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IN THE SUPREME COURT OF FLORIDA

JOSEPH EDWARD JORDAN

Appellant

vs. CASE NUMBER: SC13-2091

STATE OF FLORIDA

Appellee.
_____/

On appeal from the Circuit Court of the
Seventh Judicial Circuit,
In and For Volusia County, Florida

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Counsel will refer to the record on appeal using “V” to designate the Volume or “S” to designate a Supplemental Volume followed by an Arabic number to designate the volume followed by the appropriate Arabic number designating the pertinent pages. i.e.: (V3 265) or (S1 125).

STATEMENT OF CASE

On July 18, 2009, Joseph Jordan was arrested upon a warrant for Robbery with a Firearm and/or Weapon (V1 181). The State filed an information against him July 28, 2009, charging Robbery with a Firearm and/or Weapon of Keith Cope (V1 182). On August 26, 2009, the spring term grand jury, Seventh Judicial Circuit, in and for Volusia County, returned a two-count indictment charging Joseph Edward Jordan, Appellant, with the first-degree murder and robbery with a firearm and/or weapon of Keith Cope. (V1 184-185). On February 15, 2013, the State filed a notice of intent to seek the death penalty (V3 465).

Appellant filed several pleadings attacking the constitutionality of Florida's death penalty sentencing scheme (V2 297-400; V3 401-432). Following a pretrial hearing held July 28, 2011 (S1 129-183), the trial court denied the majority of Appellant's motions. The pertinent motions will be discussed infra.

On April 3, 2013, Defendant filed a Motion to Suppress letters allegedly written and sent by the Defendant to the victim's ex-wife and Sergeant Winston (V3 479-480). A hearing was conducted the same day (S2 292-302). The trial court denied the motions.

Jury selection began April 15, 2013 (V5 875). The guilt phase portion of the trial concluded April 19, 2013. Following

deliberations, the jury returned verdicts of guilty as charged on both counts (V4 730-731).

A penalty phase convened April 23, 2013. Following the deliberations on April 24, 2013, the jury recommended, by a vote of ten-to-two, that Appellant be put to death for the murder of Keith Cope (V4 768).

A Spencer[1] hearing was conducted August 12, 2013 (S2 315-341). The Defense filed their memorandum in support of a life sentence August 26, 2013 (V4 776-792). The State filed their memorandum in support of a death sentence September 23, 2014 (V4 793-800; V5 801-804). The sentencing hearing was conducted September 23, 2013 (V1 154-163). The trial court sentenced Mr. Jordan to death in Count I for the Murder of Keith Cope and life in Count II Robbery With a Firearm/Weapon (V1 161).

The trial court found three aggravating circumstances were proven beyond a reasonable doubt:

(1) The Defendant was previously convicted of a felony involving the use or threat of violence to a person—little weight;

(2) The capital felony was committed while Defendant was engaged in the commission of a robbery, and the capital felony was committed for pecuniary gain—great weight;

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

(3) The capital felony was especially heinous, atrocious or cruel—great weight (V5 807-808).

The trial court considered the statutory mitigating factors, concluding that only one applied: The capital felony was committed when the Defendant was under the influence of extreme mental or emotional disturbance. The Court gave this mitigator moderate weight (V5 809). The trial court found 38 nonstatutory mitigators (V5 810-813).

The Judgment and Sentence was filed September 23, 2013 (V5 818-826). The Defendant’s Notice of Appeal was filed October 21, 2013 (V5 828).

STATEMENT OF FACTS

Guilt/Innocence Phase

Mr. Keith Cope (victim) was a 50-year-old male at the time of his death. He was in the construction business building movie sets (V10 1848), and Mr. Jordan worked with Mr. Cope on various occasions. Mr. Jordan was an on-again, off-again roommate of Mr. Cope starting in 2008 (V10 1850). Mr. Cope lived within a couple of blocks from his ex-wife, Magdalene Cope, and their daughter (V10 1843).

Mr. Cope drove a Ford-green, king ranch dually pickup truck (V11 1995). Magdalene Cope saw her ex-husband's truck in his driveway Wednesday, June 24, 2009, at approximately 7 p.m. (V10 1856). She also noticed that the vehicle was not in Mr. Cope's driveway Thursday, June 25, 2009, at approximately 6:30 a.m. (V10 1857).

About three or four weeks prior to June 24, 2009, Matthew Powell drove Mr. Jordan to Mr. Cope's residence (V10 1958, V11 2086) because Keith Cope owed Joseph Jordan money (V11 2171; V11 2080). Mr. Powell was a friend of Mr. Jordan and knew Mr. Cope as well. Mr. Powell had stayed at Mr. Cope's residence in the past (V10, 1957).

On Friday, June 26, 2009, Mr. Jordan appeared at Mr. Powell's residence in Hollywood, Florida (V10 1959). Mr. Powell's girlfriend, Sadia Haque, was also present at the

residence when Mr. Jordan showed up (V10 1959). While conversing with Mr. Jordan, Mr. Powell and Ms. Haque continued to drink (V10 1969; V11 2065). During their conversation, Mr. Jordan stated he was “fucked up,” and he was going to do things to himself (V11 1969). When Mr. Powell asked why Mr. Jordan had Mr. Cope’s truck, Mr. Jordan stated that Mr. Cope was “tied up” (V10 1970-1972). Mr. Powell believed that Mr. Cope would not loan someone his truck to go from Daytona to Hollywood, Florida (V10 1971).

Ms. Haque was being evicted from her motel room the next day, Saturday, June 27, 2009, due to smoking marijuana (V11 2005). Everyone - Mr. Powell, Ms. Haque, Ms. Cassandra Castellanos (Mr. Powell’s ex-girlfriend), and Mr. Jordan — packed all their belongings and went to another hotel (V10 1973). At that point, Mr. Jordan informed Mr. Powell that Mr. Cope was literally tied up and that Mr. Powell could go back there and clean out Mr. Cope’s gun safe (V10, 1974). At that time, Mr. Jordan didn’t want to go back to Daytona or go near the truck (V10 1975). Mr. Powell decided to go to Daytona, but asked his brother, Marlon Powell, and Ms. Castellanos to go with him (V10 1975). Only Sadia Haque knew about Mr. Cope’s circumstances at that time (V11 1976).

Before going to Daytona, Mr. Jordan paid for food and drink with a credit card. Mr. Powell believed the card belonged to

Keith Cope (V10 1977). Mr. Jordan explained to Mr. Powell that he, Jordan, was using Mr. Cope's card because Mr. Cope owed him money (V10, 1978). Mr. Powell went to Daytona with the intent to either steal money or to ask Mr. Cope for a place to stay. He believed it was an opportunity to get some money or a place to stay (V10 1981).

Mr. Powell, his brother, Ms. Haque, and Ms. Castellanos left Hollywood, Florida around midnight and arrived in Daytona Sunday, June 28, 2009, at approximately 6 a.m. (V11 1982). Mr. Powell parked the truck in its usual location. He and Ms. Haque entered Mr. Cope's residence when no one answered the door (V10 1983; V11 2073). Mr. Powell did not immediately see anyone, so he continued to search the house. When he entered the bedroom he saw Mr. Cope at the foot of the bed. Mr. Cope's feet were toward the door and his head in the opposite direction. Mr. Cope was suspended by rope attached to the bed, but he was not lying on the floor (V10 1984; V11 2074).

Mr. Powell removed tape from Mr. Cope's mouth and Mr. Cope moaned (V10 1987; V11 2078). Mr. Powell cut off the rope from Mr. Cope, who then fell to the floor (V10 1987). A fragment of the rope was embedded in Mr. Cope's arm. When Mr. Powell tried to cut the tape from Mr. Cope's legs, the knife did not work, so he found a pair of scissors (V10 1988; V11 2075).

Mr. Powell observed that the safe was closed. He called Mr. Jordan and asked if he knew that the safe was locked. Mr. Jordan replied yes (V11 1989). Ms. Haque called 911 (V10 1989). Mr. Powell did not remember seeing any urine stains. Mr. Powell's brother, Marlon, tried to give Mr. Cope water, but Mr. Cope could not drink it (V10 1991).

At some point after the police arrived, Mr. Powell told the police that he came there to rescue Mr. Cope because Mr. Jordan said Mr. Cope was in trouble. However, Mr. Powell acknowledged later that Mr. Jordan did not tell him that (V10 1992).

While Mr. Powell knew that Mr. Cope might have owed Mr. Jordan money, he did not think there was any animosity between them (V10 2000). Mr. Cope was a smoker and recreational user of cocaine (V11 2001). When Mr. Jordan came to Hollywood, Florida, to visit Mr. Powell and Ms. Haque on Friday, June 26, 2009, Mr. Jordan was anxious, upset, jittery, and going off on a tangent — not his usual self at all (V11 2001; V11 2066-2067). Before going to Daytona (actuality, Edgewater, Florida) Mr. Jordan told Mr. Powell and Ms. Haque that he wanted to commit suicide. Some of the time Mr. Jordan was lucid. Mr. Jordan also said that he was making bad decisions and went off on emotional rants (V11, 2003). Mr. Jordan expressed deep concern about Mr. Cope's well-being (V11 2067).

