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IN THE SUPREME COURT OF FLORIDA

ROBERT P. MCCLOUD

Appellant,

CASE NO.: SC12-2103

v.

STATE OF FLORIDA

Appellee.

REPLY BRIEF

On Appeal from the Circuit Court
of the Tenth Judicial Circuit
Polk County, Florida

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I. THE DEATH SENTENCE IS PROPORTIONALLY IMPERMISSIBLE

> ***We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of the death sentence in this case is clearly not equal justice under the law*** **….it is our opinion that the imposition of the death penalty under the facts of this case would be an unconstitutional application under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).** *Slater v. State*, 316 So. 2d 539, 542-543 (Fla. 1975).

STANDARD OF REVIEW

Claims that are composed of constitutional issues, including claims surrounding proportionality of sentence, uniformity in death penalty proceedings, and disparate treatment of defendants involve mixed questions of law and fact, and are reviewed de novo. *Taylor v. State*, 937 So. 2d 590, 598 (Fla. 2006); *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001). Usually, a trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence. *Puccio v. State*, 701 So. 2d 858, 860 (Fla. 1997)

ARGUMENT

The Answer Brief urges this Court to adopt a *per se* rule that if that codefendant enters into a deal with the State, then this Court is precluded, as a matter of law, from considering the resulting sentence in a proportionality analysis no matter how much more culpable that codefendant is from the one who received

the death penalty. To adopt such a rule would unconstitutionally limit the authority of this Court and remove judicial oversight to ensure that death sentences are proportionate based on totality of the circumstances of each individual case.

As Justice Anstead stated in *Shere v. Moore,* 830 So. 2d 56, 64-67 (Fla. 2002):

> This Court has acknowledged the principle that the relative culpability and punishment of a codefendant is an important factor to be considered in considering a capital defendant's sentence. *See, e.g., McDonald v. State*, 743 So. 2d 501 (Fla. 1999); *Fernandez v. State*, 730 So. 2d 277 (Fla. 1999); *Jennings v. State*, 718 So. 2d 144 (Fla. 1998); *Howell v. State*, 707 So. 2d 674 (Fla. 1998); *Gordon v. State*, 704 So. 2d 107 (Fla. 1997); *Puccio v. State*, 701 So. 2d 858 (Fla. 1997); *Raleigh v. State*, 705 So. 2d 1324 (Fla. 1997); Cole v. State, 701 So. 2d 845 (Fla. 1997); *Slater v. State*, 316 So. 2d 539 (Fla. 1975). In fact, there are at least seventy published opinions in which this Court has referred to this sentencing principle. Invariably, these cases fall into two basic categories in which the Court has either (1) reversed the death sentence of the defendant or granted resentencing because a codefendant who received the lesser sentence was in fact equally or more culpable; or (2) affirmed the death sentence of the defendant or denied relief because the codefendant was found less culpable.
>
> This Court has applied this same analysis in case after case. *See, e.g., Fernandez*, 730 So. 2d at 283 ("The record reveals and we find that appellant's degree of participation in the crime was similar to that of codefendant Abreu, a getaway driver who received a life sentence after a plea negotiation."); *Puccio*, 701 So. 2d at 863) ("We find that Puccio's sentence of death is disproportionate when compared to the sentences of the other equally culpable participants in this crime."); *Hazen*,700 So. 2d at 1211-12 (holding that defendant nontriggerman accomplice to murder could not be sentenced to death when more culpable nontriggerman accomplice received sentence of life imprisonment.); *Curtis*, 685 So. 2d at 1237 (reversing death sentence where "the actual killer was sentenced to life"); *Slater*, 316 So. 2d at

> 542 (reversing death sentence where "the court that tried the appellant also permitted the 'triggerman' . . . to enter a plea of nolo contendere").

