Filing # 19041788 Electronically Filed 10/06/2014 02:09:29 PM

TGEGKXGF ."321814236"36<36<38."Lqj p"C0Vqo cukpq."Engtm"Uwrtgo g"Eqwtv

IN THE SUPREME COURT OF THE STATE OF FLORIDA

RODNEY TYRONE LOWE,
Appellant,

v.

STATE OF FLORIDA
Appellee.

FL Supreme Court Case No. SC12-263

L.T. Case No. 311990CF658A

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA [CRIMINAL DIVISION]

APPELLANT'S INITIAL BRIEF

Antony P. Ryan
Regional Counsel
Office of Criminal Conflict and Civil
Regional Counsel, Fourth District

Steven H. Malone
Special Assistant Regional Counsel
Florida Bar No. 305545
401 S. Dixie Highway
Suite 200
West Palm Beach, FL 33401
Telephone: (561) 837-5156
Facsimile: (561) 837-5423
Email: RC4AppellateFilings@rc-4.com
andstevenhmalone@bellsouth.net

TABLE OF CONTENTS

PAGE

Table of Authorities…... vi

Statement of the Case and Facts……….................................... 1

The State's Case………………………………………………… 1

The 1987 Brevard County Crime…………………………….. 18

The Defense Case……………..………………………………. 20

The State Rebuttal…………………………………………….. 34

Remaining Proceedings……………………………………….. 34

Summary of the Argument……………………………………………35

Argument…………………………….………………………………..36

Point 1. THE TRIAL COURT ERRED IN FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES…… 36

Point 2. ALL BUT ONE OF THE AGGRAVATING CIRCUMSTANCES ARE INAPPLICABLE OR INSUFFICIENTLY PROVED AND SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY OR RELIED UPON IN SUPPORT OF A DEATH SENTENCE……………………………………………………….. 39

Standard of Review…………………………………………….. 39

Merits.

A. (5)(a). Community Control….…………………………………… 39

B. (5)(b) Previous Violent Felony………………………………….44

C (5)(c) Avoid Arrest………………………………………………… 45

D. Fundamental Fairness and Improper Doubling……………………….47

Point 3. THE SENTENCING COURT TREATED MITIGATION UNLAWFULLY, REQUIRED A NEXUS OF MITIGATION WITH THE CRIME, AND UNLAWFULLY RELIED ON THE PRIOR DEATH SENTENCE AFFIRMANCE……………………..…………………………………… 48

Standard of Review…………………………………………………… 48

Merits...49

A. Unlawful Reliance on Prior Affirmance……………………….49

B. Age…………………………………………………………… 49

C. The Finding of unproffered mitigation and analysis as aggravation, and lack of findings of exposure to an alcoholic father, brutal punishment as a child, homelessness, shunning in childhood and mental health mitigation… 51

D. The Use of Other Unfound Aggravation…………………… 53

E. Failure to Give any Weight to Mitigation…………………… 53

Point 4. THIS COURT SHOULD REVERSE FOR A NEW TRIAL BECAUSE THE RECORD IS INCOMPLETE………………………………………… 53

Standard of Review…………………………………………………… 54

Merits………………………………………………………………… 54

Point 5. THE TRIAL COURT IMPROPERLY GRANTED THE STATE A CAUSE CHALLENGE TO A PROSPECTIVE JUROR…………………… 57

Standard of Review…………………………………………………… 57

Merits………………………………………………………………… 57

Point 6. THE JURY WAS PRECLUDED FROM CONSIDERING EVIDENCE OF APPELLANT'S LIMITED ROLE IN THE KILLING,

DISPROPORTIONATE TREATMENT COMPARED TO OTHERS INVOLVED AND LAWFUL EVALUATION OF AGGRAVATORS………………… 58

Standard of Review…………………………………………………… 59

Merits………………………………………………………………… 59

Point 7. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CULPABILITY FINDINGS IT HAD TO MAKE BEFORE IT COULD EVEN CONSIDER A DEATH SENTENCE……………………………… 63

Standard of Review…………………………………………………… 63

Merits………………………………………………………………… 63

Point 8. THE JURY WAS MISLED AS TO THE EFFECT OF A LIFE RECOMMENDATION AND WAS PREJUDICED BY STATE ARGUMENT RELYING ON THE PRIOR DEATH SENTENCE……………………… 67

Standard of Review…………………………………………………… 67

Merits………………………………………………………………… 68

Point 9. IT WAS HARMFUL ERROR TO PERMIT THE COMMUNITY CONTROL OFFICER TO FALSELY TESTIFY APPELLANT WAS EXPOSED TO THIRTY YEARS IF HE VIOLATED COMMUNITY CONTROL WITH A NEW OFFENSE……………………………………………………… 70

Standard of Review…………………………………………………… 71

Merits………………………………………………………………… 71

Point 10. THE TRIAL COURT ERRED IN RESTRICTING MITIGATING EVIDENCE AND LIMITING CROSS EXAMINATION………………… 72

Standard of Review…………………………………………………… 72

Merits………………………………………………………………….. 73

Lorenzo Sailor's Prior Violence and Gun Use………………… 73

Limitation of Cross of Green Regarding Dwayne Blackmon Allegations…………………………………………………… 74

Point 11. THE TRIAL COURT IMPROPERLY EXCLUDED DEFENSE EVIDENCE OF UNLIKELIHOOD OF FUTURE VIOLENCE…………… 77

Standard of Review………………………………………………… 80

Merits……………………………………………………………...80

Point 12. PREJUDICIAL EVIDENCE NOT INTRODUCED AT TRIAL WAS SENT TO THE JURY ROOM FOR CONSIDERATION DURING DELIBERATIONS……………………………………………………… 83

Standard of Review………………………………………………… 83

Merits…………………………………………………………… 83

Point 13. USE OF AN UNDISCLOSED COMPUTER ANIMATION WITHOUT A RICHARDSON HEARING REQUIRES REVERSAL……………………86

Point 14. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTION TO THE STATE'S USE OF A MANNEQUIN………………………………87

Standard of Review………………………………………………… 87

Merits…………………………………………………………… 87

Point 15. CLOSING ARGUMENT THAT FOCUSED ON COMPARISON OF THE WORTH OF THE VICTIM AGAINST MR. LOWE AND THE PRIOR DEATH SENTENCE WAS FUNDAMENTALLY UNFAIR…………..… 88

Standard of Review………………………………………………… 88

Merits……………………………………………………………….88

Point 16. DEATH IS DISPROPORTIONATE IN THIS CASE…………… 90

Point 17.THE TRIAL COURT ERRED IN DENYING THE REQUESTED SPECIAL VERDICT FORM AND INSTRUCTIONS FOR FINDINGS ON

AGGRAVATORS…………………………………………………………… 99

Point 18. CUMULATIVE ERROR REQUIRES REVERSAL……………… 100

Conclusion . . . . ……………. 100

Certificate of Service . . . . ….. …… xiv

Certificate of Compliance . ….. . . . .…. xv

TABLE OF AUTHORITIES

CASES **PAGES**

Abdul–Kabir v. Quarterman, 550 U.S. 233 (2007)………………………… 62

Almeida v. State, 748 So.2d 922 (Fla.1999)………………………………… 93

Alston v. State, 723 So. 2d 148 (Fla. 1998)………………………………… 45

Apprendi v. New Jersey, 530 U.S. 466 (2000)…………………………… 100

Armstrong v. State, 73 So. 3d 155 (Fla. 2011)……………………………… 70

Ault v. State, 866 So. 2d 674 (Fla. 2003)……………………………………. 57

Ballard v. State, 66 So. 3d 912 (Fla. 2011)…………………………………. 98

Beard v. State, 104 So. 2d 680 (Fla. 1st DCA 1958)………………………… 86

Bell v. State, 841 So. 2d 329 (Fla. 2002)……………………………………. 95

Berger v. California, 393 U.S. 314 (1969)……………………………… 74

Blake v. State, 972 So. 2d 839 (Fla. 2007)………………………………… 98

Brown v. State, 550 So. 2d 527 (Fla. 1st DCA 1989)……………………… 87

Buzia v. State, 926 So. 2d 1203 (Fla. 2006)………………………………… 46

Caldwell v. Mississippi, 472 U.S. 320 (1985)……………………………… 70

Calhoun v. State, 138 So.3d 350 (Fla. 2013)……………………………… 46

California v. Green, 399 U.S. 149 (1970)………………………………… 74

Caspari v. Bolden, 510 U.S. 383 (1994)………………………………… 74

Chambers v. Mississippi, 410 U.S. 284 (1973)……………………………. 74

Coday v. State, 946 So. 2d 988 (Fla. 2006)………………………………… 48, 53

Cole v. State, 36 So. 3d 597 (Fla. 2010)………………………………………96

Connor v. State, 803 So. 2d 598 (Fla.2001)………………………………… 45

Consalvo v. State, 697 So. 2d 805 (Fla. 1996)………………………………..46

Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988)……………………………… 95

Cooper v. State, 336 So.2d 1133 (Fla.1976)…………………………………..80

Coxwell v. State, 361 So. 2d 148 (Fla. 1978)……………………………… 74

Davis v. Alaska, 415 U.S. 308 (1974)……………………………………… 74

Dawson v. State, 20 So. 3d 1016 (Fla. 4th DCA 2009)……………………… 82

Delap v. State, 350 So. 2d 462 (Fla.1977)…………………………………… 57

Delhall v. State, 95 So. 3d 134 (Fla. 2012)………………………………… 80

Diaz v. State, 513 So.2d 1045 (Fla.1987)…………………………………. 64

Duest v. State, 855 So.2d 33 (Fla.2003)…………………………………… 93

Eddings v. Oklahoma, 455 U.S. 104 (1982)…………………………… 62, 95

Elledge v. State, 346 So. 2d 998 (Fla. 1977)………………………… 52,53

Enmund v. Florida, 458 U.S. 782 (1982)………………………………….… 63

Fitzpatrick v. State, 527 So.2d 809 (Fla.1988)………………………………. 96

Franklin v. State, 545 So. 2d 851 (Fla. 1989)……………………………… 71

Garcia v. State, 622 So. 2d 1325 (Fla. 1993)………………………………. 72

Gonzalez v. State, 578 So. 2d 729 (Fla. 3rd DCA 1991)…………………… 45

Grace v. State, 832 So.2d 224 (Fla. 2d DCA 2002)………………………… 81

Graham v. Florida, 130 S.Ct. 2011 (2010)……………………..…… 44, 95

Gray v. Mississippi, 481 U.S. 648 (1987)…………………………………… 58

Gregg v. Georgia, 428 U.S. 153 (1976)……………………………… 39, 53

Green v. State, 907 So. 2d 489 (Fla. 2005)……………………….......... 44

Grissinger v. Griffin, 186 So. 2d 58 (Fla. 4th DCA 1966)………………..… 85

Hardy v. United States, 375 U.S. 277 (1964)…………………………………57

Harris v. State, 843 So.2d 856 (Fla.2003). ………………………………… 87

Haywood v. State, 24 So. 3d 17 (Fla. 2009)………………………………… 90

Henyard v. State, 689 So. 2d 239 (Fla. 1997)……………………………… 44

Hernandez v. State, 4 So. 3d 642 (Fla. 2009)……………………………… 45

Hildwin v. State, 727 So.2d 193 (Fla. 1998)………………………………… 44

Hitchcock v. Dugger, 481 U.S. 393 (1987)………………………………… 62

Hitchcock v. State, 673 So. 2d 859 (Fla. 1996)…………………………… 69

Ivory v. State, 330 So. 2d 853 (Fla. 3d DCA 1976)………………………… 86

Jackson v. State, 127 So. 3d 447 (Fla. 2013)……………………………… 100

Jackson v. State, 502 So. 2d 409 (Fla.1986)……………………………… 64

Johnson v. Mississippi, 486 U.S. 578 (1988)……………………………… 72

Johnson v. State, 720 So.2d 232 (Fla.1998)………………………………… 97

Jones v. State, 32 So. 3d 706 (Fla. 4th DCA 2010)………………………… 86

Keen v. State, 639 So. 2d 597 (Fla.1994)…………………………………… 85

Kennedy v. Louisiana, 554 U.S. 407 (2008)……………………………… 99

Koile v. State, 934 So. 2d 1226 (Fla. 2006)……………………………… 42

Kopsho v. State, 84 So. 3d 204 (Fla. 2011)………………………………… 67

Larkins v. State, 739 So. 2d 90 (Fla.1999)………………………………… 96

Lockett v. Ohio, 438 U.S. 586 (1978)…………………………50, 62, 74, 81

Lowe v. State, 2 So.3d 21,33 (Fla. 2009)……………………………… 47, 59

Mattear v. State, 657 So.2d 46, 47 (Fla. 4th DCA 1995)………………… 82

McDuffie v. State, 970 So.2d 312 (Fla. 2007)……………………… 71, 72, 81

McWatters v. State, 36 So. 3d 613 (Fla. 2010)……………………………… 39

Mendenhall v. State, 48 So. 3d 740 (Fla. 2010)…………………………… 41

Moore v. State, 701 So. 2d 545 (Fla. 1997)……………………………… 74

Morton v. State, 789 So. 2d 324 (Fla. 2001)…………………………… 38, 92

Offord v. State, 959 So.2d 187 (Fla. 2007)………………………………… 93

Parker v. State, 873 So.2d 270 (Fla. 2004)………………………………… 38

Patterson v. State, 513 So. 2d 1257 (Fla. 1987)………………………...... 38

Patton v. State, 784 So. 2d 380 (Fla. 2000)………………………………… 38

Payne v. Tennessee, 501 U.S. 808 (1991)…………………………………… 89

Penry v. Lynaugh, 492 U.S. 302 (1989)…………………………………… 62

Perez v. State, 919 So. 2d 347 (Fla. 2005)………………………………… 64

Poore v. State, 531 So. 2d 161 (Fla. 1988)………………………………… 71

Reed v. State, 837 So.2d 366 (Fla. 2002)……………………………… 63, 67

Riley v. State, 366 So. 2d 19 (Fla. 1978)…………………………………….. 45

Ring v. Arizona, 536 U.S. 584 (2002)…………………………………… 99

Rivera v. State, 561 So. 2d 536 (Fla. 1990)………………………………… 74

Roopnarine v. State, 18 So. 3d 1192 (Fla. 4th DCA 2009)………………… 82

Roper v. Simmons, 543 U.S. 551 (2005)………..………………………… 44, 95

Sanchez-Andujar v. State, 60 So. 3d 480 (Fla. 1st DCA 2011)…………… 82

Shere v. Moore, 830 So. 2d 56 (Fla. 2002)………………………………… 99

Silvia v. State, 60 So. 3d 959 (Fla. 2011)………………………………… 92

Singleton v. State, 783 So. 2d 970 (Fla.2001)…………………………… 57

Skipper v. South Carolina, 476 U.S. 1 (1986)…………………………… 50

Smith v. State, 95 So. 2d 525 (Fla.1957)…………………………………… 85

Smith v. State, 801 So. 2d 198 (Fla. 4th DCA 2001)……………………… 57

Smith v. Texas, 543 U.S. 37 (2004)……………………………………… 50

State v. Biegenwald, 110 N.J. 521 (N.J. 1988)……………………………..47

State v. Chubbuck, 141 So.3d 1163 (Fla. 2014)…………………………… 42

State v. Dixon, 283 So. 2d 1 (Fla.1973)…………………………………… 93

State v. Fleming, 61 So. 3d 399 (Fla. 2011)……………………………… 85

State v. Hamilton, 574 So.2d 124 (Fla.1991)……………………………… 85

State v. Milbry, 476 So. 2d 1281 (Fla. 1985)………………………………… 42

Strickland v. Washington, 466 U.S. 668 (1984)…………………………… 74

Sullivan v. Louisiana, 508 U.S. 275 (1993)………………………………… 63

Taylor v. Illinois, 484 U.S. 400 (1988)……………………………………… 87

Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994)…………………… 87

Tennard v. Dretke, 542 U.S. 274 (2004)…………………………………… 50

Terrien v. State, 94 So.3d 648 (Fla. 4th DCA 2012)……………………59, 63, 88

Terry v. State, 668 So.2d 954 (Fla.1996)………………………………… 93, 97

Tison v. Arizona, 481 U.S. 137 (1987)……………………………………… 64

Trease v. State, 768 So. 2d 1050 (Fla.2000)……………………………… 53

Trotter v. State, 576 So.2d 691 (Fla. 1990)………………………………......41

Trotter v. State, 690 So. 2d 1234 (Fla. 1997)……………………………… 43

Urbin v. State, 714 So.2d 411 (Fla.1998)………………………………… 93

United States v. Gaskell, 985 F.2d 1056 (11th Cir. 1993)………………… 87

United States v. Santos, 533 U.S. 507, 514 (2008)..……………………… 41

Vannier v. State, 714 So. 2d 470 (4th DCA 1998)………………………… 74

Wainwright v. Witt, 469 U.S. 412 (1985)…………………………………… 58

Wheeler v. State, 4 So. 3d 599 (Fla. 2009)………………………………… 90

Wickham v. State, 124 So. 3d 841 (Fla. 2013)…………………………… 70

Wilcox v. State, 143 So. 3d 359 (Fla. 2014)………………………………… 46

Williams v. State, 143 So. 3d 1120 (Fla. 4th DCA 2014)........................ 82

Williamson v. State, 894 So. 2d 996 (5th DCA 2005)........................... 85

Wilson v. State, 746 So. 2d 1209 (Fla. 5th DCA 1999)........................... 86

Witherspoon v. Illinois, 391 U.S. 510 (1968)................................... 58

Yacob v. State, 136 So. 3d 539 (Fla. 2014)...................................... 93

Yanes v. State, 418 So. 2d 1247 (Fla. 4th DCA 1982)........................... 85

Zant v. Stephens, 462 U.S. 862 (1983)... 52, 72

Zerquera v. State, 549 So. 2d 189 (Fla. 1989).....................................74

FLORIDA STATUTES

Section 90.104(1), Florida Statutes.. 68

Section 775.021(1), Florida Statutes...41

Section 921.0026(2)(d), Florida Statutes.. 42

Section 921.141 (5)(a), Florida Statutes....................................... 40, 41

Section 948.001(3), Florida Statutes.. 40

Section 958.03(2), Florida Statutes (1987)..................................... 40

Section 958.04, Florida Statutes... 40

Section 958.14, Florida Statutes.. 40

Section 985.021, Florida Statutes... 42

OTHER AUTHORITIES

Florida Rule of Appellate Procedure 9.142(a)................................ 56

Florida Rule of Criminal Procedure 3.400(a)(3)……………………….. 85

Florida Constitution, Article 1………………………………………… *passim*

Fifth, Sixth, Eighth and Fourteenth Amendments,

United States Constitution……………………………………….…*passim*

STATEMENT OF THE CASE

Rodney Lowe was convicted of first degree murder and attempted robbery and sentenced to death followed by a 15 year consecutive sentence. His convictions and sentences were affirmed by this Court in *Lowe v. State*, 650 So.2d 969 (Fla.1994). A Rule 3.851 motion was granted in part because trial counsel provided ineffective representation, prejudicial only at penalty phase; this Court affirmed that order in *Lowe v. State*, 2 So. 3d 21 (Fla. 2009). At the new penalty phase, the jury recommended death, and the trial court imposed the death sentence. R507.[1]

STATEMENT OF THE FACTS

The State's Case.

