IN THE SUPREME COURT
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

ALAN LYNDELL WADE

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Appeal No.: **SC08-573**
L.T. Court No.: 05-CF-010263

APPELLANT'S INITIAL BRIEF ON DIRECT APPEAL, PURSUANT TO FLA. R. APP. PRO. RULE 9.140(1)(a)

On Appeal from the Circuit Court, Fourth Judicial Circuit, and For Duval County, Florida

Honorable Michael R. Weatherby
Judge of the Circuit Court, Division B

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PRELIMINARY STATEMENT

Appellant, ALAN WADE, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorneys Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the "undersigned counsel." Counsel at the time of trial, attorneys Refik W. Eler (acting as 1st chair and guilt phase counsel), and Frank J. Tassone (acting as 2nd chair and penalty phase counsel), will be referred to as "Mr. Eler" and "Mr. Tassone".

References to the Record on Appeal will be designated "(volume number), R __" where the number of the appropriate volume number of the ROA will appear, followed by a page citation. References to the 2 volume record of trial exhibits included with the ROA will be designated "(volume number, R __".

STATEMENTS OF THE CASE AND FACTS

Procedural History

Alan Lyndell Wade, Bruce Nixon, Michael Jackson, and Tiffany Cole were each indicted for two counts of First-Degree Murder, two counts of Armed Robbery, and two counts of Armed Kidnapping on August 15, 2005. Jury selection in Wade's trial was held on October 15, 2007 before the Honorable Judge Michael R. Weatherby, Circuit Judge of the Fourth Judicial Circuit in and for Duval County. Trial was held October 22-24, 2007.

The jury found Mr. Wade guilty on all counts on October 24, 2007. The penalty phase of the trial began on November 15, 2007 and resulted in an 11-1 jury recommendation in favor of the death penalty for the murders of Carol and James Sumner. A *Spencer*[1] hearing was held on March 8, 2007.

In the sentencing order (5 R 799-819), the court found the existence of seven (7) statutory aggravators in determining the defendant's sentence for both Counts One and Two, including: 1) Crime(s) committed by a convicted Felon pursuant to Fla. Stat. 921.141(5)(a); 2) Crime(s) committed while engaged in the commission of kidnapping pursuant to Fla. Stat. 921.141(5)(d); 3) The crime was especially Heinous, Atrocious, and Cruel

[1] Pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993)

(hereafter HAC Aggravator) pursuant to Fla. Stat. 921.141(5)(h); 4) The Capital felony was committed in cold, calculated, and premeditated matter (hereafter CCP aggravator) pursuant to Fla. Stat. 921.141(5)(i); 5) Crime(s) were committed for pecuniary gain pursuant to Fla. Stat. 921.141(5)(f); 6) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody pursuant to Fla. Stat. 921.141(5)(e); and 7) The victim of the capital felony was particularly vulnerable due to advanced age or disability pursuant to Fla. Stat. 921.141(5)(m).

The Defendant introduced three statutory mitigators at sentencing, specifically: 1) The defendant acted under extreme duress or under the substantial domination of another person pursuant to Fla. Stat. 921.141(6)(e). The trial court assigned this little weight. 2) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired pursuant to Fla. Stat. 921.141(6)(f). The court afforded this some weight. 3) the age of the Defendant at the time of the crime pursuant to Fla. Stat. 921.141(6)(g). As Mr. Wade was 18 during the time of this crime, this mitigator was afforded great weight. (5 R 811)

Non-statutory mitigation evidence was presented by counsel in the form of two memorandums that introduced a total of twenty (20) non-statutory mitigators for the Court's consideration. (5 R 812-817)

Specifically, 1) The defendant grew up without a father from the time he was 8 years old after his parents divorced. The trial court held that this non-statutory mitigator was not proven and gave it little weight in determining the sentence. 2) Defendant was raised by an absentee mother. This mitigator was held to be established and was given some weight in considering the sentence of defendant. 3) Defendant was raised in a negative family setting. The court held that this mitigator was not adequately established and assigned it little weight in considering the sentence. 4) Defendant had difficulty in school. The court held this mitigator was proven and gave it some weight in considering the defendant's sentence. 5) Defendant lacked emotional maturity. The court held that this mitigator was insufficiently established and gave it little weight in considering the sentence of defendant. 6) Defendant had no parental guidance. The court held this mitigator was proven and gave it some weight. 7) Defendant had a drug problem. The court held this mitigator unproven and therefore assigned it little weight in determining sentence. 8) Defendant had a difficult childhood and acted out in response to the instability in his life. The court held this

mitigator was not established and assigned it little weight in determining sentence. 9) Defendant had mental health issues throughout his youth. The court held that this mitigator was not adequately established and assigned it little weight. 10) Defendant was thrown out of the house when he was 16 because he fought constantly with his mother. The court held this mitigator was not adequately established and assigned it little weight. 11) Defendant has been a model prisoner since his arrest. The court found this mitigator proven and assigned it some weight in determining sentence. 12) Defendant has made a desire to help others. The court held this mitigator proven and assigned it some weight. 13) Defendant has made a change for the better during his time in jail. The court found this mitigator proven, and assigned it some weight. 14) Defendant is not known to be a violent person and has had only one minor discipline review since being in jail. The court held this mitigator proven and assigned it some weight. 15) Defendant continually exhibits positive personality traits. The court held this mitigator proven, and gave it some weight in determining sentence. 16) Defendant has the love, affection, and support of his family. The court held this mitigator proven but assigned it little weight. 17) Defendant's Courtroom Behavior. The court held this mitigator proven and assigned it some weight. 18) Defendant has demonstrated that he has the potential for rehabilitation. The court held this

mitigator proven and assigned it some weight in determining sentence. 19) Defendant's willingness to help others around him has shown that he can contribute to society. The court ruled this inconsistent with the crime he was found guilty of committing, and assigned it little weight. 20) Defendant would be a model inmate whose life would serve a purpose in prison. The court afforded this circumstance little weight.

The Court imposed a Death Sentence in counts one and two on March 4, 2008. Additionally, the court imposed one life sentence for the two counts kidnapping (counts 5 and 6). Finally, the court imposed a 15 year sentence for each count of robbery (counts 3 and 4) (5 R 818)

Prior to the trial of Wade, Bruce Nixon pled guilty in exchange for testimony against his co-defendants and was sentenced to 45 years. In the summer of 2007 Michael Jackson was convicted and sentenced to death. (5 R 799) Tiffany Cole was subsequently found guilty the week prior to Wade's trial, and was sentenced to death on March 6, 2008.

Statement of Facts

The facts from trial and found in the trial courts sentencing order were the following: On or about July 8, 2007 Reggie and Carol Sumner were kidnapped and murdered. The murder began as a plan formulated by

Michael Jackson after he was given information by his girlfriend Tiffany Cole. (5 R 800)

Tiffany Cole's father lived next door to Carol and James "Reggie" Sumner in Charleston South Carolina. Cole knew the Sumners through her father, and had purchased a vehicle from them sometime prior to their deaths. Cole knew that the couple had moved from Charleston to Jacksonville, and she and Jackson had actually spent a few nights as the guests of the Sumner's in their Jacksonville home sometime prior to July of 2005. (5 R 800)

Jackson decided that the Sumners would be easy targets for robbery due to their ages and deteriorating health, and thanks to Cole, was aware of the sale of their home in Charleston. As such, he believed that they had a significant amount of money in their bank account. (5 R 800)

After formulating the plan to rob the Sumners, Jackson invited his girlfriend Cole and his friend Alan Wade. Wade then subsequently brought Bruce Nixon into the plan. (5 R 800) A few days prior to the murder, all four defendants travelled to an area North of Maccleny Florida, just across the Florida/Georgia line. There they dug a hole approximately 6 x 4 x 6. (5 R 800) After being invited into the plan, Bruce Nixon on his own volition stole four shovels from various residences in his neighborhood in preparation for

the dig. (12 R 880) At the scene, Wade and Nixon were the primary diggers being directed by Jackson, and Cole provided them with light via flashlight. (5 R 800)

On the night of the murder, all four went to the Sumner's residence in a Mazda rented by Tiffany Cole, Jackson and Cole remained in the vehicle as the Sumners would recognize them, and Nixon and Wade went to the door and asked if they could use the telephone. (5 R 801) Wade carried duct tape, Nixon carried a realistic looking fake gun. Both men wore disposable gloves. (5 R 801)

After being let into the residence, Nixon brandished the fake gun and ordered them to be silent and to comply. Wade sat Reggie down in a chair, and both Reggie and Carrol were bound and secured. The house was then searched, and while personal information was found, they were unable to locate bank account numbers and/or the PIN numbers associated with the accounts. (5 R 801) Jackson then entered the home and found the bank account numbers, but not PIN numbers. (5 R 801) A coin collection, bank records, and mail were taken from the residence. (5 R 802)

The Sumners were then taken outside, bound and gagged, and placed in the trunk of their Lincoln Town Car. The keys to said vehicle were found

in the house. (5 R 801) Wade and Nixon travelled in the Lincoln, and Jackson and Cole were in the rented Mazda. (5 R 802)

The four codefendants drove the two vehicles to the pre-dug hole in Georgia, after stopping to fuel the Lincoln on the way. (5 R 802) At the site, the Lincoln was backed up to the hole and the trunk was opened. The Sumners had managed to remove the duct tape to allow movement. Jackson ordered Nixon to reapply the duct tape which he did. Jackson then ordered Nixon to go to the road and wait there with Cole. Wade and Jackson remained at the hole with the Sumners. (5 R 802) No direct evidence exists as to who was responsible for the filling of the hole, but the Sumners were placed in the hole and buried alive, per the testimony of the medical examiner. (5 R 802) Wade and Jackson drove the Lincoln away from the hole, and Jackson then had possession of the PIN numbers linked to the Sumner's bank account. (5 R 802)

Once they returned to the road, Wade and Nixon drove the Lincoln, followed by Jackson and Cole in the Mazda, to a location roughly 20-30 miles from the burial site. The Lincoln was wiped down for prints, and all four then left in the Mazda. (5 R 802) Roughly two hours after the burial, Jackson began withdrawing funds from the Sumners bank accounts using the information stolen from the house and obtained from the Sumners at the

burial site. (5 R 803) Jackson's photograph was taken during each transaction. (1 E 19-34)

Sometime during this period, Wade and Cole returned to the local Wal-Mart and bought more latex gloves and Clorox bleach. They went back to the Sumner residence and stole a computer tower, which was later pawned. The group then spent one or two nights Jacksonville area hotels and were filmed together on hotel surveillance. Nixon then returned to his home in Jacksonville, while Jackson, Cole, and Wade travelled to Charleston. (5 R 803)

The trio was later arrested by Charleston officers, and Bruce Nixon was arrested sometime after. Nixon then confessed to the incident and directed officers to the location of the burial site. (5 R 806).

At trial, Bruce Nixon testified against Wade. Nixon testified he plead to second-degree murder and was facing a range of 52 years to life in prison. (12 R 924).

During Wade's trial, Griffis testified to Nixon's admission that ***he*** (Nixon) "buried somebody alive." (13 R 1003) Nixon took out his wallet and showed Griffis some cash, "like $200.00 worth." (13 R 1005) Nixon was bragging about the money. (13 R 1006) Nixon was also bragged about getting, "a lot of money and was going to get like a Mercedes Benz and it

was black and he was going to take me and Ackridge out shopping in the mall and stuff." (13 R 999) Nixon pointed his finger at Griffis imitating a gun with his thumb and forefinger and, "just said that he killed somebody." (13 R 1000) Nixon admitted these facts during the keg party on or about July 9, 2005. (13 R 997). This was the same keg party where Nixon was intoxicated from the pills he stole from the Sumners. (13 R 929)

The state, in its closing argument, told the jurors "when you are done I ask you to walk out not into the darkness of greed, into the terror of the night drive in the back of a trunk, but into the light of justice." (13 R, 1106-1107). This argument (among others) was objected to by the defense, whom asked for a mistrial, citing a golden rule violation. (13, R. 1107-1108).

Nixon, at his subsequent sentencing, was given significantly less time than was purported by the state to the jury in their closing arguments. He got 45 years. At sentencing, the State said Nixon, "played a significant role," and "was not dragged or coerced." The State also said Nixon "was a free and willing participant," "he knew what he was doing," and he "did it for money."

Both Wade and Nixon just turned 18 two months prior to the time these crimes were committed, Wade being the youngest.

STANDARD OF REVIEW

Pursuant to Florida Rules of Appellate Procedure 9.210(b)(5), initial briefs must contain "[a]rgument with regard to each issue including the applicable appellate standard of review."

Claims that are composed of constitutional issues—including claims surrounding proportionality of sentence, uniformity in death penalty proceedings, and disparate treatment of defendants—involve mixed questions of law and fact, and are reviewed de novo. *Taylor v. State*, 937 So. 2d 590, 598 (Fla. 2006); *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001) ; *Murray v. State*, 692 So. 2d 157, 159 (Fla. 1997).

Allegations of prosecutorial misconduct is reviewed to determine, whether "the error committed was so prejudicial as to vitiate the entire trial." *Id*., citing *Cobb v. State*, 376 So. 2d 230, 232 (Fla. 1979). The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in *Chapman v. California*, 386 U.S. 18 (1967), and its progeny. *Murray*, *supra*. Generally, the rule is that "failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review." *Brooks v. State*, 762 So. 2d 879, 898 (Fla. 2000). A single exception to this rule is when the

unobjected-to comments rise to the level of fundamental error. *Id*. at 898-99.

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Jones v. State*, 751 So. 2d 537 (Fla. 1999); *Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997), *cert. denied*, 118 S. Ct. 1370 (1998).

A trial court's ruling on an excusal for cause will be sustained on appeal absent an abuse of discretion. *Kessler v. State*, 752 So. 2d 545, 550 (Fla. 1999); *Castro v. State*, 644 So. 2d 987, 990 (Fla. 1994). Discretion is abused "only where no reasonable man [or woman] would take the view adopted by the trial court." *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990). Thus, per *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980), "[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Further, discretion is abused when "the judicial action is arbitrary, fanciful, or unreasonable," *White v. State*, 817 So.2d 799, 806 (Fla. 2002).

STATEMENT OF THE ISSUES INVOLVED

1. Whether Wade's sentence of death is a disproportionate sentence, as co-defendant Nixon was equally culpable yet received a disparate sentence.

