IN THE SUPREME COURT OF FLORIDA

JOHN BLACKWELDER,

Appellant,

vs. **CASE NO. SC01-2058**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of 17 volumes. The clerk's record including pleadings, orders, pretrial matters and the plea hearing are contained in volumes one through eight and will be designated with the prefix "R" followed by the volume and appropriate page numbers. The penalty phase and sentencing transcripts are contained in volumes nine through 17 and will be designated with the prefix "T." References to the appendix to this brief will be designated with the prefix "App." followed by a letter designation.

STATEMENT OF THE CASE AND FACTS

A Columbia County grand jury indicted John Blackwelder, an inmate at Columbia Correctional Institution, for the first degree premeditated murder of another inmate, Raymond D. Wigley, occurring on May 6, 2000. (R1:2) On March 15, 2000, Blackwelder pleaded guilty to the crime as charged with the understanding that the State would seek the death penalty. (T4:646-647; 736-760) During the plea hearing, the following exchange about the voluntariness of Blackwelder's plea transpired:

> THE COURT: How about knowingly and intelligently?
>
> THE DEFENDANT: Very intelligently. You know, I knew from the day when it happened what going to happen, you know. So, yeah.
>
> THE COURT: When it happened?
>
> THE DEFENDANT: When I killed Wigley.
>
> THE COURT: Okay. When you did that, then you knew what was going to happen?
>
> THE DEFENDANT: That I would get the death penalty, or hopefully will.
>
> THE COURT: Okay. And that's your position?
>
> THE DEFENDANT: That's the position -- why I killed him. If it wasn't going to be him, it would be another or another, you know. I made it clear I want -- I want off this world. I can't kill myself. I'm not suicidal. But I sure can make it hard for everybody else.
>
> THE COURT: And how was that?
>
> THE DEFENDANT: Just doing what I have to do?

THE COURT: And what is that?

THE DEFENDANT: Until I get my death penalty, you know.

THE COURT: Okay. And what did you have to do to get the death penalty?

THE DEFENDANT: I had to kill someone.

THE COURT: Okay.

THE DEFENDANT: I don't want to kill no more. But if I get another life, that's the way it will be. Sooner or later they're going to put me near somebody, and I'll do it again.

THE COURT: You will do it again.

THE DEFENDANT: Yes, sir. Yes, sir, I made it very clear.

THE COURT: Okay. You made --

THE DEFENDANT: I don't want to. But if I don't get the death penalty, yes sir.

THE COURT: You will kill again.

THE DEFENDANT: Sure.

THE COURT: As many times as necessary, is that --

THE DEFENDANT: Yes, sir.

THE COURT: -- what you're trying to convince me of?

THE DEFENDANT: And not just trying. I wrote it from the beginning. I think Mr. Dekle will tell you. He's got paperwork where I wrote, you know. He had a shrink come and talk to me. He made his opinion. Of course, I think that shrink is something, but I would ask that -- I want some psychological testing done. I want you to feel confident that I have my right facilities[sic]. I know who I am, what planet, what galaxy I'm on, everything, you know.

THE COURT: And you feel confident in that?

THE DEFENDANT: Oh, yes.

THE COURT: In other words, there's no question about you understanding what we're doing here today?

THE DEFENDANT: Yes, sir. Yes, sir.
I'm asking, to save the state money, you know, all the way around the board, let's just call it quits. You might call it assisted suicide. I don't know, you know.

But the point is I know how I am. I'm stuck in prison the rest of my life. There's no way of getting out. I'm not being in there. I can't handle it. It's not even like the old prison system; it's a lot different ball game.

I don't like being messed with, you know. The reason I took that one out was from messing with me, you know. It don't matter who it will be. It could be an officer the next time, and that's what I don't want.

I really don't want to hurt nobody. I took a little plan on picking the woman. I knew he had a life sentence. I knew he had no parole. I knew he was in for rape. So yes, I preplanned it.

THE COURT: And I'm getting the impression that you're trying to convince me that, if you aren't executed by the state, that you're going to execute someone else. Is that your position?

THE DEFENDANT: To be honest with you, I can't tell you for sure. But I -- I can't see me staying in prison long.

* * * *

THE DEFENDANT: Right. Now, I'm not waiving the jury phase. I want the jury phase.

THE COURT: For the penalty phase.

THE DEFENDANT: That's right.

THE COURT: And why do you want -- why do you want that?

THE DEFENDANT: Well, I figure this. Number one, I don't want it all falling on your shoulders. Okay? And I then that it would be hard, if I was in you position, to do it by just one person than what 12 recommends. I think it would be easier for you, for you to hear them come back and say yes, his aggravating factors are more than the mitigating.

THE COURT: And you want to speak to the jury.

THE DEFENDANT: Sure.

THE COURT: Okay. Well, I respect that right. And we all agree then to have -- impanel a jury for penalty phase?

MR. DEKLE: Yes, sir.

MR. AFRICANO: Yes, sir.

THE DEFENDANT: Yes, sir. I don't want to make it hard on no one.

(R4:739-742) Blackwelder told the court that he wanted his attorneys to investigate and present at the penalty phase anything they could find in mitigation. (R4:747-748)

The prosecutor related the factual basis for the plea, and the defense agreed that the State could establish a prima facie case:

MR. DEKLE: Basically, the state stands ready to prove that the defendant, in his cell at Columbia Correctional Institution here in Columbia County, tied inmate Raymond Wigley in a four-point restraints into -- on the bottom bunk that was in that cell, that he then took a ligature and tied it around the neck of

> Mr. Wigley and compressed that ligature to the point that he killed Mr. Wigley by strangulation.
>
> At that point he then left the cell, leaving the body in the cell, went and reported his conduct to a correctional officer. The FDLE and the Office of the Inspector General were summoned to the scene.
>
> Since that time Mr. Blackwelder has given a full and complete taped statement in which he admitted to premeditating the murder of Mr. Wigley and describing how he committed that murder. That complete taped statement was made after a full and complete advisal of his Miranda rights. A transcript of that statement is in the court file.
>
> Since that time Mr. Blackwelder has written a number of letters which contain what the State contends to be admissions to the -- to the -- to the homicide.
>
> And that's basically the evidence that the state stands ready to prove to prove the premeditated homicide. When we get to the penalty phase, we'll be offering a tremendous amount of additional evidence as it relates to the circumstances of the homicide. But that's enough to prove the premeditated murder.

