

IN THE SUPREME COURT OF FLORIDA

JAMES BELCHER,

Appellant,

v.

CASE NO. SC01-1414

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a direct appeal in a capital case. Cover pages of the record incorrectly refer to this case as an appeal from the denial of a motion to vacate judgment and sentence. The record on appeal consists of 22 volumes. The clerk's record including pleadings, orders and pretrial hearings are contained in volumes one through ten and will be designated with the prefix "R" followed by the volume and appropriate page numbers. The trial, penalty phase and sentencing transcripts are contained in volumes 11 through 22 and will be designated with the prefix "T." References to the appendix to this brief will be designated with the prefix "App."

STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

A Duval County grand jury returned an indictment on February 25, 1999, charging James Bernard Belcher with first degree murder and sexual battery for the death of Jennifer Embry occurring on the 8th or 9th of January 1996. (R1:14-15) Belcher pleaded not guilty on February 26, 1999. (R4:655-657) The case proceeded to a jury trial commencing on March 26, 2001. (T11:1) On March 30, the jury found Belcher guilty of first degree murder as charged in count one under both premeditation and felony murder theories. (R3:459; T18:1404) As to count two, the jury found Belcher guilty of sexual battery with great force as charged. (R3:460; T18:1404) The penalty phase of the trial was held on April 11, 2001. (T20:1429-T22:1844) After hearing additional evidence, the jury recommended a death sentence by a vote of 9 to 3. (R3:582; T22:1840) The trial court conducted a Spencer hearing on May 3, 2001. (T22:1848)

On May 17, 2001, Circuit Judge Peter L. Dearing sentenced Belcher to death for the murder and 25 years in prison for the sexual battery. (R4:627-632h;T22:1862-1883) (App. A) The court found three aggravating circumstances: (1) a previous conviction for a violent felony; (2) homicide occurred during a sexual battery; and (3) the homicide was especially heinous, atrocious or cruel. (R4:632a-632e)(App. A) In

mitigation, the court found 15 nonstatutory mitigating circumstances: (1) Belcher's considerate and generous relationship with his family; (2) the loving relationship between Belcher and his immediate and extended family; (3) Belcher's ongoing encouragement and counsel to family members assisting them from engaging in criminal activity; (4) Belcher's many acts of kindness to others; (5) Belcher's encouragement to his cousins; (6) Belcher's role as a mentor to his family; (7) Belcher's continued availability to counsel relatives even though he was in prison; (8) the fact that Belcher was raised in a high crime area in New York; (9) the fact that Belcher was sent to an adult prison at a young age which impacted on his development; (10) the fact that Belcher never abused alcohol or drugs; (11) Belcher's service as a tutor to younger inmates, including providing counsel which built self-esteem, gave them positive advice, and fostered peaceful resolution of disputes; (12) Belcher's desire to continue to help other inmates in the future and his ability to serve society in that capacity in prison; (13) The fact that Belcher has not been a discipline problem during his recent incarcerations; (14) Belcher displayed proper behavior at trial; and (15) Belcher express sincere remorse and genuine concern for the distress caused to the victim's family. (R4:632e-632f)(App. A) The trial court "... considered each of these mitigating circumstances and has assigned some weight to each with greater weight being assigned to the argument, supported by the evidence, that even

in prison the Defendant continues to benefit society by providing counsel to inmates who sought him out for advice.” (R4:632f-632g)(App. A)

Belcher filed his notice of appeal on June 14, 2001. (R4:637) ***Facts -- Guilt***

Phase

On January 9, 1996, Jennifer Embry did not arrive at her job at Arlington Acute Care Center, and her supervisor and friend, Pamela Lyle, called Jennifer’s brother, Ricky Embry, about her absence.(T15:744-751) Ricky worked for the Jacksonville Fire Department. (T13:570-571) Jennifer, his younger sister, also lived in Jacksonville where she attended Florida Technical College and worked two jobs. (T13:572-577) Ricky checked on his sister frequently, and he had installed a peephole and a security chain on the front door of her townhouse where she lived alone. (T13:573-577) The house also had an alarm system, but it may not have been connected to a monitoring service. (T13:578) After receiving the call from Pamela Lyle, Ricky first tried to call his sister, and then he went to her house. (T13:579-580) He placed his key in the front door, and the door just opened. (T13:581-582) The alarm did not sound. (T13:582-582) He entered and called for his sister. (T13: 582) Upon looking through the house, Ricky found Jennifer’s body in the bathtub of the downstairs bathroom. (T13:582-583) He called 911 for assistance. (T13:583)

Dr. Bonofacio Floro, the medical examiner, secured the body at the scene and later performed an autopsy on Jennifer Embry. (T14:640-682) Floro opined that the cause of death was strangulation and drowning. (T14: 640) Based on an external examination of the body, Floro concluded that the body had been submerged. (T14:645) He also found foaming in the nose and mouth. (T14:645, 651) The foaming is consistent with drowning due to the mixture of water and air in the trachea and bronchial tree. (T14: 656) There was a bruise and an abrasion at the corner of the right eyebrow, bruising on the neck, and a laceration on the right shoulder. (T14:649-652) An internal examination revealed a small hemorrhage on the hyoid bone and bruising. (T14:653) The lungs were filled with fluid.(T14:657) Embry was alive when the strangulation and drowning commenced. (T14:654-656) Although death would not have been instantaneous, strangulation would have produced unconsciousness within a minute. (T14:655-656) The drowning could have occurred after unconsciousness. (T14:656)

During the examination of the body, Floro also found a bruise to the hymen and a small laceration on the vagina. (T14:657-661) These injuries could have been caused by the forcible entry of something into the vagina. (T14:660-661) A specimen retrieved from the cervix, revealed spermatozoa including the heads and tails. (T14:665-668) When first deposited, the spermatozoa will have the heads and tails intact, but as time

passes, the tails will break off. (T14:668-669) Some of the spermatozoa had lost their tails. (T14:669) Sperm can remain viable in a live person for 24 hours. (T14:669) When a person dies, there are more variables, and sperm has been known to survive as much as four weeks. (T14:669-670) Floro said the sperm will keep their tails for three to six days after being deposited. (T14: 669) Based on the presence of the sperm Floro found, he concluded that Embry could have had sexual intercourse within three to six days before her death. (T14:671) Although Floro stated that the laceration to the vagina should not have occurred during consensual sex, he could not say that the sperm was deposited at the time of the injuries. (T14:673-675)

Sheriff's Office crime scene investigators examined the scene, took photographs and collected various items as possible evidence. (T14:606-639) The townhouse was immaculately clean and neat which was consistent with Jennifer Embry's housekeeping habits. (T13:578; T14:609-612, 708) In the bathroom where the body was located, the only items found out of place were green slippers in the middle of the floor and a shower curtain rod which had been pulled down and was being held up with a wash cloth. (T14:614-617, T15:) Testing on the green slippers disclosed that one had a semen stain including intact, non-motile spermatozoa. (T16:1005-1007) A bath towel had been placed on the toilet seat, and a nightgown and undergarments were on the sink vanity. (T14:617-619) The tub had been partially filled with water.

