IN THE SUPREME COURT OF FLORIDA

KEVIN JEROME SCOTT,

Appellant,

v. **CASE NO. SC09-1578**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FL 32301
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	27
ARGUMENT	30
ISSUE I THE PROSECUTOR'S IMPROPER COMMENT IN CLOSING ARGUMENT, SUGGESTING THAT THE DEFENSE COULD HAVE PRESENTED TESTIMONY TO DISPROVE THAT SCOTT'S VOICE WAS ON THE RECORDING DESI BOLLING OBTAINED FOR THE STATE, IMPROPERLY SHIFTED THE BURDEN OF PROOF FROM THE STATE TO THE DEFENSE IN VIOLATION OF DUE PROCESS REQUIREMENTS THAT THE STATE PROVE THE CRIME CHARGED.	30
ISSUE II THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL WHEN A WITNESS MENTIONED SCOTT HAD BEEN INCARCERATED ON AN UNRELATED CRIMINAL DRUG CHARGE.	38
ISSUE III THE TRIAL COURT ERRED IN DENYING A MOTION TO SUPPRESS THE AUDIO RECORDING DESI BOLLING OBTAINED FROM SCOTT IN JAIL.	46
ISSUE IV THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.	51
ISSUE V THE TRIAL COURT ERRED IN NOT DISMISSING THE DEATH PENALTY AS A POSSIBLE SENTENCE BECAUSE FLORIDA'S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.	57
CONCLUSION	59
CERTIFICATE OF SERVICE AND COMPLIANCE	60

TABLE OF AUTHORITIES

PAGE(S)

CASES

Apprendi v. New Jersey, 530 U.S. 446 (2000).....57

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002).....29, 58

Brooks v. State, 868 So. 2d 643 (Fla. 2d DCA 2004).....39, 41

Cuervo v. State, 967 So.2d 155 (Fla. 2007).....46

Czubak v. State, 570 So. 2d 925 (Fla. 1990).....28, 38-40

DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir. 1986).....48

Ealy v. State, 915 So. 2d 1288 (Fla. 2d DCA 2005).....31-34

Escobedo v. Illinois, 378 U.S. 478 (1964).....48

Goodwin v. State, 751 So. 2d 537 (Fla. 2000).....28, 38

Hayes v. State, 660 So. 2d 257 (Fla. 1995).....32, 33

Hess v. State, 794 So. 2d 1249 (Fla. 2001).....56

Illinois v. Perkins, 496 U.S. 292 (1990).....49

Jackson v. State, 575 So. 2d 181 (Fla. 1991).....31, 32, 36, 37

Johnson v. State, 720 So. 2d 232 (Fla. 1998).....55

Jones v. State, 705 So. 2d 1364 (Fla. 1998).....53

King v. Moore, 831 So. 2d 143 (Fla. 2002), cert. denied, 123 S. Ct. 657 (2002).....29, 58

Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005).....58

Massiah v. State, 377 U.S. 201 (1964).....48

McGuire v. State, 584 So.2d 89 (Fla. 5th DCA 1991).....42, 43

Offord v. State, 959 So. 2d 187 (Fla. 2007).....29, 51

TABLE OF AUTHORITIES

PAGE(S)

Perry v. State, 801 So. 2d 78 (Fla. 2001).....44

Rembert v. State, 445 So. 2d 337 (Fla. 1984).....52

Ring v. Arizona, 536 U.S. 584 (2002).....29, 57, 58

Rodriguez v. State, 433 So. 2d 1273 (Fla. 3d DCA 1983).....48

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).....38

State v. Lee, 531 So. 2d 133 (Fla. 1988).....38

State v. Malone, 390 So.2d 338 (Fla. 1980).....48

State v. Steele, 921 So. 2d 538 (Fla. 2005).....58

Terry v. State, 668 So. 2d 954 (Fla. 1996).....29, 51, 53, 54

Thompson v. State, 647 So. 2d 824 (Fla. 1994).....52

Tillman v. State, 591 So. 2d 167 (Fla. 1996).....29, 51

Traylor v. State, 596 So. 2d 957 (Fla. 1992).....48, 49

United States v. Henry, 447 U.S. 264 (1980).....48

Urbin v. State, 714 So. 2d 411 (Fla. 1998).....29, 51

Voltaire v. State, 697 So. 2d 1002 (Fla. 4th DCA 1997).....49

Walls v. State, 580 So. 2d 131 (Fla. 1991).....49

Ward v. State, 559 So. 2d 450 (Fla. 1st DCA 1990).....40, 41, 44

White v. State, 743 So. 2d 484 (Fla. 4th DCA 1999).....42

White v. State, 757 So. 2d 542 (Fla. 4th DCA 2000).....32, 34, 36

Williams v. State, 707 So. 2d 683 (Fla. 1998).....52

STATUTES

§ 784.045(1)(a)2, Fla. Stat.....53

§ 921.141, Fla. Stat.....29, 57, 58

CONSTITUTIONS

Amend. V, U.S. Const.....27, 28, 37, 45, 48, 50

Amend. VI, U.S. Const.....27-29, 37, 45, 48-50, 57, 58

Amend. VIII, U.S. Const.....45

Amend. XIV, U.S. Const.....27, 28, 37, 45, 48, 50

Art. I, § 16, Fla. Const.....27, 28, 37, 45, 48, 50

Art. I, § 17, Fla. Const. 29, 45, 51

Art. I, § 9, Fla. Const.....27-29, 37, 45, 48, 50, 51

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KEVIN JEROME SCOTT,

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STATE OF FLORIDA,

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The record on appeal consists of eleven volumes. The first four volumes contain the clerk's records of the case, pleadings and transcripts of pretrial hearings and the sentencing hearing. These volumes will be referenced with the prefix "R" followed with the page number. Volumes five through eleven contain the transcript of the trial and penalty phase proceedings. Page numbering begins anew with page number 1 starting in volume five. References to volume five through eleven will use the designation "T." An appendix to this brief contains the sentencing order and exerts from the guilt phase of the trial. References to the appendix will be with the prefix "App."

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On December 6, 2007, a Duval County grand jury indicted Kevin Scott for first degree murder, attempted armed robbery and possession of a firearm by a convicted felon. (R1:26-27) The indictment superseded an information charging second degree murder and attempted armed robbery filed on October 24, 2007.(R1:15-16) These charges arose from an attempted robbery of a coin laundry and the shooting of the owner, Kristo Binjaku, on June 30, 2007. (R1:26) Count III charging possession of a firearm by a convicted felon was severed before trial. (T5:12-13) On April 21, 2009, the State filed an information for aggravated battery alleging that Kevin Scott struck Gentian Koci with a gun on June 30, 2007. (R2:227) Koci was present and a witness in the coin laundry attempted robbery and homicide. (R2:227; R4:673-675) The court consolidated the aggravated battery case with the attempted robbery and murder case for trial. (R4:673-675) Scott proceeded to a jury trial on the three charges as consolidated on April 27, 2009. (T5:4) On April 30, 2009, the jury returned verdicts finding Scott guilty of first degree murder under both premeditated and felony murder theories, attempted armed robbery with a firearm, and aggravated battery while possessing a firearm. (R2:376-379; T10:1006-1009) The penalty phase of the trial commenced on May 5,

2009. (T10:1037) On the same day, the jury recommended a death sentence by a vote of nine to three. (R3:455; T11:1294) The court held a Spencer hearing on June 18, 2009. (R4:709)

On July 23, 2009, Circuit Judge W. Charles Arnold sentenced Scott to death for first degree murder, to 25 years imprisonment for attempted armed robbery with a firearm and to 15 years imprisonment for aggravated battery. (R3:567-575; R4:719-724) (App. A) In the sentencing order imposing death, the trial court found two aggravating circumstances: (1) previous conviction for a violent felony based on the contemporaneous aggravated battery conviction (great weight); and (2) the homicide was committed during an attempted robbery(great weight). (R3:552-553) (App. A) In mitigation, the court rejected the statutory circumstances of no significant history of prior criminal conduct and Scott's age of 22 years at the time of the crime. (R3:553-557) (App. A) The court found that nine non-statutory mitigating circumstances were proven: (1) Scott's religious faith (slight weight); (2) Scott's love for family and friends(slight weight); (3) Scott's father was absent from his life (slight weight); (4) Scott's family loves him (slight weight); (5) Scott was a good, respectful son (little weight); (6) Scott was a good surrogate father to his girlfriend's children (slight weight); (7) Scott can be a good father figure from prison (slight weight); (8) Scott overheard domestic violence as a small

child (slight weight); (9) Scott once stopped a theft at Winn Dixie where he worked (slight weight). (R3:557-564) (App. A)

Scott filed his notice of appeal to this Court on August 20, 2009. (R3:581-582)

Prosecution's Case

Gentian Koci was a friend of Kristo Binjaku and frequently visited at Binjaku's coin laundry. (T6:308-311) On Saturday, June 30, 2007, Koci was socializing at the laundry around 8:30 in the evening. (T6:311-312) He sat in a chair near a back side door. (T6:312) Binjaku was seated on the floor working on a machine. (T6:313) Another friend, Ismet Rapi, was inside the laundry as well as a customer. (T6:312) Koci's son was outside playing with Binjaku's son, Xhulio. (T6:312) As Koci talked to Binjaku, two men entered through the side door and one of them struck Koci with a hard metal object. (T6:314-316) Binjaku got up, and Koci heard him tell the men to go away as he motioned with his hands. (T6:316) Koci heard a gunshot. (T6:317) He did not see the shooting because his head was down. (T6:317) Then, he saw Binjaku on the ground in front of him, just outside the side door. (T6:317) Koci turned him back inside the door near the chair. (T6:319) He asked customers in the store to call the police. (T6:317) After hearing the gunshot, Koci thought the metal object used to hit him was the gun. (T6:326) Koci said the men had a masks covering their faces.

