IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1232

KENNETH RAY JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding is the appeal from the convictions and death sentence of Kenneth Ray Jackson on premeditated first-degree murder, sexual battery with a deadly weapon or force likely to cause injury, arson in the second degree, and grand theft motor vehicle before the Honorable William Fuente. All proceedings in the circuit court were in Tampa, Hillsborough County.

STATEMENT OF FONT

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REQUEST FOR ORAL ARGUMENT

Mr. Jackson requests oral argument. Mr. Jackson has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. Due process dictates that this Court grant Mr. Jackson an opportunity to present oral argument. *Huff v. State*, 622 So.2d 982, 983 (Fla. 1993). A full opportunity to air the issues through oral argument is warranted in this case, given the seriousness of the claims involved, the stakes at issue, and this Court's opinion in *Huff*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Constitution

Statutes

Rules

STATEMENT OF THE CASE AND THE FACTS

Mr. Jackson was charged by indictment on October 10, 2007 with Murder in the First Degree Premeditated, Sexual Battery (Deadly Weapon or Force Likely to Cause Injury), Arson Second Degree, and Grand Theft Motor Vehicle. The State sought the death penalty on February 23, 2009. This was a high profile case with a massive volume of pre-trial publicity. The State filed approximately 34 notices of discovery that included 3,000 pages of documents, 48 audio or visual tape recordings, 750 photographs, and listed more than 240 witnesses. (R.674).

Mr. Jackson was represented by Attorneys Gregory Hill and Charles Traina of the Hillsborough County Public Defender's Office.

During a pre-trial motion hearing on June 24, 2011, defense counsel learned that the State intended to pursue felony murder using the sexual battery count as the predicate felony which was not enumerated in the grand jury's indictment. Mr. Jackson filed a motion in limine to prohibit the State from arguing felony murder as an alternate theory (R.673-82). The State argued that it was proceeding under both theories. The defense also argued that there would be a need for the jury to be unanimous as to the means on which the murder was committed (premeditated or felony murder) under *Ring v. Arizona*, 536 U.S. 584 (2002)(R.276). The motions were denied.

Mr. Jackson filed several motions to declare Florida statutes unconstitutional regarding the "heinous, atrocious and cruel aggravating" factor, during the commission of a felony and "cold, calculated and premeditated" aggravators. Mr. Jackson also filed a motion to declare Fla. Stat. 921.141 unconstitutional under *Ring* in that the jury's recommendation of death must be unanimous. All motions were denied.

Mr. Jackson asked for an interrogatory penalty phase verdict, which was granted. He asked for additional peremptory challenges, but was denied without prejudice (T.47, 1190-91). Mr. Jackson's motion for jury questionnaires was denied (T. 47, 379).

The State conceded at a pre-trial hearing on June 20, 2011, that it could not prove that the victim was alive when the van was set on fire (T. 38, 425). The defense conceded that Mr. Jackson's statements to the Carrabelle Police were voluntary (T. 38, 460).

On June 10, 2011, Mr. Jackson filed a demand for speedy trial as his case had lingered for four years without going to trial (T. 4, 427). On July 11, 2011, voir dire began with a panel of 59 prospective jurors who were sworn. The jurors were questioned by counsel for three days. The defense used all 10 of its peremptory challenges and several cause challenges. The State used fewer than 10 peremptries and several cause challenges. Only 11 jurors remained after the challenges were exercised (T. 6, 826; 843). The trial court, without the input from the parties or Mr. Jackson, *sua*

sponte released the entire panel of jurors who had been chosen and reset the trial to July 28, 2011. Id. Because jury selection had begun and an attempt had been made to choose a jury, the trial court found the speedy trial provisions had been satisfied and a new 90-day period would be extended (T.6, 843-848). Mr. Jackson objected to any further continuance, arguing that the original demand for speedy trial was not extended or tolled by the ill-fated attempt at jury selection (T.6, 830-31). The motion was denied.

Thereafter, the defense requested an *in camera* hearing and a continuance to pursue newly discovered evidence of quantitative electroencephalogram ("qEEG") testing that may benefit Mr. Jackson (T.40, 578-602). Speedy trial was waived and the court granted the continuance. Id.

On August 4, 2011, Mr. Jackson filed an amended notice of discovery listing Dr. William Lambos, Ph.D., as an expert on qEEG with a report finding Mr. Jackson had significant brain damage (T.17, 3027). The defense intended to introduce this evidence at penalty phase. The State objected. On January 23, 2012, Mr. Jackson filed a motion to preclude a *Frye* hearing. The defense asked the judge to allow the jury to hear the opinions of defense psychological experts regarding qEEG without a *Frye* hearing as such testing had already been ruled admissible by the Eleventh Judicial Circuit, and the test was not a new and novel technology. Mr.

Jackson argued that qEEG testing had been accepted by the relevant scientific community. Id.

On February 9, 2012, the defense filed a motion in limine to admit the qEEG testimony at penalty phase (T.17, 3028). The trial court denied the motion without prejudice to seek a *Frye* hearing. Id.

On October 1-3, 2012, a *Frye* hearing was conducted on the admissibility of qEEG test results in Mr. Jackson's case as well as *Edward Covington v. State*, Case No. 08-CF-9312, and *Richard McTear v. State*, Case No. 09-CF-7933(T. 43, 651-654). Counsel for Mr. Jackson, Mr. Traina, said the defense was withdrawing the qEEG motion for use at trial (T.42, 655). He reserved the right to present the evidence at a *Spencer* hearing.(T. 43, 654).

I. Jury Selection

Jury selection began for the second time on October 8, 2012 and continued through October 12, 2012. Because the media exposure in this case was excessive, the court was concerned about obtaining an impartial jury panel when this was going to be a lengthy trial (T. 48, 1247-53).

Mr. Jackson's case came between the extremely high profile homicide cases of Dontae Morris, who was convicted of killing two Tampa Police Department officers. See *Morris v. State*, Case nos. 2D13-1971; SC14-1317. On October 1, 2012, this same judge granted a motion for change of venue in the Morris case and brought in a

jury from Orlando for the trial. Mr. Morris' first trial began on March 11, 2013. Because Mr. Jackson's trial fell during that time, the judge was predisposed not to change venue in Mr. Jackson's case and defense counsel did not even request it. The court was determined to get a jury from a Hillsborough County pool. Problems arose almost immediately.

On October 10, 2012, the defense moved to strike the panel based on conversations between prospective juror #103 Singh who was caught researching Mr. Jackson on Google the night before and was reported by Juror #102 Tompkins (T.10, 1741;52, 1748-50; 1904). He said Juror #155 also heard him talking about the Google search. Singh was excused (T.10, 1834). A note was sent to the judge about Juror #44 Davis who had a sibling named Kenneth Jackson as it was "freeking her out" (sic) (T.10, 1742). She was struck. (T.10, 1835). The defense moved to strike the panel, but was denied (T.52, 1756).

The next day, on October 11, 2012, the defense renewed its motion to strike the jury panel based on its exposure to outside information (T. 54, 2103). The motion was denied (T. 54, 2108). Defense counsel also objected to the court's reluctance to challenge jurors for cause. For example:

Juror #2- Both parties agreed on a cause challenge to juror #2 James Garcia because he was sleeping during portions of the jury

selection process. The Court denied the cause challenge despite counsel's observations and the agreement of both parties.

Juror #15-The court denied a cause challenge by both parties to juror #15 Miller St. Hilaire, who also was sleeping during portions of jury selection and indicated that sexual battery was worse than most crimes and is, in fact, the ultimate crime.

Juror #29-Daphne Fiore. Ms. Fiore had more than one friend who was a murder victim. The case of one friend was opened, and defense counsel Gregory Hill, the same attorney representing Mr. Jackson, represented the person who was accused of the crime. Despite a bias against the defense, the court denied a cause challenge to Ms. Fiore. Trial counsel was forced to use a peremptory challenge on this juror.

Juror #36-Silemy Suarez. Ms. Suarez repeatedly approached the bench to address issues she had regarding the possibility of her serving on Mr. Jackson's jury. Ms. Suarez's aunt was the victim in a death penalty case involving Freddie Clemmons. Her aunt was murdered while Ms. Suarez was at work. The court denied the cause challenge and defense counsel had to use a peremptory challenge to remove this juror from the panel.

Juror #46-Jennifer Russo. Ms. Russo said during jury questioning that she might vote for death automatically if she considered the murder to be premeditated. The court denied a

challenge for cause and the defense had to use a peremptory challenge to strike her.

Juror#47-Kristopher Spengler. Mr. Spengler said that he would lean toward the death penalty if he found the defendant guilty and without hearing the evidence on the case. The defense moved for a cause challenge. The court denied the motion for cause and the defense moved to strike Mr. Spengler using a peremptory challenge.

Juror #71-Olga Hearne. When Ms. Hearne was questioned about the presumption of innocence, she said that it was common to have the person who is guilty of the crime prove their innocence. The defense moved to strike Ms. Hearne for cause based on her statements about the presumption of innocence, which was denied. Mr. Jackson used a peremptory challenge to remove her from the panel. (T. 57, 2614-2720).

On October 12, 2012, the defense moved for additional peremptory challenges (T. 57, 2720). The motion was denied (T. 57, 2722). The defense objected to the jury panel and moved to strike it (T. 57, 2732). The motion was denied. Mr. Jackson refused to accept the jury panel. Id. Defense counsel said it would have struck jurors #12 Bowden-Harris; #42 Guerra; #57 Bradley, and #111 Fraser had it been given additional peremptory challenges (T.57, 2722-23). The motions were denied. Id.

A jury of 12 and four alternates was chosen and sworn on October 12, 2012 (T. 57, 2732). Testimony began on October 15, 2012.

II. Trial

Hillsborough County Sheriff Office Sgt. Sean Peters was dispatched on September 13, 2007 to Gibsonton for a van on fire in a vacant lot off Bullfrog Court (T. 58, 2523-40). The van was destroyed. He did not know there was a body in the van at the time. He spoke to neighbors, but got no useful information. Id.

A missing person's report was made at 3:30 p.m. on September 13, 2007 by Truong Tran and his father, Banh Tran, for his missing mother, Cuc Tran (T. 58, 2882-86). Bahn Tran only spoke Vietnamese and the son translated (T. 58, 2891-2909). Truong Tran had last seen his mother on September 12th, the night before. Id. Both men assumed that Cuc Tran had gone for her routine morning jog at 5:30 that morning. Id.

Robert Berg lived on Bullfrog Court and reported a vehicle fire two lots down from his house at 6:45 a.m. on September 13, 2007 (T 58, 2924-2930).

Police responded to a van fire and towed the van to the impound lot (T. 59, 2944-66). A body was discovered inside the van, and it was removed by the medical examiner (T. 59, 2957). No fingerprints were recovered from outside of the van (T. 59, 2972). The van appeared to have gotten stuck in the sand and a wooden

board had been placed under a tire in a failed attempt to drive out of a rut. The wooden board was not collected or tested. Id.

The police were dispatched to the St. Francis of Assisi Catholic Church on September 13, 2007. (T. 59, 3015-3019). Lawn workers there found clothing, a shoe, a sock, a pink hair curler, and blood behind a berm near the church property (T. 59, 3019-20). It was later learned that the clothing and hair curler belonged to Cuc Tran.

At the spot where the van was found, police collected evidence. No fingerprints of value were found on unburned areas of the van. Id. Clothing, jewelry, and a pink hair curler were taken from the body. Id. No fingerprints were developed from the wood board near the driver's side front wheel. (T. 60, 3047). Nothing linked Mr. Jackson to the evidence found. (T. 60, 3074; 3152).

Luis Carrero had been trying to sell his 1993 dark blue Dodge Caravan and parked it in front of an Advanced Auto Parts (T. 60, 3124-27). It had been at the store for two weeks and he had seen it still parked there at 9 p.m. the night before the crime Id.

When Christopher Solequ reported to work at Advanced Auto Part the next morning at 6:30 a.m., he discovered the van was gone on September 13, 2007 (T. 60, 3136-38).

Police conducted a roadside check to try to get information from commuters who may have seen the van. Bonnie Cramer saw a blue van on Highway 579 going 5 or 6 mph on September 13, 2007 at 5:45

a.m. and she saw it suddenly pull off the road. She couldn't tell how many people were inside the van (T.60, 3166-76).

Robert Paugh was going to work on September 13, 2007 between 6:15 and 6:30 a.m. and saw a blue van traveling at a very high rate of speed and cut him off (T. 60, 3192-3207). He couldn't see any of the occupants of the van. He saw the van turn onto the westbound ramp toward I-4 (T.60, 3194).

Dr. Amy Shiel, the former Hillsborough County Assistant Medical Examiner, testified that the cause of death was homicide due to stab wounds with penetration of the jugular and carotid arteries (T. 61, 3341). She believed that the victim may have remained conscious for "probably seconds to several minutes depending on the circumstances." (T. 61, 3343). She was alive when the stab wounds were inflicted but not when the van was burned because there was no soot in her lungs. The victim had been sexually assaulted. She collected vaginal, anal, and oral swabs for DNA testing.

Defense counsel renewed its objections to the cumulative and prejudicial autopsy photographs (T.61, 3271-73) but was overruled. Id. The defense objected to the predicate as well as the cumulative and grossly prejudicial photographs of the charred remains of the victim. A majority of the images showed injuries not relevant to the cause of death but were the result of the fire, after death

(T.61, 3301). The State proffered the relevance of the photos (T.61, 3275). The defense motion was denied (T.61, 3296).