(T14:618, 626-628) The bathroom floor was dry. (T14:616) Some latent fingerprints were lifted from various places in the townhouse, and the ones of value for comparison purposes proved to have been made by Jennifer Embry. (T15:758-772, 784-808) From the downstairs master bedroom, investigators obtained some items including sheets, two mattress pads and a comforter from the bed. (T15:774-775; T16:976-977) One mattress pad had a semen stain including intact spermatozoa. (T16:976-978, 1005-1010)

Anna Alford and Maxine Phillips were Jennifer Embry's neighbors living in the two townhouses adjacent to one side of Embry's residence. (T14:683-684, 690-691) Alford also went to school with Jennifer at Florida Technical College where they both studied computer science. (T14:685-686) On January 8, 1996, Alford had seen Jennifer pull her car into her driveway the night before as she normally did. (T14:686-687) Jennifer did not show up for class the next day which was unusual. (T14:686, 697-701)

Phillips lived next-door to Jennifer's townhouse. (T14:691) She saw Jennifer sometime before 8:00 a.m. on January 8, 1996. (T14:692-693) Later, during the early morning of January 9th around 2:00 a.m., Phillips was awakened by three loud noises from Jennifer's house which sounded like someone falling against the wall. (T14:693-694)

During the course of his investigation, Detective Robert Hinson interviewed James Belcher on August 4, 1998. (T15:896-911) Hinson showed Belcher a photograph of Jennifer Embry and asked if Belcher knew her, had a chance encounter with her or had seen her. (T15:896-911) Belcher stated that he did not know her and had never seen her. (T15:896-911) He stated that he had never had sex with her. (T15:903)

Derrick Scott met Jennifer Embry at Florida Technical College where they were both computer science students. (T17:1176-1183) Although Scott was married, he and Jennifer dated and had sexual relationship from July to November 1995. (T17:1182-1186) They parted friends. (T17:1188-1189) Detective Hinson interviewed Scott in October 1998. (T15:911-914; T17:1192) Scott related having seen Jennifer talking to a man in the parking lot of the school after class sometime before October 1995. (T17:1192-1198) Jennifer was seated in her car and the man was standing beside the car talking to her. (T17:1196-1197) Scott said the man was about six feet two inches tall, medium build with a low cut hair cut, goatee and a scar on his face. (T17:1196-1197) When shown a set of photographs, Scott identified a side view photograph of James Belcher based on the scar. (T17:1191-1194, 1204-1205) Scott identified Belcher in court as the man he saw. (T17:1197-1198)

Elaine Rowe worked as an administrative assistant at Florida Technical College in 1995 through part of 1996. (T17:1211-1213) She worked at the front entrance to the school, and she knew Jennifer Embry. (T17:1213-1214) Rowe stated that one time a man came to the school asking to have Jennifer called from class to speak with her. (T17:1214-1215) The man was African-American, taller than six feet, wore a short haircut and appeared to be in his 30's. (T17:1215-1216) Rowe remembered that he was well-dressed, polite, and had a professional demeanor. (T17:1216) He and Jennifer Embry had a conversation. (T17:1216-1217) Rowe said there were no problems associated with the meeting. (T17:1224) She remembered the event because this was the only time she recalled someone coming to the school asking to see a student. (T17:1216) When shown a group of photographs, Rowe picked out Belcher's photo. (T17:1217-1220; 1225-1230) Rowe also identified Belcher in court. (T17:1222)

Janelle Mueller, a forensic biologist with FDLE, examined several items of evidence for the presence of semen. (T16: 968-979) She found semen present on the vaginal swabs, one of the green slippers found in the master bathroom and on a mattress pad from the master bedroom. (T16:973-9778) Because she had been informed that the body was found in the bathroom, Mueller did not save a sample from the mattress pad for DNA testing. (T16:977-978) Mueller performed DNA testing

on samples from the vaginal swabs and the green slipper using the PCR testing method. (T16:964-966) During the investigation, Detective Hinson obtained DNA samples from several men who had had a sexual relationship or dated Jennifer Embry. (T15:829-837) Mueller compared the DNA samples from these men to the semen samples and was able to exclude all of them as depositors of the semen except Robert Davis. (T16:979-985) She also compared DNA samples from James Belcher and was unable to exclude him. (T16: 985-986) Mueller forwarded the samples to another analyst for DNA testing using the RFLP testing method which can render more information. (T16:965-966)

Dr. James Pollack, a DNA analyst with FDLE, performed DNA testing on samples from the vaginal swabs and slippers and compared them to DNA samples from a number of individuals, including Robert Davis and James Belcher. (T16:1034-1048) He used the RFLP testing method. (T16:1040, 1045) Pollack was able to exclude all of the individuals, except James Belcher, as depositors of the semen found on the exhibits. (T16:1047-1049) Belcher's DNA was a match to the DNA found on the slippers and the vaginal swabs. (T16:1049, 1058)

Dr. Martin Tracey, a professor of biology with expertise in population statistical genetics, testified. (T17:1098-1173) Initially, Tracey checked Dr. Pollock's work regarding the matches of the known DNA to the evidence samples. (T17:1117-1118)

He then calculated the odds of someone other than the known individual with the genetic match to the evidence sample being a contributor of the DNA on the sample using FBI DNA database. (T17:118-1125) Regarding the sample on the vaginal swab, Tracy calculated that the odds of someone in addition to Belcher being the contributor of the DNA at one in two trillion when using the African-American data.(T17:1134) When using the Caucasian data, the odds were one in 400 billion. (T17:1141) The Hispanic data produced odds of one in 300 billion. (TT17:1141-1142) Tracy also made the calculations using a database compiled by the Broward County Sheriff's Office. (T17:1140) Those calculations placed the odds at one in 833 million. (T17:1140)

Penalty Phase And Sentencing

The State presented four witnesses at the penalty phase of the trial. Jennifer Embry's father, brother and friend testified to the impact Embry's death had on their lives. (T20: 1545, 1548, 1550) Wanda White, who was the victim in a prior crime for which Belcher was convicted, testified about the circumstances of the offense. (T20:1522-1523) Belcher was convicted for burglary and aggravated assault in 1989. (T20:1553) White testified that a man entered her home while she was asleep, placed a gun to her, ordered her into the bathroom where he tied her and then masturbated on her back. (T20:1523-1544) She did not see the man's face. (T20:1527, 1532) Belcher

and White had contact before this event, and she identified Belcher as the man by the sound of his voice and general physical build. (T20:1532) The State also introduced judgments Belcher had for an attempted robbery in 1981 and a robbery in 1976. (T20:1553-1554)

The defense presented nine witnesses. James Belcher's mother, two aunts, and sister talked about his family background. (T20:1558, 1589, 1599, 1612) Laura Flowers testified about Belcher's lack of a disciplinary record at the jail. (T21:1664) Stephanie Cook, a former teacher at the prison where Belcher had been incarcerated, testified about his assistance in a tutoring program she headed. (T21:1627) Three youthful inmates testified to how Belcher mentored them as a tutor in the program and also as a friend -- teaching them to avoid confrontations and motivating them to better themselves. (T21: 1666, 1684, 1712)