On the morning of July 3, 1990, a civilian witness Luedtke went to the Nu-Pack store. T1402-03. A car was parked in the lot, which he described as late model, white, with wider body molding, and he thought it was a Taurus. T1404-05. As the witness walked in a man came out of the store quickly to his right. T1409. The man was black, wearing a ball cap. The man walked toward the driver's side

---

[1] The record developed at the penalty trial below is referred to as "R" or "T". Reference to the original trial record is "OR" or "OT" and the postconviction record as "PCR." *See Florida Rule of Appellate Procedure* 9.142 (a)(1)(C): "The supreme court shall take judicial notice of the appellate records in all prior appeals and writ proceedings involving a challenge to the same judgment of conviction and sentence of death." Appellant requests such judicial notice.

of the white car; he was 5’8”, 5’10”, shorter than the witness, weighing 150 or 160. He was not “fat” or short, T1410, or real tall. The man was kind of tall and thin. T1411. As the man headed for the driver’s side door, the witness did not notice it open or anyone trying to let the man in. T1406, 1408, 1411. The man’s clothing was light in color – tan, beige or light brown - and the button up, collared shirt seemed lighter than the pants. T1412. He had a mustache and kind of a scraggly beard, an unshaved look. T1413. The witness went to the counter, saw the decedent on the ground, T1413-14, and called 911. When he looked the other car was gone. T1416-17. An officer five minutes later and he gave him a description. 1420.

On cross the witness agreed he did not see anyone get in or out of the white car, and does not know if the man kept walking around the corner. T1424-25. He helped prepare a composite drawing. T1426. The clothing the man was wearing was very light and the shirt was darker than the pants. These were not dark brown pants. T1428.[2] He came back to the police station about a week later, but was unable to pick Rodney Lowe out of the lineup. T1429. The man had a full beard but it was scraggly. T1429. The cap was like a baseball cap. T1429. The witness also thinks the man had glasses on, but does not think they were sunglasses. T1430. He could have been as short as 5’7”. T1433.

---

[2] Other witnesses attested the Gater Lumber uniform Mr. Lowe wore was comprised of light tan shirt and dark brown pants. T1462 (CSI); T1769-70, 1805(Green); T2018-2022 (Victoria Blackmon)(and a cap); T1925 (Patricia Shegog White); See Ex. 17 & 18.

Officer Ewert went to the Nu-Pack store after a radio alert and found the decedent Donna Burnell by the register. T1369-71. She did not respond to questions, and kept saying "no." T1371. He saw a bullet hole in her forehead and chest. Paramedics arrived. T1372. There was a crease on the register from a bullet and a 7-Up can with moisture on the outside. T1376-7.

The crime scene investigator went to the Nu-Pack store. The register buzzer was going off. T1437. He collected evidence, including the wrapper from a cheeseburger in the microwave. T1439, 1441,1444. He later retrieved bullets and a shirt from the medical examiner, T1448, 1451, and other evidence from Mr. Lowe's home, T1453-55, and from his blue car, T1456. He later received a firearm and empty box of ammunition. T1457-58.

The general manager of the Nu-Pack confirmed the time on the daily receipt total. T1473-74. The register would beep if not opened properly, T1475, and there was a silent alarm but it was not activated. T1477. The register had not been opened and nothing was missing from it; a cigar box with $200 cash was not disturbed. T1479.

The Medical Examiner testified there were gunshots close to the face: one above the left eye, one in the chest and one on the top of the decedent's head. T1494. Any of the three were potentially lethal. T1514. The doctor did not know the relative positions when the wounds were inflicted. T1518, 1520. He could not

testify to the order of the projectiles. T1528. She would have been conscious a short time after the first one. T1529; 1534-35.

An investigator with the State Attorney's Office, Kerby, testified to the statement taken from Mr. Lowe. T1548-53. On the recording, Mr. Lowe says on the date in question he guessed he was at work at Gater Lumber in Sebastian. T1555. Mr. Lowe says he knows where the Nu-Pack store is at and probably has been there, though he did not know how long ago. He normally goes to the Cumberland Farms store because it's closer and takes his credit card, T1556-57, which he got in April of 1990. T1559-60.

Mr. Lowe said that was the same day his fiancé was pulled over because of the car, came and got him at his job and he had to drive to Wabasso. T1573-5. He had heard about the robbery and said if it was the same girl, Donna, he used to be pretty good friends with her, having previously lived right beside a store she worked at. T1573; 1576-77. He did not know she was working at Nu-Pack and would know her if he saw her. T1578. Asked if she would know him if she saw him, Mr. Lowe said they were not on a first name basis, and he had moved from there about a year previously. T1579.

On the day in question, Mr. Lowe said he was at work, but left once for lunch and then later had to drive his fiancé after she got the ticket and then returned to work. T1582-86. The officers became more accusatory about the

shooting, suggesting various scenarios and evidence law enforcement had, to which Mr. Lowe repeatedly responded he did not kill or shoot anybody. T1587-96, 1598-1610. Mr. Lowe told them they needed to ask Dwayne (Blackmon) what happened. T1597.

In testimony, Investigator Kerby described the lead up to the second interview and evidence gathered. T1600-20. On the second tape, they let his fiancé Patricia White go into the cell with Mr. Lowe and recorded their conversation. T1620. On the recording, Ms. White told Mr. Lowe the police had a lot of evidence against him. He said Dwayne was in there, T1623, and he didn't do anything. T1630. She says he should tell on Dwayne if he did it. T1635. Mr. Lowe tells her that on the day he had to bring her home, he clocked out to go home and leave her a car. He picked up Dwayne. Mr. Lowe stayed inside the car, and his prints were not on any hamburger wrapper. Mr. Lowe continued that Lorenzo was also in the car, and he was parked on the side in the back. He did not know if Lorenzo went in or not but Lorenzo had his gun. He did not know who killed her but Dwayne came around the corner first. Lowe pulled out in front and Lorenzo came out and got in the car. Lowe pulled the seat back, he got in and they drove off. On the way, the two said "well, we did," he dropped them off then went back and picked her up and put the car in the garage. 1636-37. Ms. White asked why Blackmon didn't take the money and Lowe said he couldn't get to it; he tried to

shoot the register but it wouldn't open. Lowe thought Lorenzo did it, because he had Lowe's gun. T1638. Lowe again denied killing her. T1638-39. Mr. Lowe said if he told he would get as much time as the other two because he was driving. T1639. Ms. White continues to urge him to tell the police about Dwayne. T1643. Lowe said he would tell, T1646, and wanted her to stay. T1647.

Kerby and Green came back in, and Ms. White stays. T1648-49. The questioning continues, and Mr. Lowe tells law enforcement that day he was supposed to come home early, but went by Dwayne's house in Wabasso first. T1652-53. Mr. Lowe gave directions. T1654. He picked up Dwayne and Lorenzo and they drove to Nu-Pack, parking on the side. T1655. Lowe described the route. Lorenzo had the .32 and Lowe was driving the white car. All three were going to go in the store, but Lowe stayed in the car. Lorenzo had Lowe's .32 and Dwayne his .38. T1657. Lorenzo was the one who was supposed to go do it. T1657. Lorenzo was in the store and they waited, Lowe staying in the car. Dwayne stepped around the corner, came back a minute later and jumped in the car. T1658-59. Lowe pulled the car around to the front, Lorenzo came out of the store, Lowe opened the door, let his seat up, Lorenzo got in the back and they drove off. Lowe dropped them off and went to his house. He took Dwayne's gun out and took it inside. T1659. He picked up Ms. White at the house and took off back to work and clocked back in. T1660-61; 1670-76. Mr. Lowe described Lorenzo. T1676.

Lorenzo said they wouldn't believe it but he didn't get any money. T1662. Lorenzo said he went in the store, the lady was messing with her baby, looked up, saw him, then went back with her baby. Lorenzo said he just walked around the corner and shot her. He shot at and banged the register but it wouldn't open. T1662-63. All three had agreed to rob the store. Dwayne mentioned he had looked at the store before, T1666, and it would be a perfect spot; Lowe "like a dumb ass," agreed to do it. T1667.

Lowe said the reason they were putting it on him was because of a fight over a TV and other things, after Dwayne and Vicki messed up his car. T1669; 1679-80. Vicki came over and wanted Dwaye's gun and bullets, and Vicki made Patty wrap it in paper towels. T1680. The fight began over firecrackers. T1680-81. Since then, Dwayne came over and showed him about the crime in the paper. T1686. The gun Lowe had was a .32 he had gotten from Dwayne about three months before. T1688-89. They shot them in the park. T1690. Lowe did not load the gun that day but unloaded it and threw empties out the window. T1692-93. Lorenzo had Lowe's gun; it had been sitting on Lowe's lap and Lorenzo got it when they got to the store. T1696. After throwing the bullets out, Lowe sat it back on his lap. T1699. When he dropped the two off, Dwayne took his gun in the house. T1700. Lowe again denied shooting the lady or going in the store. He found out who was killed from the paper. T1701. It took him some time to realize who it was; he did

not know her on a first name basis and it had been a year since he had seen her. T1702-05.

Dwayne wanted his gun back, getting mad at them because Lowe had their TV. Vicki came over and got it, along with the gun, though she would not touch it, making Patty wrap it in paper towels. T1709. None of them got anything from the store; Lorenzo said he "capped" her and tried to get in the register but it would not open. Lorenzo cannot read and could not read the keys. T1710-11. Kerby testified on that day Lowe had a full mustache. T1717.

On cross, Kerby said the civilian witness Luedtke was unable to pick Mr. Lowe out of the photo display, where he was shown with a mustache. T1227-28. Blackmon may have been released OR after his arrest on October 16 of the same year but it had nothing to do with his assistance. T1731. Lorenzo not a suspect because Kerby believed him. T1732-33. On redirect Kerby described Blackmon as big, about 6'3", guessing about 240 lbs.; Lorenzo Sailor is small and wiry, probably 5'2", about 135 lbs., really small. T1636-37. On recross Kerby said he had not taken photos of Sailor, was not sure if he was 5'2" or 5'5", and was guessing; he would say Lowe was noticeably taller and larger than Sailor. T1737.[3]

---

[3] Other state witnesses also described Dwayne Blackmon as tall and large, Lorenzo Sailor as short and thin. See T1760-61 (Green)(Blackmon larger than Lowe, Sailor smaller); T1862 (Dordelman); T1984, 1987(Victoria Blackmon).

Former Deputy Green testified the register tape shows the last sale was 10:07 on July 3, 1990. T1741. The 911 call was received at 10:17, so the crime occurred between those times. T1742. They did not tell the media what caliber the bullets were the victim was shot with. T1747. He spoke with Ben Carter who advised that Blackmon had a .38 and Lowe a .32 and practiced shooting at a park; police went and found the .32 casings. T1750-51. They retrieved Mr. Lowe's time card showing Lowe left work at 9:58 and returned around 10:34, so he was out during the time the crime was committed. T1754-55. He was driving Ms. White's mother's car, a white Topaz. T1755-56. He retrieved the .32 from a shed behind Blackmon's home in the paper towels with ducks on them, the same as in the kitchen of Lowe's house. T1757-58. Lowe did not live far from Nu-Pack. T1759. Lorenzo had nothing noticeable on his face that stood out. T1760-61. A photo shows Lowe with a full mustache at the time he was interviewed. T1767.

He test drove the route Lowe said he took during the crime to see if it could be done with 36 minutes. T1762-63.[4] The video of the route taken was played and narrated. T1773-79. A second video taken April 5, 1991 was played and narrated, purporting to show the route described in Mr. Lowe's statement. The officer

[4] Newspapers at his home and vehicle from July 6th were found, and a dark baseball cap in the blue car. T1768. A search of Mr. Lowe's home also turned up shirts and pants from Gater Lumber. T1769-70. Sunglasses and cigarettes were also found, though he did not know if Mr. Lowe smoked. T1771.

concludes it took 19 minutes longer to take the route Mr. Lowe described in his statement than the time he was clocked out of work. T1787-98.

On cross the officer testified he put together a live lineup with Mr. Lowe and five others the same day he was arrested. Mr. Lowe was pictured with a mustache. Witness Luedtke did not pick out Mr. Lowe as the perpetrator. T1807-08, 1818. Though Blackmon was a multiple convicted felon the officer did not arrest him for possession of the firearm. T1813-14. Luedtke did not say the man was wearing sunglasses, but he believes the composite shows a man with sunglasses. T1820-21.

Later, Dwayne Blackmon signed an affidavit saying the witness and another officer told him he could get the chair or 50-100 years. They held a meeting with him at the state attorney's office. He recalls Blackmon making accusations. T1823. The witness denied threatening or coercing Blackmon and said Blackmon would be lying if he says he did. T1833-34.

The yard foreman from Gater Lumber's testimony was that at the time Mr. Lowe was in charge of loading and unloading trucks and helping in the yard. T1843. Mr. Lowe was working on July 3, 1990, and asked if he could take some time off. The time clock was in the break room. T1844. Normal hours were 7 or 7:30 to 4 p.m., and workers had to punch in and out or they would not get paid. T1846. On July 3d Mr. Lowe said he had some things to do in the morning so he was given time off; he did not act any different when he returned. T1847. On cross

the witness agreed the time clock was in the back and not secured; anyone could go in the break room. T1851-52. He could not testify Mr. Lowe is the one who clocked out and in. T1853.

A former coworker and roommate of Mr. Lowe's testified Mr. Lowe had moved into his house about two weeks before the July 4th weekend. T1858. The witness saw a gun which looked like a .38 special at the house 2-3 days before the killing but not after. T1858-60. The witness had been in the service and 2-3 days before the killing Mr. Lowe asked him if he had ever killed anyone, wanting to know what it would be like. T1861. Mr. Lowe had moustache. T1863.

The office manager from Gater Lumber described how the time cards worked. T1876-79. On July 3 Mr. Lowe punched in at 7:21 a.m., clocked out at 9:58 a.m., and clocked back in at 10:34. T1855. The second time he clocked out was 11:49 and he was back at 12:43. She could not testify Mr. Lowe actually clocked in and out. T1887-89.

Patricia Shegog White had lived with Mr. Lowe when she was 15 or 16. T1912. On July 3d Mr. Lowe had a gun, she believes a .32. He said he had gotten it from Blackmon. T1915-16. She attested to their money problems, and her spending problem, including bouncing checks. T1919. On July 3d Mr. Lowe went to work in her car, the white Topaz. Blackmon was driving Lowe's blue car. T1922-23. Rodney got home between 10 and 11 and she drove him back to work

so she could use the car. T1926. She went to pick up Dwayne's wife, Vicki, and she saw Dwayne in bed complaining he was sick. T1927, 1929. She was pulled over by an officer who said her car matched one involved in a murder that day; her license had been suspended and she got a ticket. T1930. Dwayne's uncle picked up Lowe so he could drive the car, and he went back to work. T1931.

On July 4th she got in an argument with Dwayne. T1932. He and Vicki had items at their house of theirs, and Vicki came and picked them up, including the gun and bullets. T1933. Lowe retrieved the gun from the garage, and Vicki wouldn't take it unless she wrapped it in the duck covered paper towels and Vicki took it that way. T1934-35.

After the statement, Mr. Lowe sent her a letter telling her that he met the other two at the ball field, waiting while Blackmon and Sailor used her car for the robbery. He asked her to tear it up after reading it and she thinks she did. T1937.

On cross Patty White did not remember Mr. Lowe ever wearing glasses. He was always clean shaven, unlike Sailor who was always scruffy on his cheeks and chin. T1942. Mr. Lowe had been taking care of her after a drug arrest, and she went back to drugs after he was arrested. T1944. Of the group, Mr. Lowe was the only one with a full time job. Ms. White had met Mr. Lowe's family. She considered Mr. Lowe to be a caring and affectionate person, and that he loved her;

she had problems with her father and stepfather, felt she had done Rodney wrong. She had not written Lowe in the last 10 years. T1950-52.

On redirect she acknowledged her previous testimony was Lowe told her about Blackmon and Sailor planning the robbery. T1954-55. Mr. Lowe's parents were very strict and very pushy with the Jehovah's Witness religion. T1956-57.

Deputy Brown stopped Ms. White on July 3d. He testified he had gotten a BOLO for a white Ford Taurus, and stopped Ms. White, who was with another female, around 11:30 a.m. T1970-71. Her license was suspended, and he gave her a ticket but was never called to court to testify. T1973-75.

Victoria Blackmon testified at the time this happened Dwayne made his living dealing drugs. T1979. They had lived with Rodney and Patricia, but moved out in 1990. T1981. The four were friends.T1983. Lorenzo Sailor was a very close friend of the family, and they considered themselves related. Lorenzo was disabled a little mentally. At the end of June or beginning of July Lowe was short on money with Patty going through whatever he had. T1984. Blackmon had a .38 and Rodney a .32, and they practiced. T1985.

On July 3 1990 she and Patty White were supposed to go shopping, and she woke up with Patty blowing her horn between 1030 and 11. Dwayne was sleeping, very sick in bed. T1986. Lorenzo was staying with them in the spare bedroom but she did not see him that morning. She got in the car, and on the way back to the

house Deputy Brown pulled them over because of the white car and wrote a ticket for Patty. T1989. Neither she nor Patty had a license, but the deputy said it was okay for them to go around the corner. T1990. Her uncle took them to get Lowe from his job at Gater Lumber, Lowe drove the uncle back to the trailer park and took the witness and Patty to their home in Sebastian.T1991.Lowe took the car, a 2 door white Topaz, back to work. T1992.