(T6:319-320)

Ismet Rapi was socializing with Koci and Binjaku at the laundry at the time of the crime. (T6:331-334) He was standing, talking to Binjaku who was working on a machine. (T6:335) Two men came to the laundry, and one entered the laundry through the side door. (T6:336) The second man stayed just outside the door. (T6:340) One who entered pointed a black gun at Koci and hit him on the head with butt of the gun. (T6:337, 341) Binjaku stood up, told the man he had no money and to leave. (T6:338) The man shot Binjaku in the face. (T6:338) Rapi said he heard two shots. (T6:340) Rapi could tell the two men were black, but he could not see their faces. (T6:339-340) The man who fired the gun was skinny, about five feet eight inches to six feet tall, and he wore a white t-shirt pulled up to cover his face. (T6:339-340, 343) Rapi said the man who stayed outside was also skinny and wore a t-shirt. (T6:344)

Xhulio Binjaku was Kristo Binjaku's son. (T6:273-275) On the evening of Saturday, June 30, 2007, he was at the laundry with his father. (T6:276) The laundry stayed open until 10:00 p.m. (T6:277) His father's friend Gentian Koci and his twelve-year-old son, Erni, were visiting at the laundry. (T6:278) Around 9:30 p.m., Xhulio was playing soccer with Erni in the open field area behind the laundry. (T6:278-279) Xhulio saw two black males walking the alleyway that

ran behind the businesses in the strip mall. (T6:280) They went to the BP service station. (T6:281) A few minutes later, the same two individuals walked back in the alley. (T6:281-282) Xhulio could not see their faces because they had pulled their white t-shirt up over their heads. (T6:281-282) One was skinnier than the other, and they both wore baggy jeans and baggy shirts. (T6:285) This time the two entered the side door of the laundry. (T6:283) Xhulio was suspicious, and he entered the laundry through a back door. (T6:283-284) He saw one of the men half way in the side door with a gun. (T6:284) Xhulio said he had no memory of hearing a shot, but his father was down on the floor, and Gentian Koci was trying to assist him. (T6:284-285) He called 911 for help. (T6:292-300)

James Wiggins was a customer in laundry at the time of the shooting. (T6:345-347) He had been near the front of the laundry about 45 minutes when he heard the crash of a gumball machine knocked to the floor near the back of the building. (T6:348-349) The owner and another man were at a side door about three–quarters of the way to the back of the building. (T6:349) Wiggins also heard the pop sound of a gunshot. (T6:349-351) A man stood in the doorway with his right arm extended holding a black, semi-automatic handgun. (T6:351-356) Based on the man's hairstyle, Wiggins believed he was a black man. (T6:351-352) He wore dark clothes and

had a white bandanna or cloth covering his face. (T6:352-353) Wiggins went to a nearby BP service station and called the police. (T6:353-

Officer Jonathan Ladue received a dispatch at 9:49 p.m. on June 30, 2007, to go the coin laundry. (T6:361-362, 376) He found a number of distraught individuals just outside the front of the laundry. (T6:365) Once inside, he found a man covered in blood on the floor. (T6:365-366) The injuries appeared to be fatal. (T6:366) Rescue personnel arrived, and Ladue allowed them into the laundry through the sliding glass side door. (T6:367) The rescue team determined that the man was dead. (T6:366-367) Just outside the sliding door, Ladue found an expended cartridge shell casing. (T6:368, 371)

Noelle Dunn, a crime scene evidence technician, arrived at the laundry and spoke to Officer Ladue. (T6:385-388) Dunn collected the expended shell casing, photographed the scene and attempted to lift latent fingerprints from various locations. (T6:388-394, 397-400) A partial fingerprint was lifted from the framing around the sliding glass door. (T6:394-397) Richard Kocik, a latent fingerprint examiner, determined that the partial fingerprint had insufficient detail and had no value for comparison. (T7:419-422)

Dr. Valerie Rao, an associate medical examiner, performed an autopsy on Kristo Binjaku on July 1, 2007. (T8:694-699) Rao found

a single gunshot entrance wound to the face with the bullet passing through the mouth and severing the spinal cord just below the medulla. (T8:698-703) Gunshot residue caused stippling around the entrance wound leading Rao to conclude the muzzle of the firearm was within an intermediate range of 18 inches. (T8:701) The bullet did not exit the body, and Rao recovered bullet fragments. (T8:704-705) This wound would have caused immediate paralysis and unconsciousness with death in a few minutes. (T8: 710, 712-714) Rao also discovered that Binjaku wore jewelry and had $1075 in cash in his pocket. (T8:709-710)

Lawrence Wright lived at Williamsburg Common Apartments in back of Wolfson High School in the area of Binjaku Coin Laundry. (T7:545, 553-554) Wright had been to the laundry and knew the owner. (T7:561-562) In June of 2007, he worked a second job as night security at the apartments. (T7:545) Wright was acquainted with Kevin Scott having met him at another apartment complex a couple of years earlier. (T7:548-549) He also knew Desi Bolling through another friend. (T7:549-550) On Saturday, June 30, 2007, Wright arrive at the apartment complex about 7:45 p.m. (T7:551-552) A couple of men he knew were in the parking lot and one had car problems. (T7:553-554) Wright starting talking to the men at the car, when Desi Bolling drove into the area in a black Charger with tinted windows. (T7:556) Bolling left and came back two different

times. (T7:556-557) The first time, he was gone about fifteen minutes. (T7:556-557) The second time Bolling left, he returned in about three minutes and had two other men as passengers. (T7:556-558) Wright recognized one man as Kevin Scott, but he did not know the third man. (T7:558) Bolling stopped the car and opened the trunk. (T7:559) Scott and the other man got out of the car, and Wright noted that they were not wearing shirts. (T7:559) The men put their shirts in the trunk of the car and pulled other shirts from the car to wear. (T7:559) Scott appeared sweaty and shaky. (T7:560) Later, Bolling, Scott and the third man left. (T7:560-561) Wright, at some point that evening, walked to the BP service station to buy a lottery ticket. (T7:561) He saw police and rescue vehicles at the laundry and learned of the shooting. (T7:561-563)

Wright heard there was a $20,000 reward for information about the crime. (T7:563) The reward was actually a hoax. (T7:564) Wright talked to the police and told them about seeing Bolling, Scott and the third man the night of the crime. (T7:563-565, 589) Additionally, Wright knew Desi Bolling had been attempting to sell a firearm before the night of the shooting. (T7:563) On July 14, 2007, Wright agreed to wear a recording device and assist the police by buying the gun from Bolling. (T7:565, 595-597) He purchased the gun with money the police provided. (T7:566) At the time of the transaction, Bolling told Wright to be careful because

there was a body on the gun. (T7:566) When Wright gave the firearm to Detective Oliver, it was wrapped in a white T-shirt and had 14 live rounds in the magazine. (T7:595-596)

On July 16, 2007, Detective J. T. Anderson, who is also an evidence technician, processed the Glock firearm (State Exhibit No. 21), the 14 cartridges (State Exhibit No. 16), and the expended cartridge shell casing from the scene (State Exhibit No. 20) for possible DNA samples. (T8:628-637) Anderson used separate swabs for each of the cartridges, the expended cartridge casing, and for each location on the firearm – the trigger, trigger guard, handle, and slide. (T8:632-636) Bryne Strother, a DNA analyst, received the swabs and tested them for DNA. (T8:637-646) No detectible DNA was present on any of the submitted swabs. (T8:646-648)

Peter Lardizabal, an FDLE tool mark and firearms expert, examined the .40 caliber Glock firearm (State Exhibit No. 21) and the expended .40 caliber cartridge casing(State Exhibit No. 20). (T8:672-673) After making a comparison of the markings on the exhibits, Lardizabal conclude that the expended cartridge casing was fired in the Glock pistol. (T8: 673-675)

The police arrested Desi Bolling on August 10, 2007. (T7: 434) Initially, Bolling told the police that did not know anything about the attempted robbery and murder. (T7:466-467, 597) Later, with his lawyer, Bolling met with the prosecutor and Detective

Oliver, and he gave information about the crimes. (T7:468-469, 598) Desi Bolling agreed to testify for the State. (T7:433, 495-498) The State allowed Bolling to plead guilty to second degree murder, and on June 18, 2009, after Scott's trial, Circuit Judge Charles Arnold sentenced Bolling to the time he had already served of 678 days and ten years probation. (R3:508, 544-545;T7:495-498, 514-516, 524-526)

