IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC09-2016

ERIC KURT PATRICK,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

A CAPITAL APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY

CRIMINAL DIVISION

****

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, “SR” will designate the supplemental record on appeal, "T" will designate the pre-trial, trial and sentencing transcripts, and “AB” will designate the State’s Answer Brief.

ARGUMENT[1]

(I)

THE TRIAL COURT ABUSED ITS DISCRETIONIN EXCUSING JURORS FOR CAUSE WITHOUT ALLOWING DEFENSE COUNSEL AN OPPORTUNITY TO QUESTION OR REHABILATE JURORS

The State argues that the trial did not abuse its discretion by excusing prospective jurors for hardship even where the defense had not had an opportunity to question the jurors. (AB-23). Moreover, the State maintains that the trial court properly excused juror Souci, though the judge’s reason for doing so was partly based on Souci’s views on the death penalty and even though the defense was prohibited from questioning her. (AB-23-24).

It is undisputed that the following jurors were excused by the court over defense objection: Hughes, Fernandez, Souci, Safaroff, Gregorio, Gravel, Guerrero, Johnson and Mason. It is likewise undisputed that all of these jurors

[1] Defendant relies on his initial brief on Issues V, VIII and XVII.

(except Gravel) were excused even though the defense had not been given an opportunity to question the jurors but the prosecution had been given such an opportunity.[2] Juror Gravel was questioned by both parties.[3]

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[2] These jurors were questioned by the court and prosecutor and the following occurred:

Hughes: She told the court she was somewhat concerned about her substitute teacher and the upcoming F-CAT testing. However, when the court asked her directly whether she could sit on the jury if chosen she answered "Yeah." (T. 90). She told the prosecutor that she was concerned about the substitute teacher, but usually the same substitute is assigned to the class. (T. 206). Ms. Hughes said she would probably be distracted. (T. 207).

Fernandez: She told the court she was concerned about her sick mother. The court assured her that she could check on her mother and that the court would "let the lawyers talk to ya [sic] a little bit more about that." (T. 98). She later told the prosecutor she would be "a little" distracted but that her mother would progressively get better. (T. 217-218).

Souci: She told the court that it would be hardship to serve because she worked for a civil litigator and would not get paid unless she worked. (T. 102). The court told her "I'm going to leave something for the lawyers to talk to you about…" (T. 103). She further told the court that she could not vote for the death penalty. (T. 149-150). The prosecutor asked Ms. Souci about her financial difficulties and she said it would be tremendous hardship. (T. 226).

Safaroff: She told the court that was under treatment for medical reasons. (T. 104). She further told the court she was religiously opposed to the death penalty. (T. 150). She informed the court that she was in pain and was sitting with no medication. The court let her know that the lawyers had to talk to her. (T. 186).

Gregorio: Ms. Gregorio told the court that it would be difficult for her to serve because she was the mother of 27-month old boy with autism and the father of her child was scheduled for back surgery. She also explained she was the sole income for the household. The court informed her that the lawyers would talk to her about it. (T. 106). Gregorio told the prosecutor the same thing. (T. 230).

Guerrero: He told the court that he was self-employed and he would have a problem "for the time." (T. 339). The court assured him that the lawyers would talk to him about it. (T. 340). The prosecutor questioned him about the hardship and Mr. Guerrero stated it would be a financial hardship. (T. 438).

No matter how one reads the record in this case, it is abundantly clear that the defense was shut out of any meaningful participation in the voir dire process as it related to all but one of the foregoing jurors. Almost without exception, the court re-assured jurors who had expressed hardship reservations that the lawyers would have an opportunity to question them about it. In fact, only the prosecutor questioned those jurors.[4]

The State argues that the defense agreed to release jurors for hardship even if it had not yet questioned them about the death penalty, citing a portion of the record where defense counsel stated he did not want to inconvenience anyone.

Johnson: He told the court that he was semi-retired. He owned a bunch of buildings. He explained he had an 86-year old mother that he cared for. The court assured him the lawyers would talk to him about it. (T. 356-357). He informed the prosecutor that he could serve "without a doubt" but that his situation would be a distraction. (T. 469-470).

Mason: He informed the court that he worked for the State as a management consultant. He maintained that working for the State it would not be a problem serving, but that child care would be "an issue." The court assured him the lawyers would talk to him about it. (T. 362-363). He subsequently informed the prosecutor that he could not be sure whether his wife could assist with the child care issues due to her work schedule. (T. 478-479).

[3] Juror Gravel was questioned by the court, the prosecutor and defense counsel. He had no hardship issues. (T. 115). He told the prosecutor the death penalty would be difficult for him, although he was open to hearing the case and the law. He would be able to weigh the aggravating and mitigating factors. (T. 245-247). He told defense counsel that the death penalty should be used in rare cases. He said he was open to hear all factors. (T. 701-703).

[4] The State points out that jurors Hughes, Fernandez and Gregorio were not questioned about the death penalty. (AB-17-18). The record shows that these jurors were questioned, as part of the panel, on the issue of the death penalty by the court. (T. 146-156). Moreover, Gregorio actually addressed the death penalty issue, saying it would be "a hard decision for me to do." (T. 150).

(AB-19; T. 188). However, just before the portion of the transcripts cited, the court stated that the important issues were time and death. Defense counsel informed the court: "*Once Ms. Ferraro deals with that* I waive my right to actually voir dire them before they are sent home…" (T. 188). Defense counsel was not waiving voir dire altogether. Subsequently, the court conducted a hearing where certain jurors were excused by agreement of the parties. The defense objected to the excusal of jurors Hughes, Souci, Safaroff and Gregorio and the court excused these jurors over defense objection. (T. 276(Hughes); T. 278 (Fernandez); T. 279 (Souci); T. 279-280 (Safaroff); T. 280 (Gregorio)). As to Ms. Hughes, the court recognized that she had given inconsistent statements concerning the substitute teacher, wondering how she had come differently. (T. 275-276). The court made clear it would strike her "*whether you object, I'm going to overrule your objection.*" (T. 276). Defense counsel duly objected. As to Ms. Fernandez, the court struck her due to her sick mother, telling defense counsel "*whether you agree or not.*" (T. 278). Defense counsel duly objected. As to Ms. Souci, the court struck her because "she said death penalty never and losing money and her family can't take that hit…" (T. 279). The defense requested an opportunity to talk to her. The court reiterated the fact that Souci said "death penalty never." (T. 279).[5] As to Ms. Safaroff, the court struck her even though defense counsel requested an

