# IN THE SUPREME COURT OF FLORIDA

**LEONARD SPENCER**

**Appellant**

**-VS-**

**STATE OF FLORIDA**

**Appellee**

**Supreme Court Case No. 77430**

**Cir. No. 86-5921** CF **A02**

**(Corrected)**
**BRIEF OF APPELLANT**
**Leonard Spencer**

Nelson E. **Bailey, Lawyer**
**Florida Bar Board Certified Criminal Trial Lawyer**
**Commerce Center, Suite 300**
**324** Datura **Street**
**West Palm Beach, Florida 33401**
**Florida Bar No. 117216**

**Telephone: (407) 832-7941**

## TABLE OF CONTENTS

## CASE AUTHORITIES

## OTHER AUTHORITIES

## HISTORY OF CASE
## and
## STATEMENT OF FACTS

This is a direct appeal by Leonard Spencer from two first-degree-murder convictions and sentence of death, and six convictions for related non-capital felonies and sentences of imprisonment. (TR 4913-4, 5448-71, 5472-5). Trial was in the Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Florida.

Late one night in June, 1986, two men engaged in a crime spree of robberies and shootings along Military Trail in West Palm Beach during which two citizens were killed at two separate locations on Military Trail. Leonard Spencer and Vernon Amos were charged with being the men who committed those crimes: they both were charged with two counts of first degree murder and the related felonies. (TR 4922-31)

Leonard Spencer and Vernon *Amos* were tried together; however, this appeal relates to Leonard Spencer only.

The first trial of Spencer and Amos took place in October of 1986, resulting in convictions of both men on all counts, and both were sentenced to death. On appeal to the Florida Supreme Court their 1986 convictions were reversed and the case remanded for trial again. **Spencer** v. State, 545 So.2d 1352 (Fla. 1989); *Amos* v. State, 545 So.2d 1352 (Fla. 1989).

In October of 1989 the case went to trial a second time. This second trial was prosecuted by a different prosecutor and presided over by a different judge than the first: this time by Assistant

State Attorney Mary Ann Duggan and Circuit Judge James T. Carlisle (and both would become participants in events central to this appeal). (TR 4822) The second trial of Spencer and Amos resulted in a hung jury, as to both defendants on all counts, and a mistrial was granted. (TR 4846)

In November of 1989 the case went to trial a third time, again prosecuted by Assistant State Attorney Mary Ann Duggan and presided over by Judge Carlisle. (TR 4849) At this third trial the jury convicted Leonard Spencer on both counts of first degree murder and on all related felonies. (TR 4881, 5166-9) But as to co-defendant Vernon Amos, the jury was hung again, meaning another mistrial was declared as to *Amos* only, and his case was set for trial yet a fourth time. (TR 4881)

Meanwhile, as to Spencer, in January of 1990 "Phase II" of his third trial was held, still prosecuted by Mary Ann Duggan and presided over by Judge Carlisle. (TR 4885) The same jury who convicted Spencer recommended by majority vote, on both counts of first-degree murder, that Spencer be sentenced to death. (TR 4886, 5223-4)

After Phase II of Spencer's third trial was completed, the court scheduled a single hearing date to hear Spencer's motion for new trial and the final sentencing presentations of the parties, i.e., Phase III, and to impose sentence, all to occur on Friday, March 9, 1990, at 1:30 p.m. On that date and time Spencer and his attorney were in the courtroom ready to proceed -- but no judge or prosecutor was present. Ten minutes past time for the Phase III

hearing to start, Spencer's lawyer walked out of the courtroom into the judge's office to find out the reason for the delay. When he walked into the outer office where the judge's judicial assistant sits, he found Judge Carlisle and his judicial assistant, along with prosecutor Mary Ann Duggan and her assistant prosecutor, all working together proofreading, correcting, and typing a document. He asked what was happening and they simply showed him the document they were working on. It was a sentencing order -- an order sentencing Leonard Spencer to death in the electric chair. (TR 4471, Additional TR 37, Draft Order at TR 5242-54)

Moments later when court convened Lawyer Bailey said he was confused by what had just happened in the judge's office. "At approximately 1:40 I walked into your office," Bailey said, "and you and the State Attorney and your secretary were proofreading a sentencing Order." (TR 4471) Bailey said he wanted whatever had been happening back there to be on the record, and asked the judge to address it. (TR 4471)

In response, Judge Carlisle talked about the recent Grossman decision of the Florida Supreme Court which had been brought to his attention in an earlier conversation he had been having with prosecutor Mary Ann Duggan. Grossman v. State, 525 So.2d 833 (Fla. 1988), requires a trial judge, upon imposing a sentence of death, to hand down a written sentencing order contemporaneous to the time he or she pronounces sentence from the bench. The judge, however, was quick to say, "I assure you that that piece of paper that is sitting back there will not be what is prepared," but went on to

say that the written order sitting back there on his desk now, "was done in an effort not to delay this thing more than it is necessary." (TR 4473)

To make clear that the judge and prosecutor were proofing the court's draft order together when he walked in on them, and were doing it without notice to defense counsel, Lawyer Bailey said,

> MR. BAILEY: My problem, obviously, Judge, is, first of all, you and the state attorney were proofing it together, and I was not on notice.
>
> And I think it is fair for me to bring that out, Judge.
>
> THE COURT: Sure.
>
> (TR 4472)

Lawyer Bailey, obviously assuming at that point that the judge had drafted the order which the judge and the prosecutor had been proofreading together, expressed concern that, before even starting the final sentencing hearing, the Court already had done a written outline or draft order giving the court's reasons and conclusions for imposing death. Bailey suggested this denied the defendant a fair sentencing hearing to whatever extent it indicated a "prejudgment" by the Court before it even had heard the final sentencing presentations or Phase III of this capital case. (TR 4474-5) Based on that, and before the sentencing hearing went forward, Lawyer Bailey made the following motion, with the following result.

> MR. BAILEY: Judge, I would move that the Court, in light of this -- and I don't want you to take it personally -- I am moving to recuse you from the sentencing in this case.

**THE COURT:** No way. Okay.

**MR. BAILEY:** Is there a written Order that exists, or a draft?

**THE COURT:** There is a draft.

**MR. BAILEY:** Prepared by whom, if I may?

THE COURT: Prepared by myself and Mary Ann.