Earline Floyd is James Belcher's mother. (T20:1559) James was born on July 1, 1959, and he is her oldest child. (T20:1559-1560) When James was three or four years old, Floyd separated from James' father and moved from Jacksonville to New York where she married Ray Brown within a couple of years. (T20: 1561-1562) Floyd had two other children, Lashawn and Raymond, who were six and ten years younger than James. (T20:1561-1562) They lived in a low income and high crime area in the Brownville part of Brooklyn. (T20:1566-1567) Later, they were able to move to an area

where the crime rate was lower. (T20:1567) When James was 15-years-old, he snatched a purse. (T20:1567-1568) He was prosecuted as an adult and sent to an adult prison for five years. (T20:1567-1568) Although James did not complete high school, he received his GED and attended college for a year. (T20: 1579-1581) At age 21, James was living with his father in Jacksonville, and he was convicted in Nassau County for robbery. (T20: 1568-1569) Floyd stated her relationship with her son was good, and they always remained in close contact with one another. (T20:1569-1570) James was a good influence on others, and he was a guest speaker at the youth program at his mother's church where he counseled the youth to stay away from trouble. (T20:1578-1579) James was also close to his other relatives. (T20:1570-1572) One cousin, Wayne Deas, credits James with steering him away from trouble growing up. Deas is a Florida State graduate with a successful financial services business on Wall Street. (T20:1570-1572) A niece had lost three babies who died at childbirth. (T20:1573) From jail, James wrote to her and called her providing her a source of hope and inspiration. (T20:1572-1573)

Betty Burney is James' aunt. (T20: 1590) Burney owned a daycare business and formerly worked as an assistant vice president in a bank. (T20: 1590) She noted that she was only few years older than James, and their relationship was more like a brother and sister. (T20:1591) James was always polite and considerate of others. (T20:1592)

James wanted her to be sure to talk to her two young sons about keeping out of trouble. (T20:1593) Burney felt that James could continue to be positive influence for her and her sons even from a prison cell. (T20: 1594-1595) She planned to visit James and bring her sons to visit him as well. (T20:1595-1596)

Lashawn Cason is Belcher's younger sister. (T20:1600) James was always a supportive big brother to her. (T20:1601-1602) He counseled and supported her when she had trouble in her marriage. (T20: 1602) He helped her when her father died. (T20:1604) He encouraged her to continue school and to stay out of trouble. (T20: 1604-1605) James had a relationship with a woman named Aretha who was Lashawn's neighbor. (T20:1606) They had a son, Devin. (T20: 1606) James treated Aretha's older children the same as he did his own son. (T20:1606) Lashawn was of the opinion that James could be a positive influence in her life and in the lives of others even while he was in prison. (T20:1607-1609)

Priscilla Jenkins is James Belcher's aunt. (T20:1613) She is an Assist Dean for Academic Affairs at Morris Brown College and a trained counselor. (T20:1612-1613, 1615) She is six years older than James, and they grew up much like a close big sister and younger brother. (T20:1613-1614) He was always the child who looked out for others. (T20: 1614) He was polite and caring. (T20:1614-1616) She felt James could continue to contribute to others in prison. (T20: 1616)

While incarcerated at Appalachian Correctional Institution, Belcher worked as a tutor and educational assistant in the literacy program which prepared inmates to take the GED exams. (T21:1628-1635) Stephanie Cook was the director of the program. (T21: 1628-1629) She stated that Belcher's assistance in the program was very useful. (T21:1635) Cook worked with Belcher everyday. (T21: 1634) She always felt safe around him. (T21: 1639-1640) In addition to generally assisting her in the classroom, Belcher tutored the inmate students directly. (T21:1635-1636) The prison had a large number of young inmates. (T21: 1636) They looked up to Belcher and sought him out for advise inside and outside the classroom. (T21:1636-1637) Because of Belcher's calm demeanor and intelligence, the younger inmates benefitted from their contact with him. (T21:1642) He made others feel comfortable in approaching him. (T21:1642-1643) Belcher recruited students into the voluntary program, and Cook had a high participation rate in the program because of Belcher's assistance. (T21:1635) Cook believed Belcher's interest in educational work was real, and he gained satisfaction from helping others. (T21:1638, 1643)

Five inmates from Appalachian Correctional Institution testified about how Belcher helped and mentored them. (T21:1666, 1684, 1712, 1732, 1751) Robert Hiers went to prison when he was 17 years-old, and at the time he testified, he had been out on probation for two years. (T21:1668-1669) Belcher tutored Hiers in the GED

program. (T21:1669-1670) Additionally, Belcher also coached the younger inmates playing basketball. (T21:1670) Heirs and the other younger inmates looked to Belcher as they would a big brother or a father figure. (T21:1672) Heirs said his time with Belcher was the first time he had a relationship with an older male. (T21:1673-1674) Any time he had a problem, Heirs would go to Belcher for help and advice. (T21:1674-1675) When Belcher left Appalachian Correctional Institution, Heirs said there was no one else who filled the same role with the other inmates. (T21:1675)

Michael Suggs went to prison at 15 years of age to serve 14 years. (T21:1685) He met Belcher at the educational department at the prison. (T21:1686) Belcher was his tutor, and outside the classroom, Suggs viewed Belcher like a big brother. (T21:1687) Suggs trusted Belcher to give him good advice. (T21:1687-1688) Belcher acted as a peacemaker among inmates and helped them resolve conflicts. (T21: 1694) When Suggs felt depressed, Belcher would help cheer him up and talk about problems. (T21:1688-1689) Although Suggs was raised by both parents “off and on,” he believed he would never have gone to prison if he had had someone like Belcher to counsel him. (T21:1690-1691) During the first five years Suggs was in prison, his mother had come to see him three times. (T21:1689) Due to Belcher’s help, Suggs received his GED. (T21:1692) Alfonzo Smalls went to prison at 15-years-old to serve a sentence of life without parole. (T21:1713-1714) He met Belcher on the

basketball court as Smalls was about to get into a fight. (T21:1714) Belcher pulled him aside and counseled him on how not to fight and to stay out of trouble. (T21:1714) Smalls saw Belcher almost everyday. (T21:1715-1716) Belcher talked to him like a big brother. (T21:1715-1716) At Appalachee Correctional, there was a separate dorm for some of younger inmates under age 21. (T21:1715-1716) The inmates in that dorm fought frequently, and life could be rough in the dorm. (T21:1716) The older inmates did not want anything to do with the younger inmates in the dorm. (T21:1716) The dorm was called the “dog pound” or the “gladiator dorm.” (T21:1716) Belcher developed relationships with a number of the inmates from the dorm. (T21:1717) They liked Belcher because he tried to help them. (T21:1717-1718)

Dwayne Hayes went to prison at 14-years-old to serve over eleven years. (T21:1733) He met Belcher on the basketball court, and they “just clicked.” (T21:1734) Belcher counseled him about different problems. (T21:1734) Hayes knew he could go to Belcher about anything. (T21:1735) As a basketball coach, Belcher taught Hayes skills, discipline and self-confidence. (T21:1735-1736) Hayes also learned self-control over his temper. (T21:1738) Hayes had never before had a relationship with an older man. (T21:1737)