The couples argued the next day over whether Dwayne or Patty hit her with a firecracker, and Dwayne was mad. The witness went back to retrieve items at their residence; Rodney had borrowed a TV. Patty gave her a gun and ammunition wrapped in paper towel with ducks. T1995. Their kitchen was decorated in blue ducks. Lowe told Patty to tell the witness this was because he was mad at her because she wrecked his car, and to give the ammunition to Blackmon. T1996. The witness had in fact wrecked Lowe's blue car. She gave the items to Blackmon when she got home, but he did not say anything. T1997-98. Later she and Dwayne gave statements, and Dwayne took law enforcement back to their house and gave them Lowe's gun. T1998. She and Blackmon had two children together and though they divorced in 1995, remained in contact; he died in 2003. T1999.

On cross, the witness agreed Dwayne Blackmon was a successful drug dealer, making enough to support them and loan Lowe money. T2002. The witness was only guessing about Rodney Lowe and Patty White's money problems. T2004.

Dwayne had been driving Lowe's blue Olds. There were problems between the two because of the accident, less than a week before July 3. T2005. She and Patty White were good friends; neither worked. T2006. Sailor was mentally impaired, and she did not think he could read or write. Sailor had just been released from prison and was living with her and Dwayne in the spare room. T2007-08. She did not see Lorenzo on the morning of the third and had not seen him for a couple days prior to or after July 3d, either. T2012.

At a June 27 birthday party for Dwayne, he and Lorenzo got hats. T2015. She had previously said Dwayne wore a Miami Bad Boy cap for his birthday, and Lorenzo had one, but now only remembers Lowe having a hat. T2016-17. The witness says Lowe always wore a hat, mostly his uniform hat. She does not think she saw Lowe wear glasses. She did not know what Dwayne did after she and Patty White left. T2021-22. When they picked up Lowe he was wearing his Gater Lumber outfit light tan shirt; she does not know what pants.

The witness was called to the State attorney office in November of 1990. T2028. She believed "Dwayne had gotten into some trouble, and I think he was kind of threatening if you don't help me get out of this trouble, I won't tell you guys what I know." T2029. She repeated a similar view on repeated questioning, adding that she thought "they told him, oh, you will, because that will be perjury and that you were lying all along, and something like that." T2029. The witness says "I told

him [Dwayne's attorney] that -- what Dwayne told me to tell him, which was if they don't get him out of this he wasn't going to testify." T2030. Dwayne told her essentially that he wanted something from police in exchange for his testimony, for his problems to go away, and if his problems would not go away, he would not be testifying about anything the police wanted him to testify about. T2030.

On redirect, the witness said Dwayne's problems did not go away, he did not get out of jail. T2030. She said Lowe always wore the ball cap with netting in back and never saw Dwayne or Lorenzo wear one. T2031. On recross, the witness said Dwayne had been arrested quite a few times, and around October 1 was arrested, but bonded out two weeks later. T2032.

Dwayne Blackmon's testimony from the first trial was played. He was 19 and on probation at the time of the crime. T2042. Blackmon has been convicted of a felony nine times; in April of 1990 he was selling crack cocaine. He identified the pistol, saying he traded 60 dollars' worth of dope for it, getting it for Lowe. T2043. They had visited the Nu Pack earlier because they were gonna rob it. T2049. On a previous attempt Lowe went in the store with the gun but came back out, saying someone was in the cooler. They drove back to the house. T2050. Lowe, Blackmon and Sailor were in the car, and all three were going to rob the store and split the money. T2051. They went back the next day in the white car but

there were cars and they did not rob it that time either. T2052-55. Lowe had a .32, the witness a .38. They did not discuss going a third time. T2056-7.

The witness was sick the morning of July 3d. T2057. After Vicki left he realized he forgot to give her money so he got up and drove the blue car, went down to find them, saw cops and stopped. He took the back roads to "Rod's" house, where he ate cereal, then got back in the car and looked but did not see them so he went home. T2058. The witness saw Lowe after 4:30 when he got off work, he was looking kind of sick and Lowe told the witness he went to rob the store they were supposed to rob but didn't get anything, supposedly together with other details. T2060. The witness was "shocked," "confused." He thought the paper said mainly the same thing Lowe told him. T2063. Blackmon did not call police, thinking he could be charged. T2064.

Vicki came back with the gun and bullets wrapped in duck paper towels saying Rod sent it to him, so he put it in wardrobe outside. T2065. On the 10th he turned it over to police; he and Lowe had a previous argument when the witness dented his car. T2066. He met with Green and Kerby and Detective Green took him home and got the gun. After Lowe's arrest the witness and Patty White went to talk with him to find out more and Lowe apologized for the part about saying he was at the store. It was a lie about the baseball field. T2068-69.

On cross the witness says he asked Lorenzo if he was with Lowe when he did it because “Lorenzo wasn't home either. Lorenzo was staying with me at the time.” T2070. When Lowe went into the Nu-Pack that Friday he was not wearing gloves. T2078.On Saturday Lowe had Blackmon’s .38 and Lorenzo had the .32. T2079. Lowe tried to give the gun back to the witness before the killing. T2080. When Vicki brought the gun back Lowe had already supposedly told the witness he killed the woman. T2081. Blackmon was not arrested for anything he did regarding the Nu-Pack killing. T2087.

The FDLE firearms expert compared four fired bullets, the damaged case register drawer, a shirt, a .32 S&W long caliber, and said 3 of the 4 bullets were fired from this revolver; the 4th was similar. T2100. The register drawer was consistent with a .32 firing. T2101-02. The soot on the shirt around the hole showed it was fired at from approximately one foot. T2104-06. A print expert testified Mr. Lowe’s prints had a “large” number of points of similarity with those on the wrapper. T2113-34. No latents of value were on the firearm. T2135.

The 1987 Brevard County Crime.

The judgment and sentence from the 1987 case was introduced. T1977. An officer from Brevard County testified he received a bulletin of an armed robbery, followed the identified van with lights and sirens and it began to flee into a community. T1866-68. The van turned onto a golf course and crashed into a fence

and tree. T1869. He recovered a sharp piece of plastic. T1870. He does not recall any scuffle. T1871. The victim said the man in the van did not want to hurt him, and he was not injured. T1872. There was no knife, but he recovered a piece of plastic. The man was taken into custody without "hassle." T1873.

The victim of the 1987 robbery testified. He had left a club meeting in the evening and drove home. When he got there he turned the ignition off. Someone grabbed him from behind and put something against his neck; it was sharp but he does not know if it was a knife. The man said "don't turn around, I don't want to hurt you," and to put his keys on the dashboard, turn over his wallet and get out, which he did. T1962-64. The man took off and he was not able to identify him. T1965. The man did not want to hurt him.

The Probation Officer supervising Mr. Lowe on the 1987 case testified DOC records indicate that on May 3, 1988 Lowe was sentenced to six years suspended after four years, to be followed by two years community control. He was released February 24, 1989. T2138 Community control is stricter than probation including no firearms. T2141-42. Asked over objection how much time he would get if he committed another offense while on community control, the officer said in the area of thirty years. T2142-43. He went over the conditions with Mr. Lowe. T2144.

On cross the officer said it was a youthful offender sentence and he was not sure of the law at the time of the violation. T2145. If sentenced as a youthful

offender there was possibly a different potential sentence, and there "absolutely" was a difference between a Youthful Offender and adult sentence. To the witness's knowledge the initial sentence is different but not the potential sentence. T2146. Mr. Lowe did not violate community control. T2154, 2156.

Victim impact evidence was presented from Ms. Burnell's daughters, T2162-67, together with a photo of the victim taken right before her death.

The state rested. T2173.

The Defense Case.

Correctional Officers testified when Mr. Lowe was housed in the local jail several times for an extended period, he was a "model inmate," T2178, who caused no problems whatsoever, and was always respectful. T2176 (Dep. Kane). He was eventually allowed to mingle with other inmates because he had no blemishes on his record and has earned the trust of the jailers. T2177 (Dep. Kane). Two supervising officers attested to similar good conduct, a complete absence of disciplinary incidents while at the jail, T2183, 2185, and that Mr. Lowe attends religious services. T2184. (Sgt. Stewart); T2223 (Sgt. Gregg).

Since 1998 the chaplain for death row inmates has met with Mr. Lowe. T2197-98. Mr. Lowe is sincerely "seeking to transform himself and was seeking how spirituality and a relationship with God could help him change himself and change the way he dealt with things in his environment." T2198. Mr. Lowe has

shown a “constant increasing maturity” spiritually and the “ability to translate that into specific behavior.” T2199. During his cell front visits, the chaplain said when others are “acting out” and angry he has seen Mr. Lowe maintain his calm and effectively encourage others not to lash out but to find a way to control themselves. T2202-03. Mr. Lowe’s spirituality is authentic, not “jailhouse religion.” T2204. This is only the second time the chaplain has testified for any death row inmate, because he believed the spiritual transformation was genuine. T2205.

Ron McAndrew is a former warden of several Florida prisons, including FSP. T2228-2230. He reviewed Mr. Lowe’s DOC records and met with him. T2235, 2242. Mr. Lowe has only received two very minor disciplinary reports in all his time in DOC, the last one in 1997. T2236-2238. For an inmate to go that long discipline free is “more than amazing” because they are so easy to get. T2238-39. Mr. Lowe told him he remained discipline free because he learned to show respect to get it, and gave respect both to officers and other inmates. T2243. Mr. Lowe told him he was not the same human being he was 20 years before, and had to do his growing up in jail. He left a rough childhood to step straight into prison, and had to grow up or give up. T2244. The former warden concluded if Mr. Lowe was living in open population he would not be a danger to anyone. T2245. In addition to the records and interview, that opinion is based on the fact Mr. Lowe has close continued contact with his family. T2244-45. On cross the witness said

Mr. Lowe was a lot less likely to break the law than he was 20 years ago, and behavior anywhere is what you have to go on. T2259.

The defense next presented Lisa Miller, who has 12 felony convictions and two for dishonesty. T2265. In 1990 Ben Carter was her boyfriend. T2265. She did not know Mr. Lowe personally, and knew of the Nu-Pack crime from reading it in the paper. T2266-67. A few months after the Nu-Pack shooting Dwayne Blackmon was arguing with his wife and told her "I killed one bitch, I'll do it again." T2269. He was talking about Nu-Pack, giving Carter details about the robbery, and mentioning the name Rodney Lowe. He was excited about what he had done and that he had gotten away with it. T2270. She told law enforcement, T2271-72, including Phil Williams, Gremis and Parrish, from the MACE Unit and anyone who would listen to her, told an investigator about it in 2002 or 03 and at a subsequent hearing in 2003. T2272-73.

On cross Ms. Miller testified when Blackmon was talking to Carter he gave details of the Nu-Pack robbery: that it was three people, Mr. Lowe's name was mentioned, and a Lorenzo. They had gotten together to do a robbery and Dwayne and Rodney went into the Nu-Pack store. Rodney went to a cooler and got something out. While Rodney was at the cooler, Dwayne was at the counter. Dwayne said "she hesitated, so I shot her," Rodney dropped it and ran out of the store. T2275-76. She told police. T2276-77.

Ben Carter testified; he is also in custody with a DOC sentence and has 11 felony convictions. T2281-82. Dwayne Blackmon is his cousin. T2283. Carter was on good terms with Blackmon, living in the same house. T2284. The witness also knows Lorenzo Sailor. In 1990 Sailor had facial hair, a "kinda" bushy beard. T2285-86. Carter did not know of Blackmon's involvement in 1990. T2288. Carter heard Dwayne say in anger that "he had killed the lady and stuff like that" maybe 5 or 6 times. T2288-89. This was in 1992 or 1993 while making a threat toward someone, like "I killed the bitch, something like that, you know. You-all don't fuck with me or something like that." T2289. That statement did not change. T2290-91. At some other points Blackmon said Sailor shot Ms. Burnell. T2290-91. Rodney Lowe was clean shaven most of the time. T2293. On cross Carter denied telling police he overheard a conversation between Blackmon and Rodney Lowe in which Lowe admitted he was the shooter. T2294.

Sherri Lowe, Rodney Lowe's mother, testified. She is retired, having worked at Kennedy Space Center 40 years and having lived in Titusville since 1968. T2296-97. Rodney's father Charlie, Sr., had died over three years before. Rodney's father also worked at the Kennedy Space Center after having served in the Marines in Vietnam for two years. He received an honorable medical discharge. T2297. Charlie Lowe was a very hard worker and very responsible to his family. With his background as a Marine, he was "very firm." T2298.

Ms. Lowe has two other children, Charlie Jr., 42, and her daughter Toni, 33. Rodney is 42. Ms. Lowe described their family as average, with lots of family activities. The family associated with other families in the congregation of Jehovah's Witnesses. T2299. When Rodney was young his father was not a Jehovah's Witness, but she would take the kids to church regularly. T2300.

Rodney Lowe's father was drinking before he joined the church, and did not spend as much time with the family as he did later. On occasion he would not come straight home and would drink, causing tension. T2301. When Rodney was about twelve Ms. Lowe and his father separated for about six weeks. She left the area with the kids to live with her parents because when Rodney's father was drinking he would use language not appropriate for her and the kids. T2302. After she and her children left, her husband went to the congregation and asked for help, confessing he drove his family away, was sorry, and wanted his family back. He began the conversion process. T2303.

Ms. Lowe said there were discipline guidelines for the children. She would counsel them, give them restrictions, revoke their privileges, and "we employed corporal punishment." Ms. Lowe administered the physical punishment with a belt or her hand when they were smaller, but the majority of time her husband did it. When they came back her husband was not perfect but made positive steps, joining Jehovah's Witnesses, studying the Bible, and changing his way of life. T2303-04.

Ms. Lowe and Rodney's father believe they were mandated to raise children according to the Bible's principles of what is right and wrong. She would go door to door with her children, handing out Watchtower and Wait magazines. Children were required to accompany parents on these missions, T2305, and Rodney did unless he was sick. Their assignment was all of Titusville. At times Rodney might recognize someone whose home they approached.

In school Rodney was very easy; very quiet, laid back, and not a difficult child to raise at all. T2306. He had no problem following rules, and would do chores. There was a little rivalry with his brother, but he would help with his sister when she came along 8 years later. Rodney would help with whatever she asked. At one point he played football, and she thinks he was good and enjoyed it. T2307.

Rodney had no problems through middle school, but at 15 or 16 things began to change due to peer pressure. T2308. He associated with other children who had lenient boundaries. She told Rodney she was a Christian parent, obligated to raise her children according to the Bible unlike other parents. T2309.

At the time of the incident when Rodney was 17 he was violating curfew and may have skipped school. Rodney left home, and she thinks he was sent by DOC to a juvenile program. T2310. After Rodney was released from incarceration, he never lived at home. Ms. Lowe recalls visiting him at a halfway house and afterward at his home just before this offense, and Rodney visited them. They all

went to the Kingdom Hall a couple of times. His vehicle was in bad condition, so she and his father got him a blue Oldsmobile. T2311.

In July of 1990, Rodney was still welcomed home. She can't say how often she saw him, but they visited. T2312. She visited Rodney after that conviction, she thinks more than 10 times. T2313-14. The family has maintained a relationship with Rodney since his conviction. He is still very positive and hopeful. T2315.

Rodney knitted her and her daughter a sweater, which they still have, and he gave her daughter a beautiful painting. He writes letters. When he was younger there were older people in the neighborhood and Rodney would take their garbage out. T2316. She recalls one elderly man, Rodney would cut his grass and check on him. Since the conviction Rodney has written and encouraged her daughter to continue on the right path. Rodney has a desire to become more spiritual, and in letters they share scriptures; he takes his relationship with God seriously. T2317. She will continue to love him. T2318.

On cross Ms. Lowe identified a photo of the family home Rodney grew up in from the age of eight, saying they were "humble" accommodations. T2319-20. The state made a number of statements about Rodney getting arrested as a juvenile "numerous times," though Ms. Lowe was not sure. Though Ms. Lowe did not know the specifics, but the state continued with its similar statements. T2321-22.

The state then showed Ms. Lowe a letter from December of 1988 represented to be from Ms. Lowe to her son Rodney.T2322-23. The state said in the letter Ms. Lowe told her son Rodney "the course you are on is leading to death." Continuing making statements apparently based on a school counselor report which Ms. Lowe did not recall, the state said she and her husband were concerned about Rodney's "increased ability to lie" and "the things that he was doing were "very sneaky, premeditated and deliberate as opposed to characterized by innocence and just impulsiveness." T2330. Ms. Lowe agreed she and her husband tried their best with Rodney, trying to get him on the right path several times, including after he had gone to prison after the 1987 car burglary. T2331.

On redirect Ms. Lowe agreed her husband was the head of the household, and her role was to support him. T2331. Referring to the letter, Ms. Lowe said it was part spiritual counseling and encouraging him to do what was right. The biblical principles of repenting, turning around and being positive were included in the letter. T2332. She did not know about the other charges. T2333. Rodney Lowe's older brother had problems as well. Rodney Lowe is not the same person as when she wrote the letter; in 1988 he was a troubled teen, getting pressure from outside the home. He is now a different person, mature, and has grown up. T2334.

Rodney Lowe's sister Toni Smith grew up 7 and 8 years younger than her brothers. She is an account representative with a medical facility, and lives with

her mother and daughter. T2336-37. She described herself as the spoiled child growing up, daddy's little girl. Her brothers catered to her. T2337. She and her brother Rodney had a good relationship; he was always there for her and he was never violent. T2338. She was shielded from family problems.

She has maintained contact with her brother Rodney since going to DOC. T2339. She writes letters about issues she had, such as wanting to move out with her boyfriend at age 17. Rodney discouraged her from that, telling her that her parents were acting out of love, not wanting her to date someone so much older. T2341. On her birthday and Mother's Day he always sends her cards. He has knitted sweaters for her and sent a portrait of her high school graduation picture. T2341. Rodney is very caring. He counsels her about her daughter, telling her to stay in school and get an education. She has no reservations about her daughter having a relationship with her Uncle Rodney. She intends to continue having a loving relationship with him. He loves his family, loves her daughter, and has nieces and nephews he has never met but asks about and encourages them. She loves her brother. T2342.

A forensic psychologist Dr. Reibsame testified. T2346-47. He obtained background information and conducted an in-person evaluation of Rodney Lowe. T2350. Mr. Lowe was disappointed with himself and mistakes he had made. When he was younger his father consistently communicated his disappointment both with

Rodney and his brother; much of what they did was not good enough for his father, which had an effect on his self worth. Rodney Lowe's mother and sister told the psychologist the same thing. T2352.

