IN THE SUPREME COURT OF FLORIDA



DARIOUS WILCOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. SC11-1017

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On Appeal from the Circuit Court of the
Seventeenth Judicial Circuit of Florida
(Broward County)

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# INITIAL BRIEF OF APPELLANT

CAROL STAFFORD HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit
421 Third Street
West Palm Beach, Florida 33401

GARY LEE CALDWELL
Assistant Public Defender
Florida Bar No. 256919

Attorney for Appellant

(561)355-7600; (561) 624-6560

appeals@pd15.state.fl.us
gcaldwel@pd15.state.fl.us

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## STATEMENT OF THE CASE AND FACTS

This case arises from Darious Wilcox's conviction for first degree murder, armed robbery, and four counts of armed kidnapping. Wilcox was sentenced to death for the murder and to life imprisonment for the other offenses. The jury recommended a death sentence by a vote of 7-5. R4 636.

It was undisputed that Nimoy Johnson was murdered in his apartment on the morning of February 3, 2008. He lived next door to Wilcox's cousins. About a week earlier, Johnson had been threatening the cousins because he thought they had burglarized his home and stolen a large amount of marijuana (Johnson - usually referred to "Kevin" and "Dread" in the transcripts - was a drug dealer.)

Three women came to see Johnson around 5 a.m. on February 3. When they arrived, a masked gunman was with Johnson in his apartment. The gunman had Johnson tie the women up and Johnson was shot and killed shortly afterward. His body was found with his hands and feet bound. The women could not identify the assailant. The state's theory was that Wilcox had committed the earlier burglary and that he murdered Johnson because of Johnson's threats. Wilcox, proceeding pro se, denied involvement and contended that the murder was committed by his cousin Terrell Collier or one of Collier's associates.

A. *Johnson threatens his neighbors regarding a January burglary at his apartment.*

Johnson lived in apartment H of an apartment complex. Next door in apartment G were Wilcox's cousins Terrell Collier, Richaunda Curry and Shaquira Curry. Frequently present at apartment G were Richaunda's boyfriend Willie Ward, Ward's sister Jaquinda Wright, and Ward's friend "Lump."

Richaunda Curry and Collier testified that Wilcox came to stay with them about a week before the murder. Richaunda said Wilcox arrived the Monday before the murder. S10 453.

That Monday, Johnson confronted Richaunda, Ward and Lump:

> He said, you pussy ho's, you broke into my fucking house. You drinking champagne. I'm gonna kill all you niggas.
>
> I was looking like why you coming up acting like that. Willie got in the truck was like you heard what he just said. And I said yeah, I heard him; but he tripping.
>
> I got in my truck and drove to work that Monday.

SR10 254. (Ward and Lump did not testify at the trial.)

When Richaunda came home that evening, Johnson took her to his apartment and said someone had robbed him on Sunday. He said they drank his champagne and messed up his house. He felt like it was somebody from Richaunda's place. He said there was a footprint on the wall that separated their door. She asked to see the footprint, but he said he had wiped it off. SR10 256-57.

During this conversation, they were smoking weed. Johnson

said he had first thought it was Richaunda's brother (Collier), but then he didn't think he would do it. He later came to her place and she bought a bag of weed from him. He said he didn't like to think it was anyone in her house. SR10 257-58.

Collier testified that Richaunda told him that Johnson had been ripped off and that Johnson was saying that somebody from their house had robbed him. T15 656.

Det. Hardy testified that various persons told him that Johnson had said he had been burglarized. T14 490-91. Johnson had said "if I find out you burglarized my apartment, there's going to be, what he called, stray bullets flying." T14 485-86.[1]

These second and third-hand accounts provided the only evidence that this burglary occurred. There was no evidence that Johnson ever intended to report it to the police.

B. *Stephanie Hankerson, Veronica McMorris, and Taneshia Arnold are tied up, and Johnson is murdered on February 3.*

As already stated, three women came to Johnson's place before dawn on February 3. They were Stephanie Hankerson, Veronica McMorris, and Taneshia Arnold. They knew Johnson as "Kevin."

*Stephanie Hankerson* testified that they arrived around 4:30 or 5:30 a.m. in Hankerson's white Tahoe. T14 523, 526.

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[1] The phrase "stray bullets flying" came from the police statement of a friend of Johnson's named Louvens Jean. T1 46. Jean did not testify at trial, although there was considerable discussion about Wilcox's desire to have him subpoenaed to testify, as discussed in Point IV below.

McMorris got part way in the front door and ran out screaming, afraid. They started to leave and got a phone call from Johnson saying everything was cool, it was one of his friends and they should come back. T14 530-32.

They returned and Hankerson went in by herself. Standing near Kevin (Johnson) was a gunman in a baseball cap, a black leather jacket, a black shirt, long black pants, with an orange bandana around his face. She could only see his eyes, which were brown, and his eyebrows, which were thick and dark. He sounded American. She was told to call the other women and tell them to come inside. T14 532-36.

When the others came in, the gunman started "asking us what they came there for, asking if we were going to drink and stuff. Just small talk." He told Johnson to get them drinks - she thought it was Moet. He had them all go upstairs. T14 539-40.

The man had Johnson roll a joint, which the two men smoked He told Johnson to tie the women up. Hankerson was afraid, but the gunman said he wasn't going to hurt them. He checked to see if they were tied tight enough. He wiped the cell phones with a T-shirt. He took the Tahoe keys, saying he needed it to get away and asking if she had insurance. He said he would take their purses out of the truck and leave them in the house, but the purses were not there after he left. T14 541-46.

The men went downstairs, and there was a gunshot. Hankerson

untied herself and called 911, then went downstairs. T14 546-48.

The shot was about 45 minutes after the men went downstairs. The others did not want her to untie them. She did not know how long it was before she called 911, but said it was minutes. She could not give 911 an exact address. T14 548-49.

Downstairs, she found Johnson tied up and shot in the back of the head. Once outside she asked some guys for the address. Shortly after that she saw a police car. T14 551-53.

Hankerson never signed paperwork for temporary registration of the Chevy Tahoe; it had a regular tag. T14 554.

McMorris and Arnold gave testimony similar to Hankerson's about the incident, although with more detail about what they heard after the two men went downstairs.

McMorris said that after Hankerson untied herself there were thumps or a thump downstairs. After the gunshot they heard him hit the floor - there was a gunshot then a loud thump a few minutes later. Before that there was a noise. SR9 139, 141.

The entire time, the TV was playing a loud action movie. During quiet scenes there were rattling sounds. SR10 163-64. There was a sound that could have been a door. SR10 167.

Arnold said there were noises like a belt buckle after the men went downstairs. The TV was loud. After about ten minutes there was something really loud. Before the buckle, she heard the door. It closed twice and then there was a gunshot. After

the gunshot, the door opened and closed again. SR10 202-03.

The medical examiner testified that Johnson died of a gunshot to the head. T15 717.

C. *Johnson's neighbors testify about Wilcox's activities around the time of the murder.*

*Richaunda Curry* testified she and Ward got home around 9 or 10 p.m. on February 2. Shaquira Curry was there with her baby, and Collier had just got back from Miami. Also at the apartment were Wilcox and Wright. They were drinking and Wilcox told Richaunda he liked Wright and wanted to take her out. Around 10 or 11, Wilcox said good night to Richaunda and left. SR10 259-62.

Wright was drunk and Richaunda asked Ward to walk her home and lock up when he got back. SR10 263.

Around 4:30 or 5 a.m., Richaunda got a call from Wilcox, who wanted to talk to Collier. She told him to come upstairs. He said he was not there, that he had left. She woke Collier up and told him to call Wilcox. SR10 263-65.

She went back to sleep, but was awakened by a gunshot a short while later. She went into Collier and Shaquira's room, and they had also heard the sound. SR10 266-67.

She did not call 911 or the police. SR10 268.

About 30 or 40 minutes later, she saw the police. After a while, she tried to go out but her door was taped shut. She overheard a discussion about their neighbor being shot and she

started crying and began drinking. SR10 268, 270.

She talked to Wilcox on the phone that morning and told him her neighbor was killed. He "was like for real? Like, you know, that's crazy. What's going on?" She asked him when he was coming back to take Wright out, and he said on Friday. SR10 271.

That night, Richaunda, Wright, Shaquira, Collier and Ward went to the police station for questioning. Richaunda told the police she did not know who did it. SR10 269.

After February 2, she did not see Wilcox's bag in the house any more. At some point she told him about having smoked marijuana with the neighbor. SR10 273.

Richaunda made a second sworn statement on February 7 at the police station. She said she had no knowledge of a burglary next door and did not know who killed her neighbor. R10 275-76.

She admitted being untruthful when she told Det. Hardy that she had no knowledge of a burglary, since she was present when Johnson made the threats about the burglary at his apartment. But then she said she always told Hardy that Johnson was killed by whoever robbed him. SR10 277-78, 283.

She withheld her information about who robbed Johnson. She had been told the whole story about who robbed him by Ward's friend Lump. Lump was dark skinned, about 5' 7." She did not remember if he had a beard. SR10 280-81.

Wilcox sought to impeach Richaunda with her February 3 po-

lice statement, as summarized in Det. Hardy's arrest affidavit. The state objected that the affidavit was not prepared by the witness and was inaccurate. Wilcox pointed out that he did not have a transcript of Richaunda's recorded police statement. The court ruled that he was not entitled to one, and sustained the state's objection to his use of the affidavit. SR10 283-86. (This issue is discussed in Point I below.)

On February 7, Richaunda went to the station immediately after Hardy had asked her to come to the station around 2 or 3 p.m. or before noon. SR10 299-300.

She told Hardy that she had to speak with Collier about whether he had information about the incident. She was stressed and wanted Collier to speak up for himself, he was about to go to jail for a crime he didn't do. SR10 292-95.

When Richaunda left the police station on February 7, she went to Jaquinda Wright's apartment. Collier and Ward were there. Richaunda told Collier he had to do something. Ward began crying and said he needed to say something. Det. Hardy arrived. Hardy and Richaunda went to Richaunda's apartment, where Richaunda gave Hardy her jacket. SR10 289-90, 295-97.

Hardy came to Wright's apartment around midnight, seven hours after she talked to him at the station. SR10 302.

At first Ward started talking, then Richaunda, then Collier. Richaunda and Hardy went to the police station and then to

Richaunda's apartment. SR10 303.

*Jaquinda Wright* lived in the apartment complex and was the sister of Richaunda's boyfriend, Willie Ward.

She was at Curry's apartment on the night of February 2, 2008, the night before the murder. There was a party and she spoke with Wilcox, who said he had just got out of a chain gang. He was asking about a robbery in an area called Franklin in Sunrise, an area of drugs and killings. While they talked, Wilcox would go back and forth to the area out the back door of the first floor; Wright called this area the balcony. T15 596-99.

Some days later she had a phone conversation with Wilcox and let him know about the man who was killed next door. Wilcox "was like oh, for real?" T15 600.

Wilcox "was like shocked" about hearing the man died next door. Wright started asking questions about the murder and he said don't do it over the phone. T15 602.

On Saturday night, Wright left the apartment around 10:30 or 11 p.m. with her brother Willie Ward. Wilcox was still at the apartment. T15 602-03, 605.

Wright first met Wilcox on January 31 at his cousin's apartment. T15 608-09.

On February 7, she heard Wilcox allegedly committed the crimes when the police came to get her at her house. T15 609-10.

After the murder, Wright got a text from Ward saying

"Dread" was dead. He did not say who committed the murder, he didn't know. T15 612.

Wright first heard Wilcox allegedly committed the crime the day after they came from the police station, the third. She heard it from Ward, who said he was told Wilcox had done it. Ward said Terrell said that D (Wilcox) killed the Jamaican man. T15 613-16.

*Terrell Collier*, Wilcox's cousin, lived next door to Johnson with his sisters Richaunda and Shaquira Curry.

Collier said that Wilcox came to live with him and Richaunda like a week before the Super Bowl. T15 652-53.

They knew Johnson as "Dread," although he told them his name was Kevin. They had no problems with Johnson until a week before the Super Bowl. T15 654.

When they first moved in, Johnson gave them an extension from his house to use for lights. Collier and Richaunda both bought weed from Johnson. T15 655-56.

There was a Super Bowl party on February 2.[2] Present were Collier, Richaunda Curry, Jaquinda Wright, Willie Ward, Shaquira and her little boy, and Wilcox. T15 656.

Johnson was ripped off about a week before the party; Collier said he was not aware of it until his sister told him that Johnson said somebody from their house had robbed him. Collier

[2] The Super Bowl was the next day, February 3. SR10 238.

was not present when Johnson talked to Richaunda. T15 656-57.

On the night of the party, Collier did not have any conversations directly with Wilcox. Around 10, Collier went outside. He saw Wilcox leave the house and did not see him come back in after that. Wright and Ward also left, and Ward later came back. T15 658-60.

Collier went to bed in a room he shared with his sister Shaquira. Awakened by Richaunda, he looked at his phone and saw missed calls from Wilcox starting around 4:45. Collier called back and Wilcox answered. T15 660-63.

He told Collier go downstairs and bring the bags outside to the front porch. Collier put the bag on the porch and called Wilcox. He heard the neighbor's gate unlock, and Wilcox came out dressed in black with a skully over his mouth. T15 663-65.

Wilcox uncovered his mouth and put the bags in a white Tahoe. Collier had never seen him with a white Tahoe before. Wilcox cranked the truck up and went back to the neighbor's house. He had a gun and told Collier to go into his house. While going up the stairs inside his apartment, Collier heard a shot. T15 665-68.

Collier did not call 911; he ran and woke up Shaquira. Richaunda came in and asked if they heard that. Shaquira jumped up out of bed and said, Oh, my God, what was that. Richaunda looked out and saw a girl in a panic and a police unit pulled up. This

was some time after the shot. T15 669-70.

The police said nobody could come out of the house. Collier later spoke with the police. T15 671-72.

Around 7 or 8, Wilcox called. Collier said Wilcox asked if they were okay, and "I said yeah. I asked what happened, and I asked him what happened. That's when he tells me what he had done." Wilcox said he had shot the man. Collier asked why, and "he said for our safety because he didn't know how would the man react." He didn't know how the man would react to how he had been robbed or with him knowing they were related. Collier took it to mean Wilcox thought he was protecting him by taking away any threat because of the rip off. T15 672-73.

Collier talked to detectives that evening, but did not tell them about the phone call or who did the rip off. T15 674-75.

When he left the station he told Ward that Wilcox did it. He didn't mention the bag or going downstairs. T15 675-76.

A couple of days later, Collier talked to the detective again, and made a taped statement which was the same as his trial testimony. This statement was on February 7 at his mom's house. His mom lives in Miami. T15 676-78, 691.

Collier was told by Det. Celetti that if he didn't tell them something he would be doing two years. The first time he spoke to the detectives he lied to them. T15 687-88.

At Collier's mom's house, the detectives told him to be

straight because they had talked to Ward and everybody else and if he lied there wouldn't be another chance for him and he would go to jail. T15 688.

