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

ALAN LYNDELL WADE

Appellant,

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

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

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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TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

Cases **Pages**

Florida Supreme Court and District Courts of Appeal Cases

United States Supreme Court Cases

United States Constitutional Amendments

Florida Constitution

ARGUMENT ONE

CONTRARY TO THE STATES POSITION IN ANSWER, THIS COURT CAN AND HAS CONSIDERED UNEQUAL CONVICTIONS OF CO-DEFENDANTS UPON CONDUCTING A DISPARATE SENTENCING REVIEW

The state contends that this claim is without merit due to the fact that Nixon pled to second degree murder in exchange for testimony, whereas Wade was found guilty of 1st degree murder at trial relying on *Shere v. Moore*, 830 So. 2d 56 (Fla. 2002). The State's response ignores cases cited by petitioner in the initial brief where this court ruled that the unequal convictions of co-defendants should and can be considered in a disparate sentencing review, where the facts at trial point to equal culpability between all defendants.

In *Shere*, this Court mentions that the lesser conviction of a co-defendant does not defeat a disparate treatment claim, as the court states that it has examined and conducted a disparate treatment analysis at least ten times in the past, stating that:

> We have decided numerous cases where we have addressed the proportionality of defendants' death sentences based on the argument that an equally culpable codefendant received a lesser sentence. However, in only ten of those cases did the proportionality analysis involve codefendants who received immunity or codefendants whose lesser sentences were based on convictions for second-degree murder or third-degree murder. *See Howell v. State*, 707 So. 2d 674 (Fla. 1998) (codefendant pled to second-degree murder and received a

> sentence of forty years); *Cardona v. State*, 641 So. 2d 361 (Fla. 1994) (codefendant pled guilty to second-degree murder and testified against the defendant); *Mordenti v. State*, 630 So. 2d 1080 (Fla. 1994) (codefendant received immunity for her testimony); *Cook v. State*, 581 So. 2d 141 (Fla. 1991) (codefendants pled guilty to second-degree murder and received sentences of twenty-three and twenty-four years); *Hayes v. State*, 581 So. 2d 121 (Fla. 1991) (codefendant pled guilty to second-degree murder and testified against the defendant); *Downs v. State*, 572 So. 2d 895 (Fla. 1990) (codefendant testified against the defendant under a grant of immunity); *Brown v. State*, 473 So. 2d 1260 (Fla. 1985) (codefendant pled to second-degree murder); *White v. State*, 415 So. 2d 719 (Fla. 1982) (codefendant convicted of third-degree murder); *Tafero v. State*, 403 So. 2d 355 (Fla. 1981) (codefendant received a life sentence after pleading to second-degree murder); *Salvatore v. State*, 366 So. 2d 745 (Fla. 1978) (codefendant received a ten year sentence after pleading to second-degree murder). In none of these cases did we find the sentence of death disproportional because the codefendant received a lesser sentence or no punishment at all.

Shere, at 62-63.

In *Puccio v. State*, 701 So. 2d 858 (Fla. 1997) the defendant and six co-defendants were present and participated in the murder of the victim. Only Puccio received the death penalty. As for the other co-defendant's, the convictions and sentences were as follows: (1) Heather Swallers, second-degree murder and conspiracy (seven years prison); (2) Derek Dzvirko, second-degree murder and conspiracy (eleven years imprisonment); (3) Alice Willis, second-degree murder and conspiracy (forty years imprisonment); (4) Donald Semenec, second-degree murder and conspiracy

(life and fifteen years imprisonment); (5) Derek Kaufman, first-degree murder and conspiracy (the jury recommended life and he was sentenced to life and thirty years imprisonment); (6) Lisa Connelly, second-degree murder and conspiracy (life and five years prison). *Id.* at 859

This court found that the trial court erred in imposing death when other equally culpable *co-perpetrators* were sentenced to lesser sentences, as the 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. *Id*. at 860; *See generally Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992).