The entire foundation of all death penalty laws in the United States, as determined by the overwhelming body of United States and Florida Supreme Court case law since *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976) is based on the premise the death penalty must not be applied irrationally, capriciously, arbitrarily, or unequally. The law requires a case by case, fact-based determination aimed at narrowing the class of murder defendants whom are death-eligible based on individualized comparative factual determinations based on rational and codified criteria to limit death to those cases with facts that show the cases are the most aggravated and least mitigated. That must be done by means of an objective consideration at trial and on appeal of individual facts bearing on the comparative blameworthiness of the defendant sentenced to death to insure the worst cases are winnowed and they are reserved for application of death eligibility. To adopt the rule proposed by the State would be an arbitrary and capricious application of the death penalty, which is precisely what *fifty* years of precedent was designed to prevent, especially based on the facts of the instant case.

The practical application of this rule would similarly yield absurd results. If this Court uniformly adopted this rule without considering the totality of the circumstances of each individual case, then a person who committed multiple

murders could receive a term of years or Life sentences while a non-shooter could get death merely because of a deal with the State. Furthermore, the determination of who lives and who dies stops being a question of justice and proportionality, and instead becomes a race to the State for a plea agreement. The first one to make a deal lives, the last one dies regardless of that codefendant's culpability.

A. Critical Facts for Proportionality Review

Appellant was not the triggerman, he was not the main instigator of the robbery, and he did not commit the robbery with the intent that someone would be killed. (V. 13, R. 2194-2199), (V. 15, R. 2531, 2534). For their assistance, Dre received fifteen years in prison, despite being on federal probation, and, an identified shooter and the major planner of the robbery, Bryson, received ten years in prison. (V. 15, R. 2518). According to Bryson, *Dre admitted to shooting one of the victims*. (V. 28, T. 2224)(V. 15, R. 2518). Finger agreed to cooperate, but after two hours of trial testimony, he admitted that everything he said was a lie. (V. 15, R. 2518). After Appellant's trial, the State moved to set aside Finger's plea, but later offered him a sentence of fifteen years which he accepted. (SR. 1-7). He was not charged with perjury, a second-degree felony. Florida Statutes § 837.02(2). The State waived the 10-20-Life minimum mandatory sentences for all three of these codefendants.

The evidence revealed Bryson was the main instigator and major planner of

the robbery. Bryson and Mate previously robbed the victim so they knew where the drugs and money were (or so they thought), and Bryson was identified as the man who shot Fang in the leg (a 25 to Life minimum mandatory that was waived). (V. 33, T. 3092-3093), (V. 33, T. 3094, 3097). Appellant had nothing to do with the previous robbery. (V. 25, T. 1704). During the previous robbery, Bryson and Mate advised the surviving victim that they would be back. (V. 33, T. 3091). There were also a significant number of phone calls from Bryson's cell phone and Finger's cell phone during the time of the robbery. (V. 30, T. 2675). (V. 33, T. 3091) (V. 25, T. 1752). Dre stated that Bryson set the entire robbery up and advised individuals in the house where to look for money and drugs. (V. 25, T. 1745), (V. 26, T. 1833, 1837-1838). The victim was unable to identify Appellant entering his residence much less torturing or shooting him. (V. 33, T. 3095). As the trial court found, there was no evidence presented that there was any plan to harm or kill anyone, and Appellant was not the main instigator of the robbery. (V. 15, R. 2525, 2530-2531). The prosecution's witnesses all testified that the intent was to rob Fang.

There were indisputably two guns used in these murders and attempted murder, a .45 caliber and a .38 caliber. (V. 37, 3770). All of the crime participants were armed. (V. 25, T. 1704). All witnesses placed the .45 in the hands of Major Griffin (Mate). Mate stated that he was going to rob and kill Wilkins Merilan i.e.

"Fang" in the car on the way to the robbery. (V. 37, 3770). .45 caliber casings and projectiles were recovered from the murder scene. (V. 22, T. 1163-1164), (V. 37, 3770). Mate had a knife and he is the one who beat, cut, and poured boiling water on "Fang to get him to divulge where his money and drugs were hidden." (V. 26, T. 1801-1802). Mate received no deal and still faces trial soon, but he was found by the trial court to be incompetent and to be retarded and thus not eligible for the death penalty.