While in Hollywood, Florida, Mr. Jordan expressed to Ms. Haque that he messed up, and that Mr. Cope was in a situation, specifically a tied-up situation, that he really needs help and somebody needs to go check on him (V11 2069). Mr. Jordan stated that Mr. Cope's vehicle needed to be returned (V11 2069).

At Mr. Cope's residence, Ms. Haque assisted in removing the bindings from Mr. Cope (V11 2077). She observed Mr. Cope was barely able speak or nod his head (V11 2078). She spoke to the police a couple of days later and lied to them about why they were there (V11 2079). Mr. Haque was aware that Mr. Jordan and Mr. Cope were having arguments about money (V11 2080, 2085). Mr. Jordan had been depressed for weeks and had expressed his desire to commit suicide (V11 2089).

Detective Eric Seldaggio was a patrol officer with the city of Edgewater on June 28, 2009 (V10 1861). He was the first officer at the scene, although other law enforcement personnel arrived shortly after (V10 1862). When Detective Seldaggio went into the bedroom, he observed Mr. Cope at the foot of the bed with his hands bound behind his back. Tape was wrapped around his neck and head multiple times to the point where it was over his mouth (V10 1864). His hands were bound by thin rope. His feet were bound by rope and duct tape (V10 1865). The detective was informed that Mr. Cope wanted a glass of water (V10 1865).

When Detective Seldaggio entered the room, Mr. Cope was moaning and groaning. He was conscious and was looking up at the detective (V10 1866). Rope was embedded in Mr. Cope's left arm, which was cold to the touch and greenish in color (V10 1866). Mr. Cope had on sweat pants and socks (V10 1867). Detective Seldaggio smelled urine. He cut Mr. Cope's hands free and tried to remove other restraints (V10 1867). The medical personnel arrived and they removed Mr. Cope from the scene (V10 1868). Detective Seldaggio remained to take photographs and collect evidence (V10 1869). The detective could not figure out how Mr. Cope was tied to the bed. The rope was just lying from bedpost to bedpost, hard to tell (V10 1870). Mr. Cope was transported to Halifax Hospital (V10 1872).

After the police arrived at Mr. Cope's residence, Ms. Haque left. Right after she left, Mr. Jordan called and asked if Mr. Cope was okay (V11 2095). Ms. Haque testified that Mr. Jordan put the keys in Mr. Powell's hand and told him to take the truck back and check on Mr. Cope (V11 2096). According to Marlon Powell, Mr. Jordan told Matthew Powell to go up to Daytona because Mr. Cope needed help (V11 2140). According to Ms. Castellanos, they were going to Daytona to find out how Keith was doing (V11 2151).

Dr. Melinda Rullan was Mr. Cope's treating physician after the amputation (V12 2365). Mr. Cope entered the hospital in

critical condition with a life-threatening illness related to a compartment syndrome of the left upper extremity. He was hemodynamically unstable, meaning he had little or no blood pressure. In addition, he was undergoing cardiovascular collapse (V12 2365). Mr. Cope also was diagnosed with acute kidney failure (V12 2667). Mr. Cope developed acute signs of left-sided stroke, as well as lung problem findings (V12 2368).

From Mr. Cope's original physical exam, it was clear he had bindings on his right wrist and both ankles. He had signs of dead tissue on his right wrist, right arm, and both feet (V12 2370). Mr. Cope died July 13, 2009, after being removed from life support (V12 2377).

Dr. Rullan acknowledged that the abrasions on Mr. Cope's wrists and ankles were consistent with him hanging off the bed (V12 2382). In addition, Dr. Rullan acknowledged that if Mr. Cope had remained on the bed and had not attempted to escape the bindings he might not have caused his death and he might have survived (V12 2384).

Dr. Marie Hermann performed the autopsy on Mr. Cope July 14, 2009 (V12 2391). Dr. Hermann found the following: Mr. Cope's left arm was amputated; She observed healing abrasions on the ear, the nose, the back of right hand, around wrists and ankles, and healing lacerations inside the mouth; Bilateral cerebral infarctions where present indicating he had strokes on both left

and right sides of brain (V12 2395); There was evidence of coronary artery disease and an enlarged prostate, mild pulmonary emphysema and gastritis; and there was a clinical history of dehydration, acidosis, rhabdomyolysis, renal failure, aspiration and pneumonia (V22 2396).

Dr. Hermann testified that the abrasions on the ear, nose, and posterior, as well as the lacerations in the mouth were consistent with the pressure of tape and bindings put around Mr. Cope's mouth (V13 2399).

A day or two before Mr. Jordan was arrested, Mr. Yarrow, a friend, allowed Mr. Jordan to stay in Mr. Yarrow's place of business (V11 2157). The day before Mr. Jordan was arrested, he mentioned to Mr. Yarrow that Keith Cope owed him (Jordan) money, which Mr. Cope did not have. Mr. Jordan and Mr. Cope partied hard by drinking, doing cocaine, and soliciting prostitutes. A drug dealer came by and dropped off a large amount of drugs. Mr. Jordan beat up and robbed Mr. Cope (V11 2158; 2165). Mr. Yarrow was not sure[2] if Mr. Jordan had mentioned that he, Jordan, had pistol-whipped Mr. Cope (V11 2158). Mr. Yarrow indicated that he made that statement in a deposition. Mr. Yarrow tried to get Mr.

[2] Although Mr. Yarrow stated that Mr. Jordan told him he pistol-whipped Mr. Cope and the trial court found that the "victim was… pistol-whipped by the defendant" (V5 808), there was no testimony by Dr. Hermann, the ME, indicating that she observed any injuries that were caused by pistol-whipping or blunt force trauma (V12 2395-2400; V13 2401-2408)

Jordan to turn himself in. After that, Mr. Yarrow called law enforcement and Mr. Jordan was arrested (V11 2161-2162). According to Mr. Yarrow, Mr. Jordan was antsy, nervous, sweating, said he felt like throwing up, assumed the fetal position several times, defecated on himself, and experienced severe withdrawal symptoms similar to detox (V11 2166).

Penalty Phase

State's case:

The State introduced four witness-impact statements (V14 2785-2801; R15 2802-2806), Mr. Jordan's prior violent felony conviction (V4 696-699), and called Dr. Tara Wilson to testify (V14 2750).

Mitigation:

Mr. Jordan was born March 19, 1970, in New York. Since the beginning of his life, he suffered from asthma and was frequently hospitalized (V15 2809, 2814). Mr. Jordan has two sisters and an unofficial adoptive brother (V15 2809). Although Mr. Jordan graduated from school two years early and was the valedictorian of his class (V15 2802), he had suffered a number of closed head injuries during his childhood. These injuries were caused by fights and daredevil exploits, which caused him to be hospitalized (V15 2900).

As he grew older, it became apparent he was suffering from bipolar disorder (V15 2813). Doctors wanted to prescribe

different types of medication to control his ADHD (V14 2902); however, his mother would not allow it (V15 2813). Mr. Jordan's father was a strict disciplinarian (V15 2832). His father was a New York City homicide detective (V15 2832), who suffered from a nervous breakdown (V15 2901). Mr. Jordan's mother and father divorced before moving to Florida in 1983 (V15 2810).

Mr. Jordan's mother was an abusive alcoholic. She used to hit him with various objects, yet Mr. Jordan never complained or avoided the physical abuse. His mother died at 51 with a stomach illness (V15 2811-2812), and she had a history of marijuana and cocaine abuse (V15 2901). His father suffered from multiple sclerosis and died at the age of 56 due to complications of gallbladder surgery (V15 2901).

When Mr. Jordan was taking his medication, he was caring and sweet, and he would perform random acts of kindness (V15 2820). He had a strong work ethic (V15 2830) and was mostly employed in the construction business. He even worked for Mr. Cope. Mr. Jordan had worked on repairing cruise ships (V15 2830).

Through the years, records indicate Mr. Jordan was prescribed many different types of medications: Ritalin (V15 2902); Depakote for bipolar (V15 2903); Neurontin for bipolar (V15 2903); Paxil, Wellbutrin, Celexa, Effexor and Pamelor for

antidepression (V15 2904); and Risperdal, an antipsychotic (V15 2905).

When Mr. Jordan experiences a bipolar episode, he hardly eats, loses weight, has poor concentration, and little energy. He feels quite hopeless, has no joy in life, and during depressive bouts contemplates suicide because he believes he is better off dead V15 2907). He has attempted suicide on a number of occasions. The first time was when he was 15 years old (V15 2907).

