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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

REPLY BRIEF OF APPELLANT

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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.

At the outset, Appellant points out that this is not the first case where this prosecutor and judge were involved together in a case involving prosecutor misconduct. *Crew v. State*, 2014 WL 4249756 (Fla. App. 5 Dist 2014). The *Crew* trial occurred approximately five months before the instant case. Many of the prosecutor's comments made during the Crew case are similar to the comments made in Appellant's case.

Upon reversing Crew's conviction for cumulative improper prosecutor comments, Judge Berger wrote the following in his concurring opinion:

> Although the trial judge in the instant case properly sustained objections by defense counsel, not once was the jury instructed to disregard the improper comments, nor was the prosecutor called to task for his conduct.
>
> In my view, sitting silent absent an objection by opposing counsel, tacitly, albeit unintentionally, condones such conduct. As Judge Schwartz noted in *Borden, Inc. v. Young,* 479 So.2d 850, 851 (Fla. 3d DCA 1985), "it is no longer—if it ever was—acceptable for the judiciary to act simply as a fight promoter, who

> supplies an arena in which parties may fight it out on unseemly terms of their own choosing....” Judges have a responsibility to protect jurors from improper closing arguments. *See D'Auria,* 673 So.2d at 147; Borden, 479 So.2d at 851. Failing to do so demeans the system of justice we serve to protect.

In her dissenting opinion in *Merck v. State*, 975 So.2d 1054, 1067 (Fla. 2007), Justice Pariente discussed this court’s long established rulings on improper comments:

> The question presented is how many times will this Court condemn a specific closing argument and how bad does a closing argument have to be before we will reverse a verdict based on improper prosecutorial comment. In my view, the cumulative effect of multiple improper closing arguments, many of which have been repeatedly condemned by this Court, unquestionably crossed the line in this case and should not be tolerated by this Court.

Appellant acknowledges this Court in *Power v. State*, 886 So.2d 952, 963 (Fla. 2004), states: “[f]undamental error is the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.”

However, as expressed by Judge Harris in his concurring opinion in *Ward v. State*, 765 So.2d 299, 303 (Fla. 5th DCA 2000), how can we tell what is fundamental error?

> “But how can we tell if an unpreserved error is or is not fundamental, that is, whether it has denied defendant a fair trial or not, unless we first conduct a harmless error analysis? Let me be direct. Can there be a harmful error-that is, one that has adversely affected the outcome of the trial-that is not

fundamental? If so, what are those errors?”

COMMENTS ON REMORSE

Appellee takes the following position regarding all of the prosecutor’s comments during closing argument: The prosecutor’s comments, taken in the totality of the argument, were within the permissible bounds of advocacy (AB43). The same argument was made by Appellee in the Crew case, but rejected by the District Court. This Court should do the same.

In *Kokal v. Dugger*, 718 So.2d 138 (Fla. 1998), and *Shellito v. State*, 701 So.2d 837 (Fla. 1997), this court found that a brief reference to remorse was insufficient to constitute fundamental error. However, this court also indicated “We have clearly stated that lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing.” Id. at 842. As in *Jones v. State*, 569 So.2d 1234 (Fla. 1990), this court held: “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**?’”

At page 46 of Apellees’s Answer Brief, Appellee attempts to minimize the harm caused by the prosecutor’s improper comments on remorse because the trial court made no mention of remorse in

the sentencing order. First, Appellee fails to consider that the jury members are instructed that they may consider evidence from both guilt and penalty phases, and their recommendation is given great weight. Second, Appellee fails to consider the effect the comments had on the jury's recommendation.

At page 45 of Appellee's Answer Brief, Appellee cites to *Bigham v. State*, 995 So.2d 207, 214 (Fla. 2008), for the proposition that "A comment on a lack of evidence is not the same thing as referencing facts that were not admitted into evidence." Appellant contends *Bigham* does not hold for the proposition suggested by Appellee. In *Bigham*, this court held that the comment about the case's theory was not improper. (For convenience, the comment was that Bigham choked the victim at virtually the same time as the sex act took place.) Surely, Appellee is not suggesting that the prosecutor's theory in this was case was Appellant's lack of remorse? As stated in Appellant's initial brief, "remorse" does not appear anywhere in the transcript from testimony or by Appellant's argument. It only appears in comments by the Prosecutor.

This Court has clearly indicated for many years that comments by a prosecutor on remorse is error, whether in the guilt phase or penalty phase.