Tamiqua Taylor and Mr. Freeman were shot to death with .38 caliber bullets. The .38 caliber found on Appellant at the time of his arrest was conclusively proven *not* to be the murder weapon. (V. 30, T. 2614-2615, 2633). Fang testified that Bryson was in the house, had a gun and he believes was one who shot at him. Dre alone says he saw Appellant shoot Tamiqua Taylor in the head. (V. 26, T. 1782-1783). Finger and Bryson do not know who shot anyone, but deny they did. (V. 28, T. 2209). Dre was severely impeached at trial, including but not limited to, the testimony of Bryson who said Brown tried to persuade him to falsely blame McCloud for shooting the young woman. (V. 28, T. 2266). Bryson refused. Additionally, according to Bryson, *Dre admitted to shooting one of the victims*. (V. 28, T. 2224). The jury's interrogatory verdict found that Appellant carried but did not discharge a firearm during the crime thus rejecting Dre's testimony, the only testimony making Appellant a shooter. There are still two actual murderers

among the codefendants and the jury held Appellant is not one of them. Therefore, the two shooters and killers have avoided death eligibility and Appellant, a non-shooter, has been sentenced to death.

B. Federal Law

It is well settled that a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant. *Tison v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982). In *Enmund*, the United States Supreme Court, "citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder" under the circumstances of that case. *Tison*, 481 U.S. at 147, 107 S.Ct. at 1682; *cf. Coker v. Georgia*, 433 U.S. 584 (1977) (holding the death penalty disproportional to the crime of rape). Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." *Tison*, 481 U.S. at 156. Therefore, if the state has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be disproportional punishment. *See generally Id.; Enmund*, 458 U.S. at 782.

C. Florida Proportionality Review

Proportionality review comes from Florida's capital punishment statute, section 921.141, Florida Statutes. This statute mandates that every judgment of conviction and sentence of death "shall be subject to automatic review" by this Court. § 921.141(4), Fla. Stat. (2008). Section 921.141 further states that this review "shall be heard in accordance with" rules this Court establishes. *Id.* In *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973), this Court interpreted section 921.141 included proportionality review of death sentences and reasoned that the automatic, mandatory, and statutorily required review of death penalty cases "must begin with the premise that death is different." *Fitzpatrick v. State*, 527 So. 2d 809, 811 (Fla. 1988) (citing *Dixon*, 283 So. 2d at7).

As this Court has held as a bedrock principle for the past forty years,

> If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great in order to control and channel the sentencing process until it "becomes a matter of reasoned judgment. *Dixon*, 283 So. 2d at 10, rather than an exercise in the kind of uncontrolled discretion that led the Supreme Court in *Furman*, 408 U.S. at 253 (Douglas, J., concurring), to invalidate the death penalty as applied under sentencing procedures that created a substantial risk that ***[death] would be inflicted in an arbitrary and capricious manner***." *Gregg v. Georgia*, 428 U.S. 153,188 (1976) (plurality opinion). In other words, ***[b]ecause death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases.*** *Id.*

Death is a punishment reserved only for the most aggravated and least

mitigated of first degree murders. *Green v. State*, 975 So. 2d 1081, 1087-88 (Fla. 2008). It is not merely a counting process; what matters is the nature and quality of the aggravators and mitigators --and the totality of the circumstances --and how they compare with other capital cases in which the death penalty has been upheld or overturned. *Id.* at 1088; *Larkins v. State*, 739 So. 2d 90, 93 (Fla. 1999). The proportionality standard is two-pronged: this Court compares "the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of [first degree] murders." *Crook v. State*, 908 So. 2d 350, 357 (Fla. 2005); *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999); *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999). In cases where more than one defendant was involved in the commission of the crime, there is the additional analysis of relative culpability. ***Underlying a relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment***. *See Ray v. State*, 755 So. 2d 604, 611 (Fla. 2000).