After reading the trial court's sentencing order, the Florida Supreme Court held that Puccio played no greater role in the planning and killing of the victim than *several* of the co-perpetrators, and in fact, less than others. *Id*. at 862 This court found the plot to kill the victim was "hatched" by Willis and Connelly, and their first recruit was Kaufman. The next day Dzvirko was enlisted. All defendants discussed various ways to kill the victim. Semenec struck the initial blow, and from that point onward Semenec, Kaufman, and Puccio all participated in the stabbing and beating of the victim. *Id*. The final blow was done by Kaufman, and then Puccio

threw the body into the canal. *Id.* Similar to appellant, the state in Puccio conceded he was not the ringleader in the crime. *Id.*

In reviewing the trial court's sentencing order, this court concluded Puccio's sentence of death was disproportionate when compared to the sentences of the other equally culpable participants in the crime. *Id. Citing Hazen v. State*, 700 So. 2d 1207 (Fla. 1997); *Curtis v. State*, 685 So. 2d 1234 (Fla. 1996); *Scott*, 604 So. 2d at 468-69; *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975)(reversing death sentence where "the court that tried appellant also permitted the 'triggerman'… to enter a plea of nolo contendere").

Like *Puccio*, the sentencing order in Wade does not demonstrate Wade any more culpable than his co-defendant Nixon. In fact, it can be argued Nixon played a greater role in the murder. In conducting a disparate treatment analysis, this court should follow the holding in *Puccio* and vacate Wade's sentence of death, as his culpability was equal to, or less than, that of Nixon, who received a sentence of 45 years.

More recently, in cases such as *Sexton v. State*, 775 So. 2d 923 (Fla. 2000), and *Hernandez v. State*, 4 So. 3d 642 (Fla. 2009), the court upheld the death sentence of the appellant, but again conducted a comparison between co-defendants receiving a conviction of a lesser crime. In each case the court noted that the facts present in both cases warranted the allowance of

disparate sentences as the facts at trial and the sentencing order of the court indicated that Sexton and Hernandez were the more culpable of the co-defendants associated with each respectively. *Sexton*, at 935; *Hernandez*, at 671. In *Hernandez*, the co-defendant was found guilty of 1st degree felony murder and sentenced to life, which like 2nd degree murder, lacks the intent element of 1st degree pre-meditated murder.

Distinguishing the appellant's case from *Hernandez* and *Sexton*, are various sources in the Record which support the contention of equal culpability between he and Nixon and a definitive comparison to *Puccio*, including: (1) Nixon's trial testimony and admitted acts; (2) the trial court's language in the order sentencing Wade; (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) Nixon's boastful bragging to a witness where he described his role in killing the Sumners; (6) The fact that the state argued for equal culpability between parties at trial (13 R 1047-1048), and initially sought 1st degree murder and the death penalty against Nixon (12 R 924); and finally (7) Nixon's own confession to the murder on the stand.

The fact that Nixon was offered an arbitrary deal that easily could have been offered to Wade, especially in light of the state's original intention to seek death against Nixon, does not mitigate the fact that Nixon

was equally if not more culpable in the murder than Wade. The court found that both acted under the orders of Jackson, and similar mitigation was offered by both at their respective sentencing. 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.

This Court should base its disparate sentence review on the factual aspects of the case concerning the crimes, and not on the position of the state in that the defendant's relative culpability is different based not on the facts of the case, but on one defendant escaping the death penalty by pleading to Second-Degree Murder. Appellant's sentence should be commuted to life to reflect his equal culpability with Nixon.

ARGUMENT TWO:

THE TRIAL COURT IS OBLIGATED UNDER FLORIDA LAW TO CONSIDER THE SENTENCE OF A CO-DEFENDANT CONVICTED OF A LESSER OFFENSE PROVIDED THE FACTS OF THE CASE POINT TO EQUAL CULPABILITY

In response the state again relies on the argument that because Nixon pled to 2nd degree murder as a result of an arbitrary offered by the state after having first sought the death penalty against him, he is therefore less culpable than the petitioner. The state contends that the trial court need not have considered Nixon's deal of 52-life, which ultimately ended in 45 years

thereby making it likely that Nixon will be released from prison, when sentencing appellant to death.