(R4:746-747) Circuit Judge E. Vernon Douglas accepted the plea and scheduled the case for a penalty phase trial. (R4: 753-756) The court ordered a psychological examination and a presentence investigation at the request of the defense. (R4:753-754, 757-758)

The jury recommended a death sentence with a 12 to 0 vote. (R7: 1240; T14: 831-834) Judge Douglas imposed a death sentence. (R 8: 1410-1425; T16:791-819)(App. A) In the sentencing order four aggravating circumstances were listed as proven: (1) the homicide was committed while Blackwelder was under a sentence of imprisonment; (2) Blackwelder had been previously convicted of

a violent felony; (3) the homicide was especially heinous, atrocious or cruel; (4) the homicide was committed in a cold, calculated and premeditated manner. (R8:1410-1415)(App. A)

Regarding mitigation, the order addressed statutory and nonstatutory mitigation. (R8:1415-1422)(App. A) Four statutory mitigators were discussed:

(1) Blackwelder was under the influence of extreme mental or emotional disturbance at the time of the crime. The factor found and given little weight based on a finding that Blackwelder suffered antisocial personality disorder.

(2) The victim was a participant in the crime. The factor was rejected.

(3) Blackwelder acted under extreme duress or the substantial

domination of another. The factor was rejected.

(4) Blackwelder's capacity to appreciate the criminality of his conduct or to conform his conduct to legal requirements were substantially impaired. The factor was found and given little weight, on the basis of Blackwelder's diagnosis of antisocial personality disorder.

Four nonstatutory mitigating factors were discussed:

(1) Blackwelder's relationship with his parents. The factor found as a mitigation circumstance and given little weight.

(2) Blackwelder's history of sexual abuse as a child. The factor found as a mitigation circumstance and given little weight.

(3) Blackwelder's history as friendly, loving and helpful to friends and family. The factor was rejected.

(4) Blackwelder's mental impairments. Based on a diagnosis of antisocial personality disorder, the factor found and given little weight.

A Notice of Appeal to this Court was filed. (R8:1440-1441)

Penalty Phase Trial

State's Presentation:

On May 6, 2000, John Blackwelder was housed in F-dormitory at Columbia Correctional Institution. (T11: 390-391) Blackwelder approached Sergeant Timothy Saxon, a correctional officer supervisor, and said, "You can go ahead and take me to jail, Sarge. I just killed a fagot in my cell." (T11:391, 406-407) Saxon had another correctional officer handcuff Blackwelder, and he proceeded to Blackwelder's cell. (T11:391) In the cell, Saxon found the body of Thomas Wigley face down on the bottom bunk partially covered with a sheet. (T11:392-395)

Shawn Yao, a crime laboratory analyst, examined and photographed the crime scene. (T11:421-430) Photographs of the

cell, the bed and the body were introduced as State's Exhibits 13-21) (T11:423-427) The body was nude and had a white strip of cloth wrapped around the throat as a ligature. (T11: 423-425) Clothing was found on top of a footlocker. (T11:426-427) Additional strips of cloth were attached to the bottom of the bunk. (T11:425-426) One strip was located underneath the mattress. (T11:426-429) Yao took the strips of cloth into evidence. (T11:427-430) (State's Exhibits 24-26)

Dr. Bonifacio Floro, a forensic pathologist, performed the autopsy on Wigley. (T11:372-373) The body arrived completely nude with a white cloth tied around the neck. (T11:374) Due to the blood going to the brain being unable to return because of the ligature, the neck and head were swollen and red. (T11:374-375) Upon removing the ligature, Floro found a furrow around the neck with and abrasions or scratches, which Floro opined were caused by Wigley's attempt to loosen the ligature. (T11:376) Both eyes contained hemorrhages consistent with strangulation. (T11:376-377) Floro
concluded that cause of death was strangulation as the result of a
homicide. (T11:377-378)

According the two inmates who lived in the same dorm, Blackwelder and Wigley had a homosexual relationship. (T11:396-

398, 412-413) Londell Moss was Blackwelder's roommate for three weeks. (T11:396-398) During that time, Moss said that Blackwelder and Wigley used the cell for sex perhaps three times. (T11:398, 401) They would ask to "borrow" the cell. (T11:398) A friend of Wigley's, Walter Martinez, said that Wigley and Blackwelder had a break-up of the relationship for about a week, but they were back together for a week at the time Wigley was killed. (T11:413-415) On the day Wigley died, Blackwelder mentioned to Moss that he and Wigley were having problems. (T11:398) Later, when Moss returned to the cell after his job, he met Blackwelder who carried his property and said he was moving. (T11:399) He told Moss that Wigley was asleep in the bunk in the cell. (T11:399) Moss said there was cardboard on the cell window which he removed. (T11:399-400) He nudged Wigley, but he did not move. (T11:400) Moss pulled back that blanket and was shocked to find Wigley dead. (T11:400) Sergeant Saxon arrived and had Moss escorted to another dorm. (T11:400) Moss said he knew that Blackwelder had been taking psychotropic medication and that he stopped taking it over three weeks earlier, about three days before Moss moved into the cell. (T11:401-402) Blackwelder would sometimes play cards with imaginary friends -- Bubba, No-Name and Jimmy. (T11:401) He

would become upset when Bubba would win the card game. (T11:401)

Blackwelder gave four statements to Jack Schenck, the correctional officer performing the criminal investigation. (T12:441-530) The first statement was shortly after the homicide on May 6, 2000. (T12:444-474) (State's Exhibits Nos. 27 & 28) At that time, Blackwelder advised that he killed Wigley to stop Wigley from sexually harassing him. (T12:448-449) Initially, Blackwelder and Wigley had been friends. (T12:450) There was no sex involved in the relationship. (T12:450) Wigley kept asking to give Blackwelder oral sex, and one day, Blackwelder agreed. (T12:450-452) Blackwelder told Wigley he did not like it and did not want to engage in any sexual acts with him. (T12:452-454) For about two weeks, Wigley kept coming back to Blackwelder asking for sex -- wanting to be lovers. (T12:448-449) Blackwelder told Wigley that he had been molested as a child and he had psychological problems. (T12:449) After the noon meal on May 6, Blackwelder returned to his cell. (T12:454) He was housed in an open population area where the inmates were free to move around during the day. (T12:451-452) His roommate was not at the cell and Blackwelder went to the guard station to advise that he was not there since he had been paged. (T12:454-455) Upon his return to the cell, Blackwelder found Wigley sitting