**MR. BAILEY:** Mary Ann, being the Prosecutor?

THE COURT: Yes.

**MR. BAILEY:** And it is fair to comment, to make it, that I was not a party to that process?

THE COURT: You were not a party to the process, no.

**MR. BAILEY:** No. I wasn't even on notice that it was done.

THE COURT: Correct.

**MR. BAILEY:** I am objecting to that and I am objecting to further proceedings before your honor at this point.

**THE COURT:** Okay. You made the point. Let's go. I am going to deny the motion.

**(TR 4475-6)**

Next, after refusing to recuse himself, the judge heard and then denied Spencer's motion for new trial (TR 4476-80, 4903).

After motion for new trial had been heard and denied, defense counsel returned to the subject of the draft, asking the court to mark the draft itself as an exhibit, right now, so it would be part of the record. (TR 4481) The judge agreed to do so, but added, "I assure you that that will not be the order." (TR 4481) And then the judge said corrections were being typed in it right now, and as soon as those corrections were done, it would be put in the record

as counsel requested. (TR 4481-2) Defense counsel asked why, if the draft was not intended as the final order, it still was being corrected even now. The judge answered, "It is a draft; I like them nice." (TR 4481-2)

[The Draft Order is at TR 5242-5254.]

At this point in that day's hearing the Court heard witnesses (TR 4482-90) and then heard the arguments of respective counsel (TR 4490-4, Additional TR 2-25) on the question of sentencing: in other words, the Phase 111 presentations of counsel. At the end of both side's sentencing presentations the judge announced he had decided not to impose sentence that day, based on Grossman. (Additional TR 23, 25) Then the judge said,

> THE COURT: * * *
>
> I might also add that the context in which this thing came up was yesterday, in connection with another case, Mary Ann made me aware of Grossman.
> We talked, you know, with Ray Markey on the telephone as to what we ought to be doing.
>
> MR. BAILEY: The record ought to reflect that Ray Markey is a former Assistant Attorney General.
> And it was in that capacity that you talked to him?
>
> THE COURT: Yes. I picked his brains. He seems to know more about penalties -- death penalty cases than I know, and in connection with this case I asked her [Mary Ann Duggan] to prepare a list of aggravating circumstances she was going to ask for.
>
> MR. BAILEY: What you got was a draft order?
>
> THE COURT: What she has done is taken my prior orders and prepared an order for me.
>
> MR. BAILEY: But the record ought to reflect that this was without notice to counsel for the defense.

THE *COURT:* Well, it sort of evolves from one conversation to another.

(Additional TR 26-7)

Finally, after completion of the sentencing presentations, at end of the Phase III hearing, the judge asked defense counsel to write his own draft order or memorandum outlining factors favoring life sentences over death. (Additional TR 27-8)

Six days later Judge Carlisle called respective counsel back into court.

THE COURT: Okay. Let me tell you why I brought you here.

In the hearing the other day you moved to recuse. I started to write an order on that motion.

I -- two things: I began to remember back on the hearing that we held, and, secondly, in writing the order I don't want to find myself in an adversarial position in terms of recusal.

Do you follow me? I don't want to be saying this happened and this didn't happen, because that is automatic disaster.

But, thinking back on the whole hearing that we held last -- What day was it?

MS. DUGGAN: Friday.

THE COURT: -- the whole hearing that we held, you moved to recuse and we talked, and so on. And, you know, I remember being in trials myself where I had hearings, and I make my motion, and then I think back and I wish I hadn't.

Do you understand?

Do you want to make a motion?

MR. BAILEY: I did make a motion.

THE COURT: And do you want to stick by that motion?

MR. BAILEY: Yes.

THE COURT: Why don't you do this. Do the whole formal thing and --

Here is what I think I am -- Just go back. She comes to me with the Grossman case and -- can't think of the name of the other case right now, but there is another case following Grossman in connection with another matter -- begin to do some research on this thing, and somewhere during the course of this thing I say: Wait a minute; we have a hearing coming up tomorrow; give me a list, an abstract, if you will, of the arguments you are going to make.

And I can see, and I apologize to you. Sometime during that conversation I should have picked up the phone and either gotten you over here or asked you to do the same, or something like that.

I didn't see that case again until 1:00 o'clock, when I came in to read the PSI and all that good stuff.

But you walk in and here we are. She prepared, using my old opinion, my old death sentence, in essence, an opinion for me.

I can tell you that is not going to be the opinion, if I am going -- if I am on this case.

But that is what she prepared. And I can see -- I am going to other stuff, but everybody in there is looking at this and are proofreading it. I made some corrections on it.

MR. BAILEY: When I came in the room you and Assistant State Attorney Mary Ann Duggan and Assistant State Attorney Craig Salisbury and your secretary were proofing an Order sentencing my client to death, and your secretary was at the computer, making corrections in this typed Order that you all were proofing.

I want the record to reflect that that was what was happening. And up to that point I had -- until I walked into the room, which was ten minutes after the sentencing was supposed to start --

THE COURT: And I don't know whether, on its face, that constitutes grounds for recusal.

MR. BAILEY: What I was going to say -- I had no knowledge of that happening until I walked into the room, and basically I asked: What is everybody reading so intently?

And that was when you indicated to me they were -- you were proofing this Order.

THE COURT: I don't know whether that is grounds for recusal.

(Additional TR 35-8)

The Court and counsel went on to discuss other subjects, but later the judge returned to discussing what had occurred.

THE COURT: I am not so sure how clearly I delineated the facts. And let me try to do that a little better.

Mary Ann came to me with the Grossman case, which put me in a bit of a quandary. And I began with Mary Ann to try to determine exactly what Grossrnan meant, and what it required me to do.

And, at first, it seems that it wants you to write the Order before holding a sentencing hearing. It was only that night at home that I began to realize that the way out was to hold an additional hearing, proceeding in which you simply pronounce sentence and file it contemporaneously.

MR. BAILEY: You say that night at home. You mean Friday night?

THE COURT: Thursday night at home, Thursday night at home, I began to realize that the graceful way to do it is not to try to write the opinion beforehand but to hold the sentencing hearing and then, at one's leisure, write the Order, and then conduct another proceeding which -- in which you simply pronounce the judgment and the sentence and file the Order.

