train. (T10:1168) Jackson and Wade left together a couple of times, and Jackson returned with more money, another \$5000. (T10:1168-1169) The three of them took a week long trip to Myrtle Beach where they partied, shopped and spent a lot of money. (T10:1169-1172) At one

point, Jackson and Wade bought toy pistols that shot little plastic pellets. (T10:1171-1172)

After spending a couple of days in Charleston, Jackson, Wade and Cole drove back to Jacksonville. (T10:1172-1173) Wade returned to his home in Jacksonville. (T10:1172) Cole and Jackson had enough money for two hotel nights. (T10:1172-1173) After the two nights, they wanted to stay one more night before returning to Charleston. (T10:1174) Cole remembered that the Sumners had invited her to visit them in Jacksonville. (T10:1174) Although her father knew the Sumners well, she did not. (T10:1174) She had purchased her Chevrolet Lumina from the Sumners, and they gave Cole their new address and telephone number in Jacksonville. (T10:1157-1162, 1174) Cole and Jackson spent one night in the Sumners' spare bedroom. (T10:1174-1178) Carol Sumner and Cole had a conversation, and Carol happened to mention that they had made a profit of \$99,000 on the sale of their house in Charleston. (T10:1176) Although Jackson was not in the room, the door was open, and Cole thought Jackson overheard the conversation. (T10:1177) Cole and Jackson drove back to Charleston the next morning. (T10:1178)

The day of their return to Charleston, Thursday, June 30, 2005, Jackson left Cole, and he took the Mazda back to Jacksonville. (T10:1179-1182) At one point while he was gone, Jackson called Cole to state the Mazda was missing. (T10:1180) Alan Wade had driven the car, and Jackson was unable to reach him.

(T10:1180) On Sunday, July 3, 2005, Jackson returned to Charleston, driving the car with Alan Wade. (T10:1182)

On Monday, July 4, 2005, Jackson, Wade and Cole made another trip to Jacksonville. (T10:1184-1185) Jackson was expecting more money, and he talked about starting a business in Jacksonville. (T10:1184-1185) He told Cole the trip would be for one night to allow him a day to look at a building that was for sale. (T10:1184-1185) After the trip began, Cole learned that Jackson only had \$20 to make the trip. (T10:1184-1185) Cole started writing bad checks on her account to fund the trip expenses. (T10:1185) On Tuesday, July 5th, the three of them looked at a couple of buildings. (T10:1185) The owner of a tint shop that was for sale asked Jackson to check back with him on Friday. (T10:1186-1187) Jackson extended the stay through Friday. (T10:1187) Cole testified that she did not want to stay in Jacksonville, and she had not packed clothes and other items for more than one night. (T10:1187-1188) The three of them stayed at Alan Wade's house where he lived with his mother. (T10:1188-1189) On July 6th, Wade and Jackson left Cole at the house for a period of time. (T10:1189-1190) When they returned, Jackson said that he and Wade had driven across town to check on the Summers. (T10:1189-1190) Cole thought this was unusual. (T10:1189-1190) As the three of them drove around the evening of July 6th, Cole overheard Jackson and Wade talking about getting some property. (T10:1190) She also overheard Wade talking

to someone on the cell phone about digging a hole. (T10:1191) Cole asked Jackson for an explanation about the statements, and he told her they planned to get money and property from the Sumners' house. (T10:1192-1193) Cole said this was the first time she heard anything about a theft. (T10:1192-1193) She told Jackson that she did not want anything to do with taking property from the Sumners. (T10:1193)

Later in the evening of July 6th, they drive to the MacClenny area where they pick up Bruce Nixon. (T10:1193-1194) Cole did not know Nixon and she had never seen him before this time. (T10:1194)

Nixon came to the car carrying four shovels. (T10:1194) There was some discussion about obtaining money and property. (T10:1195) Nixon gave Cole driving directions, and he led them to a remote wooded area near where he used to live. (T10:1195-1196) After they stopped the car, the four of them walked back in the woods where, at Jackson's direction, Wade and Nixon dug a hole. (T10:1196-1197) Cole held a flashlight. (T10:1196-1197) Jackson never said how the hole would be used. (T10:1197) Cole assumed the hole would be used to secret some stolen property. (T10:1197) She never had any idea the hole would be a grave. (T10:1197) As they drove away from the site, Wade asked Jackson if Nixon could "get in on the deal." (T10:1198) Jackson agreed. (T10:1199) Cole did not take part in that discussion. (T10:1198-1199)

Carol Sumner called Cole on July 7th. (T11:1205-1206) She asked Cole about a "smartcard" related to the cable television receiver in the spare bedroom that had been misplaced. (T11:1205-1206) Cole did not know anything about the device and told Carol Sumner she had not seen it. (T11:1206) Cole said she did not call the Sumners to initiate a conversation. (T11:1205)

On July 7th, Jackson, Wade, Nixon and Cole went to stores and bought items. (T10:1199) Tiffany Cole was the only one of the four with a driver's license, any identification, a credit card or a checkbook. (T10:1199-1200) Everyday, they bought something, and Cole would write a bad check for \$20 over the purchase for cash. (T10:1199-1200) Cole always used her correct name and address, and she never tried to hide her identity. (T11:1204) On July 8th, at 8:36 p.m., they bought duct tape and a large roll of plastic wrap used to wrap large items from a Home Depot Store. (T11:1208-1210) Jackson picked up these items, but Cole, as she did for all purchases made, paid the bill. (T11:1210) Cole did not know why Jackson bought these items, but she thought the plastic wrap might be to wrap and waterproof items they intended to take from the house. (T11:1210)

Before reaching the Sumners' house, there had been no talk of a plan. (T11:1211) Cole stated that Jackson, Wade and Nixon argued among themselves over who would actually enter the residence as they drove to the house between 9:00 and 9:30 the night of July 8th.