2. Whether the trial court erred in not considering and/or conducting a proportionality assessment of co-defendant's sentence when sentencing Wade to death

3. Whether the state's prosecutorial misconduct warrants a new trial.

4. Whether the trial court abused its discretion in not granting Wade's motion for mistrial after the state's improper Golden Rule violation in guilt phase closing argument.

5. Whether the trial court erred in denying Wade's motion to preclude the death penalty as Florida's death penalty sentencing scheme does not comply with the holding in *Furman v. Georgia*, 408 U.S. 238 (1972).

6. Whether the trial court erred in denying Wade's Motion to Strike the state's notice of intent to seek death based the state's lack of uniform standards in determining who is death eligible.

7. Whether the trial court erred in dismissing prospective juror Butler for cause

8. Whether Wade's execution is prohibited under Fla. Const. Art. I, Sect 17 and U.S. Const. Amendment(s) Eight and Fourteen, as Wade was 18 at the time of his crimes.

SUMMARY OF THE ARGUMENTS

1. Wade and Nixon are equally culpable in the instant crime. They should be punished equally. The fact Nixon was convicted of the lesser Second-degree murder charge does not end this analysis, as the Florida Supreme Court has consistently reviewed cases under a disparate treatment review to determine whether a violation of Fla. Const. Art. I, Sect. 17 and/or U.S. Const. Eighth

Amendment occurred. Wade's sentence should be reversed to life in prison.

2. **The trial court did not consider Nixon's disparate sentence when determining the appropriate sentence for Wade, in violation of *Witt v. State*, 342 So. 2d 497, 500 (Fla. 1977) and its progeny. Wade should be granted a new penalty phase with instructions for the trial court to consider same**

3. **The state's prosecutorial misconduct rendered Wade's trial fundamentally unfair. In both the state's guilt and penalty phase closing, it made improper arguments, including, (1) commenting on improper facts not within the record. Specifically including the fact co-defendant Nixon could receive less than fifty-two years to life in prison upon the condition of mitigating evidence at Nixon's sentencing (2) improper vouching of its state witness, again concerning co-defendant Nixon as to his "reasons to lie." (3) Golden rule violations, asking the jury in guilt phase closing arguments not to walk out "into the darkness of greed into the terror of the night in the back of a trunk, but into the light of justice," and in penalty phase closing, asking the jury to place themselves in the position of the victims. (4) improperly instructing the jury that voting for life would be a violation of their lawful duty by "taking the easy way out," and; (5) improperly commenting on Wade's right to testify in stating "there is no evidence that Alan Wade said a word to law enforcement about Bruce Nixon." The misconduct was not harmless error, and the culmative effect of said improper arguments violated Wade's fundamental right to a fair trial.**

4. **The trial court abused its discretion in not granting Wade's motion for mistrial upon the state's improper golden rule argument. This statement was the last the jury heard from either the defense or state before it began its deliberations, and cannot be considered harmless error.**

5. **The trial court erred in not denying without hearing Wade's Motion to Preclude the Imposition of Death Penalty, based on a study conducted by the Capital Jury Project (CJP) which was sponsored by, and the results of which were ultimately endorsed**

by, the National Science Foundation. The study found numerous categorical problems existing in current statutory capital sentencing schemes regarding the beliefs of jurors and their predetermined judgments of guilt of the accused. Wade was denied his right to a fair trial as the trial court failed to consider this motion and determine whether similar problems existed in Wade's case.

6. **The 4th Judicial Circuit state attorney's office (as well as numerous other states attorney's offices in Florida) has no uniform procedure in determining whether to seek death on an individual. Twenty years ago the 4th Circuit had a uniform procedure. The trial court erred in denying Wade's motion to Strike the state's notice of intent to seek the death penalty based on the state's lack of uniform procedure in determining why they sought the death penalty on Wade.**

7. **The trial court erred in dismissing prospective juror Butler for cause. Wade's counsel objected to same, arguing he rehabilitated Butler as to her views of whether she could recommend a death sentence.**

8. **Wade was not two months over the age of 18 when the instant crimes were committed. *Roper's* three-pronged rule of why juveniles cannot be executed corresponds to Wade's characteristics and personality, and Wade should be considered a juvenile and ineligible for the death penalty.**

ARGUMENT ONE

WADE AND NIXON WERE EQUALLY CULPABLE IN THE INSTANT CRIMES. BECAUSE THEY DID NOT RECEIVE THE SAME SENTENCE, NIXON'S DISPARATE TREATMENT RENDERS WADE'S PUNISHMENT OF DEATH DISPROPORTIONATE IN VIOLATION OF FLA. CONST. ART. I, SECT. 17 AND THE EIGHTH AND FOURTEENTH AMENDMENT(S) OF THE U.S. CONSTITUTION.

Upon a close examination of the evidence at Wade's trial, the Court's sentencing Order, Nixon's testimony at Wade's trial, and the State's theory of the case, the record conclusively demonstrates that Wade and Nixon played equal roles in the instant crimes. Their sentences should be the same, in accordance with Fla. Const. Art. I, Sect. 17 and U.S. Constitution's Eighth Amendments proscriptions against cruel and unusual punishments. *See Sexton v. State*, 775 So. 2d 923, 935 (Fla. 2000)

The Florida Supreme Court performs a proportionality review to prevent the imposition of "unusual" punishments contrary to Article I, section 17, of the Florida Constitution. *Tillman v. State*, 591 So. 2d 167 (Fla. 1991) In cases where more than one defendant is involved in the commission of the crime, this Court performs an additional analysis of relative culpability. *Shere v. Moore*, 830 So. 2d 56 (Fla. 2002) When a co-defendant is equally as culpable as or more culpable than the defendant, the disparate treatment of the co-defendant may render the defendant's

punishment disproportionate. *Larzelere v. State*, 676 So. 2d 394, 406 (Fla. 1996) A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence. *Puccio v. State*, 701 So. 2d 858, 860 (Fla. 1997)

The U.S. Constitution's Eighth Amendment, applied to the states by virtue of the Fourteenth Amendment, prohibits the imposition of punishments that are arbitrary and capricious. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) Though the U.S. Supreme Court does not guarantee proportionality, *Harmelin v. Michigan*, 501 U.S. 957 (1991), there are a minority of U.S. Supreme Court Justices who dissent from this principle, including Justice Marshall, who said:

> The singling out of particular defendants for the death penalty when their crimes are no more aggravated than those committed by numerous other defendants given lesser sentences is unacceptable. As Justice Brennan pointed out in his dissent in Pulley, comparative proportionality review, at the very least, "serves to eliminate some of the irrationality that currently surrounds imposition of a death sentence" and "can be administered without much difficulty by a court of statewide jurisdiction." 465 U.S., at 71. In the present case, petitioner has not merely "requested" review for comparative proportionality, cf. *id*., at 44, but has (in the lower court's own words) "presented an elaborate survey of published Court of Appeal decisions," allegedly showing that "many first degree murderers of equal and greater culpability have received sentences less than death." 50 Cal. 3d, at 718, 789 P. 2d, at 916. I cannot

> understand how this Court can reconcile a refusal to review such evidence with our capital jurisprudence.

See Turner v. Cal., 498 U.S. 1053 (1991)(J. Marshall, dissenting).

Other U.S. Supreme Court Justices believe the Eighth Amendment *does* require a proportionality review. *See* Harmelin v. Michigan, 501 U.S. 957 (Justice White, with whom Justice Blackmun and Justice Stevens, join)[*Stating, "not only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court's cases suggest that such a construction is impermissible,"*](Justice White referring and commenting on numerous U.S. Supreme Court decisions, including: (1) *Rummel* v. *Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980), "the holding of which Justice Scalia does not question, itself recognized that the Eighth Amendment contains a proportionality requirement, for it did not question *Coker* and indicated that the proportionality principle would come into play in some extreme, non-felony cases." *Id.*, at 272, 274; *Enmund*, at 788; (2) *Stanford*, 492 U.S. at 369-371; *McCleskey* v. *Kemp*, 481 U.S. 279, 300, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987), "are cases that have recognized that a proper proportionality analysis must include the consideration of such objective factors as 'the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have

made'"; (3) *Robinson* v. *California*, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962), "held for the first time that the Eighth Amendment was applicable to punishment imposed by state courts, it also held it to be cruel and unusual to impose even one day of imprisonment for the status of drug addiction," *id.*, at 667. (4) "The principal opinion in *Gregg*, *supra*, at 173, observed that the Eighth Amendment's proscription of cruel and unusual punishment is an evolving concept and announced that punishment would violate the Amendment if it "involved the unnecessary and wanton infliction of pain" or if it was "grossly out of proportion to the severity of the crime." (5) "Similarly, in *Enmund* v. *Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982), we invalidated a death sentence for felony murder, on disproportionality grounds, where there had been no proof of an intent to murder." *Id.* (J. White, dissenting).

The preceding Florida and U.S. Supreme Court decisions recognize the uniqueness of the death penalty, especially when determining the proportionality of a death sentence and the importance of ensuring it is carried out without being cruel and unusual, or arbitrary and capricious.

Appellate counsel has a clear responsibility and could be held to be ineffective in failing to argue proportionality and bring to this Court's attention a sentence less than death imposed on a co-defendant. *Shere v.*

Moore, 830 So. 2d 56 (Fla. 2002)(J. Anstead concurring and dissenting in part). *See* *Sexton v. State*, 775 So. 2 923 (Fla. 2000); *Puccio v. State*, 701 So. 2d 858 (Fla. 1997); *Witt v. State*, 342 So. 2d 497, 500 (Fla. 1977), [*Holding a co-defendant's life sentence was a factor that had to be considered when sentencing Witt*].

In Wade's case, his co-defendant Bruce Nixon was equally or more culpable, thereby rendering Wade's sentence disproportionate. Various sources support this contention, including: (1) co-defendant's Nixon's trial testimony, (2) the trial court's order sentencing Wade and, (3) the State's theory of the case in trial in closing and opening statements, (4) the State's factual basis during Nixon's plea, (5) and an eyewitness whom Nixon confessed and/or bragged to killing the Sumners. Wade's sentence should be commuted to life.

I. Nixon's trial testimony.

Nixon testified as a State witness at Wade's trial. (12 R 880) A summary of Nixon's testimony is as follows:

Nixon admitted he was guilty of participating in the murders, kidnapping Carol and Reggie Sumner, robbing them, and killing them. (12 R 880-882) Nixon explained that Wade first called him about "robbing somebody." (12 R 884) Wade then called Nixon about digging holes,

whereby Nixon stole four shovels from various homes in his neighborhood after a search for same. (12 R 885-886) Approximately twenty minutes after this conversation, Jackson, Cole, and Wade picked Nixon up and the quartet went looking for a place to dig a gravesite. (12 R 887-888) A location was eventually found in Georgia, across the street from where Nixon used to live. (12 R 888, 928) Nixon grew up near the location of the gravesite and as a child rode a school bus past the road where the holes were eventually dug. (12 R 927) All four co-defendants participated in digging the holes however Wade and Nixon did the majority of the digging. (12 R 888-889) Nixon stated that while he was digging, he knew that a robbery was going to take place, and stated that he knew the hole was related to the robbery. (12 R 889) After the holes were finished, Wade asked Jackson if Nixon could "go with them", to which Jackson replied "yes." (12 R 891) All four participants discussed the method and planning of the crime to be committed against the Sumners. (12 R. 891) Nixon's understanding of the crime was Jackson was going to kill the Sumners with a "shot." (12 R 891-892) A "shot" meant with medicine and a needle. (12 R 893) At this point Nixon stated he knew what the hole was to be used for. (12 R 892)

While the four where driving around casing the Sumner house (Cole was driving), Cole called the Sumner's residence. The call occurred one day

after the holes were completed. Nixon was participating in this crime for money. (12 R 894) A sum of two hundred thousand dollars ($200,000.00) was discussed between the four. (12 R 895) Jackson was the one who promised Nixon money in exchange for assisting in the crime. (12 R 945).

In preparation for the kidnapping all four went to an Office Depot. Nixon and Wade were together walking around the store. Cole and Jackson bought Saran wrap. The group, driven by Cole, then went to the Sumners's residence, around 10:00 p.m. that night. (12 R 895) At the residence, Nixon carried a realistic looking fake gun, while Wade carried duct tape. Nixon was also supplied with duct tape by Wade. (12 R 896)

Nixon and Wade entered the Sumner residence first, and prior to entry, both put on latex gloves. They knocked on the door, and when Ms. Sumner answered, asked if they could use the phone. (12 R 897) Upon gaining entry, Nixon produced the gun to ensure the obedience of the Sumners. Wade then directed Mr. Sumner to sit in a chair. (12 R 899) While Nixon pointed the realistic looking fake gun at the Sumners, Wade pulled out the phone line. (12 R 900)

The plan was for Nixon and Wade to obscure the Sumner's eyes so they could not see Jackson, who was then going to enter the house. (12 R 898) Jackson said the covering of the eyes was a "mind thing", and that

when he killed the Sumners, Jackson did not want them to see him "or something like that." Jackson was clearly calling the shots, but Nixon admitted to fully participating. (12 R 899)

Nixon alone then brought the Sumners into a separate room, where he duct-taped their eyes, arms, and legs, then stayed in the room with them. Nixon also covered their mouths so they wouldn't be able to scream. (12 R 901) No one else was in the room with Nixon and the Sumners. (12 R 902) The Sumners were then asked for their bank cards, as the plan was to rob them of their debit and/or credit cards, and not jewelry or cash. (12 R 900). Jackson then beeped Nixon on his Nextel and asked if he could come in, to which Nixon replied yes. (12 R 901)

With Nixon guarding the Sumners, Jackson entered the house. Along with Wade, he went through the house and searched a large pile of mail looking for bank statements. (12 R 902) Jackson then went outside and directed Wade and Nixon to place the Sumners in the trunk of their Lincoln, which they subsequently did. (12 R 903)

Nixon picked the Sumners up and forced them into the trunk. (12 R 928) The plan was to drive to Georgia to the location of the pre-dug hole. Wade drove the Lincoln with the Sumners in the trunk, and Nixon was in the

passenger seat (12 R 904) The Lincoln needed gas, so the four stopped at a gas station. Jackson paid. (12 R 905).