But that day I was not only concerned about fast cases, but wondering about this. And I asked her to prepare -- What she prepared was more than I needed, but she took other Orders that I had written in death cases and --

MR. BAILEY: Other sentencing Orders, you are talking about?

THE COURT: Yes, other sentencing Orders, and wrote a -- wrote an Order. And it sentences your guy to death.

That would not have been the Order that would be the final Order.

I then -- That was the end of it, until the next day at 1:00 o'clock when I came to read the other documents.

I am not exactly sure when you arrived on the scene, but I was reading the other document, and people were in my office and people were -- were trying to make changes in the Order that she wrote.

MR. BAILEY: You are not denying that you were a participant in that; are you? You had read the Order; you had made corrections to the Order?

THE COURT: I had read the Order and made corrections in the Order. But I'll tell you right now, that would not have been the Order.

MR. BAILEY: May I make a suggestion?

THE COURT: Sure.

MR. BAILEY: Why don't you go ahead and recuse yourself, instead of going through all this?

(Additional TR 45-7)

Judge Carlisle answered that he wanted to think about it, and told Lawyer Bailey to go ahead and file his formal written motion for recusal, saying he would rule on it quickly. And then, referring to the Court's invitation made at end of the Phase III hearing for defense counsel to submit a draft order of his own, Judge Carlisle said, "Of course, it is a matter of record that I invited you to participate in that Order by presenting your own arguments." (Additional TR 47)

Earlier in the proceeding that day defense counsel had asked if the court would waive the requirement of two supporting affidavits when the motion to recuse is filed, since the factual predicate for recusal was the judge's and prosecutor's joint drafting of a sentencing order, and that fact already was a matter of record. (Additional TR 40-5) The judge agreed to waive the requirement, saying, "It is what I wrote to the final Order, as well as what she wrote. I think we can go on those facts." (Additional TR 48)

A couple days later Spencer filed motion for recusal, with two supporting affidavits anyway. (TR 5259-66) He also included in it a motion asking Judge Carlisle to withdraw his ruling on the motion

for new trial so it could be determined on its merits by whichever judge is assigned the case after Carlisle's recusal. Judge Carlisle immediately entered a written order recusing himself, but made no ruling on the motion to withdraw his ruling on new trial. (TR 5277)

After Judge Carlisle's recusal and upon a substitute judge being assigned, Spencer filed a motion and memo of law with the substitute judge offering an additional ground for new trial, being that in a capital case a substitute judge may not impose sentence: that only the judge who tried the case and saw the witnesses at Phase I and Phase II of the jury trial properly can impose sentence. (TR 5309, 5345-9) The substitute judge heard and denied that motion. (TR 4564-6, 5351-2)

At time of sentencing in front of the substitute judge, Spencer renewed his challenge to the substitute judge proceeding with sentencing, and it was again denied. (TR 4574-90)

Upon a substitute judge being appointed, Spencer also renewed his motion to set aside Judge Carlisle's ruling on the motion for new trial, asking that the substitute judge himself rule on the merits of Spencer's motion for new trial, among other reasons, because even before the incident took place which resulted in Judge Carlisle's recusal, a primary thrust of the motion for new trial had been judicial bias at trial against Spencer and his court-appointed attorney. (TR 5308, 5259-66, 5328-44) The substitute judge heard (TR 4519-23, 4540-62) and then denied (TR 4562-3) the

motion to set aside Judge Carlisle's ruling and to re-determine the merits of Spencer's new-trial motion.

* * *

During the original trial, before Phases II and III were ever reached, the attorneys for both Spencer and Amos complained about the Court showing favoritism to the prosecutor. (TR 3962-5; compare, 3081-3084, 3263-8, 3270-93) As to Spencer specifically, many times at trial when Spencer's lawyer tried to present motions or arguments in support of motions, the judge delayed hearing them, cut counsel off in middle of them, walked out of the courtroom in middle of them, or belittled the motion or argument, or altogether refused to hear it. (TR 2245, 2375-6, 2421-3, 2445-6, 2454, 2474, 2536-7, 2579-80, 2588, 2596, 2598, 2607-10, 2715, 2723-4, 2753-4, 2977, 2988, 2899, 3075, 3077, 3081-3084, 3086-7, 3136-7, 3175, 3177, 3179, 3193-6, 3251-2, 3222-3, 3712, 3718, 3823-4) Before the trial judge's ex *parte* communications with the prosecutor at time of the Phase III hearing ever became an issue, judicial bias towards Spencer and his lawyer already was a pending issue before the court, in Spencer's yet-to-be-ruled-upon motion for new trial. (TR 5180-3)

* * *

The other two points on appeal relate to events in Phase I of trial. Here is what the record reflects as to those two points.

During opening statements to the jury, Spencer's counsel told the jurors there would be no issue about whether the two-man crime spree of murders and robberies actually occurred. He told them

that, as to Leonard Spencer, the only issue would be whether the State can prove Spencer's identity as one of the two who participated in those events, those crimes. (TR 2969-72, 2975-6)

After opening statements, of all the eyewitnesses the State then called in its case in chief, only one made a "positive" in-court identification of Leonard Spencer as a participant in these crimes: Allen Sedenka. A former police officer and a now convicted cocaine trafficker, (TR 3598-9, 3627), Sedenka testified he was a civilian but had a police scanner in his car the night these events occurred, and while driving south on Military Trail he heard police dispatched to the two murder scenes at two separate locations on Military Trail. As he listened to the dispatches he thought he saw the two suspects being described, walking south beside the road, so he stopped down the road a ways at a pay phone and called 911. During the time he was out of his car talking with the 911 operator, the two suspects walked towards his location, so eventually he dropped the phone and jumped back in his car -- but too late. The two men made him get out, at gun point, and they drove off in his car, leaving him standing there by the pay phone with the 911 operator on the line. (TR 3598-3628)

In the courtroom Sedenka identified Leonard Spencer as the taller of the two men who robbed him of his car at gunpoint that night. (TR 3608)

Concerning any statement Sedenka gave police afterwards that night, this is the sum total of what the prosecutor asked him at trial, and of what Sedenka said on the subject:

Q. After this happened on June 13th of 1986, did you give a statement to a detective concerning what you observed on that date?