Collier denied seeing Wilcox at Circle Plaza when he went down to see his mother. (Circle Plaza is in Miami.) He denied telling Wilcox on Circle Plaza that things were crazy up in Broward County. He denied showing Wilcox a firearm. He denied coming to Perrine in a white truck. T15 689-92.

Collier used to go to Miami on weekends to his mom's and he would hang out and see Wilcox at Circle Plaza. T15 690-91.

After going to his mother's house on February 6, Collier did not return to Broward County until after the end of the month. He did not hear from his sister until March. T15 693-94.

At this point, Collier became unclear and contradictory. He said he was not in Broward County after February 6 and he also said he left Broward on February 7. T15 693-95. He then said he never spoke to his sister after going to his mom's house. T15 695. After that, he said he told Wilcox that Johnson "was threatening us at first thinking that me or somebody in the house had robbed him." T15 698. Collier said he told Wilcox this at his sister's house in Broward on February 6. T15 698. But he then denied that this conversation was on the sixth. T15 698.

Collier said everybody in the house was threatened by Johnson, including Wilcox. The threat was communicated to them by

Collier's sister, who said that Johnson said "he wasn't worried about us. He said he knew it couldn't be me or anybody else. It had to be somebody or he described, he described everything just how you [Wilcox] is." Johnson gave a description of who he thought it was; he had seen Wilcox at their house; he said he knew it was somebody in the house. T15 699-700.

Collier did not know of Lump having gold teeth. T15 700-01.

Johnson approached Collier's sister, Willie and Lump about the burglary because he thought Willie, Lump and Collier has something to do with it. T15 701.

Collier never saw Wilcox with braids or twists in his hair. He had not seen him without a cap for a long time. T15 701-02.

Collier said Wilcox called him on February 3 and said he did it, but admitted that the phone call did not appear on the phone records for that time. T15 703-06.

Six days after Wilcox's arrest, he and Collier were in jail together; Collier was in jail for a misdemeanor. T15 706-07.

D. *Wilcox is arrested in Perrine on February 9.*

Officers located Hankerson's SUV in Perrine on February 9. Wilcox was arrested nearby. He had the cell phone that had been calling Collier's number on the night of the murder. The murder weapon was in the SUV.

*K-9 Officer Marckioli* said the SUV's front doors were open. Wilcox came out of a house with his hands up, holding a cell

phone, and he was taken into custody. T14 411-14.

*Det. Hardy* said the SUV had a temporary license plate on it, which was not the original license plate that Hankerson had received from the State of Florida. Wilcox had an address near where it was found. T14 452.

Inside the SUV was a temporary license application for the name Bobby A. Wallace. T14 467. Wilcox's fingerprints were on the temporary registration application. T16 757-59, 762-63.

The phone taken from Wilcox had the number 786-312-5445. The contacts contained a listing for "Terrell" with the phone number 786-337-1127. T14 461-62.[3]

Two firearms were found in the SUV: a black Taurus 9 millimeter and a black and chrome .380. T14 454-55. (The bullet recovered in the autopsy was fired by the Taurus. SR9 62.)

Hardy testified that he read Wilcox his rights at the Miami-Dade Jail and Wilcox spoke with him. Hardy told him what he was investigating, and "The first question I asked was when is the last time he had been to Broward County. His answer was he had never been to Broward County." T14 463-65.

(In the defense case, a recording of the statement was put in evidence. On it, Hardy told Wilcox he was charged with murder

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[3] Calls were made from the 5445 number to the 1127 number 4:45 to 5:12 a.m. off cell towers in Fort Lauderdale (tower P4534), Sunrise (tower P2224), and Lauderhill (tower P3504). T14 431-33; R 931. Later calls were made as the 5445 phone was moving south from Lauderhill toward Miami. T14 477-79.

and asked about his address and other matters, including his cell phone. Wilcox denied having a cell phone. T16 802-03. He then invoked his right to counsel. T16 806 ("I'd like to talk to an attorney, because it's my life, and I'd like an attorney present and I would like, you know, to get a phone call -"). Hardy did not end the discussion but continued to ask Wilcox about drinking and drug use, and then read Wilcox his rights. T16 807-08. Wilcox said he understood his rights. Without asking Wilcox if he still wanted an attorney or whether he was waiving his rights, Hardy said, "this is not a case about who did it. There is an incident that happened in Lauderhill almost a week ago," and asked him when he went up to Broward. T16 808. Wilcox replied, "I haven't been to Broward." T16 809. Wilcox again invoked his right to counsel and the recording ended. T16 809-10.)

*Cleveland Aguilar* went to bars with Wilcox and Wilcox's cousin "Man" on the night of February 8-9.

Wilcox had a white Tahoe, which Aguilar had seen sometime in the previous four or five days. Wilcox said the Tahoe was his. SR10 214-15.

Aguilar had a .380 and Wilcox had a Glock 9. SR10 220.

They stopped at a corner store. Aguilar saw the police and did not get back into the car because he knew the guns were in it. He told the others they should walk away. They did not listen to him and left in the car. Aguilar then walked home, leav-

ing his gun and jacket in the car. SR10 221-23.

In his police statement of February 19, Aguilar said that Wilcox had told him a chick bought the car for him. SR10 226.

He also said in the police statement that he had seen Wilcox with the Tahoe only three days before February 9, and not four or five days. SR10 230.

Aguilar had never known Wilcox to leave Miami-Dade County or go to Broward County. At some time someone told him that Wilcox went to Broward. SR10 232.

Around February 2, Wilcox borrowed Aguilar's .380 and returned it the next day. Wilcox had a firearm of his own at the time. SR10 234-35.

Wilcox borrowed Aguilar's .380 on February 2 just as it was getting dark. He returned it the next night. SR10 235, 237.

In his police statement, Aguilar also said he had never seen Wilcox with a firearm. SR10 243.

E. *DNA evidence does not rule out the possibility that Wilcox was at some time in Johnson's apartment.*

A marijuana cigar blunt was found on the coffee table in the living room of Johnson's apartment. T13 393. DNA on the cigar blunt was compared to Johnson and Wilcox's DNA. There was a match with Johnson. T16 778. Also, one chromosome would match two percent of the population, including Wilcox. T16 780. One person in 37 from the general population would have that partic-

ular profile. T16 789-90. The DNA sample was not compared to Wilcox's cousin, but the state's expert testified: "Cousins share approximately an eighth of their DNA. So the chances that a cousin would also match would be 1/8th to the 15th power, which put us into the one in a trillion, one in a quadrillion range." T16 790. The expert did not explain what happened to the 1 in 37 likelihood that a person would have the profile.

E. *Wilcox denies committing the crimes.*

As already noted, Wilcox presented the video of Hardy's interrogation of him, which tended to impeach Hardy's account. He also presented testimony of several witnesses in favor of his contention that he did not commit the crimes charged.

*Princess Arnold*, testified that the she was the owner of the cell phone found when Wilcox was arrested. She and Wilcox were together about three years and he did not have a phone of his own. T16 816-17.

She let Wilcox have her phone but only in situations such as leaving it with him when she was visiting next door. T16 818.

Wilcox was jailed for three or six months starting in July the year before his arrest in the present case. While he was in jail, Arnold was living at Circle Plaza. Wilcox occasionally had Terrell and his girl cousin stay over to make sure she was okay. T16 818-20.

Wilcox was a drug dealer, and Arnold took over his opera-

tion while he was in jail. She had his cousin Terrell Collier working for her. While Wilcox was locked up, Collier was in Miami although he moved right before Wilcox got out. He said he was moving in with his sister. T16 821-23.

Arnold would stay in Broward and would converse with Collier. Collier had Arnold's phone on occasions. T16 823-24.

While Wilcox was in jail, she was not selling drugs herself - she would have Collier sell them as her employee. T16 835.

Arnold last saw Wilcox maybe a week or two before his arrest. She last spoke to Collier around the time of Wilcox's arrest. T16 838.

*Nicki Finch*, Wilcox's cousin, said Wilcox was incarcerated for around six months before the Super Bowl. She saw him around the time of the Super Bowl. T16 844.

She was staying at her cousin Shayla's house and cooked breakfast for Wilcox every morning. She talked with him between 11 and 12 on February 3, telling him Princess Arnold had called on February 2 saying she was on her way to Miami. T16 844-45.

Finch saw Wilcox every day after he got out of jail. He never disappeared for days at a time. On the day of his arrest, she saw him in a white truck with James Durham and Terrell Collier. She first saw Wilcox in the white truck about four days after the Super Bowl. T16 846-47.

Finch never saw Wilcox with a large amount of weed or drug

paraphernalia and he did not have a phone - he would come to her house to use the phone, but not often. T16 847-49.

While Wilcox was in jail, Finch, Princess Arnold and Terrell were staying at an apartment in Circle Plaza. Terrell moved to Broward before Wilcox was released. T16 848-49.

*Marquitta Robinson*, said that on the Wednesday before Wilcox's arrest she and Wilcox took their son to the doctor for shots. T16 851-52.

Robinson never saw Wilcox with a white truck. T16 853.

Wilcox would contact her off everybody else's phone. He did not have a designated place to stay. She last saw him at Shayla's place in Circle Plaza. T16 853.

*Darious Wilcox* testified on his own behalf.

On the day of the Super Bowl, he was in Miami and watched the game with a friend from jail. T16 861-62.

Wilcox said he supports himself by dealing drugs. T16 862.

He was in the Miami-Perrine area on the night of Saturday, the second of February. The night before that, he was at a club. T16 862-63.

He got the vehicle from Terrell Collier on Wednesday the sixth. T16 863.

He had the 312-5447 phone when he was arrested, but he did not have it until the fifth. T16 863.

He saw Terrell on the sixth when Terrell was getting a

haircut at Circle Plaza. Terrell told Wilcox about an infraction in Broward County. Terrell said he got the truck from a friend. Terrell gave the truck to Wilcox and disappeared. Wilcox then went and picked up his cousin James Durham. T16 864.

He owned a black leather jacket, but he did not have it when he was arrested - Durham was the one who threw it. He denied possessing bullets and a bandana. T16 864-65.

After Collier gave him the truck, Wilcox used it until the day of his arrest. When the police got behind him he left because he had drugs on him, and the vehicle was stolen - he knew it didn't belong to Collier, who couldn't afford it. He has never been in Broward County. T16 865.

He did not know who committed the crime. T16 866.

On cross-examination, the state brought out that Wilcox had been previously convicted of second degree murder, armed robbery and grand theft. T16 866-68. (See Point II below.) In addition, he had another felony conviction. T16 869-70.

F. *Penalty phase proceedings.*

1. Jury proceedings: Det. Hardy testifies regarding the kidnappings and murder; Wilcox's mother testifies about Wilcox's background.

Wilcox was represented by counsel at penalty.

In the jury proceedings, *Det. Hardy* testified about the facts of the kidnappings and murder.

Hardy said that there were several conversations around

4:50 a.m. between Wilcox and Collier within the same cell towers where the murder happened. The police learned nothing from Collier in his initial interview on the day of the murder. He was interviewed again four or five days later and the police learned what had taken place. T20 1136-37.

Hardy said Wilcox stayed at his cousins' place for about a week. A burglary happened next door. Two pounds of weed, a Playstation and cash were taken, and Hardy believed that champagne was consumed. There was no forced entry. Johnson thought a neighbor committed the burglary. Richaunda relayed to Hardy that Wilcox and Collier were outside and close enough to hear Johnson confront Richaunda and Ward about the burglary. T20 1138-39.

Johnson said "if he found out it was somebody from that apartment, his quote was there would be stray bullets flying." T20 1140.

Hardy said that, according to Richaunda, Ward went downstairs to tell Wilcox to turn out the lights and lock the doors. Not finding Wilcox, Ward locked the doors himself. Wilcox did not have a key to the apartment. This was around 10:30 or 11:30. T20 1144-45.

Hardy had information from some persons that Johnson was at the Banana Boat and got home around 4 a.m., when Richaunda heard his motorcycle. T20 1145-46.

Hardy then essentially repeated the testimony of Hankerson,

McMorris and Arnold about the kidnapping and murder. T20 1146-48. Hardy also gave his version of Collier's account of the night of the murder. T20 1148-51.

Hardy then recapitulated the testimony regarding Wilcox's arrest. T20 1152-54.

Hardy said that phone records showed that Wilcox was no longer in Johnson's apartment by 5 a.m. He said that about 10-15 seconds passed from when Collier went back inside until he heard the shot. T20 1155-56.

Hardy was asked the basis for his testimony that Wilcox was in a position to hear Johnson threaten the others. He said the information came from someone who did not testify at trial.[4] That person did not know Wilcox, but said there was a black male with gold teeth who was there. This person knew Collier and said Collier was present. T20 1164-65.

Hardy said different people had different versions of how much marijuana was taken in the January burglary - there were "different stories, different rumors going around." T20 1170-71.

After Hardy's testimony, the prosecutor read a statement by Johnson's mother and then rested. T20 1171-73.

*Lawanda Wilcox*, the defendant's mother, testified for the defense.

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[4] This person was Louvens Jean. As discussed in Point IV below, Jean did not specifically identify Wilcox as being present.

She was an inmate at the Miami Detention Center, and did not have her medication when she was taken to Broward County to testify. T20 1184.

Darious was the oldest of her four children. She had him when she was 15. Her boyfriend broke up with her about a month after learning about Darious. It was hard for her to raise him. She had other men friends that she messed around with and they helped her out here and there. She would date men to get money for Pampers and stuff like that. T20 1185-86.

Lawanda was always surrounded by drugs and saw all kinds of people get killed. Darious was a very troubled child. She wasn't there for him to reach out to. She was on drugs real bad. T20 1186-87.

She was on heroin and crack. She did a lot. She started when she was ten. She stopped for a while when she was pregnant. T20 1187-88.

She was depressed after Darious was born. T20 1188.

Her mother was sweet but was raising seven children without a father. Her mother worked a lot to survive and she wasn't there for Lawanda. Her mother was very tired and just slept when she came home. T20 1188-89.

Lawanda never had time to talk to Darious. She wasn't in the right mind to talk with him about things he was going through. He needed professional help for his problem. "But I

couldn't help him. I was going through the same thing." T20 1190.

She was staying with her mother when she had Darious. She was sleeping on the floor and he was sleeping on the couch. She didn't like being a mom, she wasn't able to do things a mom was supposed to do, she was young. She was not able to talk to him about right and wrong or see to his education. She was always very slow and had nobody to talk to. T20 1190-91.

She started taking psych medication when she was about 20. It helped, but she continued using heroin and crack. Some days the psych medication hurt and she wouldn't take it and would choose drugs. T20 1192.

Darious would have seen her being paranoid, grouchy. He would see that when she was coming down. T20 1192-93.

When she needed money for drugs, she would sell Darious's toys and clothes. He would see her date males for money. T20 1193-94.

At the time of her testimony she was in jail for drugs. She has been arrested about 40 times. Darious had seen her being arrested. When he was two or three she would take him along when she bought drugs. She would send him out to get Coke cans for her to smoke out of. She used drugs day and night. T20 1194-96.