During his manic stages, he has tremendous energy despite the lack of sleep. While engaged in a manic episode he acts in an irresponsible manner, drives too fast, spends money recklessly, and uses drugs (V15 2909).

During his depression, Mr. Jordan would self-medicate by using various drugs. Individuals who have bipolar disorder in particular have a much higher rate of substance abuse than the general population (V15 2910). Twice a month Mr. Jordan would experience unprovoked panic attacks that lasted about 20 to 30 minutes. The attacks caused an intense anxiety and shortness of breath (V15 2913).

When he did not take his prescribed medication he would self-medicate by ingesting, injecting, or inhaling several types of drugs. He began using marijuana around 12 years old and was a heavy daily user. Powder cocaine was his drug of choice and he

did it on a binge basis, but used crack cocaine on occasion. He did ecstasy in 1989, 1990, and 2001; used methamphetamine twice; used LSD regularly from 1981 (when he was almost 12 years old) to 2001 (V15 2915); tried ketamine once; tried GHB once, but didn't like it; even inhaled White-out once (V15 2916; and Xanax (V15 2917).

Mr. Jordan used Xanax to offset the jitters and restless effects of cocaine. Mr. Jordan had a stretch of time when he was using oxycodone (V15 2918). For a week, Mr. Jordan utilized morphine. Mr. Jordan entered a treatment facility when he was 14 or 15 years old (V15 2919). Just prior to and just after the crimes Mr. Jordan was using alcohol, cocaine, marijuana, and ecstasy (V15 2920).

Mr. Jordan tested in the average range of intelligence. While Dr. Danziger did not discuss the events surrounding the crimes with Mr. Cope, Mr. Cope did inform the doctor that he was off his medications at that time (V15 2923). According to Dr. Danziger, bipolar individuals suffer from extreme mood swings.

Mr. Jordan had expressed to others that he did not plan the robbery. Mr. Yarrow testified that Mr. Jordan and Mr. Cope had been drinking, doing cocaine, and soliciting prostitutes, and that apparently Mr. Jordan snapped (V11 2158).

Ms. Sanya Corday-Rochlin was with Mr. Jordan just before Mr. Jordan went to Mr. Cope’s residence. She reported that Mr. Jordan was not taking his meds, and his personality changed dramatically. While he was on his medication, he was sweet and kind, but when he was off his medication, he was emotional, angry, and irrational. After the incident—but before his arrest—Mr. Jordan spoke with Ms. Corday-Rochlin and indicated he wanted to commit suicide. Before Jordan was arrested, she spoke with him on the phone and he sounded worse than before he left for Edgewater (V15 2821-2823).

SUMMARY OF ARGUMENT

The Prosecutor’s improper comments during closing argument substantially impaired the Appellant’s right to a fair guilt phase and penalty phase trial and constituted fundamental error. These improper comments were offered solely to mislead and inflame the jury against the Appellant and his defenses.

Appellant did not kill Mr. Cope or know that his actions would cause Mr. Cope’s death. Mr. Cope’s attempt to extricate himself tragically contributed to his own death. The Court cannot apply the Heinous, Atrocious, and Cruel (HAC) aggravator vicariously to the Appellant when he did not know the victim would die or how the victim would die.

Section 921.141(7), Florida Statutes (1996), specifically limits victim-impact evidence to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Admitting testimony about how the victim’s death affects the family or what the victim will no longer be able to do is so prejudicial it amounts to a nonstautory aggravator.

A statutory mitigator should be found or not found solely upon whether there is competent, substantial evidence in the record to support the mitigators and not the magic words expressed by experts.

This case does not warrant the death penalty. The application of the HAC aggravator was improper, but even if it is proper, it still does not apply to the Appellant. Given the substantial mitigation and the facts of this case, life imprisonment was the proper sentence.

Florida is the only state in the country that allows a majority verdict by a jury that is already predisposed to agree to a death recommendation. This is a violation of the United States Constitution.

ARGUMENTS

ISSUE I

THE STATE'S IMPROPER COMMENTS IN CLOSING ARGUMENT CONSTITUTED FUNDAMENTAL ERROR AND VIOLATED THE APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

During the first and final closing argument by the State in the guilt phase, the prosecutor made numerous statements that were improper. Defense counsel did not object to those comments, save one. Below is a laundry list of the prosecutor's improper comments that will discussed in turn. Appellant contends that each listed comment constituted fundamental error. However, should this Court disagree, Appellant contends that cumulatively they amount to fundamental error and deprived Appellant of a fair trial. *Braddy v. State*, 111 So.3d 810 (Fla. 2013):

> We do not review each of the allegedly improper comments in isolation; instead, we examine "the entire closing argument with specific attention to the objected-to ... and the unobjected-to arguments" in order to determine "whether the cumulative effect" of any impropriety deprived Braddy of a fair trial.

See also: *Poole v. State*, 997 So.2d 382, 394 (Fla. 2008):

> While the questions on Poole's lack of remorse do not individually amount to fundamental error, we find that the cumulative effect of this error and the error of presenting inadmissible nonstatutory aggravation of Poole's criminal history and the content of his tattoo deprived Poole of a fair penalty phase. The combination of these errors had the effect of unfairly prejudicing Poole in the eyes of the jury because these errors created a risk that the jury would give

undue weight to this information in recommending the death penalty.

The first challenge to improper comments occurred when the prosecutor attempted to rebut the defense's argument before defense counsel presented it in his closing. Additionally, the prosecutor continually and egregiously referred to Defendant's lack of remorse.

> The first point is I'm sorry. The second point is I didn't mean to kill Keith. And the third point is I'm not responsible for the harm that occurred after I left.
>
> **That was what was said in opening statement by the defense**. That was what was asked to many of the witnesses that were on the stand.
>
> So let's talk about that argument. Let's talk about the defense's argument in this case.
>
> Let's start with I'm sorry. Nowhere in the evidence, nowhere, is there a single fact that demonstrates the defendant is sorry about anything.
>
> He wrote six letters. You listened to them yesterday as they were read. You'll have an opportunity to take them in the back and read them yourself.
>
> Look carefully for the words I'm sorry. I'm sorry doesn't appear anywhere. I'm sorry doesn't come up in the statement to Joanne Winston out at the jail.
>
> There is no I'm sorry. When he told his friends, Raymond Hill and Eddie Yarrow and Mathew Powell and Sadia Hague, not once did he say I'm sorry.
>
> Not once did he say, God, I wish it hadn't happened this way. I -- I wish Keith were in better shape or hadn't died.

(V13 2540-2541).

* * * *

You know, nowhere in there, though, was I'm

> sorry. The most we got was I'm suicidal. I F'ed up. I didn't want to go to jail, but we never heard I'm sorry.

(V13 1695).

* * *

> And you may hear it again in closing that it wasn’t Joseph Jordan’s fault.

(V13 2524).

First, the defense’s argument had not been presented yet. Second, nowhere within the opening statement did Appellant’s counsel say Mr. Jordan was sorry. Defense counsel said he was sorry that Mr. Cope passed away (V10 1816). The State intentionally misled the jury as to what Appellant’s counsel stated during opening statement and to what Appellant’s defense was.

Further, the State’s constant references that Mr. Jordan did not say he was sorry were improper comments about remorse and facts not in evidence. The State was clever to make these comments during the guilt phase rather than the penalty phase. However, jurors may consider all evidence presented during the guilt phase, as well as the penalty phase. The Prosecutor’s comments regarding lack of remorse during the guilt phase was a two-fold improper argument: Find him guilty of felony murder because he lacks remorse for his actions, and consider remorse as an aggravator during penalty phase after you find him guilty.

This court has renounced remorse comments since *Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1983):

> Its use as additional evidence of an especially heinous, atrocious or cruel manner of killing only when the facts of the crime support the finding of that aggravating factor without reference to remorse is, at best, redundant and unnecessary. Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred in the case now before us-inferring lack of remorse from the exercise of constitutional rights. This sort of mistake may, in an extreme case, raise a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence. For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.

"Sorry" is defined as "feeling sorrow." Webster's Ninth Collegiate Dictionary, (1991). "Sorrow" is a synonym for "remorse." Thesaurus.com. *Jones v. State*, 569 So.2d 1234, 1240 (Fla. 1990).

> We likewise find merit in Jones's contention that the state improperly commented on his lack of remorse. During **closing** argument in the guilt phase, the prosecutor impermissibly asked the jury, "Did you see any remorse?"

The reference to "remorse" in *Jones* and in *Robinson v. State*, 520 So.2d 1 (Fla. 1988), pales in comparison to the prosecutor's two-page denunciation of Mr. Jordan not saying "I'm sorry" in the instant case. Ironically, the Prosecutor points

out to the jury that “Nowhere in the evidence, nowhere, is there a single fact that demonstrates the defendant is sorry about anything” (V13 2450). However, any reference to evidence not in the record is an improper comment. *Charriez v. State*, 96 So.3d 1127 (Fla. 5th DCA 2012)(improper references to the facts not in evidence).