Arriving at the crime scene, Jackson went up to the trunk of the Lincoln, popped the trunk, and saw that the Sumners had managed to free themselves from the duct tape. They started screaming. Jackson ordered Nixon to reapply the duct tape, and Nixon obeyed applying it again to their eyes, arms, and feet. (12 R 907) Jackson was upset about the removal of the duct tape because he did not want the Sumners to see him. (12 R 908)

Wade then attempted to back the Lincoln up to the hole but could not, so Nixon jumped in the car and successfully did so. Jackson had control of the keys to the Lincoln. (12 R 910) Jackson then told Nixon to wait with Cole by the road. Nixon knew what was going to happen to the Sumners. Wade and Jackson stayed at the crime scene. (12 R 911)

Nixon stated that he did not know what happened next. (12 R 912) However, at the scene, Jackson had a yellow pad with the Sumners' ATM numbers and account info on it. (12 R 915) Nixon stated that he did not know who buried the Sumners. (12 R 933)

Leaving the crime scene, Wade drove the Lincoln with Nixon as a passenger. (12 R 912) The shovels used to commit the crime were in the trunk of the Lincoln. (12 R 913) The four then drove to Sanderson Florida,

and proceeded to wipe the Lincoln down. All four then got in the Mazda RX-8, with Wade and Nixon in the back seat. They went to an ATM, to a Wal-Mart, and then to a hotel. (12 R 914) During this time, the four went to Wade's mother's house, and were caught off guard when she came home unexpectedly. Ms. Wade began cursing and screaming at Jackson, telling him to get out of the house as she did not like Jackson. (12 R 923)

Sometime later, Cole and Wade went back to Sumners' house, and stole a computer from the residence. Nixon stayed with Jackson at the hotel at this time. (12 R 915) Nixon was given two-hundred dollars for this crime. Nixon stayed with the group for another day or two, and then left to go back home. (12 R 916) Jackson, Cole, and Wade then traveled to South Carolina. (12 R 917) During this time, Jackson is seen on ATM surveillance numerous times, retrieving monies from ATM. (1 E 19-33)

After Nixon arrived home, he went to a party and got inebriated, in part from the pills he stole from the Sumners. (12 R 917) Doing "keg stands," and generally having a great time, he did not feel sorry for the Sumners. (12 R 930) This party occurred two days after Nixon had participated in the murder of the Sumners. (12 R 930)

Nixon was subsequently interviewed by the police, and initially lied to them because he did not want to implicate himself. Nixon eventually told

"part" of the truth to police after he learned Jackson and Cole were "saying stuff". Nixon stated that he lied to police as to his knowledge of how the Sumners were going to die. (12 R 921) Nixon subsequently took the police to the grave site. (12 R 922)

Nixon pled to Second-Degree Murder, Armed Kidnapping and Armed Robbery. Nixon was originally indicted for First-Degree Murder and the State was seeking the death penalty. His plea was to constitute a range from 52 years to life in prison. (12 R 924)

Nixon testified that "he and Alan [Wade] got into this situation, were young, and had bad role models at the time." (12 R 925) During the crime, Nixon and Wade were 18 years old (Wade being the younger of the two), Jackson was 23, and Cole was 24. Nixon also stated he and Wade "were with somebody we shouldn't have been hanging out with, somebody came into our lives and messed up our life and got stirred in the wrong direction." (12 R 925-926)

II. Trial Court's Order imposing sentence.

Although the trial court's order does not make an explicit determination of whether Wade or Nixon are equally culpable, it certainly infers that they are. The court first mentions the trials of the co-defendant's

were "substantially similar, if not identical," making it difficult to "particularize the sentencing orders." (5 R 831)

Cole knew the Sumners before this crime, knew that the Sumners had moved from South Carolina to Jacksonville to establish a new residence, and had purchased an automobile from the Sumners in the past. (5 R 831-832) At some point prior to July 4, 2005, Jackson and Cole traveled to Jacksonville and *actually spent the night* with the Sumners at their home and place of their eventual kidnapping. (5 R 832)

Prior to the crime, Jackson decided the Sumners would be easy targets of a raid on their bank accounts, believing they had significant funds from the sale of their house in South Carolina. (7 R 832) Jackson then invited his girlfriend Cole into the plan. (5 R 832) Jackson subsequently invited Wade to participate in the crime, and Wade then invited Nixon. (5 R 800, 832)[2]

Nixon, without assistance, stole four shovels used to dig the Sumners' subsequent grave. (5 R 800, 832-833). The holes were predominately dug by both Wade and Nixon. (5 R 800, 833) The initial entry into the home, and kidnapping of the Sumners were done by Nixon and Wade, at the direction of Jackson. (5 R 801, 833) Cole and Jackson remained outside in

[2]The trial court made a "corrected" order in the instant case. Therefore, Appellant cites to both the original order and the corrected order, as they both are a part of this record on appeal.

the Mazda, because the Sumners were likely to recognize them. (5 R 833) Nixon and Wade, wearing latex gloves, knocked on the door of the Sumners and asked to use the phone. (5 R 801, 833) Nixon, armed with a life-like toy gun, produced it and commanded the Sumners' silence and compliance, while Wade grabbed Mr. Sumner and sat him down. (5 R 801, 833)

The Sumners were then bound and gagged with duct tape.[3] Both searched for personal financial documents, but eventually called for Jackson's assistance. Jackson eventually located the ATM information, but not the pin numbers. (5 R 801, 833) Nixon and Wade then locked the Sumners in the trunk of their Lincoln Town Car. (5 R 801, 833) The co-defendants then left the Sumner residence with Wade driving the Sumners' Lincoln and Nixon in the passengers seat, and Cole and Jackson in the Mazda. (5 R 834) Upon arriving at the location of the pre-dug holes, Nixon, at the bequest of Jackson, bound and gagged the Sumners again. (5 R 802, 834) Jackson then instructed Nixon to go to the road with to be with Cole. (5 R 834) There is *no direct evidence of exactly what happened (emphasis added)*, however the Sumners were placed in the grave and the grave filled in. By that point, Jackson had a small yellow pad containing PIN numbers to

[3]As stated herein, it was Nixon who bound and gagged the Sumners, and took them into a separate room by himself, while Jackson and Wade searched the house. (12 R 900-902)

the Sumners' accounts. (5 R 834) The group then left the scene. Wade drove the Lincoln with Nixon as a passenger. (5 R 802, 835)

Both Wade and Nixon participated in wiping down the Lincoln for prints. (5 R. 803, 835) No more than approximately two hours "after burying the Sumners, Jackson began withdrawing funds from their bank accounts using the stolen ATM cards and PIN numbers." Jackson handled all the transactions and possessed the security numbers. Jackson's photograph was taken at various ATM machines. (5 R 835) Wade and Nixon then spent one or two nights at local motels, where they were videotaped by security systems. Nixon returned home, and the remaining three traveled to Charleston. (5 R 803, 835)

III. The State Attorney, in Nixon's sentencing, disagreed with Nixon's trial counsel that he was a "relatively minor participant."

Nixon's sentencing hearing occurred on December 7, 2007. During that time, the State made numerous comments regarding Nixon's culpability in this crime. Specifically, the State said Nixon, "played a significant role," and "was not dragged or coerced." The State also said Nixon "was a free and willing participant," "he knew what he was doing," and he "did it for

money."[4] The State also opined that at "least in the Wade case perhaps there would not have been a conviction but for Bruce Nixon's cooperation."

IV. Nixon confessed at a keg party to Alex Levi Griffis about killing the Sumners, two days after their murder. In fact, he was bragging about it.

During Wade's trial, Griffis testified to Nixon's admission that *he* (Nixon) "buried somebody alive." (13 R 1003) Nixon took out his wallet and showed Griffis some cash, "like $200.00 worth." (13 R 1005) Nixon was bragging about the money. (13 R 1006) Nixon was also bragged about getting, "a lot of money and was going to get like a Mercedes Benz and it was black and he was going to take me and Ackridge out shopping in the mall and stuff." (13 R 999) Nixon pointed his finger at Griffis imitating a gun with his thumb and forefinger and, "just said that he killed somebody." (13 R 1000) Nixon admitted these facts during the keg party on or about July 9, 2005. (13 R 997) This was the same keg party where Nixon was intoxicated from the pills he stole from the Sumners. (13 R 929)

V. The Record on Appeal demonstrates Nixon and Wade are equally culpable, and therefore Wade's sentence should be commuted to life

The record on appeal demonstrates with clear fact that Wade and Nixon were equally culpable in this crime. From the State's opening

[4] Appellant filed a Motion to Supplement the Record containing the plea and sentencing transcripts of Nixon.

statements, to the testimony of Nixon himself, to the testimony of Mr. Griffis, to the Court's sentencing order, and finally to Nixon's sentencing hearing, there exists no proof of any difference in the relative culpability of Nixon and Wade. At a minimum, and per the State Attorney's own admission in Nixon's sentencing on December 7, 2007 where the state claimed that, "he played a significant role", Wade and Nixon are equally culpable.

Both Nixon and Wade took orders from Jackson, and both were a part of this scheme born of Cole's prior relationship with the Sumners and knowledge of their lives. (12 R 799-800, 899) In opening arguments, the state informed the jury that Bruce Nixon was "a murderer" and that Nixon would "take responsibility for his heinous role in this horrible crime". (10 R 458)

Both Nixon and Wade were substantially younger than their co-defendants. Wade was the youngest of the four (born May 22, 1987), followed by Nixon (born May 9, 1987). Jackson was five years older than Wade and Nixon (born May 12, 1982), and Cole was the oldest of the four (born December 3, 1981). At the time of the writing of this brief, Wade is the youngest person on Florida's Death Row. As the record shows, there was a large age disparity among the co-defendants. (12 R 926)

The facts in the record show that once Nixon was told about this plan, he was an eager and willing participant, beginning with the stealing of the shovels. Nixon also fully confessed and pled to murder, kidnapping, and robbery charges. (12 R 924) Nixon even admitted under oath that he fully participated in the killing of the Sumners. (12 R 889) Jackson was the dominating and controlling force behind both Wade and Nixon's actions. At his direction and orders, they did whatever he told them to do, as Jackson was "calling the shots". (12 R 899) As the trial court opined, "one could certainly suggest that the evidence is that Wade followed Jackson's instructions as an army squad member would follow the instructions of the squad leader". (5 R 843)

VI. The fact that Nixon pled to Second-Degree Murder does not defeat this claim.

1. The State Attorney's office sought the death penalty for both Nixon and Wade.

Like Wade, Nixon was indicted on First-Degree Murder charges, and the State Attorney's Office filed its notice to seek the death penalty. (12 R 924) A death notice was filed by the State Attorney's Office. Nixon hoped his trial testimony against Wade would reduce his sentence. (12 R 925)

Nixon ultimately pled and was sentenced on March 12, 2008, having pled to a reduced charge of two counts of second degree murder, two counts

of armed robbery, and two counts of armed kidnapping. In Wade's trial on October 23 and 24, 2007, Nixon was not yet sentenced for his involvement in this case, but had entered a prior plea to the above charges. (12 R 925)

2. Nixon confessed under oath to fully participating in the kidnapping, robbery, and murder of the Sumners.

During Wade's trial, Nixon admitted to fully participating in the crimes against the Sumners. (12 R 899) His plea was conditional and contained an agreement to provide truthful testimony against his co-defendants.

3. The trial court's order does not distinguish between the relative culpability of Nixon and Wade.

In the trial court's order imposing the death penalty on Wade, Nixon's disparate treatment apparently was not considered. (12 R 799-819) *See* Witt *v. State*, 342 So. 2d 497, 500 (Fla. 1977), [*Holding a co-defendant's life sentence was a factor that had to be considered when sentencing Witt*]..

4. The State Attorney's theory of the case supported the fact(s) Nixon and Wade were equally culpable.

In the State's opening statement, the equal culpability of Nixon and Wade is explained (10 R 442-444, 449-450, 452, 458). In fact, the State Attorney tells the jury Nixon, right after the crime, "was high at a party exaggerating and bragging about what he did." (10 R 458)

At Nixon's sentencing on December 7, 2007, the State Attorney "disagreed" with Nixon's trial counsel's assertion Nixon was a minor participant in this crime, and instead "he played a significant role."

5. Alex Levi Griffis heard Nixon bragging about killing the Sumners.

Nixon, only two days after the murder, at a keg party, and while flashing twenty dollar bills around, bragged that he buried somebody alive. (12 R 999-1006)

Certainly Nixon's own words evince his relative culpability in this case, and in fact, leads to the assumption Nixon was even more involved in the crime than he led everyone to believe.

6. Fla. Const. Art. I, Sect. 17 and the U.S. Const., Amendment Eight, require both a disparate treatment and proportionality review of Wade, despite Nixon being convicted of a lesser sentence.

The second-degree murder plea by Nixon was not a "weight of the evidence" issue, but instead constituted prosecutorial discretion concerning gaining another witness against Wade. Wade's proportionality claim should not be dismissed because of Nixon's plea.

This Court should base its disparate sentence review on the factual aspects of the case concerning the crimes, and not on the fact that the defendant's relative culpability is different because one defendant escaped

the death penalty by pleading to Second-Degree Murder. Not to consider the State largesse for Nixon flies in the face of Fla. Const. Art. I, Sect. 17, the U.S. Constitution Eighth Amendment, and is a per se arbitrary application of the death penalty in violation of both.

The singling out of particular defendants for the death penalty when their crimes are no more aggravated than those committed by numerous other defendants given lesser sentences, according to U.S. Supreme Court Justice Marshall, is "unacceptable." *See* *Harmelin v. Michigan*, 501 U.S. 957 (1991) (J. Marshall dissenting.) As U.S. Supreme Court Justice Brennen pointed out, this "comparative proportionality" review, at the very least, "serves to eliminate some of the irrationality that currently surrounds imposition of a death sentence" and "can be administered without much difficulty by a court of statewide jurisdiction." 465 U.S., at 71. Resolving Wade's disparate treatment and/or proportionality argument by only comparing the convictions, under Justice Brennen's view, is an irrational decision.

This Court should distinguish and/or make an exception the instant case from the holding in *Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975), making a limited ruling that "an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital

punishment in the other case," if the defendant's are not *equally culpable in the crime, crime meaning particular facts of the crime and not what the co-defendant's actually were convicted of. (Emphasis added)*. This was not an example of jury or court mercy; it was a prosecutorial gift.