in the cell waiting for him. (T12: 454-455) Wigley said, “Come on, let’s do something.” (T12:455) Blackwelder told him that he would have sex with him if Wigley stripped and allowed Blackwelder to tie him down to the bed. (T12:456) Wigley agreed, took his clothes off and placed them on a footlocker. (T12:456-457) Blackwelder tied Wigley’s hands and feet with strips of cloth which had been attached to the bed while he was face down on the bottom bunk. (T12: 457-458, 461-462) Additionally, Blackwelder tied a wash cloth over Wigley’s mouth. (T12:458, 462) Blackwelder took his pants off and got on his knees sitting on top of Wigley’s back. (T12:459) Blackwelder asked, “Are you read for the fun?” (T12:459) At that time, Blackwelder pulled another strip of cloth from under the top bunk mattress and looped it over Wigley’s neck and strangled him. (T12:459, 464-466) At first, Wigley said, “John, stop. John, you’re hurting me.” (T12:465) Blackwelder responded, “Really? Ain’t that a bitch. You should have thought about that before. We might just finish it.” (T12:465) Blackwelder pulled the string tighter until Wigley’s face turned blackish and blood came out of his nose. (T12:465-466) He then untied Wigley, placed his personal property in a pillow case and walked to the captain’s office where he advised the officers “there was a dead one in there.” (T12:466) Blackwelder realized killing Wigley was not the right,

but he had been trying to get psychological help. (T12:472) He said he could no longer talk to Dr. Hamilton at the institution because he could not trust the confidentiality of his conferences. (T12:472)

A second interview of Blackwelder occurred at 7:00 p.m. on May 6, 2000. (T12:474-478) Schenck again asked Blackwelder about the sequence of the events, and then, he questioned Blackwelder about his motives. (T12:476-488) Blackwelder intended to kill Wigley so that he would not again bother anyone. (T12:489-498) Blackwelder felt as if Wigley was another molester trying to manipulate just like the one who molested Blackwelder as a child. (T12:489) The string Blackwelder used had been in place under the mattress for a couple of days. (T12:494-495) Blackwelder said he prepositioned the string to be ready because he felt that Wigley was not going to stop bothering him. (T12:494-495) For four months, Blackwelder had been sexually harassed by other inmates. (T12:495) He went for psychological help, but instead of help, Blackwelder said he received a disciplinary report for making a verbal threat. (T12:496) He concluded that the next time a problem arose he would deal with it himself rather than trying to seek help. (T12:496) Blackwelder killed Wigley to stop him. (T12:497-499)

On May 9, 2000, Schenck conducted a third interview of Blackwelder. (T12:500-503) Schenck asked Blackwelder about the relationship he had with Wigley and confronted him with an allegation that he killed Wigley because Wigley had started a relationship with someone else. (T12:510-513) Blackwelder denied that was true and said it would have been a blessing if Wigley had a relationship with someone else. (T12:513)

Schenck interviewed Blackwelder a fourth time on May 31, 2000. (T12:523-530) Blackwelder had sent a letter to the State Attorney which contained a riddle about a wrist watch. (T12:524-527) After killing Wigley, Blackwelder took Wigley's watch. (T12:527) He denied that he killed for the watch and that he took it since Wigley didn't need it anymore. (T12:527) Schenck took possession of the watch during the interview. (T12:528)

The State introduced several letters Blackwelder wrote after the homicide. (T12:529-547)(State's Exhibits Nos. 39-46) These letter were addressed to the State Attorney, FDLE, the Governor, and a newspaper. (T12:534-548) Two letters to the State Attorney included the riddle about the watch and one suggesting that other murders in prison were in some way connected and urging the State Attorney to get him to trial. (Ex. Nos. 39, 40)(T12:536) A letter to the FDLE urging that the State Attorney be pressured to get Blackwelder to trial or there would

be other murders in the prison system. (Ex. No. 41)(T12:537) One letter to a named FDLE agent mentioned earlier misinformation Blackwelder sent about the Adam Walsh case and stated that he had a dream about a crop duster spraying a purple haze over a crowded NFL football game in Florida. (Ex. No. 43)(T12:539) The first of three letters Blackwelder sent to the Governor asked for a pardon to be released from prison to seek revenge on eleven others in the community.(Ex. No. 42) (T12:538) The second letter to the Governor related the dream about crop dusters spraying a purple haze on a football game. (Ex No. 44)(T12:540-541) A third letter to the Governor, admitted that he killed Wigley and had planned the murder for days. (T12:542) Blackwelder explained in that letter that he had a life sentence with no chance of release and therefore had a license to kill. (T12:542-543) He said there was no advantage or disadvantage to kill inmates or staff when you had a life sentence. (T12:543) The letter suggested that depending on how Blackwelder's case is resolved will show other inmates with a life sentence if there is a reason not to kill in prison. (T12:543) Blackwelder stated in this letter that he had vowed to kill 13 people who caused him to unjustly be imprisoned for life and would kill inmates or staff as substitutes. (T12:544) The letter also mentioned the crop duster dream. (T12: 544)Blackwelder stated that he prayed

for the death penalty and that if he received death he would not kill anyone else. (Ex. No. 45) (T12:544) A letter was sent to the Ft. Pierce News Tribune which in substance was the same as the letter to the Governor. (Ex. No. 46) (T12:545)

The State introduced, via a stipulation, Blackwelder's prior convictions: sexual battery on a child under 12; attempted sexual battery on a child under 12; and five counts of lewd and lascivious or indecent act on a child under 16. (State's Exhibits Nos. 48 & 49) (T12:548)

Defense Presentation:

Dr. Chat Hamilton, a psychological specialist with Department of Corrections, was Blackwelder's case manager. (T13:612-614) Blackwelder had a working diagnosis of impulse control disorder, antisocial personality disorder and pedophilia. (T13:615, 633) He was treated with medications -- Prozac and Mellaril. (T13:615-616) Hamilton first saw Blackwelder in 1999, and he thought Blackwelder had been on the medications since 1998. (T13:616) In January 2000, Blackwelder came to Hamilton with a psychological alert problem. (T13:616) A procedure was in place for where an inmate could who is distraught, wants to hurt himself, or wants to hurt someone else can declare a psychological emergency and be seen for assistance

within an hour. (T13:617) Hamilton said such a request is considered a “cry for help.” (T13:617) Blackwelder stated that he felt like he was being sexually harassed in his housing area. (T13:617) He did not want to hurt himself or to be hurt, but he did want the harassment stopped. (T13:617) He felt like hurting someone else. (T13:617) He wanted a break from the housing area and sought some kind of confinement. (T13:619) There were two types of confinement options available to him: (1) administrative confinement afforded to inmates who feel their life is threatened and (2) confinement of inmates who have made verbal threats to hurt someone. (T13: 618-620) Blackwelder did not want the first, administrative confinement for protection. (T13:619) In this context, for the purpose of obtaining temporary confinement, Blackwelder made a threat -- he felt like using the laces from his boot to strangle another inmate -- for the purpose of being confined. (T13:617-621) He knew a threat was a ground for breach of confidentiality and that Hamilton would have to advise security. (T13:621) Neither Hamilton nor Blackwelder realized that in addition to confinement, security would also write a disciplinary report (DR) punishing Blackwelder for his threat. (T13:621) Blackwelder wrote Hamilton with his frustration over the DR and said he could no longer trust Hamilton. (T13:622) He also expressed concerns about

inadequate protection of confidentiality of patient records. (T13:622-623) Blackwelder wanted a transfer to receive mental health treatment from someone he could trust. (T13:622) Doug Johns, Blackwelder's classification officer, wrote a report acknowledging Blackwelder's major mental health issues and recommended a transfer. (T13: 657-661)

Dr. Pablo Lamangcolob , a psychiatrist with the Department of Corrections, treated Blackwelder.(T13:664-665) He used a working diagnosis of impulse control disorder and pedophilia. (T13:665-666) Treatment included both medications and psychotherapy. (T13:666) Aggression, impulsivity and violence can be the result of impulse control disorder. (T13:669) On March 27, 2000, Blackwelder requested to stop his medication. (T13:669) Lamangcolob counseled against that action, but Blackwelder exercised his prerogative to stop medication. (T13:669-670) From March 27th until June 6th, including the date of the homicide of Wigley, May 6th, Blackwelder was not taking his medications or receiving psychotherapy. (T13:670-671) Lamangcolob saw Blackwelder on May 9th, after the homicide, and at that time, Blackwelder said that if he had been taking his medications the homicide probably would not have occurred. (T13:671-672)

A long-time friend of Blackwelder's, Michael Guero, testified. (T13:699) Guero knew Blackwelder as a compassionate and giving man. (T13:700) He was thoughtful, never forgot a birthday and would help plan family gatherings. (T13:700) He was a friend who was always there to help. (T13:702) Guero did not know much about Blackwelder's youth, except that he attended an academy when a child. (T13:700) Blackwelder's parents were tough people. (T13:700-701) Guero knew Blackwelder when he ran the family business, and he did not think Blackwelder was fairly compensated for his work. (T13:701-702) He knew that Blackwelder was hurt by the way his parents treated him. (T13:702)

Jean Gardner is Blackwelder's sister. (T13:705) She said John was the youngest of four children to parents who only wanted two. (T13:705) The oldest, Dwight, was the favored child. (T13:705) John was a baby when the family moved from Ohio to Florida. (T13:706) Their father, an alcoholic, ran a bar for a time in Sanford. (T13:706) Ultimately, the family opened a restaurant in Fort Pierce. (T13:706) Jean, at 13, was expected to work long hours at the restaurant. (T13:706-707) Jean, her younger sister, Susanne, and John, when he was a bit older, worked constantly in the restaurant. (T13:706-707) They would work until 10:00 at night, their dad would pick up a quart of liquor as he drove them home, they would arrive home sometimes

as late as 11:00, eat dinner and do their homework. (T13:707) When John was five-years-old, his parents sent him to boarding school, Sanford Navel Academy. (T13:708) An instructor at the academy molested him. (T13:708) John kept calling his parents and begging to come home. (T13:708) Finally, John and another boy broke into a car in the parking lot and the academy sent him home on a bus. (T13:708) Their dad was angry that the school had sent him home on a bus because he was so young. (T13:709) The molestation was never even acknowledged or talked about, much less anything done about it. (T13:709) Jean remembered that John would do anything for attention from his parents. (T13:709) She said he was like a puppy trying to get someone to pet him. (T13:709)

When John was grown, he worked running the family business. (T13:710-711) She said he was never fairly compensated. (T13:710-712) Their parent seemed to think that allowing him to live at the house and drive one of their cars was a substitute for a salary. (T13:710)

Blackwelder testified personally about several matters pertaining to his childhood, his mental health condition, the circumstances of the crime and the letter he wrote after the homicide. (T13:715-785)

When Blackwelder was eleven years old and in the sixth grade, a teacher at the Sanford Naval Academy molested him. (T13:716) The teacher used to take three or four of the children to the movies and other outings. (T13:716) One night, two of the older children awoke Blackwelder and told him to go to the teacher's room. (T13:716) At the room, the older boys pulled Blackwelder's pants down and the teacher, Mr. Munday, had him come to his bed. (T13:716) Munday was nude. (T13:716) He had Blackwelder perform oral sex on him. (T13:716) Blackwelder started crying and was told to go to his room. (T13:717) The next morning the commandant stopped him and asked him why he had been in the hallway during the night crying. (T13:717) Blackwelder told him what happened. (T13:717) The commandant scolded him, told him to go to class and forget about it. (T13:717) Munday was fired. (T13:718) Blackwelder started rebelling -- smoking on campus, stealing hub caps off of cars in the parking lot. (T13:717-718) The school never gave him counseling, but he was sent home on bus. (T13:718-719) His parents were told of allegations that a teacher bothered him. (T13:719) Blackwelder never received counseling. (T13:719)

The circumstances leading up to the homicide started in January 2000. (T13:719) Blackwelder stated that some inmates at Columbia Correctional were sexually harassing him. (T13:719) He

said when it is known you are incarcerated for molesting children a label is attached. (T13:719) Although he tried to avoid problems, a time came when he could not. (T13:720) Blackwelder went to mental health services under the self-declared medical emergency procedure.(T13:720) He advised Dr. Hamilton about the harassment from three inmates. (T13:720) During the interview, Blackwelder said he made a verbal threat toward Inmate Green. (T13:720) He threatened to strangle him with a shoelace. (T13:720-721) Blackwelder made the comment solely to be sent to protective confinement. (T13:721) He knew Hamilton would have to report the threat. (T13:721) However, Blackwelder did not expect to also receive a D.R. for the comment, and he felt ill toward because Hamilton did not have to write the D.R. under the circumstances. (T13:721) Blackwelder said his trust in the prison mental health services was further eroded when he saw inmate files in the hallway, compromising confidentiality. (T13:722-723) He gave up on the mental health services. (T13:723) After he was denied protective management by removal to another institution and the reliance on drugs rather than counseling, Blackwelder stopped seeing the prison psychologists. (T13:723-725) He also stopped taking his medications on March 27, 2000. (T13:670-671, 723)