Destin Turner went to prison at 19-years-old to serve 22 years. (T21:1751-1752) Turner met Belcher when Belcher pulled him away from a disagreement he was having

with another inmate. (T21:1753-1754) Belcher talked to him about his attitude with others and his problems on the basketball court. (T21:1754) Turner enrolled in the GED program. (T21:1754-1755) Although Turner has not yet passed the GED exam, he said he has learned to enjoy reading because of Belcher's influence. (T21:1755) Turner told his parents about Belcher's help and counsel. (T21:1757) Belcher helped Turner through an argument with his mother. (T21:1756-1757) Turner thought that Belcher had helped him learn to think before acting and that his life was better because of his contact with Belcher. (T21:1758)

SUMMARY OF ARGUMENT

1. The State presented the testimony of Wanda White, who was the victim of a burglary and aggravated assault for which Belcher was convicted in 1989. Although the testimony was to provide the facts of Belcher's prior violent felony convictions which were presented as aggravating circumstances under Section 921.141(5)(b) Florida Statutes, the prosecutor later argued these facts to the jury speculating that they showed Belcher's actions in this case were to eliminate Jennifer Embry as a witness, even though witness elimination had not been asserted as an aggravator. See, Sec. 921.141(5)(e) Fla. Stat. The trial court denied Belcher's

objection and motion for mistrial. The prosecutor was allowed to argue to the jury an aggravating circumstance which was never an issue in the case, since the state never asserted it and could not prove it. Belcher's penalty phase has been tainted because of the introduction of an improper aggravating circumstance, and the death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

2. The evidence in this case was insufficient to establish the heinous, atrocious and cruel aggravating circumstance. Sec. 921.141(5)(h), Fla. Stat. According to the trial court's findings and the trial testimony, the medical examiner concluded that the victim may have lost consciousness within 30 seconds to one minute and could no longer feel pain. The court erroneously instructed the jury that it could consider the HAC circumstance on these facts. Additionally, in the sentencing order, the trial judge improperly found HAC as an aggravating circumstance. The jury and the trial court should not have considered the HAC circumstance, and James Belcher's death sentence is unconstitutional. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. Belcher now urges this Court to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

3. Belcher requested special jury instructions listing non-statutory mitigating factors for the jury to consider which the evidence presented in the penalty phase of

the trial supported. The trial judge denied the requested instructions in favor of the “catchall” instruction provided in the standard jury instructions. The trial court erred in refusing to give Belcher’s requested special jury instructions on specific nonstatutory mitigating factors. Neither the “catchall” instruction nor the instructions as a whole was sufficient to guide the jury in its consideration of these factors. Belcher was deprived of due process and fair, reliable jury recommendation, in violation of the United States and Florida Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

4. Florida’s death penalty sentencing scheme violates Article I, Sections 9, 16, 17 and 22 of the Constitution of Florida and Amendments V, VI, VIII and XIV to the United States Constitution. Belcher moved to dismiss the indictment and to declare Section 782.04 and 921.141 Florida Statutes Unconstitutional because they do not meet the due process and right to a jury requirements set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000). The trial court denied Belcher’s motion. This Court has previously rejected challenges to Florida’s capital sentencing scheme based on Apprendi reasoning that “[b]ecause Apprendi did not overrule Walton [v. Arizona], 497 U.S. 639 (1990)], the basic scheme in Florida is not overruled either.” Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), *cert. denied*, 121 S.Ct. 1752 (2001). However, the United States Supreme Court recently agreed in Ring v. Arizona, 122 S.Ct. 865 (2002),

to decide whether Apprendi overrules Walton. The validity of this Court's holding in Mills is therefore dependent on the outcome of Ring.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF THE VICTIM OF A PRIOR VIOLENT FELONY, INTRODUCED TO ESTABLISH THE FACTS OF THAT OFFENSE, TO BE USED IN THE PROSECUTOR'S ARGUMENT TO THE JURY TO SUGGEST THE EXISTENCE OF ANOTHER AGGRAVATING CIRCUMSTANCE WHICH WAS NOT IN ISSUE IN THE CASE SINCE THE STATE HAD NOT ASSERTED IT AND COULD NOT PROVE IT.

The State presented the testimony of Wanda White, who was the victim of a burglary and aggravated assault for which Belcher was convicted in 1989. (T20:1522-1544) Although the testimony was to provide the facts of Belcher's prior violent felony convictions which were presented as aggravating circumstances under Section 921.141(5)(b) Florida Statutes, the prosecutor later argued these facts to the jury speculating that they showed Belcher's actions in this case were to eliminate Jennifer Embry as a witness, even though witness elimination had not been asserted as an aggravator. (T21:1785-1787); See, Sec. 921.141(5)(e) Fla. Stat. The trial court denied Belcher's objection and motion for mistrial. (T21:1786-1787; T22:1838) The prosecutor was allowed to argue to the jury an aggravating circumstance which was never an issue in the case, since the state never asserted it and could not prove it. Belcher's penalty phase has been tainted because of the introduction of an improper

aggravating circumstance, and the death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

Legal Standards

Whether the actions of a trial court has deprived a capital defendant of his due process right to fairness and reliability in the application of the sentencing procedures is a question of law reviewed on appeal *de novo*. The State is prohibited from presenting aggravation to the penalty phase jury which is not relevant to any of the aggravating circumstances actually at issue in the case. See e.g Kormondy v. State, 703 So.2d 454 (Fla. 1997); Hitchcock v. State, 673 So.2d 859 (Fla. 1996); Geralds v. State, 601 So.2d 1157(Fla. 1992). Presentation of such irrelevant aggravation to the jury is reversible error unless the State can establish beyond a reasonable doubt that there is no reasonable possibility that the error did not contribute to the jury's recommendation. *Ibid*.

Discussion

The prosecutor improperly argued Wanda White's testimony about the facts of the previous violent felony conviction as relevant to show that Belcher killed Jennifer Embry in this case to eliminate a witness. (T21:1785-1787) Witness elimination was not an aggravating circumstance at issue in the case since the State could not prove such a motive for the homicide. See, Sec. 921.141 (5)(e) Fla. Stat.; Zack v.

State, 753 So.2d 9, 20 (Fla. 2000); Consalvo v. State, 697 So.2d 805, 819 (Fla. 1997); Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992). Nevertheless, the prosecutor injected the improper inference before the jury that Belcher killed to eliminate a witness through the misuse of Wanda White's testimony.

In his closing penalty phase argument to the jury, the prosecutor stated:

Don't those violent crimes show his true character? Doesn't it show that he is a person who refuses to learn from prior experience? You might restate that. You might say he actually learned from one of those experiences. What did he learn regarding Ms. White? She was able to identify him. Ms. Embry wasn't able to come into this court and identify him.

(T21:1785) This argument prompted defense counsel to object:

Your Honor, I think that is objectionable. It's a thinly veiled argument about elimination of a witness. Elimination of a witness is not an aggravator that the State has proved, nor can they do it, but that is what the argument is all about. It's not an argument about anything but that. Has nothing to do with any of the aggravators.

(T21:1786) The trial judge overruled the objection. (T21:1786) The prosecutor continued to argue the same theme:

What does this aggravator prove? That the defendant is willing to kill to cover his tracks. That he chose to kill, in addition to committing a dangerous violent felony, sexual battery.

