IN THE SUPREME COURT OF THE STATE OF FLORIDA

APPEAL NO. 79,604

BOBBIE LEE ROBINSON,

Appellant,

Vs.

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

Oral Argument Requested

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INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, entered following a jury trial before the Honorable Alfonso Sepe of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida. In this brief, the clerk's transcript of record on appeal is cited as "R.," the supplemental record is cited as "S.R." and the transcript of the proceedings is cited as "T."

STATEMENT OF THE CASE AND FACTS

Lee Arthur Lawrence was shot and killed on March 20, 1989. (R. 1-3). Mr. Lawrence, along with two other individuals, Josias Dukes and Bernard Williams, were victims of armed assailants. (R. 1-3).

On April 12, 1989, a Dade County Grand Jury returned an indictment against the Appellant, BOBBIE LEE ROBINSON, along with co-defendants, Ronnie Johnson, David Bertrum Ingraham and Rodney O'Neal Newsome, for conspiring to commit first degree murder and attempted first degree murder (two counts). (R. 1-3).[1] The Grand Jury also charged Mr. Ingraham with possession of a firearm by a convicted felon. (R. 3).[2]

Mr. Robinson, adjudged indigent, (R. 124), became the client of a court appointed Special Assistant Public Defender, Mr. Alan Sovin, by the Order of Judge Alfonso Sepe. (R. 16). Mr. Sovin attempted to disqualify the prosecutor who was in turn trying to disqualify him. (R. 11-13).[3] Additionally, there was a brief time where Attorney Sovin was removed as Mr. Robinson's counsel, but he was reinstated following an Order granting a

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[1]Subsequent to the return of the instant indictment, the Appellant ROBINSON was severed from his co-defendants and proceeded to trial individually.

[2]Mr. Ingraham had previously been convicted of Attempted Armed Robbery and Possession of a Firearm during a commission of a felony in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida, on March 21, 1988.

[3]An evidentiary hearing on the State's motion to disqualify Attorney Sovin due to a potential conflict of interest was conducted on September 5, 1990, before Judge Sepe, and waivers were obtained from Mr. Robinson and from another client of Mr. Soven's, Marc Word.

motion by the Third District Court of Appeals.[4] The case was remanded back to Judge Sepe's division. (R. 16).[5]

Prior to Mr. Robinson's trial, oral motions were made and denied in an effort to prevent the State from improperly admitting victim character and reputation evidence. (R. 1680-1700). Throughout the trial, the state repeatedly represented the deceased, Mr. Lawrence, as an anti-drug crusader while it portrayed Mr. Robinson as a drug dealer. (R. 235-241, 543-558, 664-739, 1337-1440). Also, prior to trial, no written notice was provided to Mr. Robinson that the State would present the testimony of Marvin Hauser to allege that Mr. Robinson had committed the crime of attempted solicitation to commit first degree murder.[6]

On March 25, 1991, the jury selection process began in Mr. Robinson's trial. (R. 1671-2273). During voir dire, outside the presence of the jury, the State accurately

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[4]Following Mr. Robinson's trial, the undisputed fact that Mr. Soven received money from the Robinson family, even though he was court appointed counsel, became the subject of a motion for a new trial. Mr. Soven testified that the money he received from the Robinson family was a gift and the Motion for a new trial was subsequently denied.

[5]The guilt/innocence phase and part of the penalty phase of Mr. Robinson's trial was conducted by Judge Sepe. At the sentencing phase, however, because Judge Sepe had been removed from the bench by administrative Order following his indictment in a federal sting entitled, "Operation Court Broom" in the United States District Court for the Southern District of Florida, allegedly for taking bribes and kickbacks from court-appointed attorneys in exchange for their appointments, a County Court Judge, Gerald Hubbart conducted the sentencing hearing.

[6]The State conceded this reversible error, a violation of §90.404(2)(b), and the Court properly granted Mr. Robinson's motion to exclude Mr. House's testimony. After recessing for the day, the Court, the next morning, reversed its ruling and permitted Mr. House to testify over Mr. Robinson's objection. (R.).

pointed out that although Mr. Robinson's counsel filed a Demand for Speedy Trial, counsel failed to file a witness list for either phase of this death penalty proceeding. (R. 1674-1677). The State also alerted the Court to the fact, among other things, that Mr. Robinson's counsel also failed to file a Motion to Suppress Mr. Robinson's statement. (R. 1678-1679).[7] The State's Motion in Limine to prohibit the defense from bringing up the fact that the arresting officer in Mr. Robinson's case had been indicted for criminal charges (for murdering his wife) was granted by the Court. (R. 1678-1690). Mr. Robinson's Motion to Strike Additional Witnesses, which the State did not list until two years after the arraignment in this case, was denied by the Court, and these witnesses were not deposed by Mr. Robinson's counsel. (R. 1699).

Mr. Robinson moved to control and prevent the disclosure of pre-trial publicity, but the Court, over defense objection, permitted television cameras into the courtroom. Even though there was extensive coverage by the media in this highly publicized case, the Court told the jury that they could watch the news and read the newspaper, but they should "avoid watching and reading about this case." (R. 1727). Several jurors who served on Mr. Robinson's jury heard about or read about this case before trial. (R. 1730). Jurors admitted sympathizing with the deceased because he was being held out by the press as an anti-drug crusader who was killed by drug dealers. (R. 1795-1800). Extensive pre-trial publicity reflected that jurors were under the distinct impression that an upstanding citizen

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[7]At the conclusion of voir dire, Mr. Robinson's counsel admitted that he was not ready for trial, and he requested money for a private investigator to interview witnesses. (R. 1678-1679). Counsel failed to depose State witnesses and he also did not receive Brady materials regarding a jail house informant. (R. 1699-1704).

had been shot and that the deceased was held in such high esteem by the community that a street was named after him. (R. 1795-1805).