A. Yes, I did.

Q. Do you happen to recall to whom you gave your statement?

A. I don't recall exactly. There were quite a few detectives.

Q. Would the name Detective Van Garner sound familiar to you?

A. Yes, it does.

(TR 3613-4)

At no time while he was on the stand was any tape-recording, of a statement he made to Van Garner, shown to him or played to him or otherwise identified or discussed by him. Nor was he even asked, either on direct (3598-3628) or cross (3628-40), if any statement he gave was, in fact, tape recorded.

The only tape recording he was asked about was a tape of his 911 call, which he said he had listened to and which he confirmed accurately records his conversation with the 911 operator that night. (TR 3617-8) And so, while he was on the stand on direct, that 911 tape was admitted in evidence and played to the jury. (TR 3622-5)

Later in trial, after several other witnesses testified, the state sought, by proffer, to introduce through Detective Van Garner a tape-recording of the statement he took from Sedenka that night. Spencer's counsel strenuously objected on grounds Sedenka never identified the tape, and, more importantly, Spencer has a right to

cross-examine not the detective but Sedenka himself about whatever he said on the tape. The prosecutor maintained Sedenka was available for cross-examination about it earlier, and it was dealt with on direct when the prosecutor asked him if he had given a taped statement that night and he had said yes. Spencer maintained the state in no way dealt with what he had said in any taped statement to police, and, more to the point, Sedenka was not subject to cross-examination concerning the contents of any tape of his statements to police that night. Availability for cross-examination is, Spencer argued, a requirement for the tape to become admissible based on Section 90.801, Florida Statutes, which was the section the State was relying on for admissibility of the tape. (TR 3824-7) Spencer's lawyer argued,

> MR. BAILEY: My objection is right of confrontation. The State did not use this tape at the first trial of this case. They did not use this tape at the second trial of the case. They introduced the man's testimony. We cross examined him. They packed him up and sent him home.
>
> And now they want to introduce the tape. The man is not subject to cross examination concerning what is on the tape. That tape has never been in front of the jury. (TR 3827)

The prosecutor maintained Sedenka was cross-examined about his taped statement, and Spencer's counsel answered, "No, he was not," that the "contents" of any taped statement by him to police "never" were dealt with on direct or cross of Mr. Sedenka. (TR 3828) To which the Court replied,

> THE COURT: We will admit it.
>
> MR. BAILEY: I would ask The Court compel the State to make Mr. Sedenka available for cross examination regarding the tape and its contents.

THE COURT: You can call him as your own witness.

MR. BAILEY: I'm talking about cross examination, not my own witness.

MR. BOUDREAU [CO-DEFENDANT'S LAWYER]: As further grounds, there was no cross examination by Defendant Amos that made any allegation of recent fabrication, therefore it is inadmissible as it relates to him on top of Mr. Bailey's grounds.

THE COURT: You got the benefit of it.

MR. BAILEY: Mr. Sedenka hasn't confirmed that this tape is the tape that he gave. The State is sandbagging us and The Court should not permit it.

Your allowing them to do it deprives us of the right to cross examine Mr. Sedenka about the tape and its contents.

MR. BOUDREAU: Because something is in the Rules of Evidence doesn't mean it comports with the confrontation clause.

MR. BAILEY: My motion [i.e., position] is that the Rules of Evidence protect the confrontation clause and you are misapplying them.

It says the man must be subject to cross examination concerning the statement.

THE COURT: And he was. He testified concerning the statement.

MR. BAILEY: No, sir. That taped statement was not the subject --

THE COURT: Let's talk about something else, because it will save another recess.

(TR 3828-30)

Whereupon the Court moved on to other matters. (TR 3830) Later when the tape was about to be played to the jury, Spencer renewed his objection. He also asked the Court to listen to a proffer of the tape first, before it came in, for rulings on admissibility of

its contents. The Court refused to entertain the proffer. (TR 3847-50)

Whereupon, with Detective Van Garner on the stand, the tape recording of Sedenka's detailed factual statement made to the detective was played to the jury. (TR 3851-64)

At conclusion of the tape being played, Detective Van Garner was turned over for cross-examination. The first question put to him by Spencer's lawyer was, "Mr. Sedenka, let me ask you some questions about what you said on the tape." The judge interrupted, "He is not Sedenka." Spencer's counsel replied, "That is exactly my point." (TR 3864) Then Spencer's counsel proceeded to cross-examine Detective Van Garner.

Spencer's lawyer brought out from Van Garner on cross that it was the detective's own voice, not Sedenka's, which is heard on the tape giving the physical description of the taller of the two who robbed Sedenka of his car (i.e., of Spencer). The officer explained that he made that recital on the tape based on an earlier, non-recorded conversation he had had with Sedenka. The detective agreed that Sedenka himself would have to address the accuracy of that description's details, if he were able. (TR 3865-6)

Detective Van Garner also confirmed on cross that, at the time of the tape-recorded conversation, Sedenka said he had <u>not</u> seen the taller individual's face, not clearly. (TR 3867)

Immediately at conclusion of this detective's cross-examination, the State rested its case. (TR 3860)

Spencer's counsel immediately moved for mistrial on grounds the State's use of the tape had "totally, absolutely frustrated## his ability to cross-examine Sedenka himself concerning what he said on the tape, and on grounds the State's use of the tape to conclude its whole case highlighted the error even more. (TR 3870-1) That motion was denied. (TR 3871)

This same issue was argued again in Spencer's motion for new trial, which also was denied. (TR 5178-9; 2092, 4480, 4903)

* * *

Co-defendant Vernon *Amos* testified in his own defense. On direct he testified he was there throughout the crime spree, but he had no gun and committed no crimes, that the taller guy he was with did all the shooting and everything, and Amos himself was only with that taller guy because he was forced to go along at gun point. (TR 3927, 3929, 3930-1, 3934) Amos was never asked, on direct by his own attorney, to identify that taller man he was talking about. (TR 3921-3937)

On cross by the prosecutor, *Amos* was immediately asked and immediately identified the taller man he was with, as the man in the courtroom, Leonard Spencer. (TR 3937-8) But moments later on cross by the prosecutor he refused to discuss the identity of the taller man any more, because, as he explained it, he wanted no role in sending someone to the electric chair. (TR 3939-42) And for the remainder of his cross-examination by the prosecutor, he refused to discuss the identity of that other person any more. (TR 3939-61, 3994-7) At one point the judge told *Amos* he was making a

big mistake in the Court's opinion -- because it might render *Amos'* testimony about his own role not credible to the jury. (TR 3943)

