IN THE SUPREME COURT OF FLORIDA

MICHAEL RENARD JACKSON,

Appellant,

v. **CASE NO. SC10-1646**

STATE OF FLORIDA,

Appellee.

_______________________________/

APPELLANT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 6

SUMMARY OF THE ARGUMENT 11

ARGUMENT

I. THE COURT ERRED WHEN IT ALLOWED THE STATE TO PLAY A RECORDING OF THE POLICE REPEATEDLY ASKING JACKSON WHY HE KILLED BOYER, THAT DNA EVIDENCE CONCLUSIVELY LINKED HIM TO THE MURDER, THERE WAS NO QUESTION HE HAD KILLED HER, AND THE DEFENDANT REPEATEDLY DENIED HE HAD COMMITTED ANY CRIMES AGAINST HER, A VIOLATION OF THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS. 15

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT JACKSON SEXUALLY BATTERED ANDREA BOYER WITH GREAT FORCE, AS ALLEGED IN THE INDICTMENT, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL. 31

TABLE OF CONTENTS

(Continued)

ARGUMENT **PAGE**

III. THE COURT ERRED IN FINDING THAT JACKSON COMMITTED THE MURDER WHILE UNDER A SENTENCE OF IMPRISONMENT OR PLACED ON COMMUNITY CONTROL OR FELONY PROBATION, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS...38

IV. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE MAXIMUM SENTENCE JACKSON FACED IF THEY CONVICTED HIM OF SEXUAL BATTERY WAS LIFE IN PRISON, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS 43

A. Rule 3.390(a), Fla. R. Crim. P., poses no barrier to admitting evidence that Jackson would serve a life sentence for the sexual battery concurrent to the sentence imposed for the murder. 47

B. The evidence of a life sentence was relevant as a matter of due process in determining if Jackson should live or die. 50

C. Defense counsel never argued the convictions as mitigation, and the jury instructions were more limited than that read in Nixon. 56

D. Additional reasons the court should have admitted the evidence of Jackson's other sentences. 57

V. THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO.2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO.2D 403 (FLA. 2002)...59

TABLE OF CONTENTS

(Continued)

PAGE

CONCLUSION 70

CERTIFICATES OF SERVICE AND FONT 71

TABLE OF CITATIONS

CASES **PAGE(S)**

Alabama v. Evans, 461 U.S. 230 (1983)... 64

Alonso v. State, 821 So.2d 423 (Fla. 3d DCA 2002). 34

Anderson v. State, 841 So.2d 390 (Fla. 2003)... 69

Apodaca v. Oregon, 406 U.S. 404 (1972) 67

Apprendi v. New Jersey, 530 US. 446 (2000) 59,62

Bottoson v. Moore, 863 So.2d 393 (Fla. 2002) 14,60,62,63,64,65,67,69

Boyd v. State, 910 So.2d 167 (Fla. 2005)... 32

Burns v. State, 609 So.2d 600 (Fla. 1992)... 48

Butler v. State, 842 So.2d 817 (Fla. 2003)... 67,69

California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446,
77 L.Ed. 2d 1171 (1993)... 49,55

Carpenter v. State, 785 So.2d 1182 (Fla. 2001)....................................... 32,34

Carranza v. State, 985 So.2d 1199 (Fla. 2008) 33

Chaky v. State, 651 So.2d 1169 (Fla. 1995) 48,49

Connor v. State, 803 So.2d 598 (Fla. 2001) 41

Consalvo v. State, 697 So.2d 805 (Fla. 1996) 41

Darling v. State, 808 So.2d 145 (Fla. 2002) 34

Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983) 64

Dilbeck v. State, 643 So.2d 1027 (Fla. 1994) 48,57

Duest v. State, 855 So.2d 33 (Fla. 2003) 63,66

Elledge v. State, 346 So.2d 998 (Fla.1977) 57,58

Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed. 2d 854 (1992) 46,66

Eugene v. State, 36 Fla. L. Weekly D176 (Fla. 4th DCA January 26, 2011) 27

Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005) 34

Ford v. Wainwright, 477 U.S. 399 (1986) 68

Hall v. State, 614 So.2d 473 (Fla. 1993) 54,55

Harrod v. Arizona, 536 U.S. 953 (2002) 64

Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003) 69

Hubbard v. United States, 514 U.S. 695 (1995) 60,61

In Re Amendments to Florida Rules, 609 So.2d 516 (Fla. 1992) 49

Johnson v. Louisiana, 406 U.S. 356 (1972) 67

King v. Moore, 831 So.2d 403 (Fla. 2002) 14,60,64

Knight v. State, 24 Fla. L. Weekly S135 (Fla. March 11, 1999) 52

Lawrence v. State, 846 So.2d 440 (Fla. 2003) 65,66,69

Miranda V. California,
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 16,17

Mohr v. State, 927 So.2d 1031 (Fla. 2nd DCA 2006) 24,25,26,27,29

Myers v. State, 788 So.2d 1112 (Fla. 2nd DCA 2001) 24

Nixon v. State, 572 So.2d 1336 (Fla. 1990) 13,45,46,49,54,56,58

Pandeli v. Arizona, 536 U.S. 953 (2002) 64

Patterson v. McLean Credit Union, 491 U.S.164 (1989)......................... 61,62

Pausch v. State, 596 So.2d 1216 (Fla. 2nd DCA 1992)...................... 24,25,27

Proffitt v. State, 428 U.S. 253 (1976) 40

Riley v. State, 366 So.2d 19 (Fla. 1978) 41

Ring v. Arizona, 536 U.S. 584 (2002) 59,60,61,62,63,64,65,66,67,69

Robinson v. State, 4 So.3d 87 (Fla. 3d DCA 2009)..................................... 24

Rodriquez de Quijas v. Shearson/ American Express,
490 U.S. 477 (1989) 60

Rose v. Florida, 535 U.S. 951 (2002) 64

Sansing v. Arizona, 536 U.S. 953 (2002) 64

Schrader v. State, 962 So.2d 369 (Fla. 4th DCA 2007)........................... 24,27

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187,
129 L.Ed. 2d 133 (1994).. 46,49,52,53,54,68

Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669,
90 L.Ed. 2d 1 (1986).. 54

Songer v. State, 322 So.2d 481 (Fla. 1975) 39

Sparkman v. State, 902 So.2d 253 (Fla. 4th DCA 2005) 24,26,27,29

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) 29,30

State v. Dixon, 283 So.2d 1 (Fla. 1973) 39

State v. Hernandez, 645 So.2d 432 (Fla. 1994) 47

State v. Ramos, 579 So.2d 360 (Fla. 4th DCA 1991) 28

Stewart v. State, 558 So.2d 416 (Fla. 1990) 58

Tascano v. State, 393 So.2d 540 (Fla. 1981) 49

Tafero v. State, 403 So.2d 355 (Fla. 1985) 41

Teague v. Lane, 489 U.S. 288 (1989) 64

Trotter v. State, 690 So.2d 1234 (Fla. 1996) 39

Troy v. State, 948 So.2d 635 (Fla. 2006) 33

Use by Trial Courts of Standard Jury Instructions in Criminal Cases,
431 So.2d 594 (Fla. 1981) 49

Walker v. State, 707 So.2d 300 (Fla. 1997) 46

Walton v. Arizona, 497 U.S. 639 (1992) 62

Wike v. State 648 So.2d 683 (Fla. 1994) 49

Wright v. State, 596 So.2d 456 (Fla. 1992) 48

Zack v. State, 753 So.2d 9 (Fla. 2000) 41

Zant v. Stephens, 456 U.S. 410 (1982) 40

CONSTITUTIONS AND STATUTES

United States Constitution
Amendment V 56
Amendment VI 62,68
Amendment XIV 56

Florida Statutes (2008)
Section 794.011(3) 31
Section 921.141 38,39,41,53

Florida Statutes (2007)
Section 90.401 16
Section 90.403 15,16
Section 921.141 43

Florida Statutes (2002)
Section 921.141(3) 67

OTHER SOURCES

American Law Institute, Model Penal Code, § 210.6 (1980) 53

American Law Institute Model Penal Code §210.6 (1962) 39

Florida Rules of Appellate Procedure
Rule 9.140 49

Florida Rules of Criminal Procedure
Rule 3.220 48
Rule 3.250 49
Rule 3.260 47
Rule 3.390(a) 13,47,48,49

I. PRELIMINARY STATEMENT

MICHAEL RENARD JACKSON, was the defendant in the trial court and will be referred to in this brief as either “appellant,” “defendant,” or by his proper name.

References to the Record on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses.

II. STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Clay County on March 9, 2007 charged Michael Jackson with one count of first-degree murder with a weapon, and one count sexual battery (1 R 14). The State also filed a notice that it would seek a death sentence if he were convicted of the murder (1 R 21).