Before the court reconvened on October 18, 2012, Juror #11 Clark became overcome by the intensity of the evidence and testimony. He feared heights and was suddenly panicking at being in the enclosed courtroom (T. 64, 3577-89). The trial judge eventually allowed him to go home and granted his release from the jury. Alternate juror, Thomas English, was moved up in order.

The swabs collected by Dr. Schiel tested positive for sperm cells (T.64, 3637. DNA analysis of those swabs showed a mixture of DNA. (T. 64, 3641-42). One DNA profile included that of the victim and the other profile included Mr. Jackson (T.64, 3642-43).

FDLE Analyst Evelyn Bigord used the FBI database to extrapolate her statistical probabilities of 1 in 34 quadrillion Caucasians; 1 in 750 quadrillion African Americans; and 1 in 65 quadrillion Southeastern Hispanics (T.64, 3645; 3651). The Earth's population is 6.5-7 billion people. Id.

Police collected video surveillance tapes from Wal-Mart that showed Mr. Jackson entering the store on September 13, 2007 at 5:07 a.m. and playing video games. He left the store and the surveillance tape showed his black and white Nike sneakers and bike tires going westbound toward 579 and his house. Twenty-two minutes later, Mr. Jackson is seen back at the Wal-Mart. He was seen exiting the building at 5:35 a.m. riding a bicycle.

At 8 or 9 a.m., Iris Williams, who had seen Mr. Jackson three or four times before, saw him walking north along Highway 41 and gave him a cigarette (T.65, 3796-97). He told her that Linda O'Neal had kicked him out of their trailer in Seffner. Id. He didn't act unusual and had no bruises or cuts on him (T.65, 3808; 3811). She called Linda O'Neal immediately when she got home.

Linda O'Neal lived with Mr. Jackson and her husband Wally O'Neal at the Grand View Mobile Home Park in Seffner since July, 2007 (T.65, 3813-14). Kenny had a job cleaning parking lots. He didn't have a car or a cell phone. He hung around the neighborhood at Wal-Mart and the gas station, and played video games (T.65 3814-23). At 7:30 a.m. on September 13th, she received a call from Iris Williams saying she had seen Kenny walking on Highway 41 and that he said he had been kicked out of her house. (T. 65, 2824).

Mrs. O'Neal did not see Mr. Jackson walk to their trailer until 1 or 1:30 p.m. that day. He was sweating but otherwise unhurt (T. 65, 3824-28). During her testimony, when asked how long he had been staying with her and her husband, she said, "I don't know how long since he had been released."

Defense counsel objected and moved for mistrial. The judge called counsel to the bench and admonished the witness to simply answer the questions. After a few more questions, Mrs. O'Neal again was unresponsive. The judge removed the jury and warned her that she had nearly caused a mistrial and that she was only to

answer the questions being asked by the prosecution. Defense counsel again moved for a mistrial, which was denied.

Mrs. O'Neal admitted that she did not like Mr. Jackson and that she only allowed him to live with them after his grandmother died.[1] The Monday after the crime, Mr. Jackson moved out. She bought him a one-way bus ticket to Tallahassee (T. 65, 3830). At the end of her testimony, Mrs. O'Neal burst into tears and covered her face with her hands when questioned about her husband's death (T.65, 3832). Defense counsel again objected to relevance and prejudicial display. The defense renewed its motion for mistrial (T. 65, 3832). It was denied. Id.

Mr. Jackson's name emerged by chance from a BP gas station employee, Christine Elhelw, who told police about a customer named "Kenny" who talked about a murder she hadn't heard of. She knew that he lived at the Grand View Mobile Home Park.

Mr. Jackson was found in North Florida, and was interrogated by police in Carrabelle, Florida on September 20 and 27, 2007. Defense counsel conceded that Mr. Jackson's statements were voluntary. Mr. Jackson voluntarily provided a DNA sample. Mr. Jackson gave inconsistent and conflicting statements in which he

[1] It wasn't made clear until the penalty phase that Wallace O'Neal was Kenny's grandmother's boyfriend who had raised him and sexually abused him. He was Linda's husband at the time of the crime. Linda admitted she did not like Kenny.

denied knowing or having contact with the victim. After the preliminary DNA results came in, Mr. Jackson was arrested.

While awaiting trial, Mr. Jackson was placed in a cell near federal inmates, Antonio Gonzalez and Michael Kennedy. Both inmates claimed they had no deal in exchange for their testimony against Mr. Jackson and expected no benefit. Gonzalez claimed that Mr. Jackson confessed to watching, abducting and raping "an Asian lady" and that he stabbed her in the neck to keep her quiet and put her body in a stolen van. He drove it to a remote area where he got stuck and he lit the van on fire with her body inside to dispose of it. Inmate Kennedy told essentially the same story and said Mr. Jackson worried that he told police that he had ridden his bike everywhere when he actually had walked home.

The State rested (T.72, 4719).

The defense moved for judgment of acquittal, which was denied.(T.72, 4726, 4753).

The defense presented the testimony of Dr. Anjali Ranadive, who said that duplicate DNA profiles were possible and that DNA could be transferred (T.73, 4818-38). She said the FBI DNA database used by FDLE to extrapolate the statistical probabilities in this case was not as reliable as FDLE analyst Bigord had said. DNA could be transferred and there was no way of knowing how long or under what circumstance the DNA could have been deposited. Id.

Sheriff Detective Bunten testified that he had conducted a roadside traffic check and that various drivers had given differing accounts of seeing a blue van driving through the area. He also said that Mr. Jackson did not have any bruising or cuts on his body when he was arrested (T.73, 4845-52).

Mr. Daniel Eberly testified that around the time of the murder he saw a minivan in that same area with two Hispanic males and a woman lying in the backseat (T. 73, 4864-65). He didn't think anything of it when he initially spoke to police, but remembered after thinking about it, but he did not know the exact day he saw the van. Id.

Carolyn Yvonne Allen saw a woman jogging and a blue van driving erratically that morning. It was about 7 a.m. and she saw the man get out of the van (T. 73, 4878-80).

Diane Lachemayer testified that she drove the route around the Wal-Mart on the morning of the crime. She saw two men coming out of Bullfrog Creek Road walking toward Gibsonton with a gas can (T. 73, 4883). One had white T-shirt and long, blonde, bushy hair and the other had on a dark hoody. Id. She remembered the incident because she would not have wanted to run out of gas out there.

The defense rested.

When Juror Gomez learned that the jury was going to be sequestered after being given guilt phase jury instructions, she asked to be excused as she is the sole caregiver for her young

children. She was replaced with an alternate, but she was not excused from the jury in case she would be needed for penalty phase deliberations where she would not need to be sequestered (T. 73, 4891).

On October 25, 2012, the jury found Mr. Jackson guilty of first degree murder (premeditated and felony murder, sexual battery); sexual battery with a weapon or actual physical force likely to cause serious personal injury; second degree arson; and theft of a motor vehicle. The court adjudicated Mr. Jackson guilty but did not discharge the jury or alternates and deferred the penalty phase to November 1, 2012 (T. 3034).

III. Penalty Phase

Penalty phase began on November 1, 2012 (T. 5130). The State relied on evidence it had presented during the guilt phase of trial (T.5163). A victim-impact statement was read into the record by State Attorney's Office employee, Jason Derry for the victim's eldest son, Troung Tran (T.5162). The trial judge instructed the jury not to consider the victim-impact statement as an aggravating circumstance (T.5164).

During the penalty phase, Juror #10 Regina Eades sent a note to the judge asking to be dismissed from the jury because "things seem to be hitting me emotionally close to home and at this point I don't know if I even know how to be fair or impartial." (T. 11, 1866). Upon questioning, Juror Eades said she was listening to her

youngest son "I've just started shaking this morning...I don't think I'm mentally prepared for what I'm looking at."(T.76, 5200). She said she could no longer be fair and was released. Id.

Over defense objection, Juror Eades was replaced by Juror Gomez, who had become an alternate juror during guilt phase because she did not want to be sequestered (T. 74, 4947).[2] She was then returned to the main jury panel. Mr. Jackson objected to Gomez replacing Eades as the next alternate juror should have been Ms. Speakman-Felts (T.74, 4947;76, 5203).

The defense then presented Dr. Yolanda C. Leon, a psychologist and neuropsychologist, who was accepted as an expert in clinical psychology and as a school psychologist (T.5283-5377). She interviewed teachers and family members, and reviewed records (T.5289-90). She performed a clinical interview of Kenny Jackson and was asked to provide a psycho-social and developmental history of him. Id. She found that Kenny was conceived when his biological mother, Patricia Helms, was only 14 years old. Kenny's father, 28, was not involved in his upbringing in anyway and he never knew him (T.5294). Kenny's mother left him when he was 6 months old and he

[2]Defense counsel made clear when Juror Gomez was allowed to become an alternate so she would not be sequestered and that the next alternate juror to be moved up would be Ms. West (T. 74,4947). However, when Juror Eades asked to be excused during penalty phase, the judge moved now alternate Juror Gomez back into the jury for penalty phase (T.76, 5199-5202). In essence allowing Juror Gomez to circumvent being sequestered during guilt phase.

was left to live with his maternal grandmother, who was 30 (T.5295), and who lived with her boyfriend, Wallace O'Neal.

Kenny's life devolved into dysfunctional chaos. He was unable to form human attachments and bonds (T.5304). Kenny had no semblance of a normal childhood (T.5331).

He was encouraged to steal at an early age. He was sexually abused and physically tortured by the adults in his life. Kenny suffered from erratic parenting, without nurturing or caregiving. He had no stable influence in his life and no frame of reference for a normal life.

When he was 6 or 7, Kenny was ejected from a moving car that was traveling at 30 mph because he was not restrained in the seat (T.5304).

He was exposed to sexual abuse, and tortured by a primary caregiver. Kenny was abandoned. In the only chance meeting he had with his father at age 6 (T. 5305), he denied being Kenny's father, and told the boy he didn't want anything to do with him. Id.

Kenny was exposed to a great deal of neglect and suffering (T.5309). He suffered from chronic head lice and wore dirty clothes. He didn't bathe. He had ring worm for more than two weeks without treatment (T.5323).

Patricia Helms, his biological mother, said Kenny was abused by her former husband. He was made to do "nasty things." Kenny had

to perform oral sex on him. If Kenny didn't do it, he would get kicked out of the car and have to walk (T.5312).

As punishment, Kenny was put in a trailer in the summer with a 4 x 4 that was cemented together. He was required to hit it over and over again with a baseball bat until it broke. He described very graphically how the bat vibrated, how his finger stiffened and the pain involved (T.5328). This punishment was by his step-father, who screwed the windows of the trailer shut, and Kenny would be in there for two or three days at a time in the heat of the summer trying to get out (T.5328).

Kenny's step-father also made him stand in a corner on his knees or on his toes, as punishment (T.5329).

A cousin, Cindy Allen, reported to Dr. Leon that Mr. Jackson was exposed to sexual acts as a child. He may have had sex with an aunt. He was forced into having sex by Wallace O'Neal, his grandmother's boyfriend. (T.5312-5314). O'Neal was arrested for sexually abusing Kenny's sister, but his grandmother talked her into dropping the charges (T.5315).

At one point, Kenny lived in the same house with his uncle, and was fond of him (T.5325-5326). But Kenny's uncle ultimately committed suicide by taking an overdose of prescription pain medication and he was abandoned again (T.5324).

These were Kenny's adult role models (T.5315). Because of Kenny's chaotic upbringing his ability to form secure attachments

was impaired, and he never developed that ability. He never learned to conform to social norms from the significant people in his life (T.5327).

Kenny came from an impoverished environment. Mr. O'Neal reported having financial difficulties and he was the only one working in the home. The family applied for financial aid but Kenny's grandmother was not employed, and O'Neal was just a day laborer (T.5322). They got by from stealing.

Kenny was encouraged to steal from an early age because they couldn't afford certain food (T.5322). On one occasion, Mr. Jackson's grandmother wanted shrimp, but they had no money to buy it. At the age of 8 or 9, Kenny stole some shrimp so his grandmother could have it (T.5322). Mr. Jackson's biological mother, Patricia Helms, also said Kenny was encouraged to steal because they had no money (T.5322). As a child, Kenny was easily led, and would do whatever he was asked to do (T.5314).

Eventually, Kenny's grandmother went to prison on felony charges for forging prescriptions. Ms. Helms said that her mother and O'Neal were chronic abusers of street drugs and alcohol (T.5323).

Cindy Allen, Kenny's cousin, stayed with the family on one occasion. She had a prescription for pain medication. She had to tape the bottle of pills to her torso to keep Kenny's grandmother and O'Neal from stealing her prescription (T.5324).

At age 5, Kenny smoked cannabis with his family and graduated to taking pills by age 16. He got crack cocaine from his aunt when he was a minor (T.5324)

Rosemary Borden, a staffing specialist with Hillsborough County Public Schools, testified that Kenny performed poorly. He was held back. He was hyper and diagnosed with attention deficit hyperactivity disorder (ADHD). He took an overdose of Ritalin and had to be hospitalized. When he was in the fifth grade, Kenny was in a specific learning disability and emotionally handicapped program. He wrote on a piece of paper in class that "Kenny is dead, Kenny will die." He drew on the paper a stick figure lying in the road. Kenny, in fifth grade, said he wanted to kill himself. He was Baker Acted. He was 12 years old and reading at a first grade level (T.5177).

Kenny would also injure himself by cutting his left arm to relieve stress (T.5315). He inserted forks and spoons into his urethra via his penis. He swallowed a razor blade. While in the jail, he threatened to break light bulbs and use the glass to cut himself (T.5316).

Dr. Leon found Kenny's cutting as an attention seeking behavior, and typical of unstable behavior. It is expected of someone exposed to a chaotic environment and the tortured existence that he was exposed to during his developmental years (T.5317).