The jury selection process was further unforgivably tainted thereafter when the Court sustained the racially motivated challenges of Jurors Gibbs and Bradley. (Proceedings held on March 28, 1991, p. 233-236). Juror Gibbs, an African-American who shared that he had read about the homicide involving a respected community leader who was against drugs, advised the Court that he recalled the community's reaction to the shooting as being one of shock. (R. 1729-1854). Juror Gibbs stated that, in his community, shootings in drug-related crimes occur so frequently that he could not really state his reaction. (R. 1729-1854). Juror Gibbs testified that he resided in Carol City, a different neighborhood from the one in which Mr Lawrence was killed. Juror Gibbs did not know the deceased victim's name, and he did not know or had never heard of Mr. Robinson or other people indicted in this offense. (R. 1729-1854). Juror Gibbs is self-employed in a lawn service business, and is married to a woman who works as a supervisor with the Internal Revenue Service. (R. 1729-1854). Juror Gibbs has two children, and his daughter is a security guard at the airport. (R. 1729-1854). Juror Gibbs stated that he has resided in Dade County for approximately twenty years and that, having earned his GED, he volunteered at Dunbar Elementary School during the childrens' field trips. (R. 1729-1854). Juror Gibbs honestly informed the Court that he had served a jail sentence, but that he had not had bad experiences with the police in the last ten to fifteen years. (R. 1729-1854). While he stated that he had been a victim of a crime three times, including being shot in the head, and that his brother had been accused of a crime, Juror

Gibbs testified that he could render a fair and impartial verdict.

> Defense Counsel: Was there anything about those incidents that would prevent you from being fair and impartial today?
>
> Juror Gibbs: No. I believe in God. I forgave him. It don't bother me.

(R. 2010).

Although at one point Juror Gibbs seemed ambiguous as to whether or not he would be able to impose the death penalty, following further questioning and clarification by the Court, Juror Gibbs unequivocally stated that he could and would follow the law and vote in favor of the death penalty given the appropriate circumstances.

> Juror Gibbs: Yes, sir. Well, all night I couldn't sleep thinking about this situation, and after thinking about it I am still not in favor of capital punishment, but if I was given my choice to make a decision, I think after I have weighed the mitigating and aggravating part of it, and if one outweigh the other, I think I could reach a decision. I think I could make that decision.
>
> The Court: After weighing each side of it, whichever one outweigh the other, then --
>
> Juror Gibbs: I think I would be able to render a decision.
>
> The Court: All right. Thank you sir. So you have thought it over last night. Let me see if I understand your answer. Your answer to me today is that while you are opposed to capital punishment, you could if you sat on this jury, and the jury found the defendant guilty of first degree murder, could you weigh the aggravating circumstances and mitigating circumstances, and if the aggravating circumstances outweigh the mitigating circumstances, you could return a recommendation for the death penalty?

Juror Gibbs: Yes sir, I could.

The Court: That is your answer today?

Juror Gibbs: Yes.

(R. 1925-1927).

Nevertheless, even though other jurors who served on Mr. Robinson's jury confessed that they too had brothers who had bad experiences with the law, Juror Gibbs was excused without any inquiry conducted surrounding this issue by the State.[8]

The Court: James Gibbs, 521.

Defense Counsel: Accept.

Prosecutor: We strike.

Defense Counsel: Mr. Gibbs is Black and I fail to see that is anything but a racially motivated strike. I request that the State make a showing.

The Court: 521, James Gibbs.

The Prosecutor: It will take a while. He said so many different things that --

The Court: Just give us the litany of things you feel he said.

The Prosecutor: First of all, he has been convicted. He served three and a half years. in prison. He was on probation. He was shot at. He said he couldn't sleep all night the other night. He had problems with the capital punishment. The record was clear on capital punishment. He went back and forth. It was not enough for cause but he was

[8]The Assistant State Attorney asked questions regarding people's experiences with law enforcement of a plethora of potential jurors, but did not ask Juror Gibbs one question with respect to his experiences.

ambivalent. The case law says ambivalence is enough for the State to allow a peremptory that does not meet the cause.

The Court: You have more. You want to recite them?

The Prosecutor: There is plenty more that we have.

The Court: If you want to make a record, you may recite. You don't need it from me.

The Prosecutor: When they were talking about police today, Mr. Sovin was talking about can you believe police officers. Can you treat them like any other witnesses, and the comment was made. Mr. Gibbs gave a laugh and a snicker like he could never believe a police officer at all. I forget the context And the record, but I made a note down that this reaction isn't recorded in the record because it was a snort and laugh that all police officers never tell the truth, and if it in put in the context that the conversation was this afternoon when the snort was, that was the impression I got that he could not. Besides, his answers to all the questions have just been everything, done everything, always had an answer to a question and things that I mentioned before.

The Court: 535, Charles West.

Defense Counsel: Is the Court sustaining or overruling the challenge?

The Court: There was not a challenge on Mr. Gibbs. What are you talking about?

The Prosecutor: Move to strike.

The Court: I am sorry. The State challenged him and it is challenged peremptory. What is there to overrule?

Defense Counsel: Can I object on the basis it was racially

motivated?

The Court: You want me to make a findinq? I am sorry the Court finds no racially based motive for the challenge.

Defense Counsel: Sustain the challenge?

The Court: Yes, the Court sustains the challenge.

(Proceedings held on March 28, 1991).

Following jury selection and opening statements where the State repeatedly injected prejudice against Mr. Robinson by referring to him as a drug dealer and to the deceased as an anti-drug crusader, (R. 225-305), and where Mr. Robinson's counsel admittedly misled the jury into believing that Mr. Robinson's defense was that the victim's son was actually responsible for these shootings and that he just wanted to shock the jury into listening to him, (R. 225-305), the State called thirty-six witnesses to testify on its behalf in an attempt to prove its case against Mr. Robinson. (R. 225-1297).

State witnesses testified that even though Mr. Robinson was not present at the time of the shooting, he had brilliantly masterminded, planned and engineered the killing of the grocer/anti-drug crusader as well as the attempted killing of two bystanders and the death of a dog. (R. 225-1297). Conflicting testimony was presented by state witnesses, including that of convicted felons, in exchange for leniency in pending cases, that Mr. Robinson told them that he had someone taken care of because he believed they were involved in his brother's murder and/or that this someone was interfering with his drug activity. (R. 306-472). Another state witness claimed that even though he knew Mr. Robinson for only a week, he had been offered the opportunity to take care of someone

for $14,000. (R. 639-778). The State conceded the fact that it violated Mr. Robinson's rights in failing to notice him regarding this witness required by the Williams Rule, but the State stated that it hoped the Supreme Court would find it harmless error even though the witness was clearly confused as to who actually offered him money and had refused to give a sworn statement. (R. 639-778).