Jackson filed several motions, the following of which have relevance to this appeal:

1. Motion for Special Verdict (1 R 104). Denied (4 R 731).
2. Motion to Exclude Evidence Lacking Probative Value . (1 R 118). Denied (4 R 730)
3. Motion to Declare Florida's Capital Sentencing Procedure Unconstitutional under Ring v. Arizona (1 R 172). Denied (4 R 732).
4. Motion to Declare Section 921.141(5)(a) Florida Statutes Unconstitutional as Applied (4 R 633). Denied (4 R 734).
5. Motion in Limine and Offer to Stipulate Concerning "Under Sentence" Aggravating Factor (4 R 683). Denied (4 R 735).

Jackson was tried before Judge William Wilkes, and the jury found the defendant guilty as charged on both counts (4 R 754-6). As to the murder conviction, it also found that he had used a weapon (4 R 756). The defendant moved for a new trial (4 R 785-86), but the court denied that request (5 R 833).

Jackson proceeded to the penalty phase of his trial. The State presented only victim impact testimony from two members of the victim's family (16 R 1550-53).

Jackson refused to present a full case for mitigation, and after an inquiry as to that intent, the court allowed defense counsel to make a verbal proffer to it, but not the jury, of the mitigation he believed he could have presented (16 R1469-75). Jackson, did, however, permit counsel to call a probation officer to testify that the defendant was a "pretty good guy" and had no problems with him while he was on probation (16 R 1574). Jackson's lawyer also called the security commander for the Clay County jail who said that while Jackson was there he posed no problems and abided by the jail's rules (16 R 1578-810) The jury recommended, by a vote of 9-3, that the court impose a death sentence, which it did (5 R 820). Justifying that punishment, it found in aggravation that

> 1. Jackson committed the murder while under a sentence of imprisonment or probation. Great weight
> 2. Jackson committed the murder during the course of a sexual battery. Great weight.
> 3. Jackson was previously convicted of another violent felony. Great weight.
> 4. The murder was especially heinous, atrocious, or cruel.

(5 R 858-59).

Against these aggravators the court found no statutory mitigation, but it did find and weigh the following nonstatutory mitigation:

> 1. The existence of any factors in the Defendant's character, background or life. Slight weight.

2. The Defendant had a deprived early childhood without role models. Slight weight.

3. The Defendant's father was absent from the home. Slight weight.

4. The Defendant's mother abandoned him when she moved to Florida from Texas. Slight weight.

5. The Defendant suffered from severe physical injury (skull fracture) at a young age, along with other injuries. Slight weight.

6. The Defendant and his family were poor. Slight weight.

7. The Defendant was abused by older women when his mother was not around. Slight weight.

8. The Defendant and his siblings were subjected to child sexual abuse and neglect. Slight weight.

9. The Defendant's Clay County Jail incarceration revealed that he is capable of adapting well to long-term incarceration. Slight weight.

10. The Defendant is loved by his family and friends. Slight weight.

11. The Defendant had a severely dysfunctional family. Slight weight.

12. The Defendant has friends, cares about others, and has brought others to believe in God. Slight weight.

13. The Defendant believes in God. Slight weight.

14 . The Defendant was subjected to involuntary drug use and alcohol abuse prior to reaching his fifth birthday. Slight weight.

15. The Defendant was hospitalized and/or required major surgery on three occasions prior to attaining the age of three years old. Slight weight.

16. At the age of six months, a medical specialist detected abnormal brain wave activity. Slight weight.

17. The Defendant was raised in a low-income housing project. Slight weight.

18. As a child the Defendant witnessed violence perpetrated upon his mother when she was shot by her husband in the Defendant's presence. Slight weight.

19. After being abandoned in Texas by his mother at an early age, the Defendant was unilaterally removed from the care and custody of a caring relative, and sent to Florida. Slight weight.

20. The Defendant was sexually abused during his teenage years by a juvenile detention counselor. Slight weight.

21. The defendant has been described as a hard worker. Slight weight.

22. The Defendant was kind to children and homeless individuals. Slight weight.

23. The Defendant was polite, cooperative, and respectful to his attorneys and legal staff during the pendency of his criminal case. Slight weight.

24. After being released from long-term custody, the Defendant resided with, and assisted with the physical care of an older couple with medical issues. Slight Weight.

(5 R 862-65)

The court sentence Jackson to life in prison for the sexual battery conviction, to run concurrently with the death sentence (5 R 873, 875)**.**

This appeal follows.

STATEMENT OF THE FACTS

A. The Prosecution's case

On January 23, 2007, Andrea Boyer worked as a veterinarian technician at a animal clinic in Jacksonville (11 R 482). That morning, as was her routine on operating days, she was supposed to open the clinic about 5 a.m., and get it ready for the day's activities, which, this day, would be surgeries on some of the animals housed at one of the clinic's three buildings (11 R 482). Although she apparently got there about that time, that is all she did.

At 6:45 a.m., Boyer's other co-workers began to arrive, and the first one there noticed, not only was the clinic not ready for business, lights were off, and things were not right (11 R 585, 589). Joy Ortiz, one of the other vet. techs., looked around to see what was going on, went through the main office, and noted that the cash box did not have the $100 it normally had (11 R 587). Another technician went to another building and discovered Boyer's body (12 R 618).

The police were called, and soon they arrived and began investigating her death. Her body was laying on the floor with her panties pulled down and left on one leg (12 R 703, 13 R 974). She had numerous bruises including ones on her

shoulders consistent with her bra strap being pushed into a cement floor (13 R 990-91), bruises on her right arm consistent with being grabbed, bruises on her hand and hip consistent with it being forced to the floor or fighting her attacker, and a bruise to her left arm (13 R 990-96). The body had no broken bones (14 R 1006). There were also eight "sharp force" superficial wounds on her left hand and two on her right (14 R 1007-1015, 1061).[1] There was no trauma to her vagina or anus, and none of her clothes had tears (14 R 1099). There was thus no evidence she had been sexually battered (14 R 1099).

Boyer had been strangled manually and with a ligature, and she was probably alive, conscious, and struggling when manually strangled (14 R 1018, 1026-27, 1030-31). Something, such as a fire extinguisher, had also hit her at least one time in the back of the head, causing her skull to fracture and injuring her brain and brainstem (14 R 1042, 1047, 1052). The blow could also have caused instantaneous unconsciousness (14 R 1099).

At trial, the medical examiner said that Boyer died from either the strangulation or the blow to the head (14 R 1058)[2].

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[1] A knife blade was found a few days after the murder in a drain on the floor (13 R 806-807).

[2] While the medical examiner said Boyer was alive while being strangled, he was unsure if she was when hit on the head (14 R 1060).

DNA consistent with Jackson's DNA was found in Boyer's vagina (14 R 1138, 1143).

On January 23, Michael Jackson lived with a couple, the Goolsbys, at an extended stay lodging in Jacksonville and had done so for several months (12 R 768, 773, 775).[3] He worked for a construction company, and he got up about 4 or 5 a.m. every morning to be at work by 6 or 7 a.m. (12 R 780, 13 R 829). Usually he walked the half mile or so to it (12 R 780, 13 R 815), but occasionally he got a ride from a co-worker (12 R 780, 13 R 816). The veterinary clinic was only a couple of blocks from where the defendant lived, and Jackson had to walk by it on his way to work (12 R 772, 13 R 885).

On January 23rd, the Goolsbys noticed no injuries or scratches on Jackson, did not see any blood on his clothes, and saw no change in his demeanor (12 R 786, 798-99). A co-worker, however, noted that after the murder, the defendant no longer had a beige or white jacket that, before then, he had regularly worn (13 R 816).

At times, Jackson would also stop at a convenience store on his way to work (11 R 536). Boyer also regularly stopped there on her way to the clinic, which was also nearby (11 R 533-34). In particular, on January 23, she went inside and bought

a soda and some cigarettes (11 R 539). There is no evidence the two ever met or saw each other at that store (11 R 536).

Boyer had been married for several years (11 R 481, 518), and she had had three abortions, the most recent being about two months before her death (11 R 517-18). She and her husband occasionally smoked marijuana (11 R 499), she had several tattoos on her body, and seven to ten piercings in each ear (11 R 513-515). While working at the vet clinic, she had also danced part time as a stripper at a club called Solid Gold (11 R 519).

When the police learned that Jackson's DNA had been found in Boyer's vagina (13 R 913), they questioned and eventually arrested the defendant (13 R 941). During their interrogation, they directly and repeatedly accused the defendant of killing her (13 R 914, 920, 931). He steadfastly denied doing so, and never admitted murdering her (13 R 915, 919-23, 924, 930, 933, 935-36).

B. **The Defense case**.

Jackson knew Andrea Boyer, or rather, he had seen her dance at the Solid Gold club at least twice and knew her as Haley (14 R 1200, 15 1206-1207). He had also seen her frequently at the convenience store they had patronized (15 R 1207).

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[3] During this time, Jackson had an affair with Mrs. Goolsby (12 R 787).

One time, he walked by her truck and smelled the odor of marijuana coming from it. He told her "that's a great smell" and gave her a marijuana cigarette (15 R 1209-10). Over time, they developed a friendship of sorts. They would smoke marijuana together, and he would sell her some of the weed (15 R 1213). When she asked if he "did" pills, he said he did not, but he was able to get her some (15 R 1214).