The Prosecutor continued to make comments about facts not in evidence, and he persisted to mislead the jury about Appellant’s defense. In the Prosecutor’s statement above, he claims that Defense said in opening argument: “And the third point is I'm not responsible for the harm after I left[3]” (V13 2540). In his opening statement, Defense Counsel never said that Mr. Jordan was not responsible “…for the harm that occurred after I left” (V10 1811-1817). At best, Defense Counsel stated, “He did not kill this man (V10 1815),” and “He’s not guilty of first-degree murder” (V10 1817).

In addition, undersigned counsel could not locate anywhere within the record that proved Mr. Jordan ever testified at the trial. So, other than speculation—not reasonable inferences—the Prosecutor could not comment about opposing counsel’s defense “theme” since Mr. Jordan didn’t testify, Defense presented no witnesses to refute Mr. Jordan’s actions that the Prosecutor alleged, and the Defense had not presented closing argument yet.

[3] The State was referring to the Defendant.

The sole reason the Prosecutor made those statements was to inflame the passions of the jury. *Toler v. State*, 95 So.3d 913 (Fla. 1st DCA 2012)

> The statements "'must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.' " *Smith v. State,* 28 So.3d 838, 862 n. 15 (Fla.2009) (quoting *Bertolotti v. State,* 476 So.2d 130, 134 [Fla.1985]).

The Prosecutor also exhorted the jury to do its job. He also misstated the law by saying, "…the rest of this stuff doesn't matter so much" (See below).

> I asked you on Monday and Tuesday if you could enforce the law. And in this particular case, you should have no hesitation.
>
> The defendant has confessed to the crime, and there is no other explanation. (V13 2529).

* * *

> You see, because the State has given you the facts and evidence necessary to satisfy the elements of the crime, the rest of this stuff doesn't matter so much. We gave you the proof necessary in order to do your job.
>
> And on Monday when I talked to you, and hear me again now, if you think for some reason that we haven't proved our case, then I want you to do your job.
>
> You see, I want you to enforce the law no matter which way it comes. I want you to enforce the law and hold him guilty if you find beyond a reasonable doubt that he committed these crimes.
>
> And I want you to enforce the law and find him not guilty if for some reason we haven't proven to you by now that the defendant robbed Keith Cope and that Keith Cope died as a result of that robbery. (V13 2539).

* * *

> When a person comes to a jury trial, it's about asking the members of the community to enforce the law, one way or another.
>
> I'm asking you, the State is asking you, to enforce the law and not to be misled by this argument that he didn't mean to kill Keith Cope. (V13 2542)
>
> * * *
>
> And so the State is asking you to enforce the law as it's written. These laws exist for a reason, and we're all bound by them. (V13 2542)
>
> * * *
>
> And it was agreed that it could, so I'm asking you to enforce it now. (V13 2580).

United States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(It is—at least in some contexts—reversible error for a prosecutor to "exhort the jury to 'do its job,' " because "that kind of pressure ... has no place in the administration of criminal justice.") Telling the jury that **he** wanted them to enforce the law was improper. The Prosecutor also misstates that Mr. Jordan "confessed to the crime." There is nothing in the record supporting the claim that Mr. Jordan confessed to first-degree murder. Undersigned counsel concedes that Mr. Jordan explained the actions he performed, but never conceded it was first-degree murder. In fact, his counsel continuously argued that, at best, the State proved Manslaughter.

In addition, the above statement misstates the law of reasonable doubt when he says, “the rest of this stuff doesn’t matter so much.”

In *Charriez,* 96 at 1128, the court held it was an improper misstatement of the law to say “if you believe the victim you would have to convict.”

> Next, the prosecutor misstated the law as it relates to reasonable doubt when she suggested that if the jurors believed the victim, they would have to convict Charriez. *See Clewis v. State,* 605 So.2d 974, 975 (Fla. 3d DCA 1992) (“The test for reasonable doubt is not which side is more believable, but whether, taking **all the evidence in the case into consideration,** guilt as to every essential element of the charge has been proven beyond reasonable doubt.”) (citing *United States v. Stanfield,* 521 F.2d 1122, 1125 (9th Cir.1975). (emphasis added).

In essence, the Prosecutor in the instant case said the same thing to the jury. When the prosecutor said, “the rest of the stuff doesn’t matter so much,” he was telling the jury to disregard Mr. Jordan’s defense of lesser included offenses, as well as all other testimony. That is not what the law intended. The jury has to consider **all** of the evidence.

Mr. Jordan contends that in the State’s first closing argument the Prosecutor violated the Golden Rule by putting the jury in the position of the victim.

> And so he -- this is just a summary of that activity and all of the things that had happened while Joseph Jordan was spending the hard-earned money of Keith Cope and partying with his friends.
> **And during that time, I'd like to remind you**

> **where it was that Keith Cope was, how Keith Cope spent his last hours**. (emphasis added).
>
> And so when you compare and contrast the two, there really is no question in this case whose fault it was that Keith Cope died.

(V13 2524). *Victorino, v. State*, 127 So.3d 478 (Fla. 2013)(Golden Rule arguments are those that invite the jurors to place themselves in the victim's position during the crime and imagine the victim's suffering.) Shortly after the above statement, the prosecutor told the jury the following:

> Because he was bound, because he was gagged, because he went three days without water and suffered extreme dehydration, because he ultimately struggled in his restraints and was hanged in them, the rope and tape was what did the damage to Keith Cope's arm and what caused his death.

(V13 2528). Reminding the jury about the victim's physical condition—while the Defendant was having a good old time—and then telling them how the victim suffered, was tantamount to imagining themselves in the victim's position in violation of the Golden Rule.

At one point, the Prosecutor began to argue case law to the jury to support his interpretation of felony murder:

> So let's take a look at the first-degree-felony-murder instruction.
>
> To prove the crime of first-degree felony murder, the State must prove the following three elements:
>
> Keith Cope is dead.
>
> Agreed by both sides and testified to by every witness.
>
> The death occurred as a consequence of and

while Joseph Jordan was engaged in the commission or attempting to commit a robbery.

The way the case law interprets that, the way the law –

MR. NIELSEN: Objection, your Honor.

MR. SMITH: Objection.

MR. NIELSEN: Like to approach with a motion.

(V13 2531). At that point, Counsel approached the bench and moved for a mistrial, which was denied (V13; 2531). Although the trial court did not hear the Prosecutor say "case law," the Prosecutor agreed he did say "case law." Although the Prosecutor did not inform the jury about what the case law specified, it was clear to the jury by the context that his interpretation of felony murder was supported by case law. That was improper and prejudiced Mr. Jordan. *Profitt v. State*, 970 So.2d 416 (Fla. 4th DCA 2008). The trial court erred in failing to grant the defense's motion for mistrial.

During the Prosecutor's final closing argument, he continued to make improper statements. Again, the Prosecutor refers to his first closing statement: he knew the Defense would claim that it was everybody else's fault except the Defendant's.

MR. WILL: I told you it was coming, and there, there we heard it. It's everybody else's fault but the defendant's.

I mean, if he had stayed on the middle of the bed, he would still be alive.

If these guys had come up from south Florida

a day and a half earlier, he'd still be alive. Come on. Everybody's fault but his. (V13 2672-2573).

Not only does the Prosecutor misstate the facts, he denigrates Mr. Jordan's defense. The Prosecutor suggests to the jury that Mr. Jordan's only defense was: "if he had stayed in the middle of the bed…," and "If these guys had come up from south Florida a day and a half earlier…"(V13 2672). During the Prosecution's closing argument, he failed to make even one reference to the Appellant's defense, which was a follows:

> And we're not trying to make an excuse for any action that our client may have done by referencing Mr. Cope. That's not what's going on.
>
> We are explaining and giving you the information that you could then use to make your decision.
>
> What you have here, ladies and gentlemen, is a disagreement as to the charges and the level of responsibility being attributed to Mr. Jordan. (V13 2555).
>
> * * *
>
> …but there's a legal battle going on here as to whether -- whether or not they've proven this charge of first-degree murder. (V13 2556).
>
> * * *
>
> He didn't murder the man. He left him there. (V13 2556).
>
> * * *
>
> So if he's really trying to get away with this robbery plan and murder plan, why is he sending people to the house?
>
> And I submit he's doing that because he's not trying to get away with the robbery and this

alleged murder. (V13 2559).

On a number of occasions, defense counsel stated that this case was not first-degree murder (V13 2560, 2564, 2567, 2571, 2572). Defense counsel never said it was everybody else's fault. The Prosecutor's improper argument on that point, which was not in evidence, would only be offered to mislead the jury by denigrating Mr. Jordan's defense.