Bolling became friends with Kevin Scott when they both attended Wolfson High School. (T7:437) Although in the Army stationed at Fort Stewart in Georgia, Bolling frequently returned to Jacksonville on weekends to visit friends and family. (T7:434-436) He came to Jacksonville on Friday, June 29, 2007. (T7:439) About two weeks earlier, he discussed with Kevin Scott locations that could be robbed. (T7:440-441) Bolling needed money because the Army mistakenly overpaid him, and he owed the Army repayment. (T7:463) Bolling had previously attempted to sell a .40 caliber Glock handgun, as well as a bullet proof vest and other military type equipment. (T7:441-444) Scott mentioned a coin laundry near Wolfson High School. (T7:441) Bolling spent time with with friends at Ravenwood and Williamsburg apartments on Saturday afternoon, June 30th. (T7:445-446) He met Scott that evening at the nearby BP service station. (T7:446-447) Another man Bolling did not know was with Scott, and Scott introduced him as "Miami." (T7:447-451) They

discussed the laundry and firearms. (T7:449-451) Scott retrieved Bolling's firearm, the Glock, from the trunk of Bolling's car. (T7:451) The other man had a firearm, but he did not have bullets for it. (T7:451-452) Bolling was not going to participate in the actual robbery, but he expected Scott to buy the Glock with the proceeds from the robbery. (T7:452) Bolling did not expect anyone to be shot. (T7:453) Scott agreed to call Bolling to pick him and Miami up after the robbery. (T7:453) Bolling drove back to Williamsburg Apartments. (T7:453) Scott called Bolling about fifteen minutes later. (T7:454)

When Bolling picked up Scott and Miami, they were sweating. (T7:456) Scott said they robbed the place, and he shot the man because he had "jacked the buck." (T7:456) Bolling understood this to mean the man resisted the robbery. (T7:456) Scott did not say if the man was alive or dead. (T7:456) In further conversation, Scott said the man "jacked the buck" and he did not get any money. (T7:461) They went to Williamsburg Apartments where Scott placed the Glock back in the trunk of Bolling's car. (T7:458) Scott and Miami may have changed shirts. (T7:459) The three of them talked with a few people in the parking lot where a friend of Bolling's was working on a car. (T7:457) Later, Bolling dropped Miami off at his home, and he drove Scott to Hilltop Apartments. (T7: 457, 460-461) Bolling also checked the Glock and determined that one cartridge

was missing from the magazine, there had been 15 rounds loaded in the gun and only 14 remained. (T7:461-462) Sometime later, Bolling sold the Glock to Lawrence Wright, even though he knew at that time the gun had killed someone. (T7:462-467)

On October 2, 2007, Bolling agreed to wear a recording device and engaged Scott in conversation about the crime. (T7:469-470) The purpose was to have Bolling elicit an admission of guilt to the crime from Scott. (T7:522) Bolling was in jail on the murder charge, and Scott was also in jail. (T7:470-471) Detective Oliver arranged for Bolling and Scott to be housed in the same area of the jail in order for Bolling to have access to Scott. (T7:598-599) According to Bolling, Scott admitted during that conversation in the jail that he hit one man with the butt of the gun and shot the second man in the face, when the man rushed him with a chair. (T7:471-495) Bolling identified Scott's voice on the recording played for the jury. (State Exhibit 32) (T7:475)

Prior to trial, the defense moved to suppress the jail conversation and statements Bolling recorded for two reasons. (R2:223-226; R4:675-679; T6:228-233) First, the statement was obtained in violation of Scott's constitutional rights since Bolling was acting as a agent of the state. (R2:223-226) Second, the quality of the recording was extremely poor with much of it unintelligible. (R2:223-226) The trial court denied the motion and

allowed the prosecution to play a portion of the recorded conversation. (R2:235) (State Exhibit 32) The defense renewed the objections at trial. (T7:473) A portion of the recorded conversation was played for the jury. (T7:472-495) Due to the poor quality of the recording, the State used Desi Bolling to explain portions of the recording at trial. (T7:471-472,475-479) Additionally, Bolling assisted in preparing a working transcript. (T7:471-472, 475) (State Exhibit for Indentification HH, reproduced App. C)(R2:288-292) The State was allowed to use the working transcript (Exhibit for Identification HH) as an aid for the jurors to listen to the recording (State Exhibit 32). (T7:472-473) As the tape was played in open court, the court reporter transcribed the tape as played. (T7:467-495)(Transcription reproduced App. B)

John Holsenbeck was staying with friends in the San Jose Villa Apartments located across the street from Binjaku Coin Laundry. (T7:528-530) Between 9:30 and 10:00 p.m. on June 30, 2007, Holsenbeck and a friend were at the apartment pool. (T7:530-531) He heard a noise from across the street that he thought was gunfire. (T7:531-532) A short time later, a black male ran by the swimming pool. (T7:533) The man wore shorts and a white or light-colored T-shirt. (T7:533) Since the man was running, Holsenbeck saw him for only seconds, and he did not clearly see the man's face. (T7:533) Based on the man's dress and size, Holsenbeck said it

appeared to be a man he saw earlier in the day in the area who inquired about the bus schedule. (T7:536-537) The man appeared to be running in the direction of Wolfson High School. (T7:534) Later, Holsenbeck walked across the street, saw the rescue and police at the laundry and learned that a shooting occurred. (T7:538) He told the police what he heard and saw. (T7:538) About three weeks later, Detective Travis Oliver talked to him and showed him a photospread to see if he could identify anyone as the person he saw running. (T7:539, 548, 588-594) Holsenbeck picked photographs of two individuals and said one of them could be the person he saw. (T7:540) Detective Oliver testified that the two photographs Holsenbeck picked out were of Kevin Scott and Lamont Ernest. (T7:591) Oliver stated that Lamont Ernest was on active duty in the Navy, and he had been stationed in Jacksonville only a short time. (T7:594)

Alibi Defense

Four witnesses testified that Kevin Scott was present at a neighbor's birthday party at the time of the crime. (T8:740, 764, 785; T9:906) Scott lived with his girlfriend, Nicole Corley, who was older, and she had three children. (T9:833-836) Corley worked and Scott stayed home to care for the children. (T8:742-744; T9:833-836) The next-door neighbor, Quartx Barney, referred to Scott as "Mr. Mom." (T8:743) On June 30, 2007, Barney had a

birthday party for her daughter. (T8:744) She had a barbecue that started around 5:00 to 5:30 p.m. (T8:744) Neighbors were invited, and Scott came with Corley's children. (T8:745) Corley was at work. (T8:745) Scott arrived at the beginning of the party, and he assisted in setting up and cooking the barbecue. (T8:746) The party ended for the children about 8:00 or 9:00 p.m., but the adults stayed until after 11:30 p.m. (T8:746) Barney was sure of the date of the party and sure of Scott's presence. (T8:744, 747)

Tony Paige, who was sixteen years-old at the time he testified, stated that he was present at the birthday party on June 30, 2007. (T8:764-767) He arrived in the afternoon and stayed until 9:00 p.m. (T8:767) The entire time Paige was at the party, Kevin Scott was also there. (T8:767) Scott assisted with the party, cooking barbecue and helping with the children. (T8:768)

Ray Washington had been in a relationship with Quatx Barney, and she knew Barney's neighbors, Nicky Corley and Kevin Scott. (T8:785-787) Washington was present for Barney's daughter's birthday party on Saturday, June 30, 2007. (T8788-789) The party began around 5:30 p.m., and Kevin Scott was present and assisting with the barbecue and playing with the children. (T8:789-790) Scott remained at the party the entire time until the adults left just before midnight. (T8:790-791) On cross-examination, Washington mentioned that detectives had talked to her and Barney

about Scott's presence at the party. (T8:794-795) She said that was the first time she told anyone about Scott's being at the party. (T8:798-799) The prosecutor probed Washington's memory and asked if it was 2007 or 2008 that she spoke to someone about the party:

> Q. Was it in 2007? Was it in 2008?
>
> A. Yes. It was after he was incarcerated. He had went to jail on a drug charge. Then Ms. Nicki called down there and they say he had a case pending and then that's when y'all start coming out.