This relationship eventually included sex, including group sex with another couple (15 R 1217). Eventually, her demand for pills included trading sex for the drugs (15 R 1218-19).

On January 23, 2007, he met Boyer, or rather, she picked him up and they smoked some marijuana and had sex (15 R 1223). They parted with her going to her job and he went to his (15 R 1223). Sometime before then she told him that she was pregnant with his child (15 R 1224).

Michael Norris, a former boyfriend and ex-fiancé of Boyer had dated her for three years (15 R 1300). During that time they had smoked some marijuana and occasionally taken some pills (15 R 1300). They had also had different types of sex, including one time when she asked him to watch as she had sex with another female (15 R 1300).

III. <u>SUMMARY OF THE ARGUMENT</u>

ISSUE I: During the State's presentation of its case in chief, it introduced, over objection, a redacted version of the police interrogation of Jackson. The gist of the edited version was that the police accused Jackson of killing Andrea Boyer, and he adamantly denied doing it. He never gave any hint, suggestion, or clue that he had anything to do with her homicide. Hence, the evidence of this questioning had marginal relevance, at best, and more realistically whatever it may have tended to prove was substantially outweighed by the prejudice of hearing the police repeatedly say they believed Jackson had murdered Boyer.

The law in this area holds that a police interview should be redacted where the interrogating detective made prejudicial statements of fact and personal belief about the guilt of the defendant, which were not adopted or admitted by him. This makes sense because jurors tend to attach greater significance to what policemen say, and that likelihood becomes particularly prejudicial when they express their beliefs of the defendant's guilt.

ISSUE II. Jackson was convicted of sexually battering Andrea Boyer. There is, however, insufficient evidence that he did so. First, he denied doing committing that crime, and he never said anything different. Second, the other evidence supports that. None of the victim's clothes was torn, used to tie her, or placed in her mouth as a gag. She had no injuries around her vagina, which would have indicated forced sex. Of course, she was strangled but there is no evidence it was done during the course of having sex with her. Moreover, he had a reasonable explanation for how his DNA was found in her vagina. In short, the circumstantial evidence supports his explanation of voluntary sexual activity, and none of what the State presented refutes it.

ISSUE III. The court found that when Jackson committed the murder he was on probation. Hence, it found the aggravating factor that the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. The problem is that while Jackson admittedly was on probation, there is no evidence that he committed the murder for any reason connected with that status. If Florida's death penalty statute is to have validity the aggravating factors must

somehow significantly narrow the class of persons eligible for a death sentence. Here, the mere fact that Jackson, by some unfortunate coincidence, happened to be on probation at the time of the murder does not do this. The trial court, therefore, erred in finding this aggravating factor.

ISSUE IV: In addition to the conviction for first degree murder, the jury also found that Jackson had committed a sexual battery. While the jury knew about the facts of those capital and noncapital crimes, and that he faced a possible death sentence for the murder, the court refused to tell it that he also could be sentenced to life in prison for the sexual battery. Although it summarily denied that request, this Court's opinion in <u>Nixon v. State</u>, 572 So.2d 1336, 1345 (Fla. 1990) supported that ruling. In that case, this Court said that Rule 3.390(a), Fla. R. Crim. P., prohibited the jury from hearing about other sentences the defendant may have, the evidence was irrelevant for mitigation, and besides defense counsel had argued the convictions as mitigation and the court instructed the jury that it was "unlimited."

None of the reasons withstand scrutiny or application to this case. Rule 3.390(a) applied only to the guilt phase of a trial. The evidence was accurate and had relevance to the defendant's record. Additionally, the evidence of the

punishment Jackson faced for the sexual battery was accurate and of the type sentencers have traditionally used in determining the appropriate sentence a defendant should serve. Such evidence also tended to rebut or minimize the weight the jury would have given to the uncontested aggravating factors of (1) Prior violent felonies, and (2) Committed during the course of a sexual battery.

ISSUE V. This Court wrongly decided Bottoson v. Moore, 863 So.2d 393 (Fla. 2002), and King v. Moore, 831 So.2d 403 (Fla. 2002). Because it has recently and repeatedly rejected arguments challenging the correctness of those decisions, Jackson recognizes the futility of repeating those arguments. He raises this issue now simply to preserve it for further review.

IV. ARGUMENT

ISSUE I:

THE COURT ERRED WHEN IT ALLOWED THE STATE TO PLAY A RECORDING OF THE POLICE REPEATEDLY ASKING JACKSON WHY HE KILLED BOYER, THAT DNA EVIDENCE CONCLUSIVELY LINKED HIM TO THE MURDER, THERE WAS NO QUESTION HE HAD KILLED HER, AND THE DEFENDANT REPEATEDLY DENIED HE HAD COMMITTED ANY CRIMES AGAINST HER, A VIOLATION OF THE DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

This issue involves an application of §90.403, Fla. Stats. (2007), which precludes the admission of relevant evidence when its probative value is substantially outweighed by its prejudicial impact.

> 90.403. Exclusion on grounds of prejudice or confusion.
> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.]

At trial, over defense objection (1 R 48, 98, 12 R 1272, 1282-1307)[4], the police, after reading Jackson his Miranda rights, which he waived, repeatedly asked him why he had killed Andrea Boyer. As often, Jackson denied killing her. He never admitted raping and murdering her, and the jury heard only a lengthy questioning in which the police repeatedly, ad nauseum, demanded, asked, or begged the defendant to tell them why he had killed her. He never admitted doing that or raping her, never admitted being at the scene of the murder, and never explained how his DNA was found inside her vagina. In short, other than the repeated accusations by the police and the repeated denials by Jackson, this evidence had little or no relevance, no tendency to prove any material fact. §90.401, Fla. Stats. (2007)(Relevant evidence is any fact tending to prove or disprove any material fact.). Moreover, whatever relevancy it may have had was substantially outweighed by the danger of unfair prejudice. §90.403, Fla. Stat. (2007) This Court should review this issue under an abuse of discretion standard of review.

[4] By way of a pretrial motion to redact, Jackson objected to the State introducing an unedited version of the questioning (8 R 1251, 1271-72, 1273-74, 1277-79, 1282, 1287, 1310). After he and the prosecutor went through and deleted some, but not all, of what the police and Jackson said the court denied, in part, the motion and let the prosecutor play a redacted copy of it.

A. What the jury heard.

At trial, the jury heard the lengthy police questioning of Jackson. Initially, the law enforcement officers tried to put him at ease by saying that they were at the police station, and "We're all friends here, right? . . Well, I took a bath today, so--" (13 R 898) They casually read him his Miranda rights, and with a "Uh-huh" he waived them (13 R 899).

After some conversation about football (13 R 899-900), where he lived, his social security number, whether he wanted to wipe his nose, and other minutiae (13 R 899-901), they began asking him about who he lived with, where he worked, how long, how he got there, and if he knew where the "vet clinic" was (13 R 901-908). The defendant admitted he knew where it was, but he had never been there (13 R 909). He also said he did not know Andrea Boyer (13 R 909), and knew almost nothing about her murder (13 R 910). Then, Detective Martin Cotchalevoich, one of the two interrogators, asked:

> In your whole life never run into her? Don't recognize her from anywhere?
>
> MICHAEL JACKSON: No.
>
> DETECTIVE COTCHALEVOICH: The only question I have is why did you kill her?
>
> MICHAEL JACKSON: Why did I kill her?
>
> DET. COTCHALEOVICH: Yeah.
>
> MICHAEL JACKSON: What do you mean why did I kill her?
>
> DET. COTCHALEOVICH: Why did you kill her?

MICHAEL JACKSON: I ain't kill her.

DET. COTCHALEOVICH: If you want to rape her that's one thing but to kill her that's - - (Inaudible.) - - different. ... You may not know it but we have physical evidence at our scene, okay, that we run tests on, semen that sort of thing.

MICHAEL JACKSON: My DNA?

DET. COTCHALEOVICH: Absolutely. ...

MICHAEL JACKSON: I ain't - - listen, I ain't killed nobody.

DET. COTCHALEOVICH: Michael. Michael, we're not - - we're not here to argue. We're not mad, okay? What I want to understand is why this happened.

MICHAEL JACKSON: I ain't killed nobody. I ain't - - ...

DET. COTCHALEOVICH: ... The profile test that was matched matched with your profile. It's 100 percent guaranteed.

* * *

Listen to me. We're not here to dispute it, okay? All we want to do is understand this, okay? ... We deserve that and we put a lot of hours into this case. We didn't't pick your name out of a hat. We've been talking to a lot of people, that's true, but when we get a call from FDLE and they say without a doubt 100 percent that we have his DNA and this is your suspect then we start to work - - (Inaudible.)

* * *

You don't understand. When he says profile each one of us, me, him and you, okay, we've all got identifiers in our DNA that we cannot do anything about. They're with you from the time you're conceived in the womb, okay? ... This girl was killed. Do I think maybe that you went over there to actually murder the girl? I don't know. I wasn't there. You're the only person that can provide that information to me.

MICHAEL JACKSON: I ain't murdered nobody. ... I ain't murdered nobody. I ain't done nothing to nobody. I don't go anywhere. I don't walk anywhere. ... I ain't killed nobody, sir. I ain't murdered nobody. I ain't never murdered nobody. Don't even think about murdering nobody.