Other state witnesses testified that Mr. Robinson had been seen talking with one of the individuals arrested for the murder of Mr. Lawrence, and the State made inferences upon inferences that money had exchanged hands between Mr. Robinson and others arrested in this case, but never offered one iota of proof to support this allegation. (R. 225-1297). The State alleged that one person was recruited by Mr. Robinson to carry out his ingenious scheme, but then that person recruited two other individuals to systematically carry out the carefully thought out conspiracy. Weapons, acknowledged as "look alikes" to those used in the shooting were introduced into evidence, over defense objections, and a tape recording of a conversation that Mr. Robinson had with Rodney Newsome was introduced evidencing that Mr. Robinson knew him, but also revealing that Mr. Robinson was confused as to how he might help this person who had been arrested for murder. (R. 265, 267, 1057). Testimony was presented that one of the guns that may have been used in the shooting may have been owned, but not possessed by, Mr Robinson's wife before she and Mr. Robinson were married. (R. 1202). Finally, testimony at trial revealed that Mr. Robinson had indeed been in the area of the murder on the day before the shootings took place, an area referred as a "drug hole," but the record at trial is void of the deceased ever having reported to the police any information that implicated Mr. Robinson in any drug

activity - despite the fact that testimony was presented that Mr. Lawrence regularly informed the police about drug activity in his area and turned drug dealers in (R.) - or that the deceased and Mr. Robinson even knew each other. Furthermore, although testimony was presented to prove that Mr. Robinson had used drugs, the State failed to provide any evidence that Mr. Robinson was a drug dealer. (R. 887-1012).

Based upon this circumstantial evidence, or despite the lack thereof, the jury returned a verdict of guilty on all counts against Mr. Robinson. The Court adjudicated Mr. Robinson guilty of first degree murder and two counts of attempted first degree murder, and it immediately began to conduct a penalty phase hearing, informing the jurors over and over again, that the sole decision as to whether or not Mr. Robinson would receive the death penalty rested with the Court. (R. 1636, 1637, 1660).

The State relied on evidence presented during the guilt/innocence phase and a certified copy of Mr. Robinson's contemporaneous convictions to establish four statutory aggravating circumstances beyond a reasonable doubt.[9] Mr. Robinson presented testimony by his mother and father to support mitigating circumstances revealing that Mr. Robinson's brother's murder had a grave effect upon him. Although the jury had only been deliberating for five short hours, the court, on its volition, without a request by the jury for clarification or concern, and without a motion by either the State or Mr. Robinson, summoned the jury into courtroom, interrupting their deliberations because the Court could not understand why they were taking so long to make a decision that did not require a

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[9]The four statutory aggravating circumstances included: previous violent felony convictions; knowingly created great risk of death to many persons; pecuniary gain; and murder was cold, calculated and premeditated.

unanimous vote, and re-read the jury instructions for the penalty phase. The cold written record does not reflect the inflection and tone used in re-reading these instructions, but the record is clear that it was only ten minutes later that jury subsequently returned with a 10-2 "recommendation" to impose the death penalty upon Mr. Robinson. (R. 1646-1671).

The Court, in its Sentencing Order dated February 11, 1992, stated that it considered not only the mitigating evidence presented on behalf of Mr. Robinson during the penalty phase conducted in front of the jury, but that it also considered evidence presented only to the Court in a Sentencing hearing. (R. 198-202). Evidence that the jury did not hear, but that the Sentencing court considered, included expert testimony that Mr. Robinson's intelligence was well below normal, that Mr. Robinson was unable to appreciate the criminality of his conduct, and that he suffered from substantial abuse of alcohol and marijuana following the murder of his brother. (R. 201). The Sentencing Court erroneously found four statutory aggravating circumstances and incorrectly stated that it considered the mitigating circumstances as non-statutory circumstances which did not outweigh the aggravating circumstances. (R. 198-202). The Court, thereafter, unconstitutionally sentenced Mr. Robinson to death by electrocution for the first degree murder conviction of Mr. Lawrence and to two consecutive thirty year terms for the two attempted first degree murder convictions. (R. 198-202).

SUMMARY OF ARGUMENT

Mr. Robinson's trial and sentencing proceedings evidence obscene violations of Mr. Robinson's Eighth and Fourteenth Amendment rights, exposing the unconstitutional and corrupt nature of Florida's death penalty statute. On flimsy circumstantial evidence, the State proceeded to trial, seeking the death penalty. A tainted jury heard ambiguous instructions by a biased judge, and then a County Court judge heard significant mitigating evidence, not heard by the jury, which was essentially ignored in order to impose the death sentence. Florida's death penalty statute, facially and as applied in Mr. Robinson's case, cries out to be struck down once and for all.

While the State was allowed to portray the deceased victim as a drug-crusader and hero in the community, the State, without any proof whatsoever of its allegations, was also entitled, if not encouraged, to depict Mr. Robinson as an evil, but brilliant, drug dealer who had no regard for human life, and who masterminded, planned and engineered the shooting of Mr. Lawrence, two innocent bystanders and a dog, despite Mr. Robinson's low level of intelligence and inability to appreciate the criminality of his conduct.

The jury selection process was unforgivably tainted by unlawful State challenges against African-American jurors. The Court's outrageous comments and misleading instructions to the jury prejudiced Mr. Robinson and denied him a reliable verdict and penalty phase recommendation. The Court reversibly erred when it repeatedly informed the jury that their recommendation was merely advisory and that the decision to impose the death penalty upon Mr. Robinson rested solely with the Court. In an absurd and reprehensible manner, the Court summoned the jury during their penalty phase

deliberations, sua sponte, and interjected a re-reading of the jury instructions.

Prior to their penalty phase deliberations, the jury did not hear that Mr. Robinson's intelligence was well below normal, that he suffered from alcohol and drug abuse, or that he was unable to appreciate the criminality of his conduct. It is more likely than not, considering that mere circumstantial evidence was presented by the State, that if the jury knew that Mr. Robinson was not capable of being the mastermind of a conspiracy that culminated in a death and shooting of three individuals and a dog, it would have found Mr. Robinson innocent of first degree murder and of two counts of attempted first degree murder. Furthermore, even if Mr. Robinson would have been found guilty, it is unseemly to imagine that the jury, if mitigation that was produced for the Sentencing court would have been presented to them, would have recommended a sentence of death for Mr. Robinson.