This Court can find authority to conduct and rule on a disparate treatment and/or proportionality argument in *Puccio*. In *Puccio*, the Florida Supreme Court has previously reversed a death sentence under a *proportionality* review with co-defendant's that were convicted of crimes lesser than first-degree murder. *Puccio v. State*, 701 So. 2d 858 (Fla. 1997)

Puccio was convicted of first-degree murder and sentenced to death. Of his six co-defendant's, five of them were convicted of second degree murder. *Id.* Examining the co-defendant's sentences, this court held there existed nothing in the judge's sentencing order showing Puccio was more culpable than the other co-defendants, and in fact, he played a lesser role in the crime than most of the others, and the State conceded he was not the ringleader. *Id.* The Court concluded the trial court order assessing culpability of Puccio was not supported by competent substantial evidence, and Puccio's sentence was disproportionate "when compared to the sentences of the other equally culpable participants in this crime." *Id.* Important here is

the reversal of a death sentence using a proportionality analysis with co-defendant's who were *not* convicted of first-degree murder. *Id.*[5]

Like *Puccio*, no evidence exists that Wade was as culpable as the other co-defendants. In fact, the State's theory at trial and the record on appeal suggest the opposite. The State did not portray Wade as the ringleader; that dubious distinction was given to Jackson. (12 R 899, 925-926, 13 R 1099-1100). Like *Puccio*, the State argued although Wade not the ringleader, he was a participant. *Id.* Also as in *Puccio*, the evidence from trial, Nixon's testimony, the trial court's order, and the State's own theory of the case shows he was equally or not as culpable as a co-defendant who received a lesser sentence.

Other than *Puccio*, this Court has conducted other disparate treatment reviews involving situations like Wade where one defendant is convicted of First-Degree Murder and the other Second-Degree Murder or less. It is important to note these cases did not limit and foreclose the disparate treatment inquiry to whether one defendant was convicted of First-Degree Murder and the other a lesser, but rather decided on a *factually culpable analysis*, using specific findings of fact in the record to make a disparate treatment determination. *See Howell v. State*, 707 So. 2d 674 (Fla. 1998);

[5] Only one other co-defendant, besides Puccio, was convicted of first-degree murder. *Id.*

Cardona v. State, 641 So. 2d 361 (Fla. 1994); (*Mordenti v. State*, 630 So. 2d 1080 (Fla. 1994); *Cook v. State*, 581 So. 2d 141 (Fla. 1991); *Hayes v. State*, 581 So. 2d 121 (Fla. 1991)

The preceding cases did not find the disproportion necessary for reversal or reduction. However, the cases are distinguishable from the instant case, as they did not have a clear record of equal culpability that included: evidence from trial, the State's theory of its case in chief, the co-defendant's own testimony of his relative culpability, a witness who overheard Nixon say he "buried somebody," and a trial court order's finding of fact inferring same.

Sexton v. State, 775 So. 2d 923 (Fla. 2000) is also informative on this issue. In *Sexton*, this Court stated, "Florida case law is clear – a defendant may not be sentenced to death if a more culpable co-defendant has been sentence to life imprisonment or less. *Id.* [*Conducting a proportionality review from a death-sentenced defendant compared to his twenty five year sentenced co-defendant*]. Wade was sentenced to death while an equal or more culpable co-defendant was sentenced to less than life, in violation of the ruling in *Sexton*.

Hernandez v. State, 2009 Fla. LEXIS 149 is also informative, wherein this court conducted a capital disparate review of co-defendants,

despite the latter co-defendant pleading to non-premeditated felony-murder.[6] In *Hernandez*, the trial court's sentencing order specifically found Hernandez' co-defendant to be less culpable. *Id.* Using the trial court's order and the record, the *Hernandez* court found that Hernandez was more culpable, as he *actually* inflicted the injuries, and cited this fact as a reason why the sentences can be disproportionate although the lesser-sentenced defendant actively participated in the murder. *Id.*

Unlike the facts in *Hernandez*, the record does not show Wade actually inflicted the injuries, and there is no evidence in the record showing that Wade buried the Sumners. (5 R 799-817) Nixon, an eyewitness, admits he did not know who buried the Sumners. (12 R 915, 933) The trial court, in its sentencing order, found, "there is *no direct evidence of exactly what happened (emphasis added)*, the Sumners were placed in the grave and the grave filled in…By that point, Jackson had a small yellow pad containing PIN numbers to the Sumners' accounts." (5 R 834)

All four co-defendants were present during the burial, although two were next to the hole and two were at the road waiting. (12 R 911) The evidence points to Jackson burying the Sumners, as he was the one who carried a yellow notepad away from the scene containing their ATM

[6]The jury did not specify whether it found Hernandez guilty of felony murder or premeditated murder. *Id.*

numbers. (12 R 915) By all accounts, including Nixon's own admissions, Nixon and Wade were equally culpable.

The Florida Supreme Court should find the trial court's order and record on appeal supports the finding Wade and Nixon were equal participants in the crimes against the Sumners. Accordingly, Wade's sentence should be commuted to life.

ARGUMENT TWO:

THE TRIAL COURT ERRED IN NOT CONSIDERING THE DISPARATE TREATMENT OF CO-DEFENDANT NIXON WHEN DECIDING WADE'S MITIGATION AND SUBSEQUENT SENTENCE OF DEATH

At no place in the trial court's sentencing order does it discuss the relative culpability of co-defendant Nixon, nor does it contain a proportionality analysis of Nixon's sentence compared with Wade's. (5 R 799-817) As such, the trial court erred in failing to consider Nixon's disparate sentence of 45 years in prison when sentencing Wade to death, and therefore this Court should reverse and remand Wade's sentence ordering the trial court to consider same.[7]

I. Wade and Nixon were equally culpable in the crimes.

[7]In the trial court's oral pronouncement, he mentions in passing Nixon received 45 years in prison. (7 R 1168)

As discussed at length above in Argument One, the record clearly demonstrates this fact.

II. Nixon and Wade had very similar mitigation.

Much of the mitigation presented by Nixon's counsel at sentencing was applicable to Wade, and was also argued by Wade's counsel in his sentencing, including but not limited too:

A. Both were 18 years of age.

An expert at Nixon's sentencing gave an insightful analysis of how the brain matures and what parts of it mature last and how it relates to culpability of someone committing a crime at age 18. In sum, the expert stated the frontal/prefrontal areas of the brain are the last parts of the brain to fully mature. It process is called myelination, and it deals with cellular maturation of the brain that is involved with the development of associations, that affect brain function. *Id.*

Frontal and prefrontal areas of the brain predominately deal with decision making, controlling impulses, and the ability to manage or not manage excitatory needs. Substantial research finds the main reason that many young people in late adolescent/early adulthood evidence a high rate of crime, and alcohol and drug abuse is that because the prefrontal/frontal areas of the brain have not fully developed.

Research indicates the maturation process is complete at about 21 years of age. Both Nixon and Wade were "only a few months past" their eighteenth birthdays. *Id.* In fact, Wade was approximately two weeks younger than Nixon. The trial court gave great weight to this statutory mitigating factor in Wade's sentencing order. (5 R 812)

B. Both were acting under the Order of a substantially older co-defendant.

Nixon's own admission at Wade's trial evinces this fact. Nixon stated, "me and Alan [Wade] got into this situation, were young had had bad role models at the time". (12 R 925) Nixon also stated, "Jackson was calling the shots in this case". (12 R 899) Wade's counsel argued this fact as a statutory mitigator, which the trial court gave little weight. (5 R 811-812)

C. Both had mental health issues throughout their youth.

Wade was Baker Acted at a young age. (5 R 815) He tried to commit suicide and his principal tried to assist him. Alan failed the 6th grade twice and did not advance to 7th grade until he was 15 years of age. (3 R 599) Alan suffered from depression as a youth and engaged in dangerous games with friends involving choking each other to the point of unconsciousness. (3 R 599) Nixon, "for reasons that did not seem to be within his control," could not maintain any kind of stability living situation.

D. Both had a rather chaotic childhood in a sense they came from a broken family.

The parents of both defendants split up at a very young age. (5 R 812-813) Both were raised in a negative family setting. (5 R 813) Both lacked emotional maturity. (5 R 814)

E. Both essentially were raised by Ms. Gainey, Wade's mother. 5 R 813-816)

F. Both had made a change for the better. (5 R 815-816)

The trial court did not discuss the comparative mitigation between both Nixon and Wade, despite being very similar.

III. The trial court was intimately aware of the similarities between Nixon and Wade's cases, as it presided over both until conclusion.

The trial court was aware of Nixon's culpability in the crime, mitigation, the subsequent sentencing, and the facts contained in his judgment and sentence, as it was the same court that presided over Wade's case. The trial court was aware of Nixon's fate prior to the imposition of Wade's sentence, as Nixon was sentenced December 7, 2007, (Wade was sentenced March 4, 2008) Given the relative culpability of Nixon and Wade's role in this crime, the trial court should have considered Nixon's sentence in deciding Wade's sentence, and sentenced Wade to life, as he was equally or less culpable than Wade.

IV. The trial court was required under *Hazen v. State* to consider the sentence of Nixon as a factor in determining Wade's sentence.

Failure by the trial to conduct the above disparate treatment and/or proportionality review was error. *See* *Witt v. State*, 342 So. 2d 497, 500 (Fla. 1977) The holding in *Witt* makes clear the Florida Supreme Court considers a co-defendant's life sentence a factor had had to be considered. *See also* *Hazen v. State*, 700 So. 2d 1207 (Fla. 1997) [*Holding, "defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same."*]. In *Witt*, this Court said the following regarding the disparity between the Appellant and his co-defendant's sentence.

> Under these circumstances we cannot judicially ignore the discretionary inconsistency in the life sentence given appellant's codefendant Tillman in his severed proceeding. The trial judge agreed to sentence Tillman to life imprisonment in exchange for Tillman's plea of guilty following a determination of competency to stand trial, yet the facts in this case on their face appear to justify the imposition of the death sentence for both the appellant and the codefendant.

Witt v. State, 342 So. 2d 497 (Fla. 1977)

The facts on their face appear to justify the death penalty for both Wade and Nixon. The State Attorney thought so as well, as they sought death on both. The trial court erred in not conducting a proportionality review regarding the disparate treatment of an equally culpable Nixon when

deciding what sentence to administer to Wade. This Court should reverse and remand with instructions for the trial court to create new sentencing order, utilizing Nixon's facts and sentence**.**

The trial court erred in not considering the disparate sentence of co-defendant Nixon when decided the appropriate penalty for Wade. This error is not harmless, as discussed above, Nixon and Wade had similar, if not equal culpability and mitigation in the case. This Court should reverse and remand for a new penalty phase or a new sentencing hearing with instructions to consider the disparate sentence of Nixon.

ARGUMENT THREE

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN BOTH GUILT AND PENALTY PHASE CLOSING ARGUMENT. THE STATEMENTS MADE BY THE PROSECUTION BY THEMSELVES AND CUMALTIVELY DENIED WADE HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL.

When counsel fails to object to improper statements made by the State during closing arguments, the improper prosecutorial comments are not cognizable on appeal absent a contemporaneous objection. *Urbin v. State*, 714 So.2d 411 (Fla. 1998); *Kilgore v. State*, 699 SO. 2d 895 (Fla. 1996)

However, the exception to this procedural bar occurs when the comments constitute fundamental error, defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could

not have been obtained without the assistance of the alleged error. *Id*. *See also: Urbin v. State*, 714 So. 2d 411 (Fla 1998)*; Ross v. State*, 726 So.2d 317 (2nd DCA 1998), [*Holding that because of the prosecutor's improper closing arguments and the defense counsel's failure to object to a new trial was proper because*, "*the Sixth Amendment right to counsel exists in order to ensure the fundamental right to a fair trial*."]

When an objection and motion for mistrial are made by a criminal defendant complaining that there was an improper comment on his exercise of his right to remain silent, the trial court must determine if such an improper comment occurred. If the court finds that there was not such an improper comment, the objection should be overruled. In that event, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal. *Simpson v. State*, 418 So. 2d 984 (Fla. 1982)

In the instant case, the prosecutor's comments made in closing arguments in both the Guilt and Penalty trial made the proceedings presumptively unreliable and unfair. Therefore, a new trial should be granted because a verdict of guilty would not have been obtained without the assistance of the alleged error. *See Bonifay v. State*, 680 So. 2d 413 (Fla. 1996)

Improper Comments on Facts in Record

The state made highly improper and misleading statements to the jury when referencing State witness Bruce Nixon during the guilt phase closing arguments. The state first attempted to imply that they did not "choose" Mr. Nixon as their witness, stating that "Alan Wade chose Bruce Nixon as our witness." The plain truth of the matter was that Mr. Nixon was offered a deal by the State in exchange for testimony against his three co-defendants. Mr. Wade did not tell Bruce Nixon to testify against him or any of the codefendants at trial, nor did he offer Bruce Nixon's name as a potential witness.

The state chose to place the onus on Mr. Wade for "forcing them" to use Mr. Nixon as a witness despite the principal theory of equal culpability, on which the state spends a portion of their closing argument explaining as a means to convict Mr. Wade:

> If Wade helped Jackson, Cole, and Nixon do a crime then he is a principal and must be treated as if he had done everything that they did, everything that they did, everything that they did if he had a conscious intent that the crime by done. He did something to help. He did something to assist and he does not even have to be present when the crime is committed…Thinking of principals in another way, it's one for all and all for one. When you're in you're in and Alan Wade was in from the very beginning.

(13 R 1047-1048)

Later, after the state has clearly attempted to link all four co-defendants as being equally culpable to the crime, the state then attempts to lessen the culpability of its main witness Bruce Nixon by saying that his deal wasn't in fact a deal at all:

> However it isn't really a great deal. Bruce Nixon told you what kind of deal it was when he was cross examined and Mr. Eler said 52—you don't see the difference between 52 years and life and a 20 year old boy said "not really". Seems to me that it's about the same.
>
> So why would this guy lie [Mr. Nixon], to get that deal? To get life?

(13 R 1061-1062)

The truth is that Mr. Nixon was sentenced to 45 years for all 6 charges brought in the shared indictment against all four co-defendants, not a life sentence, while the other three received death sentences. (Appendix B, pg. 53)

The misrepresentations to the jury of first placing the onus of witness selection for the state on the defendant, then attempting to gloss over and lessen the culpability of the co-defendant in order to legitimize the reduced sentence and deal he was given, represent both a violation of the prosecutor's code of ethics, and improper comment on the evidence that was presented to the jury. *Goddard v. State*, 143 Fla. 28 (Fla. 1940); *Williamson v. State*, 459 So. 2d 1125, 1128 (Fla. Dist. Ct. App. 3d Dist. 1984); *Redish v.*

State, 525 So. 2d 928, 931 (Fla. Dist. Ct. App. 1st Dist. 1988); *Singletary v. State*, 483 So. 2d 8 (Fla. Dist. Ct. App. 2d Dist. 1985).