Kenny's ability to regulate his emotions was extremely poor (T.5318). He suffered psychological trauma due to the deprivation and lack of parental nurturing that he should have had when he was an infant and toddler (T.5361).

Kenny didn't have a way to learn empathy and he wasn't afforded empathy by any significant others in his life. He was abused, neglected, had unstable parents. These factors increased the likelihood that a child who already had a conduct disorder and ADHD could develop into a personality disorder, namely anti-social personality disorder. (T.5327).

In school in Texas, Teresa Gribbon was Kenny's teacher at Bowie Elementary School's behavioral unit for the emotional disturbed students when he was 11 years old. Kenny didn't get along with other children in the class. He didn't make friends. He struggled as a student and was far behind in academics. He never formed attachments to others (T.5255). He began acting out.

During this time, Kenny started medication to help with his behavior. But instead of diminishing, his acting out behavior escalated. His grandmother did not provide strict parenting when she lived with her boyfriend Wally O'Neal.

He had a lot of aggression and physically tore up the small trailer that he lived in with his grandmother and her boyfriend. During this time, Kenny slept in the same bed with his grandmother and her boyfriend so they could watch him (T.5259).

In school in Florida, Cathy Wetherington a Hillsborough County School Psychologist, said Kenny was placed in learning disabled classes and an emotionally handicapped program in 1995. He had behavioral issues, and as the year progressed, his behavior deteriorated. In Texas, he had been belligerent and defiant. He teased and accused other children (T.5178). He tried to antagonize other children and called them names. He was developmentally very slow (T.5179). As Kenny became more and more defiant, he refused to do his school work. He threw his paper and pencils off his desk. He yelped like a dog and snorted like a pig and refused to stop the inappropriate noises. He was removed from class at least once a week (T.5182).

When Kenny entered kindergarten, he had difficulty following the rules, respecting authority, and playing well with others (T.5235).

In second grade, he had a full scale IQ of 85, on the Wechsler Intelligence Scale, WISC-R. (T.5237).

When he entered the third grade, he was angry, used aggression and hostility to cover up his insecurity and control his environment. He was placed in a special education program (T.5237-5238).

When he was in the fifth grade, Kenny was tested using the Wechsler Intelligence Scale for Children, 3rd edition. His full scale score was 75. His verbal score was 75, and his performance

scale was 79. His reading was 53. His math was 68. His writing was 32. Kenny had social and emotional factors that interfered with his learning (T.5228).

When Kenny entered fifth grade, his teacher noted that he was well behaved, but as time progressed, his behavior worsened (T.5238). He became more openly defiant and turned away from the work, despite the teacher's encouragement. He eventually became openly defiant to the teacher (T.5239). Kenny used aggression and acting out in response to the stress of not being able to do the class work (T.5241).

Kenny was evaluated by Dr. Steven Gold, a trauma and child abuse psychologist. He was asked to evaluate Kenny to determine if trauma was a factor in his case (T.5381-5385). Dr. Gold evaluated Kenny with the Adverse Childhood Experiences Study (ACE) which is based on a study of 17,000 participants, to determine if there is trauma, and if it leads to long-term psychological effects (T.5387). The factors are looked at before the age of 18.

Dr. Gold opined that Kenny had all 10 of the experiences, which was "rare." (T.5417). They included:

1) childhood psychological neglect. Kenny came to school unwashed, wearing dirty clothes, with cuts and bruises and head lice. School teachers said he didn't bathe and wore unkempt clothes (T.5407);

2) childhood emotional neglect. Kenny saw his biological father twice, and didn't interact with him. He had no nurturing relationship with him. Kenny was born to a teenage mother who abandoned him. He lived with his grandmother and her boyfriend. His biological mother was in and out of his life, and Kenny was

raised by his grandmother, who didn't understand the child's needs, and her boyfriend understood them even less (T.5408-5409);

3) childhood physical abuse. Mr. Jackson's grandmother regularly slapped him in the face and cursed at him. His mother's husband beat him intensely with a board, until it broke. Mr. O'Neal physically sexually abused him;

4) childhood sexual abuse. While Dr. Gold said sexual abuse was difficult to corroborate, there were indicators of sex abuse when Kenny was in the fourth or fifth grade. Kenny had difficulty remembering personal history or putting things in sequence (T.5411). Kenny reported that when he was 7, he slept in the same bed with his 11-year-old female cousin, and 7-year-old male cousin. He had sex with both of his cousins. When Kenny's grandmother was incarcerated, he was anally raped by O'Neal several times while she was gone (T.5411-5412);

5) childhood verbal abuse. Kenny's grandmother and boyfriend screamed and cursed at him regularly. They spoke to him in a demeaning manner (T.5412);

6) alcohol and drug abuse. Kenny's grandmother had alcohol and drug problems. She was addicted to pain and anxiety medication. O'Neal was an alcoholic and abused marijuana regularly;

7) incarceration. Both Kenny's grandmother and her boyfriend were incarcerated for their substance abuse problems;

8) domestic violence. There was violence between Kenny's grandmother and her boyfriend. The violence escalated as he got older. Kenny's two aunts were regularly beaten by their spouses. Kenny's grandmother intervened and took him with her. Kenny saw domestic violence at home and at his aunt's house (T.5414);

9) mental illness in the household. Kenny's uncle committed suicide. Shortly after that, Kenny began writing in school, "Kenny is dead. Kenny will die. I want to die." His teacher reported it to the school authorities. Kenny was involuntarily Baker Acted in a psychiatric hospital for 24 hours; and

10) growing up in a home without both biological parents. Kenny didn't know his father and his mother abandoned him at a very early age (T.5416).

Dr. Gold found that Mr. Jackson had difficulty with memory, concentration, and controlling his emotions and behavior. He was isolated and had no friends. The closest thing to a friend was his male cousin who slept in the same bed with him and a female cousin (T.5421).

Kenny had no interpersonal relationships. His ability to interact as a fully functioning adult is very limited (T.5422).

The defense rested.

In rebuttal, the State sought to present Dr. Wade Myers. The defense objected to improper rebuttal because Dr. Myers's testimony did not actually rebut any testimony or evidence. The trial court overruled the objection (T.5376-5435).

Dr. Myers did not interview Mr. Jackson (T.5461). Without ever seeing Mr. Jackson, he opined that he had an anti-social personality disorder. He opined that any abuse or lack of parenting or nurturing that Mr. Jackson suffered did not cause him to act violently as an adult. Dr. Myers said Mr. Jackson didn't suffer from lack of nurturing. He saw no evidence of child or sexual abuse (T. 5458). Dr. Myers did not interview any teachers or family members in rendering his opinion. He conducted no testing of Mr. Jackson.

The State then rested. The defense renewed all objections.

The jury recommended death by a vote of 11 to 1 (T.5601-5602).

On March 22, 2013, a *Spencer* hearing was held. The defense presented one witness and filed a proffer on the qEEG issue (T.5611-13).

Patricia Helms, Kenny's biological mother, testified that Kenny is now 30 years old. The only time he lived with her was when he was 14-16 years old. (T. 5614-5616). She couldn't keep Kenny and had an agreement with her mother to keep him. She described him as an angry, young teenage kid. Id. She saw Kenny on weekends, birthdays and at Christmas. She lived in Texas, while he lived in Florida (T. 5612).

When they did spend time together, they had a good relationship. (T.5618). At Christmas one year, he made her a plaque that said, "love you, Mom." Id. Once when her back was out, he helped her clean the house, cook and get around. Id.

Kenny could be very affectionate. He wanted to stay with her and his sister, Nicole, who was six years younger (T. 5619). They got along well and played together. Kenny was a loving kid, but he had his moments (T. 5620). He was closer to her mother than her. (T. 5621). If she could, she would have kept him with her. She loves him very much. She lives 500 miles away and it is hard for her to see him. She came for his trial and saw him daily. She wrote him letters and tries to stay in touch with him (T. 5621).

The defense asked for a ruling on its motion to present qEEG evidence at penalty phase in mitigation. Id. The court held that

there was a *Frye* hearing on the issue on October 1-3, 2012. The defense wanted to call Dr. Lambos to testify on the qEEG analysis and how it could be mitigating. The defense would have called him but it would have delayed the trial so it abandoned its intent to call Dr. Lambos to testify in front of the jury in penalty phase. The defense wanted to call Dr. Lambos at the *Spencer* hearing (T. 5623-25).

The trial court reiterated that the defense did not seek to introduce the qEEG testimony in its case-in-chief in penalty phase. Id. The trial court said it prohibited the qEEG testimony at trial and penalty phase and would prohibit it from the *Spencer* hearing (T.5625). The defense argued that it never intended to introduce the qEEG evidence at trial but wanted to present it at the *Spencer* hearing (T. 5626).

At sentencing on June 5, 2013, the defense filed its motion to reconsider allowing the defense to present the qEEG testimony to the judge. The defense noted the recent change in legislation to the *Daubert* standard (T. 5635-36). Though there was no different testing, there would be a different analysis under *Daubert* that should be performed by the court. Id.

The court ruled that the qEEG would not be admissible and denied the motion to reconsider (T. 5368).

The court found the during the course of felony (sexual battery) aggravator and the "heinous, atrocious and cruel"

aggravators had been proved beyond a reasonable doubt, but found that the heightened premeditation necessary for the "cold, calculated and premeditated" aggravator had not been proved, even though that instruction had been submitted to the jury. (T. 5641-43).

The trial court found the following mitigation established by a preponderance of the evidence:

1) That Jackson had a dysfunctional family background that resulted in an environment of instability (moderate weight);

2) That Jackson suffered psychological trauma due to deprivation in parental nurturing during his infancy and toddler years that affected his social and psychological development (minimal weight);

3) That Jackson was abandoned by his mother and his father (minimal weight);

4) That Jackson did not have a healthy role model from which to learn appropriate behavior and coping skills (minimal weight);

5) That Jackson was sexually abused by his grandmother's paramour (Wally O'Neal) during his early teenaged years and that his life was predetermined during the years of his early development based on behavior patterns witnessed by former school personnel (moderate weight);

6) That Jackson developed pathological behaviors as a result of his dysfunctional family background and has exhibited cutting and other self-mutilating behavior (minimal weight);

7) That Jackson's dysfunctional family life when young resulted in his inability to create secure attachments and to articulate and self-regulate his emotions, causing him to be an individual who is mentally and emotionally incomplete (moderate weight);

8) That Jackson suffers from a personality disorder which developed due to his childhood experiences and the genetic traits passed to him from his parents (moderate weight);

9) That Jackson was raised in extreme poverty and was taught and encouraged to steal food and clothes by his family (minimal weight);

10) That Jackson was raised by neglectful guardians that encouraged his criminality at a young age (moderate weight);

11) That Jackson has a history of prescription and alcohol abuse by his care givers (minimal weight);

12) That Jackson, as a young boy, was impacted by the suicide of a loved one (minimal weight); and

13) That Jackson exhibited positive signs of normalcy during his childhood years in that he was affectionate with his mother and younger sister Nicole of whom he was protective, and that he was very close to his grandmother (minimal weight)(T. 3043-53).

On its own, the trial court found statutory mitigation that the above mitigating circumstances cumulatively diminished Mr. Jackson's capacity or ability to conform his conduct to the requirements of the law, but did not determine that such circumstances diminished his capacity or ability to appreciate the criminality of his act (moderate weight) (T. 3053).

The trial court then imposed death on count 1-1st degree murder; life on count 2-sexual battery with a deadly weapon; 15 years on arson concurrent to counts 1 and 2; and five years on grand theft; concurrent with counts 1, 2 and 3. (T. 5640). The court imposed all statutory costs as a lien and awarded Mr. Jackson five years, five months and three days credit for time served. Id.

Mr. Jackson filed a motion for new trial on April 8, 2013 (T.17, 3006-18). It was denied on May 15, 2013 (T. 17, 3023-25). An

order denying the motion to reconsider ruling on qEEG evidence was filed on June 5, 2013.

A timely notice of appeal was filed on June 14, 2013. This appeal follows.

SUMMARY OF ARGUMENT

1. Florida's capital sentencing statute is unconstitutional because it fails to comport with *Ring v. Arizona*. *Ring* dictates that a jury's death recommendation must be unanimous. Mr. Jackson's jury was not required to vote unanimously nor was it required to find each of the aggravating circumstances proved beyond a reasonable doubt. Mr. Jackson's death sentence was contrary to *Ring*. The outcome of *Hurst v. Florida* currently before the United States Supreme Court will affect Mr. Jackson's case.

2. The trial court improperly denied cause challenges and Mr. Jackson's repeated motions for additional peremptory challenges when the jury panel had been tainted by heavy pre-trial publicity.

3. The trial court erred in excluding consideration of qEEG evidence in mitigation when it showed Mr. Jackson suffered from organic brain damage. qEEG testing had been admitted in Florida courts and was scientifically sound. Had the court analyzed the claim under the prevailing *Daubert* standard or conducted the proper *Frye* analysis, Mr. Jackson would have additional substantial and weighty mitigation that should have been weighed against the two aggravators in this case.

4. The trial court erred in failing to grant the defense motion for mistrial when Linda O'Neal, a state witness who was biased against Mr. Jackson, refused to follow the instructions of the court and prosecution when she testified that Mr. Jackson lived with her "after he had been released" presumably from prison. The fact that she did not say the word "prison" or "jail" did not erase the taint of her comment and the court's admonishment to her was insufficient to cure the prejudice to Mr. Jackson.