D. Florida Precedent Supporting Appellant's Position

Contrary to the State's assertion, this Court has found death sentences disproportionate ***even where the codefendant's sentence was the result of a negotiated plea.*** In *Slater v. State*, 316 So. 2d 539 (Fla. 1975) three individuals, were charged with robbery and murder. Two of the codefendants, pled guilty and

agreed to testify against the defendant in exchange reduced sentences: one received life in prison and the other received five years in prison. *Id.* Although a codefendant was granted immunity, he refused to testify at trial and was held in contempt. *Id.* Although the trial court overrode the jury's life recommendation, this Court ruled that Slater's death sentence was disproportionate because he was an accomplice who was clearly not the "triggerman" despite the codefendant's negotiated plea bargain with the State. *Id.*

Similarly, in *Hazen v. State*, 700 So. 2d 1207, 1207-1208 (Fla. 1997) three codefendants, forcibly entered a home, raped the victim's wife, and the victim was shot point-blank in the head. One codefendant accepted a plea bargain, pled guilty to first degree murder, and agreed to testify against his codefendants in exchange for a life sentence. *Id.* at 1208. Hazen was convicted, based on the codefendant's testimony, and sentenced to death. *Id.* The trial court rejected the assertion of disparate sentences between Buffkin and Hazen and stated that:

> The rule of law precluding disparate treatment of equally culpable non-triggerman co-defendants is inapplicable when (as in this case) the state elects not to pursue the death penalty against one co-defendant in exchange for testimony establishing the identity and participation of the other. Under these circumstances any resulting difference in the severity of sentence arises from a tactical choice made by the prosecuting authority and not by the exercise of independent discretion by either the jury or sentencing judge. *Id.*

This Court rejected this finding and held that Hazen's death sentence was disproportional to the codefendant's life sentence, ***even though the life sentence***

was the result of a negotiated plea with the State. *Id.* at 1211. ***This Court reasoned that one codefendant was more culpable than Hazen because the evidence revealed the other two codefendants were the primary instigators of the crime, and Hazen was not the actual shooter.*** *Id*. at 1211.

Several other cases support Appellant's argument that the death penalty is disproportionate. In *Curtis v. State*, 685 So. 2d 1234, 1237 (Fla. 1996), where the codefendant shot the victim during a robbery, this court reversed the death sentence because the actual killer pled and was sentenced to life. Unlike *Curtis* who shot another victim in the foot, Appellant merely possessed a firearm. Similarly, in *Puccio v. State*, 701 So. 2d 858, 859 n. 1 (Fla. 1997), the sentence of death was found to be disproportionate when compared to the sentences of the other equally culpable participants who received sentences ranging from seven years to life, some on *second-degree murder charges*. This Court determined that a life sentence was appropriate because trial court's finding that defendant was more culpable than the others was not supported by competent substantial evidence in the record and is contrary to the State's own theory at trial. *Id*. at 860.

This Court has considered a codefendant's lesser sentence in eight other cases despite a plea to a lesser charge. *Howell v. State*, 707 So. 2d 674, 682-683 (Fla. 1998) (codefendant pled to *second-degree murder* and received a sentence of forty years); *Cardona v. State*, 641 So. 2d 361, 365-366 (Fla. 1994) (codefendant

pled guilty to second-degree murder and testified against the defendant); *Mordenti v. State*, 630 So. 2d 1080, 1085 (Fla. 1994) (codefendant received immunity for her testimony); *Cook v. State*, 581 So. 2d 141, 143 (Fla. 1991) (codefendants *pled guilty to second-degree murder* and received sentences of twenty-three and twenty-four years); *Hayes v. State*, 581 So. 2d 121, 122, 127 (Fla. 1991) (codefendant pled guilty to *second-degree murder* and testified against the defendant); *Downs v. State*, 572 So. 2d 895, 901 (Fla. 1990) (codefendant testified against the defendant under a grant of immunity); *White v. State*, 415 So. 2d 719, 720 (Fla. 1982) (codefendant convicted of third-degree murder); *Tafero v. State*, 403 So. 2d 355, 362 (Fla. 1981) (codefendant received a life sentence after *pleading to second-degree murder*). Although this Court upheld the death sentences in these cases because the defendant was either the triggerman or more culpable, the Court still considered a codefendant's lesser sentence, ***despite a plea to lesser charges, even second-degree murder,*** just like the codefendants in the instant case**.** *See also Gonzalez v. State,* 2014 Fla. LEXIS 1211 (Fla. 2014).