Another inmate introduced Blackwelder to Wigley. (T13:725) Blackwelder needed funds to buy soda and toiletries, and Wigley offered him a deal. (T13:725) Wigley would supply Blackwelder with those items, and in return, Blackwelder would act as his "woman." (T13:725-726) The understanding was that there would be no sex involved. (T13:725-726) Wigley wanted to change his image on the compound so that others would think he was a "man" now. (T13:726) Blackwelder knew that when at another prison Wigley had been a "boy." (T13:727) Blackwelder would serve Wigley -- change sheets on his bed, get drinks during meal time, give him massages. (T13:726) After about two weeks, Wigley wants to break the deal and Blackwelder agreed. (T13:726-727) A week later, Wigley approached Blackwelder to restart the arrangement. (T13:727) Wigley said to show he was sincere, he would perform oral sex on Blackwelder. (T13: 727) Afterwards, Blackwelder told Wigley that he did not want to restart a relationship with him. (T13:727-728) However, Blackwelder knew Wigley would be back to bother him again about the relationship. (T13:728) Blackwelder made a decision that he would deal with the situation. (T13:729) He set up the bunk with the strips of cloth as tie downs. (T13:729)

Wigley showed up in Blackwelder's cell after lunchtime. (T13:729) Blackwelder's roommate was not there at the time.

(T13: 729-730) Wigley asked for sexual activity of some kind. (T13:730) In response, Blackwelder said they could do something if Wigley would allow Blackwelder to tie him and have sex as the dominate. (T13:730) Wigley agreed, removed his clothes and lay down on the bunk. (T13:730) Blackwelder tied Wigley's hands and feet and placed a cloth mouth piece on him. (T13:730-731) Then, Blackwelder took his own pants off and sat on Wigley's back. (T13: 731-732) He lead Wigley to believe he was going to have sex with him. (T13:731) Blackwelder then put another string around Wigley's neck and strangled him. (T13:731-732) Although Blackwelder denied he was acting on impulse, he did state that if Wigley had not come to his cell he would not have killed him. (T13:732) After Blackwelder lost his appeals, he told himself that he would not live in prison for a long time. (T13:736) He knew he would kill someone eventually because he wanted to be given the death penalty. (T13:737-738)

Blackwelder admitted writing the various letters after the homicide which the State introduced. (T13:744-750) He wrote them to inflame and provide aggravating factors for a death sentence. (T13:748-749) Acknowledging that he would never get out of prison, Blackwelder said his goal was not to hurt anyone, but to "call it quits." (T13:749) He said he had no remorse for Wigley's death, and he actually thought he did him a favor since

Wigley, too, had a life sentence without parole and suffered from cirrhosis of the liver. (T13:753-754)

Spencer Hearing:

A Spencer hearing was held on July 30, 2001. (T17:1-32) Prior to the hearing, the State introduced a judgment from the U.S. District Court, Southern District of Florida against Blackwelder for threatening the life of the Vice President. (R7:1260-1266) Against the advise of counsel, Blackwelder had the psychological reports from Dr. McMahon and Dr. Mhatre introduced as evidence. (T17:3-8; R7:1338-1345)

Dr. Elizabeth McMahon's summarized her psychological examination of Blackwelder. (R7:1338-1339) She found no major thought disorder or affect disturbance. (R7: 1338) However, she did find Blackwelder suffered form a poorly developed conscience, was self-indulgent and had difficulty delaying impulse gratification. (R7:1339) McMahon concluded that Blackwelder was competent. (R7:1339) Additionally, she did not find that Blackwelder qualified for statutory or nonstatutory mental mitigating circumstances. (T7:1339)

Dr. Umesh Mhatre conducted a psychiatric evaluation of Blackwelder. (T7:1340-1345) He found Blackwelder sane at the time of the offense, not qualified for involuntary

hospitalization and competent to proceed in court. (T7:1345) Mhatre's psychiatric impressions were that Blackwelder exhibited pedophilia, antisocial personality disorder and depression which was in remission. (T7:1345) In Mhatre's opinion, Blackwelder's desire for the death penalty was not grounded in depression. (T7:1344)

Blackwelder personally addressed the court at length taking issue with various statements and opinions of the prosecutor and defense counsel. (T17: 9-29) Ultimately, Blackwelder asked the court to impose a death sentence. (T17:9-29)

SUMMARY OF ARGUMENT

1. John Blackwelder killed in order to obtain the assistance of the State of Florida in committing his own suicide. From the time he planned the homicide through the penalty phase trial and sentencing, Blackwelder's efforts were aimed at securing a death sentence. These efforts included the selection of a jury inclined to vote for death. These efforts effectively turned the adversarial process on its head. Rather than two parties with competing goals selecting a jury to fairly try the issues, the selection process was skewed in favor of selecting a jury inclined to vote for death. The skewed jury selection process and the trial court's giving the jury's death recommendation great weight has tainted the reliability of the death sentence imposed in this case in violation of the Florida and United States Constitutions. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.