(T11:1211) Nixon and Wade were the ones who entered the Sumners' house. (T11:1212-1213) Cole drove the Mazda, dropped Nixon and Wade at the house, and Cole and Jackson waited down the road in the car. (T11:1213) After Nixon and Wade entered and tied up the Sumners, they call Jackson using the walkie-talkie feature on the cell phones. (T11:1213-1214) Cole then drove Jackson back, and he entered the house. (T11:1214) Cole waited in the car. (T11:1214) She drove away when she saw someone walking with a flashlight. (T11:1214) Jackson called her on the cell phone and cursed her for driving away and directed her to come back. (T11:1214-1215) She drove back to the house, and Jackson came to the car carrying a white trash bag that he placed in the car. (T11:1215) Cole had no idea where Nixon and Wade were at that time. (T11:1216) At some point, Cole then saw the Sumners' Lincoln Towncar backing down the driveway. (T11:1219) Wade was driving, and he almost backed the car into the ditch. (T11:1220) She thought Nixon and Wade decided to steal the car. (T11:1219-1220)

Jackson directed Cole where to drive. (T11:1221) Wade and Nixon were in the Lincoln, and they had to stop to put gas in the Lincoln. (T11:1221) As the two cars headed on I-10 toward MacClenny, Jackson started communicating with Nixon with the cell phones about the Sumners being in the trunk of the Lincoln. (T11:1222-1223) Jackson told Cole that the Sumners' were in the trunk. (T11:1223) This was when Cole first learned where the

Summers located. (T11:1222-1223) She was scared, but she continued to drive to the remote wooded area as Jackson directed. (T11:1223-1227) There were few cars on the road at that time of night, and the remote wooded area was dark. (T11:12126-1227)

When they reached the area of the woods where the hole had been dug, Jackson told Cole to park the car on the roadway and to stay there. (T11:1227-1229) Jackson took the ignition key to the Mazda with him. (T11:1227-1228) He frequently took control of the ignition key leaving Cole with the car with no key. (T11:1228) She assumed Jackson took the key to keep her from leaving in the car. (T11:1228) Wade pulled the Lincoln up to the gate area leading into the woods. (T11:1229) Cole could tell that Wade, Nixon and Jackson opened the trunk of the Lincoln, but she could not see what was in the trunk from her location at the road. (T11:1229-1230) Cole never saw the Summers that night. (T11:1230) Wade attempted to drive the Lincoln into the woods, but he could not do it. (T11:1230) Nixon took over driving the car and succeeded in driving it back in the woods. (T11:1230-1231) Cole could hear them driving the car in the woods, but it was too dark for her to see anything. (T11:1230) She lost sight of the Lincoln. (T11:1231) Cole remained at the road with the Mazda. (T11:1231)

Bruce Nixon was the first of the three men to walk out of the woods. (T11:1232) He told Cole he was coming to check on her. (T11:1232-1233) Cole said there was nowhere for her to go since

the location was remote and she had no car keys. (T11:1233) After staying with Cole for a time, Nixon walked back into the woods. (T11:1233) Next, Alan Wade walked out of the woods. (T11:1234) He told Cole that Jackson got the PIN codes for the Sumners' accounts. (T11:1234) Jackson had told Cole when they were driving on the interstate that the purpose for taking the Sumners to the woods was to get the PIN codes. (T11:1232-1233) Wade said that after Jackson got the codes, he pushed the Sumners in the hole. (T11:1234-1235) Wade was nonchalant when telling Cole this information, but Cole did not think Wade was aware that Jackson was going to push them in the hole. (T11:1234-1235) Michael Jackson obtained money from an ATM from the Sumners' account. (T11: 1235) He gave some money to Nixon, who left the group. (T11:1236, 1239-1240) Cole did not receive any money directly since Jackson maintained control over the money. (T11: 1235-1236) Jackson, Wade and Cole went back to Charleston. (T11: 1137) Cole admitted she talked to Detective Meacham on the telephone pretending to be Carol Sumner. (T11:1237) There was no plan for her to do this. (T11:1237) Jackson was already on the phone pretending to be Reggie Sumner, and he went to Cole and said the detective wanted to talk to Carol. (T11:37) At first, Cole refused, but Jackson told her she had no choice. (T11:1237-1238) Jackson handed her a piece of paper with information written out, and he had Cole participate in the call. (T11:1238) After the arrest, Cole said she tried to

cooperate with Detective Meacham and gave him the best information she could about what happened and how to find the burial site. (T11:1239) She also gave the detective the new information that Bruce Nixon was also involved. (T11:1239)

Tiffany Cole testified she felt bad about what happened to the Summers, and she wished she could have stopped their murder. (T11:1246-1247) She stated that she did not knowingly participate in a plan to kidnap, rob and murder the Summers. (R11:1241-1242)

The Penalty Phase

At the penalty phase of the trial, the State presented two victim impact witnesses -- Reggie Sumner's sister, Jean Clarke and his sister-in-law, Carolyn Sumner. (T14:1478, 1484) Carolyn Sumner also read a statement from Carol Sumner's daughter, Rhonda Alford. (T14:1484-1488) The defense presented several witnesses: Tiffany Cole's mother; a prison classification officer; two jail correctional officers; a friend met in jail; Cole's aunt; two cousins; and a psychiatrist, Dr. Earnest Miller. (T14:1489, 1596, 1579, 1603, 1612, 1622, 1626, 1631, 1634) The State presented some brief testimony of Detective David Meacham in rebuttal. (T15:1702)

Tiffany Cole's mother, Shirley Duncan, testified. (T14:1489) She testified that she was unwed and 16 years-old when Tiffany was born on December 3, 1981, in Charleston, South Carolina. (T14:1491, 1541) David Duncan was Tiffany's father, and at the time of Tiffany's birth, he was in prison. (T14:1492) Shirley and Tiffany

lived with Shirley's mother for a time. (T14:1492) While Tiffany was young, they moved a number of times. (T14:1492-1493) They required government assistance for support for a time. (T14:1493) David Duncan and Shirley did marry. (T14: 1494-1496) They had another child, who was born when Tiffany was five. (T14:1541) Tiffany took on a caregiver role for her brother at a young age. (T14:1541) Although David Duncan provided financial support, he showed little interest in Tiffany or her younger brother, D.J. (T14:1496) David and Shirley divorced after five years of marriage. (T14:1528) Tiffany moved back and forth between them. (T14:1528) Shirley entered a relationship with another man, Rick, who became a stepfather figure to Tiffany by the time she was twelve. (T14:1498, 1541) This relationship brought another younger stepbrother to Tiffany. (T14:1498) Tiffany dropped out of school in the tenth grade, even though her grades were good, and ran away from home. (T14:1543, 1550, 1555-1556) She later finished her GED. (T14:1517) She moved in with her boyfriend, Steven. (T14:15432-1543) Shirley said she had to accept the situation, and she and Tiffany maintained a relationship. (T14:1543) Tiffany and Steven broke up after about two years. (T14:1543) Tiffany dated a few boys, but her next boyfriend, Wayne, became abusive. (T14:1543) Wayne was the son of the Sheriff, but he was extremely abusive. (T14:1536) Her last boyfriend, Brian, was kind, but he had a seizure disorder leaving him on disability. (T14:1528-1529, 1543)