The misstatements at to the severity of Mr. Nixon's deal, labeling Mr. Wade as the person somehow responsible for the state offering a deal to Nixon in exchange for testimony, and the misrepresentation of the facts as presented at trial as to Nixon's reduced culpability, constitute a finding of fundamental error which warrants a new trial in the instant case.

Improperly Vouching for the Credibility of State Witness

The state continued in the guilt phase by impermissibly vouching for the credibility of Bruce Nixon, asking the jury to imagine why Bruce Nixon would have any reason to lie as his deal was essentially a life sentence:

> Why would Bruce Nixon lie?...So why would this guy lie, to get that deal? To get life?...There is no way that Bruce Nixon is that bright.

(13 R 1061-1064)

> The only reason he was involved [Bruce Nixon] was because he wanted money and his best friend gave him the opportunity and he told the police the truth.

(13 R 1102)

These statements represent both an improper comment on the evidence, as discussed herein previously, as Bruce Nixon did not receive a

life sentence but instead received 45 years, and an improper vouching argument for the credibility of the state's witness.[8]

In this case, the state attempted to vouch for Nixon's credibility by implying that his deal in exchange for testimony was a life sentence, when in fact it was only 45 years, and that because he was sentenced to life he therefore had no reason to lie to the police. The state also implies that Bruce Nixon was not smart enough to come up with such an elaborate scheme on his own, thereby inviting the jury to view his lack of intelligence or creativity as a reason to believe his testimony.

Both examples constitute an impermissible form of vouching for the witness. *See* Gorby v. State, 630 So. 2d 544 (Fla. 1993), [*Holding "It is improper to bolster a witness' testimony by vouching for his or her credibility*."] *See also:* Redish v. State, 525 So. 2d 928 (Fla. Dist. Ct. App. 1st Dist. 1988) *[Holding "Prosecutorial comment which has the effect of invading the province of the jury by emphatically directing the jurors as to how the evidence should be viewed is barred. Ultimate deductions from the evidence are for the jury to draw."]*

[8]In fact, according to Nixon's plea colloquy on March 12, 2008, Nixon could have received a much lower sentence than 52 years, upon a judicial finding of substantial mitigation in Nixon's sentencing.

The prosecution clearly vouched for the testimony of Mr. Nixon by informing the jury that his credibility was good in explaining that: a) Nixon's sentence was a life sentence and therefore gave him no reason to lie, when in fact it was only 45 years, or b) claiming that his lack of intelligence didn't allow him to be creative enough to falsify testimony against Mr. Wade.

Both statements are examples of impermissible vouching for the credibility of a witness by the prosecution, and constitute fundamental error warranting a new trial.

Golden Rule Violations

The state made two Golden Rule violations, one in guilt phase closing arguments, and one in penalty phase closing arguments. Golden Rule violations, which invite the jury to place themselves in the place of the victim, have been deemed impermissible countless number of times in Florida Case law. The defense objected to the guilt phase violation (13 R, 1108) (argued in the forthcoming claim, argument 4), but did not in the second instance. (13 R 1106-1107)

In the penalty phase the prosecution attempted to impermissibly influence the jury through the creation of an imaginary script and inviting them to place themselves in the victim's situation:

> How about being driven down that road, stopping for gas in a trunk not knowing what's going on, wondering where they are at, why have they stopped, are they going to be set free, what is in store for them? Was their horror over? No, it had just begun. A 35 mile drive going to where they could not know, probably 45 minutes in the trunk of their car, perhaps more. They get to somewhere else. They stop. They don't know where they're at. There are no lights. There are no friends. There's no family.

(14 R 1302)

Both examples constitute an example of a Golden Rule violation. See *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951); *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004); *Urbin v. State*, 714 So. 2d 411 (Fla. 1997); *Garron v. State*, 528 So. 2d 353, 358 (Fla. 1988)

Neither of these Golden Rule violations can be construed as fair and impartial comments on the evidence, and both represent fundamental error warranting the granting of a new trial.

Improperly Instructing the Jury

Finally, the state impermissibly asserted that any juror's vote for life would be irresponsible and would constitute a violation of the juror's lawful duty. In penalty phase closing arguments the prosecution said the following:

> You might hear an argument about 'life is enough'. Life is however many years he's got left and he leaves that prison only when he dies. What I suggest to you is that [this] argument tells you that this defendant should not be held fully accountable for his actions. That argument in essence says, 'let's take the easy way out'.

(14 R 1308)

In *Urbin v. State*, 714 So. 2d 411 (Fla. 1997) this court stated that the nearly identical wordage and argument was impermissible per prior rulings in *Redish v. State*, 525 So. 2d 928 (Fla. 1st DCA 1988); *Henyard v. State*, 689 So. 2d 239 (Fla. 1996); *Rhodes v State*, 547 So. 2d 120 (Fla. 1989) and *Garron v. State*, 528 So. 2d 353, 358 (Fla. 1988)

The insinuation that a life sentence would somehow not be holding the defendant "fully accountable", and that in voting for life a juror would be "taking the easy way out" is clearly impermissible. This argument can only be seen as an attempt to pervade into the duty of the jury and to unduly pressure the jury into voting for death using the prosecution's own opinions and moral conviction.

Florida law declares that a sentence of Life in Prison or the death penalty constitute suitable punishment for a conviction of First Degree Murder, and the opinions of the prosecution cannot be allowed to impermissibly influence the jury at trial. See *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985), and *Campbell v. State*, 679 SO. 2d 720 (Fla. 1996). As such, these statements constitute a clear violation of previous case law, and defendant should be granted a new trial.

Improper Comment on Defendant's right to testify

During closing arguments of the penalty phase, the prosecution made an impermissible comment on the defendant's right to testify (13 R 1102), which was recognized and objected to at trial. (13 R 1307) Specifically, the prosecution stated:

> Bruce Nixon was the last one in and the first one out. There is no evidence that Alan Wade said a word to law enforcement about Bruce Nixon.

(13 R 1102)

This statement is a direct comment on Mr. Wade's decision not to testify in his defense. This comment insinuates that because Mr. Wade chose not to testify and present an alternative to the state regarding the content of Nixon's testimony, that he is in fact guilty because he, unlike Bruce Nixon, did not confess to law enforcement after the murders. Counsel objected to this statement, and subsequently moved for a new trial, which was denied by the trial court. (13 R 1107)

The Fifth Amendment right to silence is guaranteed by the United States Constitution and has been interpreted to include the right to decline testifying at one's own trial. *Miranda v. Ariz.*, 384 U.S. 436 (U.S. 1966)

This is a fundamental right of a citizen, and the insinuation that a failure to testify in ones defense represents guilt is a blatant impropriety on

behalf of the prosecution, subject to a new trial. *See* Miller v. State, 847 So. 2d 1093, 1094-95 (Fla. 4th DCA 2003) *(finding that prosecutor's closing statement that the defendant has the right to remain silent and that "he did not take the stand in this case" impermissibly highlighted the defendant's decision to not testify)*; Layton v. State, 435 So. 2d 883, 883-84 (Fla. 3d DCA 1983) *(finding that prosecutor's closing remark that the defendants "have been sitting here . . . listening to how each witness testified" was an impermissible comment on one defendant's decision to not testify)***;** Fernandez v. State, 427 So. 2d 265, 265-66 (Fla. 2d DCA 1983) *(finding that prosecutor's closing statement "I would suggest to you during this entire trial the defense has rested. I haven't heard a defense yet" clearly commented on the defendant's failure to testify)***;** Hall v. State, 364 So. 2d 866, 867 (Fla. 1st DCA 1978) *(finding that prosecutor's closing remark that the defense had to use a particular defense tactic "because [the defendant] is sitting over here quietly" referred to the defendant's silence during cross-examination testimony rather than during the closing argument and was thus impermissible).*

The comment in the instant case is analogous to the same kind of impermissible statements as made in the above examples. Lately, Florida Law has attempted to analyze the context from which a statement made by

the prosecution is made when ruling on this issue. *See* Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003) *(finding that the prosecutor's statement during closing argument emphasizing uncontradicted evidence of the defendant's actions was for the purpose of rebutting a defense argument and not to impermissibly direct attention to the defendant's decision to not testify)*; Chandler v. State, 848 So. 2d 1031, 1043-44 (Fla. 2003) *(finding that prosecutor's closing remark telling the jury to "think about all the things [the defendant] wouldn't talk about and didn't say" was not an improper comment on the defendant's Fifth Amendment rights)*; State v. Jones, 204 So. 2d 515, 517 (Fla. 1967) *(finding that prosecutor's statement "these are the acts and conduct of the defendant," when read in full context of the closing argument, did not refer to the defendant's decision to not testify)***;** *see also* Bauta v. State, 698 So. 2d 860, 864 (Fla. 3d DCA 1997) *(finding that although the challenged closing statement was improper when taken in isolation, the statement was permissible when read in context)*

When addressed alone, or in the context of the entire point from which it arose, the result is the same in the instant case. The prosecution was blatantly referring to the decision of Mr. Nixon to confess to the police, and asking the jury to remember that Mr. Wade chose not to speak to either speak to the police at the same time Nixon did, or rebut Nixon's testimony at

trial. This comment constitutes reversible error and Mr. Wade should be granted a new trial as such.

ARGUMENT FOUR

THE TRIAL COURT COMMITTED REVERSABLE ERROR IN NOT GRANTING THE DEFENSE'S MOTION FOR MISTRIAL, AFTER THE PROSECUTION COMMITTED A GOLDEN RULE VIOLATION

I. The prosecution's Golden Rule violation

In their guilt phase closing argument, the prosecution improperly asked the jury to put themselves in the place of the Sumner's, when they stated:

> Reggie and Carol Sumner were more than the people who were in a hole while dirt was piled shovel upon shovel upon shovel not knowing ho long it took to fill up that hole until their chests were compressed and they could not breathe, until dirt and debris was inhaled in their nose and their mouth and down their trachea until they were smothered and compressed and buried alive…When you are done I ask you to walk out not into the darkness of greed, into the terror of the night drive in the back of a trunk, but into the light of justice.

(13 R 1106-1107)

These statements were clear Golden rule violations and violated Wade's right to a fair trial by impartial jurors. *Urbin v. State*, 714 So. 2d 411 (Fla. 1997); *Garron v. State*, 528 So. 2d 353, 358 (Fla. 1988); *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951); *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004).

Much like the prosecution's comments in Bullard v. State, the prosecution in Wade asked the jurors to imagine themselves in the back of a trunk, at night, while the car was being driving by greed. (13 R1106-1107). *See* Bullard v. State, 436 So. 2d 962 (Fla. 3rd DCA 1983). *[*Finding a golden rule violation and reversing appellant's conviction on the improper prosecutorial comment, i.e. "*Imagine yourselves as coming out of a club, imagine some individual coming up to you, pointing a gun in your face like this, tell me what you see, give me your money, give me watches, give me everything you got –].*

II. Defense counsel immediately objected to the improper Golden Rule violation, requesting a mistrial

Upon hearing the above improper comment, both defense counsels for Wade objected. (13 R 1107-1108). The following dialogue took place:

> Mr. Eler: "Judge, I'm going to move for a mistrial. There's a couple of areas in the prosecutor's closing argument that I think are objectionable under Florida law. One was found, I guess, at 14:39:26 of the real time where he indicates - - Mr. Plotkin indicates no evidence that Alan Wade ever said anything to law enforcement about Bruce Nixon. That's a comment on his right to remain silent and it shifts the burden of proof." *Id.*
>
> But the other, I think, which is even more egregious came at the end where he's talking about greed got us here to the courtroom. I don't have an exact quote. Maybe Mr. Tassone does, but when - - I ask you that when you walk out of here that you

walk back in this community or something to that effect. It's a violation of the golden rule, Judge. In puts the jurors in, I guess, the victim's place."

Mr. Tasssone: "And when he [the prosecution] talked about - - think about the night drive on the way to darkness and greed and – and I would ask the Court to review the transcript itself because it's clear golden rule violation."

The Court: "Motion is denied."

(13 R 1107-1108)

Upon the conclusion of this sidebar conference, the trial court thanked the jurors for their attention, and gave them the jury instructions. (13 R 1108)

This is not mere harmless error. This was the last thing the jury heard before from the prosecution regarding the facts of the Wade case before they deliberated on Wade's guilt. Moreover, Wade's culpability as to first-degree murder was not "lock-tight." There was no confession or witnesses, despite the co-defendant Nixon's testimony. The prosecutor went as far as to opine, "in the Wade case perhaps there would not have been a conviction but for Bruce Nixon's cooperation."

Wherefore, the trial court erred in not granting Wade's motion for mistrial. Wade's judgments and sentences should be reversed.

ARGUMENT FIVE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY AS THE DEATH SENTENCING SCHEME IN FLORIDA DOES NOT COMPLY WITH THE REQUIREMENTS AS SET FOR IN *Furman v. Georgia*, 408 US 238 (1972)

Trial Counsel for Mr. Wade filed a Motion to Preclude Imposition of the Death Penalty (4 R 757-764) and accompanying Memorandum of Law on November 11, 2007. (4 R 602-756) The motion was denied by the trial court without argument on January 30, 2008. (7 R 1156)

The motion and accompanying memorandum contained facts from a study conducted by the Capital Jury Project (CJP) which was sponsored by, and the results of which were ultimately endorsed by, the National Science Foundation. The purpose of the CJP was to test whether the death penalty statutes and procedures approved by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976) had succeeded in satisfying the concerns of the Supreme Court of arbitrariness in sentencing of death penalty cases expressed in *Furman v. Georgia*, 408 U.S. 238 (1972).

The CJP was a sociological study conducted from post-sentencing survey data from over one thousand two hundred (1200) actual death penalty jurors who participated in a combined total of three hundred fifty four (354)

capital trials covering fourteen (14) states, including Florida, from 1988 to 1995.