Mr. Lowe may have a longstanding depressive disorder, a theme of an individual with an absent male role model. Rodney Lowe had no problems or criminal activity until age 15. He did well academically in school, and is at least average intelligence. Problems began in middle adolescence in response to what was going on in the household. T2353. In 9th or 10th grade he had an angry interaction with the Driver's Ed. teacher, took off with the car and was arrested. He also got in trouble for breaking a window at school to make a long distance call. Both Rodney Lowe and his brother ran away from their father's disciplinary efforts, and were spending the nights in abandoned homes and living in the woods. At this time there were some arrests for burglaries. T2354. He completed juvenile probation then was sent to the Dozier School for Boys for several months. T2355. At the time of the 1987 burglary, Rodney was 17, homeless and living on the streets. He had been shunned by his family and the Jehovah's Witness congregation. He was arrested for the crime and ended up in DOC. T2355.

The psychologist had learned from a 1991 evaluation Rodney Lowe had average intelligence and there was no indication of significant brain impairment. T2356. The witness focused his testing on emotional or behavioral problems.

T2357. The psychologist used the MMPI, and Rodney Lowe scored high on two subscales. T2360. One shows independent thinking, assertiveness, leaderful like and maybe aggressive at times, somewhat rebellious. It would not be an unusual score for an attorney. T2361.The other high subscale suggests Mr. Lowe may not easily trust people and is sensitive to whether he is being treated fairly, consistent with one who has been confined for a long period. T2362-63. On everything else Rodney Lowe came up fairly normal. He is moderately depressed, has no psychotic experiences, a wide range of interests, interacts with people, can tolerate being alone and with others. There are no elevations to show a severe mental disorder or psychopathology. T2363. There is no evidence he is a psychopath or sociopath. T2364-65. Mr. Lowe maintains relationships and empathizes. He accepts responsibility for things he's done in life. He is not impulsive; he is thoughtful and has goals if released. T2366. On the Wide Range Achievement Test, he reads above the high school level.

Rodney Lowe was 20 years and one month of age at the time of the shooting. T2367. The adolescent brain does not function like that of a 40 year old; it evolves. Adolescents have worse decisionmaking abilities and tend to be more impulsive. T2368. He has no major personality disorder. T2369. His behavior from ages 17-20 is explained by what was going on with his family and religious circumstances; any 17 year old would be struggling. The psychologist spoke with

Ms. Lowe, his brother and sister about his father's heavy alcohol use. While Ms. Lowe minimizes it, the rest of his relatives describe it as alcoholic like. He came out of the Marines with a pattern of heavy drinking; family members observed his intoxication. T2379. The alcoholism fueled the marital separation. T2371.

For the Jehovah's Witnesses it was expected the whole family would participate in door to door evangelizing. To Rodney, this was a source of embarrassment and humiliation. His family was required to go around the neighborhood most weekends evangelizing while his peers did not. This led to harassment in school. If he did not behave according to the expectations of the congregation there was a shunning process. T2371.

His father joined the congregation and assumed control of the family. It was very patriarchal, very authoritarian. T2372. The psychologist believes corporal punishment can be beneficial on a limited basis and if not excessive. T2372. The child has no control and is helpless, but if there is a loving relationship and the parent soothes the child after, the fearfulness can be for a short time. T2374. The corporal punishment was described consistently by all family members, but interpreted differently. The father primarily carried out the physical punishment, which went on for several years. The physical punishment was primarily directed at Rodney Lowe and his brother, not their sister, "[a]nd punishment would be – would consist[] of father using either hand, extension cord, broom stick, paddle,

hitting the boys on their calves, thighs and their behind sometimes with their pants on and sometimes with their pants off." T2374-75. The psychologist could not opine whether the physical punishment was abusive. There were no reports to HRS to consider and he did not know the circumstances. The children's (now adults) interpretation was it was painful and fearful but it was all they knew. T2374.

The psychologist explained what a risk assessment for future violence is. T2375-7. His opinion regarding future violence was based on three factors which diminish the risk of reoffending; first, his age. Most violent offenders are 25 years or younger, while Mr. Lowe is in his 40's, which lowers the risk. Mr. Lowe does not have a severe mental disorder, which lowers the risk. There is no history of substance abuse; most violent offenders are drug and alcohol abusers; young and have mental health issues. None of that applies to Mr. Lowe. In addition, he remains connected with his family, and his family is supportive of him. Prior to arrest he had a stable work pattern. T2388. There is a risk factor that Mr. Lowe has a history of a violent offense, and has violated conditions of supervision, both of which increase the likelihood of reoffending. T2389. His opinion varies depending whether Mr. Lowe is in or out of custody. In a structured and secure situation there is a minimal risk of a violent offense. Out of custody, there are some risk factors that lower the risk and some historical factors that increase it. In his opinion the greater factors lower the risk. T2389-90. Mr. Lowe is now 40 and was 20 when he

was involved in the violence and violated community control. There continues to be no substance abuse problem and no severe mental health disorder. T2390.

On cross the psychologist said he understood the father stopped using alcohol when Rodney was 12. T2390. He was not saying there was a cause and effect between what he did when he was 20 and his father's alcoholism, and not talking about child abuse as it is defined based on the information he has. T2391. He is not saying the "spanking" is cause and effect for Rodney Lowe's behavior, but a contributing factor in the family circumstances. The state questioned about prior criminal activities, a "number of burglaries" and said other breakins to homes were to steal things, though the witness was not familiar with the details. T2391-92. Additional details of prior incidents were discussed by the state.

The psychologist agreed there were no major personality disorders. T2392. Mr. Lowe is independent but the psychologist is less certain about whether he could lead others. The high scores on aggressiveness and conflict with authority are not a good thing. T2393. Mr. Lowe did not believe society owed him things. There is no psychosis and no insanity, T2394-95, no indication of brain damage and his IQ is normal. There are no substance abuse issues. There was no mental illness to explain his criminal behavior, but Mr. Lowe did not offer that explanation. He agreed it was a decision on his part at the time. T2396. He agreed human behavior is unpredictable. T2396. The state pointed to times Mr. Lowe

behaved well in custody and committed crimes upon release, including the homicide. T2397-99.

The defense rested.

The State Rebuttal.

Bill Williams testified he was with the Indian River County Sheriff's Office in 1990 and did not recall having a conversation with Lisa Miller about it at this time. No one gave him information Dwayne Blackmon was the actual killer. T2401. On cross the officer was not sure where his notes about the robbery were, and probably met Lisa Miller. T2402-03. John Grimmick was also with IRCSO previously. He was familiar with Lisa Miller but between 1990 and 2003 she did not come to him and say Dwayne Blackmon said he shot Donna Burnell. T2405. On cross he agreed he was on road patrol at the time and not even tangentially involved in the case. He has a brother Billy and was in the MACE unit later, not in 1990. T2407. Investigator Kerby was recalled. He knows Ben Carter and spoke with him July 9, 1990 between the murder and arrest. T2408. Carter told them Dwayne Blackmon was his cousin, and he had overheard a conversation in which Lowe told Blackmon he had attempted to rob the Nu-Pack store and in the course of it shot the attendant. T2410-11. Blackmon was previously in prison and he assumes it is true he had nine convictions. T2412-13.

Remaining Proceedings.

The jury unanimously recommended death. T2555. At the *Spencer* hearing the state offered nothing additional in aggravation and the defense nothing additional in mitigation. ST172-79. At sentencing no new defense evidence was presented, the parties having submitted memoranda. ST2566. The state presented victim impact testimony to the court. T2567-2575. The Court pronounced a death sentence. T2575-76.

SUMMARY OF THE ARGUMENT

Point 1. Most of the sentencing order is copied from the state's memorandum urging death, so the sentencing Court did not personally weigh the factors.

Point 2. The community control aggravator does not apply because Mr. Lowe was not placed on it. Other aggravators were not proven or were unlawfully presented.

Point 3. Mitigation was treated unlawfully by the trial Court.

Point 4. The incomplete record requires a new trial.

Point 5. The state cause challenge was wrongly granted.

Point 6. Instructions prevented the jury from considering essential mitigation.

Point 7. This Court's directive that the jury be instructed on *Enmund/Tison* culpability standard was ignored.

Point 8. State reliance on the prior death sentence, focus on release and credit, and suppression of the consecutive sentence misled the jury.

Point 9. False testimony and argument Mr. Lowe faced 30 years if he violated "community control" was unlawfully presented.

Point 10. Restriction on testimony and cross was error.

Point 11. Exclusion of defense mitigating evidence as a discovery violation was harmful.

Point 12. Prejudicial evidence not admitted at trial went to the jury room.

Point 13. The prosecutor improperly compared the worth of decedent and Mr. Lowe.

Point 14. The animation was not disclosed and no *Richardson* hearing was held.

Point 15. The mannequin was improperly used.

Point 16. Should this Court reach the issue, death is disproportionate.

Point 17. *Ring* error requires a new trial.

Point 18. Cumulative error requires reversal.

ARGUMENT

Point 1. THE TRIAL COURT ERRED IN FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES

The sentencing order in this case reads as though it was written by a prosecutor advocating that Mr. Lowe be put to death. Comparison of the order with the state's sentencing memorandum shows the most important parts of it were.

At the *Spencer* hearing the Court asked counsel for both parties to submit sentencing memoranda. *Supp. R* V2 T176-77. The defense "Memorandum in

Support of a Life Sentence" argued against potential aggravation and in favor of mitigating factors. R447-61. The "State of Florida's Sentencing Memorandum" argued for a finding of specific aggravators and discussed mitigation. R463-480. It also included a section on the "analysis of aggravating circumstances and mitigating circumstances". R480-484.

With some additions describing the weight accorded to factors, the trial court's sentencing order in this case is a verbatim adoption of the state's memorandum in support of the aggravating circumstances, and very nearly so, including the title, of the "analysis of aggravating and mitigating circumstances." *Compare state memorandum*, R466-475 & 480-484 with *Sentencing Order*, R508-18 & 522-527.The discussion of mitigating factors in the sentencing order does not appear to be wholly copied from the memorandum of either party. *Compare state memorandum,* R465-80, with *sentencing order*, R519-22.

The sentencing Court's wholesale adoption of the state's memorandum arguing in support of aggravating factors, and its nearly complete adoption of its argument that aggravation outweighs mitigation requires vacation of the death sentence. The sentencing Court failed to comply with the most basic of the requirements of Section 921.141, *Fla. Stat.,* and the holdings of this Court that it *personally* evaluate the aggravators and mitigators and *personally* weigh and balance them.

> As we explained in *Patton v. State*, 784 So. 2d 380, 388 (Fla.2000), the sentencing order is 'a statutorily required personal evaluation by the trial judge of aggravating and mitigating factors' that forms the basis for a sentence of life or death. The sentencing order is the foundation for this Court's proportionality review, which may ultimately determine if a person lives or dies. *Id*. If the trial judge does not prepare his or her own sentencing order, then it becomes difficult for the Court to determine if the trial judge in fact independently engaged in the statutorily mandated weighing process.
>
> In *Patterson v. State*, 513 So. 2d 1257, 1261 (Fla.1987), we condemned the practice of a trial judge delegating to the State the responsibility of preparing the sentencing order. Section 921.141, *Florida Statutes* (Supp.1992), requires a trial judge to independently weigh the aggravating and mitigating circumstances. *See Patterson*, 513 So.2d at 1261.

Morton v. State, 789 So. 2d 324, 333 (Fla. 2001). "In preparing a sentencing order following a resentencing proceeding, a trial judge must abide by these same principles." *Id.* at 334.

The prejudice from the sentencing Court's conduct in fostering arbitrariness and foreclosing a reasoned proportionality review is particularly apparent when comparing the Court's mitigation findings with its inconsistent "analysis of aggravating and mitigating circumstances." R522-27. While the Court found age should be given "little weight," R520, in its "analysis," it says age should be given "little or no weight." R525. The Court finds Mr. Lowe's "good behavior while in confinement" should be given "moderate weight" R520-21, but in its "analysis" says such behavior, among others, is "not mitigating in this case, and [ ] entitled to little or no weight." R526. The same inconsistent findings are made for "family relationships" and "maturity." *Compare* R521 with R526. Finally, while the Court

finds "low risk of future danger" should be given "little weight," R522, in its "analysis," it finds the testimony supporting that factor "underwhelming." R526. *See also* Point 3. This order is the essence of arbitrary decisionmaking in the death sentencing process and violates Florida law as well as the eighth and fourteenth amendments. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

While this Court has vacated and remanded for entry of a new order in similar past cases, the complete failure of the sentencing judge in entering arbitrary findings should require a new penalty phase before a new judge and jury.

Point 2. ALL BUT ONE OF THE AGGRAVATING CIRCUMSTANCES ARE INAPPLICABLE OR INSUFFICIENTLY PROVED AND SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY OR RELIED UPON IN SUPPORT OF A DEATH SENTENCE

Standard of Review: "[W]hether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *McWatters v. State*, 36 So.3d 613, 641 (Fla.2010).

Merits. Appellant challenges the following aggravators.

A**. (5)(a). The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or felony probation.**

This aggravator was unlawfully presented to the jury at trial and improperly applied to Mr. Lowe as a basis for his death sentence because at the time of the killing he was not on "community control," but rather in a "community control program" imposed as part of a youthful offender sentence.

Appellant contends the youthful offender sentence does not qualify as a felony conviction for purposes of this aggravator. *See* subsection 2, below. Even if it does, for this aggravator to apply, there must be both a conviction **and** commission of the offense while "placed on community control," Section 921.141(5)(a), *Fla. Stat.*, and Mr. Lowe was not placed on "community control."

The youthful offender statute under which Mr. Lowe was sentenced, V. 4, R65-70, does not include community control as part of the sentence, only a "community control program." It is so described in the youthful offender statutory scheme in §958.03(2*), Fla. Stat*. (1987). **Definitions**:

> (2) "Community control program" means a form of intensive supervised custody in the community, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of the offender is restricted within the community, home, or noninstitutional residential placement and specific sanctions are imposed and enforced.

Adult community control is defined the same under Section 948.001(3), *Fla. Stat.*, with the exception of the use of the article "an" instead of "the" before the word "offender." Both terms "community control program" and "community control" are used in the youthful offender sentencing statute, Section 958.04, *Fla. Stat*. Most defining, though, is the statutory requirement that a person sentenced as a youthful offender can only violate either probation or a community control program, not community control. *See* Section 958.14, *Fla. Stat.* **Violation of probation or community control program**. The statute is so titled, and

specifically provides: "A violation or alleged violation of probation or the terms of a **community control program** shall subject the youthful offender to the provisions of s. 948.06." (e.s.). It could not be clearer that the legislature has prescribed a "community control program," not community control, for youthful offenders. Community control is an adult, not a youthful offender sentence.

Because Section 921.141(5)(a), *Fla. Stat.,* aggravates only for murders committed by those "placed on community control," and youthful offender sentencing commits a defendant to a "community control program," and not to "community control," this Court must hold the aggravator is not applicable to Mr. Lowe. "Penal statutes must be strictly construed in favor of the one against whom a penalty is to be imposed." *Trotter v. State*, 576 So. 2d 691, 694 (Fla. 1990)(probation was not community control). This Rule of Lenity is "not just an interpretive tool, but a statutory directive." *Mendenhall v. State*, 48 So.3d 740, 753 (Fla. 2010). *See Sec*. 775.021 (1), *Fla. Stat*. It is a federal constitutional rule as well, and "[u]nder a long line of our decisions, the tie must go to the Defendant". *United States v. Santos*, 533 U.S. 507, 514 (2008)(Scalia, J.).

Section 921.141(5)(a), *Fla. Stat.*is clear and unambiguous, and

> [w]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent.

State v. Chubbuck, 141 So. 3d 1163, 1170 (Fla. 2014)(*quoting Koile v. State*, 934 So.2d 1226, 1230-31(Fla.2006)). Reading section 921.141(5)(a) to include "community control program" when it says "community control" would certainly extend or modify it, and "[c]ourts should not construe unambiguous statutes in a manner that would extend, modify, or limit their terms or the obvious implications as provided by the Legislature." *Chubbuck*, 141 So. 3d at 1170. In *Chubbuck*, this Court also noted specific language in the youthful offender statute directed to the sentencing issue there, and determined its absence in the Criminal Punishment Code meant it was intentional: "Had the Legislature intended to require unavailability of specialized treatment in the DOC as an element of subsection 921.0026(2)(d), it could have said so." *Id*. at 1171. The legislature would have said "community control program" if that is what it meant to include in the aggravator, but it did not.

Exclusion of those under a youthful offender sentence from this aggravator is entirely consistent with legislative intent. The legislative intent in creating the youthful offender statute is to provide remedial sentencing for rehabilitative purposes. §985.021, *Fla. Stat. See State v. Milbry*, 476 So. 2d 1281 (Fla. 1985). It is not at all an "unreasonable result" or "clearly contrary to legislative intent" to conclude the legislature did not intend to include the remedial, rehabilitative

youthful offender community control program as an aggravating factor in a death penalty case.

So while someone handwrote "community control" on the sentencing order in this case, by operation of law once declared a youthful offender, appellant's post-incarcerative sentence was not to be "placed on community control," but in a "community control program." Mr. Lowe was not on community control at the time of the killing here and it was harmful error for this aggravator to have been submitted to the jury and found by the Court.[5]

The state made much of this aggravator before the jury. The state even presented Mr. Lowe's community control program officer as a witness, describing in detail what community control meant, and inaccurately saying Mr. Lowe was subjected to if he was violated as 30 years. T2137-45. The totally inapplicable community control was used to cross the defense witnesses on the issue of future danger as well. T2397-99. The state argued the aggravator both as a reason for the jury to impose death, and to undermine mitigation. *E.g.*, T2455. The trial court instructed the jury on this aggravator, T2539-40, and gave this factor great weight. Its presentation was unquestionably harmful and disrupted the guided

---

[5] The aggravator did not incorporate community control at the time of the crime, July 3, 1990. It violates the state and federal *ex post facto* clauses to use the aggravator retrospectively. Appellant recognizes there is contrary authority. *Trotter v. State*, 690 So. 2d 1234 (Fla. 1997). However, that case is wrongly decided.

consideration of the circumstances governing the death decision by the jury and Court.