When Darious was sleeping she would be using cocaine at three or four in the morning and would start yelling and scream-

ing. She would not go see his teachers because she did not want other kids to see her like that; they would tease him. He was thin, abused, hurt bad enough. T20 1196.

Darious liked school, but he used to act up. He was a C student. She would spank him and keep him in the bathroom. She did not help him with his homework. T20 1197.

Darious was very slow. A lot of things people should know, he didn't know. He was convicted and sent to prison when he was 14. While he was in prison his grandmother died. He was not allowed to come out and grieve with his family. T20 1197-98.

When she had her youngest son, Darous, in 1990 she did not bring him home from the hospital. She was using cocaine at the time he was born. She knew they wouldn't give him to her. They said someone in the family would have to get him. Darious was about 12 at that time. T20 1199-1200.

She would get state assistance for the children. She used it to buy drugs. T20 1200-01.

Lawanda's mother was 62 when Darious was born. When Lawanda was growing up, her mother was raising seven children with just one bedroom. When he was small, Darious lived with his grandmother. Lawanda was around but she was out in the streets. When she got tired she laid her head at her mother's house. She would be up at 4:30 a.m., going crazy in the house. Until Darious was 11, he lived with Lawanda in her own place. T20 1203-05.

Darious was thrown out from regular schools. He went to a school for bad kids. She saw him going through the same thing as herself. T20 1205.

After Lawanda's testimony, the defense put in evidence the arrest affidavit regarding the murder conviction of Wilcox when he was 14. T20 1206-08.

The affidavit says the crime occurred on March 8, 1992, and lists the co-defendants as Cory Waters and Duane Smith. Wilcox's date of birth was July 20, 1977, and he is listed as a student at Project Leap. The affidavit states:

> On the above date the Def. [Wilcox] and the Co-Def's stole a 1986 Cadillac from 16924 SW 104 ave., Richmond Elementary. The Co-Def (Waters) then obtained a fire-arm and responded with the other def's to the above location. Once at the above location Co-Def. Waters gave Co-Def. Smith the firearm. The Def. along with the Co-Def. Smith exited the veh. Co-Def. Smith pointed the gun at the victim and other witnesses and ordered them to get down on the ground. The Co-Def. Smith then shot the victim causing his demise. The Def. and Co-Def. Smith then removed U.S. Currency from the Victim.
>
> Def. was advised of his rights per Miranda and under-standing them he provided a stenographically recorded statement admitting to [his?] involvement.

R6 908.

The jury recommended a death sentence by a vote of 7-5. R4 636.

2. The *Spencer* hearing: Dr. Fichera ties Wilcox's life experiences to his criminal activity.

At the *Spencer* hearing,[5] the defense presented Dr. Christopher Fichera, a psychologist. He has been appointed or retained in about a thousand criminal cases. T22 1299.

Dr. Fichera reviewed the probable cause affidavit, the offense report, psychological evaluations by Drs. Rapa and Brannon, four sentencing and mitigation reports, two DCF abuse investigation reports, and Department of Corrections reports, and interviewed Appellant Wilcox and Linda Wilcox, his maternal aunt. He also reviewed relative research literature. T22 1300.

Fichera first testified about Wilcox's life up to and through his arrest and imprisonment for murder at age 14. Wilcox was born in Miami in 1977 to a 15 year old unwed mother. His father immediately abandoned his mother after his birth. He did not know his father until he was about four years old. After that, he had very little contact with his father, who was in and out of jail and was a user of crack cocaine, alcohol, and cannabis, and provided no child support. T22 1301-02.

Wilcox grew up in projects in Miami, in the Circle Plaza area. His mother was a severe crack addict in and out of the house throughout his childhood. He was raised primarily by his grandmother. His mother supported her drug habit by prostitution and thefts, resulting in her incarceration and being put in drug programs. Wilcox repeatedly saw his mother use drugs and/or un-

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

der the influence of drugs as a pre-adolescent and adolescent. He was often shuttled back and forth between his grandmother and his mother when his mother was not incarcerated or on the street. Where he slept at night depended on where he found himself at the end of the day. When present, his mother was typically on drugs; she frequently beat him with a belt and administered other forms of harsh discipline. T22 1302-03.

His Uncle Harry also lived in the home. He was an active heroin addict who often shot up in front of Darious in the family home. T22 1303.

Wilcox's mother would frequently sell his clothing, his toys and so forth, for drug money. She often brought him with her to buy drugs when he was a child. T22 1303.

She abandoned two of her children at the hospital upon giving birth following pregnancies in which she actively used crack cocaine. Three babies were born addicted to crack. Two of them were immediately put into state custody. Wilcox has never met these younger brothers. T22 1303-04.

A turning point in his life took place at age 12. Until then, his primary coping mechanism was video games. He would spend large amounts of time at home, wrapped up in these games. At age 12, his mother sold his games for drug money. T22 1304.

Deprived of this primary coping mechanism, he underwent a dramatic change. He became angry, sullen, began to exhibit signs

of childhood depression. He began spending a lot of time on the streets with delinquents and got involved in criminal and delinquent activities, began selling drugs at age 13, began smoking pot at age 15, while incarcerated. T22 1304.

His grandmother was trying very hard to provide some sort of a healthy environment; but she was completely overwhelmed. In addition to Wilcox, she took in five other grandchildren who were born to two of Wilcox's aunts, both of whom were also drug addicts. T22 1304-05.

He began staying out until early morning hours, increasingly exposed to a corruptive community environment and frequent displays of violence, often witnessing people shot at night during block parties when he spent unsupervised time on the street, beginning around age 12. Two friends were shot to death: one when Wilcox was eight, the other when he was 11. T22 1305.

Before he reached the age of 15, most of his peers were sent to jail or prison for various crimes. Four of his peers were arrested and/or convicted on murder charges. Drug dealing and drug use were common in his neighborhood, and he witnessed this firsthand by both peers and adults alike. Adults selling drugs to minors was commonplace. T22 1305-06.

By age 13, he had been charged with aggravated assault, petit theft, burglary. He began showing signs of aggression at school. He was placed in a special education school for learning

disabilities. T22 1306.

By age 14, he dropped out of the 8th grade, and was arrested for grand theft auto, possession of a controlled substance, burglary to a conveyance and armed robbery. T22 1306.

By age 15, he was sentenced to ten years in prison in the homicide case. He spent his entire adolescence and early adult years incarcerated. T22 1306.

Dr. Fichera concluded this phase of his testimony:

> In summary, Darious Wilcox was born into poverty without the benefit of an intact family environment.
>
> His mother was active crack addict, who was frequently incarcerated and used drugs openly in his presence and involved him in criminal activity.
>
> His neighborhood was a violent, corruptive environment that exposed him to various pernicious and damaging influences, resulting in catastrophic developmental consequences.
>
> In short, based on the research I have reviewed, which I'll present to the Court today, Mr. Wilcox was damaged and predisposed to violence by circumstances beyond his control and by maladaptive choices he made while still a minor child.

T22 1306-07.

Dr. Fichera then discussed the effect of such an upbringing in the light of research conducted by the Department of Justice, Harvard Law School and the NAACP.

The Department of Justice has conducted research involving thousands of children to determine why some children become violent during childhood or as adults. T22 1308-09.

Fichera said this research is important to the issue of mitigation because the degree of blameworthiness of an individual for criminal or even murderous conduct may vary, depending on what factors shaped their influence, their development. Even though they are equally criminally responsible, capital defendants may vary in a moral culpability, and ultimately blameworthiness. The guilt phase looks to questions of whether defendants could control themselves, whether they had a choice, whether they knew right from wrong. The penalty phase addresses questions of what shaped the choices the defendants made, what shaped the moral and value system, how did they get here, how were they damaged. T22 1311-12.

Research has shown risk factors for violence and delinquency if they occur in a child's life at ages six through adolescence. The larger the number of risk factors, the greater the probability of violent behavior. Going over such factors, Fichera said that all but one of them applies to Wilcox - the exception being "extreme" economic deprivation. Fichera said Wilcox was "brought up in an economically deprived environment. But the word extreme, I left that out." T22 1314-15.

There are also protective factors that guard against the development of violent behavior. Only one of these protective

factors applies to Wilcox: intelligence.[6] The other protective factors are absent. T22 1315.

Dr. Fichera explained that such a pattern does not mean that all such children commit murder, but that they strongly predispose the child to a future of violence:

> The idea of predisposition, I would like to get on the record, the idea that not all kids who are exposed to these factors act violently is a fact; but it also is a fact that a much greater number of them will be predisposed to it.
>
> Like a number of people that smoke heavily are likely to get cancer. Not a hundred percent will succumb to the illness in order for it to be a predisposing factor.

T22 1315-16.

Fichera then discussed what social science has established regarding the effects of the conditions of Wilcox's upbringing.

The first condition is multiple transitions. Wilcox's mother was in and out of the home. He was back and forth between his mother and grandmother, sometimes daily. He slept wherever he found himself at the end of the day. A 1999 study in the Juvenile Justice Bulletin followed 4000 urban kids from early adolescence through adulthood, and found a consistent relationship between a greater number of family transitions and a higher level of delinquency. T22 1317.

Next is absence of the father. The data on this factor "is

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[6] The only evidence about intelligence was that Dr. Rapa had scored Wilcox's IQ as 81. T22 1336. Rapa did not testify.

truly impressive." The likelihood that a young male will engage in criminal activities doubles if raised without a father and triples if he lives in a neighborhood with high concentration of single parent families. 70 percent of juveniles in state reform institutions grew up in single or no parent situations. 72 percent of adolescent murderers grew up without fathers. T22 1318.

Fatherless children are at a dramatically greater risk of drug and alcohol abuse, mental illness, suicide, poor education performance and criminality. T22 1318.

The third condition is early exposure to domestic violence. Wilcox was exposed to significant domestic violence in his youth. He witnessed his Aunt Sandra being beaten by her boyfriends, resulting in black eyes, bruises. The police were called on one or two occasions. When he was six, he witnessed first-hand his Aunt Gloria stabbing her boyfriend. T22 1319.

The fourth is exposure to drug abuse. Wilcox's mother was a chronic, severe drug addict, which he witnessed first-hand. When she was present, she was intoxicated or using drugs. She would take him to buy drugs, and would sell his belongings. T22 1319.

Child abuse is a fifth condition in Wilcox's background. Fichera learned about it from Wilcox's aunt and investigative interviews. Wilcox's mother was abusive, hit him, put him in the bathtub for hours, and so forth. T22 1319-20.

The next condition is exposure to corruptive adult role

models. Wilcox's neighborhood was filled with them. His uncle, who lived with them, was using heroin. His mother was using drugs, in and out of jail almost constantly. Bouncing back and for the between the grandmother and the mother did not insulate him from this toxic environment: it was part of the toxic environment, part of the fabric of his environment. T22 1320.

Dr. Fichera noted the devastating effect of his mother selling his clothes and especially his video games, which were his "main defense mechanism." T22 1321.

After this incident, he began staying out on the streets until early morning without supervision, which brought delinquent behavior, and the beginning of establishment of antisocial norms. Most or all of his peers were involved in delinquency. He had multiple arrests. There was no psychological intervention. He was sentenced to prison around age 14. T22 1321-22.

As a result, he spent his entire adolescence, from 14 to 23, incarcerated. He came to adulthood in prison. T22 1322.

Returning to Wilcox's upbringing, studies show that the absence of limit-setting by parents poses a grave risk of psychological health. Children need order and external structure to help develop internal structures and the capacity for self guidance. When guidance is not provided, self control is not developed; aggression can unfold. T22 1322.

Dr. Fichera next testified about exposure to violence.

Quite a few studies, including a 1996 Department of Justice study, show that exposure to violence raises a child's risk of violent behavior, chronic delinquency and adult criminal behavior. 1000 children in Rochester were followed in terms of the results of their exposure to three kinds of violence: spouse abuse, child abuse, a general climate of violence and hostility. 38 percent of kids with no exposure to violence engaged in some form of youth violence. 60 percent of those exposed to one type of violence engaged in "serious" youth violence. This rose to 73 percent for those exposed to two types, and to 78 for those exposed to all three types of violence. T22 1323-24.

Against this background, Dr. Fichera discussed risk factors identified by the Department of Justice. They fall into five categories: individual, family, school, peer and community factors. T22 1324-25.

As to individual factors, Fichera noted that around age 12 or 13 Wilcox showed symptoms of childhood depression as established by the American Academy of Child and Adolescent Psychiatry, including increased irritability, anger, hostility, frequent absences from school, poor performance in school. If one or more of these signs persist, professional help should be sought. Such help was not sought for Wilcox. T22 1325.

Family risk factors are strongly linked to criminal activity well into adulthood. Wilcox's family risk factors were se-

vere: teenage mother, absent father, parental drug addiction, physical abuse, inadequate supervision, economic challenges, domestic violence, parental criminal behavior. 1325-26.

The mother's crimes included cocaine possession, tampering with evidence, petit theft, VOP, possession of paraphernalia, battery. Sons of teenage mothers are 2.7 times more likely to land in prison. T22 1325-26.

Further, a Juvenile Justice and Delinquency Prevention study followed kids for 20 years. It found that parents' poor supervision and aggressive discipline predicted the children's convictions for violent crimes well into their 40's. T22 1326.

As to the impact of abuse and neglect, a study of 877 cases with matched controls found that these kids are 4.8 times more likely to be arrested as juveniles, two times more likely to be arrested as adults, and 3.1 times more likely to be arrested for violent crimes as adults. T22 1326-27.

Quality of attachments to parents and other members of the family in childhood is essential to development of healthy adults. Multiple sources show the family environment's influence on the child's social development lasts a lifetime. T22 1327.

Dr. Fichera then testified about Wilcox's school risk factors. He failed the second grade. He had learning disabilities and was in special ed classes. He had no involvement with an adult mentor. There were multiple changes in schools. His formal

education ended in the eighth grade. T22 1327.

Wilcox also had peer related risk factors. Most of his peer group were drop outs, drug abusers, engaging in significantly diverse criminal delinquent behaviors. T22 1327-28.

The fifth risk factor concerns the community and neighborhood. Wilcox grew up in conditions of community disorganization. There is an increased risk of later violence when an adolescent has drugs available and knows adult criminals. T22 1328-29.

Exposure to violence increases a child's risk of violent behavior later in life. Researchers at Harvard Law School and the NAACP found that 42% of black males aged 18-35, on any day in Washington D.C., were in the criminal justice system. The same is true for 56% of black males aged 18-35 in Baltimore. This was not because of their race but because of the community risk factors found in Wilcox's childhood. The estimated annual rate of homicide offenders in black males aged 18 to 24 is upwards of 347 per 100,000. For white males, it is 33 per 100,000. The estimated annual rate of homicide offenders among black males 25 and older is upwards of 59 per 100,000, and almost 8 for white males. The differences were accounted for by family, neighborhood and social factors, not race. The environment dramatically predisposed black kids compared with whites. Children respond to chronic neighborhood violence, psychological disorders, grief and loss, maturity, intellectual developments,

stunted moral developments, identification with an aggressor, and a pathological adaptation to violence. They become used to violence. It becomes part of how their world is. T22 1328-29.