(T8:799) Defense counsel moved for a mistrial since the fact that Scott was incarcerated on a drug charge had been the subject of a motion in limine and that information was not to be presented to the jury. (T9:804-805) The court denied the motion for mistrial solely on the ground that the State did not elicit the information and disclosure of the drug charge to the jury was not the State's fault. (T9:805)

Regina Corley is Nicole's Corley's teenage daughter who was eighteen at the time of her testimony. (T9:806-807) She lived in her mother's apartment along with Kevin Scott. (T9:807) Scott assumed the role of stepfather to Regina, and she considered him her dad. (T9:808) On June 30, 2007, Regina remembered that Scott and her little brother went to the neighbor's birthday party around 5:00 p.m. (T9:809) Regina stayed home, but occasionally looked outside and could see Scott playing football with the boys at the party. (T9:809-810) She said Scott returned to the apartment

between 11:30 and 12:00 when her mother returned from work. (T9:810-811)

Prosecution's Rebuttal

The State called Kevin Scott's girlfriend, Nicole Corley, to ask her if Scott had a friend named "Miami." (T9:833-850) Corley explained that Scott stayed home with the children while she worked. (T9:835-836) She said Scott rarely went anywhere and rarely brought friends to the apartment. (T9:838) Scott, on a couple of occasions, mentioned someone named "Miami", but Corely never saw this person and did not know him. (T9:839-841)

Detective Travis Oliver testified that neither he nor any member of the homicide investigative team interviewed the four alibi witnesses. (T9:850-853) Oliver asserted that no one working in the sheriff's department would interview a witness on one of his cases without his knowledge. (T9:852)

Prosecutor's Closing Argument

In his closing argument to the jury, the prosecutor emphasized the importance of the tape recording Desi Bolling secured in the jail. (T9:943-948) He also discussed the alibi witnesses presented in the defense case. (T9:953-954) At one point, the prosecutor said:

> I want to talk a little bit about the different witnesses, that alibi witnesses that you heard and things of that nature. You know, as -- I'm not as veteran as Mr. de la Rionda, but in my short stint I've already

> learned that sometimes it's not what you hear that's actually more important than what you hear.
>
> I thought it was pretty ironic as I sat here listening to all the different witnesses the defense called today, girlfriend, friends. I just kept waiting. I kept thinking at any moment now one of them is going to say, oh, I've listened to that jail tape. That's not his voice. That's not him. I mean that would be the most obvious thing, wouldn't you think? Oh, yes, Desi Bolling has scripted this with somebody. That's not his voice. You didn't hear that once.
>
> Why is that? I don't know. Admit what you can't deny and deny what the state has no way to prove or disprove? …

(T9:953-954)

Defense counsel moved for mistrial when the prosecutor commented on defense's failure to call witnesses to testify that the recorded statement did not contain Scott's voice. (T9:953-954; 958-959) Addressing the motion, the trial court ruled that the prosecutor's comments were not improper and denied the motion based on that ruling. (T9:959)

> THE COURT: Thank you. Your motion will be denied. I think it was a fair comment on people who claim to be very knowledgeable of the defendant and was staying with him or seeing him on a daily basis for a number of years, and it just seemed to be a simple, logical question if somebody were to ask him if they recognize the voice. I think it's fair comment on the evidence. Therefore I'll deny the motion.

(T9:959)

Penalty Phase

The State presented two witnesses to testify to victim impact. (T10:1056, 1063) Mavina Binjaku, the victim's daughter, read a prepared statement about her and her family's life since her

father's death.(T10:1056-1063) Sally Trammel, a family friend who taught the victim's daughter, read a prepared statement about the loss the family suffered. (T10:1063-1065) In mitigation, the Defense presented the evidence from several of Scott's relatives, friends and former employers about Scott's childhood, current character and relationships. (T10:1066-T11:1164) Scott also testified in his own behalf. (T11:1164) As rebuttal witnesses, the State presented several law enforcement officers who testified about Scott's prior criminal arrests and convictions. (T11:1198-1224)

Latonya Holly Roberts is Kevin Scott's mother. (T10:1131-1132) She was a teenager when Kevin was born on February 5, 1985. (T10:1132) His father was never involved in Kevin's life. (T10:1132) Roberts had little money for Kevin's clothes or toys, but she worked at Burger King and went to college. (T10:1132-1134) Kevin's sister, Nicole, was born when Kevin was two-years-old. (T10:1134) Roberts married twice while Kevin was young, however she separated from one after he became abusive about six months into the marriage. (T10:1135) Although Roberts tried to protect the children from exposure to the abuse, Kevin would overhear the abuse she suffered. (T10:1135-1136) Kevin told her that if he were big enough nobody would ever hurt her. (T10:1136) She married Freddie Holland, and they stayed together for a couple of years, separated

for nine years and then remarried after Kevin was grown. (T10:1093-1094, 1136-1137) Holland was a kind man and a positive influence when he was present in the children's lives. (T10:1137) Holland testified that he tried to be a father to Kevin, and he found Kevin to be respectful, smart and loving toward others. (T10:1094) When Kevin was fifteen, he flew to see his biological father, but he was despondent when he returned, since his father did not seem to be interested. (T10:1142) Dorothy Gragg, Kevin's paternal grandmother, testified that Kevin's father was a crack cocaine addict. (T10:1110) She spent time with Kevin during the trip, and she found him to be a kind, caring and spiritual person. (T10:1110-1114)

Kevin grew up involved in church. (T10:1082, 1091, 1095, 1136, 1138-1141) At six-years-old, he wanted to wear a suit to school because he wanted to be a minister. (T10:1138-1139) When he was in middle school, Roberts received a call from the school because Kevin, dressed in suit, was preaching on the school grounds. (T10:1147) For a time, Kevin worked at a Winn Dixie. (T10:1147) He once stopped a man who was stealing from the store. (T10:1148) Kevin chased the man down in the parking lot and told him stealing was not right. (T10:1148) His grandmother, Eddie Phelps, said Kevin was respectful, and he had a joyful spirit. (T10:1082, 1084)

Kevin could be fun-loving as well as serious. The family considered him the jokester; he enjoyed making others laugh.

(T10:1066, 1095, 1143, 1146) He also took responsibility for care and protection of his sister and brother. (T10:1082-1083) His sister, Nicole Green, testified that he was a good big brother who helped, protected and supported her. (TT10:1066-1071, 1091) He assisted her with homework and encouraged her in her sports activities. (T10:1070-1071) She and Kevin were raised in the church, and she went to him for advice. (T10:1071-1073) After he went to jail, they wrote to each other, and she continues to seek his advice. (T10:1071-1072) Nicole and Kevin worked for the same company for a time, a fiberglass and welding company. (T10:1073-1074) Kevin was a welder, and the supervisors found him reliable. (T10:1073-1074) Dwayne Hopkins, the manager, wrote a letter in Kevin's behalf acknowledging his value as an employee. (T10:1090)

Nichol Corley, Scott's fiancé, testified. (T10:1097) She worked as a switchboard operator for a taxi cab company, and she met Kevin when he called for a cab. (T10:1098-1099) She found him to be a generous, kind, loving person who was good with her children. (T10:1099) He became "Mr. Mom" to her children, allowing her to work the shift work her job required. (T10:1099) Kevin did all the housework, cooked, cleaned and helped the children with homework. (T10:1099-1100) He became the father figure for her children, and they became closer to Kevin than they did their biological father. (T10:1100-1101) She and Kevin have a daughter

together who was born after Kevin's arrest and who was sixteen-months-old at the time of trial. (T10:1098) Corley plans to keep Kevin involved in the child's life as she grows up if Kevin is given a life sentence. (T10:1103)

Regina Corley, Nichol Corley's daughter, was sixteen when Kevin first came into her life.(T10:1076) Her mother was several years older than Kevin. (T10:1081) When Kevin moved in with the family, he became a father figure to her. (T10:1077) He gave her advice and helped her with her schoolwork. (T10:1077) He helped her with boyfriend problems and played ball with her younger brother. (T10:1078) Kevin also cooked, cleaned, and made sure Regina and her brother went to school. (T10:1077) Her mother worked odd hours, but Kevin was around to take care of them. (T10:1078) She believes that Kevin could continue to be a positive influence for her from prison. (T10:1079)

Kevin Scott testified in his own behalf. (T11:1164-1170) Scott said that his mother, stepfather and grandmother had a great influence on his life. (T11:1164) Although his living conditions growing up were difficult at times, he credited his mother with doing her best to provide for him. (T11:1165) He attended church regularly and that experience stayed with him in life. (T11:1165) At 16 years-old, he left home and lived with friends. (T11:1166) He did not graduate from high school, but he did take the G.E.D.

later. (T11:1164-1165) Scott admitted that he got into trouble with some of his friends. (T11:1166) However, he stated that he had never before been convicted of a crime of violence. (T11:1167-1168) Scott addressed one report when he was 14 years-old that he and another boy followed a girl home after school and forced their way into her home. (T11:1166) He explained that he and the other boys frequently went to the girl's house after school. (T11:1166) A neighbor told the girl's mother, and the girl made up the story about being followed. (T11:1166) The incident never went to court. (T11:1166-1167) Scott acknowledged that he had been convicted of possession of cocaine, a theft and fleeing and eluding an officer. (T11:1167) Scott told the jury that he believed he could have a productive life in prison. (T11:1168) In particular, he said he would continue to be helpful to Regina Corley for whom he had become a father figure. (T11:1168-1169) Scott said he decided to testify to have the chance for the jury to hear him speak for himself. (T11:1170) He asked the jury for mercy. (T11:1170)

In rebuttal, the State presented testimony of police officers about Scott's arrests and convictions. Detective Larry Baker was a school resource officer in 1999, when Kevin Scott was a 14 year-old student at Wolfson High School. (T11:1198-1199) Erica Holmes, another 16-year-old student, reported that Scott and another boy followed her home, went inside her house and tried to lift her

dress. (T11:1201-1204) No charges were filed and no arrests were made. (T11:1203-1204) Detective Donnie Slayton investigated some burglaries in 2003, and he spoke to Kevin Scott who admitted to being a look-out for a burglary and helped Slayton recover stolen property. (T11:1208-1211) Detective L.J. Walton was also investigating burglaries in 20003, and he found a stolen cell phone in Scott's pocket during a pat down search. (T11:1212-1213) Officer Phister was called to a location in 2005, and upon leaving, he became involved in chasing a car after seeing it collide with another car. (T11:1216) Kevin Scott was the driver of the car the officer chased. (T11:1217) Phister charged Scott with reckless driving and not having a valid driver's license. (T11:1237-1238) In 2005, officer Andrew Lavender set up a controlled buy of cocaine. (T11:1219) Kevin Scott was a passenger in the suspect's vehicle, and Phister observed Scott throw a baggie of cocaine from the car. (T11:1220) In 2006, Officer James Hendley stopped a car with three individuals including Kevin Scott who was a passenger in the back seat. (T11:1222-1223) A small baggie of marijuana was located where Scott was sitting. (T11:1223) A search of the cargo area of the vehicle revealed a stolen video game player and game. (T11:1223-1224) The prosecutor introduced judgments against Kevin Scott for grand theft, dealing in stolen property, fleeing and eluding an officer, reckless driving, resisting an officer without

violence, no valid driver's license, and possession of cocaine. (T11:1224-1225)