Yet, instead of hearing unrefutable statutory and non-statutory mitigating evidence on behalf of Mr. Robinson, the jury heard only controverted statutory and non-statutory aggravating evidence against Mr. Robinson, rendering the death sentence in this case unconstitutional. In addition, the Court erred in shifting the burden of proof from the State to Mr. Robinson to establish whether he should be sentenced to life or death.

The Court, throughout the trial, displayed its bias against Mr. Robinson and on several occasions erroneously admitted testimony presented by the State, even when error was conceded by the State, which violated Mr. Robinson's right to a fair trial. In addition, the trial court permitted the State to raise a climate of suspicion and innuendo by mounting inference upon inference which permeated Mr. Robinson's trial.

The trial court subsequently provided the jury with unconstitutional instructions with which to render a verdict. The aggravating circumstances instructions given to the jury during the penalty phase, unconstitutionally, both facially and as applied, render the jury's recommendation of death unreliable requiring that Mr. Robinson be afforded a new sentencing hearing.

Improper comments and statements made by the State, especially during closing argument, illustrate the prejudicial nature of these proceedings against Mr. Robinson. The State's vouching for witnesses who were convicted felons, the State's offering its own testimony, and the attacks the State made upon Mr. Robinson's counsel unmistakably adversely affected the jury's ability to render a fair and impartial verdict.

Mr. Robinson's trial court proceedings were fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth and Fourteenth amendments to the United States Constitution.

ARGUMENT

I.

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing scheme denies Mr. Robinson his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. This case is a blatant example of the corrupt nature of Florida's death penalty statute. After reading the transcript of Mr. Robinson's trial proceedings, this Honorable Court will most certainly be moved by the high degree of unprofessional practice of law exhibited by all of the parties involved in this case. Mr. Robinson's trial mocks our system of justice and stands as a monument for the compelling reasons required to declare, once and for all, Florida's death penalty statute unconstitutional.

Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. Execution by electrocution imposes physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the

United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S.Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S.

238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Florida is the only state in this country in which the jury plays a critical role in sentencing where a simple majority vote is sufficient to impose the death penalty. Mr. Robinson was sentenced to death following unforgivable interference into the jury's sacred deliberation process during the penalty phase because the trial judge could not, in all of his wisdom, figure out why the jury was taking its time in deciding whether or not to recommend life or death for Mr. Robinson. Furthermore, because the jury was forced to make their recommendation without being fully informed of the extensive mitigation in this case, their 10-2 recommendation for death is wholly unreliable and perpetrates the fraud that Florida's death penalty statute creates.

Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

II.

ALTHOUGH THE STATE CONCEDED ERROR IN VIOLATING MR. ROBINSON'S SIXTH AMENDMENT RIGHTS BY COMMITTING A SERIOUS WILLIAMS RULE TRANSGRESSION, THE TRIAL COURT SYSTEMATICALLY ADMITTED PREJUDICIAL TESTIMONY AGAINST MR. ROBINSON AND ERRONEOUSLY DENIED GRANTING MR. ROBINSON A MISTRIAL.

Prejudicial testimony unrefutably constituting Williams[10] Rule evidence under

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[10]Williams v. State, 110 So. 2d 654 (Fla.) cert. denied, 361 U.S. 847, 80 S.Ct. 102 (1959).

90.404(2), Florida Statutes, was egregiously inserted into Mr. Robinson's trial proceedings.

During a hearing on Mr. Robinson's Motion for Mistrial based on the claim that the State failed to comply with the notice requirement when using purported evidence of a separate crime, the State conceded that its allegation that Mr. Robinson was involved in a conspiracy to recruit two individuals to kill Mr. Lawrence did indeed constitute a Williams Rule violation. (R. 639-779). The State said that it hoped that the Supreme Court would hopefully find it harmless error. The State then requested a Richardson hearing to establish that the Williams Rule violation did not prejudice Mr. Robinson, and the Court declared that the testimony was reliable despite misidentifying and misnaming Mr. Robinson, despite the time differences in the testimony, and despite the fact that Witness Hauser refused to give a sworn statement to the police. The Court erred when it denied Mr. Robinson's Motion for Mistrial, even though the State, throughout Mr. Robinson's trial, was guilty of committing similar Williams Rule violation.

During the State's opening, Mr. Robinson was depicted as a drug dealer who went to a drughole while portraying the victim as an anti-drug crusader. State witness after witness testified, over Mr. Robinson's objection, to the policies and practices of the victim regarding drugs, referring to the drughole and inferring that Mr. Robinson was involved in drug activity. When pressed, however, no State witnesses offered any testimony that Mr. Robinson was a drug dealer even though he may have used drugs.

This entire line of testimony was wholly inadmissible and improper since the State's evidence was clearly insufficient to establish a separate crime. Whether or not Mr. Robinson possessed or used drugs is irrelevant because that is not a material issue in this

case. One's possession and use of drugs, in and of itself, does not establish motive for first degree murder, and the State was unable to show any other type of evidence with regard to drug-related activity. In Florida, the State must establish by clear and convincing evidence that the collateral crime was committed and that it was committed by Mr. Robinson; "mere suspicion is insufficient." State v. Norris, 168 So. 2d 541 (Fla. 1964).

The State conceded that it failed to meet this standard of proof with regard to its conspiracy/solicitation theory, and it showed its utter disregard for the standard by trying to link its suspicion that Mr. Robinson was involved in a drug business in an effort to establish motive. Without this unlawful use of collateral crime evidence, the State could have put on a case. Because this violation so severely prejudiced Mr. Robinson and denied him a fair trial and his Sixth Amendment rights, a new trial should be granted.

III.

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO EXERCISE A PEREMPTORY CHALLENGE AGAINST AFRICAN-AMERICAN JURORS GIBBS AND BRADLEY FOR REASONS THAT WERE NOT NEUTRAL, NOT RECORD-SUPPORTED, OR WERE OTHERWISE PRETEXTUAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTIONS 2, 9 AND 16 OF THE STATE CONSTITUTION.