(T21:1787) Defense counsel renewed his objection which the court overruled.

(T21:1787) Counsel moved for a mistrial based on the cumulative error which was denied. (T22:1838)

White's testimony may have been relevant to provide the facts of the prior violent felony in order to assess the severity of that offense. See, Lockhart v. State, 655 So.2d 69 (Fla. 1995). However, the State was not free to use the evidence to raise the *speculation* that Belcher killed in this case to eliminate a witness to avoid arrest. The State may not indirectly present an irrelevant, unprovable aggravating circumstance to the jury that it cannot directly prove and present. See e.g Kormondy v. State, 703 So.2d 454 (Fla. 1997); Hitchcock v. State, 673 So.2d 859 (Fla. 1996); Geralds v. State, 601 So.2d 1157 (Fla. 1992).

In Derrick v. State, 581 So.2d 31 (Fla. 1991), the State presented a penalty phase witness who testified that Derrick told him that he had killed the victim and that he would kill again. Reversing the case for a new penalty phase, this Court wrote:

During the penalty phase James was allowed to testify over objection that Derrick told James that he had killed Sharma and that he would kill again. Derrick claims that this testimony was irrelevant to the penalty phase and impermissibly showed lack of remorse and the possibility that Derrick would kill again. The state argues that this testimony was relevant to show that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. The state further argues that the testimony was not impermissibly used to show lack or remorse since the

prosecutor never argued lack of remorse and the judge did not instruct the jury on lack of remorse as an aggravating factor.

We agree with Derrick that James's testimony was erroneously admitted and constitutes reversible error. The statement was not relevant to show Derrick's guilt because guilt is not at issue in the penalty phase of a trial. Therefore, the state must show that the statement is relevant to an issue properly considered in the penalty phase. We do not construe James's testimony to support the factor of cold, calculated, and premeditated without any pretense of moral or legal justification because all that Derrick admits in the statement is that he did kill Sharma. The statement makes no reference to a plan to kill Sharma, nor to a lack of justification for the murder. The testimony was not relevant to any other aggravating factor. *See Pope v. State*, 441 So.2d 1073, 1078 (Fla. 1983)("[L]ack of remorse should have no place in the consideration of aggravating factors."). While the statement would be admissible to rebut evidence of remorse or rehabilitation, it was introduced before the defense presented any evidence. The statement was highly prejudicial because it suggests that Derrick will kill again.

Derrick, 581 So.2d at 36.

In Kormondy v. State, 703 So.2d 454 (Fla. 1997), the trial court allowed the State to elicit testimony during penalty phase that Kormondy, after his arrest and while in jail, threatened to kill a surviving victim and a friend who had turned him in to the police for a reward. This Court relied on Derrick v. State, 581 So.2d 31 (Fla. 1991) and concluded that the testimony effectively established a nonstatutory aggravating circumstance which prejudiced Kormondy's penalty phase jury. In the opinion reversing Kormondy's case for a new sentencing proceeding, this Court wrote:

In sum, we find that Beck's cross-examination testimony was highly inflammatory and could have unduly influenced the penalty-phase jury.

The manner in which the cross-examination was conducted effectively established another nonstatutory aggravating circumstance. It is important to note that our death penalty statute does not authorize a dangerousness aggravating factor.

The jury is charged with formulating a recommendation as to whether Kormondy should live or die. Testimony that Kormondy said he would kill again, when that testimony is not directly related to proving a statutory aggravating circumstance, is outside of the scope of evidence properly presented by the State during the penalty phase. We find that this evidence in this instance constitutes impermissible nonstatutory aggravation. For this evidence to be admissible at the penalty-phase proceeding, it has to be directly related to a specific statutory aggravating factor. Otherwise, our turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute. Finally, we are unable to say that this evidence about Kormondy's desire to commit future killings, when presented to the jury by an attorney, was harmless beyond a reasonable doubt.

Kormondy, 703 So.2d at 463.

In Hitchcock v. State, 673 So.2d 859 (Fla. 1996), this Court addressed a similar problem where the State elicited evidence during direct examination of the victim's sister that the defendant had sexually abused her. Reversing for a new penalty phase trial, this Court explained that the State's direct evidence must be limited to matters relevant to aggravating circumstances. Acknowledging that the State offered the evidence, not to prove aggravating circumstances but to explain why the witness did not come forward for several years, this Court disagreed with that position. This Court concluded that the prosecution used this theory as "a guise for the introduction

of testimony about unverified collateral crimes.” 673 So.2d at 861. In part, the opinion states:

We have held that, to be admissible in penalty phase, the State’s direct evidence must relate to any of the aggravating circumstances. Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991). Evidence necessary to familiarize the jury with the underlying facts fo the case may also be introduced during penalty phase. Teffeteller v. State, 495 So.2d 744 (Fla. 1986). Additionally, the State may introduce victim-impact evidence pursuant to section 921.142(8), Florida Statutes (1993). See, Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 516 U.S. 1012, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995)....

* * *

Instead, the State argues the testimony of the victim’s sister during direct examination was admissible because defense counsel opened the door to it during cross-examination....

* * *

We do not agree that the testimony of the victim’s sister about Hitchcock’s alleged attacks upon her was responsive to the testimony elicited from her during cross-examination.....

* * *

The redirect examination, in reality, became a guise for the introduction of testimony about unverified collateral crimes. In an analogous context, we have held that the State is not permitted to present evidence of a defendant’s criminal history, which constitutes inadmissible nonstatutory aggravation, under the pretense that it is being admitted for some other purpose. See, Geralds v. State, 601 So.2d 1157 (Fla. 1992).

Hitchcock, 673 So.2d at 861.

In Robinson v. State, 487 So.2d 1040 (Fla. 1986), the prosecutor, on cross-examination of penalty phase defense witnesses, asked if the witnesses had knowledge of two crimes the defendant allegedly committed after the murder and for which he had not been charged. The State's theory was to impeach the witnesses' testimony that the defendant was a good-hearted person. Holding that the State "went to far" and that the evidence prejudiced the jury, this Court wrote:

In cross-examining several defense witnesses during the sentencing portion of this trial the state brought up two crimes that occurred after this murder and that Robinson had not even been charged with, let alone convicted of. [footnote omitted] The state argued that these questions would undermine the credibility of these witnesses who testified that Robinson was a good-hearted person and a good worker. Defense counsel objected because Robinson had not been convicted of these purported crimes, but the court allowed the state questions. In arguing to the court and then in closing argument the state gave lip service to its inability to rely on these other crimes to prove the aggravating factor of previous conviction of violent felony. [citations omitted] Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

Robinson, 487 So.2d at 1042.

In Geralds v. State, 601 So.2d 1157 (Fla. 1992), the prosecutor attempted to impeach Gerald's good character witnesses by asking them if they were aware of

Geralds' criminal history. This Court reversed, holding that the impeachment technique improperly allowed the introduction of evidence of nonstatutory aggravation:

This Court has long held that aggravating circumstances must be limited to those provided for by statute. E.g. Wike v. State, 596 So.2d 1020 (Fla. 1992); McC Campbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Miller v. State, 373 So.2d 882 (Fla. 1979). In particular, a defendant's convictions for nonviolent felonies are inadmissible evidence of nonstatutory aggravating circumstances. See, Maggard v. State, 399 So.2d 973, 977-78 (Fla.) cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981).