On June 18, 2009, the court held a Spencer hearing. (R4:709-718) The court considered the pre-sentence investigation report and two letters, one from Scott's natural father who expressed regret that, due to drug dependency, he was never a part of Scott's life; and another from Scott's aunt, who asked for mercy. (T4:711-716) At the court's request (R4:716), the State and Defense filed sentencing memoranda. (R3:482-488, 489-544) On July 23, 2009, Circuit Judge W. Charles Arnold sentenced Scott to death for first degree murder, to 25 years imprisonment for attempted armed robbery with a firearm and to 15 years imprisonment for aggravated battery. (R3:567-575; R4:719-724) (App. A)

SUMMARY OF ARGUMENT

I. In his closing argument, the prosecutor emphasized the importance of the audio recording Desi Bolling secured in the jail. He also discussed the alibi witnesses presented in the defense case. At one point, the prosecutor commented that he found it ironic that the defense never asked an alibi witness to listen to the audio recording and testify that the voice in the recording was not Scott's. The prosecutor's comment shifted the burden of proof to the defense. The comments suggested that Scott had the obligation to establish that the recording did not contain his voice. Scott's rights to due process and fair trial have been violated and a new trial is required. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, VI, XIV U.S. Const.

II. On cross-examination, a defense witness stated that Scott had been previously incarcerated on a drug charge. Defense counsel moved for a mistrial since the fact that Scott was incarcerated on a drug charge was inadmissible. Although acknowledging the evidence was improper, the trial court erroneously denied the motion for mistrial stating that the prosecutor did not intentionally elicit the information and disclosure of the drug charge to the jury was not the State's fault. The trial court made no assessment of the prejudice the error caused to the fairness of the trial. Erroneous admission of irrelevant collateral crime evidence is presumptively

prejudicial, and the State cannot now meet its burden of establishing beyond a reasonable doubt that the error was harmless. See, Goodwin v. State, 751 So.2d 537, 546-547 (Fla.2000); Czubak v. State, 570 So. 2d 925 (Fla. 1990)

III. Detective Oliver violated Scott's constitutional right to counsel and due process when he sent Desi Bolling to engage Scott in conversation in the jail in order to secure a recorded admission. See, Art. I Secs. 9, 16 Fla. Const.; Amend. V, VI, XIV U.S. Const. The right to counsel attaches when the State's action shifts from an investigatory process to an accusatory one. Scott's right to counsel attached when Detective Oliver issued a bulletin identifying Scott as a codefendant in the murder and directing law enforcement to pick him up. The fact that Scott was arrested on a drug charge and the detective cancelled the bulletin did not change Scott's constitutional rights. Scott's motion to suppress statements should have been granted.

IV. The death sentence is not a proportional sentence in this case. This crime was Scott's reactive shooting of the victim who rushed Scott with a chair used as a club while attempting to stop the robbery. Only two aggravating circumstances exist, and the trial court found several non-statutory mitigating factors. A review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital

cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Offord v. State, 959 So.2d 187 (Fla. 2007); Urbin v. State, 714 So.2d 411, 417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1996). Such a review of this case shows that the death sentence is not proportionate and must be reversed. Art. I Secs. 9, 17, Fla. Const.

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

ARGUMENT

ISSUE I

THE PROSECUTOR'S IMPROPER COMMENT IN CLOSING ARGUMENT, SUGGESTING THAT THE DEFENSE COULD HAVE PRESENTED TESTIMONY TO DISPROVE THAT SCOTT'S VOICE WAS ON THE RECORDING DESI BOLLING OBTAINED FOR THE STATE, IMPROPERLY SHIFTED THE BURDEN OF PROOF FROM THE STATE TO THE DEFENSE IN VIOLATION OF DUE PROCESS REQUIREMENTS THAT THE STATE PROVE THE CRIME CHARGED.

Standard of Review

A trial court's ruling regarding the issue of whether a prosecutor's closing argument constitutes a comment on the defendant's failure to call witnesses in violation of due process is mixed question of law and fact reviewed in this Court under the de novo standard.

Discussion

In his closing argument to the jury, the prosecutor emphasized the importance of the audio recording Desi Bolling secured in the jail. (T9:943-948) He also discussed the alibi witnesses presented in the defense case. (T9:953-954) At one point, the prosecutor said:

> I want to talk a little bit about the different witnesses, that alibi witnesses that you heard and things of that nature. You know, as -- I'm not as veteran as Mr. de la Rionda, but in my short stint I've already learned that sometimes it's not what you hear that's actually more important than what you hear.
>
> I thought it was pretty ironic as I sat here listening to all the different witnesses the defense called today, girlfriend, friends. I just kept waiting. I kept thinking at any moment now one of them is going to say, oh, I've listened to that jail tape. That's not his voice. That's not him. I mean that would be the

> most obvious thing, wouldn't you think? Oh, yes, Desi Bolling has scripted this with somebody. That's not his voice. You didn't hear that once.
>
> Why is that? I don't know. Admit what you can't deny and deny what the state has no way to prove or disprove? …

(T9:953-954)

Defense counsel moved for mistrial based on the prosecutor's improper comment on Scott's failure to call witnesses to testify that the recorded statement did not contain his voice. (T9:953-954; 958-959) Addressing the motion, the trial court ruled that the prosecutor's comments were not improper and denied the motion based on that ruling. (T9:959)

> THE COURT: Thank you. Your motion will be denied. I think it was a fair comment on people who claim to be very knowledgeable of the defendant and was staying with him or seeing him on a daily basis for a number of years, and it just seemed to be a simple, logical question if somebody were to ask him if they recognize the voice. I think it's fair comment on the evidence. Therefore I'll deny the motion.

(T9:959) The trial court's ruling is wrong. This comment shifted the burden of proof on the issue the State had the burden of proving –- that the jail recording was of Scott's voice. See, e.g., Jackson v. State, 575 So.2d 181 (Fla. 1991); Ealy v. State, 915 So.2d 1288 (Fla. 2d DCA 2005). As this Court in Jackson stated:

> . . . Jackson correctly contends that the State should not have told the jury to draw inferences from the fact that Jackson did not call his mother to testify. It is well settled that due process requires the state to prove every element of a crime beyond a reasonable doubt, and that a defendant has no obligation to present witnesses.

> Accordingly, the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence. . .

Jackson, 575 So.2d at 188.

Prosecutors may comment on an alibi defense, since it is an issue that the defense has assumed the burden of producing evidence, under a narrow exception to the rule about commenting on a defendant's failure to present witnesses. See, Jackson v. State, 575 So.2d at 188; White v. State, 757 So.2d 542, 544-546 (Fla. 4th DCA 2000). However, the prosecutor's comment in this case was not addressing the alibi defense. Even though the prosecutor mentioned the alibi witnesses, the comment was improperly aimed at the issue of identity of Scott's voice on the recording, an issue the State had the burden to prove. See, Hayes v. State, 660 So.2d 257 (Fla. 1995); Ealy v. State, 915 So.2d 1288 (Fla. 2d DCA 2005); Jackson v. State, 690 So.2d 714 (Fla. 4th DCA 1997).

Several cases are on point and support Scott's position that the prosecutor's comments violated his due process rights. In Hayes, 660 So.2d 257, this Court held the prosecutor presented evidence and commented on the defendant's failure to request scientific testing of certain physical evidence to establish that blood and hair samples from the scene did not match his own. Holding that the narrow exception to the rule for affirmative defense's that place some burden of proof on the defense did not apply, this Court

wrote:

> The State asserts that its comments were invited by the defense in opening arguments when counsel told the jury that it would receive probative evidence that the defendant did not commit the crime. In *Jackson*, we recognized an exception to the general rule that the prosecutor may not comment on the failure of the defense to call any witnesses when the defendant raises an issue for which the defense carries some burden of proof. *Jackson*, 575 So.2d at 188, For example, if a defendant claims an alibi, we have held that the State may comment on the failure of the defendant to call witnesses to substantiate the alibi. *Buckrem v. State*, 355 So.2d 111, 112 (Fla. 1978). However, the exception cited by the State does not apply in the instant case because Hayes never put at issue any claim for which he carried any burden of proof and for which the prosecutor's comments would be relevant. In opening argument defense counsel stated: "You will be provided with solid physical evidence that this terrible crime was committed by another person. In fact, you will receive evidence that the murderer was not a black man but a white person." The evidence to which defense counsel referred was hair found clutched in the victim's hand. These strands were inconsistent with the defendant's hair and suggested that a Caucasian individual may have committed the murder. Defense counsel never assumed any responsibility for presenting the hair strands to the jury as part of an affirmative defense. In fact, it was the prosecutor who first raised the issue of the hair strands in opening argument, and defense counsel's statement is consistent with the notion that evidence presented by the State itself would be probative evidence that another person committed the murder.