As an example of the habituating effect of violence, Fichera related that when he first worked in an emergency room as a student, the things he saw would be very upsetting. He would come home, think about it, dream about it. By the time he finished his training, he was not affected by walking into the ER and seeing somebody bleeding on a gurney. T22 1329-30.

As an example of a damaged community, Fichera mentioned the Lexington Terrace project built in Baltimore in 1959. It became a step-stool of problems, drugs, prostitution, violence. Authorities tried to clean it up, but, after failure after failure, the solution in 1996 was to implode the building. T22 1330.

More than half of urban murders and aggravated assaults take place in a few high crime war zones. The experiences of American children growing up in the high crime neighborhoods has been compared by researchers to that of children growing up in war zones of Mozambique, Cambodia and the Middle East. T22 1330.

After summarizing the risk factors, Dr. Fichera said: Wilcox's "scales are eroded on the risk factor side overwhelmingly. And the damaged child is a damaged adult." T22 1331.

Fichera summarized the mitigating effect as follows:

Criminal behavior is the product of interacting fac-

tors in both the person and his environment.

Alone or in combination, these factor can either facilitate or protect, if you will, or inhibit delinquent outcome. They can either cause, or they can protect against delinquent outcomes of violence.

Most theories of criminal behavior acknowledge that children are especially vulnerable to a chronic delinquent outcome when they are exposed to both biological and social deficits.

These kids are theorized to be at the higher risk for persistent antisocial behavior.

In order for intervention to be effective, it has to take place early on in life span.

Darious Wilcox was subjected to a great number of risk factors that resulted in the predisposition for violent criminal behavior. This predisposition took place at a time in his life when he was still a minor child and was the outcome of circumstance that were beyond his control.

So in conclusion, as damaging or impairing or mitigating factors go up, had an influence of how we think about the moral culpability and the ultimate decision the judge has to make.

T22 1332-33.

In sentencing Wilcox, the court found four aggravating circumstances: conviction of a prior violent felony (great weight); the murder was cold calculated and premeditated (great weight); felony murder (great weight); and the murder was committed to avoid or prevent a lawful arrest (great weight). R5 861-67.

The court found in mitigation that: Wilcox grew up in a difficult environment and lacked stability (little weight); his dysfunctional childhood led to the murder (little weight); cir-

cumstances beyond his control resulted in a dysfunctional childhood and adolescence (little weight); he had untreated symptoms of childhood depression (little weight); he will spend the rest of his life in prison (little weight); he behaved well in court(little weight). R5 867-71.

## SUMMARY OF THE ARGUMENT

I. Because of the state's discovery violations and the court's failure to remedy them, a new trial should be ordered.

II. The court erred in letting the state show that Wilcox had prior convictions, including a murder conviction.

III. The court erred in ruling that Richaunda Curry's recollection could be refreshed only with statements made by her.

IV. Wilcox was denied his right to compulsory process for the attendance of witnesses.

V. The court erred in not letting Wilcox impeach Richaunda Curry with a prior inconsistent statement.

VI. The court erred in instructing the jury on and in finding the aggravating circumstance that the murder was committed to avoid a lawful arrest.

VII. The court erred in instructing the jury on and in finding the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner.

VIII. The court erred in giving little weight to substantial uncontradicted mitigation.

IX. The death sentence rests on a constitutionally unreliable 7-5 death verdict.

X. Florida's death penalty statute is unconstitutional.

## ARGUMENT

I. THE RULE OF DISCOVERY WAS VIOLATED WHEN THE STATE REFUSED TO PROVIDE WILCOX WITH TRANSCRIPTS OF THE STATEMENTS OF RICHAUNDA CURRY, SHAKIRA CURRY, TERRELL COLLIER AND WILLIE WARD AND OF WILCOX'S POLICE STATEMENT, AND WHEN THE STATE DID NOT DISCLOSE UNTIL THE MIDDLE OF RICHAUNDA CURRY'S CROSS-EXAMINATION THAT THE ACCOUNT OF HER STATEMENT PROVIDED IN DISCOVERY WAS MATERIALLY INCORRECT.

Wilcox contended that he was framed by Terrell Collier and his associates. He sought to prove their untruthfulness through their police statements. But he could not use the statements because they were recorded in media unusable to him due to his incarceration by the state, and the state refused to provide transcripts of the statements. As a result, he relied on summaries of the statements in the arrest affidavit. In the middle of the trial, the state disclosed that the affidavit was materially false.

Despite Wilcox's repeated requests, the court took no steps to remedy the situation.

The state would violate its discovery obligations if it made evidence available for inspection only in a room with no light. In effect, that occurred at bar. Because of the plain prejudice to Wilcox's trial preparation and defense, a new trial

should be ordered.

A. *Wilcox seeks transcripts of witness statements and his own statement before trial. His efforts are frustrated.*

The month before the trial, Wilcox sought transcripts of the recorded statements of state witnesses, including Richaunda Curry, Shaquira Curry, Terrell Collier and Willie Ward. T8 69-70. The state said the statements of Richaunda, Shaquira, Collier and Ward were on DVDs, and it would not transcribe them "because of the extensive costs." T8 68-70. Wilcox also sought a copy of the transcript of his videotaped police statement, and the state again refused. T8 72-73.

The state said it would give Wilcox copies of the DVDs and the videotape themselves, but recognized he would not be able to view the recordings because he was incarcerated. T8 70, 73.

The court realized the problem, but said Wilcox was not entitled to transcripts of the recordings:

> MS. VOGEL [ASA]: That's what I said. Those statements were on DVD. There are not transcripts of them. I do not intend to provide transcripts.
>
> DEFENDANT: Why not.
>
> THE COURT: Nor does she have to.
>
> DEFENDANT: They are needed.
>
> THE COURT: You're only entitled to the DVD's. That's what she has.
>
> DEFENDANT: I'm incarcerated.
>
> THE COURT: I told you there are a lot of pitfalls to

representing yourself in a capital homicide. You're starting to find out how limited you are.

Remember, you want to act as your own lawyer. You want to act as your own lawyer. I told you I didn't think it was in your best interests. I still don't. Mr. Walsh[7] doesn't think it is in your best interests. No one thinks it is in your best interests but you.

You're subject to the fact that your ability to do the types of things that a lawyer can do is extremely limited because, as you said, you're incarcerated.

You don't have access to these matters.

T8 73.

Wilcox also sought transcripts of recordings of phone calls he made from the jail, and again the state said it would provide him only with copies of the recordings (this time on CD), but said it would not make transcripts.

MS. VOGEL: He also asked for copies of, I think it is in his January 7th demand for Brady material, which I indicated there were telephone calls he made since he has been in custody. We have copies of those on CD's.

I think at this point there are three CD's. I have two I can give him here in court today. I had two blank CD's in my office I made copies of. DVD's and CD's, normally the public defender's office, defense counsel supplies us with blanks. We make copies.

I'm not sure in this situation, since the defendant is pro se, I don't know if he has access or my obligation with regard to getting other DVD's to copy for him.

THE COURT: That's a good question. I'm not sure I have an answer.

MS. VOGEL: I'll give him the two I have here in court

[7] Joseph Walsh had been retained by the Regional Conflict Counsel to represent Wilcox at penalty before Wilcox discharged counsel. He came back on the case after Wilcox was convicted.

I copies [sic] the last time we were here.

THE COURT: They won't let him take it back.

DEPUTY: I don't think so. May Mr. Walsh can take them to the jail, let him have it. I don't know.

T8 74-75. (Walsh said: "I'll try to put the CD's into his property. I don't know how he will be able to listen to them." T8 80.)

Before the trial, Wilcox again demanded transcripts of the statements of Richaunda Curry, Shaquira Curry, Collier and Ward as Brady material. R1 115, 124.

B. *At trial, the state discloses for the first time that the arrest affidavit is materially false and Wilcox is barred from using it for impeachment.*

The discovery issue came to a head at trial, during the cross-examination of Richaunda Curry.

Curry testified on direct that Johnson had initially threatened persons from her apartment because he thought they had committed the January burglary and that he later told her that he had thought the matter over and did not think they had committed the burglary. SR10 254-58. This testimony was contrary to Det. Hardy's arrest affidavit. In the affidavit, Hardy said he spoke with Richaunda and Shaquira Curry, Willie Ward and Terrell Collier on February 3 and "[a]ll four … denied any knowledge or involvement with the burglary of their neighbor's residence a week prior to the murder." R1 4.

Wilcox sought to impeach Richaunda with her February 3

sworn police statement. Because of the state's refusal to provide a transcript of the statement, he had to rely on Hardy's account of her statement in his arrest affidavit. SR10 283-86.

The state objected that Wilcox could not impeach Richaunda with the arrest affidavit as she did not write it, and said the DVD of her statement was contrary to Hardy's account in his affidavit. Wilcox pointed out that he had been denied a transcript of her statement in discovery. The judge simply shrugged him off, ruling that there was no discovery violation:

> MR. ROSSMAN: He wants to take the arrest affidavit, paragraph from that affidavit, which is the sworn, the arrest affidavit offered by Hardy or Celeth, and try to use something they wrote about their belief of something as to what she said.
>
> She said she always told them about the robbery. In her first statement on the DVD, she tells them about the robbery. She tells about the burglary. Says he was robbed the week before.
>
> DEFENDANT WILCOX: All four said they no knowledge of a burglary nor knowledge of a murder.
>
> THE COURT: That's what they write. That's not what she said.
>
> You can't impeach her with somebody else's words, based upon their impression. If you had a statement that she made to the contrary, that's one thing. You can't use that to do it.
>
> DEFENDANT WILCOX: She is being used as a witness. I'm have requested former statements. I have no statements taken from her. I requested them.
>
> THE COURT: I told you, transcripts, the State has no obligation to provide you.
>
> DEFENDANT WILCOX: Using her as a witness.

MR. ROSSMAN: I don't have a transcript of her statement.

I watched the DVD over the weekend.

DEFENDANT WILCOX: I have no copy of a DVD.

MR. ROSSMAN: It was given over in discovery. What he has I don't know. Ms. Vogel has a strict list.

DEFENDANT WILCOX: I don't have her statement nor a disk with her statement on them.

THE COURT: I can't say what Ms. Vogel did or did not turnover.

I know you asked for things.

I know there were DVD's. You could not take them in court. It was not permitted.

This is one of the reasons I told you on the perils of self representation on a case of this nature, the access that you have to various things and your ability to do things. This is one of those things.

There is no transcript; therefore, you are not entitled to a transcript.

If you didn't get the DVD, you had recourse to get it, with a motion to compel, you could have done it by means of an attorney.

You can't turn around after you acknowledged by a demand for speedy trial that you are ready for trial and say I don't have it, I'm not ready.

The reality is you cannot use that.

MR. ROSSMAN: What he's using put's him on notice those statements exist; and our discovery exhibits tell him the statements exist, and they were turned over in discovery.

SR10 283-86.

So the state waited until the middle of cross-examination of Richaunda Curry to disclose that the lead detective's arrest

affidavit, on which Wilcox relied in preparing for trial, was materially incorrect. As a result, Wilcox's cross-examination of a key state witness on a crucial issue blew up in his face. The state's less than admirable tactics and the court's ruling were directly contrary to the rule of fairness that animates our discovery rule.

C. *The discovery rule is a rule of fairness. Wilcox was denied that basic fairness, to the prejudice of his defense preparation.*

"The trial of a criminal case is not a game that prosecutors play, and they must comply with the spirit as well as the letter of the discovery rules." *Wortman v. State*, 472 So. 2d 762, 766, n. 3 (Fla. 5th DCA 1985). This is a first degree murder case in which the state has obtained a death sentence, at great expense to the taxpayers. We are now engaged in an expensive appeal in the state's highest court. This is not the type of case for the state to nickel-and-dime the defendant.

In fact, the state's alleged reason for not providing transcripts was belied by its action during the trial when it produced a transcript of the recorded police statement of Louvens Jean. SR9 45. The prosecutor said he had had the court reporter prepare the transcript. He never explained why he could produce a transcript of the statement of Louvens Jean, who did not testify, but could not produce transcripts of the statements of Richaunda Curry and Terrell Collier, who did testify.

"This Court has held that the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush." *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006).

"Because full and fair discovery is essential to these important goals, we have repeatedly emphasized not only compliance with the technical provisions of the discovery rules, but also adherence to the purpose and spirit of those rules in both the criminal and civil context." *Id.*

Our discovery rule is based on fairness:

> Similarly, as this Court concluded in *Evans*, the Fourth District has pointed out, in finding error in a litigant's failure to disclose a change in an expert's opinion, "[a] party can hardly prepare for an opinion that it doesn't know about, much less one that is a complete reversal of the opinion it has been provided." *Office Depot, Inc. v. Miller*, 584 So. 2d 587, 590 (Fla. 4th DCA 1991). The Fourth District concluded:
>
> > While judicial economy may have been served by adhering to the decision made at trial to deal with the problem, justice is ultimately better served even if a new trial must be held **to insure fairness** to the litigants. The trial court's action here sends out a strong message to those who do not adhere to the code of **fair play** advanced by *Binger*. Serious violations of the pretrial disclosure rules may result in the exclusion of important evidence, and may, in extreme circumstances, lead to the grant of a new trial.
>
> *Id.* at 591. Moreover, the Fourth District in *Office Depot* emphasized, relying on *Binger*, "[p]arties who fail to make such disclosure do so at their peril, depending on the circumstances of the particular case." *Id.*

*Id.* at 1145 (e.s.). This goal of fairness was defeated at bar.

A trial court must inquire "upon being advised that the State had committed a possible discovery violation." *State v. Evans*, 770 So. 2d 1174, 1182 (Fla. 2000).

The court must thoroughly inquire into whether there is procedural prejudice to the defense and must consider all possibilities to alleviate that prejudice. *See Scipio.*

*Scipio* was a murder case in which four witnesses identified Scipio as the killer. Despite this strong evidence, he claimed he did not commit the crime. He intended to rely on the testimony of Robert Burch, a Medical Examiner investigator, who said at deposition that there was a pistol under the victim's body, and that he had turned it over to law enforcement. He based this testimony on a crime scene photo. Defense counsel "believed that this evidence could have created doubt in the mind of the jury as to whether Scipio was the assailant." *Id.* 928 So. 2d at 1140.

At the start of the trial, the state showed Burch crime scene photos, and he decided the object was a pager and not a pistol. *Id.* at 1140-41. The state did not disclose his change in testimony to the defense. The judge denied a motion for mistrial based on the change in testimony. *Id.* at 1141. On appeal, the Fifth District held the discovery violation was harmless:

> Had the defense known about the witness' change in his testimony, its trial strategy could only have been one of two things. One, it would not have called the wit-

> ness. Clearly the outcome of this case would not have been affected given the multiple eyewitness testimonies concerning Scipio's shooting Smith inside the Inn. Or second, the defense would have called the witness and sought to impeach him, to present the jury with his prior testimony. That is, in effect, what happened in this case, which if anything, was more favorable to Scipio than not having called the witness.