5. The trial court failed to limit or conduct the proper balancing test in determining the admissibility of grotesque and irrelevant photographs of the victim's autopsy and post-mortem injuries. The photographs failed to prove any legitimate issue in dispute and could have been limited to show only the fatal injuries. Mr. Jackson's jury was so affected by the intense and extreme images that Jurors Clark and Eades had to be excused from the case. Mr. Jackson is entitled to a new trial.

6. The "cold, calculated and premeditated" aggravator did not apply and was insufficiently proved. It should not have been submitted to the jury.

7. The trial court erred in allowing State witness Dr. Wade Myers to testify in rebuttal to Drs. Steven Gold and Yolanda Leon when his testimony and diagnosis was not contrary to the defense case. The result was that the State improperly bolstered that Mr. Jackson suffered from anti-social personality disorder over and

over again through Dr. Myers whose testimony was consistent with the defense experts.

8. The aggravating circumstances of during the commission of a felony and "heinous, atrocious and cruel" are unconstitutional on their face and as applied to Mr. Jackson when there were only two aggravating factors in contrast to a plethora of weighty mitigating evidence.

9. Florida's death penalty scheme is unconstitutional and constitutes cruel and unusual punishment under the Eighth Amendment and has been arbitrarily imposed on Mr. Jackson. The advent of litigation in the United States Supreme Court in *Hurst v. Florida* in regard to *Ring* shows that Florida's non-unanimous jury verdict casts Florida's entire death sentencing scheme in doubt. Mr. Jackson is entitled to a new sentencing proceeding pending the outcome of *Hurst*.

ARGUMENT I

FLORIDA'S DEATH SENTENCING SCHEME VIOLATES THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *RING V. ARIZONA*, 546 U.S. 584 (2002).

Mr. Jackson filed a pre-trial motion to declare Fla. Stat.§921.141 unconstitutional under *Ring v. Arizona*, 546 U.S. 584 (2002) because a recommendation of death must be based upon a unanimous jury verdict (Vol. 4, 510-20). The motion was denied.

Mr. Jackson argued that constitutional error occurred in this case because the advisory jury in penalty phase was not required to

find specific facts as to the aggravating factors, and because the jury was not required to make an unanimous recommendation as to the sentence. Id. In addition, Mr. Jackson filed a motion to prohibit any reference to the jury's role at the penalty phase as being "advisory" or to the jury's penalty verdict as being a "recommendation." (T.4, 521-27). Both motions were denied.

On March 9, 2015, the United States Supreme Court accepted for certiorari review *Timothy Lee Hurst v. Florida,* Case No. 14-7505 on whether Florida's death sentencing scheme violates the Sixth and Eighth Amendments in light of *Ring*. The case is now pending before that Court. Mr. Jackson would respectfully request that his case be held in abeyance pending the outcome of *Hurst* and that supplemental briefing be allowed when the decision is rendered.

This Court has traditionally rejected such arguments holding that Florida's capital sentencing scheme as in *Hildwin v. Florida*, 490 U.S. 638 (1989) on the ground that "[t]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. 638, 640-41 (1989). Florida courts have subsequently held that "*Ring* does not require the jury to make specific findings of the aggravators or make a unanimous jury recommendation as to sentence." The trial court declined to revisit this issue here. This Court has concluded that *Hildwin* remains good law because it has never expressly overruled it, and because Florida's sentencing procedures

provide for jury input about the existence of aggravating circumstances prior to sentencing.

Although the jury renders an advisory verdict recommending a sentence, the jury makes no express findings as to aggravating factors and its recommendation of death is neither necessary nor sufficient for imposition of a death sentence. The court independently makes its own findings regarding aggravators and mitigators and it is the court's factual findings–not the jury's–that authorize imposition of the death sentence. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than did a trial judge in Arizona, under the statute struck down in *Ring*. See *Walton v. Arizona*, 497 U.S. 639, 648 (1990). Consequently, Florida's capital sentencing scheme violates the Sixth Amendment just as in Arizona.

Florida's capital sentencing statute also violates the Eighth Amendment because it permits the judge to impose death. In a concurring opinion in *Ring*, Justice Breyer concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death." 536 U.S. at 614. Historically, the power to impose death was the province of the jury, not the judge. Today, nearly every jurisdiction that allows for the death penalty requires the jury to impose it. And only imposition by a jury, which embodies "the community's moral

sensibility," ensures that the death penalty serves the sole legitimate penological function of retribution. Id. at 614-15.

In Mr. Jackson's case, the jury did not render explicit findings on aggravators. In fact, the jury was instructed on three aggravators -- during the course of a felony, "heinous, atrocious and cruel," and "cold, calculated and premeditated." (T.78, 5589-5591). It was not required to agree on which, if any, of the three aggravators existed. The trial judge did not find the "cold, calculated and premeditated" aggravating factor as having been sufficiently proved, but the jury was still allowed to consider it. (T. 17, 3034-3056). Mr. Jackson was sentenced to death based on two aggravating factors: during the course of a felony (sexual battery) and "heinous, atrocious and cruel." Id. It is the trial court's findings on the aggravators that authorized the death sentence, not the jury's. That is the Sixth Amendment violation.

Even if this Court decides that *Ring* does not apply to Florida, then Mr. Jackson's death sentence would still violate the Sixth and Eighth Amendments for other reasons.

First, Mr. Jackson's sentence would violate the Eighth Amendment because the jury instructions would have misleadingly "minimize[d] the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985). The jury was instructed that its sentencing verdict

would be purely advisory and the ultimate responsibility for the death sentence rested with the trial court (T.78, 5583-5598).

Second, Mr. Jackson's sentence would still be unconstitutional because no inference can be drawn from the jury's recommendation that more than seven jurors found any aggravator, particularly since the jurors were instructed on an inapplicable aggravator of "cold, calculated and premeditated." Neither the Sixth nor Eighth Amendment tolerates a death sentence based on such a slim vote. Forty-nine other states require unanimous jury verdicts as the norm. Florida is alone as a simple-majority state.

Mr. Jackson recognizes that this Court has previously rejected attacks on Fla. Stat. § 921.141 based on lack of unanimity in the jury recommendation. *James v. State*, 453 So. 2d 786 (Fla. 1984). In explaining the court's decision in *Walton*, Justice Ginsburg said, "although the doctrine of *stare decisis* is of fundamental importance to the rule of law our precedents are not sacrosanct. We have overruled prior decisions where the necessity and propriety of doing so has been established. We are satisfied that this is such a case." *Ring*, 536 U.S. at 608.

In *Bottoson v. Moore*, three justices of this Court found that Florida's non-unanimous advisory recommendation did not meet the requirements of the Sixth Amendment under *Ring*. Id., (Anstead, J. at 705; Shaw, J., at 710; Pariente, J. at 725). All states other than Florida require a unanimous verdict of guilt.

In Florida, the finding of one aggravating circumstance is necessary to render a defendant "death eligible." Under *Ring* that aggravator is the "functional equivalent" of an element of a greater offense and must, therefore, be found beyond a reasonable doubt by a unanimous verdict. *Bottoson*, 833 So. 2d 693, 714 (Fla. 2002)(Shaw, J., concurring)(if presence of one aggravator death qualifies a defendant and is the functional equivalent of an element of the offense, then the finding of that qualifying aggravator must be held to the same exacting standard as every other element).

Fla. R. Crim. P. 3.440 requires a unanimous verdict for the guilt phase of trial. Under Florida's current death penalty jurisprudence, the jury's vote of 7 to 5 in favor of death is sufficient to uphold a death sentence. See *Rose v. State*, 425 So. 2d 521 (Fla. 1993). *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring* are based on the proposition that aggravating circumstances are similar to elements of a crime and must be established with the same due process required during the guilt phase of trial. Thus, under the reasoning of *Ring*, a death sentence rendered by a jury must be based upon a unanimous decision.

The statutory aggravators require a unanimous finding by the jury as well. Florida's jury recommendation does not specify which aggravators were found by the jury and does not satisfy the Sixth

Amendment as interpreted by *Ring*. See also, *Bottoson*, 833 So. 2d at 706 (Anstead, J., concurring)(under Sixth Amendment jury's responsibility to find aggravators is the same as that undertaken by the jury in finding elements of the crime at guilt phase...the jury would have to unanimously find as a matter of fact that an aggravator existed beyond a reasonable doubt before that circumstance could be used to justify a death sentence). In *Ring*, the United States Supreme Court said:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.

Ring, 536 U.S. at 609(Ginsburg, J., writing the opinion of the Court).

Mr. Jackson's sentence also violates the Eighth Amendment because it is based on judge sentencing and jury instructions that misleadingly minimize the jury's sense of responsibility for the verdict. Under the Eighth Amendment, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

Here, the jury was instructed that its sentencing verdict would be purely advisory and that responsibility for determining whether Mr. Jackson should be sentenced to death rested with the

trial court (T.78, 5589-5591). Before jurors retired to deliberate, the trial court told them that theirs would be an "advisory sentence," and that, although their recommendation "must be given great weight," "the final decision as to which punishment shall be imposed is the responsibility of the judge." Id. Nowhere did the court instruct the jury that its verdict would constrain the court's sentencing deliberation, let alone control it. Nowhere did the court instruct that the jury's recommendation alone was sufficient to authorize the court to impose the death sentence by (implicitly) finding at least one aggravating circumstance. And nowhere did the court instruct that the jury's finding of an aggravator was necessary for the imposition of a death sentence. This Court acknowledged this Eighth Amendment problem. See *Combs v. State*, 525 So. 2d 853 (Fla. 1988)(rejecting a *Caldwell* objection, if the jury's verdict were not "only advisory," then the court "would necessarily have to find that [Florida's] standard jury instructions as they have existed since 1976 violate the dictates of *Caldwell*.").

Here, the jury was instructed to consider an invalid "cold, calculated and premeditated" aggravator that the trial judge found had not been established. Under *Ring*, it would not be possible for the judge to consider one set of aggravators, while the jury considered another. By refusing to follow the dictates of *Ring*, the jury need not even agree on which aggravator exists–so that as

few as four jurors may find one aggravating circumstance while three jurors find the other aggravator. At a minimum, the aggregate effect of these procedures would prevent the jury from conducting the meaningful deliberation required by the Constitution. Mr. Jackson's sentence must be vacated.

The United States Supreme Court will address this issue in *Hurst v. Florida* in the upcoming session. Mr. Jackson respectfully requests that his case be held in abeyance pending the outcome of *Hurst*.

ARGUMENT II

FLORIDA STATUTE §913.08(1)(a) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO MR. JACKSON. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT ADDITIONAL PEREMPTORY CHALLENGES AND FAILING TO GRANT CAUSE CHALLENGES WHEN WARRANTED.

All parties agreed that this was a high profile case. After the first attempt to seat a jury failed in 2011, the defense moved for additional peremptory challenges due to numerical disparities provided by Fla R. Crim. P. 3.350(A) and due to the sensitive nature of the voir dire issues regarding sexual assault (T4 535-540). The defense also attempted to limit the State from challenging for cause certain potential jurors who were death qualified (T. 4, 541-548). The motions were denied.

A second motion for additional peremptory challenges or to declare Fla. Stat. § 913.08(1)(a) unconstitutional was filed on

October 1, 2012 (T.10, 1654-56). Defense counsel also moved for discovery of any prosecutorial investigations of prospective jurors and asked for a list of prospective jurors and questionnaires in advance of the beginning of voir dire (T.10, 1660-61; 1662-63). The trial court granted discovery and attempted to get the juror questionnaires to counsel in advance of trial. However, the court took under advisement counsel's request for additional peremptories.

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

The second attempt at obtaining a jury began on October 8, 2012 and ended on October 12, 2012 (T. 1834-35). On October 10th, the defense moved to strike the jury panel because of discussions that were occurring amongst jurors during bench conferences. The motion was denied as was the motion for individual voir dire.

After lunch, the court received a note from juror #102 Tompkins about juror #105 Singh who had said he had Googled Mr. Jackson's name. Tompkins said juror #155 also was privy to the conversation. Juror Singh was stricken from the panel. Id. The defense renewed its motion for individual voir dire of the entire panel. The motion was denied. Id.

Later that same day, the court received a note from juror #44 Davis who had a sibling with the same name as Mr. Jackson, and it was "freeking her out" (sic). She was released.

The next day, October 11, 2012, the defense renewed its motion to strike the panel. The motion was denied.

On October 12, 2012, the defense again moved for additional peremptory challenges. The request was denied. When the jury was selected, the defense had exhausted its peremptory challenges:

> MS. SPRADLEY: The only additional thing I would like to put on the record is that if the Court would afford us an opportunity to have extra peremptory challenges, we would have sought to strike Juror No. 11 Miss Harris, Juror No.–I'm sorry, Juror No. 12, Miss Harris, Juror number–
>
> THE COURT: Juror No. 12 is Bowden.
>
> MS. SPRADLEY: Her name is Bowden Harris. Juror no. 42 Miss Guerra; Juror No. 57 Mr. Bradley, which the Court denied a cause challenge for him. We would have asked for additional peremptory and exercised peremptory challenges on him as well as Juror No. 111 Ms. Fraser. (T. 57, 2722-23).

Defense counsel then objected to the panel and refused to accept it:

> MS. SPRADLEY: I just wanted to put on the record that earlier this week we moved to strike the panel and the Court denied that. In addition, the Court denied several cause challenges where we exercised peremptory. And in addition to that, we asked for additional peremptories. Although we went through the jury's process of striking jurors, we're not accepting the panel at this time or at all.

(T. 57, 2732).

Counsel's objections were noted and denied. This was error.

Pursuant to Fla. R. Crim. P. 3.350(a-e) (1995), "if an indictment or information contains two or more counts...the defendant shall be allowed the number of peremptory challenges which would be permissible in a single case, but **in the interest of justice the judge may use his judicial discretion in extenuating circumstances to grant additional challenges to the accumulated maximum based on the number of charges** or cases when it appears that there is a possibility that the State or the defendant may be prejudiced." Id. (Emphasis added).