DET. COTCHALEOVICH: I know you did it. You used a fire extinguisher. I know you did it. ... You know I'm right because the way you're looking. I know. ...

MICHAEL JACKSON: Listen, sir, my semen ain't there. I ain't murdered, raped, however you want to say it.

DET. COTCHALEOVICH: That's right. If you hadn't had that we probably would still be wondering, but unfortunately for you it's there. It's 100 percent. There's no - - no mistake on it, okay? It's been checked and double-checked. Understand? We know, okay? ... It's up to you whether you want to tell me why it happened, ...

MICHAEL JACKSON: I ain't killed nobody. ... I ain't - - listen, I ain't murdered nobody. I ain't killed nobody. I ain't rape nobody. I ain't done no harm to nobody. I ain't left my house. When I leave there he picks me up at 6:30. 6:30 is when he picked me up. Honks the horn out front in the truck. We get in the truck. ...

DET. COTCHALEOVICH: And I'll be honest with you, I believe he probably picked you up that morning, too. Because - - ... You had more than enough time to do it. It's okay. I'm not going to dispute the fact that he probably did pick you up that morning because you would have been - - you were about a half a you, mile from the scene. You've got plenty of time to get back. ... There's a lot of things that don't make sense in this case, okay, and the fact that a girl was killed for no apparent reason. It makes no sense. That's why I was hoping that you could tell me why this happened so at least I can understand it. I can't change it and neither can you. You know that.

MICHAEL JACKSON: I ain't killed nobody.

DET. COTCHALEOVICH: ... Making a bad decision doesn't make you a horrible person, but what it does make you - - the media is going to spin this where obviously you're this bloodthirsty killer. ...

Now if I have your side of the story as to why you did what happened then I'll be able to understand it.

MICHAEL JACKSON: There can't be a side because I didn't't because I ain't commit no crime. ...

DET. COTCHALEOVICH: ... - - there's no other person it could be, Michael. ...

MICHAEL JACKSON: You're saying something I didn't do.

DET. COTCHALEOVICH: No. I'm saying something that you did do and you know in your heart you did it.

MICHAEL JACKSON: No, sir.

DET. COTCHALEOVICH: There's no doubt in my mind you did it, okay? There's no doubt. ...

Nobody else - - Michael, this is what you need to get your mind around, okay? You understand science, okay? It's not like I picked your name out of a hat, okay? We got Michael Jackson's name because of that - - you are the DNA profile that we find at the scene, okay? This is how we connect your. You have no explanation of how you could have come inside her other than being there raping her and then consequently she dies. ...

MICHAEL JACKSON: I know I didn't rape her and I know I didn't murder nobody.

DET. COTCHALEOVICH: Well, you may want to say that and you may want to think that you're going to get out of this but you're not. ...

MICHAEL JACKSON: ... I know I haven't done nothing.

DET. CALHOUN: Let me explain something to you: If you're not going o help us understand it then here's the issues we've got. She was a head veterinarian technician at the vet clinic up there. She was doing well for herself. ... we don't have any answers for anybody other than 100 percent without a shadow of a doubt you killed Andrea Boyer and you raped her, ... We have –we have a victim who is a 25, . . . 26-year-old white female that's just beginning her life. Just got married not too long ago, was wanting to start a family.

You know, her parents are very well-to-do. They got good jobs. Her husband works. She works. She had two jobs at one point. You know, this is not the case of the victim in this case is a nobody. This is somebody that was a rising star in her community. She - - (Inaudible.) - - animals.

DET. COTCHALEOVICH: She was just trying to make a living, okay? That's why she was at the vet clinic that early. She always comes in that early in the morning because she was a dedicated employee. She was the number one vet tech, okay? That is the truth. You have a mom and a dad? ... Would you want her to know what happened to you if somebody killed you? ... All right. You've already taken everything this girl's got. Why can't you just give a reason?

MICHAEL JACKSON: ... I mean I'm telling you I didn't ...

DET. CALHOUN: You understand we're going to Grimes.

We're getting your employment records. We're going to find out if you were late to work that day. We're going to find out if you walked. We're going to talk to your boss. ...

DET. COTCHALEOVICH: Were you angry at this girl?

MICHAEL JACKSON: I wasn't angry. ...

* * *

MICHAEL JACKSON: ... I'm telling your I didn't because I know I wasn't there. I know I don't leave the house.

DET. CALHOUN: So how you going to explain your DNA was in our victim? ... DNA was there the next day.

* * *

DET. COTCHALEOVICH: Right now you're sitting here lying to us when we have indisputable evidence, Michael, ... We want to know what made you do it. ...

MICHAEL JACKSON: I can't tell you something I didn't do.

* * *

DET. COTCHALEOVICH: You left the house. There's no doubt, okay? This girl was killed and she was raped, okay? ...

MICHAEL JACKSON: ... you say you have the evidence to say that I did it.

DET. COTCHALEOVICH: Absolutely, and that's the thing. I wish I didn't because you're a nice guy. I mean you're - - you don't seem like the kind of guy that would go half-cocked and kill this girl. I'll be honest with you ...

DET. CALHOUN: Michael, you went to the vet clinic. You brutally raped this girl and you hit her multiple times in the head with a fire extinguisher. You left her there bleeding, half dressed for an employee to find her. You need to understand where we're coming from.

MICHAEL JACKSON: I hear what you're saying. I understand what both of you are saying and I know I didn't do it.

* * *

DET. CALHOUN: Explain why your DNA is inside Andrea Boyer.

DET. COTCHALEOVICH: Please, Michael, please.

MICHAEL JACKSON: ... I'm telling you I'm not - - that I didn't.

* * *

DET. COTCHALEOVICH: Listen. Listen, there is no room for debate in this. ... I can't go against DNA. ... What is it that made you go off on this girl?

MICHAEL JACKSON: I mean there's nothing else that I can say to otherwise say that, so I mean you saying that's what you got and that's what it is. I'm telling you I didn't do it. ... I mean y'all saying I worked and raped and murdered her and I know I didn't do that. ...

DET. COTCHALEOVICH: ... - - there's no way to hide that stuff.

MICHAEL JACKSON: ... I didn't do it. I mean there's nothing else I can say. ...

DET. COTCHALEOVICH: Well, no. If we had the truth about what happened there then I would obviously want to listen to that but you can't' deny science.

* * *

> Listen, there is no mistake in this, okay? ... but the bottom line is you've got to get this off your chest and I need to know - - ...
> MICHAEL JACKSON: I ain't do nothing, Mr. Marty....

(13 R 913-37)

Jackson has presented this *ad nauseam* demand by the police for him to explain how his DNA was found inside Boyer and why he killed her because it was, well, ad nauseam. This lengthy, lengthy demand for him to explain himself tended to prove only that the police believed they had their man. It established no other fact, and certainly no material fact. Jackson never admitted he had killed her and never said anything that could have tied him to the murder. It did nothing that fairly advanced the State's case.

By repeatedly asserting their belief in his guilt and demanding he explain the DNA, however, the State could do what the law said it cannot do: comment on his right to remain silent, demand an explanation for the evidence, and let the jury know that the police believed Jackson had murdered Andrea Boyer. But that opinion was irrelevant, and worse than irrelevant it presented a danger of unfair prejudice to the defendant.

B. The law.

The law in this area is remarkably clear. "[I]t has been held that a police interview should be redacted where the interrogating detective made prejudicial statements of fact and personal belief about the guilt of the defendant, which were not adopted or admitted by the defendant." Robinson v. State, 4 So.3d 87, 90 (Fla. 3rd DCA 2009); accord, Pausch v. State, 596 So.2d 1216, 1219 (Fla. 2nd DCA 1992); Schrader v. State, 962 So.2d 369, 371 (Fla. 4th DCA 2007); Sparkman v. State, 902 So.2d 253, 257-58 (Fla. 4th DCA 2005). Thus error occurs when the jury hears questioning in which the police only accuse the defendant of committing some crime, and the defendant denies or otherwise refuses to agree with the allegation. This is error because the policeman's "role, like a prosecutor's, in our system of justice has at least the potential for particular significance being attached by the jury to any expressions of the [officer's] personal beliefs." Myers .v State, 788 So.2d 1112, 1113-14 (Fla. 2nd DCA 2001) Accusations, in short, are not evidence, and for the jury to hear them from the police tends to be error, particularly when the defendant denies them.

In Mohr v. State, 927 So.2d 1031 (Fla. 2nd DCA 2006), Mohr was convicted of sexual battery of a person physically helpless to resist. By way of a petition to challenge the effectiveness of his appellate counsel, he claimed the trial court erred

in allowing the jury to hear the police interview of the defendant, which had been edited to exclude parts of what the police interrogator and he had said. What had not been removed, however, were portions of the questioning in which the detective challenged Mohr's version of the events, accused him of lying, and presented his version of what he thought had had happened.