Tiffany took care of him. (T14:1543) They broke up in April or May of 2005, and Tiffany was heartbroken. (T14:1543) During this time, Tiffany was also helping to care for her father who had terminal cancer and had become weak and dependant. (T14:1429-1530, 1543) Shirley never met Michael Jackson --- he was a complete stranger to her. (T14:1529, 1544)

After leaving school, Tiffany worked at a number of jobs. (T14:1533-1537) Most of them were as a waitress at various restaurants or as a cashier. (T14:1533-1537) She did work at the women's clinic for about six months where her mother was administrative assistant. (T14:1534) She expressed interest in cosmetology training, but she had not been able to start a program. (T14:1537)

During her testimony about Tiffany, Shirley Duncan presented a number of photographs depicting Tiffany in various stages of her life with family and friends. (T14:1490-1539) Additionally, Duncan read letters from others written about Tiffany. (T14:1544-1547) Dr. Wesley Adams, a physician at the women's clinic described Tiffany's favorable work experience at the clinic. (T14:1454) Tiffany's great aunt wrote of the positive experiences she had with Tiffany throughout her life. (T14:1546) A friend of Shirley Duncan's wrote of the friendship she developed with Tiffany over many years. (T14:1547)

Dr. Earnest Miller, a psychiatrist, testified about his evaluation of Tiffany Cole. (T14:1641-1641) In reaching his opinions, Miller used Cole's history, interviews, reports about the offense, and some testing. (T14:1646-1647) First, Miller addressed the issues of competency to stand trial and insanity at the time of the offense, and he found Cole both competent and not insane. (T14:1647-1648) Although Miller did not find evidence of a psychotic disorder, he did find that Cole suffered from significant mental problems. (T14:1648-1653) First, Cole abused drugs and alcohol and suffered from dependency on these substances. (T14:1651-1652) Second, she suffered from chronic depression. (T14:1652) Third, Cole had a personality disorder, not otherwise specified, meaning the disorder did not fit into one of the six labeled diagnostic categories. (T14:1653-1654) This personality diagnosis was made based on three problem areas Cole exhibited --- (1) abnormal dependence on others and need to rely on other people for support; (2) masochism by seeking out those things that caused her trouble in life; and (3) features Miller called "cluster B" features that lead to failures of conscience to work to stop behaviors. (T14:1654; T15:1683-1685) Miller concluded these three factors in the aggregate supported the personality disorder diagnosis. (T14:1654) The fourth diagnosis related to the lifelong stressors in Cole's life history that shaped her. (T14:1655) Finally, Miller concluded that Cole's adaptive functioning was

relatively good, given the several mental problems she suffered.
(T14:1655)

In discussing Cole's mental health problems, Miller related some of her history that shaped some of these problems and the impact they had on her life. (T15:1660-1695) Miller concluded that Tiffany's abnormal dependency problems and masochism came from experiences she had early in life. (T15:1660) Her parents divorced during her early, critical formative years. (T15:1660) She moved back and forth between them, and she never felt at home or supported in either place. (T15:1660) At her mother's residence, Tiffany became a surrogate mother to her brothers and took care of them. (T15:1660-1661) Tiffany felt like she never really had a childhood. (T15:1661) She also witnessed the abuse of her younger brother at the hand of their stepfather. (T15:1661) Additionally, she saw her stepfather break a puppy's neck by throwing it against a wall. (T15:1661) This incident had a profound impact on her -- Dr. Miller believed she identified with the puppy in terms of the abuse. (T15:1661)

When Tiffany was 16 or 17 years old, her natural father sexually molested her. (T15:1661) This was about the same age that Tiffany ran away from home. (T14: 1543, 1550, 1555-1556; T15:1684) The abuse continued for almost two years. (T15:1661) This horrible boundary violation and betrayal of trust between a father and a daughter left Tiffany feeling confused, guilty and

dirty. (T15:1663-1664) Her self-esteem destroyed. (T15:1665) Any sense of security and trust was breeched, and she was left with no support and with suppressed anger. (T15:1664-1665) Tiffany did not tell anyone else about the sexual molestation, except her mother. (T15:1661) However, her mother's response was that she did not believe Tiffany and thought Tiffany fabricated the incident because she was angry at her father. (T15:1661) This was yet another message of no parental support. (T15:1661) Tiffany avoided deep emotional involvement with anyone. (T15: 1665) Because of her low self-esteem and guilt, when Tiffany entered relationships with men, she would select abusive ones. (T15:1661-1665) One tried to hit her with an axe handle, breaking her car windshield. (T15:1661-1662) She told her father, but he was more concerned about the broken windshield. (T15:1662)

Miller also explained the testimony about a happy childhood portrayed by some of Tiffany's relatives. (T15:1662-1663) He noted that there are always two points of view. (T15:1662-1663) Parents who have raised children in abusive environments do not usually come forth and talk about it, most likely because they have hidden the problems from themselves. (T15:1663; 1685)

Tiffany began using street drugs and alcohol as a way to medicate her psychological pain. (T15:1665-1666) She used Xanax, Valium, street drugs, cocaine and alcohol. (T15:1666) This drug and alcohol dependency led her to fulfill her abnormal emotional

dependency on others with a relationship with her drug supplier, a man named Brian. (T15:1666) Given her low self-esteem, he was somebody that provided some acceptance of her and provided some leadership in that he could get drugs. (T15:1666) Although she managed to move away from drugs to some extent, she never really left them, since she never received treatment for the underlying dependency. (T15:1666-1667)

Dr. Miller addressed Tiffany's relationship with Michael Jackson and her involvement in the offense. (T15:1667-1670) Miller explained this relationship with Jackson was another chapter in Tiffany's pathological need to be in abusive relationships. (T15:1667) Miller stated that individuals with

...this unusual and pathological personality bent, will get themselves involved in all kinds of relationships, many and most of which are self-defeating and they will get involved in unreasonable behaviors. They will trail along like a little row boat behind a motorboat pulled by a stern rope line and it will traffic them and travel them into all sorts of terrible predicaments.