Defense Counsel made it quite clear that he believed the State had not proven first-degree murder; at best, third-degree murder (V13 2566), or more properly, manslaughter (V23; 2566). Mr. Jordan contends that the Prosecutor's above comments regarding his defense was nothing more than an attempt to ridicule Defense Counsel rather than present an argument of reasonable inferences. *Valentine v. State,* 98 So.3d 44, 55–56 (Fla. 2012)(While a prosecutor may "not ridicule or otherwise improperly attack the defense's theory of the case," a prosecutor is permitted to suggest to the jury that "based on the evidence of the case, they should question the plausibility of the defense's theory.")

The Prosecutor's improper arguments continued. While attempting to persuade the jury about his interpretation of felony murder elements—whether right or wrong—the Prosecutor told the jury, "That's not what the law was designed for" (V13 2580). It is improper to tell a jury why a law exists, or, in

essence, what the legislature intended, especially when the law is not ambiguous.

The Prosecutor continued to misstate the law. For example:

> Premeditated murder handles intentional killings.
>
> There's a large vacuum in the law for dangerous crimes where people die. This law, first-degree felony murder, is the one that holds people responsible for committing inherently dangerous crimes and people dying as a result even though it was an accident or unintentional. (V13; 2583)

If the Prosecutor inferred to the jury that *unintentional* or *accidental* killings are the basis for creating felony murder, then that is completely inaccurate. Unintentional and accidental killings fall under third-degree murder and manslaughter statutes, which is exactly what the Defense argued.

Near the end of the Prosecutor's final argument, he states, "Don't let him get away with this" which is yet another example of improper comments. *Lewis v. State*, 711 So.2d 205 (Fla. 3rd DCA 1998).

Finally, the Prosecutor's *coup de grace* was as follows:

> You cannot find him guilty of grand theft and first-degree murder. You cannot do it. Do not do that.
>
> It's what's called an inconsistent verdict, and there will be problems. You cannot do it.

Not only did the Prosecutor misstate the law, he intended to preclude the jury from considering leniency to the Defendant

(if they chose to do so) by telling them “there would be problems.” *Wight v. State*, 117 So.3d 827 (Fla. 4th DCA 2013).

> Florida allows inconsistent verdicts because they may result from a jury's lenity rather than a definitive statement on the innocence or guilt of a defendant.

Notwithstanding Defense Counsel’s failure to object to most of the improper comments by the Prosecutor, those comments deprived the Mr. Jordan of a fair trial and violated his due process. The comments permeated both of the State’s closing arguments and were of such magnitude, it was impossible for Mr. Jordan to receive a fair trial. Appellant contends that many of the improper statements amounted to fundamental error in and of themselves. If not individually, cumulatively they affected the jury’s vote, either in the guilt phase and/or penalty phase. *Poole*, S*upra*.

Mr. Jordan is entitled to a new trial, or at least a new penalty phase trial.

ISSUE II

THE COURT ERRED IN FINDING THE HEINOUSNESS, ATROCIOUS, AND CRUEL CIRCUMSTANCE BECAUSE IT DID NOT FIND THAT APPELLANT WAS THE ACTUAL KILLER OR THAT HE KNEW HOW COPE WOULD BE KILLED.

The trial court erred in finding the aggravator of heinous, atrocious, or cruel (HAC) was proven beyond a reasonable doubt because there was a lack of competent and substantial evidence to support the trial court's finding that the HAC aggravating circumstance could be applied to Mr. Jordan.

The "especially heinous, atrocious, or cruel" circumstance does not apply vicariously to one who was not the actual killer unless the state can establish beyond a reasonable doubt that he directed or knew how the victim would be killed. In *Williams v. State*, 622 So.2d 456, 463-64 (Fla.1993), this Court wrote:

> Williams' next argument is that the trial court erred in finding that the heinous, atrocious, and cruel aggravating factor applied to him. While the record reflects that the manner in which the victims were killed was heinous, atrocious, and cruel, the State in this instance failed to prove beyond a reasonable doubt that Williams knew or ordered the particular manner in which the victims were killed. We have expressly held that this aggravating factor cannot be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed. *Omelus v. State*, 584 So.2d 563 (Fla. 1991). Consequently, the trial court erred in applying this aggravating factor vicariously. We find that the remaining aggravating factors are fully supported by the evidence.

Archer v. State, 613 So.2d 446, 448 (Fla. 1993), struck HAC where Archer "knew that [the co-defendant] would use a handgun

to kill the victim. However, he did not know that the victim would be shot four times or that he would die begging for his life."

At bar, the judge's order did not specifically find Mr. Jordan culpable of Keith Cope's death or if Mr. Jordan knew that Mr. Cope would, in fact, die as a result of Defendant's actions (V5 808).

In *Archer*, *Williams*, and *Omelus* the defendants were not present at the scene of the murder. Neither was Mr. Jordan at the time of Mr. Cope's demise. Mr. Cope died in the hospital. Nevertheless, the logic of those cases is that the defendant in some way did not agree that the murder would be committed in a torturous manner. Even more poignant is the fact that Mr. Jordan did not anticipate in Mr. Cope's death. The jury in this case did not find premeditation, so there was no basis to determine that Mr. Jordan had intended to kill Mr. Cope at all, much less in a torturous manner. By contrast, *Archer*, *Omelus* and *Williams* specifically ordered the killings.

The State may argue that a reasonable person should know someone would die if he or she were left in Mr. Cope's position. However, Mr. Cope did not die in that position; he died at the hospital. The injuries Mr. Cope sustained while attempting to escape from his bindings caused his death. Dr. Rullan testified that if Mr. Cope had not attempted to escape his bindings he may

well have survived (V12 2384). Mr. Jordan did not kill Mr. Cope, as in *Archer*, *Omelus*, and *Williams*.

While Mr. Jordan's case does not involve a co-defendant *per se*, Mr. Cope contributed to his own demise. If the facts of actually killing the victim and knowing the manner of death are necessary to support heinous, atrocious, and cruel, then these elements were not present in this case. There is no factual dispute that Mr. Jordan tied Mr. Cope to his bed and left for approximately three days. There was no evidence of premeditation, and the State agreed they were not seeking premeditation.

In *Cave v. State*, 727 So.2d 227 (Fla. 1998) and *Copeland v. State*, 457 So.2d 1012 (Fla. 1984), this Court upheld HAC because the defendants participated in the crimes and knew how the victim was to be killed. That did not happen here.

There is no dispute in the facts that Mr. Jordan sent his friends back to the residence where Mr. Cope was bound. There was testimony that Mr. Jordan was concerned for Mr. Cope's well-being. Mr. Jordan inquired about how Mr. Cope was doing. Notwithstanding the Prosecutor's opinion about these events, logic dictates that if Mr. Jordan wanted Mr. Cope dead or knew he was dead, there would be no reason to send his friends back to Mr. Cope's residence, inquire about his condition, or express his concern for Mr. Cope's well-being.

In *Perez v. State*, 919 So.2d 347 (Fla. 2006), this Court found the following:

> Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously.
>
> *Id.* at 566. Again, in *Williams v. State,* 622 So.2d 456 (Fla.1993), this Court determined that HAC "cannot be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed." *Id.* at 463. In *Archer v. State,* 613 So.2d 446 (Fla.1993), we determined that "a defendant who arranges for a killing but *who is not present* and who does not know how the murder will be accomplished cannot be subjected vicariously to the heinous, atrocious, or cruel aggravator." *Id.* at 448 (emphasis supplied). *Id*. at 380.
>
> * * *
>
> Additionally, the lack of any indication by the trial court in its sentencing order indicating that the trial court even considered the law as outlined by *Omelus* and its progeny gives us great concern with regard to whether the trial court appropriately applied this aggravating circumstance to Perez. *Id*. at 381.

The sufficiency of the evidence to support an aggravating circumstance is subject to *de novo* under this Court's independent appellate review: it is an appellate court's function "to determine sufficiency as a matter of law." Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). At bar, the evidence did not support the circumstance, and its use was prejudicial in

light of a strong argument for a life sentence. Use of the HAC circumstance violated the Due Process and Cruel and Unusual Punishment Clauses of the state and Federal Constitutions, and this Court should reverse for resentencing without HAC.

Without the HAC aggravator, the instant case is similar to the circumstances in *Perez*.

> Given the State's emphasis on the heinous, atrocious, or cruel aggravating factor during the sentencing phase before the jury and the fact that the trial court found one statutory mitigating factor along with fourteen nonstatutory mitigators, we cannot say that the consideration by the jury and the trial judge of this aggravating factor was harmless beyond a reasonable doubt. *Id.* at 381.

For the above reasons this Court should remand this case for a new penalty phase or in the alternative reduce Mr. Jordan’s sentence to life in prison without the possibility of parole.

ISSUE III

THE COURT ERRED BY PERMITTING INADMISSIBLE VICTIM IMPACT STATEMENTS INTO EVIDENCE OVER THE OBJECTION OF APPELLANT, WHICH VIOLATED APPELLANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AS WELL AS THE FLORIDA CONSTITUTION.