(A) Peremptory Strike of Juror Gibbs

The United States Supreme Court has repeatedly emphasized that "the core of the Fourteenth Amendment is the prevention of unjustified official distinctions based on race." Hunter v. Erickson. 393 U.S. 385, 391 (1969). The exclusion of African-American citizens

from service as jurors "constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." Batson v. Kentucky, 106 S.CT.. 1712, 1716 (1986)[11]. The elimination of a single venireperson on the basis of race not only interferes with the selection of an impartial jury: it "offends the dignity of persons and the integrity of the courts." Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 1366 (1991); and it injures the "excluded juror (as well as) the community at large." Id., at 1368. This is because "jury duty constitutes the most direct way citizens participate in the application of the laws." State v. Slappy, 522 So.2d 20 (Fla. 1988). In Joiner v. State, 618 So.2d 174 (Fla. 1993), the Florida Supreme Court emphatically rejected the state's suggestion that where an "improperly challenged juror is replaced by a member of the same minority, the constitutional infirmity is cured." Id., at 176. The Court explained:

> "Jurors are not fungible. Each juror has a constitutional right to serve free of discrimination. The striking of a single African-American juror for racial reasons violates the Equal Protection Clause."

Id.

Therefore, whenever objection is raised that a single venireperson is sought to be stricken in a racially discriminatory way, the trial court must require the striking party to provide a "clear and reasonably specific" racially neutral explanation for using the challenge. State v. Johans, 613 So.2d 319, 321 (Fla. 1993), citing Batson v. Kentucky, 476 U.S. at 96-98, and receding from the requirement of Neil and its progeny that the trial court need not inquire unless the objecting party demonstrates a "strong likelihood" --

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[11]The Florida Supreme Court has construed the state constitution to provide greater protection against improper bias in jury selection than is found in its federal counterpart. State v. Neil, 457 So.2d at 492.

typically based on a pattern of challenges -- that the present challenge is motivated by considerations of race[12]. The trial court cannot merely accept the reasons proffered at face value, "but must evaluate the reasons as [it] would weigh any disputed fact" and must find the reasons to be race-neutral, reasonable and non-pretextual. State v. Slappy, 522 So.2d at 22. Where a reason is facially race-neutral, the presence of one or more of the following factors establishes that the basis for the strike is unreasonable or pretextual: (1) the alleged group bias is not shown to be shared by the subject juror; (2) the prosecutor's examination of the juror is non-existent or perfunctory; (3) the prosecutor has singled out the juror for special or provocative examination; (4) the proffered reason for the strike is unrelated to the facts of the case; and (5) the proffered reason for the strike is equally applicable to an unchallenged juror. Id

As soon as the prosecutor sought to strike Juror Gibbs, defense counsel objected that the challenge was based on race, and moved for a Neil inquiry. Upon inquiry, the prosecutor proffered the following reasons for striking Juror Gibbs: (1) he was convicted and served three and a half years in prison and was on probation; (2) he had problems with capital punishment; (3) he gave a laugh and snicker regarding believing police officers that is not in the record (R. 1729-1854). From these factors, the prosecutor inferred that this was the impression the prosecutor got from Juror Gibbs, and the strike

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[12]In thus receding from the requirement that the complaining party establish a prima facie case before the trial court need inquire, the Florida Supreme Court has confirmed its construction of the state constitution as affording broader protection against this practice than does its federal counterpart. See, Footnote 4; and Batson v. Kentucky, 106 S.Ct. at 1723; Hernandez v. New York, 111 S.Ct. 1859, 1866 (1991); Purkett v. Elam, 115 S.Ct. 1769, 1770 (1995).

was allowed over defense objection (R. 1729-1854). Each reason proffered by the prosecutor for striking Juror Gibbs was either not neutral, not reasonable or pretextual.

(1) The Prosecutor's Conclusion That Juror Gibbs was "Convicted" and is on "Probation" and was "Shot at" are Insufficient and Pretextual as Applied to the Facts of this Case.

First, there were similarly situated jurors who had previous bad experiences with law enforcement who were questioned as to whether or not those experiences would preclude them from being fair and impartial, and were not stricken by the state. It should be noted that conspicuously absent from this entire record of voir dire are any questions at all of the prosecution following up with any of these matters with respect to Juror Gibbs. In fact, the prosecutor specifically chose not to ask Juror Gibbs any questions with respect to these purported reasons for striking him as a juror. Consequently, it appears from an objective analysis of this record, that the prosecutor was acting in a pretextual manner as a matter of law.

As was stated in State v. Slappy, 522 So.2d at 22 "a non-existent or perfunctory examination of the juror" is highly indicative of pretext. Similarly, when the proffered reason is equally applicable to an "unchallenged juror," this is also highly indicative of pretext. In the instant case, in response to questioning by defense counsel, Juror Gibbs advised that he could impose the death penalty, and could be fair and impartial, and would not hold against police officers any of the experiences which he had voluntarily disclosed during voir dire. Juror Gibbs was never asked one question by the prosecutor with respect to any of these concerns which the prosecutor proffered as his reasons for striking Juror Gibbs from the panel. Interestingly, the prosecutor never attempted to strike

Juror Gibbs for cause, and conceded that Juror Gibbs' feelings about the death penalty would not be sufficient for cause, but argued that it was enough of an opinion to allow a strike peremptorily.

Additionally, the prosecutor was not consistent in striking jurors who were ambivalent about the death penalty, but stated that they could set aside their ambivalence and enter a recommendation of death. Specifically, the prosecutor did not strike Jurors who were similarly situated in that regard, and the prosecutor did not strike who had adverse experiences with the police department, but were nonetheless able to render a fair and impartial verdict notwithstanding the experiences. There was no objective rational reason other than a non-race neutral reason for striking Juror Gibbs in a manner inconsistent with these other jurors.

The courts of this state have repeatedly held that, under circumstances such as those in the subject case, an African-American juror being stricken for purported reasons which are not supported by the record or inquired into by counsel are pretextual. State v. Slappy, 522 So.2d at 23 (peremptory strike of two African-Americans on proffered basis that, as teachers, they were political liberals likely to be lenient to defense, held pretextual in absence of any questions pertaining to basis alleged for bias, court noting, "[w]e cannot accept the State's contention that all school assistants and these two in particular are liberal"); Stroder v. State, 622 So. 2d 585, 586 (Fla. 1st DCA 1993) (strike of African-American elementary school teacher of emotionally handicapped children pretextual where asserted basis was that mental health professionals "are more into the helping mode rather than finding people guilty and punishing them," where prosecutor did not question juror "to