*Scipio v. State*, 867 So. 2d 427, 431 (Fla. 5th DCA 2004).

This Court reversed the Fifth District and ruled that the state failed to show that there was no procedural prejudice.

This Court wrote that procedural prejudice "does not focus on whether the discovery violation would have made a difference in the verdict. Such an analysis would make the standard for procedural prejudice identical to substantive prejudice." *Scipio*, 867 So. 2d at 1149-50. It looks to whether there is a reasonable possibility that the violation materially hindered the defendant's trial preparation or strategy. *Id.* at 1150.

The state must show lack of procedural prejudice. *Id.* at 1148. For a conviction to be affirmed, there must be no "reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." *Id.* at 1147 (quoting *State v. Schopp*, 653 So. 2d 1016, 1020 (Fla. 1995)). "[E]very conceivable course of action must be considered." *Id.* at 1150.

Reversal is required unless the lack of procedural prejudice is shown beyond a reasonable doubt:

> If the reviewing court finds that there is a reasonable possibility that the discovery violation prejudiced the defense or if the record is insufficient to determine that the defense was not materially affected, the error must be considered harmful. In other words, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless.

*Id.* The state can hardly show a lack of such prejudice at bar. The witness statements and Wilcox's own statement were vital to defense preparation. Richaunda Curry and Terrell Collier were not peripheral figures - they supplied concrete evidence putting Wilcox in the area at the time of the crime. Wilcox was denied the major tools for preparing for their testimony. Further, the prosecution laid great stress on Wilcox's police statement.

If the foregoing were not enough, the arrest affidavit shows the police statements of Collier and Richaunda Curry had important differences from their trial testimony.

The affidavit shows that on February 3, 2008 Collier told Hardy he did not hear any gunshot because he was sleeping. R1 4. At trial, he said he got up and spoke with Wilcox outside and heard the gunshot while he was going up the stairs. T15 668.

It also shows that on February 3, Collier denied any knowledge of the January burglary at Johnson's apartment. R1 4. At trial, he denied being present when Johnson made the threats about the burglary. T15 656-57.

The affidavit further shows that on February 7, Richaunda

Curry made a second sworn statement in which she again said she did not have any knowledge of the January burglary at Johnson's house. R1 5. Because of the state's discovery violation - combined, of course, with its objection to the cross-examination of her about the February 3 statement - Wilcox was not in a position to cross-examine and impeach her on this point.

Although the arrest affidavit provided brief summaries of these police statements, it would be, and in fact was, much less useful for purposes of impeachment of the state's main witnesses than their actual sworn statements.

Wilcox was thus hampered in preparing to face his main accusers with the main evidence to attack their credibility.

Further, as the judge did not inquire into procedural prejudice - as required by law - it cannot be determined whether there were other matters in the sworn statements that would be important to Wilcox's trial preparation. Given what we know about the witnesses' continually evolving stories, the state cannot show the full statements would not have been a major part of his preparation to meet and challenge their testimony.

The record does not show beyond a reasonable doubt that there was no procedural prejudice - in fact prejudice appears even on such a record as we have. A new trial should be ordered.

II. THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT WILCOX HAD BEEN PREVIOUSLY CONVICTED OF GRAND THEFT, ARMED ROBBERY AND SECOND DEGREE MURDER.

On cross-examination of Wilcox, the state asked if he had been "previously convicted of a felony or crime involving dishonesty." Wilcox objected that he was confused by the form of the question, but the state persisted in asking it again and again without clarification before eventually getting the court's permission to put before the jury that Wilcox had been convicted of grand theft, armed robbery and second degree murder:

> Q: Mr. Wilcox, have you been previously convicted of a felony or crime involving dishonesty?
>
> A: I wouldn't say dishonesty.
>
> Q: The answer is yes or no?
>
> A: No.
>
> Q: May I approach the clerk, Your Honor?
>
> THE COURT: Why don't you ask the question again.
>
> Q: (By Mr. Rossman) Mr. Wilcox, have you ever been convicted of a felony or a crime of dishonesty?
>
> A: I been convicted of a crime; but, yes, I have been convicted of a crime.
>
> Q: Have you ever been convicted of a felony or a crime involving dishonesty?
>
> A: Got to make me understand. As far as dishonesty is concerned, I don't see where I lied about anything.
>
> Q: Not my job to make you understand but to ask you a question and ask you to answer it.
>
> Have you ever been convicted of a crime, a felony crime, or a crime involving dishonesty?

A: I got to say no.

MR. ROSSMAN: May I approach the clerk, Your Honor?

THE COURT: You may.

MR. ROSSMAN: May I approach the defendant?

THE COURT: You may.

MR. ROSSMAN: Actually, Judge, at this time, I would ask the Court to review that is marked as State's T for identification purposes at this time and review the raised seal of the State of Florida on it and the signature of the person that goes with it, taking judicial notice of those records and be asked they be moved in as the State's next numbered exhibit.

THE COURT: The Court would find, based upon the package, it is a self-authenticating package and properly issued by the State of Florida.

T will come in as 19.

Q: (By Mr. Rossman) Mr. Wilcox, in case number 92-12728-C, were you convicted of second degree murder, armed robbery and grand theft motor vehicle, yes or no?

A: As an accomplice, yes, sir.

Q: Stealing a vehicle is not a crime of dishonest, stealing?

You don't consider that to be a crime of dishonesty?

A: I don't see why -

Q: If you were to steal from somebody, do you consider that not be a crime of dishonesty?

A: I was convicted. I ain't see where dishonesty, if I was convicted for that.

Q: Robbery, armed robbery, taking something by use of some weapon, you don't consider that to be dishonest?

A: Didn't have a weapon in the offense.

> Q: Second degree murder, you don't consider to be a crime of dishonesty?
>
> A: It is a crime, but like I wasn't dishonest in the case.

T16 866-69.

The foregoing shows egregious prosecutorial overreaching, and the trial court erred in letting the prosecutor show Wilcox had previously been convicted of armed robbery and murder. Wilcox did not dispute his felony record. He simply did not understand what the prosecutor meant by a crime of dishonesty. The prosecutor could have resolved the entire situation by asking if he had been convicted of three felonies. *See Atis v. State*, 32 So. 3d 81, 84 (Fla. 2d DCA 2009). Instead, he exploited Wilcox's confusion to bring out the murder and other convictions.

The rule of evidence that applies here is section 90.610, Florida Statutes, which allows impeachment with a conviction for a felony or a crime involving "dishonesty or a false statement."

One can be easily confused as to the meaning of the phrase "dishonesty or a false statement." It connotes some fraud or deception. The reasonableness of this interpretation is shown by the history leading up to this Court's non-unanimous decision in *State v. Page*, 449 So. 2d 813 (Fla. 1984).

In *Hall v. Oakley*, 409 So. 2d 93 (Fla. 1st DCA 1982), consistently with "[a]ll federal circuits" interpreting the identical phrase in the parallel federal statute, the First District

concluded that a witness may be impeached with a petit theft conviction as a crime involving "dishonesty or a false statement" only if it involved "some element of deceit, untruthfulness, or falsification bearing upon the defendant's capacity to testify truthfully." *Id.* at 97.

The Fourth District agreed with *Hall* in *Rivers v. State*, 423 So. 2d 444 (Fla. 4th DCA 1982). Likewise, the Second District agreed with *Hall* in *Page v. State*, 436 So. 2d 153 (Fla. 2d DCA 1983), although it certified to this Court the issue of whether the statute barred impeachment with a petit theft conviction without a showing of deceit, untruthfulness, or falsification bearing on the witness's capacity to testify truthfully.

On other hand, the Fifth District disagreed with *Hall* in *Hamilton v. State*, 447 So. 2d 1008 (Fla. 5th DCA 1984).

In *State v. Page*, this Court held that a witness may be impeached with a petit theft conviction even without a showing of deceit, untruthfulness, or falsification bearing on the witness's capacity to testify truthfully. Justice Adkins dissented in a detailed opinion joined by Justice Shaw.

The point here is not the correctness of the decision in *State v. Page* - it is that a number of appellate judges, including two justices of this Court, a majority of district court of appeal judges, and all of the federal circuit courts of appeal had concluded that a crime of dishonesty is one involving de-

ceit, untruthfulness, or falsification. Hence, Wilcox's bafflement is completely understandable - his murder-robbery case did not involve deceit, untruthfulness or falsification.

Further, there was ambiguity in the state's question as to whether Wilcox had been "previously convicted of a felony **or** crime involving dishonesty." This Court has noted the ambiguity of the word "or." *See Clines v. State*, 912 So. 2d 550, 556-57 (Fla. 2005). *See also State v. Mounce*, 866 So. 2d 132 (Fla. 5th DCA 2004) ("'and' sometimes can mean 'or' (or vice versa)"). The word "or" is often used to denote the equivalence of two terms, the later defining the former. Thus, WEBSTER'S THIRD NEW INT'L DICTIONARY (UNABRIDGED) says "or" may denote "the synonymous, equivalent, or substitutive character of two words or phrases," citing examples including "lessen or abate." It further says "or" may denote "correction or greater exactness of phrasing or meaning," citing as examples: "these essays, or rather rough sketches," and "the present king had no children - or no legitimate children." So someone hearing the phrase "a felony or crime involving dishonesty" may take it as meaning that the felony must be a crime involving dishonesty.

Witnesses hit with a question as to whether they have ever been convicted of "a felony or crime involving dishonesty" can react with exactly the sort of bafflement as seen at bar.

For this reason, felony convictions should be separated out

from crimes of dishonesty in questioning the witness. *See Atis*, 32 So. 3d at 84.

Regardless whether the prosecutor was correct at bar when he said, "Not my job to make you understand," he was wrong to persist in confusing the witness. *See Atis* (finding error when prosecutor persisted in asking if defendant was convicted of crime of dishonesty when witness was confused, stating three times that he did not understand the question).

Finally, there was no reason for the prosecution to ask about crimes of dishonesty - there was no crime of "dishonesty" apart from the felonies of robbery and grand theft. In *Atis*, the court condemned a somewhat similar approach by the prosecution.

Atis had prior convictions for five felonies: carrying a concealed weapon, felon in possession of a firearm, possession of cocaine, robbery, and uttering a forged instrument. Hence, he accurately admitted on cross that he had five felony convictions. But then the prosecution asked how many were for dishonesty - apparently believing that it could double-count the forgery and robbery convictions as being crimes involving dishonesty as well as being felonies. Despite the defendant's confusion, the prosecutor persisted in this line of questioning. The Second District disapproved of the state's approach and said:

> Under Florida law, all crimes "punishable by death or imprisonment in excess of 1 year" are classified as felonies. See § 775.08(1), Fla. Stat. (2007). Although

> it is plausible that the phrase "or if the crime involved dishonesty or a false statement regardless of the punishment" could be interpreted to include felonies already described in the preceding phrase, it is well established that these two phrases describe two distinct groups of offenses that do not overlap. As Justice Pariente explained when she was a member of the Fourth District, "The effect of the subsection, as amended by the legislature and as adopted by the supreme court, is to allow impeachment for all felonies, but restrict impeachment to only those misdemeanors involving dishonesty or false statement." *Bobb v. State*, 647 So. 2d 881, 884 (Fla. 4th DCA 1994). As such, **when a witness has been convicted of a felony, the other party may not inquire further into whether the felony involved dishonesty or false statement because doing so "would have the impermissible and unintended effect of elevating certain felonies over others."** *Id.*

*Atis*, 32 So. 3d at 84 (e.s.).

At bar, the state only had to ask Wilcox if he had been previously convicted of felonies, but it persisted in adding the part about crimes of dishonesty to his obvious confusion.

Further, where Wilcox objected that he was confused by the question, the court should have, "out of the presence of the jury, [instructed] the witness as to the types of crime involving dishonesty or false statement." *McClellan v. State*, 417 So. 2d 1098, 1099 (Fla. 4th DCA 1982).

Especially egregious was the state's last question: "Second degree murder, you don't consider to be a crime of dishonesty?" T16 869. There can be no basis in law for this sort of question, and no explanation other than prosecutorial overreaching.

From the foregoing, the court erred in allowing the state

to cross-examine Wilcox as it did and allowing it to introduce the nature of the convictions, especially the murder. However unfair it may be for pro se defendants to seek to take advantage of their status, it is at least as unfair for the prosecution to take advantage of the defendant's pro se status.

The devastating effect of such evidence can hardly be overstated. The state cannot show beyond a reasonable doubt that it did not affect the verdict. A new trial should be ordered.

III. THE COURT ERRED IN RULING THAT RICHAUNDA CURRY'S RECOLLECTION COULD BE REFRESHED ONLY WITH HER OWN STATEMENT.

Richaunda Curry testified on redirect examination that the detective asked if she knew anyone with gold teeth. T15 585. That made her think of Wilcox because he was the only one with gold teeth. T15 586.

On recross, she said Wilcox was "the only one that got gold teeth, that I know of." T15 587. Wilcox asked if any document would refresh her memory as to who had gold teeth at the apartment and she said: "Probably." He then sought to refresh her recollection with Louvens Jean's statement, in the arrest affidavit, that Kevin (Johnson) was talking to another person with gold teeth and nappy hair and possible twists. T15 592.

The state objected and the court ruled the witness's recollection could not be refreshed with a statement not made by her:

This is not a statement directly attributed to this

> witness that can refresh her recollection as to what she knew and what she said.
>
> This is based on somebody else's police reports and arrest affidavits, are not admissible evidence. You can use to it to refresh the recollection of officer who wrote it to determine whether or not there were other matters they may have missed.
>
> This witness cannot be refreshed or impeached based upon a statement that she did not make. That clearly refers to Mr. Jean. Not Ms. Curry.

T15 594.

The court erred. As Professor Irving Younger used to observe, anything can be used to refresh a witness's recollection.

We have had this rule in Florida for over a hundred years. *See Volusia County Bank v. Bigelow*, 33 So.704, 706 (Fla. 1903) ("it is immaterial what constitutes the spur to memory, as the testimony, when given, rests solely upon the independent recollection of the witness"); *Garrett v. Morris Kirschman & Co., Inc.*, 336 So. 2d 566, 569 (Fla. 1976) ("When a writing is used only to revive present recollection, it need not have been written by the witness himself.").

Thus, in *McCray v. State*, 919 So. 2d 647 (Fla. 1st DCA 2006), the First District found error when the trial court refused to let the defense refresh a civilian witness's recollection with a police report. The court ruled that the judge misapplied the law and hence abused his discretion.

The court cited *Garrett*, and wrote: "because inadmissible hearsay evidence may be used to attempt to refresh recollection,

the trial court erred in its decision as a matter of law." *Id.* at 649.