[5] In fact, the court had already previously telegraphed its intention to strike Ms. Souci: "She gave an answer that she's off the panel." (T. 267).

opportunity to talk to her, noting she had been crying and complaining about her health issues. (T. 279). As to Mr. Gregorio, the court granted the State's cause challenge on grounds that he had financial difficulties. Contrary to the State's assertion, the defense specifically objected to Mr. Gregorio's excusal (MR. RERES: *We object to a cause challenge at this time*." (T. 280)), and the trial court, on the scene, *noted* the objection. (T. 280). Consequently, the State's reliance on Peterka v. State, 640 So.2d 59 (Fla. 1994) and Cannady v. State, 620 So.2d 165 (Fla. 1993), is misplaced.

The removal of jurors for hardship under §40.013(6), Florida Statutes, is subject to the trial court's discretion. Wright v. State, 857 So.2d 861, 877 (Fla. 2003). In Jones v. State, 749 So.2d 561 (Fla. 2d DCA 2000), the Second District noted that a trial court cannot delegate the excusal of jurors for hardship reasons to the clerk of the court.[6] However, in the exercise of judicial discretion, the court should have permitted the defense to question the jurors on the hardship issue. Indeed, the trial court in this case specifically recognized the need for defense questioning on this issue, stating that: "…I counted 21 so far that tentatively, but you know, *they may change their answers when Mr. Reres gets up and asks them about the time constraints and things of that nature,* and that's basically what I'm

[6] The State cites to Hertz v. State, 803 So.2d 629 (Fla. 2001) and Davis v. State, 859 So.2d 465 (Fla. 2003), in support of its argument on the hardship issue. (AB-16). However, these cases dealt with jurors' views on the death penalty.

trying to find out. *The health and time constraints, everybody else is fair game and you can get to talk to them*." (T. 187).[7] In this case, the court permitted the prosecution to address the jurors on hardship issues, but the defense was not allowed to do so. The trial court's discretionary power is never intended to be exercised in accordance with whim or caprice of the judge *nor in an inconsistent manner*. Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990)(quoting Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980))(emphasis supplied).

Jurors Guerrero, Johnson and Mason, were excused over defense objection. The defense had noted there were "a few people" who did not have to be brought back. (T. 518), however, the defense reserved its right to request questioning of jurors, as the record on the foregoing jurors shows. As to Guerrero, the defense objected to his excusal. Defense counsel specifically requested an opportunity to speak with him. (T. 521). The court initially agreed to keep him, but then stated that he was losing money and excused him over defense objection. (T. 521-522).[8] As to Johnson, the defense objected to his excusal and requested an opportunity to speak with him. The court overruled the objection. (T. 523-524). As to Mason,

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[7] Thus, it is interesting that the State maintains, without citation of authority, that hardship issues are not subject to rehabilitation. (AB-22).

[8] The court was clearly inconsistent on the hardship issue. For example, Mr. Burgess had informed the court that he worked in a small company and that he did not believe he could serve if the lawyers wanted him. (T. 341). Yet, the court agreed to have him remain for defense questioning. (T. 522). Mr. Warren had told the court that financially it would be straining to serve. (T. 374). The court agreed to keep him for defense questioning. (T. 527).

the defense objected to his excusal and requested an opportunity to speak with him. The court overruled the objection. (T. 524-525). The State maintains that the defense could not have added any additional information with further questioning (AB-22), and cannot state that these jurors would not have ultimately been excused. (AB-23). Of course, because the defense was not allowed to question the jurors it is impossible to state that the defense could not have more thoroughly questioned the jurors or could have developed a record to prevent their excusal. The State argues that counsel do not generally participate in the jury qualification questioning, citing Wright, supra, Remeta v. State, 522 So.2d 825, 828 (Fla. 1988) and O'Quendo v. State, 823 So.2d 834, 836 (Fla. 5th DCA 2002). In Wright, there was no defense objection to the court's excusal of a juror and this Court found that issue was not preserved. Wright, at 877. The cases of Remeta and O'Quendo dealt with general qualification of jurors and not qualification of a jury *to try a specific case*.

The State argues that the trial court had the discretion to excuse Juror Souci because a juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind, citing Ault v. State, 866 So.2d 674 (Fla 2003). (AB-23). Of course, in Ault, the *defense had been given the opportunity to question the juror* in question and the court had found that there had been adequate inquiry by both sides. Id. at 683. The State seeks to justify Souci's

excusal by pointing to Souci's responses in the record *in the absence of any defense questioning*. This is an incorrect statement of the law. The State seeks to distinguish this Court's decision in O'Connell v. State, 480 So.2d 1284 (Fla. 1985), by noting that, unlike O'Connell, both the State and the defense did not question Souci on substantive matters. Initially, it should be noted that the prosecutor did question various members of Souci's panel on the issue of the death penalty.[9] The fact that the prosecutor chose not to specifically question Souci on the death penalty does not mean that the trial court can simply excuse a juror without allowing defense questioning, under the mandatory provisions of Rule 3.300(b), Florida Rules of Criminal Procedure. See Sanders v. State, 707 So.2d 664, 667-668 (Fla. 1998) (death sentence vacated where juror struck without defense questioning and prosecutor chose not to question juror but relied on juror's answers to court's questions in motion to strike juror). Secondly, and more importantly, this Court has *repeatedly* held that a death-scrupled juror should not be excused where the defense has not had an opportunity to question the juror. See Hernandez v. State, 621 So.2d 1353, 1356 (Fla. 1993); Willacy v. State, 640 So.2d 1079, 1081-1082 (Fla. 1994); Sanders v. State, supra. In Sanders, the trial court asked the juror questions on the death penalty and invited the State to question the juror. Rather