At page 44 of Appellee's Answer Brief, it is argued that Appellant provided no authority that anticipatory rebuttal is

improper. In *Bates v. State*, 649 So.2d 908 (Fla. 4th DCA 1995), it was found that comments were improper concerning an uncalled witness as an anticipatory rebuttal. Appellant contends the arguments of rebuttal should be left for rebuttal arguments.

In fact, this case was worse because the prosecutor's comments about "no remorse" were made concerning the Appellant's right to remain silent; it also shifted the burden of proof to the Appellant by suggesting to the jury that there was some legal requirement by the Appellant to show remorse as a defense.

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments, fundamental error exists in this case.

EXTORTING THE JURY

Obviously, Appellant and Appellee will have to agree to disagree. Appellant cannot see how Appellee would argue at page 49 of their Answer Brief that: "It is clear that the prosecutor here did not extort the jury for a conviction or a particular sentence…," when you review the words he used. For example: "The defendant has confessed to the crime, and there is no other explanation" (R2529); and, "…the rest of this stuff doesn't matter so much. We gave you the proof necessary in order to do your job." (R2539).

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments, fundamental error exists in this case.

MISSTATING THE LAW AND FACTS

At page 52 of Appellee's Answer Brief, it is argued that the prosecutor's comment about Appellant's confession was a fair comment on the evidence, and is supported by *Henyard v. State*, 689 So.2d 239, 250-51 (Fla. 1996). Appellant might have agreed with Appellee's position if the prosecutor would have argued merely that the Appellant's statements to law enforcement supported first-degree murder and left it there.

However, that isn't how the prosecutor left the argument. Immediately after he finished telling the jury that Appellant confessed, the prosecutor misstated the law when he argued: "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." In essence, the prosecutor is telling the jury that they can believe "his" evidence and disregard "their" evidence. Not proper. *Charriez v. State*, 96 So.3d 1127 (Fla. 2012).

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality

with all other improper comments, fundamental error exists in this case.

GOLDEN RULE

Appellee argues at page 53 of their Answer Brief that the prosecutor did not describe the victim's suffering or ask the jury to imagine the experience of the victim. He just noted the contrast of actions between the victim and defendant over a certain period of time.

Apparently, Appellee missed the prosecutor's statement to the jury about how Keith Cope spent his last hours:

> 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. (R2528).

Even if this statement does not meet the traditional Golden Rule argument, it certainly falls within the "subtle" Golden Rule argument. *Urbin v. State*, 714 So.2d 411 (Fla. 1998).

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments, fundamental error exists in this case.

CASE LAW

Appellee correctly points out that Appellant's cite to *Proffit v. State*, 970 So.2d 416 (Fla. 4th DCA 2008), was incorrect, and subsequently cited to Proffit correctly.

Appellee argues at page 39 of its Answer Brief that: "The prosecutor did not mention it again [referring to case law], so it is an isolated incident which was given no context." The Appellee is inaccurate. Prior to Appellant's objection, the prosecutor began to explain the law regarding the elements of first-degree felony murder, and he began to bolster that argument by stating: "The way the case law interprets that, the way the law—" (R2530). Almost immediately after the trial court denied the motion for mistrial, the prosecutor began arguing the exact same thing, minus the word "case."

> MR. WILL: Thank you.
> Back to point number two, ladies and gentlemen, the death occurred as a consequence of and while Joseph Jordan was engaged in the commission of attempting – or attempting to commit a robbery.
> The way that this phrase is interpreted, you see, Joseph Jordan committed a robbery. There's no doubt.
> But under this phrase, it may look like Keith Cope has to die there in the house. That's not what the law requires.
> The law requires the injury to have occurred during and as a consequence of the robbery.
> Joseph – or Keith Cope can die later. He can die outside the home. He can die in the hospital sometime later.
> The law doesn't require him to drop dead immediately on the scene… (R2535).

Other than not saying the word “case,” the prosecutor immediately told the jury how the “law” should be interpreted. That job is for the Court, not the prosecutor. By initially mentioning “case law,” and then referring to the exact same argument about how the law is interpreted, improperly informs the jury that case law supports the prosecutor’s argument. The context of case law was clear in the prosecutor’s argument.

The trial court erred in failing to grant the motion for mistrial. Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments, fundamental error exists in this case.

DENIGRATING JORDAN’S DEFENSE/
ATTEMPTING TO RIDICULE DEFENSE COUNSEL

At page 57 of Appellee’s Answer Brief, it is argued that the Prosecutor did not denigrate Appellant’s defense or ridicule Defense Counsel.