2. The trial court asked the State and the Defense to prepare proposed sentencing orders prior to the sentencing hearing. The State advised the court that sentencing memorandums would be appropriate. Both the State and the Defense presented sentencing memorandums. A comparison of the trial court's sentencing order and the State's sentencing memorandum reveals that the sentencing order is virtually a

verbatim copy of the State's sentencing memorandum. Florida's death penalty sentencing scheme requires, as

a fundamental structural part, the careful written analysis of the sentencing judge. See, e.g., Sec. 921.141 (3), Fla. Stat.; Patterson v. State, 513 So.2d 1257, 1261-1263 (Fla. 1987); Van Royal v. State, 497 So.2d 625 (Fla. 1986); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). In adopting the State's sentencing memorandum as the sentencing order, the trial court has abdicated its sentencing responsibility. The death sentence in this case has been imposed in a constitutionally unreliable manner and must be reversed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

3. The State asserted that Blackwelder's federal conviction for threatening the life of the vice president and his convictions for lewd act on a child under 16 supported the prior violent felony aggravator provided for in Section 921.141(5)(b) Florida Statutes. In the sentencing order, the trial court found that these convictions supported the aggravating factor. Crimes of violence for purposes of the aggravating circumstance are "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." See, Lewis v. State, 398 So.2d 432, 438 (Fla. 1981). Blackwelder's conviction for threatening the vice president does not qualify since he was

never in direct contact with a human victim and the purpose behind the crime is to punish for the disruption cause by such threats, not for an actual assault. See, 18 U.S.C.A. sec. 871 (a); United States v. Patillo, 438 F.2d 13 (4th Cir. 1971). The convictions for lewd act on a child do not qualify for the aggravating circumstance because this offense is not per se a crime of violence and the State presented no facts to establish that violence was actually involved. See, Hess v. State, 794 So.2d 1249, 1264 (Fla. 2001). In using these convictions to support the aggravating circumstance of a prior violent felony tainted the sentencing weighing process rendering the death sentence unreliable and unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

4. Sections 782.04 and 921.141 Florida Statutes are unconstitutional because they do not meet the due process and right to a jury trial requirements set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000). 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. 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.

ARGUMENT

ISSUE I

WHETHER THE SENTENCE OF DEATH --IMPOSED IN PART ON THE TRIAL COURT'S AFFORDING THE JURY DEATH RECOMMENDATION GREAT WEIGHT -- IS THE RELIABLE PRODUCT OF ADVERSARIAL TESTING, SINCE BLACKWELDER, WHO ACTIVELY SOUGHT A DEATH SENTENCE AND THE SELECTION OF A JURY INCLINED TO VOTE FOR DEATH, PREVENTED COUNSEL FROM CHALLENGING JURORS WHO COULD HAVE BEEN EXCLUDED FROM SERVICE ON THE BASIS OF THEIR PRO-DEATH PENALTY ATTITUDES?

John Blackwelder killed in order to obtain the assistance of the State of Florida in committing his own suicide. From the time he planned the homicide through the penalty phase trial and sentencing, Blackwelder's efforts were aimed at securing a death sentence. These efforts included the selection of a jury inclined to vote for death. (T9:4 - T10:322) As Blackwelder specifically stated at the Spencer hearing,

> Just like there is no law that stopped me from having people on the jury that would not think twice about giving me the death penalty and getting rid of those that weigh -- that might not vote for the death penalty.

(T17: 27) Moreover, defense counsel, during jury selection, specifically advised the court that Blackwelder was directing that challenges to certain jurors not be made. (T9:96) Blackwelder's efforts effectively turned the adversarial process on its head. Rather than two parties with competing goals selecting a jury to fairly try the issues, the selection process was skewed in favor of selecting a jury inclined to vote for

death. In cases where a defendant is actively seeking a death sentence, this Court reviews structural errors effecting the reliability of the sentencing process *de novo*. See, e.g., Hauser v. State, 701 So.2d 329 (Fla. 1997); Farr v. State, 621 So.2d 1368 (Fla. 1993); Hamblen v. State, 527 So.2d 800 (Fla. 1988). The skewed jury selection process and the trial court's giving the jury's death recommendation great weight has tainted the reliability of the death sentence imposed in this case in violation of the Florida and United States Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

At least two jurors served in this case who could have been subject to cause or peremptory challenge due to the impact their views concerning the death penalty had on their decision-making ability. See,e.g., Bryant v. State, 601 So.2d 529, 532 (Fla. 1992)(juror opinion favoring death penalty which impairs juror ability to be impartial basis for cause challenge); San Martin v. State, 717 So.2d 462 (Fla. 1998)(juror's views on death penalty which fall short of basis for cause challenge is a valid ground for a peremptory challenge).

Juror McCallister

Juror McCallister held strong beliefs that a death sentence was the only appropriate sentence for premeditated murder.

(T9:89-90)(App. B) When asked if he could set aside those beliefs and apply the law which is contrary to those beliefs, McCallister said he thought he probably could do it, but "it would be really difficult." (T9: 91)

> MS. JOHNSON[DEFENSE COUNSEL]: Do you believe that that death penalty should be imposed in all cases involving first degree murder?
>
> THE PROSPECTIVE JUROR: I don't know what first degree murder is versus other types.
>
> MS. JOHNSON: Where there is premeditation, thought, planning, do you believe the death penalty should be imposed?
>
> THE PROSPECTIVE JUROR: Premeditation, yes. If they actually plan on killing them and they want to kill them and they think about it for a length of time, yes, I think it should be.
>
> MS. JOHNSON: Can you ponder or think of any situation where even if someone plans the murder and thinks about it and premeditates it that the death penalty is not appropriate?
>
> THE PROSPECTIVE JUROR: No, not sitting here, I don't think I can.
>
> MS. JOHNSON: You are telling me that you think in all cases involving premeditation or planning or murder, first degree murder, the death penalty should absolutely be imposed?
>
> THE PROSPECTIVE JUROR: Yes.
>
> MS. JOHNSON: Even with that feeling, do you think you could still look at the aggravating evidence and the mitigating evidence and weigh that even if you knew the murder was premeditated or planned? Could you still look at the evidence and base your advisory decision on the evidence alone?

THE PROSPECTIVE JUROR: I think it would be really difficult; but I think I probably could do it, yeah.

(T9:89-91)

Upon further questioning, McCallister said he had no problem voting for death for someone who had killed and requested the death

sentence. (T9:93-94)

MS. JOHNSON: Mr. McCallister, Mr. Africano and I are faced with an unusual situation. Our client is going to ask you to put him to death. Could you still -- even if you hear that request -- still look at the evidence, meaning the aggravating factors presented by the state and the mitigating factors -- could you look at them and weigh them and not rely solely on the request from Mr. Blackwelder?

THE PROSPECTIVE JUROR: My first thoughts are if he has killed somebody for no reason and he wants to be put to death -- my first thought is I don't see a problem with that.

MS. JOHNSON: Do you think if he wants it, I should give him what he wants?

THE PROSPECTIVE JUROR: I think so. Although, I think if I am asked to review the circumstances I think I can be professional enough to do my best to be fair about it. Yeah, I think you should give him what he wants if that's what he wants.

MS. JOHNSON: Do you think you could follow the law as Judge Douglas will instruct you and solely follow that?