[9] T. 169-170; T. 173-174; T. 177-178; T. 180-181; T. 183; T. 192-193; T. 200-201; T. 209-210; T. 221-222; T. 226-229; T. 232-233; T. 235; T. 238; T. 240; T. 242-243; T. 245-246; T. 249; T. 252; T. 256-257; T. 261; T. 262.

than question the juror, the State moved to strike the juror for cause on grounds that the juror's responses were not subject to rehabilitation. The trial court asked the juror additional questions and denied the defense request to question the juror. This Court vacated the defendant's death sentence, rejecting the State's argument that O'Connell, Willacy and Hernandez were distinguishable because the prosecutor, and not the judge, questioned the juror. Id. at 668. The State asserts that Souci's excusal was based on hardship grounds (AB-26), but admits that the court excusal was based on Souci's opinions on the death penalty and hardship. (AB-24). The trial court was determined to strike her because Souci had stated "death penalty probably never…" and "forget it, she said death penalty never." (T. 279). This was done without defense questioning. This is error.[10]

(II)

THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING THE DEFENSE FROM ELICITING TESTIMONY CONCERNING THE VICTIM'S PRACTICE OF PICKING UP MEN FOR SEXUAL FAVORS IN BOTH THE GUILT AND PENALTY PHASES

The State argues that the trial court did not abuse its discretion when it granted the prosecution's motion in limine prohibiting the defense from eliciting testimony that the victim commonly picked up men in the park and took them

[10] For example, jurors who have expressed strong feelings about the death penalty nevertheless may serve if they indicate an ability to abide by the trial court's instructions. See Johnson v. State, 660 So.2d 637, 644 (Fla. 1995). The defense was never able to rehabilitate juror Souci.

home. (AB-26). The State maintains that the fact that Schumacher's desires allowed Defendant to carry out his plan does not mean that the plan did not exist. (AB-30). In particular, the State asserts that Dietz's testimony concerning Defendant's alleged plan to kill Schumacher from the beginning would not have been contradicted by the testimony the defense wished to present. (AB 29-30).

Contrary to the State's argument, evidence of Schumacher's pattern and practice of behavior was relevant because it showed under what circumstances Defendant met the victim, it dispelled any idea that Defendant targeted the victim, and it explained the role of the aggressor in this case. It undermined Dietz's testimony that Defendant targeted Schumacher "from the beginning" because it was Schumacher, not Defendant, who made the initial approach as the defense maintained; an act which comported with Schumacher's prior practice. Not only was this evidence relevant to the guilt phase issue of premeditation, but it was also relevant to the penalty phase issue of heightened premeditation under CCP. (T. 1623; T. 1890; T. 1964; R. 963).

The State cites to Guthrie v. State, 637 So.2d 35 (Fla. 2d DCA 1994), for the proposition that evidence of homosexual acts are inadmissible if the singular purpose of the evidence is to prove the bad character of the person or propensity to commit a homosexual act. First, Guthrie stands for the proposition that the defendant's homosexuality *was* relevant on the issues of motive. Id. at 36. Second,

as stated above, the purpose for the introduction of the evidence was not to show Schumacher's bad character or propensity to commit a homosexual act, but to support Defendant's own statements that Schumacher had initially approached him, not the other way around. The State also cites to Davis v. State, 928 So.2d 1089 (Fla. 2005), for the proposition that a non-violent homosexual advance may not constitute sufficient provocation to incite an individual to lose self-control. Id. at 1120. First, Davis was a post-conviction case dealing with an attorney's ineffective assistance by not presenting a self-defense or sexual advance defense. This Court pointed out that no previous authority placed counsel on notice that he would be ineffective by not presenting the defense in question. Second, the record in this case shows that Schumacher *persistently* and *aggressively* made homosexual advances on Defendant. (T. 1791-1794). Therefore, the language in Davis alluding to a "nonviolent" homosexual advance is not applicable here.

The State mischaracterizes Defendant's purpose to introduce evidence of Schumacher's activities. The State claims that the proffered testimony was only that Schumacher had met men in public before and had sexual relations with some of them, and that the defense was trying to inflame the jury against Schumacher's lifestyle. (AB-31). As stated previously, the evidence was directly relevant on a number of issues: lack of premeditation, lack of heightened premeditation, aggressiveness by the victim, corroboration of Defendant's statement to law

enforcement,[11] impeachment of Lyon's testimony concerning how Schumacher was alone most of the time, and impeachment of Lyon's testimony that Schumacher's sole objective in bringing men to his apartment was to assist them.

(III)

THE COURT ERRED IN LIMITING DEFENSE CROSS-EXAMINATION OF WITNESS MARTIN DIETZ

The State argues that the trial court properly limited cross-examination of Martin Dietz as to Dietz's feelings after his own conviction and what he hoped to get for his testimony. The State maintains the trial court properly limited the question to what was allowed under the evidence code, and further, suggests that all the information on what Dietz was promised and what happened to him after he testified at his deposition did come out before the jury. (AB-32). The State points out that Dietz was questioned about his prior convictions, his sentence and his testimony on behalf of the prosecution and that evidence of Dietz's hopes were not relevant. (AB-36).

[11] The State attempts to distinguish Salgado v. United States, 278 F.2d 830 (1st Cir. 1960), where the federal appellate court granted a new trial where the trial court excluded evidence of the witness's reputation as a homosexual which evidence was corroborative of the defendant's account of the witness's conduct. Without elaboration, the State argues that the Salgado ruling "may not be made currently." Also, the State maintains that Schumacher was not a witness but the victim. However, this is beside the point, as the issue in question involves corroboration of the defendant's statement.