explore his perception of her liberality"); Hicks v. State, 591 So.2d 662, 663 (Fla. 4th DCA 1991); (strike of African-American teacher for asserted reason that "teachers in general are more liberal in their thinking" pretextual where prosecutor did not question juror concerning the effect of her occupation on her political beliefs or ability to serve as juror); House v. State, 614 So. 2d 647, 649 (Fla. 2nd DCA 1994); (challenge to African-American mental health work based on personal judgment that "someone who works in mental health would be more liberal than conservative" invalid where prosecutor asked no questions to elicit "political or social biases" and juror evinced "readiness to follow the law as charged"); Reeves (peremptory challenge of two African-American HRS employees on alleged basis that HRS employees are biased against state invalid where prosecutor did not question challenged jurors regarding their feelings toward state); Mayes v. State, 550 So.2d 496, 498 (Fla. 4th DCA 1989) (strike of African-American licensed practical nurse because of her profession, but without having questioned juror regarding effect of employment on ability to serve, pretextual, particularly in view of prosecutor's failure to challenge other medical worker); Johnson v. State, 600 So.2d 32, 34 (Fla. 3rd DCA 1992) (strike of African-American juror "because he had worked with people who had problems" pretextual in absence of demonstrable connection between occupation and grand theft case); contrast with Happ v. State, 596 So.2d 991, 996 (Fla. 1992) (prosecutor's strike of African-American juror on basis that, "as a psychological teacher at a community college and a Catholic, [he] was more liberal than people in other professions and would be inclined not to believe in the death penalty," permissible where defense counsel did not contest these reasons); and Slater v. State, 588 So.2d 320, 321 (Fla. 4th DCA 1991) (prosecutor's strike

of two African-American teachers, explaining that he was excusing all teachers, permissible where he had stricken two non-minority teachers and had announced intention to strike two teachers remaining in venire).

Hence, where, as here, a venireperson shares some characteristic with others who served on the jury, a peremptory strike exercised on the asserted basis of that characteristic is pretextual. Richardson v. State, 575 So.2d 294, 295 (Fla. 4th DCA 1991) (prosecutor's strike of veniremember on basis of opinion that statute prohibiting purchase of marijuana within 1000 feet of school should not apply to use of marijuana in own home "presumptively pretextual," where three white jurors who were not struck shared this opinion); Strode v. State, 20 FLW D 455 (Fla. 2nd DCA, May 12, 1995) (prosecutor's strike of juror for reason of brief response to question regarding criminal justice system pretextual where unchallenged jurors' responses similarly brief); Floyd v. State, 511 So.2d 762, 764-765 (Fla. 3rd DCA 1987) (where he did not challenge white student, prosecutor's strike of African-American based on status as student pretextual).

Finally, where a prosecutor exercises a peremptory strike based on nothing more than the juror's assurance that he can follow some correct formulation of the law, that strike is invalid. See Gilliam v. State, 645 So.2d 27, 28 (Fla. 3rd DCA 1994) (juror's expressed ability to presume the defendant's innocence cannot justify peremptory strike as juror's response comprises correct if unartful statement of law). Defense counsel repeatedly characterized the structure of the capital punishment statute, without objection from the state or correction from the court, as embodying the legislature's preference for an error on the side of life in penalty phase decision making. This is an accurate characterization

of the statute. See State v. Dixon, 283 So.2d 1 (Fla. 1973). Under Gilliam, Juror Gibb's avowed inclination to follow the law is not a reasonable, non-pretextual basis for the prosecutor's peremptory strike against him.

(2) Juror Gibbs Laughing and Snickering

The prosecutor's reason for striking Juror Gibbs was based on a purported laugh and snicker regarding whether one could believe a police of f icer. The prosecutor stated there was a snort and a laugh which were not on the record, and he had allegedly based his challenge on this non-record supported activity. Nowhere in the record is there any reference of any kind by Juror Gibbs with respect to this conduct. Where, as here, the prosecutor proffers a reason for a peremptory strike for which there is no record support, the strike is deemed to be racially motivated. Shelton v. State, 563 So.2d 821 (Fla. 4th DCA 1990) (prosecutor's explanation for peremptory strike that Juror knew defendant pretextual where nothing in the record showed that stricken juror knew defendant); Williams v. State, 574 So.2d 136 (Fla. 1991) (peremptory strike exercised on asserted basis that juror could not understand felony murder doctrine pretextual where no question asked of juror about doctrine); Brown v. State., 597 So.2d 369 (Fla. 3rd DCA 1992) (asserted reason for strike that African American juror did not hear or understand prosecutor's questions without record support).

Furthermore, even if there were record support for this reason, a peremptory strike based on Juror Gibbs' alleged snicker and laugh is neither reasonable nor race-neutral. Again, the prosecutor did not attempt to pose even one follow up question with respect to Juror Gibbs and his perception of the voracity of police officers. In fact, Juror Gibbs, when

questioned earlier by defense counsel, specifically stated he could be fair and impartial notwithstanding any negative experiences he had with law enforcement. Nonetheless, the prosecutor chose to strike Juror Gibbs notwithstanding any follow up questions whatsoever, and referred to non-record supported reasons proferred at the time of the strike.

Where there is no objective basis for striking an African-American juror; and the record in fact reflects that the stricken juror would otherwise be "preferred... in the eyes of many prosecutors"; the strike may be constitutionally invalid. Valentine v. State, 616 So.2d 971, 974 (Fla. 1993) (where African-American juror was victim of crime, her nephew worked for sheriff, she had no problem with death penalty and would follow the law in recommending its imposition, "no objective basis" for strike and trial court erred in failing to inquire.) There was no objective record basis for striking Juror Gibbs. The trial court's error in allowing the prosecutor to eliminate Juror Gibbs from the venire, violated the federal and state constitutional guarantees against improper bias in jury selection, and requires reversal. Batson; Powers; Slappy.

Juror Bradley

The trial court committed reversible error in failing to conduct an inquiry with respect to the state's peremptory challenge of alternate Juror Bradley. At the time of the strike, the defense objected, and the Court ignored the objection and did not conduct any inquiry at all. Hence, under Neil/Slappy and its progeny, as stated supra, the defendant Robinson's conviction should be reversed.