At the beginning of the Prosecutor’s rebuttal argument he stated:

> 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. (R2672-2573).

This type of comment by the prosecutor not only denigrates the Appellant’s defense, but states facts not in evidence, comments on Appellant’s right to remain silent, and shifts the burden of proof.

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments fundamental error exists in this case.

MISSTATES THE LAW

At page 58 of Appellee’s Answer Brief, it is argued: Appellant ignores the comment immediately preceding the characterization of “accidental or unintentional,” where the prosecutor states “committing inherently dangerous crimes and people dying as a result,” which is a fair explanation of felony murder. Appellant did not ignore any aspect of the prosecutor’s comment. Appellant contends that Appellee apparently missed the reference to “accidental or unintentional” within the same sentence that the prosecutor references first-degree felony murder: “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.” (R 583)

There is no question that that comment is a misstatement of the law. Notwithstanding the trial court's reading of the law of felony murder, juries tend to believe prosecutors. No instruction can cure the prosecutor's suggestion that felony murder fills the vacuum in the law to include "accidental" and/or "unintentional" deaths.

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments fundamental error exists in this case.

DON'T LET HIM GET AWAY WITH THIS

At page 59 of Appellee's Answer Brief, Appellee relies upon *Patrick v. State*, 104 So.3d 1046, 1064 (Fla. 2012) *cert. denied*, 134 S.Ct. 85 (2013), in support against Appellant's complaint. However, Appellee misreads this Court's finding in that case. This Court, in *Patrick*, held that the comment did not constitute a comment on the Golden Rule or claim that the defendant would kill again.

However, in *Barrios v. State*, 50 So.3d 708 (Fla. 4th DCA 2010), and *Davis v. State*, 937 So.2d 273 (Fla. 4th DCA 2006), both courts found the prosecutor's comment that the jury should not "let the defendant get away with it" was sufficient error to reverse, in conjunction with other errors. This Court should find the same in this case.

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments fundamental error exists in this case.

INCONSISTENT VERDICT

At page 82 of Appellee's Answer Brief, it is argued that the prosecutor was merely arguing that legally inconsistent verdicts cannot stand. If that is what the prosecutor stated, Appellant would not be complaining. However, that is not what the prosecutor told the jury; this is what he told the jury: "You cannot find him guilty of grand theft and first-degree murder. You cannot do it. Do not do that."

A legally inconsistent verdict was found in the very case cited by Appellee. *State v. Hargrett*, 72 So.3d 809, 811 (Fla. 4th DCA 2011). As stated in *Hargrett*, the verdict may not stand, but the jury has a right to enter that verdict.

The jury had a right, if they chose, to find the defendant guilty of grand theft (lesser offense to robbery) and guilty of first-degree felony murder. The *Hagrett* court pointed out the following from *Brown v. State,* 959 So.2d 218, 220 (Fla.2007): "The trial court vacated Brown's felony murder conviction as 'legally inconsistent' with the theft conviction, on the theory that an acquittal of armed robbery, implied by the guilty verdict of the 'lower' offense of theft, precluded the finding

that the defendant had committed that felony, as required for a felony murder conviction.” Id. at 220.

It was improper for the prosecutor to tell the jury they CANNOT find the defendant guilty of grand theft and first-degree felony murder because they have a right to grant leniency to the defendant.

Notwithstanding whether this particular improper comment constitutes fundamental error by itself, when viewed in totality with all other improper comments fundamental error exists in this case.

CUMULATIVE ERRORS

“Where multiple errors are found, even if deemed harmless, ‘the cumulative effect of such errors' may ‘deny to defendant the fair and impartial trial that is the inalienable right of all litigants.’ ” *Hurst v. State,* 18 So.3d 975, 1015 (Fla. 2009) (*quoting Brooks v. State,* 918 So.2d 181, 202 (Fla. 2005) (*Brooks II*)). That holding applies here.

ISSUE II

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

Appellee argues there is substantial evidence to support the trial court’s finding of HAC. In so arguing, they point to the highlighted portions of the trial court’s order. (AB 65-

55). The trial court's order states that part of the victim's nose was covered with duct tape[1]. However, Matthew Powell, at R1987, stated he cut the tape from around Cope's mouth. Mr. Powell never mentioned he saw tape around the victim's nose. Officer Eric Seldaggio did not mention he observed tape around Cope's nose either (R1854). There was no competent substantial evidence to support such a finding. Common sense dictates that if Mr. Cope's mouth and nose were taped, the cause of death would have been asphyxiation.