(T15:1667-1668) Based on his knowledge of events and Tiffany Cole's personality pathology, Miller conclude that Tiffany was a follower and did not act to initiate the crime. (T15:1668) Miller did acknowledge that Cole did follow and take actions that required her to push the conscience aside. (T15:1668) However, he did not diagnosis her with what he termed a major conscience problem as might be found with someone with anti-social personality.

(T15:1669) Tiffany was following someone whom she felt was meeting her abnormal dependency needs. (T15:1669) In doing so, she was led into this destructive relationship with Jackson. (T15:1669) Jackson was the director of events. (T15:1689-1690) Miller did not find Tiffany trying to rationalize her conduct; she could not articulate why she would get so involved with an abusive person who used her as a means to his own ends. (T15:1669-1670) Miller did not think Tiffany had the insight to know her role in terms of her personality disorder. (T15:1670)

Tiffany's aunt, two cousins and a family friend testified about their close relationship with Tiffany. (T14:1622, 1624, 1631, 1634) Terrie Duncan, Tiffany's aunt, said her children are about Tiffany's age, and the two families were close. (T14:1622-1626) Amber Jones, Terri Duncan's daughter, testified that as Tiffany's cousin, she was more like a sister and best friend. (T14:1624-1620) She looked up to Tiffany and sought her advice. (T14:1628-1629) Rosanna Bustamonte, another cousin and daughter of Shirley Duncan's sister Tammy, testified the families were close. (T14:1631-1633) She remembered Tiffany as a caring person who helped her mother raise her younger brothers. (T14:1633) Deana McConnell is a long-time friend of Shirley Duncan, Tiffany's mother. (T14:1634-1635) She has known Tiffany her entire life, and McConnell knew Tiffany to be a caring and kind person. (T14:1637) She thought Tiffany

could lead a productive life in prison if given a life sentence.
(T14:1639)

Two correctional officers at the Duval County Jail testified about Tiffany Cole's time incarcerated awaiting trial. (T14:1596, 1603) Delores Jones has known Cole for the two years Cole spent at the jail. (T14:1596, 1598) A jail inmate had to be a sentenced prisoner to be technically classified as a trustee. (T14:15988-1599) Although Tiffany did not meet the classification, she worked in the jail as if she was a trustee. (T14:1599-1600) Cole volunteered to do the work. (T14:1600) Officer Jones testified that Cole never caused problems. (T14:1601) Jones was not aware of a disciplinary report on Tiffany. (T14:1602-1603) Officer B.N. Quarrels had also known Tiffany for the two years she spent incarcerated awaiting trial. (T14:1603-1605) Quarrels was aware of the one disciplinary report Tiffany received shortly after she arrived at the jail. (T14:1606-1607) Another inmate provoked Tiffany, called her a whore, and Tiffany pushed the inmate. (T14:1606-1607) No one was struck or bruised. (T14:1607) Quarrels testified that Tiffany's work at the jail kept her busy feeding the other inmates, cleaning and other chores. (T14:1604-1605)

A fellow jail inmate, Carla Luchin, testified about her friendship with Tiffany. (T14:1612) Luchin was incarcerated on February 10, 2005, on a charge of writing a fraudulent prescription. (T14:1614) She was a registered nurse at the time,

and she had become addicted to Xanax after the death of her daughter. (T14:1614) Luchin spent two months in jail before she was transferred to a drug treatment program, that proved successful for her. (T14:1614, 1617) During her time in jail, she was in the same dorm with Tiffany. (T14:1614-1615) Also, after she finished her six months of treatment, Luchin returned to the jail as a visitor to see Tiffany because of the friendship they had developed. (T14:1617-1618) While incarcerated, Luchin learned that Tiffany was a caring and compassionate person. (T14:1616) Even though Luchin was about ten years older, Tiffany looked out for her and helped her adjust to being in jail. (T14:1616) Luchin considered Tiffany a close life-long friend. (T14:1617-1618)

Diana Lee, a prison classification officer at Lowell Correctional Institution, testified about life in the prison. (T14:1580-1595) She explained the various prison programs and jobs the women inmates perform. (T14:1582-1587) All of the women are assigned some type of work, even the elderly inmates have work assignments they are capable of performing. (T14:1587) Lee noted that the inmates serving life sentences are the better inmates because they know the prison is their home until they die. (T14:1581-1584)

Detective David Meacham testified for the State in rebuttal. (T15:1702) During his interview of Tiffany after her arrest, she admitted to him that in the past she had possessed and sold

cocaine. (T15:1702-1704) Meacham thought there had been a possession of cocaine charge in Charleston that was not prosecuted, but he did not know the status any case. (T15:1706) The only prior conviction on Cole's record was for a worthless check. (T15:1706)

SUMMARY OF ARGUMENT

1. The trial court improperly and inaccurately admonished defense counsel in the presence of the jury. The comment prejudiced the defense and denied Cole her rights to due process and a fair trial. Defense counsel correctly questioned the testifying co-defendant if the terms of his plea agreement allowed the court to impose less than 52 years. The trial judge immediately interjected, admonishing defense counsel: "That's absolutely not the case, Mr. Till." Later, when counsel was able to provide the court with the terms of the plea, the court allowed defense counsel to ask about the possibility of a sentence below the 52 years. The Court did nothing to explain or retract its earlier rebuke of counsel on this point. This left the jury with the impression that counsel was misleading the jury with the original questioning and that the judge would, as he implied earlier, adhere to the minimum sentence of 52 years. The trial judge later sentenced the co-defendant to 45 years.

2. The trial court erroneously admitted irrelevant photographs of Tiffany Cole, Michael Jackson and Alan Wade made while the three of them spent a few days partying at Myrtle Beach some time before Cole and Jackson spent the night in Jacksonville with the Sumners. At the time the photographs were admitted, the State merely offered them as photographs found in Cole's possession

when arrested, and they related to the statement Cole made to Detective Meacham in which she explained her association with Jackson prior to the time of the crimes. Defense counsel objected to the photographs as irrelevant, but the trial court overruled the objection without further comment. In closing argument, the prosecutor improperly used the photographs to make the speculative argument that Cole had a motive to participate in the crimes in order to obtain money to fund the party lifestyle as depicted in the photographs. This misuse of the irrelevant photographs improperly and without foundation attacked Cole's character with suggestions of negative conduct. The improper use of the photographs to attack Cole's character prejudiced her case, and she has been denied her rights to due process and a fair trial.