E. The State's Factually Distinguishable Cases

The State adheres to a *per se* rule that the plea deals are irrelevant to a proportionality analysis. The cases they rely upon are factually distinguishable and involve much more culpable defendants than Appellant. *Smith v. State*, 998 So.2d 516, 520 (Fla. 2008), (the defendant stated, in preparation for an escape attempt,

that "he would kill any correctional officer guarding them" and the plan included one codefendant, Eglin, to attack a guard with sledge hammer); *England v. State*, 940 So. 2d 389, 394-395 (Fla. 2006)(the defendant hit the victim with a fire poker until he died and told a fellow inmate that "he bludgeoned "an old pervert" to death with a pipe."); *Knight v. State*, 784 So. 2d 396, 401 (Fla. 2001) (the defendant told four inmates that he killed the victim and blamed it on his codefendant, and the codefendant testified that he was present in the cab but that the defendant actually killed the victim.); *Brown v. State*, 473 So. 2d 1260 (Fla. 1985)(the defendant planned the burglary, bound, and then sexually battered the victim.); *Melendez v. State*, 612 So. 2d 1366 (Fla. 1992), (the defendant shot the victim in the head).

In the case at bar, the jury specifically found that Appellant did not kill either of the victims. Nevertheless, the State gave equally and much more culpable codefendants vastly disparate sentences, which should be considered by this Court in a proportionality analysis based on the precedent cited above. Two of the codefendants, who the State originally charged with first-degree murder and sought death, received ten years in prison with a waiver of the 10-20-Life minimum mandatory sentence despite being armed, one being a major planner of the robbery, and one actually shooting the surviving victim. Although one codefendant admitted he lied on the witness stand, he was never charged with perjury, a second-degree felony, and he was sentenced to fifteen years in prison. The final codefendant was

determined to be incompetent. The Answer Brief overlooks that Appellant was ***not the triggerman and was not the main instigator of the robbery***.

Therefore, based on the foregoing facts and authorities, the imposition of the death penalty is disproportionate in violation *Enmund/Tison* and in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses).

II. WHETHER THE TRIAL ERRED WHEN EXCLUDED DR. KREMPER FROM TESTIFYING THAT APPELLANT'S STATEMENT TO LAW ENFORCEMENT WERE COERCED

According to the United States Constitution, a criminal defendant has a Sixth Amendment right to call witnesses on his own behalf and a Fourteenth Amendment right to fundamental and procedural due process. Similarly, Article I, Section 9 and Article I, Section 16 of the Florida Constitution guarantee a criminal defendant the right to due process of law and the compulsory attendance of witnesses at a criminal trial. The right to call witnesses is one of the most important due process rights of a party and accordingly, the exclusion of the testimony of expert witnesses must be carefully considered and sparingly done. *Pascual v. Dozier*, 771 So. 2d 552, 554 (Fla. 3d DCA 2000); *State v. Gerry*, 855 So. 2d 157, 159-160 (Fla. 5th DCA 2003). *Florida Statutes* § 90.702 states that if scientific, technical, or other special knowledge will assist the trier of fact in

understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion. An expert should be allowed to testify if the testimony will help the jury determine a disputed fact and if the expert witness is qualified to testify. *Chavez v. State*, 12 So. 2d 199, 205 (Fla. 2009). Dr. Kremper's testimony would have helped the jury determine a disputed fact, the reliability and voluntariness of Appellant's confession, and he was qualified to give an expert opinion.