While the State still was doing its cross of *Amos*, during arguments on another issue Spencer's lawyer pointed out to the court that Spencer has a right to answers to these identity questions, and if the Court could not compel or force him to answer, then Spencer would be denied the right to confront and cross-examine the witness. (TR 3985-6) The Court later acknowledged that *Amos* originally identified the taller man at one point, as Leonard Spencer, and after having done so then decided "to get cute with the jury." (TR 3992)

After the State finished its cross-examination of Amos and he finally was turned over to Spencer's lawyer for cross, *Amos* continued his refusal to discuss the identity of the taller man. (TR 3997-4038, at 3997, 4006)

Spencer's lawyer argued this same denial of right of confrontation in his motion for new trial, which the Court denied. (TR 5179-80; 2092, 4480, 4903)

## SUMMARY OF ARGUMENT

When the trial judge, in Phase III of Spencer's trial, engaged in ex parte oral and written communications with the prosecutor, did ex parte legal research and worked on an *ex parte* draft of a sentencing order with her, and consulted ex parte with an outside lawyer, the judge violated Canon 3 of the Code of Judicial Conduct. But more to the point, he violated fundamental rules of fair play, or of due process of law. Violated was Spencer's absolute right, for example, to be heard through counsel when the parties communicate to the Court their reasons for imposing life or death. Grandin v. State, 421 So.2d 803 (Fla. 3d DCA 1982); Messer v. State, 384 So.2d 644 (Fla. 1979).

Any ex *parte* communication between a judge and prosecutor is grounds for reversal. Martin v. Carlton, 470 So.2d 875 (Fla. 1st DCA 1985): Eisner v. Eisner 513 So.2d 673 (Fla. 5th DCA 1987). In any event, the nature and ongoing character of the *ex parte* communications that occurred between this judge and prosecutor, and what it reflects about the nature of the working relationship between this judge and prosecutor, puts in doubt the integrity of the adversary process from beginning to end, casting a dark shadow over the fairness of the entire trial. Simply referring the case to another judge for sentencing, failed to remove that shadow.

Even if there were no doubts about whether the judge honored the adversary process and fundamental rules of fair play in Phases I and II of Spencer's trial, there is no specific rule of court or statute authorizing a substitute judge to handle only Phase III of

a capital case. Such a rule would be invalid if it did exist, for in a capital case the trial judge must, at time of Phase 111, independently weigh the evidence heard at Phases I and II in determining what sentence to impose. section 921.141(3), Florida Statutes. Weighing evidence is something that cannot be done from a cold record, which is why appellate courts refuse to do it, and why a substitute trial judge cannot be authorized to do it. Hudson v. State, 538 So.2d 829, (Fla. 1989). A successor judge that does not hear all the evidence may only enter a verdict or judgement after a re-trial, or if the parties stipulate to the successor judge doing so on basis of the record of the earlier proceedings. Tompkins Land & Housing Inc. v. White, 431 So.2d 259 (Fla. 2d DCA 1983).

In addition to all the above, it is fundamentally unfair to impose on a defendant facing death the burden of accepting "second best" for sentencing, meaning a substitute judge who must sentence from a cold transcript of the murder trial; and, in this case, also meaning a substitute judge who never even had tried a capital case before, either as trial lawyer or judge. (TR 4584-5)

The State certainly cannot be heard to complain that the defendant chose, and continues to choose, a new trial rather than to accept a substitute judge only for sentencing; for, after all, the State was an active and necessary party to the judicial misconduct that put the defendant in the unfair position of having to choose.

A live judge and live jury reacting to live witnesses is what the right of jury trial is all about. Under Florida's statutory scheme for sentencing in capital cases, that same process of live interaction carries through into the final sentencing stage.

Heightened standards of due process apply to capital cases. Elledge v. State, 346 So.2d 998 (Fla. 1977); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). What occurred at trial of this case fails to exemplify or reflect any such heightened standard.

At trial itself, it was a fundamental denial of the defendant's right to confront and cross-examine for the court to have allowed the prosecutor to introduce in evidence a tape recording of an eyewitness's statement, after that eyewitness already had testified and been excused, without the tape recording or its contents ever being addressed by the witness while on the stand. When the recording came into evidence, the court erred again by denying the defendant the right to recall the witness for further cross-examination. See: Section 90.801(2), Florida Statutes; Bianchi v. State, *528* SO.2d 1309 (Fla. 2d DCA 1988).

It also was a denial of this defendant's right to confront and cross-examine when the co-defendant took the stand in his own defense, initially identified Spencer as the person who committed all the crimes, and then refused to stand for any further cross-examination on the subject of the identity of the person, all prior to Spencer getting his chance to cross-examine the co-defendant on that subject. Cf., Hall v. State, 381 So.2d 683 (Fla. 1980).

## Point I
## On Appeal

The Trial Court erred in denying Spencer's motion for new trial on grounds a substitute judge could not sentence him. When, before sentence is imposed, the judge who already has tried a capital case is disqualified **for** bias or misconduct, a substitute judge who presided over neither the guilt-vs-innocence nor sentencing stage of jury trial may not determine sentence of life or death, Specifically because it is a capital case, and because the basis for removal of the previous judge is judicial misconduct, the accused has a fundamental right to more than just another judge **for** purposes of sentencing, but to a whole new trial **before** a new judge.

**Any ex parte communication a trial judge has on the subject of a pending case is unethical judicial conduct. Canon 3, Code of Judicial Conduct, requires that a judge shall "neither initiate nor consider ex parte or other communications concerning a pending or impending proceedings." In this case the trial judge acknowledges on the record having violated Canon 3, for he acknowledges having both initiated and considered ex parte communications. He acknowledges having taken part in oral conversations with the prosecutor regarding pending sentencing of Spencer, having initiated written communications to the court from the prosecutor concerning pending sentencing of Spencer, having done legal research with the prosecutor concerning pending sentencing of Spencer, having initiated contact with and considered the advice of an outside lawyer to the case concerning pending sentencing of Spencer, and, finally, having taken part with the prosecutor in drafting a sentencing order concerning pending sentencing of Spencer; and the judge specifically acknowledges having done all**

these things ex *parte*, meaning without any notice whatsoever to Spencer or his attorney.