The United States Supreme Court had made it clear that social scientific research and studies of capital sentencing schemes must use actual jurors from capital punishment trials in order to comprise legitimate and usable data. See *Witherspoon v. Illinois*, 391 U.S. 510 517 (1987); *Lockhart v. McCree*, 476 U.S. 162, 171 (1986); *McCleskey v. Kemp*, 41 U.S. 279 (1987).

In an effort to present actual scientific data which courts may rely upon in making determinations, and to comply with federal law, the findings of the CJP were based on 3-4 hour in-depth interview of each juror who previously served on a death penalty jury that chronicle the jurors' experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.

The CJP identified several unresolved problems existing in the current statutory capital sentencing schemes of the fourteen (14) states studied, which include the following[9]:

[9]The undersigned refers the Court to ROA Volume 4, pages 602-764 for a full presentation of the results, findings, and analysis of the study, and the subsequent legal argument presented to the trial court. Given page

a. Rampant premature death penalty decision making by the jury;
b. Failure of the jury selection process to remove a large number of death biased jurors;
c. Pervasive failure by jurors to comprehend and/or follow death penalty instructions;
d. Erroneous beliefs amongst jurors that the death sentence is required;
e. Wholesale evasion of responsibility for the decision imposing the death penalty;
f. Racism in the determination and imposition of the death penalty; and
g. Significant underestimation of the alternative to death.

Experts, Dr. Foglia and Dr. Bowers, both noted experts, have interpreted the results from the CJP as follows:

1. Approximately fifty (50) percent of all jurors absolutely thought they knew what punishment should be given during the evidentiary (guilt) phase of trial and prior to the start of the sentencing phase (thirty (30) percent absolute for imposing the death penalty and twenty (20) percent absolute for not imposing the death penalty). These jurors do not waiver from these decisions which were made prior to the start of the sentencing phase.
2. Sixty (60) percent of jurors with a pro death position did not change their premature death penalty provision and ninety-seven (97) percent of all pro death penalty jurors felt strongly about their pro-death penalty position during the evidentiary phase of trial.
3. Thirty (30) percent of jurors fail to understand the instruction that aggravation must be proven by a standard of beyond a reasonable doubt.

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limitations to the initial brief, the majority of the studies findings, analysis, and legal argument presented in the motion and memorandum cannot be listed herein.

4. Thirty (30) to forty-four (44) percent of jurors fail to understand the instruction, legal standard and legal considerations regarding mitigating evidence.
5. Twenty-four (24) to seventy-one (71) percent of jurors believed that the death penalty was the only acceptable punishment for six (6) specific types of murder.
6. Thirty-seven (37) to forty-four (44) percent of jurors understood that the death penalty would be required if the defendant would be dangerous in the future or the defendant's conduct is heinous, vile or depraved.
7. Only fifteen (15) percent of jurors believe that individual jurors or the jury as a whole is/are responsible for the defendant's punishment (imposition of the death penalty).
8. Jurors in all fourteen (14) states underestimated (by statistical median averaging) the sentence which the defendant would receive if the death penalty was not imposed.
9. At sentencing, jurors who estimated the non-death penalty sentence to be twenty (20) years or longer are 11.8 percent less likely to impose the death penalty over jurors who estimated the non-death penalty sentence to be from zero (0) to nine (9) years.

Finally, the study scientifically determined that **nearly one-half of the 1,200 actual death penalty jurors participating made a premature determination regarding the imposition of the death penalty**, and therefore this significant percentage indicates the Court must take steps to protect the Defendant's right to a fair trial without premature determination of the death penalty.

In comparing the results of the CJP study to the instant case, we find aspects of the findings and data produced by the CJP study born out and

evidenced. Given that the jurors in Wade were not given the survey used in the study, nor were they subsequently interviewed or questioned, the only available window into the minds of the jurors we have is in Voir Dire.

In comparing the instant case to the evidentiary findings of the second conclusion of the study, i.e. that jury selection fails to remove a large number of death biased jurors, we see proof of the study's findings mirrored in the instant case. This fact is first evidenced by the systematic removal by both the court and the state of any persons who indicated some hesitancy in recommending a Death Sentence.

Counsel for Mr. Wade asked each potential juror to rate on a scale of 1 to 5 their belief in the death penalty, with 1 indicating little to no support, and 5 indicating complete support. Of the 70 potential jurors in the voir dire pool, 59 were asked the question[10], and only 6 potential jurors indicated a score of 2 or lower. Of these 6 potential jurors[11] who indicated that their support for the death penalty was 2 or lower, 4 were struck via peremptory strike by the state, 1 was struck by the court for cause despite being rehabilitated by the defense counsel (see argument seven herein), and the

[10] The remaining 11 had already been excused for cause at the point in voir dire when the questions was asked, or were excused by the court without giving an answer to defense counsel.

[11] Potential Jurors Elmasllari, Kardatzke, Sikes, Corsano, Butler, and Stebbins.

remaining one was struck for cause as she indicated that she could not in any circumstance vote for a death sentence. (9 R 243-362)

Ms. Sikes indicated in voir dire that the death penalty was a “horrible necessity” (8 R 155) and was peremptorily struck by the state. Ms. Willinger stated that she did not believe in the death penalty (8 R 151), however she stated that she could put her personal beliefs aside and follow the law indicating a 3 out of 5 support for the death penalty, but was struck peremptorily by the state. (9 R 361) Mr. Elmasllari evidenced complete confusion as to the law, as his answer indicated that if found guilty then death was mandatory when he stated that, “If the evidence speak for itself(sic) and there is clear proof that the suspect committed this murder then I would say yes.” (8 R 153) He later indicated that his support for the death penalty was 2 out of 5. (9 R 243) He was struck by the state peremptorily. (9 R 361) Ms. Kardatzke stated that “I don’t like it but I have to go by the letter of the law” (8 R 155) and indicated support for the death penalty as 2 out of 5. (9 R 245) She was also struck peremptorily by the state. (9 R 364)

Bias for the death penalty in the potential pool is further evidenced by the following statistics: Of the 59 jurors who were asked the question to gague their support for the death penalty, 53 indicated support at a 2.5 level

or higher per the scale offered by counsel. 19 potential jurors indicated a score of 5 out of 5. 21 indicated a score of 4 out of 5. This then evidences that 67% of jurors asked indicated that they were strongly in support of the death penalty.

Of the 14 actual jurors selected for Mr. Wade's trial, four gave defense counsel a score of 3, six gave a score of 4, and four gave a score of 5. (9 R 243-362) All actual jurors in Mr. Wade's case indicated in voir dire that they supported the death penalty, and the few potential jurors that showed a lack of support were struck for cause or were weeded out of the jury by the prosecution through the use peremptory strikes.

This strong bias towards death, as demonstrated in the findings of the CJP study, was evidenced in the instant case by the failure of the trial court to reciprocate and strike jurors who indicated a near manic support for the death penalty.

Not struck for cause based on their strong opinions on the death penalty were potential jurors such as Ms. Cue, who indicated in voir dire that "If a life has been taken, an innocent life has been taken, then a guilty life should be taken also." Ms. Cue indicated that she might require the defense to prove that a life sentence was deserved instead of the death penalty should a penalty phase be necessary, despite having been explained that the burden

of proof falls on the state, and not the defense. (8 R 167) The defense was forced to use a peremptory challenge on Ms. Cue, as she was not struck for cause despite her answers. (9 R 367)

Potential Juror Duchovany stated that she "fully agreed" with Ms. Cue's assessment and stance on the death penalty (8 R 168), however fortunately Ms. Duchovany was excused for cause due to matters related to scheduling and not to her position regarding the death penalty and ability to follow the law. (9 R 349)

Potential Juror Mr. Dunkle stated that, "I believe that if innocent people are murdered then the Death Penalty should be applied", and that he agreed "in a way" that the Death Penalty should not be applied to every murder case. (8 R 168) Mr. Dunkle was struck as a potential alternate juror by the state. (9 R 368) Apparently his support of the Death Penalty was not fervent enough for the state.

Potential juror Mr. Meyers indicated that he had "no problem" handing down a death recommendation (8 R 164), and indicated his support for the death penalty as 5 out of 5. (9 R 252) The defense was forced to use a peremptory challenge to remove him from the jury. (9 R 364)

Potential Juror Garrett stated in voir dire that "I believe that if someone takes someone else's life or something like that and it's proven that

they done it I believe they should die too." (8 R 171) While Mr. Garrett did not sit on Mr. Wade's jury, his and the other preceding jurors statements serve to evidence and prove the finding of the CJP study in that a premature decision into the penalty had already been made in a number of potential jurors minds.

In looking at the responses of the actual jurors in Mr. Wade's trial, it is evidenced that 10 out of 14, or 71%, indicated strong to very strong support for the death penalty. Given that 67% of the entire jury pool who gave an answer to counsel's query showed strong support for the death penalty, the final jury composition is: a) consistent and representative of the entire panel, and b) reflects the predominant and inherent bias for death, as found in the results of the study conducted by the CJP.

In short, all actual sitting jurors indicated strong to very strong support for the death penalty, and no potential jurors who showed any hesitancy in recommending death were allowed to sit as jurors. This bias is ultimately reflected in the 11 to 1 recommendation made by the jurors at the conclusion of the penalty phase. Wade will admit that a complete comparative analysis of all the findings of the CJP to the instant case is impossible without actually questioning the actual jurors in his case, however using the data and

statements of the potential jurors in voir dire clearly indicates that the findings of the CJP are born out and evidenced in the instant case.

Finally, the scientific results of this study have been adopted in at least one US court as of the penning of this argument. On June 8, 2007, the First Judicial District Court of New Mexico granted a new penalty phase in two death cases, *State of New Mexico v. Jesus Aviles Dominguez*, D-0101-CR-200400521 and *State of New Mexico v. Daniel Good*, D-0101-CR-200400522, whereby the court ruled[12] that the capital death sentencing scheme of New Mexico does not protect a defendant's right to a fair trial or an arbitrary and capricious application of the death penalty.

The court reasoned that because the results of the study proved that nearly ½ of actual jurors questioned had made an actual determination of death during the guilt phase of trial, it was impossible to ensure a defendant's rights without adopting a scheme that provides for separate juries to sit for the guilt and penalty phases of a capital trial. A scheme that utilizes one such as New Mexico and Florida, i.e. one the empanels the same jury for guilt and penalty phases, does not provide protection against a premature decision of death prior to the completion of the penalty phase, and thereby does not comply with the principals mandated in *Furman* stating:

[12] See http://capitaldefenseweekly.com/library/TGarciaCJP.pdf for a PDF of the actual order entered in both cases granting a new penalty phase.

> Science has now proven that despite the United States Supreme Court's desire to allow the States to establish standards to guide juries through the evidentiary and sentencing phases of death penalty cases, premature decision making has not been eliminated and continues to be done by nearly half of all death penalty jurors. Without separate juries during the evidentiary and sentencing phases of trial, Defendants rights under United States and New Mexico Constitutions are being violated. Separate juries will be required for the evidentiary and sentencing phases of this trial. All portions of the New Mexico Capital Sentencing Act inconsistent with the impanelment of a separate jury for the death penalty sentencing phase of this trial are determined to violate the United States Constitution and the New Mexico Constitution.

The capital sentencing scheme of Florida does not comply with the safeguards as set forth in *Furman* and its progeny, and as such Mr. Wade's sentence of death was made in violation of his 8th amendment protections. The trial court erred in summarily dismissing the motion as presented without a hearing, as the motion required factual legal testimony as to why using the same jury in both stages of a bifurcated jury trial would not meet the constitutional protections demanded in *Furman*. A new penalty phase that ensures a lack of pro-death bias should be granted.

ARGUMENT SIX

THE TRIAL COURT ERRED IN DENYING MR. WADE'S MOTION TO STRIKE STATE'S NOTICE OF INTENTION TO SEEK DEATH PENALTY AND MAKE DEATH NOT A POSSIBLE PENALTY BASED ON FAILURE OF THE STATE OF FLORIDA TO HAVE UNIFORM STANDARDS FOR DETERMINING WHETHER TO SEEK THE DEATH PENALTY IN VIOLATION OF MR. WADE'S

EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS

Trial Counsel for Wade filed a 'Motion to Strike State's Notice of Intention to Seek Death Penalty and Make Death not a Possible Penalty Based on Failure of the State of Florida to have Uniform Standards for Determining Whether to Seek the Death Penalty' on September 12, 2007. (3 R 423) This motion was denied by the trial court in an Order date October 12, 2007 without hearing or argument on same. (3 R 430)

Florida's Capital sentencing scheme does not meet the standards as set forth in *Furman v. Georgia*, 408 US 238 (1972) and *Gregg v. Georgia* 428 U.S. 153 (1976) in ensuring that all death penalty sentences do not constitute an arbitrary and capricious sentence of death. Florida's 20 judicial circuits have no uniform procedure enacted to ensure adherence to Federal law.

Nor does the State of Florida's Capital sentencing scheme meet the standards set forth in Fla. R. Crim. Pro. 3.701(b) which has the stated purpose of "establishing a uniform set of standards to guide the sentencing judge in the sentence decision making process".

While the decision to seek death remains within the boundaries of the prosecution, it is still subject to constitutional restraint. See *Johnson v. Mississippi*, 486 U.S. 578 (U.S. 1988), *[holding "Although we have acknowledged that "there can be 'no perfect procedure for deciding in which*

cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process."] (Quoting *Zant v. Stephens*, 462 U.S. 862, 884-885, 887, n. 24, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983))' see also *State v. Bloom*, 497, So.2d 2 (Fla. 1986); *Wayte v. United States*, 470 U.S. 598 (U.S. 1985), *[holding that "Although prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights."]*

The qualitative difference of death from all other forms of punishment requires a correspondingly greater degree of scrutiny by the Court in cases involving a capital sentencing determination. *Turner v. Murray*, 476 U.S. 28 (1986)

***Carter v. State*, 980 So. 2d 473 (Fla. 2008)**

Carter is a Florida Death Case originating from the Fourth Judicial Circuit, and offers a backdrop that is instructive in distinguishing the issue at bear from a similar issue which has been argued in prior Florida cases.