* * * *

The effect of this impermissible colloquy regarding Geralds's prior record is of the same magnitude today as it was in Maggard ten years ago. The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment. This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused. Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Geralds, 601 So.2d at 1162.

In Perry v. State, 801 So.2d 78 (Fla. 2001), this Court reached a similar conclusion when the state elicited testimony from Perry's ex-wife about violent activity and some specific instances of violent conduct. This Court rejected the State contention that the evidence was relevant because Perry opened the door to it in his

guilt phase testimony and that it was relevant as anticipatory rebuttal to the mitigator of no significant history of prior criminal activity. Relying on Hitchcock v. State, and Geralds v. State, this Court reversed Perry's case for a new penalty phase:

In this instance, the nature of Melissa Perry's remarks regarding Perry's "bad acts" were not in support of any aggravating circumstance, and therefore the trial court erred in admitting Melissa Perry's testimony on direct examination during the penalty phase.

Perry, 801 So.2d at 91.

The trial court's allowing the prosecutor to argue, unchecked, that the facts of the prior violent felony suggested that Belcher killed in this case to eliminate a witness to avoid arrest violated Belcher's right to due process and a fair penalty phase proceeding. As in the above discussed cases, the prosecutor in this case has indirectly placed an improper aggravator before the jury which he could not directly present or prove. The resulting jury recommendation and death sentence are tainted and unconstitutional. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. Belcher now asks this Court to reverse his death sentence and to remand his case for a new penalty phase proceeding before a new jury.

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The evidence in this case was insufficient to establish the heinous, atrocious and cruel aggravating circumstance. Sec. 921.141(5)(h), Fla. Stat. According to the trial court's findings and the trial testimony, the medical examiner concluded that the victim may have lost consciousness within 30 seconds to one minute and could no longer feel pain. (R4:632d; T14:655-656)(App. A) The court erroneously instructed the jury that it could consider the HAC circumstance on these facts. (T20: 1453-1471; T22:1830) Additionally, in the sentencing order, the trial judge improperly found HAC as an aggravating circumstance.(R4:632d-632e)(App. A) The jury and the trial court should not have considered the HAC circumstance, and James Belcher's death sentence is unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. Belcher now urges this Court to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

Legal Standards

The issue of the sufficiency of the evidence to support an aggravating circumstance is a legal question reviewed in this Court *de novo*. F o r a n aggravating circumstance to be affirmed on appeal, there must be substantial

competent evidence upon which the trial court could find the existence of the circumstance proved beyond a reasonable doubt. See, Gerald v. State, 601 So.2d 1157, 1164 (Fla. 1992); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). When the proof relies on circumstantial evidence, the circumstances must be consistent with the existence of the circumstance and inconsistent with any reasonable hypothesis that the circumstance does not exist. See, Gerald v. State, 601 So.2d at 1163; Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984).

In State v. Dixon, 283 So.2d 1, this Court defined the HAC aggravating circumstance provided for in Section 921.141(5)(h), Florida Statutes and the type of crime to which it applies as follows:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Ibid at 9. Later, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court further explained the HAC circumstance:

The factor of heinous, atrocious or cruel is proper only in torturous murders-- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

568 So.2d at 912. To qualify for the HAC circumstance, “the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim.” Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). When evaluating the facts to determine the application of HAC circumstance, the fact finder is not permitted to consider acts which occurred post-mortem or after the victim was rendered unconscious. See, Rhodes v. State, 547 So.2d 1201 (Fla. 1989)(HAC improper for strangulation murder of semi-conscious victim); Jackson v. State, 451 So.2d 458 (Fla. 1984)(acts done after death of the victim cannot support a finding of HAC).

Discussion

The trial court made the following findings of fact in support of the HAC circumstance in this case:

3. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The evidence established at trial beyond a reasonable doubt that the victim, Jennifer Embry, was strangled and drowned in her own bathtub. The evidence most favorable to the Defendant is that the process of strangulation and drowning would have taken upwards of 30 seconds and could have taken several minutes . Strangulation of

a victim creates a prima facie case for the aggravating factor of “heinous, atrocious, or cruel.” Orme v. State, 677 So.2d 258 (Fla. 1996); James v. State, 695 So.2d 1229 (Fla. 1997). When coupled with the additionally tortuous act of drowning the victim at the same time that she was being strangled, there can be no question that this aggravating factor has been proven beyond a reasonable doubt.

The evidence does not support the Defendant’s argument that the victim was rendered immediately unconscious by the acts of the murderer. On the contrary, the evidence in the bathroom indicates a struggle in which the victim fought against her attacker. She sustained injuries to her head and shoulder, as well as to her neck, in the process of being strangled and drowned. The medical examiner testified that all of the injuries he observed on the victim occurred while she was still alive. The only conclusion that can be reasonably drawn from the evidence is that Jennifer Embry knew what was happening to her as she was being manually strangled and drowned, even if only for a matter of 30 seconds to a minute.

The State proved this aggravating circumstance beyond a reasonable doubt, and the Court has given it great weight.

(R4: 632d-632e)(App. A)

Contrary to the trial court’s conclusion, these facts do not establish the HAC circumstance. According to the trial court’s own finding of fact, the victim could have been rendered unconscious within 30 seconds to one minute and lost the ability to feel pain. (R4:632d-632e) This finding was correctly based on the testimony of Dr. Bonofacio Floro. (T14:640-682) Floro’s opinion was that death from the strangulation and drowning would not have been instantaneous, but that the acts would have produced unconsciousness within seconds, at which time the victim would no longer feel pain. (T14:655-656) During his testimony on direct

examination, Floro stated, “It takes only a few seconds to put somebody into unconsciousness while you are being strangled.” (T14:655) Additionally, Floro noted that the drowning could have occurred after Embry was unconscious. (T14:656)

This was not a homicide where the victim experienced long-lasting, severe pain. This was not a homicide where the manner of the killing was designed to produce suffering. Belcher’s case falls within the category of cases in which this Court has disapproved the HAC circumstance where the victim suffered only a brief time before unconsciousness and death. See, Zakrewski v. State, 717 So.2d 488, 490, 492 (Fla. 1998)(victim struck unconscious before killed with blows to the head and strangulation); Brown v. State, 644 So.2d 52 (Fla. 1994)(evidence on decomposed body showed three stab wounds which would not have caused immediate death); Elam v. State, 636 So.2d 1312 (Fla. 1994)(victim beaten with a brick and suffered defensive wounds in an attack which lasted about one minute and victim lost consciousness by the end of the attack); Rhodes v. State, 547 So.2d 1201 (Fla. 1989)(victim perhaps knocked out or semi-conscious at the time of her death by strangulation); Jackson v. State, 451 So.2d 458 (Fla. 1984)(victim conscious only moments after first shot and not conscious when other acts over a time produced death); Herzog v. State, 439 So.2d 1372 (Fla.