Here, Mr. Jackson was entitled to 10 peremptory challenges for an offense punishable either as a capital felony or imprisonment for life; and six peremptory challenges for other offenses. If charged by separate indictments, Mr. Jackson would have been entitled to a maximum of 10 challenges for each of Counts 1 and 2 as both are capital felonies punishable by life (T.10, 1657-58), and six challenges for Counts 3 and 4 or 32 total challenges. Id. The court refused to grant Mr. Jackson's request.

Fla. Stat. § 913.08 fails to accord the same rights on multiple charges as does Fla. R. Crim. P. 3.350(1995). The statute makes no distinction between capital felonies and life felonies and therefore, makes it more difficult to seat a fair and impartial jury in a capital case due to the complexity of issues and requirement to "death qualify" all jurors pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Authorizing less significance in peremptory challenges than is effectively allowed in other types of cases deprives Mr. Jackson of his right to equal protection under the Fourteenth Amendment and Art. I Sec. 2 of the Florida Constitution. It is in conflict with Mr. Jackson's right to be free of cruel and unusual punishment under the Eighth and Fourteenth Amendments and Art. I, Sec. 17 of the Florida Constitution. Fla. Stat. § 913.08(1)(a)(2009) makes it more difficult for a capital defendant to obtain an acceptable jury than for a defendant charged with non-capital crimes. There is no compelling interest, nor is there any rational basis, for such a severe limitation of peremptory challenges in capital cases.

In any capital felony, Fla. Stat. § 913.10(1995) states that 12 persons shall be empaneled. Thus, if additional challenges are not granted by the trial court, the defendant has less peremptory challenges. The Sixth and Fourteenth Amendments to the United States Constitution require that Mr. Jackson receive a fair and impartial jury. Cf. Art. I, Sec. 2, 22 Florida Constitution. The selection of an impartial jury in this case required additional peremptory challenges to the accumulated maximum due to the pre-trial and trial publicity, the complexity of the allegations and the divergent locations of the multiple crime scenes. This was particularly so when the judge was reluctant to entertain any motions for change of venue and granted few cause challenges.

Defense counsel objected to the court's reluctance to challenge jurors for cause. For example:

Juror #2– Both parties agreed on a cause challenge to juror #2 James Garcia because he was sleeping during portions of the jury selection process. The Court denied the cause challenge despite counsel's observations and the agreement of both parties.

Juror #15–The court denied a cause challenge by both parties to juror #15 Miller St. Hilaire, who also was sleeping during portions of jury selection and indicated that sexual battery was worse than most crimes and is, in fact, the ultimate crime.

Juror #29-Daphne Fiore. Ms. Fiore had more than one friend who was a murder victim. The case of one friend was opened, and defense counsel Gregory Hill, the same attorney representing Mr. Jackson, represented the person who was accused of the crime. Despite a bias against the defense, the court denied a cause challenge to Ms. Fiore. Trial counsel was forced to use a peremptory challenge on this juror.

Juror #36-Silemy Suarez. Ms. Suarez repeatedly approached the bench to address issues she had regarding the possibility of her serving on Mr. Jackson's jury. Ms. Suarez's aunt was the victim in a death penalty case involving Freddie Clemmons. Her aunt was murdered while Ms. Suarez was at work. The court denied the cause challenge and defense counsel had to use a peremptory challenge to remove this juror from the panel.

Juror #46-Jennifer Russo. Ms. Russo said during jury questioning that she might vote for death automatically if she considered the murder to be premeditated. The court denied a challenge for cause and the defense had to use a peremptory challenge to strike her.

Juror#47-Kristopher Spengler. Mr. Spengler said that he would lean toward the death penalty if he found the defendant guilty and without hearing the evidence on the case. The defense moved for a cause challenge. The court denied the motion for cause and the defense moved to strike Mr. Spengler using a peremptory challenge.

Juror #71-Olga Hearne. When Ms. Hearne was questioned about the presumption of innocence, she said that it was common to have the person who is guilty of the crime prove their innocence. The defense moved to strike Ms. Hearne for cause based on her statements about the presumption of innocence, which was denied. Mr. Jackson used a peremptory challenge to remove her from the panel. (T. 57, 2614-2720).

Mr. Jackson was not granted additional peremptory challenges despite the problems that arose during voir dire and the trial court wrongly failed to grant cause challenges when they were warranted and the parties both agreed. The selection of a fair and impartial jury in this case required liberal cause challenges and additional peremptory challenges. Even if the pre-trial publicity had not prejudiced the venire, the nature of the charges–murder,

sexual battery and arson–involved a substantial degree of emotional impact. Juror Clark was overcome with anxiety after hearing the medical examiner's testimony and viewing the enlarged photographs of the autopsy. He was removed during the guilt phase and replaced with alternate Thomas English.

Juror #10 Regina Eades asked to be dismissed during penalty phase of trial because "things seem to be hitting me emotionally close to home and at this point I don't know if I even know how to be fair or impartial." (T. 11, 1866). Upon voir dire at the bench, Juror Eades said she was listening to her youngest son "I've just started shaking this morning...I don't think I'm mentally prepared for what I'm looking at."(T.76, 5200). She said she could no longer be fair and was released. She was replaced by Juror Gomez, who had been allowed to be switched to an alternate juror during guilt phase because she did not wish to be sequestered (T. 74, 4947).[3] She was then returned to the main jury panel after Eades was released. Mr. Jackson objected to Gomez replacing Eades as the next alternate juror should have been Ms. Speakman-Felts (T.74, 4947). The defense objected to the judge selecting Juror Gomez,

[3]Defense counsel made clear when Juror Gomez was allowed to become an alternate so she would not be sequestered and that the next alternate juror to be moved up would be Ms. West [sic](T. 74,4947). However, when Juror Eades asked to be excused during penalty phase, the judge moved now alternate Juror Gomez back into the jury for penalty phase (T.76, 5199-5202). In essence allowing Juror Gomez to circumvent being sequestered during guilt phase.

who had not been subjected to sequestration, over the next alternate who should have been Ms. Speakman-Felts (T.76, 5203). Mr. Jackson had lost three jurors during trial due to the intense and emotional evidence.

There was no compelling reason or rational basis for limiting the number of peremptory challenges in this case in light of the severity and finality of the potential penalty. The trial judge abused his discretion in failing to grant Mr. Jackson's requests. As a result, three jurors remained on his case who Mr. Jackson would have struck given the opportunity. One of those three people, William Bradley, became the jury foreman (T.11, 1852-53).

Capital cases are qualitatively different from all other felonies. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)(death is qualitatively different from a sentence of imprisonment... there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment), and therefore, Mr. Jackson should have been afforded the extra protection of additional peremptories and accurate cause challenges. Mr. Jackson did not have a fair and impartial jury. He refused to accept the panel because he had not been given a fair opportunity to choose a jury of his peers. Mr. Jackson is entitled to a new trial.

ARGUMENT III

THE TRIAL COURT ERRED IN FAILING TO CONSIDER MR. JACKSON'S EVIDENCE OF BRAIN DAMAGE THROUGH qEEG TESTING AT HIS SENTENCING HEARING.

Standard of Review: Evidentiary issues are reviewed for abuse of discretion. Likewise, the weight given mitigating evidence is review for an abuse of discretion standard. The decision to reject mitigation must be supported by competent and substantial evidence. *Coday v. State*, 946, So.2d 988 (Fla. 2007).

The Merits: After the first failed attempt to seat a jury, the defense filed notice on August 4, 2011 that it intended to present evidence through Dr. William Lambos, Ph.D. of Mr. Jackson's organic brain damage. The doctor came to that conclusion after performing a quantitative electroencephalogram test ("qEEG") on Mr. Jackson at the Hillsborough County Jail. Defense counsel's intention was to introduce evidence of brain damage through qEEG testing at some point during the penalty phase of trial as mitigating evidence (T. 17, 3027-28). *In camera*, defense counsel discussed the issue:

> THE COURT: Best case scenario if this test works out 100 percent in your favor, what opinion would this expert give?
>
> MR. TRAINA: Simple. This guy, Mr. Jackson's brain, is so severely damaged that he – he had no ability to control his impulsivity. He has no ability. Goes directly to the statutory mitigator. He would have no ability to have the capacity to appreciate his conduct and criminality of his conduct. He would also have no ability to conform his conduct expected of him by

> society. And finally he would have an impossible time when it came to seeing things from the viewpoint of anyone else. This explains a lot of his past school history, explains a lot of his past school history and explains a lot about of his past social history. It also goes towards his mental health mitigators. But also, Judge, as you possibly have in other cases before you specific intent issues as to first phase that this could clearly impact-(T. 40, 590-91).

Based on this new information, Mr. Jackson waived speedy trial (T.40, 599).

On December 28, 2011, the State moved to exclude the evidence, suggesting that a *Frye*[4] hearing was necessary to determine whether such testing was admissible. Defense counsel objected to a *Frye* hearing requesting the court to allow the jury to hear the evidence based on the fact that qEEG testing had been ruled admissible in the Eleventh Judicial Circuit, finding that qEEG testing was not new or novel and that it had been widely accepted in its relevant scientific community. (T. 17, 3028). Counsel also filed a motion in limine to admit qEEG evidence.

The trial court denied the defense motion without prejudice subject to a *Frye* hearing. Thereafter, a three-day joint *Frye* hearing was held on the admissibility of qEEG test results in Mr. Jackson's case as well as defendants Edward Covington and Richard McTear in two unrelated cases(T. 43, 651-654)[5]. Counsel for Mr.

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[4]*Frye v. United States*, 54 App. D.C. 46, 293 F.1013 (D.C. Cir. 1923).

[5]*Edward Covington v. State*, Case No. 08-CF-9312, and *Richard McTear v. State*, Case No. 09-CF-7933

Jackson withdrew his qEEG motion for use at trial (T.42, 655) and reserved the right to present the evidence at a *Spencer* hearing before the judge.(T. 43, 654).

After hearing testimony regarding the three cases, the trial court granted the State's motion to exclude, concluding that qEEG evidence did not meet the *Frye* standard and said "any testimony or evidence related to qEEG testing is inadmissible in the penalty phase or at a *Spencer* hearing." (T.11, 1962-63). The court said:

> It is clear to this Court that qEEG testing is not generally accepted in the relevant scientific community as a diagnostic tool for the assessment of brain disorders and traumatic brain injury. Id. The court acknowledged that qEEG testing had been generally accepted in research, therapeutic and specific medical settings, i.e. anesthesia suites and intensive care units, the Court finds that it is not generally accepted as a diagnostic tool for the diagnosis of brain disorder or injury in the relevant scientific community. Id.

Defense counsel then proffered for the record that if it were allowed to call Dr. Lambos at the *Spencer* hearing he would have testified that:

> a. He would explain that qEEG analysis is a scientifically established method by which a subject's brain function can be evaluated through mapping of the brains' electrical activity;
>
> b. He would explain that qEEG assesses brain function and allows the analyst to gain significant information about patterns of brain activation and communication that can then be related to life functioning, and can be used to explain problems in attention deficit, anxiety, mood, learning difficulties, functioning or violent behavior;
>
> c. That he collected raw data from Mr. Jackson and administered the test on July 27, 2011;
>
> d. That testing showed "extreme abnormalities,"

e. He would be able to testify about the abnormalities and how they reference to an undamaged population;

f. He would testify that "the Defendant's brain pathology is entirely consistent with blunt force or even penetrating trauma to the right temporoparietal area of the head;

g. He found evidence of secondary damage to the right prefrontal; left-central orbitofrontal cortex regions of Mr. Jackson's brain;

h. The brain damage found would cause Mr. Jackson to be "incapable of the same ability as a undamaged person to control impulses, understand the consequences of his actions, or be able to see the world from another person's point of view;

i. He found that Mr. Jackson is "with the highest level of probability, severely compromised in 'these areas' of behavioral management and mental functioning." (T.11, 1973-74).

Counsel argued that Dr. Lambos' testimony was directly relevant to the statutory mental health mitigating factors of the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired or the non-statutory mitigating factor of "the existence of other factors in defendant's background that would mitigate against the imposition of the death penalty." (T.11, 1974).

The defense presented evidence that qEEG testing had been ruled admissible in a Dade County death penalty case, *State v. Grady Nelson*, Case No. 05-00846, before Judge Hogan-Scola. Mr. Nelson was sentenced to life in prison. It its motion to reconsider ruling on qEEG evidence, defense counsel noted that on July 1,

2013, the Florida Legislature mandated that the admissibility of expert testimony in Florida would be governed by the *Daubert*[6] standard akin to Federal Rule of Evidence 702, not the *Frye* standard used by the trial court. *Frye v. United States*, 293 F. 2d 1013 (D.C. Cir. 1923). The trial court denied the motion to reconsider.

It was error for the trial court not to consider the qEEG evidence proffered by Mr. Jackson.

Under *Frye*, the burden was on the defendant to prove general acceptance of both the underlying scientific principle and the testing procedures used to apply the principles to the facts of the case. The trial judge had the sole responsibility to determine this question based on a preponderance of the evidence standard. *Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995). The trial court may consider disparate sources, expert testimony, judicial opinions, or scientific or legal publications. *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001).

In Mr. Jackson's case, the court found that qEEG testing failed the *Frye* test and was not generally accepted in the relevant scientific community as a diagnostic tool for the assessment of brain disorders and traumatic brain injury (T. 11, 1962), but it was accepted in research and therapeutic settings such as

[6]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

anesthesia suites and intensive care units. Id. The court denied the motion to reconsider qEEG testing on February 11, 2013. The trial court sentenced Mr. Jackson on June 5, 2013. The Florida Legislature's new statutes went into effect on July 1, 2013.