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT VIOLATED BOTH THE SPIRIT AND THE LETTER OF FLORIDA'S DEATH PENALTY STATUTE BY REPEATEDLY MISLEADING THE JURY THROUGH ITS INSTRUCTIONS, BY SABOTAGING THE JURY DELIBERATION PROCESS DURING THE PENALTY PHASE OF MR. ROBINSON'S TRIAL AND BY FAILING TO CONDUCT A NEW TRIAL OR AT THE VERY LEAST A NEW PENALTY PHASE AFTER HEARING UNREFUTED SIGNIFICANT AND COMPELLING MITIGATION REGARDING MR. ROBINSON'S LOW INTELLIGENCE, HIS INABILITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT AND HIS AFFLICTION WITH ALCOHOL AND DRUG ABUSE FOLLOWING HIS BROTHER'S MURDER.

A. Mr. Robinson's sentencing jury was misled by comments, questions and instructions that unconstitutionally and inaccurately diluted the jury's sense of responsibility towards sentencing in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert denied, 109 S.Ct. 1353 (1989). Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Hall v. State, 541 So. 2d 1125 (Fla. 1989).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), a capital habeas corpus petitioner was awarded relief when he presented a claim involving prosecutorial and judicial comments and instructions that diminished the jury's sense of responsibility. Mr. Robinson is entitled to the same relief. A contrary result would result in a totally arbitrary imposition of the death penalty in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972).

Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc) and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), have determined that Caldwell applies to Florida capital sentencing proceedings and when either judicial instructions or prosecutorial comments minimize the jury's sentencing role, relief is warranted. The purpose of Caldwell is that capital sentences be individualized and reliable. Caldwell, 472 U.S. at 340-41.

Throughout the proceedings in Mr. Robinson's case, the court frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to guilt or innocence, they were told that they were the only ones who could determine the facts. As to sentencing, however, they were told that they merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first degree murder.

The court failed to instruct the jury that their recommendation would only be overridden in circumstances where no reasonable person could agree with it. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell, 472 U.S. at 332-33 (emphasis supplied). Comments and instructions such as those provided to Mr. Robinson's jurors served to diminish the jury's sense of responsibility.

The comments and instructions by the judge allowed the jury to attach less significance to its sentencing verdict, and therefore enhanced the unacceptable risk of the imposition an unreliable death sentence. See Mann; Caldwell.

Mr. Robinson does not have to show that the effect of the inconsistent instructions was to unconstitutionally dilute the jury's sense of responsibility. In Boyde v. California, 110 S.Ct. 1190, the United States Supreme Court held that where there was a reasonable likelihood that a jury had understood an instruction to preclude them from considering mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978), then relief was warranted. In this case there was much more than a reasonable likelihood that Mr. Robinson's jury misunderstood the effect of its decision in the Florida sentencing calculus. The overall effect of this was to create a grave danger that the sentence that emerged from Mr. Robinson's trial did not represent "a decision that the State had demonstrated the appropriateness of the defendant's death." Caldwell, 472 U.S. at 332.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Espinosa. Thus, suggestions and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she deems appropriate irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. See Mann, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa. The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Espinosa, 112 S. CR. at 2928 ("Florida has essentially split the weighing process in two"). The jury's sentencing

verdict can be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Robinson's jury, however, was led to believe that its determination meant very little and that the judge was free to impose whatever sentence he wished.

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," and that therefore prosecutorial arguments that tend to diminish the role and sense of responsibility of a capital sentencing jury violate the Eighth Amendment. Caldwell, 472 U.S. at 328-29. Because the "view of its role in the capital sentencing procedure" imparted to the jury was "fundamentally incompatible with the Eighth Amendment's heightened `need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 472 U.S. at 340. Mr. Robinson is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not limited to the substantial unreliability that diminished responsibility comments and instructions inject into the capital sentencing proceeding; instead, another concern is the unacceptable risk of bias in favor of the death penalty created by such "state-induced suggestions that the sentencing jury may shift its sense of responsibility." Id. at 330. A jury that is not convinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and

is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 472 U.S. at 331-32. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 472 U.S. at 332-33. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only factual guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332-33 (emphasis supplied). When this occurs, as it did in this case, the unconstitutionally unacceptable risks of unreliability and bias in favor of the death penalty also unconstitutionally infect the trial judge's sentence.

The state must demonstrate the comments and instructions at issue had "no effect" on the jury's sentencing verdict. Caldwell, 472 U.S. at 341. If the jurors had not been misled and misinformed as to their proper role, had their sense of responsibility not been

minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden. The evidence of non-statutory mitigation in the record provided more than a "reasonable basis" that would have precluded an override. See Hall v. State, 541 So. 2d 1125 (Fla. 1989); Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The Caldwell violations in this case had an effect on the jurors, and also infected the sentencing judge because of the great weight he had to give the jurors' recommendation. Espinosa.

B. The trial court, without a request from the jury for clarification of the penalty phase jury instructions and without a motion by either the State or Mr. Robinson, unexcusably interrupted the sacred process of jury deliberations for the sole purpose for manipulating the jury process by pushing the jury into ending their serious and profound process of deciding whether or not they should recommend life of death for Mr. Robinson.

The trial court abused its discretion, over Mr. Robinson's objection, when it ordered the jury to come back into the courtroom to listen to a re-reading of the penalty phase jury instructions unsolicited by either the State or Mr. Robinson. (R. 1658). Because the jury had exercised its rights earlier in the trial to inquire into a court matter during its deliberations, the jury was well aware that this process was an option for them if they had any questions, concerns or confusion about the jury instructions.

The trial court claimed that it could not understand why the jury was taking so long to reach a decision as to whether or not it should recommend life or death for Mr. Robinson. The court insisted on interrupting the jury's deliberating process after only five hours, and the cold record does not reveal the inflection or tone that the court used when it re-instructed the jury to carefully weigh mitigating and aggravating circumstances in

order to provide Mr. Robinson with a fair and impartial sentence. Clearly, because the jury returned with a recommendation for death within just a few moments of the re-reading, the trial court played a substantial role in the independent jury deliberating process in violation of Mr. Robinson's Sixth Amendment rights to the United States Constitution.

A jury should be afforded the courtesy by a trial court to proceed with its deliberations as it sees fit, providing there is no evidence that it is not following the court's instructions or violating the law. A jury should not be forced into making a decision, especially in a death penalty case, and should be afforded the opportunity to deliberate as long as it feels it is necessary, without interruption or corruption, even when its straw vote may initially indicate that its recommendation is neither a tie nor a consensus.