Defendant cited numerous cases in support of the proposition that evidence of a witness's interest, motives, animus, or status in relation to the proceeding is not collateral or immaterial. The State does not address *any* of these authorities in its answer brief. Rather, the State's primary argument is that Mr. Dietz was cross-examined enough for the jury to assess his credibility. This Court should not lose sight of the fact that Dietz was the *main witness* against Defendant. His testimony concerned Defendant's alleged jailhouse statements, which the State used to buttress its argument in support of premeditation (guilt phase) and heightened premeditation (CCP) and the heinous nature of the case (HAC). The trial court used Dietz's testimony in support of its CCP finding. (R. 963).[12] Cross-examination is even more important when it involves a *key witness*. See McDuffie v. State, 970 So.2d 312, 324 (Fla. 2007) (quoting Coxwell v. State, 361 So.2d 148, 152 (Fla. 1978)). In fact, cross-examination is particularly important in *capital cases*. McDuffie, supra, at 325 (quoting Coco v. State, 62 So.2d 892, 894-95 (Fla. 1953)). Moreover, the trial court was flatly wrong to rule that Dietz's hope and state of mind were irrelevant. See Gibson v. State, 691 So.2d 288, 291 (Fla. 1995)(citing §90.608(2), Florida Statutes)(witness's *state of mind* and motivation); Williams v. State, 912 So.2d 66, 67 (Fla. 4th DCA 2005) (witness's *hope*). Dietz's state of mind and hope were directly at issue during his testimony. The record

[12] In fact, the State *continues* to rely on Dietz's testimony to support the court's HAC and CCP findings. (AB-80,n.5; AB-84).

shows that Dietz continued to cooperate with law enforcement in state and federal cases. (T. 1665-1666; T. 1672; T. 1673). The prosecutor questioned Dietz as to whether she had given him an impression that she would help him in return for his testimony. (T. 1666). The record also shows that the prosecutor *in this case* testified at his sentencing hearing. (T. 1671-1672). The fact that the defense was able to cross-examine Dietz on several matters did not cure the curtailment of cross-examination. See McKinzy v. Wainwright, 719 F.2d 1525 (11th Cir. 1983)(denial of the right to full cross-examination in matters relevant to credibility is not cured simply by acknowledging that other means of impeachment were possible and permitted).

(IV)

THE TRIAL COURT ERRED IN GIVING A VOLUNTARY INTOXICATION INSTRUCTION AT THE GUILT PHASE

The State argues that the defense has not fully addressed this claim by not arguing why the court's decision to instruct the jury on voluntary intoxication was in error or how the defense was prejudiced thereby. (AB-36). Contrary to the State's claim, the defense did state why the court erred and why the court's decision was prejudicial. The trial court specifically relied on the decision in Kramer v. State, 619 So.2d 274 (Fla. 1993), in giving the voluntary intoxication instruction. (T. 1773; T. 1858). Kramer sanctions the giving of the instruction where a intoxication defense is advanced at trial. Id. at 277. Moreover, Kramer

predates the abolition of the voluntary intoxication as a defense. See §775.051, Florida Statutes. Additionally, Defendant pointed out that he did not advance any voluntary intoxication defense nor argued the lack of premeditation based on intoxicants: "I want to be scrupulously careful for the jury that I'm not asking them to use voluntary intoxication as a defense." (T. 1772)(Initial Brief, p. 70). Lastly, Defendant argued that the instruction was improper because it amounted to judicial comment on the evidence and permitted the prosecution to undermine the defense actually presented: "So, for the State to introduce the statement over objection and then ask for an instruction about it I think it is kind of like creating their own an issue, that's really not there." (T. 1772)(Initial Brief, p. 70).[13]

The State does not address any of the foregoing arguments, but states that the instruction was proper as the prosecution wanted to address the evidence that Defendant had abused drugs and alcohol on the night of the crimes. (AB-39). The court should not have weighed in on the evidence by providing the prosecution "legal cover" to undermine Defendant's statement that he had been drinking and taking drugs on the night in question. Rather than argue those facts in the record which arguably refuted Defendant's statements concerning his consumption of

[13] As such, the State's reliance on Duest v. Dugger, 555 So.2d 849 (Fla. 1990), Coolen v. State, 696 So.2d 738 (Fla. 1997), and Victorino v. State, 23 So.3d 87 (Fla. 2009), is wholly misplaced.

drugs and alcohol, the prosecution resorted to the power of a legal instruction which was not appropriate.

(VI)

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO GRUESOME PHOTOGRAPHS INTRODUCED BYTHE STATE AT TRIAL

The State argues that the trial court properly admitted the challenged photographs at trial because the medical examiner said the photographs were necessary to explain her testimony and findings. (AB-45). The record shows, however, that Associate Medical Examiner, Dr. Gertrude Juste, testified extensively about the victim's injuries without the use of any photographs. (T. 1497-1499). Dr. Juste testified that she could describe the hemorrhage and the injury to the windpipe. The photograph would just show the hemorrhage. (T. 1473). Dr. Juste also testified, when the court questioned her, that she could describe the brain injuries. The photograph would just provide a visual idea. (T. 1474). It is abundantly clear from the foregoing that the photographs were only used for visual effect, as the medical examiner conceded. The gruesome nature of the photographs was not contested by the State. (T. 1965). The defense was *not contesting* the autopsy findings. (T. 1477). As such, admission of the photographs was erroneous. See, e.g., Almeida v. State, 748 So.2d 922, 929-930 (Fla. 1999)(admission of photograph depicting gutted body cavity error).

(VII)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER GUILT PHASE CLOSING ARGUMENT

The State argues that the prosecutor's comments in question were not objected to and, as such, were not preserved for appellate review. In addition, the State asserts that the comments did not amount to fundamental error. (AB-48).[14] The State maintains that a jury may convict on first degree murder without agreeing on whether the murder was premeditated or felony murder. (AB-49-50). The defense acknowledges that this Court has found that jury unanimity is not required on the theory of first degree murder. See Mansfield v. State, 911 So.2d 1160, 1178-1179 (Fla. 2005). Nevertheless, the defense maintains that the prosecutor's argument had the effect of lessening the unanimity requirement as to guilt by arguing that jurors need not reach the verdict the same way.

The State argues that the prosecutor properly made reference to Schumacher's truck as a basis for felony murder because the indictment only charged Defendant with first degree murder without specifying the theory or the supporting facts. (AB-50). This argument disregards the fact that the prosecutor specifically argued that the underlying felony of robbery supported felony murder.

[14] Contrary to the State's assertion, the defense did object to one of the prosecutor's comments, which alluded to facts not in evidence. The court overruled the defense objection. (T. 1952-1953).