The most notable differences between the *Frye* test and Fla. Stat. § 90.702-Testimony by Experts is that if scientific or technical knowledge will assist the trier of fact in understanding the evidence or the fact at issue, an expert witness may testify if his testimony is based on sufficient facts, is based on reliable methods or principles, and the witness has properly applied those methods to the facts of the case. General acceptance in the scientific community is not an issue with the newer statute.

However, under either the *Frye* or *Daubert* standards, the trial court should have considered Mr. Jackson's brain damage as mitigation. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (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." 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 the crime. The defense proffered the testimony of Drs. Lambos and McCraney who testified that the qEEG is one of many assessment tools used to determine organic brain damage. The

defense experts testified that qEEG is used as a source of corroboration of other tests.

In this case, Mr. Jackson had been given IQ testing and psychological evaluations. Mr. Jackson showed deficits in many areas of behavior as was testified to by Dr. Leon and his Florida and Texas school teachers. Dr. William Lambos stated that "if the brain is damaged, then the qEEG should show an aberration in that area." (T. 43, 658-748; 44, 753-876; 45, 880-902). Dr. David McCraney explained that "diagnosis is based on the history, what we find on the physical exam and what we find on the tests. You have to use all three. All by itself, qEEG means nothing without the rest of the assessment." (T.46, 1102-47).

Drs. Lambos and McCraney's findings should not have been discounted in their entirety because the court found the qEEG component lacking. The qEEG itself is only one part of the diagnostic process. Both defense experts testified that neurological testing was used to identify broad areas of Mr. Jackson's brain dysfunction, and qEEG was used to narrow down those areas.

Even the State expert, Dr. Peter Kaplan, agreed that neurologists have criticized qEEG because it was, at one time, being utilized by the same practitioners as a stand-alone diagnosis. As applied in Mr. Jackson's case, the qEEG testing was not intended to be used as a stand-alone diagnosis but as a tool to

demonstrate to the court the mitigator of organic brain damage. It was error for the trial court to discount to irrelevance Drs. Lambos and McCraney. Cf. *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009)("while the State's experts identified perceived problems with the tests Dr. Dee used and the conclusions he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on a sentencing jury or sentencing judge.").

All of the experts who testified at the *Frye* hearing agreed that conventional EEG tests have been long accepted. One concern with EEG testing was the reliability of the interpretation of results by different readers of the paper tracings. People reading paper analog EEG tracings would often come to very different conclusions at to the presence of brain abnormalities. This low reliability was one of the major factors that led to the development of applying computers to conventional EEG testing. That is why the qEEG was developed. Because the qEEG is simply a refinement of a long-accepted EEG test, it no longer should qualify as a "new or novel" scientific method. Even the State experts agreed that qEEGs are regularly used and relied upon in intensive care units and in administering anesthesia, two very important functions. qEEGs have been part of the standard protocol of care at numerous major medical and scientific institutions around the United States for many years, including New York University School

of Medicine (qEEG used as part of its clinical and treatment operations since the 1970s); the National Institutes of Health ("NIH has been using quantitative EEG since the 60s"); and the Veteran's Administration was the "standard of care" for traumatic brain injury as early as 1990, including the VA hospital in Tampa, Florida), where Mr. Jackson's case was tried.

Mr. Jackson established by a preponderance of the evidence that even under the *Frye* test, Drs. Lambos and McCraney's conclusions should have been considered as mitigation at his *Spencer* hearing. The *Frye* standard does not require the trial court to assess the scientific reliability or validity of the qEEG. Rather, this Court must decide legal reliability by gauging whether there is quantitative and qualitative acceptance of the science...within the scientific community." *U.S. Sugar Corp v. Henson*, 787 So.2d 3, 15 (Fla. 1st DCA 2000), decision approved, 832 So. 2d 104 (Fla. 2002). Contrary to the trial court's order, there does not have to be a consensus in the scientific community before a scientific method is considered generally accepted. See *Brim v. State*, 695 So. 2d 268, 272 (Fla. 1997)("unanimous scientific consensus is not required for a finding of general acceptance.").

It was incumbent on the trial court to examine the quality as well as the quantity of evidence supporting qEEG technology and applications in the context of mitigation. See Id., citing with approval; *People v. Leahy*, 882 P.2d 321, 336-37 (Cal. 1994); see

also *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, 547 (Fla. 4th DCA 2001). Organic brain damage is particularly important in Mr. Jackson's case because it can rebut a diagnosis of anti-social personality disorder. Presumably, the trial court was not mislead or confused by the computerized version of an EEG and could give it the weight it deemed necessary for mitigation.

The Florida Legislature anticipated this when it adopted the new statute one month after Mr. Jackson was sentenced. "Basis of opinion by experts--is that if facts or data are reasonably relied on by experts in the subject supporting the opinion, the facts or data need not be admissible in evidence." Fla. Stat. § 90.704 (2013). It was up to the trial judge to determine the weight to be given this mitigating evidence and not discount entirely Mr. Jackson's evidence. The trial court abused its discretion in failing to consider this evidence at sentencing.

ARGUMENT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. JACKSON'S MOTION FOR MISTRIAL AFTER A KEY STATE WITNESS INFERRED THROUGH HER TESTIMONY THAT MR. JACKSON "HAD JUST BEEN RELEASED" FROM PRISON AND WAS UNRESPONSIVE IN HER TESTIMONY.

The State used Linda O'Neal's testimony to establish proximity to the victim's residence at the Grand View Mobile Home Park and

establish Mr. Jackson's whereabouts on the day of the crime. On direct examination, she said on the day of the crime she saw Mr. Jackson walk to their trailer at 1 p.m. He was sweating, but was not cut or bruised (T. 65, 3824-28). During her testimony, Mrs. O'Neal had been cautioned by the court to answer only the questions asked by counsel (T.65, 3815).

> Q [Prosecutor Harmon] did the defendant ever talk about –with you, ever talk about where he grew up or tell you about when he was growing up?
>
> A. He talked about Texas, he talked about–
>
> THE COURT: Excuse me. The answer is yes or no. Listen to his question.
>
> THE WITNESS: Oh, I'm sorry. The answer is yes. Id.

A few questions after the court's admonition, the prosecutor asked:

> Q. And prior to September 13th of 2007, how long approximately did he live with you at the Grand View Mobile Home Park with you and Wally?
>
> **A. I believe he was released–**
>
> MR. HILL: Objection. May we approach?
>
> THE COURT: Sustained. The question was how long did he live with you?

At a bench conference, the defense moved for a mistrial.

> MR. HILL: Your honor, at this point we are going to move for a mistrial. She specifically stated in the presence of the jury that he was released.
>
> THE COURT: Did she say released?
>
> MR. HILL: Yes, sir.

THE COURT: Did she say released from prison?

MR. HARMON: She just said released.

MR. HILL: I objected before she finished that part. But there's not a lot of speculation after she says released.

MR. HARMON: She was warned.

MR. HILL: Can we take the jury out?

THE COURT: No. (Bench conference concluded)

THE COURT [to witness O'Neal] Answer his specific question. Nothing more, nothing less.

THE WITNESS: I believe it was July.

MR. HARMON: So you think he lived there since July?

THE COURT: Yes or no?

THE WITNESS: I believe so.

THE COURT: Move on.

MR. HARMON: When Kenny was While Kenny was living with you and Wally at the trailer did he have a steady job he maintained?

THE WITNESS: He worked with Wally and I-

THE COURT: Yes or no, did he have a steady job?

THE WITNESS: Yes.

MR. HILL: Your Honor, may be approach?

THE COURT: Yes. Deputy take the jury out, please.

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THE COURT: Ms. O'Neal, you came within a quarter inch of destroying this entire trial. Weren't you told not to make any mention of that? Were you told not to make mention of that, yes or no?

> **THE WITNESS: Of what?**
>
> THE COURT: Of this young man being released from prison?
>
> MR. HARMON: That he was in prison or jail.
>
> THE COURT: Were you told that?
>
> **THE WITNESS: Yes.**
>
> THE COURT: And why in the world would you mention that or come close to mentioning it?
>
> **THE WITNESS: Because I couldn't figure–I couldn't remember when he was released, and that's when came to my house. I don't remember...**

(T.65, 3820)(emphasis added).

The defense asked for a recess to research the issue for mistrial. The court denied the request but said:

> THE COURT: [Y]ou have made your motion now contemporaneously, so if you want to reassert grounds or legal authority later. But I'll find your objection and your motion are timely. They are made at the time the comment was made.
>
> [to Witness O'Neal] I told you three times to answer the question directly. If it calls for a yes or no, answer yes or no. If they want more than that, they will ask you. Bring the jury back in (T. 65, 3817-19). The judge then told Mr. Harmon, "you need to assess how important this testimony is to your case." (T.65, 3820).

At the end of her testimony, Mrs. O'Neal was asked if Wallace O'Neal had passed away this last year. Mrs. O'Neal burst into tears and covered her eyes in front of the jury (T.65, 3832-33). Defense counsel again objected to relevance of the question and

prejudicial emotional display. The defense renewed its motion for mistrial (T. 65, 3832). Mr. Hill argued:

> In addition to the issue of mistrial, Mr. Harmon solicited the last question of this witness on whether her husband is now deceased which caused her to burst openly into tears and cover her eyes in front of the jury, which has no relevance to any of the evidence she has presented and be unfair to us to have to present cross-examination with her in such tears in such a state in front of the jury, especially the emotional disarray she's already caused. (T. 65, 3832-33).[7]

The trial court recessed for the day. Id.

The next day, Mrs. O'Neal testified on cross:

> MR. HILL: it's fair to say that you don't particularly care for Mr. Jackson, isn't it?
>
> A. I wouldn't say I don't care for him.
>
> Q. Well, I mean, you have quite a bit of animosity toward him. Because of these allegations, you lost your house?
>
> A. Yes, I lost my house.
>
> Q. And it caused quite a great deal of distress between you and your husband at the time, correct?
>
> A. Yes, it did.
>
> Q. And you blame Mr. Jackson for that and bringing all this on top of you and your husband, correct?
>
> A. Yes, I did. (T.66, 3849).

At the conclusion of her testimony, the court considered a written defense motion for mistrial and heard argument (T. 66,

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[7]Mr. Harmon disagreed with Mr. Hill's characterization of the witness' reaction..."her eyes watered up, you could tell she was upset, but she did not break out into tears and she didn't lose her composure." (T.65, 3837).

3853). The defense argued that Mrs. O'Neal's statement was prejudicial and impermissible for the jury to hear. "It's tantamount to basically saying he is a convicted felon, he was in custody." Id. In the context of the proceedings, counsel argued, the jury's knowledge and perceptions going back to jury selection where one juror in particular asked a question whether Mr. Jackson was in custody or not. The juror who asked the question was not a member of the jury panel but every member of the panel heard it prior to being sworn in. (T.66, 3853).

The statement was particularly highlighted because an earlier witness, Iris Williams, who barely knew Mr. Jackson, had testified that when she saw him walking in Gibsonton, she found it very unusual, suspect, and she instantly called Mrs. O'Neal to find out what was going on. It was suspicious to her and that suspicion was conveyed to the jury. (T.66, 3854-55).

The defense argued that Mr. Jackson's case had been impermissibly tainted. The defense argued that Mrs. O'Neal had been cautioned and the trial court had her admit she had been warned about such testimony. She understood the implications yet chose to make that statement even in light of the fact that it wasn't responsive to the question. Mrs. O'Neal's testimony impermissibly tainted the jury and automatically shifted the burden to Mr. Jackson to deny that he was in custody in prison (T.66, 3856).

The defense argued that no curative instruction would take care of the prejudice. "There is nothing we can tell this jury that will unhear that he had been released. There is nothing we can do." (T. 66, 3859).

The State argued that the defense did not ask for a curative instruction and that the defense assumed the jury would not follow the judge's instructions (T.66, 3850):

> I'll concede it [the statement] could mean he was released from jail or prison, but there are so many options the jury doesn't know at this point and I would suggest to the Court that there is no prejudice that was caused by that statement.

(T.66, 3861).

The State conceded that Mrs. O'Neal's responses were nonresponsive and that she had been warned on several occasions by the State not to get into that area. Id.

The trial court agreed with the defense that a curative instruction "...in this event would have exacerbated any problems this created." (T.66, 3862).

With regard to the comment, the trial court found that:

> ...we agree [the statement] was voluntary on her part, although I note that it came out when the State was trying to elicit some evidence that didn't seem to be necessary, that is when the defendant moved in there, I don't know that it mattered one way or the other, but be that as it may she made the comment that she made and it's in the transcript and it says when he was released and that's as far as it went. Id. Whether this was error or whether it's harmless error is not my call to make, it's a call for appellate court for review...

> I will say had the lady said that he was released from prison we would be starting the trial all over again for the third time...I do not find that they [comments] rise to the level of warranting a mistrial because they do not undermine the legitimacy of the proceedings as they effect Mr. Jackson (T.66, 3863). This was error.

Standard of Review: Reviewed for abuse of discretion, a motion for mistrial should be granted when the error is so prejudicial as to vitiate the entire trial. *Brooks v. State*, 868 So. 2d 643, 645 (Fla. 2d DCA 2004). In *Brooks*, the court held that "[t]he improper admission of evidence concerning a defendant's prior criminal history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court." *Brooks*, 868 So. 2d at 645 (quoting *Henderson v. State*, 789 So. 2d 1016, 1018 (Fla. 2d DCA 2000)).