In granting Mohr a new trial, the 2nd DCA found:

> Here, the detective, through the admission of his statements in the videotape, advised the jury of his personal belief in Mohr's guilt and his theories as to why Mohr committed the offense and whey the victim was telling the truth. He presented his opinion as to the ultimate fact to be decided by the jury. The jury could not reasonably have been expected to disregard the aspersions of guilt created by the detective's words.

Id. at 1034.

The court in Mohr relied on its opinion in Pausch v. State, 596 So.2d 1216, 1218 (Fla. 2nd DCA 1982). In that case, the State had charged Pausch with second degree murder and aggravated child abuse in the death of her son. She denied killing him, and as in Mohr, a police interrogator "disbelieved her story and accused her of lying, and of abusing her son. [The detective] persistently condemned

Pausch as an unfit mother, and predicted that if Christopher returned to her care, she would eventually kill him." Id. at 1218.[5]

In granting Pausch a new trial the 2nd DCA held that the statements of the police officer were "prejudicial, confusing, and misleading." It also found that "the jury in this case could not have reasonably been expected to isolate and extract from the recording that which was admissible as evidence of the crime while disregarding the aspersions of guilt created by [the detective's] words." Id. at 1219.

Finally, in Sparkman v. State, 902 So.2d 253 (Fla. 4th DCA 2005) Sparkman was convicted of manslaughter by killing her stepdaughter. The investigating officer questioned her, but during it he made several statements, including his version of the facts, his beliefs, and theories of how she killed the child. "Many of these statements are not questions to Sparkman but rather consist of Brock [the detective] informing Sparkman of what he believed happened and of what the doctors' opinions were." The Sparkman court said those statements "were clearly not adoptive admissions by Sparkman, nor do they meet any of the other exceptions to the hearsay rule listed in Florida Statutes §90.803."

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[5] The child had not died at the time of this interview.

In Eugene v. State, 36 Fla. L. Weekly D176, fn. 3 (Fla. 4th DCA January 26, 2011) and Schrader v. State, 962 So.2d 369, 370-71 (Fla. 4th DCA 2007), the court clarified its holding in Sparkman by finding that it had reversed Sparkman's conviction because the danger of unfair prejudice substantially outweighed the relevance of Detective Brock's monolog and Sparkman's tepid denials.

C. This case.

In this case, Detective Cotchalevoich, repeatedly accused Jackson of murdering Boyer and, as in Sparkman, presented scenarios of how he thought the defendant may have killed her. Unlike Sparkman, however, he did this more than once or twice. He repeated the accusations over and over and over again. It was almost like the police believed the more often they accused Jackson of murdering Boyer the more likely it was true. Despite the defendant's dogged denials, the interrogators just would not give up. Thus, because he adamantly and repeatedly denied killing her Sparkman, Pausch, and Mohr clearly apply.

As in Mohr, the police specifically and repeatedly said they believed Jackson had murdered Boyer, gave their versions of what may have happened, and he denied it. What the jury heard was "blatantly prejudicial" because it was akin to a

prosecutor telling the jury that the defendant was guilty because he or she thought he was. That would clearly be an improper argument. State v. Ramos, 579 So. 2d 360, 362 (Fla. 4th DCA 1991)("The law is well settled that expressions of personal belief by a prosecutor are improper.")

Of course, the police may make such accusations when they question a defendant, but that does not mean what they say, allege, or demand is relevant and admissible at the defendant's subsequent trial. Thus, Jackson has no problem with Detective Cotchalevoich's method of interrogation, including the repeated accusations of his guilt. What he does have a problem with is the prosecutor's use of that interrogation as relevant evidence to prove he murdered Boyer. As to that, he has a serious objection because the interrogation tended to prove only that this police officer believed Jackson was guilty. But that belief, much like a prosecutor's argument that he or she believed the defendant guilty, was not simply irrelevant, it raised a significant danger of unfair prejudice. Rather than convicting Jackson based on relevant evidence the jury may very well have done so, at least in part, because they believed the police officers believed he had committed the murder.

As in Mohr and Sparkman, the jury could not reasonably have been expected to disregard the specter of guilt created by the detective's words. They should not have been required to separate the legitimate interrogation from the "blatantly prejudicial" opinion testimony.

Of course, the State can admit and regret what happened but argue it was harmless. In light of the other evidence in this case, however, the claim that beyond a reasonable doubt it had no impact on the jury's verdict fails. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). It does so because Jackson said that he and Boyer had met at the convenience store near where he lived and had struck up a conversation because he had smelled the odor of marijuana coming from her car (15 R 1209-10). He gave her a cigarette and over time they had shared some of the weed, with him occasionally selling her some (15 R 1213). (Boyer's husband admitted that he and his wife would smoke marijuana from time to time (15 R 1289)). She also asked for pills, and when she could not afford them, she paid for them with sex (15 R 1218-19); and over the course of time they apparently had a lot

of it (15 R 1219). In fact at one point, she wanted to have deviant sex with him (15 R 1217), and a former boy friend corroborated the likelihood of such a request by testifying that she had made a similar request of him (15 R 1300).[6]

In particular on the morning of January 23, 2007, Jackson said that he and Boyer had smoked some marijuana and engaged in sexual intercourse, which explained how his DNA was found in her vagina (15 R 1222-23).[7]

With this evidence in mind, this Court cannot say with the easy confidence required by DiGuilio that the error in admitting the evidence of the police interrogating Jackson had no effect or impact on the jury's verdict.

This Court should reverse the trial court's judgment and sentence and remand for a new trial.

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[6] This former boyfriend also admitted that they had smoked marijuana together and occasionally taken some pills like Percocet or Lortabs (15 R 1300). Boyer also had several tattoos and 7-10 piercings in each ear (11 R 514).

[7]The test of her urine during the autopsy also showed she had also recently used codeine, morphine, and nicotine (13 R 988).

ISSUE II:

THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT JACKSON SEXUALLY BATTERED ANDREA BOYER WITH GREAT FORCE, AS ALLEGED IN THE INDICTMENT, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Count II of the indictment filed in this case alleged that Jackson had sexually battered Andrea Boyer with enough force to cause her serious personal injury (1 R 14). Without any serious question, he had sex with her on January 23 because he admitted doing so (15 R 1223), and his DNA was found inside her vagina (14 R 1138, 1143). The only question that arises focuses on whether he did so with her consent. Of course, Boyer was murdered, but he said that they had had sex a few hours before her homicide, of which he was not guilty, so he did not have sex without her consent, as required by §794.011(3), Fla. Stat. (2008).[8] At the close of the State's case in chief, the defendant moved for a judgment of acquittal on those grounds, but the court denied that request (14 R 1173-74). That was error, and this

[8] §794.011(3) provides: A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a life felony . . .

Court should review this issue under a *de novo* standard of review. Boyd v. State, 910 So.2d 167, 180 (Fla. 2005).

Initially, the State's case against him was completely circumstantial. As such, and in light of his reasonable explanation of having sexual intercourse with her, the State must produce evidence to refute that explanation if it is to withstand a motion for a judgment of acquittal. Carpenter v. State, 785 So.2d 1182, 1193 (Fla. 2001)(When there is no direct evidence regarding the commission of a sexual battery, this Court must analyze the facts using the law on circumstantial evidence.). Specifically, as this Court said in Carpenter, "A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Id. at 1194

The evidence, when viewed in the light most favorable to sustaining the trial court's ruling, showed that Boyer was strangled and hit in the head with some sort of blunt object, probably a fire extinguisher. She had, however, no injuries to her vagina or rectum, and none of her clothes, particularly her panties, were torn (14 R 1099). Although she had many bruises, none of the ones on her back below her

neck were life threatening, and the medical examiner could not put any of them in any time sequence (13 R 986, 14 R 1077). She had some bruise marks on her arm consistent with being grabbed and perhaps forced to the ground (13 R 994-95), and some were consistent with being caused during a sexual assault, or not (13 R 997, 14 R 1004, 1078).[9]

The State also showed that Jackson's DNA was found in her vagina, and he had never met her (11 R 536). Jackson lived and worked near the clinic where Boyer worked, and he would walk past it on his way to work (12 R 772, 13 R 885).

In measuring the sufficiency of the State's circumstantial evidence against defendants in cases similar to this one, this Court has used three facts or factors. First, and very important, were the defendant's versions of what happened consistent with one another? As to the importance of the defendant's lying, this Court in Carranza v. State, 985 So.2d 1199, 1203 (Fla. 2008) said, "Most importantly, [Carranza] made several inconsistent statements to the detectives. That in and of itself can constitute ground upon which a trier of fact may reject the defendant's reasonable hypothesis of innocence." Accord, Troy v. State, 948 So.2d

[9] Except in a gross sense, the ages of bruises cannot be determined (14 R 1072, 1081)

635, 647 (Fla. 2006)(nude body found with underwear and torn bra next to body, vaginal area had bruises, and crime scene was gruesome.)

Second, did the physical evidence corroborate what he or she claimed happened? Fitzpatrick v. State, 900 So.2d 495, 509 (Fla. 2005)(Naked body found with bloody undergarment wrapped around her breasts, which were deeply bruised, and other injuries indicating a violent encounter.)