(T. 1895). In fact, as noted above, the prosecutor made clear that jurors could find first degree murder on the felony murder theory. (T. 1897-1898). Defendant was formally charged with robbery. The robbery charge, *as indicted*, *did not* include an allegation that Defendant took the truck. The first degree murder count was charged only by premeditation. (R. 3-5). As such, it is abundantly clear that the underlying felony of robbery was set forth in Count III of the indictment. Certainly, the State cannot suggest that taking the truck was sufficient for felony first degree murder since grand theft cannot support felony first degree murder. See §782.04(1)(a)2, Florida Statutes. Leading the jury to such a conclusion would have affected the verdict.

The State argues that the prosecutor's several references to Defendant's lack of remorse, her reference to Defendant making a sandwich while the victim is laying in the tub dying and her description of the scene as disgusting and vile were proper. The State notes that the prosecutor's comments on Defendant's lack of remorse were directed at defense counsel's argument that Defendant was sorry for what he had done as seen in the statement videotape. (AB-51-52). Comments on a defendant's lack of remorse are irrelevant in either the guilt or penalty phases of a capital case.[15] Moreover, defense counsel's comments related to the videotape of Defendant's post-arrest statement and Dietz's testimony *after* the prosecutor had

[15] See, e.g., Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990).

argued that Defendant bragged about the way the victim begged for his life (T. 1903) and how he had "pulverized" the victim. (T. 1912). The State now asserts that defense counsel invited the prosecutor's comments on lack of remorse when in fact defense counsel was simply responding in defense of his client after the State's opening remarks on closing argument.

The State also maintains that the prosecutor's comments concerning Defendant's actions after he put Schumacher in the tub were made in response to defense counsel's argument that his actions were a result of a frenzy and not calm or calculated as Dietz had said. (AB-53). Again, defense counsel's remarks were made *after* the prosecutor highlighted Dietz's testimony concerning how Defendant targeted Schumacher (T. 1890), how Defendant bragged about Schumacher's pleas for Defendant to stop what he was doing (T. 1903) and how Defendant played dumb during the statement as Dietz had stated. (T. 1912).

The State argues that the prosecutor's use of the terms vile and disgusting could not be construed as an attack on Defendant himself, only his handiwork. Additionally, the State claims these comments were made after defense counsel's argument saying that the acts were horrible. (AB-53-54). Defense counsel's comments, however, occurred *after* the prosecutor told jurors in her initial argument that the photographs and evidence "screams" what happened in this case (T. 1886), that looking at the photos "you almost want to say enough already" (T.

1887), that Defendant thought of "eliminating a witness" (T. 1891), that Defendant was engaged in a "brutal ongoing beating" and a "deadly brutal beating" (T. 1893) that Defendant beat Schumacher "to a bloody pulp" (T. 1904), and that Defendant "pulverized" Schumacher. (T. 1912). Also, to say that the prosecutor's comments on rebuttal were not attacks on Defendant but only addressed his handiwork is faulty logic. Characterizations of Defendant's acts necessarily amount to characterizations of Defendant himself.

(IX)

DEFENDANT'S CONVICTIONS MUST BE REVERSED DUE TO THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS

The State argues that the defense has not properly argued this issue on appeal. Contrary to the State's argument, the defense argued that should this Court find the issues raised by Defendant to be harmless error, the cumulative effect of the guilt phase errors entitles to Defendant to a new trial. (Initial Brief, p. 80). This is precisely the standard set out in Penalver v. State, 926 So.2d 1118, 1137 (Fla. 2006). The issues raised as to the guilt phase were Issues I-VIII, as the State itself recognizes. (AB- 59). These issues concerned improper jury selection, improper limitation of evidence and cross-examination, an improper intoxication jury instruction, improper denial of Defendant's motion to suppress, improper admission of gruesome photographs, improper closing arguments and use of an improper legal standard at the hearing on the motion for judgment of acquittal.

The defense maintains that those issues, individually, were properly preserved, raised and briefed and that they warrant a new trial. Their cumulative effect argues more strongly for a new trial, as the issues spanned the entire guilt phase and affected every aspect of the trial: from jury selection to closing arguments.

(X)

THE TRIAL COURT ERRED IN ITS PENALTY PHASE JURY INSTRUCTIONS

The State argues that the defense has not fully articulated why the trial court's instructions were erroneous and does not demonstrate any prejudice from them. Moreover, the State asserts that the instructions are standard instructions which have been repeatedly upheld. (AB-61). Contrary to the State's initial argument, the defense specifically laid out the record basis for his claim concerning the jury instructions on the role of the jury (T. 2731; T. 3261; T. 3261-3262; T. 3265; T. 3267-3268; T. 3268; T. 3268-3270), highlighted those particular areas involving the use of the terms advisory and recommendation (or variants thereof) and argued that the instructions impermissibly diluted the jury's sense of responsibility for imposing the death penalty. (Initial Brief, pp. 81-83). Additionally, the defense set forth the areas in the record where the prosecutor argued the advisory nature of the jury's recommendation during opening statement and closing arguments, in support of Defendant's claim that the jury was not properly instructed on their role. (Initial Brief, p. 83 n.48). Likewise, the defense

specifically laid out the record basis for his claim concerning the jury instruction related to a non-unanimous verdict (T. 3268-3269), and argued the instruction lessened the need for jurors to find the aggravating circumstances by unanimous vote. The defense set forth the instances in the record where the prosecutor emphasized the lack of unanimity as to the aggravators, in support of his claim on this issue. (Initial Brief, pp. 84, 84 n.49). Lastly, the defense laid out the record basis for his claim concerning the denigration of the concept of mercy (T. 3267; T. 3268), and argued that such instruction dismissed or diluted the right of jurors to consider mercy in their deliberations. (Initial Brief, p. 84). The foregoing arguments are not summary arguments which the State maintains are not cognizable under Jackson v. State, 25 So.3d 518, 533 n.12 (Fla. 2010)(counsel "merely cites" to portions of record).