B. (5) (b) The defendant was previously convicted of a felony involving the use or threat of violence to the person.

This aggravator is inapplicable as well. Appellant's conviction for robbery *without* a weapon occurred on a plea of *nolo contendere* and he was adjudicated guilty. V4 R66. He was sentenced as a youthful offender. R70. Juvenile adjudications do not qualify for this aggravator. *Henyard v. State,*689 So. 2d 239 (Fla. 1997). In *Green v. State,* 975 So.2d 1090, 1112-13 (Fla. 2008), this Court reasoned a youthful offender adjudication counts as a conviction where the defendant is adjudicated guilty. However, that reasoning was not essential to the decision in the case, and is at odds with the remedial intent of the Youthful Offender Act. This Court should hold where a juvenile defendant is sentenced as a youthful offender the conviction does not qualify as a prior violent felony.[6]

The prior felony was not life-threatening. The most reasonable understanding of what happened during the 1987 robbery is that Mr. Lowe broke into the van, was looking through it, and was surprised when the victim entered.

---

[6] This aggravator was also improperly considered as independent and not merged with being on community control. *Hildwin v. State*, 727 So. 2d 193, 196 (Fla. 1998), is wrongly decided. While previously rejected, this Court should reconsider and also find the aggravator cannot apply because Mr. Lowe was a juvenile, 17, at the time of the offense. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011(2010).

There is no evidence Mr. Lowe originally intended to do anything more than break into the van and steal something. The testimony was Mr. Lowe said he did not want to hurt the victim, and that he did not. A piece of plastic was recovered. This is not a violent felony because the surrounding facts and circumstances do not show it was life threatening. *Gonzalez v. State,* 136 So. 3d 1125, 1150 (Fla. 2014). This aggravator was also argued and instructed on, T2540, and given great weight by the sentencing court. R511.

C. (5)(e). The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The evidence does not support this aggravating factor. "To establish the avoid arrest aggravating factor where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant motive for the murder was the elimination of a witness." *Connor v. State*, 803 So.2d 598, 610 (Fla.2001) (*citing Alston v. State*, 723 So. 2d 148, 160 (Fla.1998)). Where, as here, the victim is not a law enforcement officer, the State must prove beyond a reasonable doubt that the sole or dominant motive for the murder was to avoid arrest, and "proof of the intent to avoid arrest or detection must be very strong." *Hernandez v. State*, 4 So. 3d 642, 667 (Fla. 2009)(*citing Riley v. State*, 366 So. 2d 19, 22 (Fla.1978)). This Court has held that "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot

support the avoid arrest aggravator." *Id*. (*quoting Consalvo v. State*, 697 So. 2d 805, 819 (Fla.1996)).

Most persuasively, while "this Court has found it significant that the victims knew and could identify their killer . . . this fact alone is insufficient to prove the avoid arrest aggravator." *Buzia v. State*, 926 So.2d 1203, 1209–10 (Fla.2006). Yet Mr. Lowe's statement that he knew the victim is the only relevant fact the state and Court have relied upon to argue and find the aggravator. There is insufficient evidence of this aggravator. As in *Calhoun v. State*, 138 So. 3d 350, 262 (Fla. 2013), where the victim could have identified Calhoun, "[v]ery little information exists about what happened between" the killer and the victim during the time of the attempted robbery, and the ability to identify failed to prove the aggravator.

In *Wilcox v. State*, 143 So. 3d 359 (Fla. 2014), this Court struck the avoid arrest aggravator where it had been found based primarily on a statement that appellant wanted to eliminate the witness to protect his family. The Court distinguished numerous cases in which this aggravator was found where there was "an affirmative statement by the defendant demonstrating his intent to eliminate witnesses." 143 So. 3d at 386. There is no statement showing the intent of the killing in this case was to eliminate the decedent as a witness. Even the statements implicating Sailor and Blackmon give reasons unrelated to witness elimination.

There is also substantial evidence Mr. Lowe was not even the shooter, discussed at length in Point 7 below. The evidence of this aggravator is insufficient.[7] The sentencing Court's adoption of the state argument for death goes to great lengths to use other factors to show this aggravator, R 514-17, but none go beyond pyramided inferences and supposition.

D. Fundamental Fairness and Improper Doubling.

The aggravating factors of 5(a), community control, 5(e), avoid arrest, and 5(f), pecuniary gain were not sought by the state and were not found by the trial court at the original penalty phase. OT 1237-1252 (charge conf.); OR1851-56(sent order); OT1303-07 (instructions to jury). At this penalty phase the defense argued pretrial no aggravators should be submitted that were not before. V1, 6-15. It violates fundamental fairness principles of former jeopardy for the state to seek an aggravator in a new sentencing hearing when it did not seek it originally. *See State v. Biegenwald*, 110 N.J. 521, 541 (N.J. 1988)(" Given the punishment at stake in a

---

[7] In its opinion ordering a new penalty phase trial, this Court considered a police report by Officer Ewert which indicated he had spoken with the decedent when he arrived and she told him she did not know the person who killed her. *Lowe v. State*, 2 So.3d 21, 33 (Fla. 2009). The report is defendant's Exhibit 1 at the evidentiary hearing during the postconviction proceedings. The report should be considered here as evidence that the victim did not recognize Mr. Lowe. The state and Court relied exclusively on this theory for arguing and finding avoid arrest. The dying declaration was not brought to the jury's attention at this penalty phase (See Ewert testimony T1362-90).

capital prosecution, the State should be compelled to offer all its proof of any applicable aggravating factors against the defendant at his or her first trial").

Since the state relied heavily on each of these aggravators, and the Court gave all great weight, a finding any were legally inapplicable or insufficiently proved requires a new penalty phase before a jury. Permitting the jury and court to consider these aggravators violates Florida law, the *ex post facto* clauses and Article 1, sections 9, 10 and 17 of the Florida Constitution and the Fifth, sixth, eighth and fourteenth amendments to the United States Constitution. *See Gregg.*

Point 3. THE SENTENCING COURT TREATED MITIGATION UNLAWFULLY, REQUIRED A NEXUS OF MITIGATION WITH THE CRIME, AND UNLAWFULLY RELIED ON THE PRIOR DEATH SENTENCE AFFIRMANCE

The sentencing Court gave little (or no) weight to Mr. Lowe's age of 20 for all the wrong reasons, used nonstatutory aggravation, did not find uncontested mitigation and used mitigation in aggravation in its analysis which was copied almost in its entirety from the state's argument in support of death.

Standard of Review. The weight given mitigation is reviewed for abuse of discretion; the decision to reject mitigation must be supported by competent, substantial evidence and in accord with the law. *Coday v. State*, 946 So. 2d 988 (Fla. 2007).

Merits.

A. **Unlawful reliance on the prior affirmance**. The sentencing Court begins its analysis by saying it is "instructive" this Court previously determined the two aggravators found in the first penalty phase were "sufficient" to authorize death, and that in this penalty phase there were two more. R523. In light of this Court's repeated admonition the sentencers are not to consider the prior death sentence, the Court's recognition of that restriction by its citation to *Morton* is unpersuasive.

B. **Age.** In its discussion of mitigating circumstances the Court found age, but gave it little weight. R520. The Court changed that finding in its state-written analysis to conclude the "only statutory" mitigator of age had little "or no weight." R525. Its explanation is an outright disparagement of the mitigating effect of appellant's age of 20 plus one month at the time of this crime. The order says Mr. Lowe was "no stranger" to the criminal justice system, had been through the juvenile justice system and "graduated early into the adult system at 17," lived on his own since he was 16, was gainfully employed and "lived with a steady girlfriend in a middle-class neighborhood." R525-26. The fact Mr. Lowe had to live on his own from age 16, got in trouble and was later trying to support himself while living with a girlfriend "in a middle-class neighborhood" certainly does nothing to show he was somehow more mature than his age when this crime was committed when he was 20. None of these facts undermine the scientifically and

constitutionally recognized immaturity of youth and the profoundly mitigating effect of age, both in the caselaw and expert testimony here, *See* T2367-68, as discussed more fully in the proportionality point.

The Court also required a nexus of age to the offense: "Although his witnesses established that he was immature at that time, there was no testimony that his age somehow led him to commit this crime. In fact, his own expert witnesses, Ron McAndrew and Dr. Reibsame, both testified that the defendant's actions, past and present, were conscious choices, not the result of any psychological or environmental factors." R526. The sentencing court's view of mitigation violates the eighth amendment in ways that have been made clear for decades. The constitution requires that proceedings aimed at determining whether a person should receive the ultimate punishment must permit consideration of "any aspect of the defendant's character or record." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court held exclusion of evidence of good behavior in jail violated the eighth amendment. More recently, in *Tennard v. Dretke,* 542 U.S. 274, 285–87 (2004), the Court found "impaired intellectual functioning is inherently mitigating" and rejected any requirement of a "nexus" between mental capacity and crime. In *Smith v. Texas*, 543 U.S. 37 (2004) (*per curiam*), the Court held it had "never countenanced" any requirement of a "nexus" between the proposed mitigation and the crime committed. 543 U.S., at

44–45. The sentencing Court ignored these admonitions. A nexus was required by the Court on nonstatutory mitigation as well, as reflected in its analysis.

C. The Finding of unproffered mitigation and analysis as aggravation, and lack of findings of exposure to an alcoholic father, brutal punishment as a child, homelessness, shunning in childhood and mental health mitigation.

The defense did not proffer as mitigation that Mr. Lowe's family was "loving" and "normal functioning," but the sentencing court so finds.[8] The trial court improperly turns this "mitigation" finding into nonstatutory aggravation, as reflected in the analysis section.[9] In fact, the evidence was the opposite and the sentencing court failed to find it. Ms. Lowe's mother and the defense mental health expert attested to the "corporal punishment" inflicted on Mr. Lowe as a child and the strict religious upbringing. (Ms. Lowe). T2303-05. The physical punishment primarily inflicted by his father was directed at Rodney Lowe and his brother, "[a]nd punishment would be – would consist[] of father using either hand, extension cord, broom stick, paddle, hitting the boys on their calves, thighs and their behind sometimes with their pants on and sometimes with their pants off." T2374-75. The psychologist could not opine the physical punishment was abusive, but the children's (now adults) interpretation was it was painful and fearful. T2374.

---

[8] *Compare* R456, 458, 460 (defense memo arguing defendant is a "loving family member") with sentencing order R521 ("The defendant comes from a loving, normal functioning family").

[9] R525 (lived on his own since 16); 527 ("the defendant received a normal upbringing, free from abuse or deprivation. The defendant was exposed to moral training both before and after his previous prison sentence").

The defense psychologist also testified Mr. Lowe may have a longstanding depressive disorder, a theme of an individual with an absent male role model. T2353. Both Rodney Lowe and his brother ran away from their father's discipline, and were spending the nights in abandoned homes and living in the woods. At this time there were some arrests for burglaries. T2354. Mr. Lowe completed juvenile probation then was sent to the Dozier School for Boys for several months.[10] T2355. At the time of the 1987 burglary, Mr. Lowe was 17, homeless and living on the streets. He had been shunned by his family and the Jehovah's Witness congregation. T2355. His behavior from ages 17-20 is explained by what was going on with his family and religious circumstances, and any 17 year old would be struggling. While Ms. Lowe minimizes it, the rest of his relatives describe it as alcoholic like. T2371, 2379.

The trial court's finding and treatment as aggravation of a loving, normal functioning family when not proffered by the defense was plainly in error, *Elledge v. State*, 346 So. 2d 998 (Fla. 1977), *Zant*, and was prejudicially used to impose the death sentence. The failure to find this completely opposite and powerful

[10] Though not developed below, Dozier School for Boys has been and continues to be the subject of findings establishing the particularly brutal conditions suffered by teenagers who were sent there. *See, e.g.*, "Investigation of the Arthur G. Dozier School for Boys and the Jackson Juvenile Offender Center, Marianna, Florida," United States Department of Justice, Dec. 1, 2011, http://www.justice.gov/crt/about/spl/documents/dozier_findltr_12-1-11.pdf. Unlawful conditions continued throughout the 1980's.

mitigation in the absence of contravening evidence is prejudicial as well. *See Coday v. State,* 946 So. 2d 988 (Fla. 2006).

D. The Use of other unfound aggravation.

The sentencing Court based the death decision on an entirely unguided analysis. In the "analysis," the Court recites the "evil" nature of the crime, and facts totally unrelated to any of the aggravation. It relates Mr. Lowe "possessed firearms" when he wasn't supposed to, had caught a break by even having been placed on community control, had a good life but ruined it himself, and that he otherwise made his own decision to commit a murder. R525-26. How any of this fits into the aggravating circumstances the Court does not explain. It is plainly improper nonstatutory aggravation and arbitrary. *Elledge*; *Gregg*.

E. Failure to give any weight to mitigation.

The Court emphasized much nonstatutory mitigation received no weight and was "not particularly <u>mitigating</u> in this case." R526 (emphasis in original). The court does not explain how the unique facts of this case qualify the mitigation for no weight, contrary to law. *See Trease v. State*, 768 So. 2d 1050, 1005 (Fla.2000).

The Court's failings on these issues renders the death sentence violative of Florida law, Article 1, section 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution.

Point 4. THIS COURT SHOULD REVERSE FOR A NEW TRIAL BECAUSE THE RECORD IS INCOMPLETE

Substantial portions of the proceedings at trial have not been included in the record on appeal, though appellant has sought their inclusion by motions to supplement and correct the record. Appellant is prejudiced by the missing or incomplete record matters, and this Court is precluded from accurate review of issues raised and review of the entire record. This Court denied appellant's motion for summary reversal without prejudice to raise it in the Initial Brief.

A. Appellant sought to have the juror questionnaires included in the record. After hearing and consistent with the testimony, the trial court determined the completed juror questionnaires were all collected from the parties and destroyed on the Court's order and are not available for inclusion in the record on appeal. *Corrected 2d Supp. Rcd.* at 1. The blank questionnaire which was used in this case and completed by prospective jurors contains a description of the potential sentences and the jury's role in deciding, and names potential witnesses. The questionnaire also contains questions for jurors relating to their background, knowledge of the case, and opinions about the death penalty. *Supp. R.* V.5, pp 5-15. The trial transcript shows these questionnaires, completed by potential jurors, were used by both parties and the Court in the questioning of jurors and in determining challenges throughout *voir dire*.

As argued in Point 5, the defense objected to the grant of a state cause challenge of Juror Simard based on his death penalty beliefs. R272. There are

substantial grounds for reversal based on the court's exclusion of Mr. Simard that cannot be developed adequately by appellate counsel, and that this Court cannot accurately review due to the destroyed questionnaire. In addition, the complete absence in this record of the completed juror questionnaires used by the parties and the trial court during jury selection renders analysis of other *voir dire* issues by counsel and review of the complete record by this Court impossible.

B. The Court Reporter refused to certify as accurate the testimony of a number of witnesses, including Mr. Lowe's statement, only certifying the testimony was "recorded to the best of the reporter's ability". *See* T1621 (Lowe statement); T1842 (Steve White, Gater Lumber); T1875 (Mary Burke, office manager Gater Lumber); T2088 (Gary Rathman, FDLE expert). Certification of accuracy is essential to appellate review.

C. A computer animation was used by the state during opening statement but not disclosed and not introduced. The Court and counsel described it differently. Objection was overruled and appellant moved for its inclusion in the record. See T1326-28. See "*Partially Agreed Motion to Supplement and Correct the Record*." This Court denied the motion to supplement the record with the animation. Neither appellate counsel nor this Court can fully determine whether the animation was improper without its inclusion in the record.

D. Objection was made and overruled to the use of a mannequin by the medical examiner. T1515-1518. Appellant sought inclusion in the record of the mannequin or a photograph of the mannequin as presented to the jury with rods in it. This court denied the motion to supplement the record. Neither appellate counsel nor this Court can accurately determine whether the use of the mannequin in the manner described was proper without inclusion in the record.

E. Appellant previously moved for an accurate transcript, as there were a number of inaudibles in the trial transcript of Mr. Lowe's second recorded statement to law enforcement; The Court Reporter did not even certify the transcript of the recorded statement played to the jury was accurate. T1621. Appellant moved for this Court's order the transcript be certified as true and accurate and that motion was denied. There are untranscribed inaudibles at pages 1623, 1626, 1629, 1630, 1631, 1632, 1634, 1636, 1637, 1638, 1639, 1640-42, 1645-49 (primarily during conversation between Mr. Lowe and Ms. White/Shegog, whom the defense contended was acting as an agent for the police), and 1663, 1673, 1678, 1683, 1685, 1687, 1699, 1709, 1713. An accurate transcript is necessary to review of the legality and admissibility of Mr. Lowe's statement to police, and for this Court's review of the complete record.

Appellant is entitled by Rule 9.142(a), *Fla.R.App.P.* and Article 1, Sections 9 and 17, Florida Constitution, and the eighth and fourteenth amendments to the

United States Constitution to the complete record on appeal, particularly in a capital case. *See Hardy v. United States*, 375 U.S. 277, 280 (1964) ("The right to notice 'plain errors or defects' is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended."); *Delap v. State*, 350 So. 2d 462 (Fla.1977); *Smith v. State*, 801 So. 2d 198 (Fla. 4th DCA 2001). Appellant has shown substantial issues for which the missing records or correct transcription is required for briefing and review, and for this Court's assessment of potential errors and review of the entire record. Reversal for a new penalty trial is required.

Point 5. THE TRIAL COURT IMPROPERLY GRANTED THE STATE A CAUSE CHALLENGE TO A PROSPECTIVE JUROR

The defense objected to the grant of a state cause challenge of Juror Simard based on his death penalty beliefs. R272. At the end of jury selection the state said it was withdrawing its cause challenge to that juror and substituting a peremptory. R1298. This "withdrawal" does not cure any error. *Ault v. State*, 866 So. 2d 674 (Fla. 2003). It was error to grant the state cause challenge.

Standard of Review. A ruling on a cause challenge is reviewed for abuse of discretion. *Singleton v. State*, 783 So.2d 970, 973 (Fla.2001).

Merits. Mr. Simard was asked by the state about his answer on the questionnaire about his death penalty beliefs. T267-68. In court, he said both that he didn't know if he could vote for death and that it would depend on the

circumstances. He said at one point he would probably vote for life, T269, but on further examination by the defense said he could follow the law. T271.