In *Finklea v. State*, 471 So. 2d 596 (Fla. 1st DCA 1985), the First District held that "[d]espite cautionary instructions, the introduction of a prior unrelated criminal act is too prejudicial for the jury to disregard." *Finklea*, 471 So. 2d at 597.

Here, the comment by Mrs. O'Neal implied that Mr. Jackson was dangerous and had been released from jail shortly before this incident took place. While the comment didn't refer to any specific crime Mr. Jackson had committed, it came from a person who had lived with him and who could have had knowledge that Mr. Jackson had just been released from prison.

This was not harmless error. The trial court properly recognized that a curative instruction would have "exacerbated any

problems this created." But the trial court analyzed Mrs. O'Neal's statement that Mr. Jackson had just been "released" from some unknown place in a vacuum, the trial court discounted the prejudice of the statement because she did not say the word "prison" but the court did not view the comment in the context of the other facts of the case.

The jury had to be removed to try to rein in Mrs. O'Neal. Even when reprimanded by the court, Mrs. O'Neal remained defiant. She did not back off the reasons why she said Mr. Jackson moved into her house when he was released from, most logically, prison.

The numerous unresponsive statements and the statement that Mr. Jackson was "released" presumably from prison was a statement that was based in fact. It created an inference that Mrs. O'Neal had special knowledge of information that only she knew. She knew that Mr. Jackson had been released from somewhere. The most logical inference in the context of a first-degree murder trial where the death penalty is being sought would be that he was released from jail or prison, not the hospital (because there was no indication that Mr. Jackson was sick or injured) or any other benign place. The likelihood that the jury was going to believe that Mr. Jackson had been released from anything other than a prison or jail is ludicrous.

Mrs. O'Neal's obstinate behavior, repeated embellishment of her answers, and emotional crying implied to the jury that she

didn't like Mr. Jackson, that he was a danger, that he had run away from responsibility, he did not work, he had mooched a bus ticket from her, and caused her to lose her house.

However, the trial court did not analyze her comments in that context. The jury did not know Mr. Jackson had been released from prison or that he had been convicted of anything prior to this case. That is the prejudice that tainted the jury panel that was already hanging on by a thread.

During jury selection, Juror Singh had investigated Mr. Jackson on the internet and his activities were revealed by another prospective juror Tomlin. Both were struck. But the rest of the panel remained.

After trial began, Juror Clark had to be dismissed from the jury because the evidence was so intense that he succumbed to anxiety and ended up not being able to stay in the courtroom without "freaking out."(T. 64, 3577-89). After guilt phase, Juror Gomez revealed that she could not be sequestered and had to be replaced with an alternate directly before jury deliberations. Gomez was then placed back on the jury for penalty phase where she would not have to be sequestered. The defense objected to no avail.

The prejudice here must be analyzed cumulatively within the context of the trial and with the events that transpired. Cf. *Gunsby v. State*, 670 So. 2d 920, 924 (Fla. 1996)(cumulative effect

of *Brady* and ineffective assistance of counsel claims undermined confidence in the verdict and new trial required when there was a reasonable probability of a different outcome); *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991)(even though each of errors standing alone could be considered harmless, the cumulative effect of such errors was to deny defendant a fair and impartial trial).

Mr. Jackson was entitled to a fair and impartial jury. A mistrial should have been granted based on Mrs. O'Neal's prejudicial remarks, non-responsive and defiant behavior and the trial court's flawed analysis. The trial judge erred in denying the motion for mistrial. Mr. Jackson is entitled to a new trial.

ARGUMENT V

MR. JACKSON WAS DENIED A FAIR TRIAL WHEN THE THE PHOTOGRAPHS OF THE DEAD BURNED VICTIM WERE ADMITTED INTO EVIDENCE BUT WERE NOT RELEVANT TO PROVE ANY MATERIAL FACT IN DISPUTE AND THE INJURIES WERE POST-MORTEM.

Before trial, counsel for Mr. Jackson filed numerous motions in limine seeking to limit the admission of photos of the charred remains of the victim recovered from the burned van. Assistant Medical Examiner Amy Shiel found the cause of death to be exsanguination due to stab wounds with penetration of the internal jugular and carotid arteries (T.61, 3341). While Dr. Shiel could not render an opinion with certainty as to how long the victim

remained conscious, she opined that it was "probably seconds to several minutes depending on the circumstances." (T.61, 3343).

According to the State's theory, the stab wounds were inflicted in the berm near a church where the victim's clothing, shoes, and a large area of blood was found. Dr. Shiel said the thermal injuries from the burning of the van occurred post-mortem. The cause or manner of death were not material facts in dispute.

At a pretrial motion hearing on July 20, 2011, defense counsel objected to the numerous crime scene and autopsy photos of the charred remains of the victim (T.6, 899). The trial court did not "deem any proposed photograph to be unduly prejudicial" and did not limit the number of photographs in any way Id.[8] The State offered 144 photographs only one was excluded. The court reserved ruling on the Q series of autopsy photographs until the testimony of Dr. Shiel(T. 6, 892-902).

At trial, the defense renewed its objection during the testimony of Dr. Shiel, stating that the court had reserved ruling as to admissibility pending a proffer from the doctor as to their necessity (T.61, 3271). Counsel specifically preserved the issue before the last jury selection and objected that the "extremely

[8]The only photos excluded were five photographs of a firefighter's boot offered by the defense and the State's G1, which was a photo of the victim and her son at his graduation that the court said would "serve only to garner sympathy." (T.6, 899). The court allowed the graduation photo after the victim's son was redacted.

graphic" damage that was done post-mortem and was not a part of the offense. Id. The court overruled the objection but said the doctor did have to testify as to their necessity (T.61, 3273).

The State proffered the testimony of Dr. Shiel outside the presence of the jury. She said the photos were necessary to understand what happened to the victim and understand the injuries she needed to describe to the jury (T. 61, 3276).

The court said it had already ruled pre-trial on the gruesomeness and cumulative issues and the only matter left was the predicate (T. 61, 3296). The defense conceded the predicate but strenuously objected that none of the injuries shown in the other photographs attributed to the cause of death. They were all post-mortem and highly prejudicial (T.61, 3301).

Specifically, the defense objected to Q3-5 as repetitive, just from different angles; Q6 that is a full frontal image of the charred remains of the victim, as there were no facial injuries that were fatal; and Q 9-10.(T.61, 3304). The defense urged the court to conduct a balancing test between the probative value of the photos and the highly prejudicial effect the photos would have on the jury.

The court found that gruesome photos were to be admitted on the same basis as other photos and it did not mean they were not admissible. The judge acknowledged some matters are contained in more than one photograph that does not mean they are cumulative or

inadmissible. With regard to relevance and undue prejudice, the court said the photos are "relevant to some extent" the degree of relevance is for the jury to decide (T. 61, 3307-08). The post-mortem injuries were relevant to show what the defendant did to the body by burning and destroying it. The court found it was not so unduly prejudicial that it would confuse or mislead the jury.(T.61, 3309). This was error.

Mr. Jackson was not charged with destruction of evidence or desecration of a body. He was charged with first-degree murder, sexual battery, arson of a vehicle, and grand theft. There was not a disputed issue of fact that was relevant to show the charred body of the victim. *Cupertino v. State*, 725 So. 2d 330 (Fla. 4th DCA 1999)(autopsy photos are not admissible if it serves no purpose other than to highlight the horror of injuries). The court premised its decision on the State's representation that it would not argue, present evidence or suggest to the jury that the victim was burned while still alive. (T. 6, 896, n.1). The problem is the photos spoke for themselves.

Once the judge ruled the photos admissible, the State had carte blanche to introduce irrelevant matters to the jury. During her testimony, Dr. Shiel testified about the charring of the body, and the coloring of the blistered skin (T. 62, 3318). She explained that the "pugilistic" features of the victim's body of the fingers curling into her palm, elbows, and knees flexed. The victim's head

was "tucked" such that she was basically protecting that area of the body so it would not be exposed to the fire. (T.62, 3325). It was unknown how the victim could have protected an area of her body when she was not alive, but Dr. Shiel testified to those inconsistent facts even though she later admitted the victim was not alive at the time of the fire.

Dr. Shiel testified that portions of the victim's legs and arms were no longer attached due to "heat amputation." She described in detail the exposure of multiple ribs, pelvis, multiple organs and other thermal injuries (T. 61, 3270). All photographs were displayed on an "elmo," a widescreen television in the courtroom that enlarges the photographs so that the entire jury and courtroom can see the images.

The effects of the photos and testimony affected the jurors deeply. Dr. Shiel testified on October 16-17, and the photographs were shown on the 17th (T. 62, 3318-43). The next morning, Juror #11 Mr. Clark told the bailiff he was so anxious he was not able to come into the courtroom. He explained to the judge that he had been overcome by the intensity of the evidence and that his fears were causing him to panic at being in the enclosed courtroom (T. 64, 3577-89). He had to be released from the jury.

Later, Juror #10 Regina Eades asked to be dismissed during penalty phase of trial because "things seem to be hitting me emotionally close to home and at this point I don't know if I even

know how to be fair or impartial." (T. 11, 1866). Upon voir dire at the bench, Juror Eades said she was listening to her youngest son "I've just started shaking this morning...I don't think I'm mentally prepared for what I'm looking at."(T.76, 5200). She said she could no longer be fair and was released. Id. Clearly, the intensely emotional photos and testimony was taking its toll on the jury.

The trial court's failure to conduct the proper balancing test or limit the number of photos was improper. The court left the relevance and admissibility of the evidence up to the jury which was error.

Standard of Review: A trial court's ruling on the admission of photographic evidence will not be disturbed absent a clear showing of abuse of discretion. *Patrick v. State*, 104 So. 3d 1046 (Fla.2012).

The test for admissibility of photographic evidence is relevance. *Dennis v. State*, 817 So. 2d 741 (Fla. 2002). To be relevant, a photograph of a deceased victim must be probative of an issue in dispute. *Hertz v. State*, 803 So. 2d 629, 642 (Fla. 2001). The issue here was whether Mr. Jackson caused the stab wounds that killed the victim, whether he burned and stole the van. Mr. Jackson was not charged with desecration of a body or destruction of evidence.

The cause of death was not in dispute. The trial judge conceded that the autopsy photos were "relevant to some extent" but he abdicated the responsibility for determining the "degree of relevance" to the jury (T. 61, 3307-08). The problem with this reasoning is that there was no disputed issue to be relevant to and the jury does not know the standard for admissibility or relevance. See *Jennings v. State*, 123 So. 3d 1101 (Fla 2013)(to be relevant photo of deceased victim must be probative of an issue that is in dispute). The court did not conduct the balancing test or consider the emotional impact of the charred remains of a partially consumed body. *Kalisz v. State*, 124 So.3d 185 (Fla 2013)(the admissions of particularly gruesome photos can be relevant if the trial court exercises caution and limits their numbers). Juror Clark was a mature male and he was affected deeply by the grotesque display.

The autopsy photographs used in conjunction with the medical examiners' explanation of the cause of death of the murder victim were not relevant to prove any material fact in dispute, and the admission of the photographs was error. *Bartholomew v. State,* 101 So. 3d 888 (Fla. 4th DCA 2012). The cause of death were stab wounds inflicted in a different location. The cause of death was not in dispute.

Autopsy photographs may be admissible when they are required to explain the medical examiner's testimony, the victim's injuries,

the manner of death or the location of the wounds. *Hertz v. State*, 803 So. 2d 629, 642 (Fla. 2001).

Here, the photos could have been limited to those of the stab wounds to the neck of the victim which were fatal within "seconds or minutes." Instead, the jury was subjected to graphic whole body pictures, and photos of a hand with the fingers burned off. The jury also saw pictures of the face with exposed teeth when there were no wounds inflicted to the face. With the exception of the photos of the neck wounds, none of these photos depicted cause of death, location of the wounds, nature or extent of the force or violence used to commit the crime or the intent of the perpetrator. *Marshal v. State*, 604 So. 2d 799 (Fla. 1992).

Autopsy photos, like all other evidence, are inadmissible when "its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence." See, Section 90.403, Fla. Stat. The trial court did none of this analysis.

Here, the autopsy photos were cumulative, and used to solely for the purpose of inflaming the jury against Mr. Jackson because the victim was burned after death. The medical examiner could have easily testified without them. The photographs were not relevant to prove any material fact in dispute. Mr. Jackson is entitled to a new trial.

ARGUMENT VI

THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR WAS INAPPLICABLE AND INSUFFICIENTLY PROVED. IT SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY OR RELIED ON TO SUPPORT MR. JACKSON'S DEATH SENTENCE.

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

The Merits: Mr. Jackson challenged the constitutionality of the "cold, calculated and premeditated" aggravating factor by his motion to declare Fla. Stat § 921.141(5)(I) unconstitutional on its face and as applied (T.4, 488-503). The motion was denied.

This aggravator was unlawfully presented to the jury at trial and improperly applied to Mr. Jackson as a basis for his death sentence because he did not possess and the State failed to prove the "heightened premeditation" necessary to support this aggravator. In its sentencing order, the trial court acknowledged:

> ...The evidence established beyond a reasonable doubt that Jackson developed his premeditated intent to kill during the sexual battery. It did not however establish the requisite heightened premeditation to kill of this aggravating circumstance beyond a reasonable doubt, notwithstanding the jailhouse admissions to fellow inmates Gonzalez and Michael Kennedy. The evidence of his planning a sexual battery–watching her jogging at times before the date of the attack, and stealing a van in preparation or preparation–did not sufficiently directly or circumstantially, establish beyond a reasonable doubt that he was, during the time period before the assault, planning to kill Cuc Tran, rather, it established beyond a reasonable doubt that he was

> planning on accosting and raping her. The evidence did not establish that the murder was the product of calm and cool reflection or that it resulted from a careful plan or pre-arranged design. The evidence did not establish that the killing was the result of Jackson's heightened level of premeditation to do so demonstrated by a substantial period of reflection. The evidence did establish beyond a reasonable doubt, a complete absence of any pretense of any moral or legal justification.
>
> **This aggravating circumstance was not proved beyond a reasonable doubt. The Court will not accord this aggravating circumstance any weight.**

(T.17, 3041-42)(emphasis in order).