As addressed in claim two of the initial brief, the trial court is obligated, under Florida law, to consider the sentence of a co-defendant regardless of a disparity between convictions, *provided the facts of the case show equal culpability*.

The facts of this case, specifically the initial decision of the state to seek death against Nixon; the testimony of Nixon at trial; the boastful bragging to witnesses about his role in the murders by Nixon; the state's own assertion to equal culpability between the defendants at trial (12 R 899, 925-926; 13 R 1047-1048, 1099-1100); the similar mitigation presented in the respective penalty phases; and finally the trial courts order discussing the facts, clearly show significant and substantial evidence pointing to equal culpability between the appellant and Nixon. (See IB claim 1 and 2)

In *Slater v. State*, 316 So. 2d 539, (Fla. 1975) this court reversed a conviction of death after an equally or more culpable co-defendant received a sentence of life stating that, *"We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." Id.* at 542

In *Hazen v. State*, 700 so. 2d 1207 (Fla. 1997) the court vacated a death sentence where the facts at trial evinced an equally culpable co-defendant was allowed to plea and receive a sentence of life. This court in *Hazen* relied on the ruling in *Witt v. State*, 342 So. 2d 497 (Fla. 1977) in reversing Hazen's sentence of death. In Witt this court held that a co-defendants life sentence was a factor that had to be considered when sentencing Hazen. *Id.* at 500.

Hazen bears a strong resemblance to the facts on Petitioner's case. In *Hazen* the state initially took the same position as in the instant case in that it sought the death penalty against all defendants. *Id.* at 1211. Later in *Hazen*, as in the instant case, the state made the decision to "flip" a co-defendant and allow him to plea to life in exchange for testimony in order to strengthen its case against Hazen as the remaining evidence against him was circumstantial in nature. *Id.* at 1211. Finally, both Nixon and Wade, like Hazen, were found to be "followers" under the guidance of another party. *Id.* at 1214.

The trial court's failure to consider the equal culpability of Wade and Nixon in sentencing represents reversible error. 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 CUMULATIVE EFFECT OF THE IMPROPER COMMENTS BY THE PROSECUTION CONSTITUTES FUNDAMENTAL ERROR

The state in response asserts that the improper argument used by the prosecution, in both guilt and penalty phase closing, does not constitute fundamental error as the statements made were proper comments on the evidence produced at trial.

At trial the state blamed petitioner for "choosing Bruce Nixon" as a state witness. (13 R 1047-1048) The facts refute this assertion. The state offered Nixon the deal in exchange for testimony after initially seeking death against him, the state listed him as a witness, and the state called him at trial to testify. Petitioner did not "choose" Nixon as a witness. The state did so when it offered an equally culpable co-defendant a deal in exchange for testimony. The statement that Wade somehow "chose" Nixon as a witness against him is both insidious and factually false.

The state continues with questioning the record that clearly shows an improper comment made in the attempt to downplay the disparity in sentencing between Wade and Nixon. (13 R 1061-1062) Despite the assertion of the prosecution that it "wasn't really a deal", Bruce Nixon must have seen a difference between a potential death sentence and a 52-life sentence (actual sentence was 45 years, 7 years below the guidelines of the

deal) otherwise *he would not have agreed to the deal*. Nixon admitted as much at trial. (12 R 936) The state's argument at trial and in answer defending this improper comment is simply not a logical one. The state first attempted to show equal culpability (13 R 1047-1048), then proceeded to argue that despite equal culpability, Nixon's deal was equal to Wade, Cole, and Jackson when in fact it was not. (13 R 1061-1062) This is a violation of the prosecutor's code of ethics at the very minimum. *See* *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).