Carter presented an issue first with the trial court, and later on direct appeal, pertaining to a letter that was written by the Office of the State Attorney to the Government of Mexico. Prior to the arrest of Mr. Carter in Kentucky, the Office of the State Attorney agreed to waive seeking the Death Penalty in exchange for Mexico's assistance in locating Carter, who was believed to be at large in Mexico at the time the letter was written. Trial Counsel for Carter argued pre-trial that the State was bound by the promise contained in its letter to waive seeking the death penalty. The trial court ultimately ruled that the prosecution was not bound by their agreement with Mexico, as Mexico ultimately did not find and extradite Mr. Carter to the US. As stated, a hearing on this motion was held with the trial court, and argument was presented.

At the motion hearing, trial counsel conceded that while prosecutorial discretion is a well established principle, citing *State v. Bloom*, 497, So.2d 2 (Fla. 1986) which upheld a challenge to Article II, Section 3, Florida Constitution, *(stating that "where impermissible motives may be attributed to prosecution, such as bad faith, religion, or a desire to prevent the exercise of a defendant's constitutional rights")*, that it should be extended to include the circumstances present in Carter's case. However trial counsel offered no

further authority in support of this issue. The trial court denied this motion in an order dated April 18, 2005 after a hearing on same.

Trial counsel for Carter relied in part on *Adamson v. Ricketts*, 758 F.2d 441 (1985), a case from the US Court of Appeals 9th Circuit, to support their contention of selective prosecution. The reliance on this case however was misguided as *Adamson* involved a defendant who originally pled guilty to first degree murder, violated the terms of the plea agreement, and was subsequently sentenced to death. Adamson claimed that the imposition of the death penalty after having received a prison sentence comprised an arbitrary application of the death penalty, and sought to rely on the principle established in *North Carolina v. Pearce*, 395 US 711 (1969) that upon resentencing following a new trial, if a defendant receives a harsher sentence than that administered after his first trial, the sentencing court cannot act vindictively by imposing an additional punishment for the defendant having availed himself of his procedural remedies. *Adamson* at 448

Adamson's reliance on this principle was misguided, so too was trial counsel's in *Carter* per their argument of selective prosecution. Trial counsel in *Carter* failed to adequately address a significant implication inherent in the letter to Mexico from the State Attorney, namely that the process by

which the prosecution arrived at the decision to seek death was inherently flawed.

On direct appeal, Carter presented this issue to the Florida Supreme Court, who stated the following:

> Carter next claims that the State is bound by its letter to Mexican officials offering to forego the death penalty if the Mexican government returned him to the United States. He argues that the State must adhere to its offer under contract principles and the doctrine of judicial estoppel. This claim is meritless. First, under contract principles, the State did not receive the benefit of the bargain. There was no quid pro quo. *Cf.* State v. Swett, 772 So. 2d 48, 52 (Fla. 5th DCA 2000) ("[T]he plea was part of a deal whereby the prosecutor reduced the murder charge to second degree murder in exchange for the plea. The sentence was part of a *quid pro quo* and the defendant cannot accept the benefit of the bargain without accepting its burden."). The State's promise was conditioned upon the Mexican government's return of Carter. That condition was never fulfilled because the Mexican government released Carter before the State's letter reached the appropriate officials. He was subsequently arrested in Kentucky with no help or assistance from the government of Mexico. Therefore, the State is not bound by its offer.
>
> Second, the doctrine of judicial estoppel does not apply. "Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings." *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (quoting *Smith v. Avatar Properties, Inc.*, 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998)). The doctrine prevents parties from "making a mockery of justice by inconsistent pleadings," *American Nat'l Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983), and "playing fast and loose with the courts." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). In this case, the State has not taken inconsistent

> positions in any relevant judicial proceeding. The letter at issue was a communication between the State and the Mexican government while Carter was confined in Mexico. Mexico released Carter from custody prior to receiving the letter and did not turn him over to the State of Florida. Carter was apprehended in Kentucky months later. The State's ultimate decision to seek the death penalty does not impair the integrity of the courts of Florida.

Carter, at 484

Application to Wade

While Wade does not challenge the finding of the Florida Supreme Court in relation to doctrine of judicial estoppel, the Carter case presented a unique revelation regarding the process used by the State Attorney's office in determining whether to seek death in Capital cases that warranted further investigation pertaining to Wade's case.

By willingly entering into a cooperative agreement with the Mexican government, in *Carter* the state attorney candidly admitted that: 1) circumstances present in capital cases did not demand the death penalty without exception, 2) that a life sentence represented adequate punishment in Capital cases, 3) that the that the needs of the victim(s) family could be met in a capital case through a life sentence which thereby nullifies the retribution and deterrence justifications made in support of a finding of the death penalty. *See* *Gregg v. Georgia*, 428 US 153, 183, 96, S. Ct. 2909, 49 L. Ed. 2d 859, and finally 4) that the decision to seek the death penalty is

always in part an arbitrary and subjective decision made on behalf of the prosecution.

Prosecutorial discretion, as defined and intended by the argument presented in *Carter* and *Bloom* is not the crux of the issue presented by the prosecution's decision to seek the death penalty in Wade's case, or in any other capital case for that matter. Cases such as *Bloom* and *Wayte v. United States*, 470 U.S. 598 (U.S. 1985), held that, *"Although prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights."*

In contrast, the actual decision to seek the death penalty, while falling under the broad umbrella of "prosecutorial discretion", represents a separate issue that is subject to more stringent constitutional protections than would a separation of powers challenge (as was made in *Bloom*), or a "selective prosecution" challenge to a decision to file an indictment based on race or religion.

An eighth amendment challenge to arbitrary application of the death penalty on the basis of race was raised in *Freeman v. AG*, 536 F.3d 1225,

1232 (11th Cir. Fla. 2008) which stemmed from a 1986 case originating in the same Florida judicial circuit asWade's case. While the issue of race discrimination is not a factor in Wade's case, as all co-defendants were white, what is important is that the 11th circuit relied on the ruling in *Gregg v. Georgia* to define its reasoning in denying Freeman's claim. The 11th circuit held the following:

> A state must ensure that the discretion of its prosecutors is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 302, 107 S. Ct. at 1772 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932 (1976)). **If the State of Florida (acting through the State Attorney's Office) failed to "establish rational criteria [narrowing] the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold" for a capital sentence, it would violate the Eighth Amendment. *Id.* at 305, 107 S. Ct. at 1774. However, Freeman does not challenge the well-organized, multi-tiered process employed by the Florida State Attorney's Office in determining whether to pursue a capital sentence in any given murder case.** Instead, Freeman argues "[b]ased on the facts presented at the evidentiary hearing below, it is apparent that . . . [t]he State's selection of Mr. Freeman as a candidate for the death penalty was based upon arbitrary factors unrelated to the circumstances of the offense or the character of the defendant." Petitioner-Appellant's Brief, at 16-17. The problem with that argument, of course, is that it is completely undermined by the state court's adverse factual finding. By specifically finding the State Attorney's Office did not pursue the death penalty in Freeman's case based on his race, the state court eliminated the factual basis for Freeman's contention that his sentence was arbitrary and capricious in violation of the Eighth Amendment.

Id. at 1233.

Two things must be taken from the ***Freeman*** holding, which is based wholly on the prior 1976 decision of the USSC in ***Gregg***. 1) A state implementing the death penalty has the duty to ensure that the application of the death penalty is not a capricious or arbitrary decision; and 2) that the 4th Judicial Circuit of Florida must and does utilize a "rational, well-organized, and multi-tiered process" in deciding whether or not to seek the death penalty.

The 11th circuit continued by defining the process utilized decades ago when Freeman's trial was held in 1988 by the state attorney's office in the 4th judicial circuit of Florida in deciding whether or not to seek the death penalty:

> The testimony revealed that the State Attorney's Office had an established protocol for determining when to pursue the death penalty in murder cases. When a lead prosecutor identified a potential capital case, the prosecutor would present the case to a "Homicide Committee," comprised of a panel of prosecuting state attorneys. (7/16/01 Hr'g Trans. at 43:12-18.) These attorneys would review the case and, when appropriate, recommend that a capital sentence be pursued. Any time the committee recommended a case for capital prosecution, it was required to obtain Austin's personal approval before moving forward with the prosecution.

Id. at 1228

Wade, through the undersigned counsel, investigated the finding of the 11th Circuit as to whether or not the 20 Judicial circuits of Florida

presently utilize a “well organized and multi tiered process”, some 20 years after Freeman’s prosecution, in determining whether death is sought in any particular capital case as defined in ***Freeman*** by the 11th Circuit.

Wade made inquiry into the uniform protocols and process used by each of the 20 State Attorney’s in this State, 17 responded to the inquiry in writing. Mr. Wade’s research paints a decidedly different picture of the process than that utilized some 20 years ago and discussed by the US 11th circuit in ***Freeman***.

The Office of the State Attorney in the Fourth Judicial Circuit could not produce any protocol, standard, or process used to make such a determination when asked by the undersigned. Neither could the Second, Fifth, Sixth, Ninth, Fifteenth, Seventeenth, and Eighteenth Judicial Circuits. All the above listed circuits, including the Fourth, clearly stated they have *no written policies, procedures, or guidelines in place to determine which cases warrant the death penalty*.

In contrast, the First Judicial Circuit implements a process which includes a review of the file by its Death Penalty Review Committee. The committee makes a written determination, which is placed in the case file and maintained in a master Death Penalty Review Committee file. This file is maintained in each County of the First Circuit.

The Eleventh Judicial Circuit requires a Death Penalty Evaluation form to be completed before a case is death eligible. The form includes aggravating and mitigating factors as well as police, family and the recommendations of Assistant State Attorneys.

The Seventh, Eighth, Tenth, Thirteenth, and Fifteenth Judicial Circuits stated their reliance on various sources including the United States Constitution, Florida Statutes, West Florida Criminal Law, and the Florida Rules of Criminal Procedure. Other sources include applicable facts, circumstances, and evidence in the case.

The evident variance, from nothing in some Circuits like the Fourth, to an evaluation and reliance on guiding authority in others, demonstrates that: 1) there is no uniformity between Florida's judicial circuits as demanded by the USSC in the *Furman* and *Gregg* rulings; 2) there is no clear and correct standard evident as each Circuit relies on a different protocol, if that Circuit has one at all, and finally 3) the Fourth Judicial Circuit currently, some 20 years after Freeman's trial, does not rely on any "well-organized, and multi-layered" process, *by their own admission*.

Wade contends that the State of Florida has not ensured that a uniform process has been put in place by the 20 judicial circuits in deciding who is eligible for capital punishment that adheres to the stringent demands as

dictated by the USSC in *Furman* and *Gregg*. Nor does this ad hoc, and in some circuits non existent, process adequately ensure that a defendant's 8th amendment protections are honored by non-arbitrary and capricious decisions made by the prosecution according to the prevailing circumstances in any case.

In denying Wade's motion without hearing, the trial court failed to address the unsustainable position the State has placed itself in pursuant to the decision to seek death in Wade's case. At bear in the motion, and this subsequent claim, is the very validity of the process by which the death penalty is sought in the State of Florida. The integrity of the process is fundamentally unsound if the mere promise of potential cooperation by a third party can undermine the decision for death, as in *Carter*, or if the mere promise of cooperation and testimony from an equally culpable co-defendant can warrant the arbitrary removal of the Death Penalty, as in the instant case.

This then challenges the very validity of the apparatus put in place by the State's attempt at adherence to the rulings of the post *Furman* court, such as *Gregg*, which were made to ensure constitutional protections. What is clear is that although such a process was in place in 1988 in the Fourth Judicial Circuit per the *Freeman* opinion, there is no such process in place

today some 20 years later by the candid admission of the State Attorney's office themselves.

The trial court erred in summarily dismissing the motion as presented without a hearing, as the motion required factual legal testimony as to how the process used to seek death by the Office of the State Attorney complies with the stringent requirements demanded in *Furman* and its progeny. An evidentiary hearing should have been held to determine the reason why there exists a prominent difference in the state attorney's office decision making from 20 years ago, and why, in fact, it has gotten more arbitrary.

Wade's death sentence should be vacated as the State Attorney's process in determining to seek the death penalty does not comply with the requirements of *Furman*, and therefore represents an arbitrary and capricious application of the death penalty in violation of Wade's Eighth amendment protections.

ARGUMENT SEVEN

THE TRIAL COURT ERRED IN DISMISSING POTENTIAL JUROR BUTLER FOR CAUSE

The trial court erroneously dismissed juror #11, Ms. Butler, for cause during Voir Dire after Counsel took steps to rehabilitate her. This dismissal prejudiced Wade as Ms. Butler was the eleventh potential juror on the panel, and would therefore have sat on his jury minus the dismissal for cause. The

dismissal of Ms. Butler, despite counsel's successful rehabilitation, served to further load the jury with death biased jurors (as discussed in argument five) and removed a potential juror that showed no bias towards death.

In *Carratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007) the FSC held the following in relation to appellate review of a challenge for cause:

> The decision whether to excuse a juror for cause is a mixed question of fact and law that falls within the trial court's discretion. *Busby v. State*, 894 So. 2d 88, 95 (Fla. 2004), *cert. denied*, 545 U.S. 1150, 125 S. Ct. 2976, 162 L. Ed. 2d 906 (2005); *Singer v. State*, 109 So. 2d 7, 22 (Fla. 1959). "The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984) (citing *Singer*, 109 So. 2d at 24). When a party seeks to strike a potential juror for cause, the trial court must allow the strike when "there is basis for any reasonable doubt" that the juror had "that state of mind which w[ould] enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial." *Singer*, 109 So. 2d at 23-24; *see also Ault v. State*, 866 So. 2d 674, 683 (Fla. 2003)

Carratelli, at 318.

When a trial court denies or grants a peremptory challenge, the objecting party must renew and reserve the objection before the jury is sworn. Florida courts have applied this rule to jury selection issues in general, including denial of cause challenges. *Id.* 319

During the State's voir dire, the state engaged potential juror Ms. Butler in a discussion about her views on the death penalty (relevant portions are included, see 8 R 158-161 for entirety of exchange):

State: "Your views on the death penalty ma'am?"

Butler: "It's mixed"

(8 R 158)

State: "If you're selected as a juror and you're in there in that guilt or innocence phase, could you make a decision whether the state's proven its case beyond a reasonable doubt or are your feelings on the death penalty going to interfere or have a – cause a problem for you making that decision?"

Butler: "No. You're going to have to really show me the facts."

State: "Okay"

Butler: "I have to live with it."

(8 R 159)

State: "And then you are going to be asked does – do the aggravating factors outweigh the mitigating, and if you believe they do beyond a reasonable doubt my question is: Can you vote for the death penalty or is(sic) your personal feelings going to be weighing on you and cause you some concerns?"