3. This Court has long adhered to the principle that a death sentence cannot be imposed on a defendant when a codefendant of equal or greater culpability has received a sentence less than death. See, Slater v. State, 316 So.2d 539 (Fla. 1975); Scott v. Dugger, 604 So.2d 465 (Fla. 1992); Hazen v. State, 700 So.2d 1207 (Fla. 1997). Tiffany Cole has been sentenced to death in violation of this principle since the trial court gave Bruce Nixon a sentence of 45 years in prison. Her death sentence violates the constitutional protections of equal protection, due process and the right to be free from cruel or unusual punishment.

4. The trial court improperly instructed the jury to consider and found as aggravating circumstances two circumstances not proven applicable in this case. Although the homicides qualified as heinous, atrocious or cruel, the aggravator could not be vicariously applied to Cole under the principles first announced in Omelus v. State, 584 So.2d 563 (Fla. 1991). Additionally, the avoiding arrest aggravator was not proven as the sole or dominant reason for the homicides as required when the victim is not a police officer. See, e.g., Zack v. State, 753 So.2d 9 (Fla. 2000); Geralds v. State, 601 So.2d 1157 (Fla. 1992); Riley v. State, 366 So.2d 19 (Fla. 1978).

5. Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Cole acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Cole now asks this Court to reconsider its position in Bottoson and King.

ARGUMENT

Guilt Phase Issues

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT IMPROPERLY AND INCORRECTLY ADMONISHED DEFENSE COUNSEL FOR HIS CROSS-EXAMINATION QUESTION TO STATE WITNESS BRUCE NIXON CONCERNING THE PARAMETERS OF NIXON'S POSSIBLE SENTENCE UNDER HIS PLEA AGREEMENT.

Defense counsel correctly questioned Bruce Nixon about the terms of his plea agreement in exchange for his testimony. (T10:1011) The plea was for a sentence in accordance with the guidelines that called for sentence of 52 years to life in prison, and it also gave the judge the latitude to impose a departure sentence of less than the 52 years. (T10:1042-1044) On direct examination, Nixon said the bottom of his sentencing possibility was 52 years. (T10:1006-1007) When counsel asked Nixon about the fact that his plea agreement allowed the judge to consider a sentence of less than 52 years, the State objected. (T10:1011) The trial judge immediately interjected the following remark, admonishing defense counsel: "That's absolutely not the case, Mr. Till." (T10:1011) Later, when counsel was able to provide the court with the terms of the plea, the court allowed defense counsel to ask Nixon about the possibility of a sentence below the 52 years. (T10:1042-1044) The Court did nothing to explain or retract its earlier rebuke of counsel on this point. (T10:1042-1044) The improper admonishment of counsel remained uncorrected.

This left the jury with the impression that counsel was misleading the jury with the original questioning of Nixon, and that the judge would, as he implied earlier, adhere to the minimum sentence of 52 years. The trial judge later sentenced Nixon to 45 years. (R3:465) The court's comments were inaccurate and prejudicial, denying Tiffany Cole her rights to due process and a fair trial. See, Amend. V, VI, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const.; Sec. 90.106 Fla. Stat.; see, e.g., Jacques v. State, 883 So.2d 902 (Fla. 4th DCA 2004); Esposito v. State, 243 So.2d 451 (Fla. 2d DCA 1970).

A principle of Florida law has long been that a trial judge is not to comment about the weight of the evidence, the credibility of the witnesses or the guilt of the defendant. See, e.g., Hamilton v. State, 109 So.2d 422, 424 (Fla. 3d DCA 1959). This principle was codified in Section 90.106 Florida Statutes:

A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

The rationale for this rule is to prevent the jury from being swayed based on remarks empowered with the prestige and stature of the presiding judge. *Ibid.* Comments that diminish the credibility of counsel are included in this prohibition, since such remarks would also damage the credibility of the defense case. See, Jacques v. State, 883 So.2d at 904-905; Simmons v. State, 803 So.2d 787,

788-789 (Fla. 1st DCA 2001); Brown v. State, 678 So.2d 910 (Fla. 4th DCA 1996); Kelvin v. State, 610 So.2d 1359, 1364 (Fla. 1st DCA 1992); Esposito v. State, 243 So.2d at 452.

In Esposito v. State, 243 So.2d 451 (Fla. 2d DCA 1971), the court reversed Esposito's convictions because the trial judge commented on defense counsel's cross-examination about the concurrent sentence the testifying witness received in exchange for his testimony. The point of defense counsel questioning was to show that the four year sentence the witness received amounted to no sentence at all because it was concurrent to another sentence. During questioning, counsel asked the witness the clarifying question, "And, as a matter of fact, you got nothing." After the witness testified, the judge told the jury, "... the statement that he got nothing (was not) correct and shouldn't be considered by the jury." The appellate court held the judge's comment improper and prejudicial.

A recent case from the Fourth District Court of Appeal, Jacques v. State, 883 So.2d 902 (Fla. 4th DCA 204), is instructive.

The trial judge in this case commented on defense counsel's closing argument. As counsel, in closing argument, tried to clear up a mischaracterization of a witness' testimony the prosecutor made in his closing, the judge interjected and said, "That's not what she said and that's not what the record shows." The appellate court reversed holding the comment improper and fundamental error.

In Simmons v. State, 803 So.2d 787 (Fla. 1st DCA 2002), the trial judge rebuked counsel for his objection to the prosecutor's closing argument. Defense counsel objected because the prosecutor was mischaracterizing the evidence. In response to counsel's objection, the judge said, "[I]t is accurate and dead on point. Sit down, Mr. Boothe." The appellate court reversed for a new trial, and wrote:

Not only did the judge's comment reflect approval of the State's argument, it also demonstrated disapproval of the defense argument. This type of error is particularly harmful, as the judge's position of neutrality is essential to the proper functioning of the justice system. See, Sparks v. State, 740 So.2d at 36. When this neutrality is breached, the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict. See, State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). The State has not shown in this case that the judge's comment did not contribute to the guilty verdict.

Simmons, 803 So.2d at 789.