Lawful excusal of a prospective juror for cause in a death penalty case occurs only when that "juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with [the court's] instructions and [the juror's] oath.' " *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (*quoting Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). Excusal is unlawful when they are "excused for cause simply because they voice general objections to the death penalty." *Ault, citing Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). Mr. Simard's responses did not indicate his views on the death penalty would prevent or substantially impair his ability to perform his duties and follow the court's instructions.[11]

Grant of the state cause challenge and improper excusal of the juror violates Florida law, Article 1, sections 9 and 17 of the Florida Constitution and the sixth, eighth and fourteenth amendments of the United States Constitution.

Point 6. THE JURY WAS PRECLUDED FROM CONSIDERING EVIDENCE OF APPELLANT'S LIMITED ROLE IN THE KILLING, DISPROPORTIONATE TREATMENT COMPARED TO OTHERS INVOLVED AND LAWFUL EVALUATION OF AGGRAVATORS

---

[11] Destruction of the questionnaire prevents counsel from fully briefing the issue and this Court from accurate review of it. *See Point 4.*

While this Court ordered a *de novo* penalty trial at which the jury would be able to consider evidence that Mr. Lowe was not the shooter in this case, the jury was repeatedly instructed he had already been convicted of first degree murder and it was not to concern itself with the question of his guilt. The jury was never told Mr. Lowe's first degree murder conviction was *not* a conclusive finding he was the shooter. Though evidence was presented at the new penalty phase that Mr. Lowe was not the shooter, the jury was precluded from considering it.

Standard of Review: "Whether an error is fundamental is a *de novo* determination." *Terrien v. State*, 94 So.3d 648, 649 (Fla. 4th DCA 2012).

Merits. The postconviction court vacated Mr. Lowe's prior death sentence because the jury and court did not hear evidence Blackmon was the killer and Mr. Lowe a minor participant. In addition to related mitigation, that Court found a new penalty phase was required to conduct an *Enmund/Tison* inquiry. PCR2583-84, 2585-86. On appeal, this Court agreed a new penalty phase was warranted, concluding "although there was evidence presented at trial that proved that Lowe was involved in the crime, there was no evidence presented that conclusively showed that Lowe was the perpetrator who shot and killed the victim." *Lowe v. State*, 2 So. 3d 21, 41 (Fla. 2009). At the original trial the jury was instructed both as to felony and premeditated murder, as well as on principals theories as to both

the murder and attempted robbery charges. OT1116-1119. The jury rendered a general verdict of guilt. OTR1807-1808.

While the mandate of this Court and the Florida and federal constitutions require the jury be permitted to consider evidence of Mr. Lowe's relatively minor role in this killing, the instructions precluded jurors from doing so. Every juror was given a questionnaire to complete, and that questionnaire introduced the case as follows:

> You have been summoned as a potential juror in a case wherein the defendant, Rodney Lowe, has been found guilty of Murder in First Degree in the shooting death of Donna Burnell at the Nu Pak convenience store in Sebastian, FL on July 3, 1990.

Supp ROA V5, p. 6 (sample questionnaire).

Prior to questioning, each panel was provided the standard instruction governing new penalty phases:

> The Defendant has previously been found guilty of murder in the first degree. An appellate court has reviewed and affirmed or upheld the Defendant's conviction.
>
> However, the appellate court sent the case back to this court with instructions that the Defendant is to have a new trial to decide what sentence should be imposed. Consequently, you will not concern yourself with the question of his guilt.

T198-99. *See also* T554. The same instruction was given at the outset and at the conclusion of this penalty trial. T1314, 2532-33. The instruction was repeated by the state in opening. T1324.

The state theory was that Mr. Lowe committed the attempted robbery and killing alone, T1336, and the defense theory was that Mr. Lowe was not the shooter and did not act alone. T1348-49. At the close of instructions, the jury was instructed on the mitigator of being an accomplice with relatively minor participation, T2544, but in light of the Court's directive not to concern itself with Mr. Lowe's guilt of first degree murder, the jury could give no effect to it.

Under these circumstances, the jury which recommended death could not have known it was free to consider as mitigation that Mr. Lowe was not the shooter, his relatively minor role, the disproportionate punishment of the others who were involved, whether the avoid arrest aggravator could be found and the weight to accord the contemporaneous conviction. There was ample evidence Blackmon or Sailor were the actual killers and Mr. Lowe's participation was minor, including: Mr. Lowe's statement to that effect, the witness's inability to identify him in a photo display, and the testimony of two witnesses that years later Blackmon said he was shooter (or that Sailor was).[12] Having been told Mr. Lowe was already convicted of first degree murder and not to consider themselves with his guilt of that offense, but not that he had not been convicted of having

[12] This evidence is described in more detail in Point 7, below.

committed the killing himself, the jury was precluded from considering substantial mitigation and accurately assessing aggravation.[13]

In a capital trial's penalty phase, a defendant is absolutely entitled to have the sentencing jury consider any and all relevant mitigating evidence that would bear upon its decision to impose either life or death. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Permitting presentation of mitigation is insufficient to meet these requirements. The instructions must permit the jury to consider the mitigating evidence, and if they don't, eighth amendment error has occurred:

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant…. **Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. *Hitchcock v. Dugger*, [481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)].** Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U.S., at 304, 305, 96 S.Ct., at 2991, 2992.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989). *See also Abdul–Kabir v.* Quarterman, 550 U.S. 233 (2007)(emphasis supplied).

---

[13] Affirming the grant of postconviction relief as to the former death sentence, this Court noted how the evidence would help establish two mitigators previously raised by the defense but rejected: "The two mitigating circumstances are: (1) disproportionate punishment because the other individuals who participated in the crime have not been punished or even arrested, and (2) Lowe was an accomplice in the capital felony committed by another person and his participation was relatively minor." *Lowe*, 2 So. 3d at n. 7.

Consistent with the reasoning in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the defective instruction is not subject to harmless-error analysis because it "vitiates all the jury's findings," 508 U.S. at 281, and produces "consequences that are necessarily unquantifiable and indeterminate," *id*., at 282. In any event, such an error is fundamental, and "[b]y its very nature, fundamental error has to be considered harmful." *Reed v. State,* 837 So.2d 366, 369-70 (Fla. 2002)(note omitted). The misleading of the jury on this issue of profound consequence violates Florida law, Article 1, sections 9 and 17, Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 7. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CULPABILITY FINDINGS IT HAD TO MAKE BEFORE IT COULD EVEN CONSIDER A DEATH SENTENCE

Though the judge knew of this Court's requirement and brought it to counsel's attention, T178, 2428-31, the jury was never told it had to determine Mr. Lowe's conduct met a minimum level of culpability before it could even consider death as a possible punishment. T2532-2549; R230-35, *2d Supp R*, Part 2. This is fundamental reversible error.

Standard of Review. Fundamental error is reviewed *de novo. Terrien*.

Merits. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court vacated Mr. Enmund's death sentence in a felony murder case because this Court had affirmed it "in the absence of proof that Enmund killed or attempted to kill, and regardless

of whether Enmund intended or contemplated that life would be taken." *Id*. at 801. The Court modified that formula in *Tison v. Arizona*, 481 U.S. 137 (1987), holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Tison*, 481 U.S. at 158. This Court determined the *Enmund* finding must be submitted to the jury in *Jackson v. State*, 502 So. 2d 409 (Fla.1986).

In *Jackson*, 502 So. 2d at 413, this Court **directed** trial courts in cases such as this to ensure the jury is apprised of the culpability standard which must be met before it may even consider a sentence of death, and directed the death-sentencing Courts to make *Enmund/Tison* findings:

> In order to ensure a defendant's right to an *Enmund* factual finding and to facilitate appellate review of this issue, we direct the trial courts of this state in appropriate cases to utilize the following procedure. The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death, the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed. No special interrogatory jury forms are required. However, trial court judges are directed when sentencing such a defendant to death to make an explicit written finding that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed, including the factual basis for the finding, in its sentencing order.

This Court modified the culpability instruction to be given juries in light of the reformulation announced in *Tison,* in *Diaz v. State*, 513 So.2d 1045, n.2 (Fla.1987), and continued to require both the instruction and the sentencing findings. *Accord, Perez v. State*, 919 So. 2d 347, 365-67 (Fla. 2005).

No such instruction was given to the jury here, and no findings were made under the *Enmund/Tison* standard. There was ample evidence in this case justifying the instruction. At penalty phase, evidence was presented in support of the defense theory that Mr. Lowe was a minor participant who did not commit the killing, including:

• Mr. Lowe's statement that he was only the driver, he did not go in the store and did not shoot. It was either Sailor or Blackmon who was the shooter. T1636-37; T1652-59; 1670-76. Sailor said he had shot the lady. T1662-63; 1674-75.

• The testimony of the civilian witness Luedtke and of law enforcement, whose description of the man leaving the store did not match Mr. Lowe's appearance in many respects, T1409-13, 1426-28, 1429, 1433, including clothing color, and who was unable to pick Mr. Lowe out of a photo display. T1429 (Luedke); T1227-28 (Kerby); T1807-08 (Green).

• The testimony of defense witnesses who said Blackmon made statements to them that he (or Sailor) had killed Ms. Burnell. Lisa Miller testified that some years after Blackmon had been arguing with his wife and said he had "killed one bitch, I'll do it again." This statement was in the context of Blackmon talking excitedly about the Nu-Pak robbery about what he had done and gotten away with it. T2269-70. Blackmon gave details confirming it was the Nu-Pack robbery, saying it was three people, Mr. Lowe's name was mentioned, and a Lorenzo. They

had gotten together to do a robbery and Dwayne and Rodney went into the Nu-Pack store. Rodney went to a cooler and got something out. While Rodney was at the cooler, Dwayne was at the counter. Dwayne said "she hesitated, so I shot her." T2275. Dwayne then said Rodney dropped it and ran out of the store. T2275-76. Ben Carter testified he heard Blackmon say in anger that "he had killed the lady and stuff like that" maybe 5 or 6 times. T2288-89. Blackmon did not say this until 1992 or 1993, while making a threat, like "I killed the bitch, something like that, you know. You-all don't fuck with me or something like that." T2289. Blackmon never said he didn't do it; that statement did not change. T2290-91. Asked directly if Blackmon had maintained he was the one who shot Donna Burnell, Carter said: "At some other points in juncture, I done heard him say, like Sailor did it, you know what I mean. So I really can't say, you know what I mean." T2290-91.

• Victoria Blackmon's testimony that Dwayne Blackmon said he was not going to testify the way police wanted him to unless his problems went away. T2029-30.

The *Enmund/Tison* instruction was required to be given to the jury. The Court knew the law but did not give the instruction or make specific findings. It is hard to conceive of an error that would be more fundamental than failing to follow a specific directive of this Court to instruct the sentencer on the minimum culpability it must find before even considering a sentence of death.

"[F]undamental error is not subject to harmless error review." *Reed v. State,* 837 So.2d 366, 369-70 (Fla. 2002). But if prejudice is required, it is in full bloom here. There was substantial evidence Mr. Lowe was not the shooter, but was only the driver. Without the instruction, the jury could not have known the minimum level of culpability that had to be met to even qualify for a death sentence. The failure violates Florida law, article 1, sections 9 and 17 of the Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 8. THE JURY WAS MISLED AS TO THE EFFECT OF A LIFE RECOMMENDATION AND WAS PREJUDICED BY STATE ARGUMENT RELYING ON THE PRIOR DEATH SENTENCE

"You've heard he's on -- has been on death row for the last twenty years. We're asking you to impose the same sentence. Nothing has changed since 1990."

Prosecutor's closing argument, T2450.

While the state made sure the defense could not mention the improbability Mr. Lowe would be paroled after 25 years or that he had a 15 year consecutive sentence, it took every opportunity to remind the jury how much time he had served, and that he would get credit for that time. It clinched its death verdict when it outrageously argued the jury should enter a death verdict because he had been sentenced to death before, in the same case.

Standard of Review. Exclusion of evidence and argument is reviewed for abuse of discretion. *See Kopsho v. State*, 84 So. 3d 204 (Fla. 2011).

Merits. Discussion of this issue began pretrial, when the Court considered a state-filed motion to preclude the defense from presenting testimony concerning "[t]he likelihood of parole after 25 years." V3, R423. The Court ordered both parties not to mention the likelihood of parole and precluded the defense from mentioning Mr. Lowe also had a 15 year consecutive sentence to the life with the mandatory 25 years. ST135-148.[14] *See* Sentencing Order, OR1319.

The trial court gave a version of the standard instruction regarding new penalty proceedings to each venire, and at opening and closing. T198-99, 1314, 2532-33. During state questioning, a prospective juror asked the prosecutor whether, if he got life with a 25 year mandatory minimum Mr. Lowe would get credit for the time he had already served. The state answered yes, that he would, and the Court followed up telling the jury he would get credit, both over defense objection. T1094-1098. During opening, T1324, the state referred to the length of time having been 20 years since the crime. The state had one of its initial witnesses (Luedke) tell the jury he had testified in 1990 to the same thing. T1420. Similarly, at the end of the direct of the Brevard Deputy Scully, the state elicited he had testified during the sentencing phase trial previously. T1871. During the testimony of Mr. Lowe's probation officer, the defense objected to the state saying he was

[14] The Court having entered a pretrial order on the state motion, the issue is preserved. See § 90.104(1), *Fla. Stat.* (providing that pretrial ruling on admissibility of evidence preserves objection for appellate review). There were also overruled objections at trial. If not preserved, the error is fundamental.

released within a year on the 1987 offense, T2138, because of its effect on the jury on the parole and credit for time served on this sentence. T2139-40. The Court permitted the state to elicit the dates but not length of time. T2139-40.

Prior to closing, the judge reaffirmed both counsel were not to discuss what was going to happen with regard to parole eligibility, and that defense counsel could not argue the fact Mr. Lowe also had a 15 year sentence consecutive to the life with a 25 year mandatory minimum. T2433-2441. Yet one of the first arguments the state made to the jury in closing could not have relied more on the original sentence of death as a basis for a death verdict: “You've heard he's on -- has been on death row for the last twenty years. We're asking you to impose the same sentence. Nothing has changed since 1990.” T2450. *See also* T2501 (“With your recommendations you can send Rodney Lowe back to death row, and that's what I'm asking you to do”). This argument standing alone is fundamental error. It went directly to one reason *Hitchcock* was reversed in 1996:

> When resentencing a defendant who has previously been sentenced to death, caution should be used in mentioning the defendant’s prior sentence. Making the present jury aware that a prior jury recommended death and reemphasizing this fact as the trial judge did here could have the effect of preconditioning the present jury to a death recommendation.

Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996).

The state’s prejudicial argument, its focus during penalty trial on the relatively short length of time left in the 25 year mandatory portion of the sentence,

and court's refusal to permit the defense to inform the jury of the consecutive 15 year sentence Mr. Lowe was also facing distinguish this case from those this Court has found did not meet the prejudice of similar arguments in *Hitchcock*. *See Armstrong v. State*, 73 So. 3d 155, 173 (Fla. 2011); *Wickham v. State*, 124 So. 3d 841, 861 (Fla. 2013). *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). The errors violate Florida law, article 1, sections 9 and 17, Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 9. IT WAS HARMFUL ERROR TO PERMIT THE COMMUNITY CONTROL OFFICER TO FALSELY TESTIFY APPELLANT WAS EXPOSED TO THIRTY YEARS IF HE VIOLATED COMMUNITY CONTROL WITH A NEW OFFENSE.

The officer was asked by the state over a speculation objection how much time Mr. Lowe would get if he committed another offense while on community control, and the officer said in the area of thirty years. T2142-43. While the defense tried to correct this on cross, the officer did not relent from that plainly inaccurate testimony. T2145-46. The testimony was relied on by the state to argue for the avoid arrest aggravator, the state saying Mr. Lowe killed the decedent to prevent her from identifying him, because he did not want to go back to prison. The state told the jury in closing that Mr. Lowe "could get up to thirty years for violating his community control," and more if he committed another offense. T2465-66. This was plainly false, and misled the jury in its consideration of the avoid arrest aggravator.

Standard of Review. Evidentiary issues are reviewed for abuse of discretion. *McDuffie*, 970 So.2d at 326.

Merits. As the 1987 judgment reflects, Mr. Lowe was convicted of burglary as a third degree felony, and robbery without a weapon, a second degree felony. R66. The maximum statutory sentence was twenty years, not thirty. However, his youthful offender sentence was a "true" split sentence of incarceration for six years, suspended after four followed by two years in a community control program. R68-69; T2138. A "'true split sentence', occurs when the judge sentences the defendant to incarceration but suspends a portion of the term." *Franklin v. State,* 545 So. 2d 851, 852 (Fla. 1989), *citing Poore v. State*, 531 So. 2d 161 (Fla. 1988). For a true split sentence, the law in 1987 was

> [u]pon the violation of probation after incarceration, the judge then may resentence the defendant to any period of time not exceeding the remaining balance of the withheld or suspended portion of the original sentence, provided that the total period of incarceration, including time already served, may not exceed the one-cell upward increase permitted by Florida Rule of Criminal Procedure 3.701(d) 14.

Franklin, 545 So. 2d at 852. Even with a substantive violation of a new crime, Mr. Lowe could not have been sentenced on the violation to more than two years with credit for time served, and even that would be subject to the sentencing guidelines, which would have permitted only a one cell increase. The jury was misled on the amount of time Mr. Lowe faced upon a violation of his community control program and so in its consideration of the avoid arrest aggravator.

A death sentence based on such false information is unreliable. The decision whether to impose death cannot be predicated on mere “caprice” or on “factors that are constitutionally impermissible or totally irrelevant to the sentencing process.” *Zant v. Stephens*, 462 U.S. 862, 884–885, 887, n. 24 (1983). *See also, Johnson v. Mississippi,* 486 U.S. 578 (1988). It is also inappropriate to mislead the jury. The state “may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts.” *Garcia v. State*, 622 So. 2d 1325, 1331 (Fla. 1993). The jury was misled with false or evidence and argument on a crucial issue. Mr. Lowe is entitled to a new and fair penalty phase before a jury under Florida law, article 1, sections 9 and 17, Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 10. THE TRIAL COURT ERRED IN RESTRICTING MITIGATING EVIDENCE AND LIMITING CROSS EXAMINATION

On state objection the sentencing court precluded the defense from presenting evidence to implicate Sailor in the shooting, and prevented cross examination to show police threatened Blackmon.

Standard of Review. Evidentiary issues are reviewed for abuse of discretion. *McDuffie,* 970 So. 2d at 326.

Merits.