A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Braddy v. State,* 111 So.3d 810, 857 (Fla. 2012); *Deparvine v. State,* 995 So.2d 351, 378 (Fla. 2008).

The trial court abused its discretion by admitting most of the victim impact statements, because it violated Mr. Jordan's Federal Constitution Due Process rights, as well as Section 921.141(7), Florida Statutes (1996), which reads as follows:

> (7) VICTIM IMPACT EVIDENCE.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate **the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.** Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence. (emphasis added).

Nowhere within this statute does it permit evidence about how a family member feels, or how a family member will no longer be able to participate in life experiences with the victim.

Section 921.141(7) is limited to uniqueness and loss to the community for impact evidence.

Before the penalty phase trial started, the State informed the court about presenting four witnesses whose statements would be read to the jury (V14 2711). In response, the Defense notified the court of its objections:

> MR. SMITH: We, of course, renew our objection to the victim-impact statements being read during the penalty phase.
>
> Mr. Nielsen is going through the letters – we just got them -- and going to make specific objections to the content of those in just a moment, if you just give him a few minutes to finish reading them.
>
> I know the State's redacted them quite a bit, but they're still -- a couple of them of pretty lengthy, so if you can give us just a few minutes. (V14 2713).

After Mr. Jordan's counsel reviewed the four proposed written statements, he made specific objections to the court. Discussions commenced between Appellant's Counsel, the State, and the Court (V13 2718-2775).

The first statement Counsel objected to was from the victim's daughter – Emilee Cope. Emilee's statement, which was read to the jury, appears at V14 2803-2806. There were three sections to Emilee's statement defense counsel objected to. The first part of Emilee's statement that defense counsel objected to was read by the court:

> THE COURT: All right. So that apparently would read: “However, I can also tell you that sitting here in this courtroom these last two weeks and listening to things I have had to listen to have not been nearly as hard as the day I watched my father struggle for his last breath and begged him to let go when he was taken off life support.” (V14 218).

The State agreed to partly redact the statement with a proposed edit (V14 2720-2721), but Defense Counsel objected to it. The Court agreed with the State over Defense Counsel’s objection and read State’s proposed redaction as follows:

> THE COURT: All right, then. I’ll accept the State’s compromise, noting the defense objects to it.
> So take out the language, “However, I can also tell you that sitting here in this courtroom These last two weeks and listening to testimony I’ve had to listen to has not nearly been as hard as the day,” and then edit it to read, “it was difficult to watch my father struggle for his last breath, and I begged him to let go when he was taken off life support.” (V14 2723).

The second objection Defense Counsel made pertained to Emilee’s statement at page 3, beginning with “I will always be vigilant …” The Court read the objected portion as follows:

> THE COURT: All right. That would be the sentence is reading, “I will always be viligant [verbatim] about the safety of my loved ones and question whom they place their trust with. I have never been able to relax when away from home out of fear that I will receive a phone call that someone I love has been hurt.” (V14 2719).

The State argued that the statement was the victim's impact (V14 2724). The Defense argued against that as follows:

> MR. NIELSEN: Well, Judge, it's just that, essentially, what it is, it's a direct statement on the facts of the case.
>
> And, specifically, when she's saying, "put your trust with" – the way I'm reading this is her dad trusted Joey, and look what happened. (V14 2725).

Over the objection of the defense, the court allowed the whole portion of that statement to be admitted (V14 2725).

The third objection to Emilee's statement was at the bottom of page 3. The court read the objected-to portion as follows:

> THE COURT: So that would be reading "There are no words to describe how terrifying and heart-wrenching it was for me, as a 15-year-old girl, to see my father, who was so strong, tall, and proud, be torn down and put in a hospital bed with such horrendous injuries and without the ability to even breathe on his own" (V14 2719).

The Defense argued that this statement was essentially the same as the other by commenting about the crime itself. Defense had a problem with the word "horrendous" (V14 2725). The State proposed to take out "be torn down and put," as well as "with such horrendous injuries and…" (V14 2725). Over the Defense's objection, the Court approved the State's redaction (V14 2726).

The entire statement of the victim's daughter is as follows:

THE WITNESS: This murder was committed against my father when I was 15 years old. I had just finished my freshman year of high school.

Going into this trial, many people who care about me were very concerned that this would be a very hard thing for me to have to face.

I can tell you that this certainly has not been easy whatsoever.

It was difficult to watch my father struggle for his last breath, and I begged him to let go when he was taken off of life support.

I was there when he passed. I watched my mother and my grandmother cry for the man and the son they both loved and still love so dearly.

I stood by my father's side, tears rolling down my face, knowing that I would never see him again, although I was the daughter who still needed him so much.

And the other loved ones he left behind would lose someone so special to them as well.

Keith Cope, first and foremost, is my father. He was much more of a person than just being my father.

He was the love of my mother's life. He was a son and nephew, a brother, a cousin, an uncle and a fiercely loyal friend.

He was also an incredibly intelligent, soft-spoken, talented man who tried to help the people around him the best way he could.

It is not fair that I never got to have my dad there when I got my first car or to take pictures with me on my prom night or wave to me during my graduation.

I will never get to have my dad walk me down the aisle when I get married or teach my possible future children the wonderful things he knew.

It breaks my heart that I will never hear his voice again, see him smile, or feel one of his big bear hugs again in my life.

It was not just my father that was taken from me, but also a large piece from what was supposed to be some of the happiest years of my life.

In my father's memory, I decided to remain strong and move forward. I never used this as an excuse for failure, but as fuel to motivate *my* passions and excellence in my education.

I do not believe that horrible events have to produce horrible outcomes. And I've used this heartbreaking event in my life to work towards establishing a career to help others who have faced similar adversities.

My father's death has forever changed my life. I will always be vigilant about the safety of my loved ones and question whom they place their trust with.

I have never been able to relax when away from home out of fear that I will receive a phone call that someone I love has been hurt.

I know my life will never be the same. Every time I hear motorcycle, Corvette or diesel truck, I look to see if maybe, just maybe, it was all just a nightmare and he's coming home.

I miss my father even more with each day that passes. People keep telling that it gets better. It doesn't.

The only thing I have been able to say for time is that I've become used to the pain of this loss.

I'm used to waking up every day with a broken heart and the memory of losing someone who I believed was invincible.

There are no words to describe how terrifying and heart-wrenching it was for me, as a 15-year-old girl, to see my father, who was so strong, tall and proud, to be in a hospital bed without the ability to even breathe on his own.

I love and miss my father very much, and I would give anything to have him back with me today.

I know this is not possible, but I thank you for taking the time to hear my words.

Sincerely, Emilee Cope. (emphasis added).

The highlighted portion of Emilee’s statement violates the Appellant’s due process rights as well as Section 821.141(7), and is either a comment about the crime, or it does not relate to the victim's uniqueness as an individual human being and the resultant loss to the community. The highlighted comments are

inflammatory to the jury and beg for their sympathy. There is nothing unique about a deceased person's inability to watch his child drive her first car, or take pictures at her prom, or wave to his child at graduation, or to see a sunrise. Such examples are limitless, and the jury is well aware of what a deceased person cannot do. Mentioning those events would be a solicitation of the jury's sympathy in an already heightened emotional charged setting.

In addition, one of the aggravators was HAC (Heinous, Atrocious, and Cruel), which constituted the suffering of the victim. The witness's statement regarding her feelings about her father's condition in the hospital is a direct comment on that aggravator in violation of Florida Statutes and the United States Constitution.

The next victim impact statement defense counsel objected to was Madgalene Cope - the victim's ex-wife (V14 2796-2801). Inasmuch as the court did not read into the record those portions of the statement the defense objected to, the court only redacted two words: horrible and horrific. Madgalene Cope's entire statement was read at the penalty phase is as follows:

> THE WITNESS: I feel compelled to begin by clarifying to you that although the law defines me as Keith's ex-wife, Keith is the love of my life and always will be.
>
> I never dated since our divorce because my heart will always belong to him.

I've known Keith my whole life. He was an avid outdoorsman and fisherman.

He was smart and inquisitive, meticulous about his work, and he also had a soft spot for animals.

He loved his family very much, especially our daughter, Emilee.

This is my only chance to try and convey to you the impact Keith's murder has had on my life.

I will start by telling you I have found no words strong enough to accurately describe this to you, but I will try.

Although Keith's death has had an impact on all areas of my life, I will focus on the area that has been impacted the most, which would be the impact it has had on me as Emilee's mother.

After Emilee and I watched Keith struggle for his life for two weeks, waiting, praying, begging God to let us keep him, promising each other that whatever condition God will let Keith live in, we'll be grateful and take care of him, the reality of that is that Keith had a living will.

He would not have wanted to stay on this Earth as a burden to anyone.

As Keith's healthcare surrogate, I had to deal with the heartbreaking experience of having to sign the legal papers to take him off life support.