This insufficient instruction, however, was submitted to the jury for its consideration in giving a death recommendation. The trial court believed it was permissible to submit the aggravator to the jury knowing that it was invalid and insufficient as a matter of law because it had not been proved beyond a reasonable doubt. The trial court relied on *Williams v. State*, 37 So. 3d 187 (Fla. 2010); *Franklin v. State* 965 So. 2d 79 (Fla. 2007); *Aguirre-Jarquin v. State*, 9 So.3d 593 (Fla. 2009); *Floyd v. State*, 850 So. 2d 383 (Fla. 2002); and *Hunter v. State*, 660 So. 2d 244 (Fla. 1995) to support giving the instruction to the jury despite its invalidity (T.17, 3042). These cases are distinguishable because they deal with what is necessary to prove CCP. That is not the issue here. *Williams* and *Franklin* speak to what is necessary to find a CCP aggravator and not whether it was error for the jury to be instructed on an invalid CCP aggravator. *Williams*, 37 So. 3d at 195-98. *Floyd* dealt with fundamental error in preserving objections

to jury instructions and whether competent and substantial evidence supported the aggravators. *Floyd*, 850 So. 2d at 403. *Hunter* dealt with a void for vagueness challenge to the CCP aggravator, which is also not the issue here, but tangentially touches on the subject. *Hunter*, 660 So. 2d at 254.

Aguirre-Jarquin v. State, however, held that even though the trial court did not ultimately find the existence of this aggravator, if there is competent and substantial evidence presented to support the instruction, then it "was not error to instruct the jury on CCP." *Aguirre-Jarquin*, 608 So.3d at 607-608.

But the trial court here properly found that there was no competent and substantial evidence of the "heightened premeditation" necessary to justify this aggravator. Thus, the instruction should not have been given.

In closing, the State described in detail how this aggravator should be applied by the jury. (T.78, 5496-5499):

> What the evidence has proven to you beyond any doubt that there was a substantial period of reflection...The very nature of these events shows you that these were calm, cold blooded, cooly [sic] reflected upon over a substantial period of time. The decision to get the van, to use the van to go to the area where she was. And then that's not even including, like I talked about yesterday taking her into an area that he knows is a recessed area, a concealed area, an isolated area. And area where he can accomplish this horrible crime of rape without anyone seeing, without her having a chance to survive this, a chance to alert anybody. It's all thought out. (T.78, 5496-97).

The trial court then instructed the jury on this aggravator (T.78, 5582-5597). The State's argument and the trial court's instruction was unquestionably harmful and disrupted the guided consideration of the circumstances governing the death decision by the jury and the Court.

There was no substantial or competent evidence to support the aggravator. No evidence showed whether or when Mr. Jackson stole the van. The trial court found this aggravator had not been proved beyond a reasonable doubt. "A judge should instruct only on those aggravating circumstances for which credible and competent evidence has been presented." *Hunter*, 660 So. 2d at 252.

Since the State relied heavily on this aggravator and the Court instructed the jury on this aggravator, the trial court's finding that "CCP" was inapplicable and legally insufficient requires a new penalty phase before a jury that is properly instructed. There is Eighth Amendment error when the sentencer weighs "invalid" aggravating circumstance in reaching a death penalty decision. But, since juries do not issue findings as to aggravating or mitigating factors, courts are required to presume that unsupported factors did not weigh in to their decision. See *Johnson v. Singletary*, 612 So. 2d 575 (Fla. 1993).

This reasoning, however, is called into question in *Ring v. Arizona*, which anticipates the jury as a sentencer must be properly and accurately instructed. *Ring v. Arizona*, 546 U.S. 584 (2002)(See

Argument I). Consideration by a sentencing jury of an invalid prior conviction together with consideration of inapplicable aggravating factors is reversible error requiring vacation of the death sentence. *Rivera v. Dugger*, 629 So. 2d 105, 109 (Fla. 1993).

Permitting a jury to consider this aggravator knowing that it did not apply violates Florida law, and Article I, section 9, 10 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Mr. Jackson is entitled to a new penalty phase.

ARGUMENT VII

THE TRIAL COURT ERRED IN ALLOWING IMPROPER REBUTTAL TESTIMONY FROM THE STATE'S WITNESS IN PENALTY PHASE.

After the testimony of defense expert Dr. Yolanda Leon, the State sought to offer the testimony of Dr. Wade Myers as a state rebuttal witness (T.77, 5369-5469). Dr. Leon had testified that Mr. Jackson suffers from, among other mental illnesses, antisocial personality disorder and that his upbringing and childhood events had affected his behavior as an adult.

The State argued it should be allowed to rebut her testimony with Dr. Myers who would say Mr. Jackson is anti-social and he has no impairments of psychosocial development (T. 77, 5370-73). The court questioned what Dr. Myers was going to rebut when the two

experts were giving the same diagnosis. Id. The State claimed that Dr. Myers disagreed on what caused the disorders.

The defense objected that Dr. Myers' testimony was improper rebuttal and that the only reason the testimony was being offered was to repeat antisocial personality disorder over and over again to hammer it home to the jury. Defense counsel argued that Dr. Myers had admitted in his deposition that he understood that Mr. Jackson had a horrible upbringing.(T. 77, 5373). Defense counsel argued against the rebuttal testimony.

The trial court cautioned the State that it would not allow testimony agreeing or disagreeing with the defense expert's testimony but ultimately allowed the testimony (T. 77, 5380).

Standard of Review: Evidentiary matters are reviewed on an abuse of discretion standard. *McWatters v. State*, 36 So. 3d 613, 614 (Fla. 2010).

The Merits: In his testimony, Dr. Myers acknowledged that he never interviewed Mr. Jackson, he only reviewed his records (T. 77, 5462). He said that no one can know the cause of any disorder. Id. He did not have enough information to tell if the death of Mr. Jackson's uncle affected him negatively when he wrote in school, "Kenny will die" (T. 77, 5464). Dr. Myers testified that just because the child is the only party reporting sexual abuse did not mean that it didn't happen. He admitted there were other records documenting sexual abuse (T. 77, 5466-67).

Dr. Myers acknowledged Mr. Jackson had conduct disorders as a child and there were risk factors that may have caused the conduct disorders in a child before age 18. The disorders could have been caused by genetics, Mr. Jackson's environment, or his background (T.77, 5468). No one in any specific case can say that four or five adverse events in childhood caused a personality disorder (T. 77, 5469).

Nothing in Dr. Myers' testimony contradicted Dr. Leon. This was improper rebuttal and should have been excluded. See *Sanchez v. State*, 445 So. 2d 1, 2 (Fla. 3d DCA 1984)(prejudice to defendant from admission into evidence of improper rebuttal evidence of deceased's lack of prior criminal record); *Carter v. State*, 115 So. 3d 1031, 1037-38 (Fla. 4th DCA 2013)(rebuttal testimony was improper and harmful as improper bolstering requiring reversal). Cf. *Moore v. State*, 418 So. 2d 435, 437 (Fla. 3d DCA 1982)(improper rebuttal evidence must be preserved by timely objection). Mr. Jackson is entitled to a new trial without the improper testimony of Dr. Myers.

ARGUMENT VIII

THE DURING THE COURSE OF A FELONY AND HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING FACTORS ARE UNCONSTITUTIONAL.

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: On June 15, 2011, Mr. Jackson challenged the constitutionality of the "during the course of a felony" ("felony murder aggravator") and the "heinous, atrocious and cruel" ("HAC")aggravating factors (T. 4, 504-509; 4, 553-569).

A. During the commission of a felony aggravator:

Fla. Stat. § 921.141 (5)(d) states:

> The capital felony was committed while the defendant was engaged or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Though this Court has consistently ruled this aggravator and its standard jury instruction are constitutional, Mr. Jackson raises this issue to preserve it for future litigation.

The trial court found this aggravator proved beyond a reasonable doubt based on the sexual battery felony which was a contemporaneous offense charged in the indictment (T. 17, 3037). The trial court cited the DNA evidence as proof of this aggravator. However, the during the commission of a felony aggravator is an automatic aggravator simply based on the contemporaneous conviction itself. Thus, the aggravator fails to limit the juror's discretion in sentencing. A death penalty statute is unconstitutional if it has "standards so vague that they would fail to adequately channel

the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. See *Gregg v. Georgia*, 446 U.S. 420, 428 (1980).

A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla. 1990); *Lowenfeld v. Phelps*, 108 S. Ct. 546, 554 (1988). Instead of genuinely narrowing the class of persons eligible for the death penalty, the felony murder circumstance automatically expands the class of those eligible for the death penalty. *Collins v. Lockhart*, 754 F.2d 258, 264 (8th Cir. 1985)("We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.").

The during the commission of a felony aggravator repeats an element of the felony murder offense and creates an unlawful presumption that death is an appropriate sentence. *Jackson v. State*, 502 So.2d 409, 413 (Fla. 1986); cf. *Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir. 1988)("Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment."). Felony murder is the least aggravated form of first-degree murder since it does not entail a premeditated design to kill another

unlawfully. Hence, the felony murder aggravator creates a presumption of death for the least aggravated form of murder.

Section 921.141(5)(d) and the standard jury instruction do not meet the constitutional requirement of narrowing the class of persons eligible for the death penalty and has the opposite effect in violation of Art. I, Sec. 9 of the Florida Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. The heinous, atrocious and cruel aggravator:

Likewise, the HAC aggravator is unconstitutionally vague and overbroad and was applied in an arbitrary manner in Mr. Jackson's case. The trial court found that HAC had been proved beyond a reasonable doubt based on the testimony of jailhouse informants who recited a litany of incriminating statements purportedly made by Mr. Jackson (T. 17, 3039), and because the victim "anticipated her impending death." The court made this finding despite Dr. Shiel's testimony that the victim lived "probably seconds to several minutes depending on the circumstances." (T. 61, 3343). The trial court said it did not consider burning of the body post-mortem as support for this aggravator, however the court still found the crime, "shockingly evil" "wicked and vile" and was "designed to inflict a high degree of pain" to the victim. Id. There was no other evidence of shocking or vile behavior other than the burning of the body. There was no evidence to support that Mr. Jackson

premeditated or intended to inflict pain on the victim. In fact, the trial court found that the "heightened premeditation" necessary for the cold, calculated and premeditated aggravator had not been proved. (T. 17, 3041).

The HAC aggravating circumstance does not narrow the class of death eligible defendants, does not guide the jury or courts, and does not allow meaningful appellate review. *Maynard v. Cartwright*, 108 S. Ct. 1853, 1857-58 (1988)(Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The Supreme Court found the lack of consistently applied standards for an aggravating circumstance violates the Eighth Amendment when it fails to narrow the class of persons eligible for the death penalty. See *Godfrey v. Georgia*, 446 U.S. 420, 422 (1980). Florida's inconsistent application of its HAC circumstance results in unguided death sentencers, a class of death eligible defendants as wide as the class of all murderers, and no rational basis for review of death sentences. See *Smalley v. State*, 546 So. 2d 720 (Fla. 1989)(this Court distinguished *Maynard* on the grounds that Florida limited the circumstance in *State v. Dixon*, 283 So. 2d 1, 9 (1973), *cert. den.*, 416 U.S. 943 (1974). Here, the mitigation outweighed the automatic aggravator of during the course of a felony and the facts did not support "HAC."

Section 921.141(5)(h) and the standard jury instruction do not meet the constitutional requirement of narrowing the class of

persons eligible for the death penalty and has the opposite effect in violation of Art. I, Sec. 9 of the Florida Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Jackson is entitled to a new sentencing.

ARGUMENT IX

FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL.

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

The Merits: On June 15, 2011, Mr. Jackson filed a motion to declare Florida's death penalty unconstitutional. He argued this Court should declare the death penalty unconstitutional in that it constitutes "cruel and unusual punishment" under the present and evolving standards of the Eighth Amendment to the United States Constitution and under Art. I, Sec. 9 of the Florida Constitution. It serves no purpose other than retribution and violates due process under the Fifth and Fourteenth Amendments and corresponding provisions of the Florida Constitution.

As applied in Florida, the death penalty is arbitrarily and capriciously imposed. The Florida death penalty scheme, in which the judge, and not the jury makes the final sentencing decision, denied Mr. Jackson his right to have the jury determine the

existence of the aggravating circumstances beyond a reasonable doubt, which forms the basis for the imposition of the death penalty. See *Ring v. Arizona*, 546 U.S. 584 (2002)(Argument I).

Clearly, the outcome of *Hurst v. Florida,* Case No. 14-7505 currently pending in the United States Supreme Court, will affect how this Court analyzes the constitutionality of the aggravating circumstances found in Mr. Jackson's case. This case should be held in abeyance pending the outcome of *Hurst*. Mr. Jackson is entitled to a new sentencing proceeding.

CONCLUSION

Mr. Jackson respectfully asks this Honorable Court to order a new trial or whatever relief it deems just and necessary.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to E-mailed to Assistant Attorney General Sara Macks at sara.macks@myfloridalegal.com and the Office of the Attorney General at CrimAppTPA@myfloridalegal.com on this 2nd day of June, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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