It was unethical for the judge to have sought out Ray Markey's expert advice *ex* parte. **Canon 3** specifically allows for a judge to seek out expert advice, but not **ex** *parte*, for it requires immediate notice to the parties as to who has been consulted and what advice was received, with opportunity for the parties to respond to the advice received; and, in addition, the expert used must be a disinterested person. **As** to this latter point, the record in this case does not reflect what professional position Ray Markey held at the time Judge Carlisle sought out his advice, that is, whether he was a disinterested person, The record only reflects what Spencer's lawyer knew at the moment the Judge first told him of Markey's earlier role in advising the judge. All Spencer's lawyer knew at the time is that Markey was a former Assistant Attorney General of Florida. (Additional TR 26) If, in fact, Ray Markey was an Assistant Attorney General or an Assistant State Attorney at the time Judge Carlisle sought his advice, then under **Canon** 3 it would have been unethical for the judge to seek his advice at all. See: Love v. State, **569** So.2d 807 (Fla. 1st DCA 1990).

In any event, the impropriety of this judge's conversation, ex *parte*, with Ray Markey pales beside the much greater improprieties of the judge's ongoing **ex** parte activities with the prosecutor who was handling the case.

While the **ex** *parte* activities the trial judge engaged in with the prosecutor unquestionably violated standards for judicial

conduct, more to the point for purposes of this appeal is that his activities violated fundamental rules of fair play -- basic rules for fair trial established by the Florida and United States Constitutions.

[The right to a fair trial is the very essence of due process of law.

The Sixth Amendment of the U.S. Constitution, and Article I, Section 16, of the Florida Constitution grant every citizen accused of a crime a right to counsel. This right to counsel attaches at every critical stage of a felony prosecution unless such assistance is properly waived. Montgomery v. State, 176 So.2d 331 (Fla. 1965). Sentencing is a critical stage, at which the right is absolute. Grandin v. State, 421 So..2d 803 (Fla. 3d DCA 1982); Carter v. State, 408 So.2d 766 (Fla. 5th DCA 1982).

Even a simple hearing, held only to determine whether or not a sentence of death was imposed based in part on information not disclosed to the defendant, was held a critical stage of the criminal proceeding at which the defendant is entitled to be represented by counsel. Messer v. State, 384 So.2d 644 (Fla. 1979).

In Spencer's case this right to counsel was violated by the absence of the accused and his counsel at a critical stage of the proceedings: specifically, the stage at which the parties communicate to the court their reasons for imposing or not imposing sentence of death.] Beyond dispute, that is a critical stage. It is certainly a more critical stage than the stage at which a post-

indictment line-up is conducted, at which the right of counsel is well established. Chaney v. State, 267 So.2d 65 (Fla. 1972) It is certainly a more critical stage than the stage at which an accused is merely informed by the court of the nature of the charges, in other words, at arraignment, at which the right to counsel also is well established. Baker v. Wainwright, 245 So.2d 289 (Fla. 4th DCA 1971)

Perhaps it is worth noting that the Florida Constitution pointedly refers to the right "to be heard" through counsel rather than to a right of "advice" of counsel. "In all criminal prosecutions the accused * * * shall have the right * * * to be heard in person, by counsel or both * * *." Florida Constitution, Article I, section 16. In light of that, is it not fair to ask this question? When could the right to be heard by counsel be of greater import than at the stage when the parties in a capital case are communicating to the court their reasons for imposing or not imposing death upon the accused? The answer, perhaps, is that being heard through counsel, and being heard with all parties present and participating, are at the very heart of what constitute a fair trial and the adversary process.

The mere fact that there were ex *parte* communications between the trial judge and prosecutor may be, in and of itself, sufficient basis for granting new trial. In Martin v. Carlton, 470 So.2d 875 (Fla. 1st DCA 1985), which was not even a criminal case, never mind a capital case, a mere letter to the judge from one party without a copy to opposing counsel was grounds for automatic reversal on

appeal. In **Eisner** v. **Eisner**, 513 So.2d 673 (Fla. 5th DCA 1987), when, at the judge's request, the wife's attorney submitted a letter to the court outlining his argument, without serving a copy on the pro se husband, it was held grounds for automatic reversal on appeal, In the present case, both the nature of the ex parte communications, and the nature of the case itself, are noticeably more serious. Spencer maintains he is all the more entitled to automatic reversal on appeal.

If the law does not require automatic reversal, then the record here -- the facts here -- should require it.

Because of misconduct by the trial judge at time of Phase III, the adversary process at that stage broke down totally. The very nature and seriousness of the judge's misconduct raises a question of whether the whole trial process, including all that occurred before Phase III, also broke down. The judge's conduct in Phase 111, standing all by itself, reflects an improper, ongoing working relationship between this judge and prosecutor. What is reflected by that record is cozy conversations between judge and prosecutor about a pending case; behind-the-scenes legal research together concerning a pending case; the judge asking the prosecutor for a behind-the-scenes outline; and their working together drafting a sentencing order in a pending case; and the record reflects their secretiveness about it all; all of which was only uncovered by the fortuitous circumstance of defense counsel having walked in on them at the very end of their whole process of mutual ex parte preparation for Phase III.

Here, then, is the heart of Spencer's complaint. The very nature of the working relationship between this judge and prosecutor, as reflected by what occurred at and immediately before Phase III of trial, puts in doubt the integrity of the adversary process from beginning to end. It casts a dark shadow over the whole courtroom process, and over the fairness of the entire trial. The only way of removing that dark cloud that casts its shadow over this trial is to grant Spencer a new trial before a new judge, which Spencer sought at the time when it occurred, and which was denied him.

Simply referring this case to another judge for sentencing, as was done here, failed to remove that shadow of doubt hanging over the integrity of the whole adversary process and over the fairness of his trial.

* * *

Even if there were no doubts that prior to Phase III the trial judge fully honored the adversary process, and fully abided by fundamental rules of fair play, nevertheless the incident that occurred in Phase III creates other, independently sufficient grounds for reversal and remand for new trial.