Hayes, 660 So.2d at 265-266.

The Second District Court of Appeal, in Ealy v. State, 915 So.2d 1288 (Fla. 2d DCA 2005), held the prosecutor improperly commented on the defendant's failure to present evidence to contradict the expert witness who testified about the fingerprint

match. The defendant testified he was on his way to work and had car trouble when the robbery occurred. He did not present any evidence on the fingerprint. Reversing the case for a new trial, the Second District Court wrote:

> When a defendant testifies or presents other evidence in his case, the State clearly has the right to comment on that testimony. See, *Rivera v. State*, 840 So.2d 284 (Fla. 5th DCA 2003). For example, the State could probably comment on Mr. Ealy's decision to ask the jury to rely on his credibility about his car trouble and the description of his car when there were stronger ways for him to prove his claims.
>
> On the other hand, the State had the burden to present fingerprint evidence that was sufficiently compelling to satisfy its burden before this jury. This was a case in which the State's primary fingerprint expert had initially concluded that the fingerprints found at the bank were not Mr. Ealy's. The State needed to convince the jury that its subsequent conclusion that the prints were in fact Mr. Ealy's was determined by experts that were sufficiently professional and proficient, such that the State had no burden to present another independent witness or further evidence to buttress the existing fingerprint evidence. Instead of relying on such arguments, the State repeatedly implied that Mr. Ealy had an obligation to refute the questionable fingerprint evidence.

Ealy, 915 So.2d 1288, 1290-1292. The prosecutor's actions in Ealy are directly comparable the to prosecutor's actions in Scott's case. Scott had no obligation to present evidence to refute the State's witnesses who testified that the voice in the recording was Scott's.

In White v. State, 757 So.2d 542 (Fla. 4th DCA 2000), the defendant was on trial for trafficking in cocaine after he was found in possession of a package of the drug at an Amtrak station

in Florida. White, who lived in South Carolina, testified he had been visiting his cousin, Theron Preston, in Florida. The night before his return trip, a friend of Theron's, Charles, asked White to take a package back to his girlfriend, Sheila, in South Carolina. White said that the package did not belong to him, and he did not know what was inside. The trial court allowed the prosecutor to cross-examine White about why he did not call his cousin Theron and Charles to testify for the defense. Additionally, the prosecutor commented in closing about White's failure to call these individuals as witnesses to support his version of the facts. The Fourth District Court reversed the case stating as follows:

> Clearly, a defendant who takes the stand to testify places his credibility in issue, just as any other witness. He subjects himself to close scrutiny by the jury and takes the risk of having his testimony torn apart by a skillful cross-examiner, who may expose certain contradictions, fallacies, and absurdities in his version of events. But, because a criminal defendant is presumed innocent and the state had the burden of proving guilt on all elements of the offense, the prosecutor must stop short of inquiring about witnesses the defendant failed to call to support his story. Otherwise, the jury will be led to believe that the defendant has an obligation to produce these witnesses and to prove his innocence. In this case, when the prosecutor asked appellant why he did not call Theron and Charles as witnesses, she suggested that he was obligated to call them and to prove that he did not know the package contained cocaine. In other words, the prosecutor's comments improperly led the jury to believe that the burden of proof on the element of knowledge shifted to the defendant. This conduct infringed upon appellant's right to due process. *Jackson*, 575 So.2d at 188.

White, 757 So.2d at 546-547.

In Jackson v. State, 690 So.2d 714 (Fla. 4th DCA 1997), the Fourth District Court reversed a possession of cocaine and marijuana case because the prosecutor suggested to the jury that the defendant had the burden of calling witnesses to support his testimony claiming he had no knowledge of the drugs found in the apartment. Jackson testified that his friend and coworker, Jeff Brax, drove him to a party at the apartment where the drugs were found, and he had no knowledge of drugs at the apartment. Jackson became intoxicated, passed out and awoke as the police entered to search the apartment the next day. On cross-examination, the prosecutor pressed Jackson as to why Jeff Brax was not at trial to testify as a witness. The Fourth District Court reversed stating:

> Likewise, in the instant case, appellant never raised an issue for which he carried, or voluntarily assumed, the burden of proof. The State argued two theories under which Jackson would be guilty of possession: (1) he admitted to the detectives that the drugs were his, or (2) he possessed the drugs because he was in control of the apartment. Jackson's defense was that the apartment was not his and that he was only present on the morning of the police executed the search warrant because he had attended a party there on the evening before, become intoxicated and passed out, that he was unaware that there were any drugs in the apartment, and that he did not state to the police officer that the drugs were his. This defense amounts to nothing more than a denial that the elements of the crime have been established.
>
> Furthermore, the transcript reveals that it was not Jackson who made an issue of Brax or implied that Brax could support his story, but rather it was the prosecutor

> who made an issue of Brax. At no time did Jackson indicate that Brax could verify that no drugs were at the apartment or that Brax had been with him for the entire evening and could testify that the drugs found did not belong to Jackson. On direct examination, Jackson's testimony was limited to the fact that Brax was a coworker who had driven him to the apartment the night before. . .

Jackson, 690 So.2d 718.

Just as in the above discussed cases, the prosecutor's comment in this case shifted the burden of proof to the defense. The comments suggested that Scott had the obligation to establish that the recording did not contain his voice. Scott's rights to due process and fair trial have been violated and a new trial is required. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, VI, XIV U.S. Const.

ISSUE II

THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL WHEN A WITNESS MENTIONED SCOTT HAD BEEN INCARCERATED ON AN UNRELATED CRIMINAL DRUG CHARGE.

Standard Of Review

Erroneous admission of collateral crimes evidence is presumptively prejudicial, and the issue on appeal is whether the State can establish beyond a reasonable doubt that the error was harmless through showing that the error did not affect the verdict. See, Goodwin v. State, 751 So.2d 537, 546-547 (Fla. 2000); Czubak v. State, 570 So.2d 925 (Fla. 1990); State v. Lee, 531 So.2d 133 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Discussion

On cross-examination, a defense witness, Ray Washington, mentioned that detectives had talked to her about Scott's presence at the birthday party. (T8:794-795) She said that was the first time she told anyone about the Scott's being at the party. (T8:798-799) The prosecutor asked several questions probing Washington's memory, and he asked if it was 2007 or 2008 that she spoke to someone about the party:

> Q. Was it in 2007? Was it in 2008?
>
> A. Yes. It was after he was incarcerated. He had went to jail on a drug charge. Then Ms. Nicki called down there and they say he had a case pending and then that's when y'all start coming out.

(T8:799) Defense counsel moved for a mistrial since the fact that

Scott was incarcerated on an irrelevant drug charge was inadmissible. (T9:804-805) The subject had been litigated on a motion in limine, and after discussions, the State agreed the arrest on the drug charge would not be presented. (T6:233-240; T9:804-805) Although acknowledging the evidence was improper, the trial court denied the motion for mistrial stating that the State did not elicit the information and disclosure of the drug charge to the jury was not the State's fault. (T9:805) The trial court made no assessment of the prejudice the error caused to the fairness of the trial. (T9:805) Defense counsel declined the court's offer to give a curative instruction. (T9:805), See, e.g., Brooks v. State, 868 So.2d 643, 645 (Fla. 2d DCA 2004)(recognizing that curative instructions in such situations can be ineffective). Erroneous admission of irrelevant collateral crime evidence is presumptively prejudicial, and the issue on appeal is whether the State can establish beyond a reasonable doubt that the error was harmless. See, Goodwin v. State, 751 So.2d 537, 546-547 (Fla. 2000); Czubak v. State, 570 So.2d 925 (Fla. 1990).

This Court, in Czubak v. State, 570 So.2d 925, reversed the case for a new trial because a witness, in an irrelevant and unsolicited response, commented on the defendant's status as an escaped convict. Czubak moved for a new trial that the trial court denied, ruling the defense solicited the response. The defense did

not ask for a curative instruction. In reversing the case, this Court disagreed that the defense solicited the response and rejected the notion that the defense was required to ask for a curative instruction. Moreover, this Court rejected the contention that the error was harmless:

> The state claims that Schultz's testimony was harmless error. We do not agree. Erroneous admission of collateral crimes evidence is presumptively harmful. *Castro*, 547 So.2d at 116; *Straight v. State*, 397 So.2d 903, 908 (Fla.), *cert denied*, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." *Ciccarelli v. State*, 531 So.2d 129, 132 (Fla. 1988). In view of the fact that the case against Czubak was largely circumstantial, we cannot say beyond a reasonable doubt that the verdict was not affected by the revelation that he was an escaped convict. . . .

Czubak, 570 So.2d at 928.