Third, more specifically, did the medical evidence agree with that version. Darling v. State, 808 So.2d 145, 156-57 (Fla. 2002) (Medical examiner unequivocally said that the abrasions observed in the victim's vaginal area were evidence of forcible, violent sex.). Alonso v. State, 821 So.2d 423, 427-28 (Fla. 3d DCA 2002). Interestingly, these three factors have rarely, if ever, aligned to support the defendant's claim of innocence.

In Carpenter v. State, 785 So.2d 1182 (Fla. 2001) the defendant claimed that he and a teenage boy had consensual sex with a religious, churchgoing sixty-two year old woman. The murder occurred, so Carpenter claimed, when the youth killed the woman because she had belittled him for prematurely ejaculating.

This Court rejected Carpenter's hypothesis of innocence because he had given other inconsistent versions of what had happened, she had shared a bed but not had sex with a close friend, her morals probably would have rejected the sexual

encounter Carpenter said occurred, her bra was placed across her mouth as a gag, and the medical evidence showed she had injuries around her vagina consistent with forceful penetration.

None of those facts were similarly present in this case. Jackson never confessed to killing Andrea Boyer, but he admitted having sex with her on the day she was murdered (15 R 1223). Hence, he never used great physical force, and she agreed to have sex with him. Applying the three factors this Court has used in other cases involving similar claims shows that the State never refuted Jackson's reasonable hypothesis of what happened.

First, there are no inconsistencies in what the defendant said. When questioned by the police, he adamantly and repeatedly denied killing Boyer. At trial, he repeated that denial, adding that he knew her, and had had sex with her several times, including specifically on the day of her death (15 R 1217, 1223). Indeed, that no jailhouse informants came forward, or police investigators testified about other stories the defendant may have given only strengthens Jackson's claim of innocence.

Second, the evidence the State presented also supports him. Specifically, Boyer had no injuries in her genital area, and none of her clothes had been torn, both sure indicators that she had been sexually battered (14 R 1099).

Third, the medical examiner found no evidence of forceful sex, particularly around the victim's vagina (14 R 1099). Of course, he discussed the extensive bruising around her neck, but that testimony showed that she had been grabbed and strangled, but nothing to show that the resulting bruises occurred during a sexual attack.

Finally, other evidence supports Jackson's theory. Boyer occasionally worked as a stripper at a club Jackson had gone to, and he had seen her there (111 R 519). Apparently, she looked differently there, as might be expected, than when she worked at the veterinary clinic. The autopsy also showed she had recently smoked marijuana (13 R 988), which was consistent with Jackson's testimony that the defendant and her frequently shared a marijuana cigarette and had sex, and in particular, they had done so on January 23 (15 R 1213 , 1223).[10] A former boyfriend also admitted that she had interests in strange or deviant sex (15 R 1300).

Thus, the State presented no evidence that contradicted his claim that he had had sex with Boyer some time shortly before her death. As such, the Court erred in denying his motion for a judgment of acquittal for sexual battery, and it

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[10]The test of her urine also revealed she had recently used codeine, morphine, and nicotine (13 R 988).

compounded that error when it instructed the jury that it could find him guilty of felony murder with the underlying felony being sexual battery. Finally, it erred in the sentencing phase of this capital trial when it found the sexual battery as an aggravating factor and gave it great weight in justifying imposing a death sentence.

This Court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN FINDING THAT JACKSON COMMITTED THE MURDER WHILE UNDER A SENTENCE OF IMPRISONMENT OR PLACED ON COMMUNITY CONTROL OR FELONY PROBATION, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Before trial, Jackson filed a motion to "Declare Section 921.141(5)(a) Florida Statutes Unconstitutional as Applied." (4 R 633-37). Specifically, he asked the court to prevent the State from establishing that he was on probation, or under the sentence of imprisonment at the time of the murder. He made that claim because the "under sentence of imprisonment" aggravator, in this case, did not genuinely narrow the class of persons eligible for a death sentence. (4 R 635). The court denied that request (4 R 734), and in sentencing him to death, it found, as an aggravating factor and gave great weight , that he had committed the murder while "under a sentence of imprisonment or placed or community control or on felony probation." §921.141(5)(a), Fla. Stat. (2008) (5 R 858).

The court erred in finding this aggravating factor and giving it great weight because there was no link or nexus between Jackson's status of being on probation and the murder. This Court should review this issue under a *de novo* standard of review.

The "under sentence aggravator," as originally adopted from the Model Penal Code's death penalty sentencing scheme provided only that persons under a sentence of actual imprisonment were eligible for a death sentence if they committed a capital murder while in prison. American Law Institute Model Penal Code §210.6 (1962). Obviously, its purpose was to deter persons in prison from killing under the reasoning that an inmate who faced no possible death sentence if he or she killed someone would have no reason not to do so. That is, for example, without this aggravator a person already serving a life sentence would have no reason not to kill another inmate or guard because he or she could get only a life sentence. Such punishment for committing a first-degree murder would prove no deterrent to someone already facing life in prison. Hence, death has to be available to deter inmates from committing prison murders. This Court, in fact, followed that rationale in its earliest discussion of Florida's death penalty statute when it held that this aggravator was intended to "prescribe the death penalty for a capital felony committed by a prisoner . . ." or an escapee. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Songer v. State, 322 So.2d 481 (Fla. 1975).

In 1996, the Florida legislature amended §921.141(5)(a) by adding to the under sentence aggravator, whether the defendant was on community control or probation. Trotter v. State, 690 So.2d 1234, 1237 (Fla. 1996). The reason for

doing so, however, is far less compelling than the original statute. That is, persons on probation have other reasons for not committing a first-degree murder than facing a death sentence. Namely, their probation can be revoked, and sentencing a person to prison, even for life, can be a powerful deterrent. Moreover, if most first-degree murders are not death worthy, Proffitt v. State, 428 U.S. 253 (1976), that punishment, harsh as it is, is more realistic and hence of more deterrent value than the remote possibility of a death sentence.

Hence, if, as in this case, the State wanted to use, and the court found that the defendant committed a capital murder while on probation, there should be especially strong evidence that the defendant committed the murder because he or she were on probation. Without such compelling proof, there is little reason to believe a defendant committed the murder because he was under some sentence of imprisonment. As such, if this Court approves this aggravator in this case, then it is justifying a death sentence simply because of Jackson's status, without that status doing anything to substantially justify that punishment. Zant v. Stephens, 456 U.S. 410 (1982)(aggravators must genuinely narrow the class of persons eligible for a death sentence.)

This approach has some precedence in the way this Court has considered the "avoid lawful arrest" aggravator. §921.141(5), Fla. Stat. (2008). As originally intended this aggravator sought to deter persons who killed police officers. Riley v. State, 366 So.2d 19, 22 (Fla. 1978). It had a broader application, however, if it was shown that the "dominant purpose" of the murder was to avoid lawful arrest. To establish this aggravator "the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." Connor v. State, 803 So.2d 598, 610 (Fla. 2001). This Court has frequently rejected a lower court's finding this aggravator because the State had failed to carry this heavy burden of proof. Zack v. State, 753 So.2d 9 (Fla. 2000); Consalvo v. State, 697 So.2d 805 (Fla. 1996).

In this case, there is no evidence Jackson killed Boyer because he was on probation. It appears only as a burglary/sexual battery gone bad. There was no evidence that he killed this young woman because he was on probation, and certainly there was no compelling evidence to establish this beyond a reasonable doubt.

In Tafero v. State, 403 So.2d 355 (Fla. 1985), Jessie Tafero was on parole when he killed two police officers who had stopped him. In explaining why he had murdered them, the defendant said he did so because he would never go back to

prison. Because he was a parolee that was strong evidence that he had committed the murder because of his status. Thus, the "under sentence of imprisonment" aggravator would have been proven.

Because similar type evidence was missing in this case, this Court should find that the lower court improperly instructed the jury on and found that aggravating factor. It should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing before a new jury.

ISSUE IV:

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THE MAXIMUM SENTENCE JACKSON FACED IF THEY CONVICTED HIM OS SEXUAL BATTERY WAS LIFE IN PRISON, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The jury in this case convicted Jackson murdering Andrea Boyer. It also convicted him of sexually battering her. At the sentencing phase of his trial, the jury had to consider whether to recommend the court should sentence him to death or life in prison without the possibility of parole. The prosecution presented additional evidence that in addition to the sexual battery the jury had just convicted him of committing, he had another conviction for sexual battery. In particular it learned that in 1986, he had committed a burglary and during its course had twice sexually battered a 14-year-old girl, and despite the passage of time, she still suffered from what he had done (16 R 1545, 1549).

In addition, the jury heard victim impact testimony from Mrs. Boyer's husband and father who testified about the loss of Ms. Boyer's life had had on them (16 R 1550-1553).

While the jury heard this evidence, they did not know Jackson faced life in prison as punishment for committing the sexual battery of Boyer. They remained ignorant of that crucial fact because the court refused a defense requested instruction telling them that "On count two the maximum penalty for sexual battery is life imprisonment." (5 R 805, 17 R 1657-58) That was error, and this Court should reverse the court's subsequent sentence of death and remand for a new sentencing hearing.