For one thing, Leonard Spencer maintains there is no authority by Rule of Court or Florida Statute for a substitute judge to step in and proceed with disposition of, specifically, a capital case where, specifically, the original judge is recused for his or her own misconduct after Phases I and II of jury trial already are completed. Spencer maintains that, absent such specific authority,

his objection to a substitute judge for sentencing, and his request for a new trial instead, should have been granted as a matter of law.

In any event, a general provision by rule or statute, for a substitute judge to step in after trial has commenced and after recusal of a presiding judge, can not be applied in a capital case, at least not for purposes of sentencing only, not after Phases I and II of jury trial already have been completed. Why? Because in a capital case it is especially important that the same judge who saw and heard the witnesses at both stages of jury trial be the judge who handles Phase III and imposes sentence. Unlike in any other type criminal case, in a capital case the judge is required to consider at sentencing the credibility and weight to be accorded witnesses who testified at trial and at the jury-sentence-recommendation phase of trial. Section 921.141(3), Florida Statutes, provides that the trial judge, notwithstanding the recommendation of a majority of the jurors, shall independently weigh the aggravating and mitigating circumstances before determining a sentence of life or death. To the full extent that the witnesses' testimony bears on the judge's determination of the weight to be accorded evidence of aggravating and mitigating circumstances, the judge is required to weigh the evidence heard by the jury at both stages of trial. Yet, clearly, the weight to be accorded evidence as it bears on sentencing cannot be determined from reading a cold record of the trial, in place of seeing and hearing and responding to the live witnesses.

Appellate courts recognize that weight of evidence cannot be determined from a cold record, that only the trial judge who heard that evidence is in a position to do so, which is precisely why appeals courts refuse to consider claims, on appeal, relating to the "weight" of the evidence. See, for example: Uprevert v. State, 507 So.2d 162, at 163 (Fla. 3d DCA 1987); Tibbs v. State, 397 So.2d 1120, at 1123 n. 9 (Fla. 1981), *aff'd* Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982); Gonzalez v. State, 449 So.2d 882 (Fla. 3d DCA 1984), at 888; and, Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984), at 476-477.

Indeed, even in reviewing a death sentence, the Florida Supreme Court itself declines to reweigh or reevaluate the evidence presented as to aggravating and mitigating circumstances. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), citing Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981).

For the same reasons that the Florida Supreme Court cannot weigh evidence based on reading a cold record of Phases I and II of trial, a substitute trial judge cannot weigh evidence based on reading a cold record of Phases I and II of trial.

Florida's sentencing scheme requires more than a mere counting of aggravating and mitigating factors. The scheme requires that a "reasoned judgment" be made by the trial judge in weighing those factors. Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990). And when a trial judge does sentence to death, mere conclusory statements by the judge of reasons for doing so are insufficient; the judge's written order must show a reasoned judgement and must

show, in addition to the jury's recommendation, an independent weighing by the trial judge. **Bouie v. State**, 559 So.2d 1113, 1116 (Fla. 1990). In this case, a substitute judge simply could not do that, not unless that judge saw and felt what the jurors saw and felt when the witnesses testified at trial or at Phase 11: witnesses such as the eyewitness present at one of the murders, such as the victims of the other felonies committed that night, such as co-defendant Vernon Amos when he testified at trial. A judge who was not there when they testified has no basis for judging each of those individual's credibility, and no basis for determining what weight should or should not be accorded each one's testimony as it bears on the aggravating and mitigating circumstances and, therefore, on what sentence aught to be imposed.

> A successor judge may complete acts left uncompleted by a predecessor but may not weigh and compare testimony heard before the other judge. A successor judge that does not hear all the evidence may only enter a verdict or judgment upon a retrial, or if the parties so stipulate on the basis of the record of the prior proceedings.
>
> **Tompkins** Land & Housing Inc. v. White, 431 So.2d 259 (Fla. 2d DCA 1983), at page 260.

Also see: Reaves v. **Reaves**, 546 So.2d 744 (Fla. 2d DCA 1989).

Aside from all the arguments given above, another element of fairness is involved. Where it is the trial judge's own misconduct and not some fortuitous circumstance such as unexpected illness or death of the presiding judge that causes that judge to be recused immediately before sentence is imposed, then it is unfair to require a defendant facing a possible death sentence to submit to a substitute judge for sentencing: unfair to impose on the

defendant facing death the burden of accepting for purposes of sentencing only "second best".

In Spencer's case "second best" meant not simply a substitute judge who would have to learn about the case from cold transcripts of Phases I and II of trial, it also meant a substitute judge who never even had tried a capital case before, either as a trial lawyer or as a judge. (TR 4584-5) Spencer maintains it is unfair to him (and, under the circumstances, even to the substitute judge) to require a substitute judge to decide whether Spencer should spend life in prison or die in the electric chair.

The Florida Supreme Court has said that a trial court, in determining which sentence to impose in a capital case, must use its "judicial experience" in evaluating and weighing aggravating and mitigating circumstances as well as in weighing the jury's recommendation of life or death. Herring v. State, 446 So.2d 1049 (Fla. 1984). In Spencer's case, at time of sentencing, he was not only deprived of the sentencing judge's ability to independently weigh and evaluate the live witnesses' testimony at Phases I and II of trial, but he also was deprived of much of the counterbalancing "judicial experience." He was deprived of these things not for anything done by himself or his lawyer, but because the judge who tried Phases I and II later acted unethically and had to recuse himself in Phase 111.

Certainly, in this case, the State can not be heard to complain because the defendant elected not to bear that unfair burden at sentencing, elected instead to have a new trial. The

State itself, after all, was an active and necessary party to the judicial misconduct that placed the defendant in this unfair position.

A sense of fair play dictates, in these circumstances, that Spencer should have been given a complete re-trial of his case if he chose it at the time, which he did. The lower court, though, denied him a new trial. This was error.

A live judge and a live jury of fellow citizens reacting to live witnesses: that is what the right of jury trial is all about. Under Florida's statutory scheme for sentencing in capital cases, that same human process of live interaction is a continuing, vital part of the system for determining sentence of life or death. But in this case, at his sentencing, Leonard Spencer was denied much of that vital human element of his trial -- denied that human element because of misconduct by the trial judge. This is fundamentally wrong.