It cannot be overemphasized that Appellant's confession to law enforcement was the centerpiece of the state's case during the guilt and penalty phases. (V. 37, 3763-3764). It was featured in the prosecutor's opening statement. At trial, a videotape of the confession was played to before the jury. Two detectives testified as the contents of Appellant's inculpatory statements. References to the contents of statements permeated the prosecutor's rebuttal closing argument to the jury. When the jurors retired to deliberate, they requested a copy of Appellant's statements. The only defense Appellant had was to assert that his confession was unreliable and involuntary. *See Florida Standard Jury Instructions in Criminal Cases* 3.9 (b).

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court recognized that a confession is like no other evidence; it is probably the most probative and damaging evidence that can be admitted against a defendant; and

confessions certainly have a profound impact on the jury. *Id.* at 296. The impact of a confession is magnified when the jurors watch it on a videotape, and when, as here, the jurors specifically request and are given the opportunity to watch the videotaped confession again - this time during their deliberations--it clearly cannot be shown beyond a reasonable doubt, as the *DiGuilio* standard requires, it could not have contributed to their verdict. As the Supreme Court held in *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1991):

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."* (Emphasis added, citations omitted).

The State opined that Appellant's confession was highly probative and indicative of his guilt. Appellant attempted to rebut this contention by suggesting that his confession was a result of his suggestibility and coercive police tactics, not his guilt. Dr. Kremper's expert testimony on Appellant's suggestibility coupled with coercive police tactics would have allowed the jury to consider two opposing views of the confession and assist the jury in determining what weight to place on

the confession. Thus, it would aid in the jury's understanding of the evidence. If the jury accepted Dr. Kremper's opinion that Appellant was a person who was particularly susceptible to suggestion who could be influenced by coercive tactics, the jury would be more likely to believe Appellant's involuntary confession defense. As such, the trial court erred in excluding the evidence as it (1) aided the jury in understanding two possible explanations for Appellant's confession and (2) was probative of Appellant's guilt or innocence.

It was equally reversible error to preclude Dr. Kremper from testifying to Appellant's intellectual abilities during the guilt phase. This is especially so when the jury was specifically instructed in determining whether Appellant's confession was involuntary to consider **"the defendant's physical and mental state during the interrogation"** and **"the pressures applied which affect the powers of resistance and self control."** (V. 13, R. 2164). Dr. Kremper concluded that Appellant's verbal intellectual abilities fell within the borderline range, his verbal memory as it relates to narrative information was "very, very poor," and his reading level was the equivalent of an eleven or twelve year old. (V. 34, T. 3318-3320). Individuals, such as Appellant, who have verbal memory difficulties, are particularly susceptible to suggestion. (V. 34, T. 3320). Based on the test results, Appellant was the type of person who would be more likely to tell someone what they wanted to hear and even invent things. (V. 34, T. 3321). Dr. Kremper further

opined that coercive tactics were used, Appellant's statements to police were coerced, and the voluntary waiver of his Miranda rights was questionable. Therefore, not only was Dr. Kremper precluded from testifying that Appellant's confession was involuntary, he was also precluded from testifying about the very issues that the jury was instructed on to determine if the confession was involuntary, e.g. Appellant's mental state and his powers of self-control and resistance.

Expert psychological testimony regarding interrogations and confessions has been approved in Florida appellate cases. A trial court commits reversible error when it precludes a psychologist from testifying that a defendant's confession was not voluntarily made. *Boyer v. State*, 825 So.2d 418, 419 (Fla. 1st DCA 2002). In *Ross v. State*, 45 So. 3d 403, 433 (Fla. 2010), this Court utilized in part a false confession expert's testimony in reversing conviction. The Fourth District in *Terry v. State*, 467 So. 2d 761, 764 (Fla. 4th DCA 1985) held it was error to exclude expert witness from testifying at suppression hearing that "her mental state at the time of the post-arrest statement affected her ability to voluntarily waive her Miranda rights." Likewise, in *Fields v. State*, 402 So. 2d 46, 47-48 (Fla. 1st DCA 1981), the First District found that a juvenile's waiver of his Miranda rights was involuntary where a psychologist testified that the child had a "reduced mental ability involving a "visual perceptual disorder" with brain damage and attention