The District Courts of Appeal have reached similar decisions in similar circumstances. In Ward v. State, 559 So.2d 450 (Fla. 1st DCA 1990), the alleged victim in the aggravated assault case was asked how long she had known the defendant. She replied, "I don't know how long it was. It was right after he was already in prison and it was after he got out." The trial court denied the motion for mistrial and instructed the jury to disregard the statement. The appellate court concluded the state failed to establish the error was harmless because witnesses for the state and the defense contradicted each other:

> Under the circumstances of the instant case, we find the State has failed to bear its burden of establishing that the erroneous statement made by the victim was harmless beyond a reasonable doubt. An examination of the permissible evidence presented in this case reveals the testimony of four witnesses (two for the defense and two for the State), each of whom contradicted the other three in numerous respects with regard to whether and how the alleged assault took place. As a result of the weakness of the evidence as a whole, we find that there exists at least a "reasonable possibility" that the impermissible statement made by the victim improperly influenced the jury's verdict.

Ward, 559 So.2d at 450-451.

A case from the Second District Court of Appeal is instructive. In Brooks v. State, 868 So.2d 643 (Fla. 2d DCA 2004), the defendant was charged with aggravated battery on his former wife, Rosa. At trial, the defense was that Brook's wife was the aggressor, and on cross-examination, defense counsel questioned her about a prior incident of domestic violence in which she had shot the defendant. On redirect examination, the prosecutor asked the wife if the defendant was charged in the prior case. She responded, "A few months later, he was sent back to prison." Defense counsel moved for a mistrial. The prosecutor suggested a curative instruction, and the court gave an instruction. The appellate court deemed the instruction insufficient to cure the prejudice. Additionally, the State could not demonstrate the error harmless. The evidence of the defendant's prior criminal behavior caste doubt on his self-defense theory. Since the evidence at trial consisted of "opposing and uncorroborated accounts concerning who was the

aggressor", the evidence of the defendant's prior criminal conduct could lead the jurors to be less likely to believe Brooks' defense. Also, the defense strategy changed from relying on the defendant's prior statement to the police about the crime to the defendant testifying in order to refute the implications of the wife's assertion he was "sent back to prison." Brooks' testifying opened him up to impeachment with two prior convictions which further eroded his credibility with the jury.

In White v. State, 743 So.2d 484 (Fla. 4th DCA 1999), the defendant was on trial for possession of a controlled substance and possession of drug paraphernalia. The charges arose from the execution of a search warrant. A detective testified that he and other officers had the defendant's apartment under surveillance for two hours before executing the warrant. During that time, the detective observed narcotic transactions, but he did not directly testify that the defendant was involved in the transactions. The trial court denied a motion for mistrial. The Fourth District Court of Appeal reversed, holding that the admission of the improper testimony of other crimes was not harmless because the jury may have been led to conclude that the defendant was involved in the drug transactions and guilty of those greater crimes.

In McGuire v. State, 584 So.2d 89 (Fla. 5th DCA 1991), the defendant was on trial for murder. A State witness "blurted out"

that McGuire had been "doing time in Georgia" and "he was on a fifteen year sentence up in Georgia." McGuire's Georgia conviction was not related to the murder case being tried. The Fifth District Court of Appeal reversed stating:

> We agree that the admission of this testimony was reversible error. Sec. 90.404(2)(a) Fla.Stat.(1990). Here, even though the trial judge denied the motion for mistrial, he found a curative instruction would not have alleviated the harm done by the comment. The error was not invited by defense counsel, as the state argues. Cf., *Ferguson v. State*, 417 So.2d 639 (Fla. 1982). As the result of the clear conflict in the testimony of the witnesses present, we find there exists at least a "reasonable possibility" that the improper statement made by the witness improperly influenced the jury's verdict. See, *Ward v. State*, 559 So.2d 450 (Fla. 1st DCA 1990).

McGuire, 584 So.2d 89.

The information that Scott was possibly involved in drugs indelibly colored his character in negative way and weighed against his defense. A common conclusion in the community is that drug involvement leads to the commission of other crimes. As a result, the information likely led the jurors to presume Scott had a propensity to commit crimes beyond drug possession. The State's case rested largely upon the testimony of one witness, Desi Bolling, who admitted his involvement in the crime and who entered in a plea agreement to lessen his penalty. The Defense presented several alibi witnesses who testified Scott could not have committed the crime because he was at a neighbor's for a birthday party. While this comment about Scott's being incarcerated on a

drug charge was the only information about drug involvement the jury had in guilt phase, the impact simply could not be erased. With conflicting evidence on Scott's guilt, the State cannot carry its burden to prove beyond a reasonable doubt that the improper evidence was harmless and did not affect the fairness of the trial. There is a "reasonable possibility" that the comments influenced the jury's verdict. See, Ward, 559 So.2d at 451.

The prejudice of the drug charge comment also carried over to the penalty phase defense strategy –- the decision to assert the mitigating circumstance of no significant criminal history. During the motion in limine about the drug charge arrest, defense counsel advised the judge that the arrest would not be admitted in penalty phase because it was not a violent felony.

> MR. ELER: Which is the problem, Judge. I don't think that's proper, any mention of an arrest judge. They're not going to hear it in -- penalty phase they're not going to hear it....

(T6:235-236) With the jury having already heard about the drug charge arrest, the defense may have felt compelled to address this fact in penalty phase to ameliorate its impact. See, Perry v. State, 801 So.2d 78, 90 fn. 14 (Fla. 2001). Rather than leaving the jury with the question of what other criminal conduct Scott had in his background, the defense ended speculation with a strategy that opened to door to all of Scott's arrests, misdemeanors and other criminal involvement. (T9:1129-1130)

Admission of the testimony that Scott had been in jail for an arrest on drug related charges prejudiced the fairness of his trial and violated his right to due process. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. He now asks this Court to reverse his case for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING A MOTION TO SUPPRESS THE AUDIO RECORDING DESI BOLLING OBTAINED FROM SCOTT IN JAIL.

Standard Of Review

The review of the denial of a motion to suppress incriminating statements based on a violation of the defendant's right to counsel and due process is a mixed question of law and fact reviewed on appeal under the de novo standard. See, e.g., Cuervo v. State, 967 So.2d 155, 160 (Fla. 2007).

Discussion

Prior to trial, the defense moved to suppress the jail conversation and statements Bolling recorded for two reasons. (R2:223-226; R4:675-679; T6:228-233) (App D) First, the statement was obtained in violation of Scott's constitutional rights since Bolling was acting as a agent of the state. (R2:223-226) Second, the quality of the recording was extremely poor with much of it unintelligible. (R2:223-226) The trial court denied the motion and allowed the prosecution to play a portion of the recorded conversation. (R2:235) (State Exhibit 32) The defense renewed the objections at trial. (T7:473)

The facts set forth in Scott's motion to suppress were accepted and used as a basis for the trial court's pretrial hearing on the issues. (R2:223-226; R4:675-679; T6:228-233)(App D) Some additional facts can be found in Desi Bolling's testimony presented prior to

Scott's renewal of his objections at trial. (T7:473) As relevant to this issue, the facts are as follows:

The homicide occurred on June 30, 2007. After Bolling sold the murder weapon to Wright on July 14, 2007, Bolling was arrested on August 10, 2007, and charged with the murder. Bolling and his lawyer met with the prosecutor and the lead detective on the case to provide information and secure a favorable plea agreement. (T7:466-467, 597) Detective Oliver issued a Sheriff's Office "Intelligence Bulletin" for a pick-up of Kevin Scott and identified him as Bolling's codefendant in the murder. (App. D) (R2:223) The next day, October 2, 2007, Scott was arrested on a possession of cocaine charge. (App. D)(R2:223) Detective Oliver "cancelled" the Intelligence Bulletin. (App. D)(R2:223) Oliver arranged for Scott to be housed in the jail in the same area with Desi Bolling. (App. D)(T2:223) Bolling agreed to wear a recording device and to engage Scott in conversation about the murder. (App. D) (T2:223) Detective Oliver instructed Bolling to engage Scott in conversation with the purpose to get Scott to make incriminating admissions about his involvement in the robbery and murder. (App. D)(R2:223-224) Bolling testified that he talked to Scott for that purpose. (T7:522) An audio recording was secured and a portion was played for the jury at trial. (T7:472-495)

Detective Oliver violated Scott's constitutional right to

counsel and due process when he sent Desi Bolling to engage Scott in conversation in order to secure a recorded admission. See, Art. I Secs. 9, 16, Fla. Const.; Amend. V, VI, XIV, U.S. Cosnt. The right to counsel attaches when the State's action shifts from an investigatory process to an accusatory one. Generally, this accusatory process begins upon arrest or formal charge. See, United States v. Henry, 447 U.S. 264 (1980); Massiah v. State, 377 U.S. 201 (1964); State v. Malone, 390 So.2d 338 (Fla. 1980). However, the accusatory process may begin earlier when the State's investigatory function has shifted to an accusatory one, and the State's actions are then designed to secure evidence to aid in the prosecution. See, Escobedo v. Illinois, 378 U.S. 478, 485 (1964); see, also, Traylor v. State, 596 So.2d 957, 969-970 (Fla. 1992); DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir. 1986); Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983):

> When the process shifts from the investigatory to accusatory – when its focus is on the accused and its purpose is to elicit a confession our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.

Escobedo, 378 U.S. at 492.