In addition to the sentence Jackson faced for the murder of Andrea Boyer, the trial court imposed a concurrent life sentence for the sexual battery (5 R 873, 875). Thus, he will remain in prison for the rest of his life regardless of the punishment he received for the murder.

At the sentencing hearing, the jury, having found him guilty of sexual battery knew about that convictions. Indeed, the State argued, and jury was instructed on, and the court found as an aggravating factor that he had committed the murder during the course of a sexual battery as provided by section 921.141(5) (d), Florida Statutes (2007). The jury, however, never knew about the life sentence Jackson faced despite his requests that the court tell them of it (5 R 805).

The court summarily refused Jackson's request (17 R 1658).

In Nixon v. State, 572 So.2d 1336, 1345 (Fla. 1990), this Court approved the trial court's ruling excluding evidence about other sentences the Defendant may have had for crimes arising in the same episode as the murder for which the jury was to recommend he live or die.

> Nixon maintains that the fact that he was convicted of three other offenses which carried lengthy maximum penalties was a circumstance on which the jury should have been instructed under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Florida Rule of Criminal Procedure 3.390(a) provides that "[e]xcept in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial." This rule has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties. Coleman v. State, 484 So.2d 624, 628 (Fla. 1st DCA 1986).
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> As we recently noted in King v. Dugger, 555 So.2d 355, 359 (Fla.1990), "Lockett requires that a sentencer 'not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime. Therefore, the trial court did not err in refusing to give the instruction. Even if it had been appropriate for the jury to be instructed on the maximum penalties for the other crimes, the requested instruction merely set forth the maximum sentences for each of the noncapital offenses. The instruction did not inform the jury that it could consider the maximum sentences for the noncapital offenses as a

> mitigating factor. The jury was aware of the noncapital offenses for which Nixon was convicted, counsel urged those convictions as mitigation, and the jury was instructed that the factors which it could consider in mitigation were unlimited.[11]

Thus, this Court rejected Nixon's argument for three reasons: (1) Rule 3.390(a) prohibits the jury from knowing what sentences a defendant may face for noncapital crimes; (2) Evidence of that punishment is irrelevant to his character, prior record, or circumstances of the crime; (3) Defense counsel argued the other convictions as mitigation, and the court told the jury that mitigation was "unlimited."

This Court should re-examine what it held in Nixon because it prevents the jury from hearing accurate information that is relevant to the ultimate issue of whether death is the appropriate sentence. Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994).[12] Second, and as important, the excluded evidence had relevance in minimizing the weight the jury could have

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[11] Following Nixon, this Court in Walker v. State, 707 So.2d 300, 314 (Fla. 1997), relied on that case in rejecting a similar argument. In a footnote, the Court noted that the legislature had "remedied any possible uncertainties harbored by penalty phase jurors regarding a defendant's ineligibility for parole when it armed section 921.141" by eliminating the possibility of parole after 25 years. Now the only punishments available are death or life in prison without any possibility of parole.

[12] Because Florida has placed its "sentencing authority in two actors rather than one," the jury must be as aware of the relevant law and facts as the judge. See, Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

given at least two of the aggravating factors the judge and jury could have used in justifying a death sentence.

A. Rule 3.390(a), Fla. R. Crim. P., poses no barrier to admitting evidence that Jackson would serve a life sentence for the sexual battery concurrent to the sentence imposed for the murder.

Rule 3.390(a) provides:

> (a) Subject of Instructions. The presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.

For two reasons that rule has no relevance to this issue. First, the rule applies to the guilt phase portion of the trial, not the penalty phase. Generally, unless a rule of criminal procedure specifically includes language that makes it applicable to the penalty phase of a capital trial, this Court has refused to apply it to that proceeding. For example, in State v. Hernandez, 645 So.2d 432 (Fla. 1994), it affirmed a trial court's ruling that in a capital case a defendant could waive an advisory jury verdict. It specifically held that Rule 3.260, Fla. R. Crim. P., which concerns waivers of jury trials, applied to the guilt phase portion of a trial, and not the penalty phase part of a capital proceeding.

> First, we concur with the district court's reasoning with regard to Rule 3.260. Rule 3.260 appears under the heading of Part IX of the Florida Rules of Criminal Procedure entitled "The Trial." It does not appear in part XIV, entitled "Sentencing," and , therefore, it is not applicable to sentencing proceedings.

Id. at 434.

Likewise, Dilbeck v. State, 643 So.2d 1027, 1031 (Fla. 1994) recognized that Rule 3.220, Fla. R. Crim. P., did not control penalty phase discovery, at least with regards to allowing a state hired mental health expert to examine the defendant for penalty phase proceedings. "We have asked the Criminal Rules Committee of the Florida Bar to submit a proposed permanent rule addressing this issue. See, Burns v. State, 609 So.2d 600 n.8 (Fla. 1992)."

Indeed, this Court limited that portion of Rule 3.390(a) allowing the jury to know of the sentences the defendant faced in a capital trial to the penalty phase portion of such proceedings. Wright v. State, 596 So.2d 456, 457 (Fla. 1992) ("[T]he most logical interpretation of the rule is that the penalty instruction is required only in the penalty phase of a capital trial when the jury must recommend the penalty."). Other decisions from this Court support Jackson's contention that Rule 3.390(a) applies only to the guilt phase portion of a trial, capital or not. Burns v. State, 609 So.2d 600, 607 (Fla. 1992); Chaky v. State, 651 So.2d 1169, 1172

(Fla. 1995)(Requiring the jury to have the jury instructions in capital cases.); Wike v. State 648 So.2d 683, 686 (Fla. 1994)(Noting that Rule 3.780 specifically covers the order of closing argument during the penalty phase portion of a capital trial, and Rule 3.250 controls it for the guilt determination part of the trial.); Cf., In Re Amendments to Florida Rules, 609 So.2d 516, 549 (Fla. 1992)(amending Rule 9.140, Fla. R. App. P., to recognize that "the procedures set forth in the rules for criminal appeals were inappropriate for capital cases.") As this Court recognized in Wright, "the most logical interpretation" of Rule 3.390(a) is that the prohibition against instructing the jury on the penalties a defendant may face applies only to the guilt portion of a trial.

Second, the current Rule 3.390(a) was adopted in reaction to the prior rule which had specifically required the trial court (when requested) to instruct the jury on the "Maximum and minimum sentences which may be imposed (including probation) for the offenses for which the accused is then on trial." Tascano v. State, 393 So.2d 540 (Fla. 1981). Justice Alderman, dissenting from this Court's approval of a jury instruction implementing that rule, noted, "I suggest that no proper purpose is served and that in some cases knowledge of the maximum and minimum penalties may divert the jury from their duty to consider only the question

of whether the State has proved the defendant's guilt. Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 599 (Fla. 1981).

However legitimate that concern may be for the guilt phase of a capital trial it is inapplicable to the sentencing trial where the crucial question is, indeed, what punishment the defendant must face.

B. The evidence of a life sentence was relevant as a matter of due process in determining if Jackson should live or die.

In denying Nixon's claim that he should have been able to tell the jury about his noncapital sentences, this Court said:

> The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime.

Nixon at 1344.

Decisions from the United States Supreme Court question that conclusion. Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994); California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed. 2d 1171 (1993). In Simmons, the jury had the duty of sentencing Simmons to life imprisonment or death for the beating murder of an elderly woman. Shortly before

the trial, he pled guilty to burglary and two counts of “criminal sexual conduct” of two other elderly women. The prosecution argued that the jury should sentence him to death because he posed a risk of future dangerousness. Defense counsel argued to the contrary, especially noting that he was unlikely to become violent if he remained in prison for the rest of his life.

One of counsel’s problems, however, was the empirical evidence that most people refused to believe that “life imprisonment” meant that a person with that sentence would spend the rest of his life behind bars. To the contrary, most thought that defendants punished with life in prison would be paroled within twenty years, and 75% said he would be on the streets after 30 years. More than 75% of those surveyed also considered the amount of time an inmate actually served in prison as “extremely” or “very” important in deciding if a defendant should live or die.

Despite this evidence that few people believed life in prison meant that, the trial court refused to define “life imprisonment.” It also declined to tell the jury that they were to presume life in prison meant exactly that and they were not to speculate that it meant anything other than that. Consequently, after 90 minutes of deliberation, the jury asked the court “Does the imposition of a life sentence carry

with it the possibility of parole?" The court responded that they were "not to consider parole or parole eligibility in reaching your verdict. . . . That is not a proper issue before you."

When the United States Supreme Court reviewed the case, a majority of the court voted to reverse Simmons' death sentence on due process grounds:

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed.
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> * * *
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> The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process.

Id. at 129 L.Ed. 2d 141.