1983)(victim unconscious or semi-conscious throughout the attack). Although this Court has approved the HAC circumstance in cases where the victim died from strangulation, those cases were premised on conscious victims suffering for a period of time. See, Overton v. State, 801 So.2d 877 (Fla. 2001); Orme v. State, 677 So.2d 258 (Fla. 1996); James v. State, 695 So.2d 1229 (Fla. 1997). The evidence in these cases contrasts with the evidence in Belcher's case of an attack producing unconsciousness in seconds. Application of the HAC circumstance to Belcher's case is not supported by the evidence.

The consideration of the HAC factor in the jury's and trial court's sentencing determination incorrectly skewed the process in favor of death. Belcher now urges this Court to reverse his death sentence and either remand for imposition of a life sentence or for resentencing before a newly empaneled jury.

ISSUE III
**THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT
THE JURY ON SPECIFIC NONSTATUTORY MITIGATING
CIRCUMSTANCES AS THE DEFENSE REQUESTED.**

Belcher requested special jury instructions listing nonstatutory mitigating factors for the jury to consider which the evidence presented in the penalty phase of the trial supported.(R3:572-573; T20:1513-1514)(App. B) The trial judge denied the requested instructions in favor of the “catchall” instruction provided in the standard jury instructions. (T20:1513-1514; T22:1828-1837)(App. B) The trial court erred in refusing to give appellant’s requested special jury instructions on specific non-statutory mitigating factors. Neither the “catchall” instruction nor the instructions as a whole was sufficient to guide the jury in its consideration of these factors. Belcher was deprived of due process and fair, reliable jury recommendation, in violation of the United States and Florida Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. This Court reviews the denial of a requested jury instruction under an abuse of discretion standard, but whether the resulting jury instructions given deprive the defendant of due process in the sentencing proceeding is reviewed *de novo*.

A capital sentencing jury must consider and give effect to all relevant mitigating evidence offered by the defendant. Hitchcock v. Dugger, 481 U.S. 393

(1987); Lockett v. Ohio, 438 U.S. 586 (1978); Robinson v. State, 487 So. 2d 1040, 1042-43 (Fla. 1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). In order to give effect to such evidence,

the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also “guid[e] and focu[s] the jury’s objective consideration of the particularized circumstances of the individual offense and the individual offender . . .”

Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, 458 U.S. 1111 (1982); see also Chenault v. Stynchcombe, 581 F.2d 444, 447 (5th Cir. 1978)(requirement that sentencer must be allowed to consider mitigating circumstances “would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision”). As this Court has said:

[I]mproper, incomplete, or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and to the jury’s fundamental role in that scheme.

Riley, 517 So. 2d at 658.

The jury’s recommendation is an integral part of the sentencing process. When an instructional error distorts the jury’s weighing process and taints its recommendation, the resulting death sentence is unconstitutionally tainted.

Espinosa v. Florida, 505 U.S. 112 (1992); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988).

In deciding whether a jury has been sufficiently instructed on an aggravating factor, the United States Supreme Court has looked at whether the instructions given were “so vague as to leave the sentencer without sufficient guidance for determining its presence or absence.” Espinosa, 120 L.Ed.2d at 858. In Espinosa, Shell, and Maynard, the Court held the instruction and limiting definitions given on the “heinous, atrocious, and cruel” (HAC) aggravator failed this test because the definitions were not specific enough: “[O]rdinary jurors could reasonably construe the definitions as applicable to every first-degree murder.” See Shell, 498 U.S. at 5 (Marshall, J., concurring); Maynard, 486 U.S. at 364.

In Jackson v. State, 648 So. 2d 85, 88 (Fla. 1994), this Court applied this test to Florida’s standard jury instruction on the “cold, calculated, and premeditated” (CCP) aggravating factor, which told the jury it could consider, if established by the evidence, that “the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without [any] pretense of moral or legal justification.” This Court began its analysis by examining its own caselaw construing the CCP aggravator:

[T]his Court has found it necessary to explain that the CCP aggravator applies to “murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder,” Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), and where the killing involves “calm and cool reflection.” Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). The Court has adopted the phrase “heightened premeditation” to distinguish this aggravating circumstance from the premeditation element of first-degree murder. Id.; Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The Court has also explained that “calculation” constitutes a careful plan or a prearranged design. Rogers, 511 So. 2d at 533.

Jackson, 648 So. 2d at 88-89.

Reasoning that because the jury was unaware of the limiting construction placed on the aggravator by caselaw, this Court noted that “the average juror may automatically characterize all premeditated murders as CCP.” Jackson, 648 So.2d at 89. The CCP instruction suffered the same defect as the HAC instructions found lacking in Shell, Maynard, and Espinosa: The definition of the aggravator left the jury without sufficient guidance for determining its presence or absence. This Court concluded the definitions, *established by its own caselaw*,

...call for more expansive instructions to give content to the CCP statutory factor. Otherwise, the jury is likely to apply CCP in an arbitrary manner, which is the defect cited by the

United States Supreme Court in striking down the HAC instructions.

Jackson, 648 So.2d at 89-90. A new instruction incorporating the caselaw requirements was established.

A jury is just as likely to apply the “catchall” instruction in an arbitrary manner as to apply the CCP instruction invalidated in Jackson in an arbitrary manner. The “catchall” instruction informs the jury only that it “may” consider “any other aspect of the defendant’s character or record or any other circumstances of the offense.” The instruction provides no explanation of the nature of mitigating circumstances. Nor does it explain what categories of conduct the law recognizes as mitigating. See Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (listing examples of categories of conduct viewed in the law as mitigating). While the invalid CCP instruction defined the CCP aggravator in a way that allowed the jury to *include* every first-degree murder within its ambit, the “catchall” instruction defines--or fails to define--mitigation in such a way that allows the jury to *exclude* every valid nonstatutory mitigating circumstance from its ambit. Just as this Court required a *limiting* instruction incorporating caselaw to give content to the CCP aggravator, this Court should require a *supplemental* instruction incorporating caselaw on non-statutory mitigating factors to give content to the “catchall” instruction. A supplemental instruction should be required for each

non-statutory mitigating factor the defense asserts which is supported by the evidence. Cf. Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992)(instruction on statutory mental mitigators required whenever defendant has produced any evidence to support instruction).

In the present case, the only mitigating circumstances were nonstatutory. Furthermore, unlike the “catchall” instruction approved in Boyde v. California, 494 U.S. 370, 373-74 (1990) which informed the jury “you shall consider . . . [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime,” (emphasis added), the instructions in the present case did not explain the nature of mitigating circumstances and improperly told the jury that it “may” consider mitigating evidence, not that it “must” do so. The “catchall” instruction also could have led jurors to consider all the non-statutory mitigating evidence as a single mitigating factor, thereby distorting the weighing process.

The trial court erred in refusing appellant’s special instructions on specific non-statutory mitigating circumstances. The “catchall” instruction was wholly insufficient to guide and focus the jury in its consideration of these factors. The jury’s death recommendation, and the death sentence imposed pursuant to that recommendation, are unreliable. Belcher urges this Court to reverse his death sentence with directions to afford him a new penalty phase trial with a new jury.