In this case, the shift from investigatory to accusatory function occurred when Detective Oliver issued an "Intelligence Bulletin" identifying Scott as a codefendant to the robbery and murder and to have Scott picked up. The State was no longer

investigating Scott's possible involvement in the crime. At the time Bolling was given a recording device and his instructions to secure an admission, the goal was securing evidence for trial to aid in the prosecution. Scott was entitled to consult with a lawyer, and the State's conduct violated that crucial right. The State cannot benefit from the delay in arresting Scott to avoid having to advise Scott of his right to counsel. See, Traylor v. State, 596 So.2d 957, 969-970 (Fla. 1992)(defendant must be advised of right to counsel after formally or informally charged "as soon as feasible after custodial restraint") Due process does not permit such a circumvention of constitutional rights. See, Walls v. State, 580 So.2d 131 (Fla. 1991); Voltaire v. State, 697 So.2d 1002 (Fla. 4th DCA 1997).

The State below, relied on Illinois v. Perkins, 496 U.S. 292 (1990), to support the State's actions in this case. (R4:677-678) However, Perkins did not involve a Sixth Amendment right to counsel issue. In Perkins, the United States Supreme Court upheld the use of undercover officers or civilian agents to obtain recorded statements of individuals who are in jail during an investigation of an uncharged crime without violating Fifth Amendment Miranda rights. The circumstances in Perkins had not reached the accusatory stages as the circumstances here. Perkins did not yet have a Sixth Amendment counsel right attached. Perkins, 496 U.S. at

299.

Scott's motion to suppress statements should have been granted. His right to counsel and right to due process have been violated. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, VI, XIV U.S. Const. He asks this Court to reverse his case for a new trial.

ISSUE IV
THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

Proportionality review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. See, e.g., Offord v. State, 959 So.2d 187 (Fla. 2007); Urbin v. State, 714 So.2d 411, 417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1996). Death sentences are reserved for the most aggravated and least mitigated of cases. *Ibid*. However, proportionality review is not a process of counting aggravating and mitigating circumstances, instead the review is a qualitative evaluation of the facts to insure uniformity in the application of the death penalty. *Ibid*. A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I Secs. 9, 17, Fla. Const.

This crime was the reactive, spur-of-the-moment shooting of someone who was trying to stop a robbery. In his statement to Desi Bolling in the jail, as acknowledged and found in the judge's sentencing order, Scott related the sequence of events. (R3:551)(App. A) As Scott first entered the coin laundry, he met some resistance from Gentian Koci, and Scott struck him in the head

with the butt of the pistol. Kristo Binjaku stood up and approached Scott, yelling at him to stop and to leave the laundry. Binjaku rushed at Scott with a chair raised as a club to hit Scott. Scott reactively fired his pistol one time. Binjaku died from a single gunshot wound. Scott fled without completing the robbery.

Aggravating And Mitigating Circumstances

The trial court found two aggravating circumstances –- one, that the homicide was committed during an attempted robbery and two, that Scott had a previous conviction for a violent felony. The felony murder aggravator based on the attempted robbery, standing alone, will not support a death sentence. See, e.g., Williams v. State, 707 So.2d 683 (Fla. 1998); Jones v. State, 705 So.2d 1364 (Fla. 1998); Thompson v. State, 647 So.2d 824 (Fla. 1994); Rembert v. State, 445 So.2d 337 (Fla. 1984). The addition of a prior conviction for a violent felony in this case does not elevate this murder to one permitting a death sentence because of the nature of the prior conviction. The aggravated battery was a contemporaneous offense based on Scott's striking Koci with the pistol when Scott first entered the laundry. This event was apparently never reported to law enforcement, since the prosecutor first learned of it during a discovery deposition of Koci as a witness to the homicide. (T5:9) The aggravated battery charge was added shortly

before the trial of this case commenced. (R2:227) Although the offense qualifies as a prior violent felony aggravator, the aggravator should be considered of lesser weight in the proportionality review. First, the aggravated battery was contemporaneous with the homicide, not separate criminal behavior actually occurring at previous time. See, Terry v. State, 668 So.2d 954, 965-966 (Fla. 1996). Second, the battery was elevated to a felony of aggravated battery solely due the fact that the butt of the pistol was used to commit the battery. The prosecution relied on the theory of a battery being committed with a deadly weapon, not on the level of harm to the victim. See, Sec. 784.045(1)(a)2 Fla. Stat. (R2:227; T9:972)

In mitigation, trial court rejected as statutory mitigators Scott's age of 22 and that he had no significant criminal history. (R3:553-556)(App. A) Scott's criminal history had no violent offenses.(R3:554)(App. A) The court found several non-statutory mitigating circumstances applicable in this case:(1) Scott's religious faith; (2) Scott's love for family and friends; (3) Scott's father was absent from his life; (4) Scott's family loves him; (5) Scott was a good, respectful son; (6) Scott was a good surrogate father to his girlfriend's children; (7) Scott can be a good father figure from prison; (8) Scott overheard domestic violence as a small child; (9) Scott once stopped a theft at Winn

Dixie where he worked. (R3:557-564) (App. A)

Comparable Cases

This Court has reversed the death sentence as disproportionate in other similar cases:

1. Terry v. State, 668 So.2d 954 (Fla. 1996). Terry and a codefendant, Floyd, were looking for placed to rob. They targeted a convenience store operated by Mr. and Mrs. Franco. Terry provided the firearms, an inoperable .25 caliber pistol and a .38 caliber pistol that proved to be the murder weapon. Floyd held Mr. Franco at gunpoint using the inoperable pistol while Terry robbed Mrs. Franco in the office area. After a scream and a gunshot, Terry emerged from the office. Mrs. Franco had been fatally shot. The jury recommended a death sentence by a vote of 8 to 4. There were two aggravating circumstances present: (1) a previous conviction for a violent felony based on Terry being a principle to Floyd's aggravated assault on Mr. Franco; (2) the homicide was committed during a robbery. No mitigation was found. The trial court rejected Terry's age of 21 as a statutory mitigator. Additionally, the trial court rejected the minimal non-statutory mitigation of Terry's emotional problems and impoverished background. Even with minimal mitigation, this Court held the death sentence disproportionate because the evidence supported the theory this was a a "robbery-gone-bad."

2. Johnson v. State, 720 So.2d 232 (Fla. 1998). The defendant, Calvin Johnson, and his brother, Anthony Johnson, committed a burglary/robbery/murder. Anthony initiated the robbery of the intended victim, while Calvin took the father of the victim inside his house and robbed him. Calvin also shot the father inside the house, wounding him. He took the father to the porch where the father was shot four more times ultimately leading to his death. The jury recommended death by a vote of 9 to 3. Two aggravators were present--the defendant had previous convictions for violent felonies and the homicide was committed during a burglary for pecuniary gain merged as one aggravator. The defendant had previous convictions in 1989, for violent felonies. One conviction was an aggravated assault for shooting at his brother who was not injured and said the incident was a misunderstanding. A second conviction was for aggravated battery for shooting another individual. The contemporaneous convictions for robbery and attempted murder of the separate victim in this case, the son, were also used to support the previous conviction for a violent felony aggravator. In mitigation, the trial court found the defendant's age of 22-years-old. Non-statutory mitigation included the defendant's troubled childhood, he had been employed, he surrendered to the police and he earned his GED. This Court held the death sentence was not proportional.

3. Hess v. State, 794 So.2d 1249 (Fla. 2001). Hess was convicted for first degree murder and robbery for the shooting death of a security guard. The guard had been shot in the chest and his wallet was missing. The jury recommended a death sentence by a vote of 8 to 4. Two aggravating circumstances were present: (1) the homicide was committed during a robbery; (2) Hess had prior convictions for violent felonies occurring after the murder based on convictions of sexual activity with a child and lewd assault on a child committed on his eleven and twelve year-old nieces. The court found no statutory mitgators. Non-statutory mitigators were found that included Hess's history of learning disabilities and emotional problems. This Court held the death sentence disproportionate.

Scott's death sentence is also disproportionate. He asks this Court to reverse the death sentence and remand this case for imposition of a life sentence.

ISSUE V

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

The trial court erroneously denied various motions dismiss, to modify jury instructions and to require jury findings of the factors used for imposition of the death penalty based on the Sixth Amendment principles announced in Ring v. Arizona, 536 U.S. 584 (2002). (R1:112-121, 183-193; R2:228-229) Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context. Florida's death penalty statute violates Ring in a number of areas including the following: the judge and the jury are co-decision-makers on the question of penalty and the jury's advisory sentence recommendation is not a jury verdict on penalty; the jury's advisory sentencing decision does not have to unanimous; the jury is not required to make specific findings of fact on aggravating circumstances; the jury's decision on aggravating circumstances are not required to be unanimous; and the State in not required to plead the aggravating circumstance in the indictment.

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

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

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

of a life sentence.

CONCLUSION

For the reasons presented in this initial brief in Issues I through III, Kevin Jerome Scott asks this Court to reverse his judgments and sentences with directions for a new trial. Alternatively, in Issues IV and V, Scott asks this Court to reverse his death sentence with directions to impose a sentence of life in prison.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Thomas Winokur, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to Appellant, Kevin Scott, #J39149, F.S.P., 7819 N.W. 28th St., Raiford, FL 32026, on this ____ day of March, 2010.

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

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
Assistant Public Defender
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
BILLMC@leoncountyfl.gov
(850) 606-1000

ATTORNEY FOR APPELLANT