Appellee cites *Patrick v. State*, 104 So.3d 1045 (Fla. 2012), and *Kocaker v. State*, 119 So.3d 1214 (Fla. 2013), in support of their argument. Both of these cases were based upon the theory of premeditation. That does not apply here. In *Patrick*, the victim was beaten to death and the court found death by beating is per se HAC. Not applicable here. In *Kocake*r, the victim dies of stab wounds and carbon monoxide. Not applicable here.

Appellee is correct is asserting that "[T]he trial judge's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent, substantial evidence in the record." *Chamberlain v. State*, 881 So. 2d 1087, 1106 (Fla.

[1] The prosecutor argued during closing that the Mr. Cope's nose was covered with tape. (R1700).

2004) (quoting *Barnhill v. State*, 834 So. 2d 836, 850–851 (2002)(emphasis added).

In *Gregory v. State*, 118 So.3d 770 (Fla. 2013), this court held the standard of review for the sufficiency of evidence of an aggravator is competent substantial evidence. However, when there is a mixed question of law and fact, the standard of review is "de novo." *Connor v. State*, 803 So.2d 598 (2001). Appellant has argued that the trial court in the instant case has utilized the wrong law in applying the HAC aggravator.

The trial court did not apply the proper rule of law, nor was there sufficient competent substantial evidence to support HAC.

ISSUE III

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

Appellee argues that the impact statements admitted were not an abuse of discretion and complied with Federal and Florida law.

In *Windom v. State*, 656 So.2d 432 (Fla. 1995); *Kormondy v. State*, 845 So.2d 41 (Fla. 2003), and *Sexton v. State*, 775 So.2d 923, 933 (Fla. 2000), this Court seemed to suggest that strict application of the language of the statute would be mandatory.

> Nevertheless, we caution that any victim impact evidence must conform strictly to the parameters of the statute and our prior case law in order to avoid any potential danger of the testimony exceeding the purposes for which it is admissible. *Sexton*, 775 at 933. (emphasis added).

However, in more recent cases, this Court has appeared to allow comments about how the death has affected family members: *Baker v. State*, 71 So.3d 802 (Fla. 2011); Jackson v. State, 122 So.3d 447 (Fla. 2013), and Kaliz v. State, 124 So.3d 185 (2013). These cases seem to expand what this Court has previously held regarding admissibility of impact evidence.

While the Court in *Payne v. Tennessee*, 111 S.Ct. 2597, 501 U.S. 808, 115 L.Ed.2d 720 (1991), expressly states: “unique loss to society and in particular to his family,” Section 921.141(7), Florida Statutes (2006), makes no reference about impact to family members.

Appellant contends that this Court’s newer cases constitute legislative rewriting of the statue by expanding the definition of what is permitted impact evidence. If the legislature wanted to include impact upon family members they would have said so in the statute.

Further, Appellee argues that the admitted impact evidence does not constitute a comment on the crime. Appellee is wrong. In Issue II above, Appellee argues how Mr. Cope’s suffering in and out of the hospital was competent substantial evidence to

support HAC, but then argues that family members' comments in their statements about how they and Mr. Cope's suffered in the hospital is not a comment on the crime; Appellant contends that this is an inconsistent position.

The impact evidence introduced in the penalty phase at trial exceeded not only the parameters of Florida Statutes, but the parameters set out in *Payne* as well, and violated the Appellant's due process rights under the Federal Constitution, as well as Florida's.

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.

At page 87 of Appellee's Answer Brief it is stated: "Furthermore, Appellant identifies no evidence on which the trial court could have relied, nor does he point to any error in the trial court's analysis of the witnesses."

Apparently, Appellee failed to read pages 54 and 55 of Appellant's Initial Brief. The same evidence was available to the trial court regarding the two statutory mitigators: 921.141(6)(b)- under the influence of extreme mental or emotional disturbance, and 921.141(6) (f)- capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was

substantially impaired. However, the trial court found the first statutory mitigator, but not the second (R809).

Appellant could find nowhere within the record where the experts specifically opined that the first statutory mitigator was present, but not the second. Yet, the trial court found the first statutory mitigator was proven. Nowhere within the trial court's order does it refer to any of the facts raised at page 54 and 55 of the initial brief to explain why there was no "credible evidence was presented to substantiate this mitigating circumstance…" (R809). The court merely relied upon the testimony of the experts to find that this mitigator was not proven.