span problems, and that he had the reading ability of a first-grade student." The Eleventh Circuit also found expert testimony admissible in *United States v. Roark*, 753 F. 2d 991, 994-995 (11th Cir. 1985), where a psychologist would have testified about defendant's condition, known as "compulsive compliance," which made her more susceptible to psychological coercion. Furthermore, as the State concedes in the Answer Brief, an expert may testify about what police interrogation techniques may increase the likelihood of false confessions. *Answer Brief*, pg. 28.

The trial court erred when it excluded Dr. Kremper's testimony that Appellant's confession was coerced and involuntary. Identical to *Boyer*, Appellant filed a motion to suppress his confession asserting that it was involuntary, the trial court denied the motion, and Appellant sought to have an expert testify regarding psychological factors, environmental factors, and police tactics that rendered Appellant's statement involuntary. Like the trial judge findings in *Boyer*, the trial court in the instant case, excluded Dr. Kremper's testimony because it was such of a nature that requires special knowledge or expertise so the jury could draw its' own conclusions. As in *Boyer*, the jury here was entitled to hear relevant evidence on the issue of voluntariness and such testimony would have let the jury know that the phenomena of false confessions exists, how to recognize it, and how, based on diagnostic testing, Appellant's statements were involuntary.

The State argues for the first time that Dr. Kremper was not qualified to testify about false confessions. During the motion in limine, the State stipulated to his qualifications and Dr. Kremper states that he had testified numerous times regarding false confessions. (V. 34, T. 3310).

The exclusion of expert testimony as to the voluntariness of Appellant's statements was harmful error in violation of the Sixth and Fourteenth Amendment to the United States Constitution, and Article I, Section 9 and Article I, Section 16 of the Florida Constitution.

III. THE TRIAL COURT FUNDAMENTALLY ERRED WHEN IT GAVE THE INCORRECT JURY INSTRUCTION ON ATTEMPTED FIRST DEGREE MURDER

Contrary to the State's assertion, Appellant does not contend that he "merely prefers" a different standard instruction on Attempted First Degree Murder, but instead he argues that the instruction given omitted an essential and necessary element of the crime charged, a premeditated intent to kill. "[I]t is fundamental error to fail to give ... [an] accurate instruction in a criminal case if it relates to an element of the charged offense." *Davis v. State*, 804 So. 2d 400, 404 (Fla. 4th DCA 2001). The trial court gave the wrong jury instruction on Attempted First Degree Murder which omitted the intent element of the offense.

The Fifth District encountered a nearly identical case in *King v. State*, 800 So. 2d 734 (Fla. 5th DCA 2001). In *King*, the defendant asserted that the trial

court committed fundamental error when it gave an incomplete jury instruction on attempted felony murder. *Id.* at 735. At trial, the court instructed the jury that:

> Before you can find the defendant guilty of attempted felony murder, the State must prove the following two elements beyond a reasonable doubt:
>
> One, Christopher Aaron King was engaged in the perpetration or attempted perpetration of a robbery.
>
> Two, during the perpetration or attempted perpetration of a robbery Christopher Aaron King committed or aided or abetted in the commission of an intentional act that could have, but did not cause the death of Anthony Wayne Shirley. *Id.*

Appellant asserted that this instruction omitted the language "that is not an essential element of the felony," a disputed element of the crime, and thus fundamental error. *Id.* at 737. The State asserted that the issue did not rise to the level of fundamental error because the omitted element was not in dispute. The Fifth District disagreed and reversed the conviction. *Id.* It reasoned that since the defendant claimed he did not know that a robbery was going to take place, the jury was improperly instructed because it still had to find that King committed (or aided and abetted) an intentional act apart therefrom which could have caused the victim's death. *Id.* at 738-739.