ISSUE IV

FLORIDA’S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL BECAUSE IT DOES NOT REQUIRE AGGRAVATING CIRCUMSTANCES TO BE CHARGED IN THE INDICTMENT, DOES NOT REQUIRE SPECIFIC, UNANIMOUS JURY FINDINGS OF AGGRAVATING CIRCUMSTANCES AND DOES NOT REQUIRE A UNANIMOUS VERDICT TO RETURN A RECOMMENDATION OF DEATH.

Belcher moved to dismiss the indictment and to declare Section 782.04 and 921.141 Florida Statutes Unconstitutional because they do not meet the due process and right to a jury requirements set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000). (R2:379-389) Florida’s death penalty sentencing scheme violates Article I, Sections 9, 16, 17 and 22 of the Constitution of Florida and Amendments V, VI, VIII and XIV to the United States Constitution. The trial court denied Belcher’s motion. (T2:390) This issue of the constitutionality of Florida’s death penalty sentencing statute presents a question of law which this Court reviews *de novo*.

Initially, Belcher acknowledges that this Court has previously rejected challenges to Florida’s capital sentencing scheme based on Apprendi v. New Jersey, 530 U.S. 466 (2000), reasoning that “[b]ecause Apprendi did not overrule Walton [v. Arizona], 497 U.S. 639 (1990)], the basic scheme in Florida is not overruled either.” Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), *cert. denied*, 121 S.Ct. 1752 (2001). However, the United States Supreme Court recently agreed in Ring v. Arizona, 122

S.Ct. 865 (2002), to decide whether Apprendi overrules Walton. The validity of this Court's holding in Mills is therefore dependent on the outcome of Ring.

The views of several Justices of the Supreme Court of the United States create serious doubt whether Walton, or the Florida cases on which it was based, can ultimately be reconciled with Apprendi. See Apprendi, 530 U.S. at 521 (Thomas, J., concurring) (“Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide—as, previously, it freely could and did,—that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court’s ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.”); Apprendi, 530 U.S. 538 (O’Connor, J., dissenting) (“If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.”); Jones v. United States, 526 U.S. 227, 272 (1999) (Kennedy, J., dissenting) (“If it is constitutionally impermissible to allow a judge’s finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge’s finding may increase the maximum punishment for murder from imprisonment to death”). Although Justice Stevens' distinguished Walton in Apprendi, he has previously made clear his view that the right to a jury should

“appl[y] with *special force* to the determination that must precede a deprivation of life.” Spaziano v. Florida, 468 U.S. 447, 482-83 (1984)(Stevens, J., dissenting); *see also Jones*, 526 U.S. at 253 (Stevens, J., concurring) (noting that Walton should be “reconsidered in due course” in light of Court’s holding of defendant’s entitlement to jury determination of facts that increase maximum sentence).

In Apprendi, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. The constitutional underpinnings of the Court's holding are the Sixth Amendment right to trial by jury, and the Fourteenth Amendment right to due process. Ibid. at 476-77 (“At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without ‘due process of law,’ Amdt. 14, and the guarantee that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,’ Amdt. 6”). “Taken together, these rights indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” Ibid. at 477. Appellant submits that the provisions under which he was sentenced violate Apprendi and the Sixth and Fourteenth Amendments.

The New Jersey statutory mechanism found unconstitutional in Apprendi is remarkably similar to the capital sentencing scheme under which Appellant was charged and convicted. Apprendi involved the interplay of four statutes. The first statute, N.J. Stat. Ann. § 2C:39-4(a) (West 1995), defined the elements of the underlying offense of possession of a firearm for an unlawful purpose. The second statute, N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995), established that the offense is punishable by imprisonment for “between five years and 10 years.” The third statute, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a “hate crime.” The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 530 U.S. at 469-70. Each statute is independent, yet operated together to authorize Apprendi's punishment. The Court in Apprendi held that under the due process clause, all essential findings separately required by *both* the underlying offense statute *and* the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

Florida's capital sentencing scheme also involves the interplay of several statutes: (1) Section 782.04(1)(a), Fla. Stat. , defines the capital crime of first-degree murder, and the only elements it contains are those necessary to establish premeditated

or felony first-degree murder; (2) section 775.082(1), Fla. Stat. provides that a defendant convicted of first degree murder is to be punished by life imprisonment unless “the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death”; (3) section 921.141(5) sets forth the “aggravating circumstances,” at least one of which must be found before a defendant can be sentenced to death and which must be weighed against mitigating circumstances to determine whether a sentence of death should be imposed; and (4) section 921.141(3), Fla. Stat., provides further in pertinent part:

Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . .

Florida law clearly sets out a scheme whereby the statutory maximum penalty for capital crimes is life imprisonment *unless* the trial court, after holding a separate and distinct proceeding under section 921.141, makes findings of fact justifying imposition of the death penalty. Sec. 775.082(1), Fla. Stat.; Sec. 921.141(3), Fla. Stat.

The requisite findings include

(1) whether the state has proved at least one aggravating factor beyond a reasonable doubt, rendering the defendant eligible for the death penalty, State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) (noting that aggravating circumstances set forth in section 921.141(5) “actually define those crimes . . . to which the death penalty is applicable in the absence of mitigating circumstances.”); Blanco

v. State, 706 So. 2d 7, 13 (Fla. 1997) (Anstead, J., concurring specially) (“Under Florida's death penalty scheme, a convicted defendant cannot qualify for the death sentence unless one or more statutory aggravators are found to exist in addition to the conviction for first-degree murder”);

(2) whether “sufficient aggravating circumstances exist” to justify imposition of the death penalty Sec. 921.141(3); Dixon, 283 So.2d at 9; and

(3) whether the mitigating circumstances are sufficient “to outweigh the aggravating circumstances.” Sec. 921.141(3); Dixon, 283 So.2d at 9.

The findings necessary to impose a death sentence are made by the judge, not the jury, which merely renders an “advisory sentence.” See Sec. 921.141(3), Fla. Stat. If the court “does not make the finding requiring the death sentence,” it “shall impose sentence of life imprisonment in accordance with Section 775.082.” Ibid. Florida’s capital sentencing scheme, like the hate crimes statute at issue in Apprendi, thus exposes a defendant to enhanced punishment — death rather than life imprisonment — when a murder is committed “under certain circumstances but not others.” 530 U.S. at 484. However, none of the Sixth Amendment and Due Process requirements identified in Apprendi and Jones were satisfied in this case. The indictment did not give notice of the aggravating circumstances on which the State would rely to attempt to establish eligibility for the death penalty. The judge, and not the jury, made the specific findings authorizing imposition of the death penalty. . The judge, and not the

jury, was assigned and carried out the responsibility for determining whether an aggravating circumstance existed. Absent that finding, Belcher was ineligible for the death penalty, and the sentence provided under Florida law was life imprisonment. The jury in this case was not told that the existence of any aggravating circumstance had to be agreed upon by all jurors, and their non-binding recommendation was not unanimous.

Belcher's death sentence must therefore be vacated.

CONCLUSION

For the above presented reasons, James Belcher asks this Court to reverse his death sentence and remand his case to the trial court for resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Curtis M. French, Chief, Capital Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, James Belcher, #286173, F.S.P., 7819 N.W. 228th Street, Raiford, Florida, 32026-1160, on this ____ day of March, 2002.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

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