Although future dangerousness as a nonstatutory aggravator does not exist in Florida, Knight v. State, 24 Fla. L. Weekly S135 (Fla. March 11, 1999), the judge and jury considered it in this case when they weighed the aggravators defined in

section 921.141(5)(b), and (d).13 What one has done in the past he may do again. Of particular importance to the prior violent felony aggravator, the drafters of the Model Penal Code, on which Florida's death penalty statute is based, observed that:

> Perhaps the strongest popular demand for capital punishment arises where the defendant has a history of violence. Prior conviction of a felony involving violence to the person suggests two inferences supporting escalation of sentence: first, that the murder reflects the character of the defendant rather than any extraordinary aspect of the situation, and second, that the defendant is likely to prove dangerous to life on some future occasion. Thus, prior conviction of a violent felony is included as a circumstance that may support imposition of the death penalty.

Section 201.6, American Law Institute, Model Penal Code, 1980. (Emphasis supplied).

Simmons resonates with Florida's death penalty scheme, and it finds particular application in cases such as this one where the felony murder and prior conviction of a violent crime aggravators apply. Consequently, Jackson had a due process right to present to the jury that he a life sentence in prison in order to

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[13] (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(d) The capital felony was committed while the defendant was engaged … in the commission of … any … sexual battery … burglary.

minimize the weight of the prior violent felony aggravator. "Like the defendants in Skipper [v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed. 2d 1 (1986)] and Gardner [v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977)] the petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death." Simmons, at 129 L. Ed. 2d 143.

Simmons, moreover, has a wider application than simply allowing a response to a prosecutor's explicit argument of the defendant's record of violence. Read more broadly, the opinion holds that the sentencer in a capital case cannot be precluded, as a matter of law, from considering accurate information relevant to whether a defendant should live or die. Mitigating evidence, therefore, relates to more than Jackson's character, his prior record, or the circumstances of his crimes. Nixon, cited above at 1345. It mitigates a death sentence because it serves as a "basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).[14] That Jackson faced a life in prison in

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[14] This is a broader definition of mitigation than used by this Court. In considering allegedly mitigating evidence the court must decide if "the facts alleged in mitigation are supported by the evidence," if those established facts are "capable of mitigating the defendant's punishment, i.e., … may be considered as extenuating or reducing the degree of moral culpability for the crime committed," and if "they are of sufficient weight to counterbalance the aggravating factors." Hall v. State, 614

addition to whatever punishment he received for the capital murder was accurate information and was relevant because it rebutted the state's argument in favor of death. Simmons at 129 L. Ed. 2d 143.

This relevance became more obvious during the prosecution's closing argument. There it said that because he had committed a sexual battery in this case and two sexual batteries in 1986 (as well as a burglary), those aggravators deserve "a lot of weight." (17 R 1616-1618). Because Jackson violated society's trust by committing a murder and sexual battery society would never feel safe with him among its citizens. Death, therefore, was the only sentence that would guarantee their security. See, California v. Ramos, 463 U.S. 992, 1003, fn. 17, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)(It is proper for a sentencing jury to consider the defendant's potential for reform and if his probable future behavior weighs against his return to a free society.)

Jackson sought to rebut or minimize that argument by saying, yes, Jackson should be kept out of society, but that goal will be reached by leaving him in prison for the rest of his life. How will we know he will stay there? In addition to life in prison he must serve without any hope of parole, he must also remain in prison for

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So.2d 473 (Fla. 1993).

the rest of his life because of the sexual battery. Jackson will never be a free man.

This Court must conclude that the lower court denied Jackson his right to present his defense as guaranteed by the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution.

C. Defense counsel never argued the convictions as mitigation, and the jury instructions were more limited than that read in Nixon.

A significant portion of the State's evidence focused on the sexual battery Jackson committed at the time he murdered Boyer. During its closing argument, it also discussed that crime as it justified finding the aggravating factors of prior violent felony and the murder was committed during the course of the sexual battery and burglary (17 R 1618).

Unlike Nixon, the instructions told the jury they could consider "any of the following circumstances that would mitigation against the imposition of the death sentence: A. Any other aspect of the defendant's character, background, or life, and, B. Any other circumstance of the offense." (17 R 1669). That was more much more circumscribed than the guidance given in Nixon "that the factors which it could consider in mitigation were unlimited." Nixon, at 1345.

D. Additional reasons the court should have admitted the evidence of Jackson's other sentences.

1. The evidence of the other punishment Jackson faced did nothing more than "level the playing field."

In Dilbeck v. State, 643 So.2d 1027 (Fla. 1994), this Court approved a procedure that allowed a state hired mental health expert to examine the defendant if he intended to present his own expert to testify about his mental condition. It did so to "level the playing field."

> Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dilbeck to submit to a pre-penalty phase interview with the State's expert. See Burns. [cited above.] No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights unloved.

Id. at 1030.

That observation applies to this case. This Court has held that the prosecution can present evidence of the facts underlying the violent felonies which formed the basis for the prior violent felony aggravator because it helps the judge and jury evaluate the defendant's character. "Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge." Elledge v. State,

346 So.2d 998, 1001 (Fla.1977); Stewart v. State, 558 So.2d 416, 419 (Fla. 1990).[15] But the facts of those violent crimes certainly have no relevance to the defendant's prior record, as this Court used that term in Nixon. Only the fact of the conviction would have any pertinency to the sentencing phase of a capital trial. Yet, this Court has obviously ruled to the contrary. Thus, to "level the playing field" and give the jury a complete, accurate picture of the defendant's prior violent history, the additional fact of what sentences the defendant has for those crimes is relevant. Jackson, therefore, respectfully asks this honorable Court to reverse Jackson's sentence of death and remand for a new sentencing hearing.

[15] "Propensity to commit violent crimes" is synonymous with future dangerousness.

ISSUE V:

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO.2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO.2D 403 (FLA. 2002).

Before trial Jackson filed a "Motion to Declare Florida's Capital Sentencing Procedure Unconstitutional under Ring v. Arizona." (1 R 172-86). The Court denied it (4 R 732), and that was error.

To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Because this argument involves only matters of law, this Court should review it *de novo*.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In 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), this Court rejected all Ring challenges by simply noting that the nation's high court had upheld Florida's capital sentencing statute several times, and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of 'irreconcilable conflict' in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
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> > If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriques de Quijas, has a notable exception. If there is an "intervening development in the law" this Court can determine that impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
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> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, ... the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the "intervening development of the law" exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.). The question, therefore, focuses on whether Ring is such an "intervening development in the law" that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision.

The answer obviously is that it is a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled A>where the necessity and propriety of doing so has been established. Ring, cited above at p. 608 (Quoting Patterson, at 172). Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring's impact on Florida's death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring's fundamental holding. "Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring." Bottoson, cited above at p. 725. Justice Anstead viewed Ring as "as the most

significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest v. State, 855 So.2d 33 (Fla. 2003)(Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states.").[16] Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw concludes "that Ring, therefore, has a direct impact on Florida's capital sentencing statute." Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

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[16] Justices Quince, Lewis and Pariente agree that "there are deficiencies in our current death penalty sentencing instructions." Id. At 702, 723, 731.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that "new rules generally should not be applied retroactively to cases on collateral review." Teague v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by the nation's high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v. Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme

Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendant's to death, it may simply have not wanted to deal with a post-conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring). While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions."

There is, therefore, no reason to believe the United States Supreme Court will accept this Court's invitation to reconsider this State's death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State's death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death

When it does, this Court should consider the following issues:

1. Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction." Lawrence v. State, 846 So.2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge's decision to impose death under section 921.141, Florida Statutes (2002).. . .

> [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has never suggested that jury sentencing is required .. . .I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring.) In this case, the trial court found three aggravating factors, none of which would have satisfied her criteria.

Justice Anstead rejected Justice Pariente's partial solution to the Ring problem, and Jackson adopts it as his response to her position.

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, "The question, however, under Ring is whether a trial court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence." (Emphasis in opinion.)

2. Unanimous jury recommendations and specific findings by it. Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only

recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama,[17] Florida allows a non-unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, Jackson's death sentence may be unconstitutional. Bottoson, cited above, at 714 (Shaw, concurring in result only); Butler v. State, 842 So.2d 817 (Fla. 2003)(Pariente, concurring in part).

Pre-Ring, the Florida Supreme Court, relying on non capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that

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[17] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendation. SB449.

Florida reliance on non-capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake that voice should unanimously declare the defendant should die.

This approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations:

> The eleven -to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty.

See Anderson v. State, 841 So.2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence); Lawrence v. State, 846 So.2d 440 (Fla. 2003); Butler v. State, 842 So.2d 817 (Fla. 2003)(Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003)(Pariente, dissenting); Bottoson v. Moore, 833 So.2d 693, 709 (Fla. 2002)(Anstead, dissenting).

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida's death penalty scheme. It should also reverse Jackson's sentence of death and remand for a new sentencing trial.

CONCLUSION

Based on the arguments presented here, the Appellant, Michael Jackson, respectfully asks this honorable Court to 1. reverse the trial court's judgment and sentence and remand for a new trial, 2. reverse the trial court's sentence of death and remand for a new sentencing hearing, or 3. reverse the trial court's sentence of death and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic transmission to **MEREDITH CHARBULA**, Assistant Attorney General, The Capital, Tallahassee, Fl 32399-1050; and by U.S. Mail to **MICHAEL RENARD JACKSON**, #103663, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of April 2011. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

____
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