At bar the judge likewise made an error of law. A court has no discretion to make a ruling contrary to law. "Where a trial judge fails to apply the correct legal rule … the action is erroneous as a matter of law. This is not an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980). *See also Johnston v. State*, 863 So. 2d 271, 278 (Fla. 2003) ("The trial court's discretion is limited by the rules of evidence."). A de novo standard applies to review when the evidentiary issue concerns a question of law. *See Linn v. Fossum*, 946 So. 2d 1032, 1036 (Fla. 2006) ("Because we must decide as a matter of law whether the rules of evidence allow an expert to testify on direct examination that he or she consulted with other experts, we apply a de novo standard of review.").

Under any standard, error occurred at bar, to Wilcox's prejudice. He was thwarted in his attempts to impeach Richaunda Curry, one of the most important witnesses against him.

## IV. APPELLANT WILCOX WAS DENIED HIS RIGHT TO COMPULSORY PROCESS FOR ATTENDANCE OF WITNESSES.

Wilcox repeatedly sought to obtain process to secure the testimony of persons listed on the state's witness list on the ground that their testimony was necessary to avoid hearsay problems and they would contradict the witnesses that the state pre-

sented at trial. (The persons in question here were friends of the deceased, Mr. Johnson, or of his accusers, and not Wilcox's own associates, who he was able to present at trial.) The court denied his requests and said Wilcox needed an attorney or a family member to take care of the subpoenas.

Under Florida Criminal Rule 3.361(1), subpoenas "may be issued by the clerk of the court or by any attorney of record in an action." Wilcox did not have an attorney of record since he was acting pro se. When he sought to have the clerk issue subpoenas, the judge said he needed a lawyer to do that. The court made contradictory statements to Wilcox as to whether standby counsel could handle the task and also said family members could do it. The court declined to act to assure the attendance of the witnesses. In the circumstances at bar, Wilcox was denied his right to compulsory process.

> A. *Wilcox moves pretrial to subpoena witnesses listed by the state; the state says it will give notice if it will not call any of the witnesses or if any of them is not served.*

Wilcox moved pretrial to subpoena some of the witnesses listed on the state's witness list, saying that the motion was for the purpose of avoiding hearsay and securing their presence and testimony at trial. R1 83, 92.

At a hearing on the motion on February 2, 2009, Prosecutor Vogel said, "They have all been subpoenaed. Whether or not we

get effective service, I can't answer. Subpoenas are out for our trial date. I have no problem if you want to issue an [sic] orders -" She added: "If I know I have witnesses on his list I'm not calling or I don't have service on, I'm [sic] bring it to the attention of the Court." T8 69. Thus, the state said it would give a heads up if any of the witnesses would not testify or would not be served, and it would agree to the court entering orders to secure the attendance of the witnesses.

On February 23, 2009, the day before the trial began, Wilcox filed a "Motion for Judgment of Acquittal." R1 127. It said that the state's discovery showed that he was innocent, and said that two of the state's listed witnesses confirmed that he was in Miami at the times that other prosecution witnesses claimed he was in Broward County. R1 128. The court reviewed the motion on February 23, and ruled it was premature. T10 92d.

Despite the state's assurance that it would "bring it to the attention of the Court" if it was not calling any of the listed witnesses or did not have service on them, T8 69, the state never stated before the trial that any of the witnesses would not appear or had not been served.

B. *At trial, Wilcox again seeks to subpoena the witnesses.*

In its opening statement on February 25, the state discussed the evidence it would present. T24 312-42. It was clear

from this presentation that it would not call some of the persons sought by Wilcox. Wilcox then said in his opening that the state was aware of material evidence it was not presenting to the jury. T13 352-55. He began by referring to Johnson's friend "Louis," who was listed by the state.[8] He said Louis saw the suspect leave in the Tahoe and gave a matching description of a person out front a week before the murder. He said Louis was present when Johnson approached the suspect. T13 353-54.

Wilcox then began to read from his motion for judgment of acquittal, and the court sustained an objection by the state. T13 355. There was then a discussion in which Wilcox said his defense could be established by matters included in the state's discovery. T13 355-57.

In the ensuing discussion, he repeated his desire to subpoena persons listed by the state to avoid hearsay problems. He noted that the state had said he ambushed Johnson when he came home at 2 a.m.,[9] and said that Sabrina Gordon, a witness listed in discovery, would refute the prosecution on this point, as Johnson called her from his house at 12 o'clock. T13 362-63.

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[8] "Louis" was Louvens Jean, a witness listed by the state. T14 494 (identifying Louis as Louvens Jean); R1 30 ("Jean Louvens" listed as witness in state's discovery).

[9] The state said in opening statement that Johnson "comes home to his apartment at 2 o'clock in the morning. I believe all of the evidence will show you that waiting in that home for him already is Darious Wilcox." T13 512-13.

He said he had submitted his motion that the state's witnesses be subpoenaed "for the purpose of avoiding hearsay," and asked the court to subpoena them. T13 364-65. Prosecutor Rossman denied knowledge about the prior hearing, which occurred before he became involved in the case, and said there were a lot of witnesses that he could not find, although he did not say who. T13 365. He gave his personal opinion that Wilcox had demanded speedy trial because he knew witnesses were unavailable, but he did not say how Wilcox would know that since Rossman was not on the case when Wilcox demanded a speedy trial and Wilcox repeatedly demanded that the witnesses be subpoenaed. T13 365-66.

The discussion concluded with the prosecutor acknowledging that Wilcox was seeking subpoenas and the judge saying it was for an attorney and not for the court or the clerk to do so:

> DEFENDANT WILCOX: It was two motions in that respective date.
>
> THE COURT: I have them. Motion to demand Brady, which we dealt with and the other was to subpoena witnesses.
>
> MR. ROSSMAN: Though I was not the attorney of record at that time, I can certainly add that was well after any demand for speedy trial.
>
> That does not mean he's not entitled to ask for subpoenas to be issued.
>
> THE COURT: It is only for subpoenaing adverse witnesses from the prosecution's list. There is a list of 33. I can show you a copy of it.
>
> MR. ROSSMAN: That's fine. I take it that the Court has it.

DEFENDANT WILCOX: We had a hearing on this. I asked specifically what witnesses will be called at trial.[10]

THE COURT: That they don't have to tell you.

DEFENDANT WILCOX: That's what prompted me to submit this not to him but to Your Honor.

THE COURT: I don't subpoena witnesses.

DEFENDANT WILCOX: Clerk of the Courts, I asked to subpoena.

THE COURT: Again, that's what a lawyer would do.

T13 366-67.

Later on February 25, Wilcox sought to cross-examine the lead detective, Brian Hardy, about what he learned from the witnesses. The state objected. T14 495. There was a long discussion out of the jury's presence. Wilcox repeated that he wanted the testimony of these people. The court brushed off his concerns, saying he should telephone the witnesses and he needed a lawyer to subpoena them as it was not the role of standby counsel, the state or the court to "do this stuff":

DEFENDANT WILCOX: I have them listed as witnesses.

THE COURT: Get on the phone and call them.

DEFENDANT WILCOX: I have them listed as witnesses.

THE COURT: I understand that. That's why I told you, you should be represented by a lawyer who can do this stuff for you.

It's not the obligation of standby counsel, prosecu-

[10] Wilcox had moved that the state tell him what witnesses it intended to call. Prosecutor Vogel said this was a matter of trial strategy that she did not have to disclose. T8 80.

> tion, nor the Court.
>
> That's one of the cracks I told you that you would fall into in terms of your ability to do things, access things and be able to properly prepare.
>
> Again, this was your choice. You can ask whether or the detective, so that we're not confusing which detectives, you can ask Detective Hardy who he spoke to and what he did as a result of those conversations.

T15 500.

As Wilcox later sought to question Hardy about Louvens Jean, the prosecutor said in the jury's presence that he would not object if Jean's entire police statement was put in evidence. T14 508.

The next day (February 26), the prosecutor said Jean was not available to testify because his office had been looking for him unsuccessfully for a month - he did not say why this had not been disclosed before - and said he knew Wilcox had no means of finding him. He said he had had the court reporter transcribe Jean's recorded statement overnight so that Wilcox could review it and decide whether to put it in evidence. SR9 45. This transcript is in volume 1 of the transcripts in the record on appeal. It was not put it in evidence.

On February 27, Richaunda Curry testified on redirect by the state that Det. Hardy asked if she knew anyone with gold teeth, and she then thought Wilcox was the person as he was the only person she knew with gold teeth, and she concluded that the police were on his trail; until then she did not want to name

him to the police. T15 585-86.

Wilcox then sought to cross-examine her as to whether a different person with gold teeth was present when Johnson was making threats about the burglary of his apartment. T15 586-94.

In this regard, he wished to confront her with Louvens Jean's statement that Johnson confronted Collier and another black male with gold teeth and nappy hair and possible twists. The state objected. The prosecutor referred the court to Hardy's account of Jean's statement in the arrest affidavit. T 592.[11] The prosecutor maintained that the person with the gold teeth was Wilcox, but Wilcox maintained it was somebody else. The judge ruled that Wilcox could not use the statement to refresh Richaunda's recollection or to question her because it was not her statement. T15 593-94.

On March 3, during the defense case, Wilcox again brought up his desire to have the witnesses subpoenaed, reminding the court of his prior motion, and asked for the court's ruling. The court said: "There is no ruling. The subpoenaing of witness is your responsibility. It is not mine." Prosecutor Rossman noted that Wilcox had been able to get three of his own witnesses. The

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[11] Hardy's arrest affidavit says that Jean said "Kevin" (Johnson) approached a black male named Terrell (Collier) and another black male he described as about his height and another black male with gold teeth and nappy hair or twisties, accused them of stealing his money and drugs and said that if he found out they did it, there would be "straight bullets flying." R1 5.

court then said it was up to Wilcox to have either standby counsel or a family member get witnesses into court. T16 811-12.

C. *An error of law occurred as Wilcox was denied his basic right to summon witnesses.*

From the foregoing, Wilcox repeatedly sought subpoenas to secure the testimony of the witnesses and was thwarted every step of the way. He sought to have subpoenas issued, and the court erred as a matter of law in ruling that he needed an attorney or family member to take care of the matter.

The right to compulsory process is firmly established. In *Trafficante v. State*, 92 So. 2d 811 (Fla. 1957), this Court held that this right arises under Florida's Declaration of Rights:

> The right of an accused in a criminal case to compulsory process for attendance of witnesses on his behalf, as we have seen, stems from the express terms of our constitution. This provision was inserted because of the fundamental unfairness which results from placing a man on trial on a criminal charge and denying him the means to compel the attendance of witnesses, within the jurisdiction of the court, who are in possession of material facts which show or tend to show his innocence of the charge.

*Id.* 815.

The Supreme Court later established that this right applies to state prosecutions under the federal constitution. *See Washington v. Texas*, 388 U.S. 14 (1967); *Faretta v. California*, 422 U.S. 806, 819-20 (1975) (the accused "must be accorded 'compulsory process for obtaining witnesses in his favor.'").

At bar, the court did not follow this requirement that the

accused "be accorded 'compulsory process for obtaining witnesses in his favor.'"

Instead, the court said it was up to Wilcox's family or standby counsel to get the witnesses to court. But they had no power to subpoena the witnesses.

Under rule 3.361(1), subpoenas "may be issued by the clerk of the court or by any attorney of record in an action." When amending the rule to authorize the issuance of subpoenas by attorneys, this Court made clear that the rule applied to attorneys of record. *Amendment to Fla. Rules of Criminal Procedure 3.220(h) & 3.361*, 724 So. 2d 1162 (Fla. 1998); *Amendments to the Fla. Rules of Criminal Procedure*, 837 So. 2d 924 (Fla. 2002).

Standby counsel is not an attorney of record in the action - standby counsel serves merely "to observe the trial in order to be prepared, as well as possible, to represent defendant in the event it [becomes] necessary." *Jones v. State*, 449 So. 2d 253, 257 (Fla. 1984). In fact, the judge acknowledged at one point that it was not the role of standby counsel to "do this stuff." T14 500. The court failed to assure that Wilcox was accorded the right of compulsory process.

Wilcox's pleadings were not articulate, but he made clear the nature of his legal issue. The judge was put on notice of his claim and was provided an opportunity to address it "at an early stage of the proceedings." *See State v. T.G.*, 800 So. 2d

204, 210 (Fla. 2001). This pro se case is far from a proceeding in which counsel attempts "to gain a tactical advantage by allowing unknown errors to go undetected and then seeking a second trial if the first decision is adverse to the client." *Id.*

Both in Florida and elsewhere, the rule is well-established that pro se pleadings be liberally construed to vindicate constitutional rights. *See Ashley v. State*, 158 So. 2d 530, 531 (Fla. 2d DCA 1963) ("In processing a motion under Criminal Procedure Rule No. 1, it must always be borne in mind that such motions filed by a prisoner *pro se* should not be scrutinized for technical niceties, since a prisoner is almost always unskilled in the law and cannot be held to a high standard of pleading."); *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (pro se prisoner complaints, "'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers... .'"); *Weixel v. Bd. of Educ. of City of New York*, 287 F.3d 138, 145-46 (2d Cir. 2002) (on a motion to dismiss a pro se complaint, "'courts must construe [the complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggest[s].'"); *In re Estate of Waterman*, 798 N.W.2d 736 (Iowa Ct. App. 2011) ("Following our rule that pro se pleadings be liberally construed, we find Jingles's letter to the probate court sufficiently raised her objection to the administrators' sale of the homestead she shared with her common law husband."); *Doyal v.*

*Texas Dept. of Crim. Justice*, 276 S.W.3d 530, 533, n. 2 (Tex. App. 2008) (pro se pleadings and briefs are to be reviewed "with patience and liberality").

The state never disputed the materiality of the witnesses. It is clear from the discussion that Wilcox was not frivolously picking people at random out of the phone book or otherwise attempting to harass people with no connection to the case.

In *Trafficante*, the trial court erred in denying the defendant's sworn application for a subpoena duces tecum for the court reporter who transcribed the testimony of a state witness before the grand jury. Although Wilcox's request at bar was not sworn, it was well substantiated by the filings and the record. Further, there is no legal requirement that the application be under oath. Under *Trafficante*, the court erred in denying Wilcox his right to compulsory process for the attendance of witnesses.

At bar, the court made an error of law in denying Wilcox's right of compulsory process. It applied the wrong legal standard in rejecting his request for subpoenas - it ruled that he needed to have a lawyer or his family handle the matter, whereas in fact only the clerk or counsel of record can issue a subpoena.

Where a court bases its ruling on an error of law, the abuse of discretion standard does not apply - there is no discretion to make an error of law. "[A]ppellate courts must recognize the distinction between an incorrect application of an ex-

isting rule of law and an abuse of discretion. Where a trial judge fails to apply the correct legal rule … the action is erroneous as a matter of law. This is not an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980). *See also Johnson v. State*, 44 So. 3d 51, 65 (Fla. 2010) ("Notably, this ruling was not based on any discrete factual findings to which this Court must defer. Because the ruling consists of the court's application of law to facts, it is subject to de novo review."). Under any standard, error occurred here.