I remember standing, clutching my daughter of 15, as she was bent over her father with one hand on his heart and the other stroking his hair, me holding her as she listens to the sound of her father struggling to breathe, leaning as close as she can to his ear, hoping her father can hear her saying, "Daddy, it's okay. Please don't struggle anymore. I will be okay. I love you and I know you will still be with me.

"Please, Daddy, go to heaven and be with God. Please, Daddy. I'll be okay. I love you."

Listening to my daughter's pleas, begging her father to let go so he could be at peace as she presses her hand down even harder to try and keep feeling his now fading heartbeat.

My sweet young daughter waiting to feel her father's heart stop beating and the heart monitor to stop beeping.

Ironically, there was a bad storm we could

see out the window. It got very dark and was thundering and lightning.

We were able to leave the hospital -- when we were able to leave the hospital, there was a beautiful rainbow arching over the hospital to the east.

Emilee and I choose to believe it to be a sign that her father was letting us know he was now at peace.

My faith gives me the comfort to know that Keith is now safe, home and at peace; however, Keith's death is forever etched in my thoughts.

It is the first thought when I wake and the last when I try to go to sleep.

I have to take three antianxiety and depression medications daily since Keith's death almost four years ago.

Over the past years since Keith's death, family, friends and acquaintances meaning well have said to us, "Time heals all," "I am sorry you have not yet had closure," or "Sorry this trial is going to bring back all these memories or make you relive this experience."

I cannot express to you enough that there has not been one single day, hour or minute that passes without me thinking about how Keith died.

I cannot control these thoughts because there is always something that reminds me of it.

Driving by Keith's house several times a day, a roll of duct tape, a bedpost, a passing ambulance, a dark cloud or even a beautiful rainbow, and sometimes just a certain word.

I remember and relive it every day. Closure is a word that they use to suggest that you can put this behind you now.

This memory will always be part of me. I only have learned to live with it. I do pray that a time will come that a happy memory will come first.. So far it does not.

I am older and have lived my glory days. Our daughter, Emilee, however, has many more to live.

The right to have her father here on this Earth to share all those glory days with her has been dramatically stolen from her: events such as college graduation, her wedding, and Keith becoming a grandfather.

To sum this up, the worst impact Keith's

> death has had on my life is that, as Emilee's mother, I cannot fix this.
>
> Knowing that this beautiful wonderful being that Keith and I created, our daughter Emilee, is going to have to carry these horrible memories with her for the rest of her life.
>
> Thank you. (V14 2796-2801)(emphasis added).

The highlighted portions of Madgalene Cope's statement were objected to by Defense counsel. In support of his objection, he argued the following:

> MR. NIELSEN: Yes, Judge. In addition, the jury's going to be instructed that – you know, in reference to certain aggravators I believe State's asking for.
>
> And this discussion, the graphic detail of what was going on in the hospital and what was going on with Mr. Cope, is ver prejudicial in that regard.
>
> And as the Court knows, the victim-impact testimony is not supposed to count in any way towards aggravators, Judge.
>
> I mean, some of this language about him turning colors and so forth, I mean, leaning down and hearing his breath, and it's also third party, Judge.
>
> This is the mom writing about what the daughter went through. If it's – you know, that – I have -- that's a whole nother little twist there, another layer of it.
>
> I mean, I'll respect your ruling, Judge, but I – I would express concern and through case law that an area of problem with death-penalty cases is victim-impact testimony. (V14 2729-2730).

The highlighted portions of Madgalene Cope's statement are clearly comments about the crime when she refers to "duct tape," "bed posts," and "ambulance." Her statement about the condition of the victim in the hospital is also a comment about the crime

considering that HAC was on the table. Her comments regarding her daughter's reactions are not relevant to the uniqueness of the victim, and were mentioned only to beseech the jury for sympathy. Much of her statement above is in violation of the Mr. Jordan's Constitutional Due Process rights, as well as Section 921.141(7), Florida Statutes (1996).

The third victim impact statement read to the jury was from the victim's aunt – Lucinda Jenkins. While most of the items objected to by defense counsel were redacted, the statement was not brief, and much of the statement violated due process as well as Florida Statutes. The last three pages has nothing to do with the victim's uniqueness to the community, but only what he will never be able to do in the future. Again, this is a statement eliciting sympathy from the jury. The following part of Jenkins' statement should have been redacted as it constituted fundamental error:

> He never loaned his vehicle out to others to drive, not even me. (V14 2791).
>
> When we first found Keith, I could not understand how such a thing could happen to him. Sleep left me for days.
>
> "When I got still or tired or tried to rest, I could not get the image of Keith out of my mind.
>
> "In the beginning, the shock of the circumstances of Keith's injuries caused tears to run down my face uncontrollably. Some things are worth shedding tears over.
>
> "These days I ponder on things. I would just as soon wipe the month of July out of existence.
>
> "Keith died July 13, 2009. On my birthday, July 14, 2009, a Volusia County medical examiner

did his autopsy.

"Countless years of happy memories of family celebrations, family vacations, taking trips, going places, doing fun exciting things, all joyous memories are gone forever.

"Keith will never hold my hand again. He will never come to my house for a surprise visit again.

"We will never cook together ever again. We will never walk the trails of the state park ever again.

"Keith will never hug me again. We will never go see a Clint Eastwood movie ever again.

"I will never see those Jenkins blue eyes wink at me, never again.

"I will never see the pure pleasure of joy sprinkled in those pools of blue when he looked at his daughter.

"Keith will never tell any of us that he loves us. Now all is gone.

"When I hear a diesel truck engine, my heart jumps. When I see a white work truck with tool boxes mounted on the sides and a ladder rack on top, my heart drops.

"All of him, all he ever would be or hope to be, gone.

"On the first anniversary of Keith's death, Dale and them were here, and Emilee were here.

"We planted a tree for Keith in my front yard, a fishhook weeping blue atlas, a perfect tree for Keith.

"The tree is trained to twist, and it's badly bent like a fishhook. It is tall and stately with long weeping branches of silvery blue.

"I can watch Keith's tree from my bedroom window. It brings me comfort.

"At times I wish the breeze catch -- I'd watch the breeze catch the branches, gently causing them to sway to and fro.

"I think of Keith, his gentle sweet spirit, his successes, his failures and how everybody liked him, how even to this day I feel responsible for Keith.

"A part of me has been taken away. My loving beautiful memories of Keith are now encased forever in a tangled sense of horrible grief that I cannot put to rest. (V14 2793-2795)(emphasis added).

The statement above is highly prejudicial and does not comply with the requirements of *Payne v. Tennessee*, 111 S.Ct. 2597, 501 U.S. 808, 115 L.Ed.2d 720 (1991); or Section 921.141(7), Florida Statutes, as it is a violation of due process.

The Court in Payne held the following:

> "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Id. at 2608.

* * * *

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. Id. at 2609.

In her concurring opinion, Justice O'Connor made the following observation:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." *Ante,* at 2609. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment. Id. at 2612.

Florida has chosen to allow the admission of victim impact evidence through Section 921.141(7). However, that statute has limited the content of such evidence to the "**the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.**"

That didn't happen here. As evidenced by the statements above, they went far and beyond the dictates of the statute. They contained comments on the crime, as well as an attempt to solicit the sympathy of the jury. They certainly weren't brief, as suggested by Justice O'Connor. Id. at 2612.

This Court in *Windom v. State*, 656 So.2d 432 (Fla. 1995), upheld Appellant's interpretation of Section 921.141(7), as follows:

> The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." § 921.141(7), Fla.Stat. (1993). **Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7).** Id. at 438. (emphasis added).

The inadmissible impact evidence presented by the State became a focus of the penalty phase that violated Mr. Jordan's due process rights as well Section 921.141(7), Florida Statutes. The trial court abused its discretion by allowing the impact statement into evidence.

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO FIND AS A MITIGATING CIRCUMSTANCE THAT JORDAN'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

Mitigating circumstances must be found if established by the "greater weight" of the evidence. *Ferrell v. State*, 653 So.2d 367 (Fla. 1995). Conversely, a trial court may reject a proposed mitigating circumstance only if the record contains competent, substantial evidence to support the court's rejection. *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990); see also *Cook v. State*, 542 So. 2d 964, 971 (Fla. 1989) (trial court's rejection will not be disturbed if record contains "positive evidence" to refute mitigating circumstance). Thus, when expert testimony and opinion support a mitigating circumstance, a trial judge may reject the testimony and opinion only where the record contains substantial, competent evidence to refute it. See *Coday v. State*, 946 So. 2d 988 (Fla. 2007); *Walls v. State*, 641 So. 2d 381 (Fla. 1984); *Nibert*.

In rejecting this mitigator, the trial court stated:

> Dr. Danziger and Dr. Mings were examined and cross-examined regarding this mitigating factor, but based on the evidence presented during the guilt phase and the penalty phase, this Court finds that no credible evidence was presented to substantiate this mitigating

> circumstance even by the preponderance of the evidence... (V5 809).