THE PROSPECTIVE JUROR: I would like to think I could be professional enough to do that. I have never been in this situation before. I don't know for certain. That's what I would like to believe.

(T9:93-94)

After the questioning of Juror McCallister, defense counsel, advised the court that Blackwelder had "instructed that that Mr. McCallister is not a challenge for cause." (T9:96)

Juror Tilleman

Juror Tilleman had personal feeling which she said would predispose her to vote for death. (T9:104-106)(App.B) Tilleman had a friend and co-worker who was recently murdered by her husband. (T9:105) She candidly stated that the experience left her with strong feelings favoring the death penalty for murder. (T9:105-106)

> MR. DEKLE[PROSECUTOR]: Are you one of those people -- you have such strong feelings that you could not follow the law and the evidence in this case?
>
> THE PROSPECTIVE JUROR: Due to personal circumstances, it is possible that I would not -- that I would fall under one of those categories.
>
> MR. DEKLE: What was that personal circumstance?
>
> THE PROSPECTIVE JUROR: I had a friend I worked with that was murdered by her husband.
>
> MR. DEKLE: Would that have been recently?
>
> THE PROSPECTIVE JUROR: Yes, sir. It was a couple of years ago.
>
> * * * *
>
> MR. DEKLE: You understand that if you are accepted as a juror, that particular case and your feelings about that particular case should play no part in your verdict in this particular case?

THE PROSPECTIVE JUROR: Yes, I do.

MR. DEKLE: Can you set those feeling aside?

THE PROSPECTIVE JUROR: I can try.

MR. DEKLE: I hate to be -- I hate to push or press. We really need a definite answer on this ma'am. Can you set those feelings aside?

THE PROSPECTIVE JUROR: Probably not.

MR. DEKLE: Probably not?
Would -- I am assuming those feelings would predispose you to recommend the death penalty?

THE PROSPECTIVE JUROR: Probably so.

(T9:105-106) The prosecutor continued to question Tilleman explaining that this case was not a husband/wife situation. (T9: 106-107) Tilleman upon further questioning said she "could" vote for a life sentence if the mitigating circumstances called for it. (T9: 107)

Neither a cause or peremptory challenge was made against seating either McCallister or Tilleman. (T9:96, 111; T10:318-321) Blackwelder stated that he made the decisions concerning the challenges to prospective jurors. (T17:27) Both McCallister and Tilleman served on the jury which recommended a sentence of death. (T10:321-322, T14:833) Since the jury selection process was skewed in favor of selecting jurors prone to recommend death, the jury's decision lacks reliability. The trial court gave the recommendation great weight. (R8:1425) The resulting sentence of death is not reliable and violates due process

protections and cruel and unusual punishments prohibitions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

ISSUE II

THE TRIAL COURT ABDICATED ITS SENTENCING RESPONSIBILITY TO THE PROSECUTOR WHEN THE COURT COPIED, VIRTUALLY VERBATIM, THE STATE'S SENTENCING MEMORANDUM AS THE SENTENCING ORDER IMPOSING THE DEATH SENTENCE.

At the conclusion of the penalty phase, the trial court asked the State and the Defense to prepare proposed sentencing orders prior to the sentencing hearing. (T14:836) The State advised the court that sentencing memorandums would be appropriate. (R7:1346) Both the State and the Defense presented sentencing memorandums. (R7: 1326; 1284; R8:1377) A comparison of the trial court's sentencing order (R8:1410-1425)(App. A), and the State's sentencing memorandum (R7:1284-1302) (App. C), reveals that the sentencing order is virtually a verbatim copy of the State's sentencing memorandum. Florida's death penalty sentencing scheme requires, as a fundamental structural part, the careful written analysis of the sentencing judge. See, e.g., Sec. 921.141 (3) Fla. Stat.; Patterson v. State, 513 So.2d 1257, 1261-1263 (Fla. 1987); Van Royal v. State, 497 So.2d 625 (Fla. 1986); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). The trial judge is required to make the findings and weighing analysis necessary to impose a sentence of death. *Ibid*. This Court reviews the adequacy of the trial court's sentencing order de novo. In adopting the State's sentencing memorandum as the sentencing order, the trial court has abdicated its sentencing

responsibility. *Ibid*. In order to be valid, a death sentence must rest on the careful findings of fact, weighing and analysis of the sentencing authority -- not that of the prosecutor. *Ibid*. The death sentence in this case has been imposed in a constitutionally unreliable manner and must be reversed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

The trial judge's duty to make findings of fact concerning aggravating and mitigating circumstances and to weigh these circumstances in the sentencing process is a fundamental safeguard to insure reliability in Florida's death penalty scheme. See, Sec. 921.141 (3) Fla. Stat.; State v. Dixon, 283 So.2d at 8. This court has required that these findings be in writing in order to enhance deliberative process of the trial judge and to provide a basis for this Court to review the sentence. See, Van Royal v. State, 497 So.2d 625 (Fla. 1986). From the time the jury rendered its sentencing recommendation, the trial judge in this case expressed his willingness to abdicate his responsibility to find, weigh and consider the circumstances in coming to a sentencing decision. This willingness was evidenced by the trial court's initial request to the state and the defense to present proposed orders prior to the sentencing hearing. (T14:836) This willingness became

manifest, when the court adopted, almost verbatim, the prosecutor's sentencing memorandum as the sentencing order. (R7:1284; R8:1440) (App. A & C) A review of the sentencing order and the State memorandum shows that the two documents are virtually identical. Both have the same outline format. Both are broken into sections labeled the same. Most telling -- except for a few minor changes and additions -- the actual wording in both documents is same.

In Patterson v. State, 513 So.2d 1257 (Fla. 1987), this Court reversed for a new sentencing hearing because the trial court delegated to the prosecutor the responsibility to prepare the sentencing order. This Court wrote:

> ... we find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to *independently* weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentencing of life imprisonment should be imposed upon a defendant....

Patterson, 513 So.2d at 1261. While the prosecutor in Blackwelder's case declined the judge's request to provide an "order" and instead provided a "memorandum." (R7:1284, 1346) The effect was the same as the delegation of preparation of the

order in Patterson -- the prosecutor, not the judge, did the sentencing analysis.