The only real question is this: is it competent substantial evidence to find a mitigator was not proven because an expert failed to opine that it exists, even though there was substantial testimony presented that tended to prove the mitigator? Appellant contends that relying merely upon expert opinion and ignoring other evidence which substantiated the mitigator is an abuse of discretion.

ISSUE V

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

At page 91 of Appellee's Answer Brief it is argued: "However, this Court has repeatedly stated that it is not its

purview to re-weigh the aggravators and mitigators found by the trial court." Yet, that is exactly one of the reasons why the United States Supreme Court in *Proffit v. Florida*, 428 U.S. 242, 253; 96 S.Ct. 2960; 49 L.Ed.2d 913 (1976) found Florida's sentencing scheme constitutional:

> Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." (emphasis added).

In 1973, this Court held the following regarding mitigation:

> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. (emphasis added).

Dixon v. State, 283 So.2d 1, 7 (Fla. 1973)(superseded by Statute on other grounds). The Free Online Dictionary defines "unmitigated" as: 1. Not diminished or moderated in intensity or severity; unrelieved: unmitigated suffering; 2. Without qualification or exceptional absolute: an unmitigated lie. In recent cases this Court has changed the standard to "least mitigated." While "least mitigated" suggests some mitigation, "unmitigated" suggests absolutely no mitigation.

In a recent case, the majority of this Court has upheld proportionality review: *Yacob v. State*, 136 So.3d 539 (Fla.

2014). In *Yacob*, as in this case, the jury's recommended vote was 10-2 in favor of death.

This Court, in *Yacob*, has recognized that this Court's holding in *Dixon* was one of the reasons Florida's death penalty scheme was found to be constitutional:

> This Court has also explained that in enacting section 921.141, "the legislature intended the death penalty to be imposed 'for the **most aggravated**, the most indefensible of crimes.' " *Fitzpatrick,* 527 So.2d at 811 (quoting *Dixon,* 283 So.2d at 8). As stated in *Dixon,* "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the **most aggravated** and **unmitigated** of most serious crimes." 283 So.2d at 7. "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." *Fitzpatrick,* 527 So.2d at 811.
>
> Several of the reasons that led this Court to uphold Florida's amended capital punishment statute in *Dixon* were critical to the United States Supreme Court's subsequent decision to uphold the constitutionality of capital punishment in the aftermath of *Furman.* Id. at 547.

Yacob had only one aggravator and six nonstatutory mitigators, which were given either little or no weight. Granted, three aggravators were found in Appellant's case. However, it cannot be argued that Appellant's case is "unmitigated." In comparison to *Yacob*, Appellant's mitigation far exceeds *Yacob*'s, to include: one statutory mitigator, a mental health mitigator, as well as 38 nonstatutory mitigators.

Certainly Appellant's mitigation is neither "unmitigated" nor "least mitigated."

This Court in *Yacob*, 136 So.3d at 548, cites to *Proffit*, *Supra*, and quotes certain passages from *Proffit*, but perhaps inadvertently leaves out that part where *Proffit* states that the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida.

At 136 So.2d at 549-550, this Court in *Yacob*, for whatever reason, changes the standard that was found constitutional in *Dixon* by changing "unmitigated" to "least mitigated" without explanation:

> As this Court has repeatedly stated, the death penalty is "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Silvia v. State,* 60 So.3d 959, 973 (Fla.2011) (quoting *Terry v. State,* 668 So.2d 954, 965 (Fla.1996)). "Therefore, in deciding whether death is a proportionate penalty, the Court makes a 'comprehensive analysis in order to determine whether the crime falls within the category of both the **most aggravated** and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.' " *Id.* (quoting *Anderson,* 841 So.2d at 407–08).

Someone can only assume that this Court's opinion is that the two terms are indistinguishable, even though the English language suggests otherwise. Nevertheless, Appellant contends that his case does not proportionally qualify for the death penalty.

ISSUE VI

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

Appellant will rely upon arguments made in the initial brief regarding this issue.

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.

JEFFREY DEEN
REGIONAL COUNSEL - 5th DISTRICT

_/s/Michael P. Reiter_____
Michael P. Reiter
FL Bar #0320234
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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 7th day of October 2014.

__/s/Michael P. Reiter____
Michael P. Reiter

CERTIFICATE OF COMPLIANCE

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

__/s/Michael P. Reiter_____
Michael P. Reiter