Continuing, and despite the assertion of the state, the record clearly shows that the state vouched for the credibility of Nixon. (13 R 1061-1064) The record simply refutes the state's assertion. The prosecution, using the weight of its position and authority, told the jurors that Nixon was credible and had no reason to lie. This is a clear cut violation of *Gorby v. State*, 630 So. 2d 544 (Fla. 1993); and *Redish v. State*, 525 So. 2d 928 (Fla. Dist. Ct. App. 1st Dist. 1988)

The Golden Rule violations committed by the prosecution were not simply "comments on the evidence" as the state implies. (AB pg 45) At both

times the state went beyond the testimony at trial and asked the jurors to put themselves in the trunk of the car, to experience the "terror" of a ride in the dark, to imagine the "the dark night" of the night experienced by the Sumners, and put themselves in a hole in the ground (13 R 1106-1107; 14 R 1302). No one offered testimony as to the "terror" and "horror" felt by the victims or their state of mind at the time. This argument was clearly and plainly included by the prosecution in an effort to influence the jury to vote for death, and to appeal to the biblical "eye for an eye" mentality demanded by the death penalty.

The state overlooks the facts that are clear on the face of the record in opposition to the "vote for life" argument posited by the prosecution. (14 R 1308-1309) The state clearly said that a vote for life would in essence not hold Wade accountable, and that it would be the "easy way out". This is a verbatim argument previously condemned by this court in *Urbin v. State*, 714 So. 2d 411 (Fla. 1997) as fundamental error warranting reversal.

Addressing each error individually serves to detract from the impact of the pervasive and repeated violations made by the prosecution in guilt and penalty phase closing argument. The cumulative effect of the impermissible arguments is not harmless, and constitutes fundamental error. Wade should be granted a new trial.

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

At the close of guilt phase the prosecution stated the following to the jury: "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) Counsel for appellant objected and moved for a mistrial which the court denied. (13 R 1108) The state in response posits that this statement does not constitute reversible error. The state contends that this statement does not ask the jurors to, "Imagine the Sumner's terror as they rode in the trunk of their own Lincoln Towncar to their deaths." (AB pg. 49)

A trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard upon review. *Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997), *cert. denied*, 118 S. Ct. 1370 (1998). The appellant contends that the remark by the prosecution reached the level of prejudice requiring the granting of counsel's motion for mistrial. The denial of same constitutes fundamental error.

The argument of the state in response is simply refuted by the record. The prosecution clearly said, "I ask you to walk" in their statement to the jury. Logically, and by modern diction, this then constitutes a golden rule

violation as the prosecution specifically asked the jurors to imagine themselves in a situation it believed to have been experienced by the Sumners. This was not harmless, as it was the final statement heard by the jury prior to deliberation. *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). The trial court erred in not granting counsel's motion for mistrial.

ARGUMENT FIVE

THE RESULTS OF THE CAPITAL JURY PROJECT MEET THE UNITED STATES SUPREME COURT'S REQUIREMENTS FOR SCIENTIFIC DATA AND DEMONSTRATE THAT FLORIDA'S CAPITAL SENTENCING SCHEME DOES NOT MEET THE REQUIRMENTS OF *Furman v. Georgia*, 408 U.S. 238 (1972). THE RESULTS OF THE STUDY ARE EVINCED IN THE RECORD OF THE INSTANT CASE

The results of the capital jury project as presented in the initial brief of appellant have been embraced by courts in New Mexico, which in turn played a significant part in the recent abolition of the Death Penalty in New Mexico. Likewise, the state of New Jersey utilized similar research and findings as part of its analysis to overturn the death penalty. The results of the Capital Jury Project study meet every requirement under *Witherspoon v. Illinois*, 391 U.S. 510 517 (1987); *Lockhart v. McCree*, 476 U.S. 162, 171 (1986); and *McCleskey v. Kemp*, 41 U.S. 279 (1987). The survey results

conclusively and scientifically point out large flaws in existing capital sentencing schemes, including Florida. (IB claim five)

In support of the findings of the study, and in an effort to prove this inherent bias present in petitioner's case, petitioner spent pages analyzing and demonstrating the inherent bias towards death present in the final jury makeup selected to sit in judgment of appellant through statements made in voir dire. The appellant additionally evinced how the systematic removal of any juror who exhibited any hesitancy or reservation in dealing out death is conducted through Florida's death biased penalty scheme. (IB claim five)