(XI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

The State argues that the prosecutor's comments during penalty phase arguments were not objected to and are not preserved. Moreover, the State maintains that the defense has misconstrued the comments, which were not improper. (AB-63). The State argues that the prosecutor's comment on Defendant's lack of remorse did not amount to fundamental error. (AB-63). First,

the State points out that the prosecutor was responding to Defendant's testimony and defense counsel's earlier guilt phase argument. Secondly, the State notes that the comment was just a single, isolate remark. (AB-64). The prosecutor was *not* responding to defense counsel's penalty phase argument, *which had not yet occurred,* and, therefore, could not be considered fair rebuttal. Rather, the State reaches back to defense counsel's guilt phase arguments as justification for the prosecutor's remark that Defendant was not taking responsibility and was not showing remorse. The State has previously argued that the prosecutor's comments on Defendant's lack of remorse during guilt phase arguments had been made in response to defense counsel's argument (AB-51-52), even though the record shows that defense counsel was actually responding to the prosecutor's initial closing argument. In any event, the penalty phase was a separate proceeding and the prosecutor should not be allowed to respond to guilt phase arguments, which do not involve issues of sentencing or punishment. The State also maintains that the prosecutor was properly rebutting Defendant's testimony. As an initial matter, argument is not evidence which can be used to rebut anything. Additionally, in a 45-page direct examination, Defendant made one series of comments concerning the death of Mr. Schumacher.[16] The questions concerning Defendant's drug use

[16] "I liked Mr. Schumacher. He was a good person. It is the worse thing that could of happened. You know, I'm embarrassed and humiliated by what I did. You know, I live with it every day. I can't do anything to change it. You know, I

occurred during cross-examination. Those questions took up one page in a 12-page cross-examination and Defendant took full responsibility for his actions (T. 3033). This is what the State now maintains the prosecutor was trying to rebut. Lack of remorse is an inadmissible non-statutory aggravating circumstance. See Shellito v. State, 701 So.2d 837, 842 (Fla. 1997). Also, arguing lack of remorse cannot be used to support the aggravating circumstance of cold, calculated and premeditated. The lack of remorse is simply not relevant to this, or any other, aggravating circumstance. See Jones v. State 569 So.2d 1234, 1240 (Fla. 1990)("This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances").[17]

The State claims that the prosecutor properly argued to the jury that they were not "imposing" the death penalty because the prosecutor was merely pointing out that Defendant made the choices that led him to commit the crimes and face the consequences. However, a careful review of the record shows that the prosecutor, in leading up to her comments, stated:

> MS. TATE: "Before I close I want to just address one thing that we talked about in jury selection as we talked about when we were asking all of you your feelings about the death penalty. People discuss whether or not how they felt about their own feelings before they, people talked about

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accept responsibility for what I did. I admitted it so I don't know what more I can say about it. You know, I live with it every day. I don't like re-living it, you know." He agreed that it saddened him. (T. 3029).

[17] In Poole v. State, 997 So.2d 382 (Fla. 2008), cited by the State, the prosecutor did not argue lack of remorse during closing argument. Id. at 394.

> whether or not they could of *imposed* the death penalty and made it more personal whether they could *impose* the death penalty. And I just want to make sure everyone understands that this is *not something you're imposing*." (T. 3221)(emphasis supplied).

The record clearly establishes that the prosecutor was telling jurors they were not imposing the death penalty, thus denigrating their own role and responsibility.

Lastly, the State maintains that the prosecutor did not misstate the law by telling jurors that if the aggravating circumstances outweigh the mitigation they can recommend the death penalty because she had previously explained the process of weighing the aggravating and mitigating circumstances. (AB-65-66). However, in her comments the prosecutor improperly left the jury with the firm impression that it was required to return a recommendation of the death penalty based on simple weighing of aggravating circumstances and mitigating factors. This was improper. See Brooks v. State, 762 So.2d 879, 902 (Fla. 2000).

(XII)

THE TRIAL COURT IMPROPERLY CURTAILED DEFENSE COUNSEL'S PENALTY PHASE CLOSING ARGUMENT

The State argues that the trial court properly curtailed defense counsel's closing argument because the argument urged consideration of factors outside the scope of the jury's deliberations. (AB-67). In support of its argument, the State relies on Jackson v. State, 522 So.2d 802 (Fla. 1988). In Jackson, the prosecutor

made comments about how the victims could no longer read books, visit their families or see the sun rise in the morning, while the defendant would be able to do so. This Court agreed that these comments were outside the scope of the jury's deliberations. Id. at 809. In contrast, the fact that Defendant, if sentenced to life imprisonment, would be living a very restricted existence was *directly relevant* to the jury's assessment of the appropriate punishment in this case. This was the entire purpose of the penalty phase. The defense should have been allowed to argue the reasonable inferences from the imposition of sentence of life imprisonment term without parole.

(XIII)

THE TRIAL COURT ERRED IN LIMITING DEFENSE EXPERT'S TESTIMONY AND PRESENTATION DURING THE PENALTY PHASE

The State argues that the trial court did not abuse its discretion in limiting the mitigation evidence during Dr. Fichera's testimony. The State avers that the pictures the defense wanted to show in the slide presentation were more prejudicial than probative. Also, Dr. Fichera was properly limited in his discussion of multi-generational dysfunction. (AB-68-70). The U.S. Constitution requires that the sentencer in capital cases must be permitted to consider *any* relevant mitigating factor. Tennard v. Dretke, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett

v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The Court in Tennard ruled that relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Id., 542 U.S. at 284. The State cannot bar consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death. The Court recognized that the threshold for relevance is "low" and a jury should be allowed to consider and give effect to the mitigating evidence." Id. at 285. The trial court barred Dr. Fichera's testimony and presentation related to the photographs of the electric chair, the gurney Defendant would be strapped down to receive a lethal injection, and jail cells. These exhibits were relevant to the penalty which the jury was being asked to impose. More importantly, the court ruled Dr. Fichera could not address Defendant's mother's background. The State does not address the relevancy of Dr. Fichera's testimony, but rather, points out that the defense did not cite any case law in support of its position. (AB-70). However, the right to present *any* mitigating evidence has been part of capital jurisprudence since at least the Lockett decision in 1978. See Lewis v. State, 398 So.2d 432, 439 (Fla. 1981). The State argues that the defense had withdrawn its notice of mental health mitigation and caught the court and the prosecution unaware when it offered Dr. Fichera's testimony on mental health issues. (AB-68). Despite the fact that Dr. Fichera had been listed many months