This is a capital case. Heightened standards of due process are supposed to apply to capital cases. See: **Elledge** v. State, 346 So.2d 998 (Fla.1977) ("heightened" standard of review); Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the U.S. Supreme Court's death penalty] decisions."). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing case authorities). Clearly, what

occurred at trial of this case fails to reflect, or in any way exemplify, a "heightened standard" of due process.

## Point II
## On Appeal

The Trial Court erred fundamentally by admitting in evidence the tape-recorded statement of Allen **Sedenka,** after he had been excused from the witness stand without having discussed his taped statement on direct- or cross-examination. The **Court** further erred by denying Spencer's request to re-call Sedenka for further cross-examination when the tape-recording was admitted in evidence. Later the Court erred in denying motion for new trial on grounds admission of the tape-recorded statement effectively deprived Spencer of his fundamental right to confront and cross-examine the only State witness to make a "positive" identification of him at trial, concerning the contents of his tape-recorded statement.

**Section 90.801(2), Florida Statutes, creates a hearsay exception that allows a prior consistent statement to come in evidence to rebut an express or implied charge against the witness of improper influence, motive, or recent fabrication. In Spencer's cross-examination of Allen Sedenka, he did raise an issue of improper influence or motive, so that predicate for admission of a prior consistent tape-recorded statement by Sedenka clearly existed. See: Hutchinson v. State, 559 So.2d 340 (Fla. 4th DCA 1990). But there is another essential predicate which did not exist. Section 90.801(2)(c), says,**

> **(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concernins the statement and the statement is: * * * (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication * * *.**
>
> **(emphasis added)**

Clearly, Allen Sedenka was not "subject to cross-examination concerning the statement." And just as clearly, inasmuch as he was the only state witness at trial to make a "positive" in-court identification of Spencer as a perpetrator of these crimes, Spencer was deprived of cross-examination of the most critical witness as to a prior consistent statement concerning the most critical issue in Spencer's trial.

It is the availability for cross-examination that allows this exception to the hearsay rule to withstand constitutional challenge. See: California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Also see: Law Revision Council Note - 1976, Section 90.801, Florida Statutes. Fundamental constitutional principles involving the right to confront and cross-examine, not merely a rule of evidence, were violated by the court below when it misapplied the rule and admitted the tape-recording.

When a witness's prior consistent statement is sought to be introduced, it is while the witness is on the stand subject to cross that the prior consistent statement must come in evidence; it is error to introduce it only through another witness later. Bee: Bianchi v. State, 528 So.2d 1309 (Fla. 2d DCA 1988).

If Allen Sedenka had been available for cross-examination, there is no question his prior consistent statement to Detective Van Garner, whether or not tape-recorded, would have been admissible. See: Alvin v. State, 548 So.2d 1112 (Fla. 1989).

As it turned out, when the tape-recording was played to the jury the only description of the "taller man" in the recording was

not in Sedenka's own words, but was recited on the tape by Detective Van Garner himself based on an earlier non-recorded description given him by Sedenka. Consequently, the tape apparently was not relevant for the purpose the State sought to introduce it in the first place. If the Court had listened to a proffer of the tape ahead of time as requested by Spencer, that particular portion of Sedenka's tape-recorded interview may not have been admissible. As to the question of identity, the fact that it turned out to be the officer's words on the tape, not Sedenka's, only served to further destroy Spencer's right to confront and cross-examine the witness Sedenka concerning his statement to the detective.

## Point III
## On Appeal

> Fundamental error occurred, violating Spencer's right to confront and cross-examine, when co-defendant Amos testified in his own defense that he was there when the crimes occurred, but only because forced to go along at gun point, and it was the taller man with him who forced him to go along, and it was that taller man who did all the killings and robberies that night, and that taller man was Leonard Spencer; but later, when Spencer's lawyer cross-examined Amos, he refused to answer any questions about the identity of the taller man.

After initially identifying Leonard Spencer to the jury as his partner in crime, and as the only one of the two who did anything wrong the night of the killings and robberies, Vernon *Amos* then refused to discuss any more about the question of identity of the person he was talking about. This all occurred while he was being cross-examined by the prosecutor. Later, when cross-examined by Spencer's attorney, *Amos* still refused to answer questions about the identity of the person he was talking about.

Amos's refusal to stand for cross-examination on the subject of the identity of his partner in crime, after initially identifying Spencer, totally deprived Spencer of any ability to confront and cross-examine an identity witness against him, at a trial in which identity was the only issue being litigated by the defense.

A similar situation, in which a co-defendant initially took the stand but later refused to stand for cross-examination by the defendant's own lawyer, required reversal in Hall v. State, 381

So.2d 683 (Fla. 1980). Significantly, in Hall the co-defendant never identified the defendant as a participant, as *Amos* did here. In Hall the co-defendant merely testified on direct that neither he nor the defendant were involved with the crime, and on cross the prosecutor used a prior inconsistent statement in which he indicated he and the defendant were both involved, in response to which the co-defendant invoked the Fifth Amendment privilege to remain silent, before the defendant's lawyer had the opportunity to cross-examine.

The same fundamental right to confront and cross-examine was violated in the circumstances of the present case.

# CONCLUSION

Each one of the three points on appeal presents grounds which require reversal and remand of the case for a new trial. Leonard Spencer suggests that the first point on appeal involves the greater number of constitutional issues, and is the only one that directly involves the administration of this state's trial courts, and so is the issue which The Florida Supreme Court has the greatest obligation to address on its merits.

In any event, as to any one or two of the three points on appeal, or as to all three together, this Court should reverse and remand for a new trial.

WHEREFORE, Leonard Spencer, through his court-appointed lawyer, respectfully so moves This Honorable Court.

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of this (CORRECTED) BRIEF OF APPELLANT was served by Mail delivery upon JOAN FOWLER, Assistant Attorney General, Department of Legal Affairs, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401, on this date, the 16th day of August, 1991.

Respectfully submitted,

NELSON E. BAILEY, LAWYER
Commerce Center, Suite 300
324 Datura Street
West Palm Beach, Florida 33401
Telephone (407) 832-7941

By Nelson E. Bailey
NELSON E. BAILEY
Counsel for Appellant
Florida Bar Board Certified
Criminal Trial Lawyer
Florida Bar No. 117216