The truth of the matter is that the scientific results of this study have been adopted as fact and utilized by other courts in this nation. The study meets every Supreme Court requirement for legitimacy. The results and conclusions of the study are demonstrated as relevant to the instant case through the comparative analysis conducted by the petitioner in the initial brief. Petitioner's motion to preclude the death penalty should have been granted by the trial court. At the very least defendant should have been afforded a hearing. The results of capital jury project scientifically demonstrate that Florida's capital sentencing system is inherently flawed and does not meet the requirements as set forth in *Furman v. Georgia*, 408 U.S. 238 (1972).

ARGUMENT SIX

AS NO UNIFORMITY EXISTS BETWEEN JUDICIAL CIRCUITS AS TO THE METHOD USED TO SEEK DEATH, FLORIDA'S CAPITAL SENTENCING SCHEME DOES NOT COMPORT WITH THE REQUIREMENTS OF *Furman v. Georgia*, 408 US 238 (1972) AND *Gregg v. Georgia* 428 U.S. 153 (1976)

Petitioner relies on the argument set forth in the initial brief, but adds that Florida's Proportionality review does not serve as an effective check as the proportionality review conducted by the Florida Supreme Court does not include a comparison to similar cases in which death was sought, but a life sentence was given by the court. Only death sentenced cases are compared under the current scheme. Until such a time that the proportionality review of this course includes a comparison to other capital cases in which a life sentence was given, and not death, the proportionality review will remain one sided and biased in favor of death. The concerns as set forth in *Furman v. Georgia*, 408 US 238 (1972) and its progeny as to reserving the death penalty for only the most heinous of murders will not be addressed or met until that time.

ARGUMENT SEVEN

THE TRIAL COURT ERRED IN DISMISSING POTENTIAL JUROR BUTLER FOR CAUSE

Petitioner relies on the argument as set forth in the initial brief with one additional comment. The court's removal of potential juror Butler for

cause, after she had clearly been rehabilitated to a level accepted by the court for death favorable jurors (9 R 247), while not removing for cause the clearly pro-state and pro-death jurors Ms. Cue or Ms. Duchovany (8 R 167-168; 9 R 254, 256) further demonstrates the inherent flaws in Florida's capital sentencing scheme and serves to illustrate the results as found in the capital jury project motion. The state gave explanation as to the legitimacy of the blatant pro death bias reflected in the failure of the court to reciprocate and remove two jurors who indicated a death bias and inability to be fair, while striking a rehabilitated juror who demonstrated a desire for hesitancy and thought prior to condemning petitioner to die.

ARGUMENT EIGHT

THE EXECUTION OF PETITIONER 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

Petitioner relies on the arguments as set forth in the initial brief pertaining to this claim. Petitioner meets and demonstrates each aspect of the three pronged requirement set forth by the United State's Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (U.S. 2005). The fact that his numerical age at the time of the murder exceeded 18 years by 60 days does not imply that in that same 60 days he gained the necessary and requisite wisdom and life experience to exclude him from the prohibition against executing juveniles.

The daughter of the victim recognized appellant's impressionability and susceptibility as much at trial when she asked for a life sentence for petitioner. (5 R 1117) She recognized the domineering influence of Jackson since petitioner was 16 years old, and recognized in petitioner the low level of maturity and susceptibility to influence. (3 R 600) As set forth in the initial brief, Wade meets every requirement under the Roper test to prohibit the execution of a juvenile. The mere fact that 60 days saved separated him between life and death, further demonstrates the arbitrary and capricious application of the death penalty in the state of Florida.

The bright line rule prohibiting the death penalty prior to anyone under the age of 18, yet making eligible the execution of someone a day over 18 disregards factual instances as present in the instant case. This decision is volatile 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, and the reasons set forth in the initial brief, 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 13th day of August, 2009.

Respectfully Submitted,

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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.

s/Frank Tassone, Esq.
A T T O R N E Y