Unfortunately, the trial court's order fails to state what specific evidence it was relying upon when making its decision. Dr. Danziger diagnosed Mr. Jordan as follows:

> A. Yes. I was able to make a diagnosis.
>
> Q. And what was it?
>
> A. Well, in psychiatry, we have a technique or standard forms we use. It's called a five-axis diagnosis, and I'll try and go through it.
>
> Axis, a-x-i-s, one refers to major psychiatric diagnosis. And on that I wrote that he had bipolar disorder, type one, rapid cycling.
>
> And type one refers to full-blown episodes of mania, and rapid cycling means frequent episodes of both mania and depression.
>
> Also on axis one, I diagnosed a polysubstance dependence, meaning dependence upon multiple substances, but I wrote that it was in remission, meaning it wasn't active in the controlled environment at the jail.
>
> On axis two, I diagnosed antisocial personality disorder. (V4 2933-2934).

Mr. Jordan had informed Dr. Danziger that he was not on his medication during the timeframe surrounding the incident. Dr. Danziger described how bipolar individuals suffer from extreme mood swings.

Mr. Jordan had expressed that he had not planned the robbery. In addition, Mr. Jordan had mentioned to his friend Mr.

Yarrow that he (Jordan) and Mr. Cope had been partying by drinking, doing cocaine, and soliciting prostitutes, and that he, Mr. Jordan, had just snapped (V11 2158).

Testimony during the penalty phase revealed that when Mr. Jordan came to Hollywood, Florida, to visit Mr. Powell and Ms. Haque on Friday, June 26, 2009, Mr. Jordan was anxious, jittery, bouncing around, not his usual self, going off on a tangent, and upset (V11 2001; R11 2066-2067).

According to Mr. Yarrow, Mr. Jordan was antsy, nervous, sweating, almost felt like throwing up, assumed fetal positions, shitting on himself, the runs, like having detox, like a withdrawal real bad (V11 2166).

Ms. Sanya Corday-Rochlin was with Mr. Jordan just before he went to Keith Cope's residence in Edgewater. She indicated that Mr. Jordan was not taking his medication, and his actions and personality were negatively affected when he didn't. While on his medication, he was sweet and kind, but when he was off, Mr. Jordan was emotional, angry, and irrational. After the incident, but before his arrest, Mr. Jordan spoke with Ms. Corday-Rochlin and she indicated he wanted to commit suicide. When she spoke with him on the phone, he sounded worse than before he left to go to Cope's house (V15 2821-2823).

Appellant concedes that neither of the two defense experts specifically stated that "Jordan's ability to conform his

conduct with the law was substantially impaired." Defendant also acknowledges this court's holding in *Allen v. State*, 2013 WL 3466777 (Fla. 2013). This Court stated:

> Neither of these experts testified that Allen's health condition *substantially* impaired her ability to conform her conduct to the requirements of law, as mandated in the express language of section 921. 141(6)(f).

However, undersigned counsel is bewildered as to this Court's finding regarding Section 921.141(6)(f)'s express language, which states: "The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired." Counsel could find nowhere within the express language of the statute requiring experts to testify to those specific words in order for the mitigator to apply.

Earlier in the Allen opinion, this Court stated:

> "Mitigating evidence must be considered and weighed when contained 'anywhere in the record, to the extent it is believable and uncontroverted.' " *LaMarca v. State,* 785 So.2d 1209, 1215 (Fla. 2001) (quoting *Robinson v. State,* 684 So.2d 175, 177 (Fla. 1996)).

Appellant contends that where this mitigator is supported by competent and substantial evidence anywhere in the record, the trial court must consider and weigh it. However, counsel is confused whether this court is specifically finding that even if there is substantial and competent evidence in the record to

support the finding of this mitigator, the trial court cannot make that finding unless “an expert specifically opines that the defendant’s health condition substantially impaired his ability to conform his conduct to the requirements of the law.”

Appellant contends there is no such express language mandated within the statute. If that were true, the trial court erred finding that the defendant had proven the mitigator of extreme mental or emotional disturbance. No expert testified to an opinion of such a mitigator, yet the trial court found that mitigation was proven.

Therefore, the Appellant has to assume the trial court is permitted to make such a finding when the record supports the mitigator anywhere within the record, even though no expert testified to such an opinion.

The trial court's rejection of this mitigating circumstance was an abuse of discretion, because the trial court's ruling is not supported by competent, substantial evidence.

ISSUE V

THE DEATH SENTENCE SHOULD BE REVERSED UNDER THIS COURT'S PROPORTIONALITY REVIEW.

This court should reverse the death sentence in favor of life sentences because the aggravating and mitigating factors found by the trial judge do not support a conclusion that this case is among the most aggravated and the least mitigated of all first-degree murder cases. "The Legislature has reserved application of the death penalty only to the most aggravated and least mitigated of the most serious crimes." *LaMarca v. State*, 785 So. 2d 1209, 1216 (Fla. 2001) (citing *Jones v. State*, 705 So.2d 1364, 1366 (Fla. 1998)).

Two of the three aggravating factors found by the trial judge has a technical characteristic that must be considered for the proportionality analysis. First, this court should not include the robbery aggravator in the proportionality analysis because the evidence was insufficient to show that the perpetrator was engaged in a robbery. In addition, it contains the same circumstance by which the jury made its verdict.

Even if that aggravator is upheld, the tenuous nature of the evidence used to find this factor is relevant in the proportionality analysis. See *Johnson v. State*, 969 So.2d 938 (Fla. 2007) (explaining that proportionality review "entails 'a *qualitative* review by this Court of the underlying basis for

each aggravator.’”) (quoting *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998)).

One statutory mitigator and thirty-seven nonstatutory mitigators are a weighty number of mitigating factors, which were found to be proven and weighed by the trial judge. The trial judge afforded moderate weight to the statutory mitigator and either little or some weight to the others, which demonstrates this case is not among the least mitigated to warrant the death sentence. Each factor shows that Mr. Jordan has been physically and emotionally abused, suffers from mental difficulties, suffers from substance abuse, helps others, is a hard worker, is suicidal, has memory impairment, and is loved by many people.

In *Livingston v. State*, 565 So.2d 1288, 1292 (Fla. 1988), this court reversed a death sentence where there were two aggravators: previously convicted of violent felony and committed during armed robbery. Absent the HAC factor in this case, which does not apply as previously argued, Mr. Jordan’s aggravators are the same as in *Livingston*. In Mr. Jordan’s case, the court gave little weight to the prior violent felony aggravator.

See *Green v. State*, 975 So.2d 1081, 1088 (Fla. 2008) (“When conducting a proportionality review, we consider the totality of circumstances and compare each case with other capital cases.”).

Because the aggravating circumstances all possesses diminishing qualities, the mitigating factors are numerous and substantial, and factually similar cases were not deserving of a death penalty, this court should reverse and remand for life sentence.

ISSUE VI

THE FLORIDA DEATH PENALTY STATUTORY SCHEME IS FACIALLY UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

Prior to trial and prior to waiving his right to a jury, Jordan filed a "Motion to Declare Florida's Death Penalty Unconstitutional under *Ring v. Arizona*," challenging the Florida death penalty statute on the ground that it violated the Sixth and Fourteenth Amendments to the U.S. Constitution and *Ring v. Arizona*, 536 U.S. 594 (2002). (V2 366). The U.S. Supreme Court has not specifically addressed whether the Florida death penalty statutory scheme violates the U.S. Constitution pursuant to R*ing*. See *Evans v. Sec'y, Florida Dep't of Corr.,* 699 F.3d 1249, 1261 (11th Cir. 2012) ("The Supreme Court has not decided whether the role that a Florida jury plays in the death-eligibility determination is different enough from the absence of any role, which was involved in *Ring*, for the Florida procedures to be distinguishable."), cert. denied, 133 S.Ct. 2393 (2013). This Court should reconsider its analysis of the *Ring* decision and hold the Florida death penalty statutory scheme facially unconstitutional pursuant to the Sixth and

Fourteenth Amendments because the statute relies on the trial judge as the fact-finder for an aggravating circumstance and does not require a unanimous jury recommendation. This issue was preserved by the pretrial motion that was heard and denied on July 28, 2011 (S1 170-172).

CONCLUSION

Based on the foregoing argument, reasoning, and Citation of authorities, the Appellant, Mr. Joseph Jordan, respectfully asks this Court to reverse the judgment and death sentences.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant Attorney General Stacey Kircher electronically stacey.kircher@myfloridalegal.com, and mailed to Joseph Jordan, DOC #180632, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1000, this 27th day of July, 2014.

_/s/ Michael P. Reiter_____
Michael P. Reiter

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Courier New 12 point font.

_/s/ Michael P. Reiter_____
Michael P. Reiter