Similar to *King*, the indictment charged Appellant with Attempted First Degree Murder of Fang either with a premeditated design or while in engaged in the commission of a robbery or burglary. (V. 1, R. 26). The indictment specifically referenced Florida Statute § 782.04. (V. 1, R. 26). Instead of using the proper jury

instruction, the trial court instructed the jury, as in *King*:

> To prove the crime of an Attempt to Committ First Degree Murder, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. The Defendant did some act toward committing the crime of First Degree Murder of Wilkins Merilan that went beyond just thinking or taking about it.
>
> 2. The Defendant would have committed the crime except that he failed. (V. 13, R. 2147).

Just like the instruction in *King*, the instruction in the instant case omitted the Appellant must have had a premeditated design to kill. *Florida Statutes* § 782.04(1)(a); *Florida Standard Jury Instruction in Criminal Cases* 6.2. As in *King*, because there was a dispute over whether Appellant actually did some act which intended to cause death or whether he acted with premeditated design, it was fundamental error to give a jury instruction which omitted those elements and it further lowered the State's burden of proof to convict for this offense. *See also Florida Standard Jury Instruction* 6.3; *Neal v. State*, 783 So. 2d 1102 (Fla. 5th DCA 2001); *Battle v. State*, 911 So. 2d 85 (Fla. 2005). This error was compounded when the jury was instructed that they could use the attempted murder conviction as evidence that Appellant was previously convicted of a felony involving the use of violence. The prosecutor emphasized this during his closing argument in the penalty phase. (V. 36, 3761).

Appellant therefore is entitled to a new trial or new penalty phase. See

Armstrong v. State, 862 So. 2d 705, 717-718 (Fla. 2003) (holding that a post-trial reversal or vacating of prior violent felony conviction can be basis for new penalty phase, where is error is found to be harmful).

IV. FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL

In *Ring v. Arizona*, 536 U.S. 584 (2002) the United States Supreme Court struck down Arizona's capital sentencing statute because it violated the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 630 U.S. 466 (2000), where the statute provided that a judge, rather than the jury, would determine the findings of fact necessary to impose a sentence of death. In so holding, the *Ring* decision overruled *Walton v. Arizona*, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring v. Arizona*, 122 S.Ct. at 2443. The United State Supreme Court recently affirmed this holding in *Alleyne v. United States*, 133 S. Ct. 2151, 2158, 186 L. Ed. 2d 314 (2013). Appellant would contend that these Supreme Court holdings render Florida's death penalty scheme and jury instructions unconstitutional, facially and as applied.

Appellant asserts and asserted below that section 921.141, Florida Statutes, violates Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Sixth (notice, right to present defense), Eighth (cruel and unusual

punishment), and Fourteenth (due process and incorporation) Amendments to the United States Constitution. Appellant additionally contends that section 921.141(5)(b), 921.141(5)(d), and 921.141(5)(e), Florida Statutes, the standard jury instruction on it, and the death penalty as applied in Florida violate Article I, sections 2 (basic rights), 9 (due process), 16 (rights of accused), 17 (cruel or unusual punishment), and 22 (trial by jury) of the Florida Constitution, and the Fifth (due process), Sixth (notice, right to present defense), Eighth (cruel and unusual punishment), and Fourteenth (due process and incorporation) Amendments to the United State Constitution.

CONCLUSION

As to the other issues on appeal, Appellant would renew and reply upon the authority and arguments contained in the Initial Brief. Based upon the arguments presented and authorities cited herein, Appellant respectfully requests that this Honorable Court reverse his sentence of death and remand the case to the trial court with instructions consistent with this Court's decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished via email to the Office of the Attorney General 507 E Frontage Rd Ste 200 Tampa, Florida 33607 at capapp@myfloridalegal.com and sara.macks@myfloridalegal.com on April 25, 2014.

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I HEREBY CERTIFY that this document is typed in Times New Roman 14 point font with one inch margins.

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