The trial judge's comments in this case fall within the prohibition and prejudiced the defense. First, the remarks were emphatic, immediate and pointedly directed at counsel --- "That's absolutely not the case, Mr. Till." (T10:1011) Second, the judge was factually wrong. The judge, rather than defense counsel, did not know the limits of Nixon's plea agreement. (T10:1042-1044) Third, the impact of the judge's remarks about the plea agreement was further enhanced because the jury knew that the presiding trial judge was also the judge who would be sentencing Nixon. During

his testimony, Nixon testified to that fact. (T10:1007) Fourth, although defense counsel was later allowed to ask his plea agreement question of Nixon, this did not act as a cure for judge's improper remarks. Nixon acknowledged, at the later questioning, the possibility of a sentence less than 52 years, but he said he thought a lesser sentence unlikely. (T10:1042-1045) This testimony, when coupled with the judge's earlier admonishment of counsel, carried greater credibility because the judge as much as said 52 years was the lower limit as far as he was concerned when he erroneously rebuked defense counsel. Fifth, the trial court never retracted its improper rebuke of counsel and made no statement of the inaccuracy of the rebuke. (T10:1042-1045) As far as the jury knew, the court's rebuke of counsel remained, and the impact on counsel's credibility with the jury also remained. Sixth, the impeachment of Bruce Nixon was critically important since he was a key witness for the State. Finally, the judge, in fact, gave Nixon a lower sentence of 45 years. (R3:465)

The trial court's improper and inaccurate admonishment of defense counsel prejudiced Tiffany Cole's defense in this case. She was deprived of her rights to due process and a fair trial. A new trial is now her remedy, and she asks this Court to reverse her judgments and sentences.

ISSUE II
**THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS OF COLE,
JACKSON AND WADE WHILE PARTYING AT MYRTLE BEACH.**

The trial court erroneously admitted irrelevant photographs of Tiffany Cole, Michael Jackson and Alan Wade made while the three of them spent a few days partying at Myrtle Beach some time before Cole and Jackson spent the night in Jacksonville with the Sumners. (T9:921-923) (State Exhibits 160-171) At the time the photographs were admitted, the State merely offered them as photographs found in Cole's possession when arrested and that they related to the statement Cole made to Detective Meacham in which she explained her association with Jackson prior to the time of the crimes. (T9:921-923) Defense counsel objected to the photographs as irrelevant, but the trial court overruled the objection without further comment. (T9:923) In closing argument, the prosecutor improperly used the photographs to make the speculative argument that Cole had a motive to participate in the crimes in order to obtain money to fund the party lifestyle as depicted in the photographs. (T11:1328-1329) This misuse of the irrelevant photographs improperly and without foundation attacked Cole's character with suggestions of negative conduct. The improper use of the photographs to attack Cole's character prejudiced her case, and she has been denied her rights to due process and a fair trial. Amends. V, VI, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const.; see, e.g., Taylor v.

State, 855 So.2d 1, 21-22 (Fla. 2003); State v. McClain, 525 So.2d 420 (Fla. 1988); Dawson v. State, 585 So.2d 443 (Fla. 4th DCA 1991).

During her statement to Detective Meacham, Tiffany Cole explained her association with Michael Jackson. (T8:764-769, 776, 780; T9:814-816) She included information about a trip to Myrtle Beach with Jackson, Wade, and a female friend of Cole's who came down from her home in New York for the trip. (T9: 814-816) At the time of Cole's arrest, photographs taken on this beach trip were found in her possessions. (T9:814-817,921-922) As the prosecutor introduced other photographs about items seized at Cole's arrest, he also offered these beach trip photographs merely stating that these were mentioned in Detective Meacham's testimony. (T9:921-923) Defense counsel objected on relevancy grounds, but the trial court admitted the photographs.(T9:923) (State Exhibits 160-171) At that time, the court made no comment about the photographs or the purpose of the admitting them in evidence. (T9:923) Later, after the trial, the trial judge noted in his sentencing order that he had viewed these photographs and stated, "The Court can find nothing in the photograph to indicate anything other than that the group was involved in some heavy "partying" in Myrtle Beach." (R3:478)

In his closing argument, the prosecutor misused the photographs and made a speculative argument about Cole's motive to participate in the crimes:

You always see in dramas and T.V. shows --- you always wonder what the motive for the crime is. Well, you can't have a bigger motive than we have in this case. And the picture says a thousand words, doesn't it? Tiffany Cole liked the life. She was broke, didn't have a dime and she didn't know about her daddy's inheritance.

She didn't have a penny and she hooked herself up with Mr. Mafia man, Mr. Fun loving guy, Mr. Champagne, limousine and they're throwing around money having a good old time. She liked it. She may not want to admit that to you, but she liked being the girlfriend of some big shot who was able to walk into the door with \$10,000, and that's why she agreed to help bury her dad's friends.

There is a motive in this case and it's clear in that picture.

(T11:1328-1329) This argument was without evidentiary foundation and had no legitimate nexus to the beach trip depicted in the photographs. The prosecutor created a specious link to the photographs solely to be able to present a photograph of Cole partying and drinking that the jury could perceive as negative and bad conduct.

The principles behind the decision in Dawson v. State, 585 So.2d 443 (Fla. 4th DCA 1991), are applicable to this case. In Dawson, the arresting officer testified that Dawson admitted smoking crack cocaine. Based on that fact, the prosecutor was then permitted to elicit from the officer all the terrible things that crack cocaine addicts would do to obtain more money to buy crack. Reversing for a new trial, the appellate court, citing this Court's opinion in Nowitzke v. State, 572 So.2d 1346 (Fla. 1990), held that this testimony was prejudicial and misleading. The court wrote:

Appellant contends that the admission of testimony concerning past crimes that did not involve him was prejudicial and should not have been permitted. The arresting officer testified that appellant admitted smoking crack cocaine on the night of the crime and also testified that people on crack generally rob and steal to get money to buy more crack. The officer then testified that he knew of cases where people on crack have robbed their own grandmothers. Evidence of this sort should not have been admitted. *Notwitze v State*, 572 So.2d 1346 (Fla. 1990). "The only purpose of such testimony is to place prejudicial and misleading inferences in front of the jury." *Id.* 1356.

Dawson, 585 So.2d at 445. In this case, the prosecutor took photographs of Tiffany Cole spending a few days partying and drinking at the beach and spun them into the unfounded inference that Tiffany Cole so loved a big spending lifestyle that it became a motive for committing these crimes. Just as in Dawson, the prosecutor took one fact, compounded inference on inference, to present an unfounded, misleading and prejudicial contention to the jury.