The trial court's sentencing order does not reflect that the trial court performed its duty to independently find, consider and weigh the aggravating and mitigating circumstances. Blackwelder's death sentence has been imposed in an unreliable and unconstitutional manner. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

ISSUE III

THE TRIAL COURT ERRED IN RELYING ON TWO FELONY CONVICTIONS TO SUPPORT THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE SINCE THE FELONIES DID NOT QUALIFY AS PRIOR VIOLENT FELONIES FOR PURPOSES OF THE AGGRAVATING CIRCUMSTANCE.

The State asserted that Blackwelder's federal conviction for threatening the life of the vice president and his convictions for lewd act on a child under 16 supported the prior violent felony aggravator provided for in Section 921.141(5)(b) Florida Statutes. In the sentencing order, the trial court found that these convictions supported the aggravating factor.(R8:1411)(App. A) Crimes of violence for purposes of the aggravating circumstance are "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." See, Lewis v. State, 398 So.2d 432, 438 (Fla. 1981). Blackwelder's conviction for threatening the vice president does not qualify since he was never in direct contact with a human victim and the purpose behind the crime is to punish for the disruption cause by such threats, not for an actual assault. See, 18 U.S.C.A. sec. 871 (a); United States v. Patillo, 438 F.2d 13 (4th Cir. 1971). The convictions for lewd act on a child do not qualify for the aggravating circumstance because this offense is not per se a crime of violence and the State presented no facts to establish that violence was actually involved. See, Hess v. State, 794 So.2d 1249, 1264 (Fla. 2001).

In using these convictions to support the aggravating circumstance of a prior violent felony tainted the sentencing weighing process rendering the death sentence unreliable and unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

Legal Standards

Determining whether a criminal offense is a crime of violence for purposes of establishing the aggravating circumstance of a previous conviction for a violent felony, sec. 921.141(5)(b) Fla. Stat., is a question of law reviewed in this court under the *de novo* standard. A felony involving the use or threat of violence, in order to qualify for the aggravating circumstance, must be "life threatening crimes in which the perpetrator comes in direct contact with a human victim." Lewis v. State, 398 So.2d at 438; Johnson v. State, 720 So.2d 232, 237 (Fla. 1998). The violent nature of the felony can be established based on the statutory elements of the offense. See, e.g., Hess v. State, 749 So.2d 1249,1263-1264 (Fla. 2001);Lewis v. State; Johnson v. State. If the elements of the crime do not require an element of violence in which the perpetrator must be in direct contact with the victim, the State is permitted to establish through proof of underlying facts that the offense did factually involve such violence. See, e.g., Hess

v. State, 749 So.2d at 1264; Mann v. State, 453 So.2d 784 (Fla. 1984).

Threatening The Life Of The Vice President Not A Crime Of Violence

The federal offense of threatening the life of the vice president is not a crime meeting the definition of a violent felony for purposes of Section 921.141(5)(b) Florida Statutes. See, 18 U.S.C.A. Sec. 871; United States v. Patillo, 438 F.2d 13 (4th Cir. 1971). In pertinent part, the statute reads:

> Whoever knowingly and willfully deposits for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C.A. Sec. 871 (a). This statute is aimed at preventing the disruption of presidential activities, not any actual assault upon the President or Vice President. See, Patillo, at 15-16. A person is criminally liable under this statute for the threat, alone, even where there is no attempt to communicate the threat to the President or Vice President. *Ibid*. The elements

of the offense do not require the violent activity of the perpetrator who comes in direct contact with the victim as is needed for the aggravating circumstance under Section 921.141(5)(b).

The State did not present any underlying facts of this offense -- only a certified judgement was offered as proof. (R7:1260-1266) No attempt was made to establish actual violence through the presentation of evidence. See, Mann v. State. During his testimony, Blackwelder addressed the nature of this offense and admitted that he threatened the life of Vice President Quayle. (13:778) Blackwelder made the threat knowing that it was a federal offense and he would have a place to sleep when locked up. (T13:778)

Blackwelder's conviction for threatening the life of the Vice President was not a violent felony qualifying for the aggravating circumstance of having a previous conviction for a violent felony.

Lewd Act On A Child Under 16 Not A Crime Of Violence

Blackwelder stipulated to his conviction for lewd act on a child under 16. The State did not present any evidence of the facts underlying the offense. The prosecutor did state the jury charge conference that the sentencing scoresheet had points for sexual contact. (T12:588-590) In its sentencing memorandum, the

State merely asserted that the offense was a crime of violence qualifying for the aggravating circumstance. (R7:1289-1290)(App. C) The trial court accepted this conclusion and found the conviction to be a qualifying crime of violence. (R8:1411)(App.A) The trial court erred.

This court has held that the crime of lewd act on a child is not per se a crime involving violence for purposes of the aggravator provided for in Section 921.141 (5)(b). See, Hess v. State, 794 So.2d 1249, 1263-1264. As this Court wrote,

> However, the trial court also found that lewd assault on a child was a prior violent felony, per se. Section 800.04(1), Florida Statutes (1993), states that it is a crime for a person to handle, fondle, or assault any child under the age of sixteen years in a lewd, lascivious, or indecent manner. However, because this crime does not include sexual battery, the language does not indicate any inherent violence or threat of violence, we conclude this not per se a crime of violence. Thus, the State had the burden of proving that this crime involved violence or the threat of violence under the actual circumstances in which it was committed.

Hess, at 1265. Since the prosecutor offered no evidence of the circumstances of the crime in an effort to show the commission of the offense involved violence or the threat of violence, the conviction did not qualify as a prior violent felony for purposes of the aggravating circumstance.

Conclusion

The trial court's finding, considering and weighing these convictions in support of the aggravator was error and unconstitutionally skewed the sentencing process in favor of death. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

ISSUE IV

WHETHER 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?

Sections 782.04 and 921.141 Florida Statutes are unconstitutional because they do not meet the due process and right to a jury trial requirements set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000). 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. This issue of the constitutionality of Florida's death penalty sentencing statute presents a question of law which this Court reviews *de novo*.

Initially, 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 at 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. The provisions under which the death sentence was imposed in this case 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 in Florida. 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 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, Blackwelder 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.

Blackwelder's death sentence must therefore be vacated.

CONCLUSION

For the above reasons, this Court should reverse Blackwelder's death sentence and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Curtis French, Chief, Capital Appeals, Dept. of Legal Affairs, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, John Blackwelder, #069574, F.S.P. 7819 N.W. 228th St., Raiford, Florida, 32026-1160, on this ____ day of June, 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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