D. *In view of the wholesale violation of Wilcox's right to subpoena witnesses, a new trial should be ordered.*

Here there was a wholesale violation of Wilcox's right to subpoena witnesses to testify and contradict the state's case. The state will not be able to prove that the error was harmless beyond a reasonable doubt under *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

Wilcox said Sabrina Gordon would refute the state's time line. T13 362-63. The state had said in opening statement that Johnson "comes home to his apartment at 2 o'clock in the morning. I believe all of the evidence will show you that waiting in that home for him already is Darious Wilcox." T13 312-13. Wilcox maintained that Sabrina Gordon would have put Johnson at home at midnight. Further, it appears that other uncalled witnesses would have refuted the state's 2 o'clock timeline: the state had

Det. Hardy testify at penalty that persons at the Banana Boat said Johnson went home at 4 a.m. T20 1145-46.[12]

Wilcox also said that two of the listed witnesses could establish an alibi. R1 128. The state did not dispute that this was true, and such testimony would have been vital to establish Wilcox's alibi and to contradict the state's case.

Wilcox said the presence of the uncalled witnesses were necessary to overcome hearsay issues, issues which became a reality at trial as the state made repeated hearsay objections.

One need look no further than the issue concerning Louvens Jean to see the prejudice to Wilcox.

The state proposed that Wilcox could put Louvens Jean's belatedly provided statement into evidence. This would not have helped Wilcox. Although Det. Hardy understood that Jean identified Terrell Collier as one of the men threatened with being shot by Johnson, the transcript of the statement is less clear. In the transcript, Jean said Johnson accused "Fat Boy" of the January burglary in which his marijuana was stolen and pointed to a footprint in his house as being Fat Boy's. T1 19-20. He said Fat Boy lived next door to Johnson, although he came from

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[12] Hardy's penalty phase testimony also highlighted the prejudice arising from the state's failure to provide a transcript of Richaunda Curry's police statements. Hardy testified at penalty that Richaunda Curry said she heard Johnson's motorcycle arrive at his apartment at 4 a.m. T20 1145-46. This statement would have refuted both the state's 2 o'clock timeline and Curry's testimony that she was asleep at that time.

Dade. T1 20. Johnson said he knew Fat Boy's footprint. T1 43-44. Jean was shown a picture that he identified as Fat Boy. T1 43. So Hardy would have known from the photo identification that Fat Boy was Terrell Collier, but the identification was not clear from the transcript itself.

Wilcox needed Louvens Jean to testify that Fat Boy was Collier. This testimony was important to the defense. It contradicted Collier, the state's most important witness. Collier said he knew about Johnson's threats only through his sister, T15 656-57, and did not say he was ever personally threatened by Johnson. Jean also contradicted Richaunda Curry, who said that Johnson addressed the threat to Willie Ward and his friend Lump. SR10 254.

Wilcox also contended that he was not the person with gold teeth mentioned by Jean as being with "Fat Boy." Jean said the man with gold teeth had a "nappy ass fro. A little more big but nappy," as though he had started twisting it. T1 42. But Wilcox did not have twists in his hair. Collier testified he never saw Wilcox with braids in his hair or twists in his hair, and never saw Wilcox without a cap. T15 701-702.

It was necessary for the defense to establish that Wilcox was not this person with the gold teeth, something Wilcox could show only by asking Jean in court if Wilcox was that person.

Wilcox was denied his state and federal constitutional

right to compulsory process. A new trial should be ordered.

V. THE COURT ERRED IN NOT ALLOWING WILCOX TO IMPEACH RICHAUNDA CURRY WITH A PRIOR INCONSISTENT STATEMENT SET OUT IN THE ARREST AFFIDAVIT.

Richaunda Curry testified on direct examination that Johnson accused persons from her apartment with burglarizing his apartment in January, a week before the murder, and that later that day he said he did not think they were the burglars. SR10 254-58. On cross, Wilcox asked Richaunda whether she had denied knowledge of the burglary in her February 3 statement to Det. Hardy. She replied that she "always told him that Dread was robbed. I told him that, but I just never told him who it was. I just always told him that Dread was robbed a week before that; and I believe whoever robbed him, killed him." SR10 282-83.

Wilcox then sought to confront her with her statement to Hardy as recounted in Hardy's arrest affidavit. Hardy stated in the arrest affidavit that he spoke with Richaunda and Shaquira Curry, Willie Ward and Terrell Collier on February 3 and "[a]ll four ... denied any knowledge or involvement with the burglary of their neighbor's residence a week prior to the murder." R1 4.

The state objected that the affidavit "is not her statement, It is not, it is a report by somebody else that he wants." SR10 282-83. At the bench, it said Wilcox was trying "to take the arrest affidavit, paragraph from that affidavit, which is the sworn, the arrest affidavit offered by Hardy or Celeth, and

try to use something they wrote about their belief of something as to what she said." SR10 283. It said that on the DVD of her statement - which Wilcox had not been able to view - Richaunda told about the burglary. SR10 283-84. Wilcox pointed out that Hardy's affidavit said that all four (including Richaunda) had denied knowledge of the burglary, and he was never provided a transcript of the statement. SR10 285. The court acknowledged that Wilcox was not permitted to have access to the DVD, and said - inexplicably, given its repeated denials of Wilcox's request - that he had recourse to a motion to compel. SR10 285. The court then sustained the state's objection:

> Q: (By Defendant Wilcox) Picking up on the last question, you and Terrell did give a sworn taped statement to Detective Brian Hardy on 2/3/08 at approximately 7:00 p.m., reference to not having knowledge -
>
> MR. ROSSMAN: Asked and answered to whether they gave a statement.
>
> As to what they said, anything other than her, Terrell, or anybody else said is hearsay.
>
> THE COURT: Sustained.

SR10 286.

The court erred. Wilcox had every right to show Richaunda the affidavit to see if she would admit or deny the truth of her contradictory statement as set out in the arrest affidavit. *See MBL Life Assur. Corp. v. Suarez*, 768 So. 2d 1129, 1134 (Fla. 3d DCA 2000) (error not to allow impeachment of witness to boat accident with "witness summary" written by Coast Guard officer).

The right of cross-examination is the foundation of the Confrontation Clauses of the state and federal constitutions. This Court long ago recognized the right to full cross-examination in capital cases:

> ... a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree. . . . Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error.

*Coco v. State*, 62 So. 2d 892, 894-95 (Fla. 1953) (quoted and followed in *Coxwell v. State*, 361 So. 2d 148, 151 (Fla. 1978)).

The ruling at bar violates the Due Process, Jury, Confrontation and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const. A new trial should be ordered.

> VI. THE COURT ERRED IN INSTRUCTING THE JURY ON, AND IN FINDING, THE AGGRAVATOR THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST.

The state relied on the aggravating circumstance that the murder was committed to avoid a lawful arrest. It argued to the jury that this circumstance applied if Wilcox committed the murder to avoid lawful arrest for the January burglary:

> … . The last aggravator is whether or not this homicide occurred to eliminate Nemoy Johnson as a witness, which would then help Darious Wilcox possibly avoid arrest.
>
> When the victim of such, of this type of aggravator is not a police officer - if it is a police officer it is presumed. But the evidence is Nemoy Johnson is not a police officer. So for you to find this aggravator, you must believe the dominant motive, the main reason Nemoy Johnson is killed is to eliminate him as a witness, which then would assist Darious Wilcox from ever being arrested **on the prior burglary charge.**
>
> And **if that's not proven to you beyond a reasonable doubt, then that aggravator doesn't exist.**

T21 1227 (e.s.).

This was the only theory presented to the jury, and it has no support in the evidence.

There was no evidence of a "prior burglary charge," and no evidence that Johnson ever told the authorities about the supposed burglary or ever threatened any prosecution for it. More to the point, there was no evidence that Wilcox thought that Johnson would ever bring such charges. Hence, there is no evidence that Wilcox murdered Johnson to avoid a lawful arrest.

The court relied on *Jennings v. State*, 718 So. 2d 144, 150-51 (Fla. 1998) in finding the circumstance. R5 864. But there the victims all knew Jennings, he did not use a mask, and he had previously said that if he committed a robbery he would leave no witnesses. Pursuant to this prior plan, he killed all three witnesses. At bar, by contrast: there was no evidence Johnson could or would identify Wilcox, Wilcox wore a mask, he made no state-

ment that he would leave no witnesses, and he did leave witnesses. The only fact in common with *Jennings* was that the victim was tied up, but that cannot be enough. Finally, as already noted, there was no evidence that Wilcox thought Johnson was going to call in the police either about the January burglary or about the February 3 burglary.

The plain statutory language is directed at someone who kills while eluding a lawful arrest or escaping from custody:

> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

§ 921.141(5)(e), Fla. Stat.

It most obviously applies to the murder of a guard or an officer trying to make an arrest. Nonetheless, it has been stretched further so far as the facts strongly show that the defendant considered the murder necessary to avoid prosecution. *See, e.g., Swafford v. State*, 533 So. 2d 270, 273 (Fla. 1988) (defendant said he would get a girl and do anything he wanted with her and he would not "get caught" because he would "shoot her" so that "there won't be any witnesses"); *Consalvo v. State*, 697 So. 2d 805 (Fla. 1996) (defendant murdered victim after being told by police that she was going to press charges against him). We do not have such facts here.

The statute must be read strictly in favor of the accused.

The rule of strict construction is a basic element of our

common law heritage. Blackstone wrote in 1765: "Penal statutes must be construed strictly." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Introduction, § 3 ("Of the Laws of England").

More than two centuries ago, Chief Justice Marshall set out the purpose of this ancient rule:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department.

*United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

The rule has been part of Florida law from the beginning. *See Opinion of Justices*, 12 Fla. 651, 653 (1868) ("The provision referred to is obviously penal in its character, and judicial tribunals have ever been strict constructionists in dealing with enactments of that class, whether in the fundamental law or in ordinary statutes."); *Savage v. State*, 18 Fla. 909, 924 (1882) ("Penal statutes are to be strictly construed.").

The Legislature has codified the rule in section 775.021(1), Florida Statutes. It is secured by the Due Process Clauses of the state and federal constitutions. *See Dunn v. United States*, 442 U.S. 100, 112 (1979), and *Borjas v. State*, 790 So. 2d 1114, 1115 (Fla. 4th DCA 2001).

The rule of strict construction applies to aggravating circumstances used in capital cases. *Trotter v. State*, 576 So. 2d

691, 694 (Fla. 1990) (applying rule of strict construction to sentence of imprisonment circumstance). The Cruel and Unusual Punishment Clauses of the state and federal constitutions require strict construction of aggravating circumstances. *See Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action").

The state is free to write its criminal statutes, including sentencing provisions, as it wishes within constitutional confines, but it may not through litigation expand those enactments produced by the deliberative process of legislation. The statutory language is paramount: to expand it "would [be to] treat case law interpreting a statute as more authoritative than the statute itself - a proposition that is not supported by our precedent." *Nader v. Florida Dept. of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 726 (Fla. 2012).

At bar, the state's unsubstantiated theory would stretch the circumstance past the breaking point, contrary to the evidence and the common law, statutory and constitutional requirement of strict construction of aggravating circumstances, and violate the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amends. V, VI,

VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

The vote for death was 7-5. It cannot be said with any confidence that not even one of the seven jurors voting for death might have changed his or her vote without this circumstance. Resentencing should be ordered before a new jury.

VII. THE COURT ERRED IN INSTRUCTING THE JURY ON, AND IN FINDING, THE AGGRAVATOR THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), Rogers and Smith planned to commit a robbery. They rented a car in Orlando and acquired two semi-automatic handguns. They drove to St. Augustine and cased an A & P and a Winn-Dixie before deciding to rob the Winn-Dixie. They parked at an adjoining motel, and put on gloves and masks. They then entered the store and began the robbery. Their attempt failed because the cashier could not open her drawer, and they fled. Rogers then stopped his flight and shot a man three times, killing him. He later explained that he had seen the man slip out during the robbery, and he shot him because he "was playing hero." *Id.* at 529.

In sentencing Rogers to death, the trial court found that the murder was cold, calculated and premeditated without a pretense of moral or legal justification. This Court reversed that finding because there was "an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery." *Id.* at 533.

In *Power v. State*, 605 So. 2d 856 (Fla. 1992), Power armed himself with a gun, went to the home of a 12 year-old girl who was waiting for a ride to school, waited while the terrified girl had her ride leave without her, abducted her, beat her, anally and vaginally assaulted her, hog-tied and double gagged her, and then stabbed her and let her bleed to death over 10 to 20 minutes, "casually" walked away eating her school lunch, and, when he encountered an armed deputy, robbed the deputy of his weapon and briefly spoke with the deputy before fleeing. *Id.* at 858-60, 863-64. He left no fingerprints and had gloves when arrested several days later. *Id.* at 859-60. The murder occurred on October 6, *id.* at 858, and the judge found that he had announced the intent to commit such a murder two weeks before, on September 23. *Id.* at 864. This Court struck CCP based on *Rogers* (*id.*):

> Power also contends that the trial court erred in finding that the murder was committed in a cold, calculated, and premeditated manner. The trial court found:
>
> > It is clear from the evidence in this case and the testimony of the victims of the defendant's prior sexual assaults that the defendant had thought out, designed, prepared or adapted by forethought his method of attacking females....
> >
> > ....
> >
> > In this case he followed his previously designed method or plan of attack. He subdued Angeli Bare with the threat of violence and the use of a gun.... While she was helpless, without any pretense of moral or legal justification, he stabbed her in the neck, causing her to bleed to death in the manner he had previously thought out and described to his vic-

> tim of September 23, 1987....
>
> The coldness with which this was accomplished was demonstrated by the defendant eating the victim's sandwich she had prepared for lunch as he walked away from the scene of this brutal murder and his lack of emotion or nervousness when confronting Deputy Welty.

> To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated, and premeditated manner, the evidence must show that the defendant had a "careful plan or prearranged design to kill." *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). None of the facts recited above establish that Power had a prearranged plan to kill Angeli Bare. Rather, the evidence establishes, at best, a plan to rape. Furthermore, even if it were permissible for a judge to rely on the circumstances of previous crimes to support the finding of an aggravating factor, such evidence, standing alone, can never establish, beyond a reasonable doubt, that the murder at issue was so aggravated. In any case, it is significant that none of the previous crimes committed by Power resulted in the death of the victim. It is thus impossible to infer that Power had a premeditated design to kill the victim in this case. Lastly, the eating of the victim's sandwich, an event that occurred *after* the commission of the murder, cannot sustain the necessary finding of heightened premeditation before the murder. Consequently, we hold that the trial court erred in finding this aggravating circumstance.