before, the prosecution had *never deposed him*. He was not removed from the witness list. (T. 2815). In any event, the prosecutor apparently *did speak to* the expert, and "only had a few questions to ask him." (T. 2809). The defense made clear that Dr. Fichera was going to testify as a mitigation specialist. (T. 2724). The law is clear that evidence which does not meet the *statutory* mitigating circumstance concerning mental health may still be admissible as *non-statutory* mitigating circumstances. See, e.g., Hoskins v. State, 965 So.2d 1, 17-18 (Fla. 2007); Harris v. State, 843 So.2d 856, 869 (Fla. 2003). The State does not address the fact that the information about the mother's background was relevant to Defendant's life. The trial court ruled that information about the mother would not be admitted because "she's not on trial." (T. 2815). This was an impermissible standard. Defendant is entitled to a new penalty phase.[18]

(XIV)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

The State argues that the death penalty in this case is proportional due to the 7 aggravating factors (merged into 6) when compared to 24 non-statutory

[18] The State characterizes the proposed evidence as poverty and hard lives from "past generations." (AB-70). The defense offered testimony concerning Defendant's *mother*, who raised him, not his great grandfather or his second cousin once removed. The evidence was *directly relevant* to the mother's inability to protect Defendant and to poor parenting skills as well as the family dynamic, all of which created the person who Defendant was.

mitigating factors, only 17 of which were given weight. (AB-72). Here, aggravating factors (1-3) involved Defendant's prior crime of armed carjacking and the contemporaneous offenses. Aggravating circumstance #4(pecuniary gain) merged with circumstance #3. The cases cited by State are not persuasive given the jury votes in those cases or the non-jury situations in those cases.[19] Here, the jury recommended the death penalty by a *bare majority* (7-5). The death penalty is reserved for the most aggravated and the least mitigated of murders. Almeida v. State, 748 So.2d 922, 933 (Fla. 1999). This vote does not show a finding that the present murder qualified as the "most" aggravated and "least" mitigated of murders. In addition, the defense presented 39 mitigating circumstances. (R. 922-925). This Court has vacated a death sentence on proportionality grounds even where a prior violent felony, EHAC or CCP have been found. See, e.g., Farinas v. State, 569 So.2d 425 (Fla. 1990)(trial court found three aggravators including EHAC and CCP); Proffitt v. State, 510 So.2d 896 (Fla. 1987)(trial court found two

[19] See Russ v. State, __ So.3d __, 36 Fla.L.Weekly S527 (Fla., September 22, 2011)(plea of guilt and waiver of sentencing jury); Johnston v. State, 841 So.2d 349 (Fla. 2002)(unanimous jury vote and defense did not challenge proportionality); Johnston v. State, 863 So.2d 271 (Fla. 2003)(11-1 jury vote); Blackwood v. State, 777 So.2d 399 (Fla. 2000)(9-3 jury vote); Nelson v. State, 748 So.2d 237 (Fla. 1999)(unanimous jury vote); Hauser v. State, 701 So.2d 329 (Fla. 1997)(waiver of sentencing jury).

aggravators including CCP); Wright v. State, 688 So.2d 298 (Fla. 1996)(trial court found two aggravators including prior violent felony).[20]

(XV)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

The State argues that the trial court's sentencing order was proper. The State maintains that the trial court's decision was not fanciful, arbitrary or unreasonable, and asserts that the trial court did not engage in improper doubling and did not violate double jeopardy. Also, the trial court properly found both EHAC and CCP under the circumstances of this case. Lastly, the State avers that the trial court properly weighed the mitigating factors. (AB-73-92).

The State argues that the defense has not explained how the trial court gave disproportionate weight to felony supervision, prior violent felony and felony murder. (AB-74). On the contrary, the defense noted that these factors were given disproportionate weight because the same felony conviction supported circumstances 1 and 2. Moreover, these factors had a double impact, although

[20] The State claims that a mandatory life sentence as a mitigating factor was not addressed by the trial court and should not be a basis to challenge the court's sentencing decision. (AB-71, n.4). Mitigating evidence must be considered and weighed where found anywhere in the record to the extent it is uncontroverted and believable. See Spann v. State, 857 So.2d 845, 857 (Fla. 2003).

based on the same offense. The State argues that a contemporaneous conviction does not violate double jeopardy because at the time of conviction the defendant is death eligible and the aggravating factor is merely a sentencing selection factor. (AB-76-77). Irrespective of this argument, the trial court should not have given this aggravator great weight because the prosecution already relied upon these felonies under the felony murder theory at the time of conviction.

EHAC. The State argues that the evidence establishes that Schumacher was conscious throughout the episode, and, as such, EHAC was supported. (AB-77). The medical examiner testified, however, that while Schumacher may have been *alive* when he sustained his injuries, (T. 1500; T. 1517; T. 1529), he could not definitively say Schumacher was, in fact, *conscious* throughout the episode. (T. 1529-1530).[21] Dr. Juste could not say in what sequence the injuries were sustained. (T. 1518-1520). Dr. Juste also testified that where the neck is compressed, as in Schumacher's case, a person loses consciousness in "seconds." (T. 1520). Dr. Juste could *not* testify whether the compressed strangulation was a one-time incident or multiple incidents (T. 1522), or for how long Schumacher was alive after sustaining his injuries. (T. 1523). Dr. Juste could not say whether Schumacher could vocalize after sustaining the neck injury. (T. 1527). He did not identify *any defensive wounds*. (T. 1528). He could not say how many times

[21] Nothing done to a victim after the victim is dead or unconscious can support EHAC. Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1998).