Butler: "Well, if I got – if the facts is there then, yes, I can go for the death penalty depending on it."

State: "Would you hold the state to a higher burden of proof because the death penalty is a possible penalty?"

Butler: "Possibly, yeah."

(8 R 160-161)

Later, during Defense counsels voir dire, counsel broached the subject of the Death Penalty with Ms. Butler:

Mr. Eler: "Okay. And, Ms. Bulter, in this particular case, ma'am, do I take it then that you'd just rather not sit – you don't feel that you could be a fair juror in this case just because…"

Butler: "I just don't feel comfortable in this case."

(8 R 185)

Counsel then successfully rehabilitates Ms. Butler later during the voir dire:

Mr. Eler: "Now knowing that the state has the burden of proof, okay – we don't have a burden, but they have a burden of proof not only in the guilt phase but also in the penalty phase. They have to prove these aggravators beyond and to the exclusion of every reasonable doubt. Okay. That's the standard burden in every case. You wouldn't require them to have a higher burden than that, would you?"

Butler: "If they've got proof – if they – if they have sole proof that whatever it was that occurred then, yes, I could – I could see myself voting for the death penalty."

(9 R 247)

During discussion and argument pertaining to strikes for cause, the state moved to strike Ms. Butler after the court indicated it planned to remove her for cause. Counsel lodged his first objection immediately after:

The Court: "Ms. Butler, number 11"

Mr. Eler: "Assuming for cause on the death penalty judge?"

The Court: "Yeah. Ms. Butler I don't see how she could – you know, she waffled on two or three things and then…"

Mr. Eler: "Ms. Butler I rehabilitated I thought, Judge."

The Court: "No."

State: "For the record we move for cause on both 9 and 11" (Ms. Bulter)

(9 R 314-315)

After all counsel's peremptory challenges had been used, counsel renewed his objection to the striking of Ms. Butler prior to the swearing of the panel:

Mr. Eler: "Judge, wanted to object to the state's use of peremptory challenges on otherwise death scrupled jurors, and I have a written motion that I didn't file specifically regarding Butler and the others I feel as though we rehabilitated, a standing objection to that. Also wanted to move since we did exhaust all our peremptory challenges to strike those folks that we would have done if we had them, so for those reasons we ask for additional peremptories."

The Court: "That request is denied"

(9 R 384)

Counsel preserved this issue through objection first at the time of the strike, and again at the close of voir dire. Additionally, counsel exhausted all peremptory strikes and was denied the request for additional strikes.

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. In applying this test, the trial courts must utilize the following rule. If there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or by the court on its own motion. See *Hill v. State*, 477 So. 2d 553 (Fla. 1985); *Bell v. State*, 870 So. 2d 893 (Fla. Dist. Ct. App. 4th Dist. 2004);

At no point did Ms. Butler indicate that her opinions would prohibit her from implementing the death penalty, in fact her statements were quite the contrary. Frankly, it is difficult to see from the Record any place where Ms. Butler's answers could give the court any basis to believe that her opinion would render her impartial. Ms. Butler indicated that she would be uncomfortable as a juror, however per Fla. R. Crim. Pro 913.03, a juror being "uncomfortable" is not a viable ground for dismissal for cause.

Moreover, Ms. Butler was juror number 11 on the panel, which would have ensured that she sat on the jury minus a peremptory challenge by the state. The exclusion of Ms. Butler for cause imperceptibly skewed the final

jury roster, as it is impossible to predict what would have occurred in the way of alternate peremptory challenges by the state and defense, and what the final jury roster would have been had Ms. Butler not impermissibly been excluded for cause.

The *Hill* case, as well as a plethora of subsequent Florida Court opinions, holds that a juror should be excused for cause on motion of the party, or "*by the court through its own motion*". This then implies that the court has a shared responsibility to ensure that potential jurors who evidence clear bias are excused for cause.

The trial court in the instant case had no problem excusing Ms. Butler for cause, a potential juror that arguably would have been favorable to the defense despite her willingness to vote for death as indicated by the record. In contrast however, the court raised no alarm, and did not excuse for cause, potential jurors Ms. Cue or Ms. Duchovany based on their blatantly pro-state and pro-death responses to questioning in voir dire.

Ms. Cue stated during questioning that she believed in the Death penalty, and supported it "a definite 5 out of 5" and stated that her vote for death would be automatic, "If a life has been taken, and innocent life has been taken, then a guilty life should be taken also." She also stated that she would require the defense to prove that a life sentence was warranted instead

of death in the penalty phase, despite being re-instructed that the burden of proof is never on the defense, but on the state to prove aggravators in the penalty phase. (8 R 167; 9 R 254) Ms. Cue was not excused for cause by the trial court, and defense counsel ultimately spent a peremptory strike in removing her. (9 R 367)

Likewise, Ms. Duchovany stated that she supported the death penalty a 5 out of 5, and indicated that she agreed with Ms. Cue's opinions 100%. (8 R 168, 9 R 256). Ms. Duchovany was excused for cause pertaining to scheduling conflicts, and not for her blatantly biased statements. (9 R 349)

These examples serve to further evidence the pro-death bias evident in the jury, and the way that Florida's capital sentencing scheme allows and for the systematic removal of any juror expressing reservations about the death penalty, as discussed in argument Five herein. Moreover, the examples of Ms. Cue and Ms. Duchovany serve to highlight the fact that Ms. Butler's removal for cause, which was made by the trial court on its own behest and prior to a motion or challenge by either party, was in fact made in error.

The statements of Ms. Cue, and Ms. Duchovany's express agreement, specifically show that they should have been removed for cause pursuant to Fla. R. Crim. Pro 913.03 Ms. Cue clearly indicated that her beliefs would interfere with her being impartial, and clearly indicated that she would be

biased in following the law by forcing the defense to shoulder to burden of proof.

In contrast, Ms. Butler indicated that she would not be comfortable sitting on the jury, but stated that she would comply with the law and could render a death verdict should the facts demand it. In short, her dismissal for cause, when compared to the testimony of Ms. Cue and Ms. Duchovany, was impermissible and represents clear error on the part of the trial court.

The trial courts dismissal of Ms. Butler for cause prejudiced the defendant by a) removing a legitimate potential jury who exhibited caution in applying the death penalty but one who indicated that they would follow the law; b) further tilting the jury pool to a reflect a pro-death bias by removing a death scrupled juror; and c) radically altered the outcome of the final jury roster, as it is impossible to predict how the flow of alternating peremptory strikes would have affected the final makeup of the jury.

As such, Wade should be granted a new trial.

ARGUMENT EIGHT

THE EXECUTION OF WADE IS PROHIBITED BY THE U.S. CONSTITUTION'S EIGHTH AND FOURTEENTH AMENDMENTS, AS WELL AS FLA. CONST. ART. I, SECT 17, AS WADE WAS 18 AT THE TIME THE CRIMES WERE COMMITTED

I. Introduction

The U.S. Supreme Court, in *Roper v. Simmons*, held the execution of individuals under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments of the U.S. Constitution. 543 U.S. 551, 125 S. Ct. 1183 (2005). The justification for this ruling involved several factors, including: (1) evolving standards of decency required the prohibition of the death penalty for minors; (2) adolescents are more immature and more impulsive than adults; (3) adolescents have limited control over their environments and are more susceptible to peer pressure than adults; and (4) adolescent personalities are not fully formed. *Id.*

The Eighth Amendment is defined by the evolving standards of decency that mark the progress of a maturing society. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008)

II. Wade was only 18 for two months when this crime was committed and was functionally below the age of 18

The *Roper* decision held "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Supra*. It is, "we conclude, the age at which the line for death eligibility ought to rest." *Id.* This ruling did not contemplate a case such as Wade's, where the

defendant just turned 18, and coupled with a myriad of mitigating factors, demonstrates he was not acting as a functional 18-year-old, but more like the U.S. Supreme Court's three-pronged definition(s) describing why juveniles should not be subjected to the death penalty.

Wade's 18th birthday was May 22nd ,1987. His crimes were surrounding the period of July 4, 2005. (V, pg. 799). Therefore, Wade was less than two months past his 18th birthday. At the time of writing this brief, Wade was the youngest person on Florida's death row.

Had these crimes been committed two months prior to when they actually occurred, Mr. Wade's death sentence would have been prohibited under the Eighth and Fourteenth Amendments of the U.S. Constitution. *Id.* However, as they were not Wade is now on death row. A bright line rule regarding age 18 is an arbitrary and capricious application of the death penalty.

III. Evolving standards of decency merit a life sentence

A central justification for ***Roper's*** ruling society draws the line at the age of 18 is the many purposes between childhood and adulthood. Scientific research concerning maturation of the brain, laws prohibiting "adults" from doing activities until they are 21 (such as purchasing alcohol, gambling),

along with evolving standards of decency show age 18 is too low an age to be considered an adult.

IV. Wade's facts satisfy Roper's three prongs

Wade's character and personality emulates the three pronged-reasons of why juveniles cannot be executed under *Roper*. In fact, Wade meets all three prongs the U.S. Supreme Court used in ruling a juvenile is not a category of person to whom the death penalty is applicable. *Id.* This standard used by the U.S. Supreme Court to conclude juveniles cannot be executed should be further used to determine whether a person *is* a juvenile and therefore cannot be executed. A bright-line rule determining who is a juvenile and who is an adult is contrary to Fla. Const. Art. I, Sect .17 and the U.S. Constitution's Eighth and Fourteenth amendments prohibition against arbitrary application.

i. adolescents are more immature and more impulsive than adults

Clear in the record is the fact Wade, like a juvenile, was immature and impulsive. Nixon's testimony corroborates this fact, when he testified, "and Alan [Wade] got into this situation, were young had had bad role models at the time." (12 R 925) The trial court's sentencing order portrays this notion as well, when he stated, "one could certainly suggest that the evidence is that

Wade followed Jackson's instructions as an army squad member would follow the instructions of the squad leader. (3 R 811)

There also was a wide age disparity among Wade and his leader, Jackson, of approximately 5 years. To put that in prospective, if Jackson was 18 when he graduated from his school, Wade was 13, in 7th or 8th grade, i.e. middle school. Interestingly, Wade *was* in high school at age 16, when he and Jackson were first acquainted.

At Wade's Spencer hearing, Ms. Alford, the daughter of the Sumner's, testified as to her thoughts of Wade. (5 R 1117) Ms. Alford did not want the death penalty for Wade, as it "would cause me only more suffering." (5 R 1117) She recognized that from the time Wade was 16 he was subject to the constant influence and direction of Jackson. (3 R 600) Ms. Alford also recommended Wade be sentenced to life in prison because he did not possess a normal level of maturity and was highly susceptible to forming bad habits without fully understanding their consequences. (3 R 600)

At age 16, Wade had a significant substance abuse problem (5 R 815), and was kicked out of his house at age 16-17. These facts serve to further illustrate his immaturity. Wade's behavior and personality resemble those of a juvenile more than an adult.

ii. adolescents have limited control over their environments and are more susceptible to peer pressure than adults

As previously stated, Wade was thrown out of his home at age 16 or 17, and began associating with Jackson at that time. Jackson was 21. (3 R 599; 5 R 815; 6 R 1103) Wade was already addicted to drugs and was drinking excessively at the time. (3 R 599; 5 R 815; 6 R 1104) Wade evidenced substantial mental health issues, and was Baker Acted on one occasion. (5 R 815)

Around this time Wade's High School principle felt that Wade suffered from parental abandonment. (3 R 598) Having grown up without a father since the age of eight certainly was not beneficial in his case. (3 R 598; 5 R 812) Jackson began teaching Wade how to rob money from his mother's bank accounts. (6 R 1105) Wade believed Jackson was part of the mafia, and "had people." (6 R 1106) According to Wade's own mother, he was, "thrown out of the house and he didn't know where to go." (6 R 1111)

Ms. Alford stated, "we all know now how manipulative, cunning, cruel, and controlling Michael [Jackson] is, and he was five years older than Alan [Wade]" and to "a 16-year-old boy that is significant." (6 R 1118)[13] Wade succumbed to the peer pressure of a man five years his senior.

13 Ms. Alford met with Wade subsequent to him being found guilty by the jury. (6 R 1119)

Unfortunately the peer pressure involved played a role on putting him on death row.

iii. Adolescent personalities are not fully formed.

Contrary to ***Roper's*** holding concerning this issue, it is common knowledge within the scientific community that the frontal brain lobe does not reach maturity until an individual is in their 20's, not 18.

It is not at 18 years of age, but rather in the early 20's when adolescent personalities are fully formed. Dr. Louis Legum explained that the frontal/prefrontal areas of the brain are the last parts of the brain to fully mature. It process is called myelination, and it deals with cellular maturation of the brain that is involved with the development of associations, that affect brain function. *Id.* Frontal and prefrontal areas of the brain predominately deal with decision making, controlling impulses, and the ability to manage or not manage excitatory needs.

Research finds that the main reason that so many young people in late adolescent/early adulthood exhibit high rates of crime, and/or alcohol and drug abuse, is because parts of the brain have not fully developed.

A bright line rule of 18 using this prong, according to scientific principles, makes no sense as the age of 18 represents an arbitrary and

subjective parameter that doesn't adequately reflect or account for the accepted findings of the scientific community.

IV. Conclusion

In the words of the ***Roper*** Court, "the death penalty is the most severe punishment, [and] the Eighth Amendment applies to it with special force." 543 U.S. 551, 125 S. Ct. 1183 (2005). Where a condemned 18-year-old individual's personality characteristics clearly resemble those of a juvenile and not an adult, the Eighth Amendments "special force" should apply, thereby prohibiting execution.

Wade satisfies the U.S. Supreme Court's three-pronged definition of a juvenile, therefore the application of the death penalty represents an arbitrary and capricious sentence. The 18-year-old bright line rule regarding prohibiting the death penalty does not take into account situations as exampled in the instant case. Wade's sentence is in volation of Fla. Const. Art. I, Sect. 17 and the Eighth Amendment of the United States Constitution.

Wade's sentence should be commuted to life.

CONCLUSION:

Based upon the foregoing reasons, Wade's judgment and sentences should be reversed and a new trial granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to all counsel of record, on this 16th day of March, 2009.

s/Frank Tassone, Esq.

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

RESPECTFULLY SUBMITTED,

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