Lorenzo Sailor's Prior Violence and Gun Use. After completion of his testimony on the state's case, the defense sought permission to recall former officer Ewert, who had to return to Georgia. The defense proffered what it intended to present. T1385-7. The Court's disallowal of the testimony was harmful error.

The proffered testimony as to Sailor was that Officer Ewert was familiar with Lorenzo Sailor in the course of investigating some burglaries. He had contact with Sailor when there was a report of shots fired at an elementary school, and when Ewert arrived and saw Sailor and another black male pointing guns at oncoming traffic. Ewert told them to drop the guns. They did and ran through woods into Wabasso. At some point Sailor pointed the gun at Ewert. T1391. The witness had not heard about Sailor in the context of this case. T1391.

The state objected to any testimony from the witness regarding Sailor, and the defense argued it was admissible in support of the defense theory he participated in the robbery here, and his proclivity for the use of guns, including pointing one at a law enforcement officer. T1395. The Court sustained the objection to any testimony about Sailor from Ewert. T1396-97. The defense continued to object to the preclusion of questioning of Ewert about Sailor. T1397.

The trial court unlawfully restricted the presentation of this mitigating evidence which was wholly consistent with the defense theory regarding Sailor's involvement in the robbery and killing here. Appellant recognizes at guilt phase

similar evidence of the defendant carrying a gun around the time of a killing might be found inadmissible bad character or propensity evidence. *Moore v. State*, 701 So. 2d 545, 549 (Fla. 1997). But this was not guilt phase, and the evidence was proffered in support of the defendant. The same rules do not apply. Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (*quoting Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)). Even at guilt phase, "where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission." *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990). The relatively minor participation and disproportionate punishment of Mr. Lowe were central areas of the defense case, and preclusion of this mitigation was also eighth amendment error. *Lockett,* 438 U.S. at 604.

Limitation of Cross of Green Regarding Dwayne Blackmon accusations. Blackmon was deceased but his prior testimony was used by the state at this trial to purportedly show Mr. Lowe confessed to the shooting and other evidence. Blackmon had signed an affidavit saying the state witness Green and another officer told him he could get the chair or 50-100 years, among other threats and

promises.[15] Defense counsel asked Ewert if they held a meeting with him at the state attorney's office, and the witness recalled Blackmon making accusations. T1823. On state objection the defense was precluded from introducing the Blackmon affidavit or referring to it directly in questioning. T1823-32. The Court did not permit introduction of the affidavit or questioning from it, though the defense could question the witness whether he made such threats. T1827-30. On continued questioning, without being able to impeach with the affidavit, the witness denied threatening or coercing Blackmun and said Blackmun would be lying if he says he did. T1833-34.

"[C]ross-examination" has been accurately described by the Court as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (*quoting* 5 J. Wigmore, **Evidence** § 1367).

---

[15] Blackmon's affidavit is contained in the original trial record at OR1375-76. In it he also swore that law enforcement had withheld arresting him on a warrant until he declined to testify as they wanted in this case, and told him they would keep him in jail until Mr. Lowe's trial. *Aff.*, ¶¶1 & 2. He swore law enforcement told him they would "take care" of his driving on a suspended license charge, ¶ 3, and they had two judges in their pocket and so could influence them on his and Patty White's misdemeanor charges, ¶ 4. He swore the fine for his DWLS charge had been reported paid, but neither he nor his family had done so. ¶ 5. He swore he had been threatened with perjury prosecution and charges in connection with this killing. ¶ 6. He swore he was threatened with the chair or 50-100 years in prison on this case or sit in the chair with Mr. Lowe if he did not cooperate with law enforcement and testify against Mr. Lowe. ¶¶ 7, 8. He swore he was told by law enforcement he would get a 10,000 reward if he testified Mr. Lowe committed the murder. ¶ 9.

Abrogation of the full right to cross-examine is "constitutional error of the first magnitude." *See Davis v. Alaska*, 415 U.S. 308, 318 (1974). "[D]enial or significant diminution" of cross-examination "calls into question the `ultimate integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973*), quoting Berger v. California*, 393 U.S. 314 (1969). "[C]ross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief.. . ." *Zerquera v. State*, 549 So. 2d 189, 192 (Fla. 1989)(*quoting Coxwell v. State*, 361 So. 2d 148, 151 (Fla. 1978). It is essential to due process and cannot be unduly restricted by state procedural rules. *Chambers v. Mississippi*, 410 U.S. 284 (1973). *See Vannier v. State*, 714 So. 2d 470, 471-72 (4th DCA 1998). Likewise, restriction on mitigation by restriction of cross examination unlawfully upends the jury's death consideration calculus, and hearsay is inadmissible at penalty phase in any event.

Blackmon was deceased by the time of this trial, and the state admitted his prior testimony. The prejudice in precluding cross on his sworn affidavit is magnified because the affidavit is at odds with Victoria Blackmon's testimony at this trial, which was that Dwayne Blackmon threatened police he would not testify the way they wanted unless they made his problems go away, and the response was to threaten him with perjury. T2029-30.

Exclusion of the mitigating evidence and restriction on cross examination violates Florida law, Article 1, section 9 and 17, Florida Constitution and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 11. THE TRIAL COURT IMPROPERLY EXCLUDED DEFENSE EVIDENCE OF UNLIKELIHOOD OF FUTURE VIOLENCE

Without an adequate *Richardson* hearing and consideration of alternatives, the trial Court excluded scientific statistical evidence which would have supported one of the pillars of mitigation here: it was unlikely Mr. Lowe would engage in violence in the future. Exclusion of such defense evidence violates the Constitutions and Florida law and requires reversal.

The defense expert Dr. Reibsame had conducted a risk assessment to support his conclusion Mr. Lowe would not be violent in the future, and began to explain what that was to the jury. T2375. He explained the instrument considered a number of risk factors, and how many were present or absent. It answers a question similar to an actuarial assessment used by insurance agents, and would give a probability of low, medium or high risk of reoffending or doing something violent again. T2376. It weighed specific demographic characteristics in Mr. Lowe's case, predicting the risk of being involved in a violent act across 3-10 years. T2376.

The expert had with him the most widely used statistical tool for predicting future violence, called the "Violence Risk Appraisal Guide." He described several of the risk factors, and that they are scored on the tool, which calculates the

likelihood of the defendant engaging in violence within 7-10 years. T2376-77. When counsel asked where Mr. Lowe fell on the scale, the state approached the bench and raised a discovery violation. T2377.

The state said this was not in his report, the witness did not mention it during a three hour deposition, and they were "totally surprised." T2377. Defense counsel clarified the expert would attest to statistical data backing up the instrument's questions and a score predictive of the likelihood of future violence could be produced. T2378. Defense counsel said the expert had not done the assessment at the time of his deposition, and they had just been told about it "in the hall." T2378.

The Court conducted a *Richardson* inquiry. The state said that based on the deposition, they did not bring their listed expert Dr. Rifkin, who lives in Georgia, to Florida, or talk to their expert about it. They were "stuck with no expert to try to rebut this," and the state assumed the expert was going to say based on statistics the defendant is not a risk for future dangerousness. T2380. The state said it did not know if it met the *Frye* standard, and it was completely prejudiced. T2380.

The Court said the state had no chance to rebut something it did not know it might have to and may have a witness who could say the test was "completely bogus." T2381-82. The defense pointed out the state could talk to the defense expert and that it was not intentional. T2382. The Court said it was "perfectly convinced" it was not intentional. It said this was scientific type evidence that may

require another scientist who disagrees. The Court found it was substantial, not willful or intended, and "I have no remedy for the State to - - to either present evidence or to cross examine the witness, there just isn't any and they can't get somebody here in time for this." T2383-4. The Court again found the violation was inadvertent, not willful. It was not trivial but "effectively substantial" and that noncompliance had impaired their ability to either cross examine the witness or present their own testimony. T2384-85. The Court ruled it would not "permit him to testify about any tests he was – that were performed after the deposition taken…" T2385. The Court would permit the expert to give his opinion, but "he's just precluded from saying I conducted this test and on the basis of this test I'm concluding this." T2385. If he had "other things to say" he could give his opinion about that, if in the report T2385. His opinion about future dangerousness cannot mention the test or calculations. T2386. The witness was so instructed. T2386-87.

In his subsequent testimony the expert gave his opinion there was a low risk Mr. Lowe would engage in violence in the future, even out of custody, but was precluded from mentioning the scientific and statistical actuarial basis for that opinion based on the risk assessment. T2388-90. On cross the state pointed out human behavior is unpredictable. T2396. The state also devoted a substantial portion of its closing to arguments Mr. Lowe's past conduct shows he would be

violent in the future. T2451-55; 2494 (reference to 1987 crime, prior commitments and conduct upon release).

Standard of Review. "A trial court's decision on a *Richardson* hearing is subject to reversal only upon a showing of abuse of discretion." *Delhall v. State*, 95 So. 3d 134, 160 (Fla. 2012).

Merits. An expert's opinion is worth the data it is based on. The defense expert was permitted to voice his opinion that Mr. Lowe was unlikely to engage in future violence, but the defense was precluded from telling the jury about the persuasive scientific evidence supporting that opinion. The state admitted it **already had an expert listed as a witness** who could address the risk assessment instrument, but had not brought the witness from Georgia for trial. The Court did not even consider a brief recess for the state to contact its expert to check on availability, and to prepare for cross examination and potential rebuttal testimony. The exclusion of this important mitigating evidence requires reversal.

Even "when a discovery violation is committed by the State, exclusion of the evidence is viewed as an extreme sanction to be employed only as a last resort and only after the court determines no other reasonable alternative exists to overcome the prejudice and allow the witness to testify. *See, e.g., Cooper v. State*, 336 So.2d 1133, 1138 (Fla.1976)." *Delhall*, 95 So. 3d at 162. "[T]his rule applies with equal or greater force when a defense witness or evidence is sought to be excluded for a

defense discovery violation, because there are few rights more fundamental than the right of an accused to present evidence or witnesses in his own defense." *Delhall,* 95 So. 3d at 162-63, *citing McDuffie v. State*, 970 So.2d 312, 321 (Fla. 2007). That is why when a "discovery violation is committed by the defense, special importance attaches to the trial court's inquiry into alternative sanctions because exclusion of exculpatory evidence implicates the defendant's constitutional right to defend himself or herself." *McDuffie,* 970 So. 2d at 322. *Accord*, *Taylor v. Illinois*, 484 U.S. 400 (1988). In addition to the sixth and fourteenth amendment rights to present testimony and due process, in this is death penalty trial the exclusion of mitigation also violates the eighth and fourteenth amendments. *Lockett*, 438 U.S. at 604.

The sentencing court properly found the discovery violation was not willful: "where as here the violation has not been found to be willful or blatant, this sanction [exclusion of evidence] is generally too severe "when the only prejudice to the State is its inability to obtain evidence for impeachment of the witness." *Grace v. State*, 832 So.2d 224, 227 (Fla. 2d DCA 2002)." *Mcduffie*, 970 So. 2d at 321. Substantial prejudice must be shown by the state and "[t]he trial court incorrectly accepted 'surprise' as sufficient prejudice." *Delhall*, 95 So. 3d at 152.

The state articulated its prejudice as surprise, though it had listed an expert witness who could testify regarding the risk assessment instrument and failed to

have the expert available for trial. There were several courses the Court could have considered, but did not, including a recess for the state to contact their own expert and prepare for cross and rebuttal of testimony concerning the risk assessment. If this had not worked, the Court could have granted a continuance or mistrial. It failed to even consider these options.

"[W]hen exculpatory evidence is sought to be introduced in violation of the discovery rules, and remedies which would allow the trial to proceed are insufficient, the proper course of action is to declare a mistrial" rather than exclude relevant evidence. *Mattear v. State*, 657 So.2d 46, 47 (Fla. 4th DCA 1995); *see also Roopnarine v. State*, 18 So. 3d 1192 (Fla. 4th DCA 2009)("We agree that error occurred ... where the prejudice to the state could have been cured by another remedy short of excluding the witness.")." *Dawson v. State*, 20 So. 3d 1016, 1021 (Fla. 4th DCA 2009). *Accord, Williams v. State*, 143 So. 3d 1120 (Fla. 4th DCA 2014)(reversed for inadequate *Richardson* inquiry and failure to adequately consider alternatives).

The exclusion was harmful. "While the 'erroneous exclusion of exculpatory defense evidence following a *Richardson* hearing is subject to harmless error analysis,' . . . such "[e]rror is harmless only where it can be said, beyond a reasonable doubt, that the error could not have affected the verdict." *Sanchez-Andujar v. State*, 60 So. 3d 480, 486-87 (Fla. 1st DCA 2011)(citations omitted).

The state played up Mr. Lowe's credit for time served (20 of 25 years). The defense relied on lack of future violence as an important piece of its mitigation. Depriving the defense of the scientific studies which would have supported the expert's opinion substantially undermined it. The exclusion violated Florida law, article 1, sections 9 and 17 of the Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 12. PREJUDICIAL EVIDENCE NOT INTRODUCED AT TRIAL WAS SENT TO THE JURY ROOM FOR CONSIDERATION DURING DELIBERATIONS

The State cross examined Mr. Lowe's mother on the contents of a letter she apparently wrote to Mr. Lowe in December of 1988. T2322-23; 2329-2331. The state did not seek to, and the Court did not admit, the letter into evidence. According to the parties, the letter was contained in a box of personal belongings admitted at the guilt phase of trial as Exhibit 32. T2554. The letter, but not the remaining items in the box, was permitted to go back with the jury. T2555.

Standard of Review. Fundamental error is reviewed *de novo.*

Merits. After Mr. Lowe's mother testified on direct examination, the state surprised the defense by referring to a letter she had apparently written to her son saying in part that the course he was on was leading to death. Ms. Lowe said it was her handwriting but did not remember it. T2322. There was an objection, T2323, but a lunch break was taken and afterward the defense said problems had been

worked out. The state continued questioning on the letter saying Ms. Lowe had said her son was on the road to death. T2329. Ms. Lowe did not admit she had told her son that. T2329. On redirect Ms. Lowe testified other parts of the letter referred to spiritual counsel and encouragement. T2332. The state did not introduce the letter into evidence, but it was permitted to go back with the jury. T2555.

The unadmitted letter contains prejudicial unadmitted evidence. *See Supp. R State's evidence* 1.25.13 pp. 2-5. It contains Ms. Lowe's purported statement she did not admit saying, "[t]he course you are on is leading to death." *Supp. R*. 2. It also says Mr. Lowe was breaking her heart, that he had ignored her referral of him to people in the Jehovah's Witness congregation, recites biblical quotes referring to "covering over … transgressions," provides comments that Mr. Lowe should "come clean," religious reference to his weakness in being able "to do what is right," that Jehovah was waiting for him to "truthfully" decide to do what was right, so he could "live." *Supp R*. 2-3. There is also a reference to "Charlie" who had been identified as Mr. Lowe's father. T2297. The letter says "Charlie says until you make the needed adjustments – not to come by." *Supp R* 4. There is a reference to "Chuckie," Mr. Lowe's brother's, court case dragging on in North Carolina. There is a reference to when Mr. Lowe spent the night at Jackie's, Nicky was doing wrong. *Supp R*. 4. There is a reference to her mother saying none of her children went to jail but she wondered about her grandchildren. *Supp R* 4-5. There

is a discussion of other people having been baptized and now doing well. *Supp. R.* 5. The state made a big point of the statement in its unadmitted evidence during closing argument, arguing for death for Mr. Lowe, essentially because his mother warned him that was the road he was on. T2498 ("Remember what his mom said? You're on the course to death. That was pathetic 'cause he was. That was back in 1988 when she wrote that letter").

The new penalty proceedings were *de novo*. *State v. Fleming*, 61 So. 3d 399, 406 (Fla. 2011). While the letter was admitted in evidence in the original sentencing proceeding, it was not admitted in this one, and allowing it to go back to the jury is fundamental reversible error. Under Florida Rule of Criminal Procedure 3.400(a)(3) and the constitutions, unadmitted evidence cannot be taken to the jury room. The Court in *Williamson v. State*, 894 So. 2d 996, 998 (5th DCA 2005) discusses the applicable law:

> In *State v. Hamilton*, 574 So.2d 124 (Fla.1991), the Supreme Court held, first, that when unauthorized materials have been taken into the jury room, the State has the burden of proving that there is no reasonable possibility of prejudice to the defendant. That is to say, the State must demonstrate that the error was harmless. *See also Keen v. State*, 639 So. 2d 597 (Fla.1994). The high court also drew a distinction between unauthorized materials that deal with the facts of the case, and unauthorized materials that deal with the law. For example, where a dictionary was found in a jury room, the court held that a reversal was required because only the trial judge is authorized to give definitions and explanations regarding the law to the jury. *See Smith v. State*, 95 So. 2d 525 (Fla.1957). Similarly, in *Yanes v. State*, 418 So. 2d 1247 (Fla. 4th DCA 1982), the fact that a book of jury instructions was sent to the jury room required a reversal. *See also Grissinger v. Griffin*, 186 So. 2d 58 (Fla. 4th DCA 1966); *cf., Wilson v.*

> *State*, 746 So. 2d 1209 (Fla. 5th DCA 1999). When unauthorized matters involving facts have been sent to the jury room, however, the courts have generally applied a harmless error analysis. *See, e.g., Ivory v. State,* 330 So. 2d 853 (Fla. 3d DCA 1976), *quashed on other grounds*, 351 So. 2d 26 (Fla.1977); *Beard v. State*, 104 So. 2d 680 (Fla. 1st DCA 1958). The matter of the 1990 Williamson judgment and sentence falls into this latter category.

The court there found the error harmless. The letter here is not. The heartfelt handwritten letter highlighted the state's contention Ms. Lowe virtually predicted her son would get a death sentence, and covers other prejudicial matters not adduced in testimony. It was not even properly authenticated.