Schumacher was hit. (T. 1535). Dr. Juste found that Schumacher appeared to be in relatively good health. He was not an invalid. (T. 1536).[22] Under these circumstances, the trial court's EHAC finding cannot be sustained.[23]

CCP. The State argues that CCP was properly found because Dietz testified that Defendant told him he pretended to be homosexual so that Schumacher would take him home and that he intended to kill Schumacher. Also, Defendant apparently returned to the apartment after the beating and placed Schumacher in the bathtub to keep him out of sight. (AB-84). The State does not address Defendant's arguments that CCP was not shown by such established criteria as early procurement of a weapon or lack of provocation. Additionally, there is no

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[22] The State points to certain sections of Defendant's statement to argue that Schumacher was conscious at all times. Defendant also said that he believed that Schumacher was alive when he placed him in the bathtub, but stated that he only mumbled when he talked to him. (T. 1808-1810).

[23] The State's cited cases do not support its position. See Russ v. State, supra, at 36 Fla.L.Weekly S534 (defendant strangled, struck and stabbed victim showing that victim was likely conscious during entirety of attack and lack of defensive wounds indicated victim was bound *prior* to murder); Willacy v. State, 696 So.2d 693 (Fla. 1997)(victim beaten, bound, strangled and *set afire* while alive); Douglas v. State, 878 So.2d 1246 (Fla. 2004)(conscious victim struck *24 to 27* times in *course of sexual battery* and defensive wounds found); Dennis v. State, 817 So.2d 741 (Fla.2002)(*two victims* sustained massive injuries, one victim had a fractured skull and had defensive wounds and other victim had imprint of shotgun with facial fractures and had defensive wounds); Bogle v. State, 655 So.2d 1103 (Fla. 1995)(victim's head *crushed with a piece of cement* and likely *subjected to sexual activity* before death); Wilson v. State, 493 So.2d 1019 (Fla. 1986)(in *double homicide* case victim beaten with a hammer, *pursued within the house* and then shot dead) .

post-arrest statement by Defendant admitting a plan to kill the victims. The State maintains that Defendant committed the murder as a matter of course because he could have taken Schumacher's ATM card without killing him. The State's cited cases do not support its position.[24] This Court should strike this aggravator.[25]

Vulnerable Victim. The State argues that Schumacher was a vulnerable victim. The trial court simply noted that Schumacher was 72 years old, had neck problems, had difficulty getting around and was in overall poor health. (R. 964). The State's own medical examiner testified that Schumacher appeared to be in relatively good health. He was not an invalid. (T. 1536). Based on this record, the State did not prove this aggravator beyond a reasonable doubt.[26]

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[24] In Guardado v. State, 965 So.2d 108 (Fla. 2007), the defendant *told the police he chose the victim and had a plan to murder* and rob, and *armed himself* with a knife and a bar before going to the victim's home. In Buzia v. State, 926 So.2d 1203 (Fla. 2006), the defendant *told the police* that he arrived at the victims' residence *with the intent to take money* from them. The defendant entered the home and struck one the victims, rendering her unconscious. The defendant then accosted the other victim as he entered his home. He *procured two axes* after striking the victims and hit both victims with the axes.

[25] The trial court found that even where a defendant suffers from mental illness he may still exhibit heightened premeditation. (R. 964). However, the testimony by Drs. Fichera and Ribbler sufficiently rebutted the CCP factor, which must be proven beyond a reasonable doubt.

[26] The State's cited cases on this matter do not assist its argument. See Wade v. State, 41 So.3d 857, 863 (Fla. 2010)(victims in "extremely poor health"); Woodel v. State, 985 So.2d 524, 531 (Fla. 2008)(victim had broken her arm and was taking pain medications); Nelson v. State, 850 So.2d 514 (Fla. 2003) (defendant apparently did not contest the victim vulnerability aggravator on appeal).

The State does not address Defendant's argument that he was the subject of severe sexual and physical abuse from a very early age; that he was abandoned by his parents, who had little or no parenting skills; that while growing up, he lived "on eggshells," fearing when his father would physically attack him, his brother or his mother; that he drifted away from home and became the object of adult physical and sexual abuse. These mitigating circumstances were *uncontroverted.* The trial court simply did not give sufficient weight to the *unrebutted* mitigating circumstances, even though various witnesses, including two mental health experts, testified in support of mitigation.

(XVI)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

Contrary to the State's argument that the defense has not adequately argued this issue, the defense cited to the record where the constitutionality of the death penalty statute was challenged, but conceded that this Court has repeatedly rejected such arguments. (Initial Brief, p. 97).[27] Additionally, the defense cited to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), Nelson v. State, 850 So.2d 514 (Fla. 2003), and the recent federal court decision[28] finding Florida's statute unconstitutional. More importantly, *all* of this Court's decisions on Ring

[27] See Miller v. State, 42 So.3d 204 (Fla. 2010).
[28] Evans v. McNeil, Case No. 08-14402-CIV-MARTINEZ (S.D. Fla., June 20, 2011).

pre-date the Evans decision and, as such, this Court should reconsider its previous Ring jurisprudence. The court in Evans found the death statute unconstitutional *as a matter of federal constitutional law.* [29] This is not addressed by the State. [30]

CONCLUSION

Eric Kurt Patrick respectfully requests that this Honorable Court reverse his convictions and corresponding sentences, or alternatively, requests that this Court vacate his death sentence and remand for resentencing.

Respectfully submitted,

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[29] See Mobil Oil Corportation v. Shevin, 354 So.2d 372, 375 n. 9 (Fla. 1977)(*citing* State v. Dwyer, 332 So.2d 333 (Fla. 1976))(state courts are bound by federal court determinations of federal law questions).

[30] The Evans court found, inter alia, that the statute leaves open the very real possibility that in substance the judge still makes the factual findings necessary for the imposition of the death penalty; that the jury's decision is simply a sentencing recommendation made without clear factual findings; that an increase in a defendant's authorized punishment is contingent on a finding of fact and such findings *must* be made a jury; that a trial judge is unaware of the aggravating factor or factors found by a jury and, thus, he or she may find an aggravating factor *not* found by a jury in its death sentence; and that a judge may reject a jury's life recommendation altogether. Arguments made by Defendant in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief was mailed to Lisa Marie Lerner, Esq., Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401-3432, on this 15th day of December, 2011.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ

CERTIFICATE OF COMPLIANCE

Appellant states that the size and style of type used in his reply brief is14 Times New Roman.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