Tiffany Cole has been denied due process and a fair trial. She asks this Court to reverse her convictions for a new trial.

Penalty Phase Issues

ISSUE III

THE TRIAL COURT IMPROPERLY SENTENCED TIFFANY COLE TO DEATH SINCE THE COURT SENTENCED CODEFENDANT BRUCE NIXON WHO WAS OF EQUAL OR GREATER CULPABILITY TO A TERM OF YEARS IMPRISONMENT.

This Court has long adhered to the principle that a death sentence cannot be imposed on a defendant when a codefendant of equal or greater culpability has received a sentence less than death. See, Slater v. State, 316 So.2d 539 (Fla. 1975); Scott v. Dugger, 604 So.2d 465 (Fla. 1992); Hazen v. State, 700 So.2d 1207 (Fla. 1997). As this Court explained,

We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Slater, 316 So.2d at 542. Tiffany Cole has been sentenced to death in violation of this principle since the trial court gave Bruce Nixon a sentence of 45 years in prison. Her death sentence violates the constitutional protections of equal protection, due process and the right to be free from cruel or unusual punishment. Amends. V, VI, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const. She asks this Court to reverse her death sentence.

An evaluation of the propriety of a death sentence under the principles announced in Slater, requires an examination of the relative culpability of the codefendant receiving a sentence less

than death and the defendant whose death sentence is on review.

The evidence established that Michael Jackson was the one who initiated and directed the crimes with prior discussions with Alan Wade. Bruce Nixon and Tiffany Cole were both followers at Jackson's direction as events unfolded. Both of them first learned the crime would be a robbery. (T9:965-967; T10:1192-1193) Nixon received this information two weeks earlier than Cole from his friend Alan Wade. (T9:965-967) Cole learned it as she, Jackson and Wade drove to pick-up Nixon who awaited with the shovels to dig the hole that became the grave. (T10:1192-1194) This was when Cole and Nixon first met. (T10:1194) Neither Nixon nor Cole knew what the hole was to be used for at the time it was being dug, although both knew it was somehow related to the plan to steal property. (T9:970-971; T10:1017, 1059, 1195, 1197) Nixon lived in the area where the hole was dug, and Cole said Nixon directed them to the location. (T10:1025-1026, 1195-1196) Nixon said he learned there would be homicides involved during discussions the four of them had the next day. (T9:974-979) Cole's testimony disputed this point, since she said she did not know of the kidnapping and homicides until the events unfolded the night of the crime. (T11:1222-1223) Accepting Nixon's testimony as true, these discussions are the only evidence suggesting that Cole had prior knowledge of planned homicides, since Nixon said he had no knowledge of what others in the group knew before these discussions. (T9:974-979; T10:1059) Nixon and

Cole were both present with Jackson and Wade when the duct tape and wrap were purchased. (T9:973, 994; T10:1199-1200)

Based on Nixon's testimony, Tiffany Cole's culpability in the actual crime was no more than his, and, in fact, his culpability was greater, since he had direct contact with the victims during the crimes. Cole drove the Mazda to the house and waited outside. (T9:978, 985; T11:1213) Nixon and Wade entered the house, and Nixon bound the victims with tape. (T9:979, 980-983) Nixon guarded the Sumners in the bedroom, while Jackson and Wade searched for property. (T9:983) Wade and Nixon loaded the victims in the trunk of the Lincoln, and Nixon helped Wade actually drive the Lincoln to the gravesite. (T9:985-990) Nixon, at Jackson's direction, again bound the Sumners with duct tape because the original bindings were loose. (T9:988-990) Tiffany Cole's drove the Mazda to the entry to the wooded area where the gravesite was located and waited. (T9:988) Nixon was the one who actually drove the Lincoln into the woods to the grave. (T9:990) According to Nixon, neither he nor Cole was at the gravesite at the time of the actual killing, and they did not have direct knowledge of how the killing occurred. (T9:990-991) Jackson sent Nixon back to the road to watch Tiffany, and Nixon thought Jackson was afraid Tiffany would leave. (T9:990; T10:1054-1057) Cole testified that Nixon did walk back into the woods when Alan Wade walked out. (T11:1233-1234) A witness for the defense testified that Nixon was boasting at a party about robbing

and killing people by burying them alive. (T9:999-1000; T10:1110-1116)

In this case, Bruce Nixon's culpability is equal to or greater than that Tiffany Cole's. Since Nixon received a sentence of 45 years for his participation in the crimes, Tiffany Cole's death sentence cannot stand. See, Slater; Scott; Hazen. Cole now asks this Court to reverse her death sentence.

ISSUE IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY, FINDING AND WEIGHING AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY THE EVIDENCE.

(A) The Evidence Did Not Support The Aggravating Circumstance Of The Homicide Being Especially Heinous, Atrocious Or Cruel

The trial court found that the homicides were especially heinous, atrocious or cruel based solely on the fact that the victims died as the result of being buried alive. (R3:474) Defense counsel correctly objected to both the jury instruction and the use of the HAC circumstance, since Cole could not be held vicariously liable for this factor based on the manner of death Jackson and Wade selected without her knowledge. (T14:1570-1571) See, e.g., Perez v. State, 919 So.2d 347, 379-382 (Fla. 2005); Williams v. State, 622 So.2d 456, 463-464 (Fla. 1993); Archer v. State, 613 So.2d 446, 448 (Fla. 1993); Omelus v. State, 584 So.2d 563, 567 (Fla. 1991). In overruling the objections and finding the HAC circumstance, the trial court never applied the correct legal principle prohibiting vicarious liability for this aggravating circumstance. (R3:473; T14:1572-1573) The standard jury instruction for the HAC circumstance was read to the jury without any instruction on vicarious liability limitations. (T15:1759)

Cole was not present at the actual killings and had no knowledge of the manner of death her co-defendants used. In fact, the only evidence of a discussion about the manner of death to be

used came from the testimony of Bruce Nixon. (T10:1048-1049) He said Jackson told them that he planned to give the victims a lethal injection of some type of medication once they were at the gravesite. (T10:1048-1049) Even if Cole was present and heard Jackson's statement, she was still left unaware that the victims would be buried alive.