Permitting the letter to go back to the jury room when it had not been admitted into evidence violates Florida law, Article 1, sections 9 and 17 of the Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 13. USE OF AN UNDISCLOSED COMPUTER ANIMATION WITHOUT A *RICHARDSON* HEARING REQUIRES REVERSAL

A computer animation described by the Court as an animation of the building at which the crime in this case took place was used by the state. Defense counsel objected that it had not been disclosed, and described it as moving while the prosecutor talked. Objection was overruled, the Court finding it was demonstrative. *See* T1326-28. The Court did not conduct a *Richardson* inquiry. This is reversible error, since a *Richardson* hearing must be conducted when the trial court has notice of a discovery violation, even if not requested. *Jones v. State*,

32 So. 3d 706, 710-11 (Fla. 4th DCA 2010). Failure to conduct a *Richardson* hearing is error, and harmful here.[16] Use of the animation violates Florida law, Article 1, sections 9 and 17, Florida Constitution and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 14. THE TRIAL COURT ERRED IN OVERRULING THE OBJECTION TO THE STATE'S USE OF A MANNEQUIN

Prejudice and inaccuracy objections were made and overruled to the use of a mannequin by the medical examiner. T1515-17. While the doctor had testified he could not determine the order of injuries, he had already inserted rods in the mannequin, chest first. T1517. Later, the witness testified the mannequin was a little shorter and smaller than the decedent. T1524.

Standard of Review. The standard of review is abuse of discretion. *Brown v. State*, 550 So. 2d 527, 528 (Fla. 1st DCA 1989).

Merits. The prejudice from the use of a demonstrative exhibit can outweigh the probative value, especially if it is not relevant to the issues being tried. *See, e.g. Taylor v. State*, 640 So. 2d 1127 (Fla. 1st DCA 1994). Also, the exhibit can be used "only if the exhibits constitute an accurate and reasonable reproduction of the object involved." *Brown v. State*, 550 So. 2d at 528. *See also Harris v. State*, 843 So. 2d 856, 864 (Fla.2003) and *United States v. Gaskell*, 985 F.2d 1056 (11th Cir.

---

[16] The Court and counsel described the animation differently. This Court should review it, but it was not included in the record. *See* Point 4.

1993)(conviction reversed where expert used plastic mannequin to demonstrate shaken baby syndrome and the comparison was not sufficiently similar). The defense established the exhibit was not relevant, was inconsistent with the medical examiner's testimony, and was shorter and smaller than the decedent.[17] Permitting the state to use the mannequin in the jury's presence violates Florida law, Article 1, sections 9, 16 and 17 of the Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

Point 15. CLOSING ARGUMENT THAT FOCUSED ON COMPARISON OF THE WORTH OF THE VICTIM AGAINST MR. LOWE AND THE PRIOR DEATH SENTENCE WAS FUNDAMENTALLY UNFAIR

The state's closing argument was fundamentally unfair and constitutes fundamental error. As briefed in Point 8, the state improperly argued the jury should recommend death because Mr. Lowe had been sentenced to death before and nothing had changed since then. T2450, 2501. The state also devoted significant argument to a comparison of the worth of the decedent Donna Burnell to Mr. Lowe, using victim impact evidence previously introduced, T2162-67, for a wholly improper purpose.

Standard of Review. Fundamental error is reviewed *de novo. Terrien.*

Merits. The state argued:

---

[17] Appellant sought a photograph of the mannequin as presented to the jury with rods in it to be included in the record. This court denied the motion, hampering this Court's review and counsel's ability to argue the issue on appeal. See Point 4.

> How about the Defendant has changed and grown spiritually since he was convicted of first degree murder? Well, that's good, that's a good thing. But, really, when you stack it up against Donna Burnell's life, really, is that mitigating? Donna Burnell used her rosary every night. Is that really mitigating compared to what he did on July 3rd of 1990?

T2495. It continued with this theme, first referring to Mr. Lowe's family:

> They care about him. They love him. Donna Burnell loved her family. Her family cared about her.
>
> He is a caring and loving brother. We love the ones we have in our family. We love our family and we love that part of it. But Donna Burnell cared and loved her family, too.

T2496. The state continued with its comparisons:

> We know he wasn't doing well, we know what he was up to. We know what he was up to. Planning robberies, guns. Murdering innocent store clerks. Does this outweigh what happened to Donna Burnell? Does it? Think about what Rodney Lowe did that morning. Think about what he came from, what he was doing, his activities. His behavior prior to that. Does that outweigh what happened to Donna Burnell?

T2497. And finally, the state argued:

> Whether or not this Defendant matured over the last twenty years, behaved well in prison doesn't take away what happened to Donna Burnell.
>
> Donna Burnell was a human being who cared about her family. Mr. Lowe should be held accountable for taking away that life.

T2500.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court held that, state law permitting, the eighth amendment did not forbid introduction of evidence about the victim, the impact of the murder on the victim's family, and related argument. *Id*. at 827. However, the Court warned : "[i]n the event that evidence is introduced that is

so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id*. at 825. That analysis is comparable to the determination of fundamental error. This Court has repeatedly held "[u]nder the limited scope of the victim impact statute in Florida, victim impact evidence is not to be used by the jury to compare, contrast or weigh the relative worth of the life of the victim against that of the defendant in deciding whether to recommend the death penalty." *Wheeler v. State*, 4 So. 3d 599, 610 (2009). *See also Hayward v. State*, 24 So. 3d 17, 41–43 (Fla.2009). Yet that is precisely what the state prejudicially used it for here.

The state's argument is entirely improper and unduly prejudicial, and fundamentally unfair contrary to Florida law, Article 1, sections 9, 16 and 17, Florida Constitution, and the eighth and fourteenth amendments to the United States Constitution.

Point 16. DEATH IS DISPROPORTIONATE IN THIS CASE

This case is nowhere near the most aggravated and least mitigated of murders. The murder was not found to be either cold calculated and premeditated or heinous, atrocious and cruel, and even if upheld, the four aggravators found do not outweigh Mr. Lowe's youth, difficult childhood, rehabilitation, lack of future dangerousness and other mitigation that make death disproportionate.

In the aggravating factor portion of the sentencing order, four aggravators are found by the trial court, and all given great weight.[18] Appellant challenges these aggravators as unproven or otherwise inapplicable elsewhere in this brief.

The sentencing court rejected "minor participation" as a statutory mitigator. R519-20. It found (1) the age of the defendant as statutory mitigation, writing that Mr. Lowe was 20 and one month at the time of the crime, but gave that condition little weight. R520. The nonstatutory mitigation found by the trial court was (2) "good behavior while in confinement," moderate weight R520-21; (3) "[t]he defendant comes from a loving, normal functioning family. He has maintained relationships with his mother and sister during his long period of incarceration." Little weight was given. R521.[19] The Court found "creative ability" was not mitigating. R521. It found Mr. Lowe's (4) maturity mitigating but gave it little weight. R521. The Court found Mr. Lowe's (5) religious faith was mitigating,

---

[18] (1) The capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment or community control (R508-509); (2) the defendant was previously convicted of a felony involving the use of threat of violence to the person (R509-511); (3) the capital felony was committed while the defendant was engaged in an attempted to commit a robbery (R511-12); (4) the capital felony was committed for pecuniary gain (R512-13)(merged with attempted robbery aggravator); (5) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest (R513-518).

[19] As argued above, the defense did not seek and the evidence does not support the "mitigation" that Mr. Lowe "comes from a loving, normal functional family," later used in aggravation by the state and Court.

giving it little weight. R521. The Court found mitigation in Mr. Lowe's (6) work ethic, giving it little weight. R521. The Court found Mr. Lowe's participation in athletics proved but was not mitigating. R522. While finding (7) testimony Mr. Lowe is very caring and quite concerned about his sister's welfare, the court gave that mitigation "no weight whatsoever." R522. The Court found Mr. Lowe presented a (8) "low risk of future danger" but gave that mitigation little weight. R522. (9) "good courtroom behavior," was given little weight. R522. The Court did not even address other substantial mitigation of the beatings by his father, forced homelessness at 16, a depressive disorder, and good deeds.

As discussed in Point 1, the sentencing Court defaulted its obligation to personally conduct an analysis of the aggravation and mitigation, so this Court cannot conduct a proportionality review at this point, because the sentencing order is "the foundation for this Court's proportionality review." *Morton*, 333, citing *Patton,* 784 So. 2d at 388. The law guiding proportionality review is that "[i]n reviewing the sentence for proportionality, this Court will accept the jury's recommendation and the weight assigned by the trial judge to the aggravating and mitigating factors." *Silvia v. State*, 60 So.3d 959, 973 (Fla.2011). This Court cannot trust the sentencing Court's assignments of weight when its analysis is not its own, and the jury's recommendation is infected with error.

If this Court conducts a proportionality review, it must find death disproportionate in this case. Because the death penalty is a "unique punishment in its finality and *in its total rejection of the possibility of rehabilitation*[,] … its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So.2d 954, 965 (Fla.1996)(*citing State v. Dixon*, 283 So.2d 1, 7 (Fla.1973))(e.s.). This Court decides whether a death sentence is proportionate by a "two-pronged" inquiry, "compar[ing] 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 murders." *Almeida v. State*, 748 So.2d 922, 933 (Fla.1999)(emphasis in original). Even if the offense is one of the most aggravated, the death penalty will not be upheld if the offense is not *also* one of the least mitigated. *Id*. "[T]he Court considers the totality of the circumstances and compares the case with other similar capital cases. *See Duest v. State*, 855 So.2d 33, 47 (Fla.2003)." *Silvia*, 60 So.3d at 973. This Court's job "entails 'a *qualitative* review ... of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.' " *Offord v. State*, 959 So.2d 187, 191 (Fla.2007) (*quoting Urbin v. State*, 714 So.2d 411, 416 (Fla.1998))." *Yacob v. State*, 136 So. 3d 539, 549-55 (Fla. 2014).

Proportionality evaluation of Mr. Lowe's case should begin with the central reason the death penalty exists: its "total rejection of the possibility of

rehabilitation." *Terry*, at 965, *quoting Dixon* at 7. Over 20 years before this penalty phase, when this crime occurred, Mr. Lowe was 20 years and one month old. As the sentencing Court found, "the person on trial in this sentencing proceeding has matured considerably from the person who stood trial in 1991," and "[t]here may have been a considerable change in his personality and an improvement in his attitude over the years." R521. The Court wrote that Mr. Lowe "engaged in remarkably good behavior while in confinement." "There was testimony that while on Death Row, and while housed in the Indian River County Jail, he was extremely well mannered and was courteous to all staff members." R520-21. It also found Mr. Lowe "has maintained relationships with his mother and sister during his long period of incarceration." R521. He "actively practices a religious faith, and is of considerable assistance to other Death Row inmates during times of anxiety and stress." R521. Finding a "low risk of future danger" the Court said "[e]vidence was presented that the likelihood that the defendant would be a danger to the community is lessened by the defendant's increasing age." R522. Finally, it found "Mr. Lowe is to be commended for his behavior and demeanor during not only the trial in this case, but at all hearing[s] as well. He displayed an attitude of courtesy and respect for the court, the attorneys, and all court personnel." R522. Rodney Lowe is a far different man now than he was at the time of the crime.

"Unquestionably, a defendant's potential for rehabilitation is a significant factor in

mitigation." *Cooper v. Dugger*, 526 So. 2d 900, 902 (Fla. 1988). He has not only shown a potential, but actual rehabilitation.

Mr. Lowe was only 20 years old and one month at the time of the crime. Mr. Lowe's age at the time of the offense is compellingly mitigating. While not a juvenile on the date of the alleged offenses, his age of 20 at that time is still quite young. The Court has recognized, as do we all, that "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage". *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). The death penalty cannot even be considered for one under 18 at the time of the offense, *Roper v. Simmons*, 543 U.S. 551 (2005). Since *Roper*, the Court has extended that rationale recognizing the limited moral culpability of juveniles to also preclude a sentence of life imprisonment in non-homicide cases, in *Graham v. Florida*, 130 S.Ct. 2011(2010). In *Urbin v. State*, 714 So.2d 411, 418 (Fla.1998), this Court held that "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes." *Bell v. State*, 841 So. 2d 329, 335 (Fla. 2002). At only two years over the minimum age to even be eligible for the death penalty, this factor is especially weighty, and the trial court improperly gave it little weight.

A comparison of Mr. Lowe's case to others shows that this is not the most aggravated and least mitigated of murders. The murder was not cold, calculated

and premeditated or heinous atrocious and cruel, the most weighty aggravators in the death penalty statute. This Court has relied on the absence of these aggravators in finding a death sentence disproportionate. *See Larkins v. State*, 739 So. 2d 90, 95 (Fla.1999) ("These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis."); *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla.1988) ("In contrast, the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent.").

A prior violent felony can be weighty, *Cole v. State*, 36 So. 3d 597, 610 (Fla. 2010), but the facts have to be considered. First, the robbery Mr. Lowe was convicted of happened when he was 17 and homeless, he and his brother having been shunned by the family and congregation. Second, the officer and victim both testified Mr. Lowe did not hurt him and told him he did not want to. T1872; 1962-64. The other aggravator – that Mr. Lowe was on "community control" – is related to the prior violent felony and has been otherwise challenged. Avoid arrest is not proven and should not be weighed. The contemporaneous felony of attempted robbery is not independent of the facts of the killing.

The number of aggravators is not dispositive. There were five in *Fitzpatrick*, where this Court reduced to life. Compared to this Court's disposition

of a case in which CCP was found as an aggravator, this one is not the most aggravated and least mitigated. This case is the archetype of a "robbery gone bad." In *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996), this Court found death disproportionate where the murder took place during a robbery, and as in this case, "the circumstances surrounding the actual shooting are unclear" and though the evidence supported it was a "robbery gone bad," "[i]n the end, though, we simply cannot conclusively determine on the record before us what actually transpired immediately prior to the victim being shot." Terry had the contemporaneous and prior violent felony, though this Court discounted the prior violent felony because it was actually committed by a codefendant.

This Court found death disproportionate in *Yacob*. In that case this Court reduced the 22 year old defendant's sentence to life in a "robbery gone bad" in which the defendant shot the victim when her conduct appeared to threaten his ability to escape. 136 So. 3d at 550. "There was no indication that murdering Maida was part of Yacob's original robbery plan." *Ibid.* The mitigation was not substantial. There was a single aggravator, but this Court has held the number of aggravators is not controlling. In addition to the burglary-murder aggravator, the 22 year old defendant in *Johnson v. State*, 720 So.2d 232, 238 (Fla.1998) had been previously convicted of two separate violent felonies committed prior to the murder which involved shootings. *Id.* at 237. Aside from age, his mitigation did

not stand out. This Court found death disproportionate. This Court found death proportionate in a robbery-murder in *Blake v. State*, 972 So. 2d 839, 846-47 (Fla. 2007) but there the prior violent felony was a murder during the course of a robbery two weeks before.

In *Ballard v. State*, 66 So. 3d 912 (Fla. 2011), the defendant killed his stepdaughter in order to regain custody of her minor daughter, with whom he was having an illegal sexual relationship. *Id*. at 918. About ten days before the murder he bought the pipe he used to strike her over the head, and after her death he knocked out her teeth to eliminate comparing them to dental records. *Id*. at 916. The jury recommended death by a vote of nine to three. The trial court found CCP in aggravation and three statutory mitigators. The trial court also found numerous nonstatutory mitigators, but they were unremarkable (close relationship with wife, strong work ethic, lack of impulse control, etc.) and the court gave them little or no weight. *Id*. The court gave the statutory mitigators slight weight. This Court held Ballard's sentence was disproportionate. *Ballard*, 66 So. 3d at 920.

Finally, there is the evidence Mr. Lowe was not the shooter at all. Neither Blackmon nor Sailor were even charged. "In cases where more than one defendant is involved, the Court performs an additional analysis of relative culpability guided by the principle that 'equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment.' " *Brooks v. State*, 918 So.2d

181, 208 (Fla.2005) (*quoting Shere v. Moore*, 830 So.2d 56, 60 (Fla.2002)). Death for Mr. Lowe under these circumstances could not be more unequal.

"[C]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008)(citations and internal quotation marks omitted). This is not the most serious of crimes, and Mr. Lowe is not the most deserving of execution. This Court should reduce his sentence to life, as required by Florida law, Article 1, Section 17 of the Florida Constitution, and the eighth and fourteenth amendments to the United States Constitution.

Point 17.THE TRIAL COURT ERRED IN DENYING THE REQUESTED SPECIAL VERDICT FORM AND INSTRUCTIONS FOR FINDINGS ON AGGRAVATORS

The defense challenged the constitutionality of the statute and sought special instructions and verdict forms under *Ring v. Arizona*, 536 U.S. 584 (2002), to require the jury to separately and unanimously find each aggravator beyond a reasonable doubt. R176-78; 265-71; 296-318. The trial court denied counsel's request. T2552. The instructions and verdict did not require the jurors to unanimously find the same aggravating circumstance beyond a reasonable doubt, nor to include findings on the verdict form. T2532-2551. This was error, not cured by the unanimous general verdict. While this Court has rejected the argument

presented here, *State v. Steele*, 921 So.2d 538 (Fla. 2005), jury unanimity on individual aggravators is necessary to ensure that the death penalty is not applied inconsistently or arbitrarily. Without requiring jury unanimity, Florida's death penalty scheme is unconstitutional under the Eighth Amendment.

The jury unanimously found Mr. Lowe guilty of the attempted robbery and this Court holds this makes *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), inapplicable. *See Jackson v. State*, 127 So. 3d 447, 475 (Fla. 2013). However, whether Mr. Lowe's contemporaneous conviction was a "sufficient aggravating circumstance," *Sec.* 921.141(2)(a), *Fla. Stat.,* to authorize death was a decision the jury had to make unanimously. The verdict in this case does not authorize the death penalty under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, or article I, sections 9, 16, and 17 of the Florida Constitution.

Point 18. CUMULATIVE ERROR REQUIRES REVERSAL.

Cumulative error requires reversal pursuant to Florida law, Article 1, sections 9, 16 & 17, Florida Constitution, and the sixth, eighth and fourteenth amendments to the United States Constitution.

CONCLUSION

Wherefore, this Court should reverse the death sentence and remand for a penalty phase before a jury or judge, or reduce the sentence to life with parole after a mandatory minimum of 25 years.

Respectfully Submitted,

Antony P. Ryan, Regional Counsel
Office of Criminal Conflict and Civil
Regional Counsel, Fourth District

401 S. Dixie Highway
Second Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5156
Facsimile: (561) 837-5423

_______/s/________________
Steven H. Malone
Special Assistant Regional Counsel
Florida Bar Number: 305545
stevenhmalone@bellsouth.net

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing has been furnished electronically to Leslie T. Campbell, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401, at capapp@myfloridalegal.com this 6th day of October, 2014.

__________/s/_________________
Steven H. Malone

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief of Appellant complies with the font requirements of Rules 9.100(l) & 9.210(a)(2), *Fla.R.App.P.*, in that is computer-generated submitted in Times New Roman 14-Point.

_______________/s/______________________

_