In *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994) (*Wyatt I*), Wyatt and another escaped convict armed themselves with guns and entered a pizzeria. Wyatt had the manager (William Edwards) open the safe. William's wife Frances and another employee (Bornoosh) were locked in the bathroom. Wyatt took the money, then raped Frances, then shot all three. *Id.* at 1338. They "were subjected to at least twenty minutes of abuse prior to their deaths." *Id.*

at 1340. After seeing his wife raped, William

> begged for his life and stated that he and Frances, his wife, had a two-year-old daughter at home. Wyatt shot him in the chest. Upon seeing her husband shot, Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized William Edwards was still alive he went back and shot him in the head.

*Id.* at 1340-41. This Court struck CCP (*id.*):

> Wyatt also claims that the trial court erred in finding the murder to have been committed in a cold, calculated, and premeditated manner. On this point, we tend to agree. Proof of the cold, calculated, and premeditated aggravating factor requires evidence of calculation prior to the murder, *i.e.*, a careful plan or prearranged design to kill. *Valdes v. State*, 626 So. 2d 1316 (Fla. 1993), *cert. denied*, 512 U.S. 1227, 114 S.Ct. 2725, 129 L.Ed.2d 849 (1994); *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993), *cert. denied*, 510 U.S. 1170, 114 S.Ct. 1206, 127 L.Ed.2d 553 (1994); *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The evidence in the record is insufficient to sustain the level of premeditation required for the finding of this circumstance.

In *Wyatt v. State*, 641 So. 2d 355 (Fla. 1994) (*Wyatt II*), after committing the crimes in *Wyatt I* as part of a "crime spree throughout Florida," *id.* at 357, Wyatt abducted a woman from a bar near Tampa and drove her across the state to Indian River County, where he shot her in the head and left her body in a ditch. *Id.* at 357-58. In his own words, he killed her "to see her die." *Id.* at 359. This Court struck CCP for reasons similar

to those in *Wyatt I*. *Wyatt II* at 359.

In *Thompson v. State*, 619 So. 2d 261 (Fla. 1993), Thompson and Surace deliberately and slowly tortured and beat a girl to death at a motel. This Court quoted the facts from a prior opinion in the case, which showed that the men tortured the victim for an extended period, then took her to a phone booth and made her call her mother and ask for money, and then took her back to the motel room and beat her to death. *Id.* at 263.[13] This Court struck CCP because the evidence did not establish a planned or prearranged intent to kill before the commencement of the conduct that led to the victim's death:

> With regard to his next contention, we agree with Thompson and hold that the record does not support a finding that the homicide was committed in a cold, calculated, and premeditated manner. The evidence in this case does not establish that the defendant planned or prearranged to commit the murder **prior to the commencement of the conduct that led to the death of the victim**. *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988). We find that the improper use of the "cold, calculated, and premeditated" aggravating factor was harmless error under the circumstances of this case.

*Id.* at 266.

In *Herzog v. State*, 439 So. 2d 1372 (Fla. 1983), the defen-

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[13] The prior opinion also showed that Thompson formed the intent to kill early in the ordeal, and that Thompson, rather than Surace, was responsible for the entire incident: at the time of the girl's initial beating, Thompson left the bedroom and said he was so angry he "felt like killing Sally (the victim)," and he testified at Surace's trial that he himself was responsible for the entire incident. *Thompson v. State*, 389 So. 2d 197, 200 (Fla. 1980).

dant had the victim take Quaaludes. When she was unconscious, Herzog and a friend tried to smother her with a pillow. When that failed, they took her to another room where they smothered and strangled her. *Id.* at 1374-75. This Court struck CCP because the record did not show heightened premeditation:

> The last aggravating circumstance found by the trial court, section 921.141(5)(i), Florida Statutes (1981), "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." [Cit.] The trial court found the facts supporting this factor as follows: "[T]he killing was the consummation of prior threats and arguments based on defendant's belief that the victim had previously taken some of his money or drugs." This finding speaks to the issue of premeditation, however, it is not sufficient to establish the requirement that the murder be "cold, calculated ... and without any pretense of moral or legal justification." *Combs v. State,* 403 So. 2d at 421; *see also Mann v. State,* 420 So. 2d 578, 580-81 (Fla. 1982) (10-year-old girl abducted, skull fractured, cut and stabbed several times, not sufficient to meet section (5)(i) requirement).

*Id.* at 1380.

In view of the foregoing cases, the trial court erred at bar in applying the CCP circumstance.

The case for a prearranged intent to kill during the burglary was at best circumstantial and ambiguous. The state made much of Collier's testimony that Wilcox said he shot the man "for our safety because he didn't know how would the man react," he didn't know how the man would react to how he had been robbed or with him knowing they were related. T15 673. Collier inferred

that this meant Wilcox thought he was protecting him by taking away any threat from Johnson because of the rip off. T15 673.

This statement was ambiguous as to whether the murder was the result of a plan arising from the first burglary or whether it was a spontaneous reaction at the end of the second burglary.

Collier's account does not show greater calculation than in the foregoing cases. It does not prove a prearranged design to kill "prior to the commencement of the conduct that led to the death of the victim," or heightened premeditation.

If there was a prearranged intent to kill, Hankerson, McMorris and Arnold would not have been allowed into the apartment in the first place.

Other facts point away from a finding of this aggravator.

Wearing a mask shows the absence of an intent to kill. *See Rogers*; *cf. Barwick v. State*, 660 So. 2d 685 (Fla. 1995) (rejecting circumstance where masked defendant stalked and murdered woman), *receded from on other grounds Topps v. State*, 865 So. 2d 1253 (Fla. 2004).

Tying Johnson up points away from a prearranged intent to kill. *See Geralds v. State*, 601 So. 2d 1157, 1163-64 (Fla. 1992) ("the fact that the victim was bound first rather than immediately killed shows that the homicide was not planned").

Speculation is not proof. Regardless whether the state's evidence is consistent with the circumstance, it is not incon-

sistent with the lack of a calculated design to kill before the the conduct that led to the death of the victim began. It is not known whether the murder occurred as a spontaneous act on some sudden provocation at the end of the of the burglary.

The trial court rested its finding of this circumstance on *McCray v. State*, 416 So. 2d 804 (Fla. 1982), *Gordon v. State*, 704 So. 2d 107 (Fla. 1997) and *Farina v. State*, 801 So. 2d 44 (Fla. 2001). R5 864.

In *McCray*, this Court **struck** CCP on these facts:

> The record reflects the following facts. Shortly before 7:00 p. m. on December 17, 1980, appellant McCray, Willie Footman, Jerry Davis, and Sammy Walker drove to the store managed by the victim, Bernard Fetch. Appellant and Davis entered the store and asked to see some guns. The two left the store soon after Fetch told them that he had already put the guns away for the night. Davis then drove the men down a back road behind the store's rear parking lot and stopped the car. McCray and Footman left the car and walked back to the victim's van, which was parked in the rear parking lot. Appellant broke a window of the van and removed several boxes of guns, took them to the edge of the woods beside the road, and returned to Davis's car.
>
> Davis drove the group back into the rear parking lot where Fetch, preparing to leave for the night, sat in his van talking with Thomas Cartwright. Sammy Walker testified that McCray jumped from the car, saying that he didn't want to leave empty-handed. Cartwright testified that a man he later identified as McCray approached the van, yelled, "This is for you, mother fucker," and shot Fetch three times in the abdomen. According to Cartwright, Fetch fired back at McCray after he was shot. Walker testified, however, that Fetch fired his weapon before appellant "fired back" at him. No money was taken from Fetch.

*Id.* at 805.

At bar, the state did not prove more of a prearranged intent to kill before the crime began than in *McCray*.

The trial court also cited *Gordon*. But *Gordon* was a murder-for-hire case. *Id.* 704 So. 2d at 108.

Finally, in *Farina*, Farina and his brother robbed a restaurant where they knew the workers, did not try to conceal themselves, and discussed the shooting. *Id.* 801 So. 2d at 54.

The use of this circumstance at bar, contrary to the common law, statutory and constitutional requirement of strict construction of capital aggravating circumstances violates the Due Process, Jury and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const. The death sentence must be reversed.

VIII. THE COURT ERRED IN GIVING LITTLE WEIGHT TO SIGNIFICANT, UNCONTRADICTED MITIGATION.

The weighing process must be detailed in the written sentencing order so that this Court can make a meaningful review:

> Once established, the mitigator is weighed against any aggravating circumstance. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

*Ferrell v. State*, 653 So. 2d 367, 371 (Fla. 1995).

The review of discretion in capital sentencing is at least entitled to the formality requirements made in other areas of the law (such as civil divorce cases).[14] For example, orders granting a new trial must articulate reasons so that appellate courts can fulfill their duty of reviewing for an abuse of discretion. *Thompson v. Williams*, 253 So. 2d 897 (Fla. 3d DCA 1971); *White v. Martinez*, 359 So. 2d 7 (Fla. 3d DCA 1978).

At bar, the court made factual findings as to the mitigating circumstances detailed by Dr. Fichera, but arbitrarily gave them little weight without explanation. This violates the requirement of individualized sentencing in death penalty cases.

In a line of cases starting with *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court has held that the sentencer may not refuse to consider any relevant mitigation offered by a defendant. While *Lockett* is clearly violated by the explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved implicitly. Evidence of a troubled childhood must be considered even without "any link or nexus" to the murder. *Smith v. Texas*, 543 U.S. 37, 45 (2004).

By refusing to give Dr. Fichera's uncontroverted, mitigating evidence any real weight, the sentencing order has sent this

[14] Exercise of discretion requires some reasonable findings upon which appellate review can be based. *Kennedy v. Kennedy*, 622 So. 2d 1033 (Fla. 5th DCA 1993).

state's capital jurisprudence back to the unconstitutional days prior to *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Before *Hitchcock*, Florida had a "mere presentation" standard. Death sentences were upheld if the judge let the defendant present and argue "nonstatutory" mitigation. *Hitchcock v. State*, 432 So. 2d 42, 44 (Fla. 1983). The Supreme Court rejected this standard; it held the sentencer must not refuse to weigh the mitigation presented. *Hitchcock v. Dugger*, supra. Since then, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where consideration of nonstatutory mitigation was restricted. *E.g., Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987). Arbitrarily attaching no **real** weight to uncontested mitigation is a de facto return to the "mere presentation" rule condemned in *Hitchcock v. Dugger*.

To uphold the judge's action of summarily sweeping aside Wilcox's background as of "little weight" without explanation would say that all the work of parents and teachers to give children a nurturing wholesome upbringing is a waste of time, of no consequence, for it has little to do with future lives.

By giving "little weight" to valid, substantial mitigation without explanation, a judge is spared the hard but **vital** job of full consideration of mitigation under the constitutional requirement of individualized capital sentencing under *Hitchcock v. Dugger* and *Lockett*. The failure to explain the arbitrary as-

sessment of little weight defeats Florida's constitutional requirement of full appellate review in capital cases. Where, as here, the court has given no significant weight to valid, important mitigating evidence, affirmance of the death sentence calls into question the constitutionality of Florida's death penalty scheme, and Wilcox was denied due process and a fair reliable sentencing. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const. The death sentence must be reversed.

IX. THE DEATH SENTENCE SHOULD BE VACATED BECAUSE IT IS BASED ON A 7-5 DEATH RECOMMENDTION. A 7-5 DEATH RECOMMENDATION IS CONSTITUTIONALLY UNRELIABLE.

A person convicted of first degree murder may be sentenced to death under section 921.041, Florida Statutes, after a finding of "sufficient aggravating circumstances" and insufficient mitigating circumstances to outweigh them. "[I]n Florida, the judge and jury are considered cosentencers." *Snelgrove v. State*, 921 So. 2d 560, 571 (Fla. 2005). *See also Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992) ("Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.").

Here, the jury rendered a 7-5 death verdict. From this we know that seven jurors - a bare majority - found sufficient aggravating circumstances to support a death sentence. There is no

indication that any other juror so found.

A 7-5 jury determination is constitutionally unreliable.

In *Johnson v. Louisiana*, 406 U.S. 356 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court upheld non-capital guilty verdicts rendered by nine or more members of twelve-member juries. Justice White wrote the opinion of the Court in both cases. *Johnson* held that a 9-3 verdict did not violate the Due Process Clause. Justice White's opinion was joined by four Justices, and four Justices dissented. *Apodaca* held that 11-1 and 10-2 verdicts did not violate the Jury Clause as applied to the states. Justice White's opinion was joined by three Justices; Justice Powell concurred; four Justices dissented.

Justice Blackmun - the fifth vote in both cases - wrote a concurrence as to both cases in which he wrote:

> I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice WHITE points out, 406 U.S., at 362, 'a substantial majority of the jury' are to be convinced. That is all that is before us in each of these cases.

406 U. S. 365. In this regard, he was referring to the following from Justice White's opinion in *Johnson*:

> Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors, instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors - a substantial majority of the jury - were convinced by the evidence. In our view, disagreement of three jurors does not alone establish

> reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. … .

*Johnson*, 406 U.S. at 362.

Capital cases require a higher standard of reliability and more rigorous application of the Bill of Rights than non-capital cases like *Johnson* and *Apodaca*. *See Powell v. Alabama*, 287 U.S. 45 (1932) (holding that capital defendants have right to appointed counsel long before that right was extended to non-capital cases); *Gardner v. Florida*, 430 U.S. 349 (1977) (requiring disclosure of presentence report in capital cases); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (heightened standards are necessary because "the imposition of death by public authority is so profoundly different from all other penalties").

At bar, we do not have a "substantial majority," we have a bare majority. This bare majority does not meet the minimum requirements of *Johnson* and *Apodaca*, and is constitutionally unreliable. Wilcox's death sentence, predicated on a bare majority death verdict, violates the Due Process, Jury and Due Process Clauses of the state and federal constitutions.

## X. FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's death penalty statute violates the Sixth and Fourteenth Amendments under *Ring v. Arizona*, 536 U.S. 584 (2002), since it does not require a jury determination of facts

required for death qualification.

In fact, the Attorney General has conceded in the Eleventh Circuit that Florida must comply with *Ring*. *See Evans v. Sec'y, Florida Dept. of Corr.*, 699 F.3d 1249, 1255-56 (11th Cir. 2012).

Appellant's death sentence is not constitutionally reliable because there is no unanimous jury finding of "sufficient aggravating circumstances" to support the sentence as required by Florida law. Appellant acknowledges that this Court has rejected such arguments. See, e.g., *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002). Nonetheless, he contends that the statute operates in an unconstitutional manner and the death sentence must be reversed at bar.

## CONCLUSION

The convictions and sentences should be reversed.

Respectfully submitted,

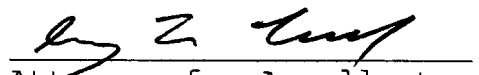
CAROL STAFFORD HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit

GARY LEE CALDWELL
Florida Bar No. 256919
Assistant Public Defender

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on 28 December 2012 a copy hereof has been furnished by email to this Court, and to Lisa Marie Lerner, Esq., Assistant Attorney General, Counsel for Appellee, by email at: CrimAppWPB@MyFloridaLegal.com and by US Mail at: Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida, 33401.



Attorney for Appellant

CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Courier New 12-point font in compliance with Florida Appellate Rule 9.210(a)(2).

Attorney for Appellant