This Court most recently addressed the legal principle of no vicarious liability for the HAC circumstance in Perez v. State, 919 So.2d 347. The evidence in that case showed that Perez did not know how his codefendant would carry out the murder and did not direct that the murder be committed in the manner used. Citing earlier decisions in Omelus, Williams, and Archer, this Court held the HAC circumstance could not be applied to Perez. 919 So.2d at 380-381. Also, just as the trial judge in Cole's case (R3:473; T14:1570-1573), the trial judge in Perez never correctly considered the legal requirement of no vicarious application of the aggravating circumstance. 919 So.2d at 381. Reversing the lower court, this Court wrote:

Given the trial court's failure to make the finding required by Omelus to apply HAC aggravator vicariously to Perez, and the lack of any evidence establishing that Perez directed or otherwise knew that Martin would be killed or the manner of death, we conclude that the trial court erred in applying HAC aggravator to Perez.

919 So.2d at 381. Acknowledging that the HAC aggravator is given significant weight, this Court could not conclude the inclusion of the circumstance in sentencing was harmless error and remanded Perez's case for a new penalty phase. 919 So.2d at 382.

In Archer v. State, 613 so.2d 446 (Fla. 1993), this Court reversed Archer's death sentence because of the improper consideration of the heinous, atrocious or cruel aggravator. Archer hired Bonifay to kill an auto parts store clerk whom Archer blamed for having him fired. The plan was for Bonifay to shoot the clerk and rob the store as a cover-up for the real motive of the killing. Archer helped Bonifay obtain the borrowed gun. Bonifay actually shot the wrong clerk, and he shot the clerk several times while the clerk begged for his life. This Court agreed that the crime was heinous, atrocious or cruel, but the circumstance could not be applied to Archer:

In Omelus v. State, 584 So.2d 563 (Fla. 1991), we held that a defendant who arranges for a killing but who is not present and who does not know how the murder will be accomplished cannot be subjected vicariously to the heinous, atrocious, or cruel aggravator. Here, Archer knew that Bonifay would use a handgun to kill the victim; he did not know, however, that the victim would be shot four times or that he would die begging for his life. Witnesses testified to the manner of the victim's death, and the prosecutor argued the applicability of this aggravator. On the facts of this case we are unable to say the error in instructing on and finding this aggravator is harmless.

Archer, 613 So.2d at 448.

The trial court erred in instructing Cole's jury on the HAC aggravating circumstance and in finding and using the circumstance to sentence Cole to death. Tiffany Cole's death sentence has been unconstitutionally imposed. Amends. V, VI, VIII, XIV U.S. Const.; Art. I Secs. 9, 16, 17 Fla. Const. She now asks this Court to reverse her death sentence.

(B) The Evidence Did Not Support The Aggravating Circumstance That The Homicide Was Committed To Avoid Arrest.

The trial court found as an aggravating circumstance that the homicides were committed to avoid arrest. (R3:662) In the sentencing order, the court wrote:

There seems to this Court to be little doubt that the murders of Carol and Reggie Sumner were committed primarily to assist the defendants in avoiding arrest and prosecution. The circumstantial evidence surrounding the deaths seems to lead to no other inference.

It is clear that the Summers knew at least two (2) of their killers. It is equally clear that they were buried many miles from their home at a location that the group hoped would not be discovered any time soon. Their deaths, of course, kept them from reporting the theft of their ATM cards, and thereby furthered the defendants' plan. The Court concludes that this aggravating circumstance has been proven beyond a reasonable doubt.

(R3:476) Although the court recognized that two possible motives for the murders existed, the court improperly concluded that avoiding arrest was the dominant motive as the aggravating circumstance requires. This aggravating circumstance is properly

found when the victim is not a police officer only upon proof beyond a reasonable doubt that the sole or dominant motive for the murder was to avoid arrest See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla. 2000); Consalvo v. State, 697 So.2d 805, 818-819 (Fla. 1996); Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992); Riley v. State, 366 So.2d 19, 20 (Fla. 1978).

The court relied on two facts to support its finding. However, these facts lend stronger support to the murders being committed to facilitate the theft of the money from the bank accounts, rather than demonstrate avoiding arrest as the dominant motive. First, the fact that the victims knew two of the defendants does not establish the aggravating circumstance. *Ibid.* Second, the fact that the bodies were concealed in a remote location lends greater support to the idea that the murders were committed to facilitate the emptying of the bank accounts. With the bodies away from the house, it would take law enforcement longer to discover that deaths occurred, thereby giving more time for the use of the bank accounts. If avoiding arrest had been the primary motive for the killings, there would have been little need to leave the bodies in a remote area. Additional evidence also supports the murders were to facilitate the taking of the money. Bruce Nixon testified when he first heard the victims would be killed, he also heard that the bank accounts were a target of theft:

Q. When did you learn that the plan was more than a robbery?

A. About a day --- probably a day later.

Q. And what did you learn?

A. Learned that we were going to get their bank bank --- the bank statements. They were going die.

(T9:974)

The trial court simply drew the wrong inference from the evidence. There was no proof beyond a reasonable doubt that avoiding arrest was the dominant motive for the murders. Including the avoiding arrest aggravator in the sentencing equation rendered Cole's death sentence unconstitutional. Amends. V, VIII, XIV U.S. Const.; Art. I, Secs. 9,16, 17 Fla. Const. She asks this Court to reverse her death sentence.

ISSUE V

THE TRIAL COURT ERRED IN NOT DISMISSING THE DEATH PENALTY AS A POSSIBLE SENTENCE BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously denied motions dismiss and to require jury findings of the factors used for imposition of the death penalty in this case based on the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002). (SR1:128-129130-132, 137-138; SR2:199 R3:88-90, 100) Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are co-decision-makers on the question of penalty and the jury's advisory sentence recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State is not required to plead the aggravating circumstance in the indictment.

Cole acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though

Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Additionally, Cole is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of Ring. See, e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So.2d 538. At this time, Cole asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare Section 921.141 Florida Statutes unconstitutional. Cole's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

For reasons presented in Issue I and II, Tiffany Cole asks this Court to reverse her judgments and sentences with directions to the lower court to provide her a new trial. In Issues III through V, Cole asks this Court to vacate her death sentence with directions that a life sentence be imposed.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by mail to Carolyn Snurkowski, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, Tiffany Cole, #J35212, Lowell C.I. Annex, 11120 N.W. Gainesville Rd., Ocala, FL 34482, on this _____ day of January, 2009.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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