The sentencing jury in a death penalty case is already under enough pressure to offer its recommendation, which is supposed to be given great weight. In Mr. Robinson's case, the trial court's action evidences its utter disregard for the jury's recommendation and it seems that the re-reading of jury instructions was given for the sole purpose of quickly concluding the proceeding. Time is not of the essence in a death penalty case, and in addition to violating Mr. Robinson's right to a fair trial, the trial court's insulation into the jury deliberation process violated the sacred trust the jury swore to uphold. Mr. Robinson is entitled to a new sentencing hearing where a jury is empowered to deliberate without a trial court's interference in its process.

C. After a replacement Judge from County court heard crucial mitigation testimony about Mr. Robinson's low intelligence, his inability to appreciate the criminality of this criminal offense and his affliction from drug and alcohol abuse,

the court erred when it denied Mr. Robinson a new trial or at the very least a new sentencing hearing before a jury who is required to recommend informed and reliable advice, which is supposed to be given great weight.

It is more probable than not that a jury, if it had been properly informed of the unrefuted mitigation evidence presented in Mr. Robinson's case, may have not only recommended a sentence of life for Mr. Robinson, but it very well may also not found Mr. Robinson guilty of First Degree Murder or Attempted First Degree Murder. Mr. Robinson's jury, charged with the responsibility of recommending life or death, was ignorant, due to no fault of its own, of the significant and compelling mitigating evidence which should have played a central role in the deliberation process. The jury recommendation, which must be given great weight by the trial court before a sentence is pronounced, is clearly tainted when the jury is disabled from fulfilling its obligation. The sentencing court, even though it properly considered mitigation offered by Mr. Robinson during a special hearing conducted by a replacement judge, erred when it failed to grant Mr. Robinson a new sentencing hearing after it realized the import of a process tainted by ineffectiveness and corruption.

Unrefutable evidence of Mr. Robinson's low intelligence strikes at the heart of the State's case against him as some sort of mastermind who engineered a diabolical conspiracy. According to the evidence introduced during Mr. Robinson's, Mr. Robinson was incapable of even appreciating the criminality of his conduct, in part due to his affliction with drug and alcohol abuse since his brother's murder. It is illogical and unreasonable to argue that a person with low intelligence, incapable of appreciating the criminality of his conduct and afflicted with the recognized disease of substance abuse

should be sentenced to death rather to life in prison, especially when the case against him was wholly circumstantial and highly controverted by conflicting evidence. Mr. Robinson's right to due process and a fair trial was denied when the Sentencing court failed to order a new penalty phase hearing after learning about Mr. Robinson's mitigating evidence.

V.

MR. ROBINSON IS INNOCENT OF THESE OFFENSES AND THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE MR. ROBINSON WAS GUILTY AS CHARGED, IN VIOLATION OF JACKSON V. VIRGINIA, 443 U.S. 307 (1979), IN RE WINSHIP, 397 U.S. 358 (1970), AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Robinson was indicted for the crime of first degree murder and two counts of attempted first degree murder (R. 1-3). The State of Florida is required to prove each and every element of the offense charged against Mr. Robinson. In Re Winship, 397 U.S. 358 (1970).

Taking all of the evidence in light most favorable to the State, no rational fact finder could find Mr. Robinson guilty of premeditated murder beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); See also, Skelton v. State of Texas, 795 S.W.2d 162 (1989). The State failed to prove the corpus delicti. Golden v. State, 18 Fla. L. Wkly S603 (Fla. November 10, 1993).

The evidence against Mr. Robinson at trial concerning both the murder and the attempted murders were entirely circumstantial. The problem with the state's evidence is that the jury was required to pyramid inferences in order to reach the conclusion that Mr.

Robinson murdered or attempted to murder all of the victims.

As the Florida Supreme Court held in State v. Law, 559 So. 2d 187 (Fla. 1989), "if the state does not offer evidence which is inconsistent with the defendant's hypothesis, `the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law.' The state's evidence would be as a matter of law 'insufficient to warrant a conviction.'" Law, 559 So. 2d at 189 (citation omitted).

"Florida courts have long adhered to the rule proscribing the fact-finder from basing an inference upon an inference in order to arrive at a conclusion of fact." Keys v. State, 606 So. 2d 669, 673 (Fla. 1st DCA 1992). In criminal cases, the rule is clear:

> Where two or more inferences in regard to the existence of criminal intent and criminal acts must be drawn from the evidence and then pyramided to prove the offense charged, the evidence lacks the conclusive nature to support the conviction."

Keys, 606 So. 2d at 673.

In order for the jury to convict Mr. Robinson of murder it was required to pyramid inference upon inference in violation of Mr. Robinson's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and corresponding provisions of the Florida Constitution. For example, because the State offered no evidence that linked Mr. Robinson to the crime of drug dealing, it was required to make false inferences in order to contrast its portrayal of the deceased as an anti-drug crusader. In addition, while the State attempted to infer that Mr. Robinson had paid individuals to kill Mr. Lawrence, since it had no proof of this dastardly deed, it also attempted to infer that

Mr. Robinson had some sort of relationship with Mr. Lawrence - and once again the State presented no evidence that the two even knew each other. Mr. Lawrence, as a person who was helpful to the police in reporting drug activity and in turning in drug dealers he knew, evidently never turned Mr. Robinson in for anything or ever reported his activities to the police which would have provided evidence of motive. The State's witnesses could not make up their minds whether the motive was because of some alleged drug related activity or related to the tragic death of Mr. Robinson's brother. The State produced no testimony that even hinted that there was any conflict between a man named Mr. Lawrence and Mr. Robinson. The State's entire case is predicated on innuendo whipped into inferences.

As a result, Mr. Robinson is entitled to have his convictions for first degree murder and attempted first degree murder (two counts) vacated and to be discharged. In Re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979). On this issue alone, or in conjunction with his other issues, Mr. Robinson is entitled to have his convictions set aside and to be forever discharged.

VI.

MR. ROBINSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE LAW SHIFTED THE BURDEN TO MR. ROBINSON TO PROVE THAT DEATH WAS INAPPROPRIATE REQUIRING THE TRIAL COURT TO EMPLOY A PRESUMPTION OF DEATH, BECAUSE NON-STATUTORY AGGRAVATING FACTORS WERE INTRODUCED AND THE USED BY THE STATE AND BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF BOTH STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES

ESTABLISHED BY EVIDENCE IN THE RECORD.

A. The trial court unconstitutionally employed a presumption of death in determining Mr. Robinson's sentence by shifting the burden of proof to Mr. Robinson to prove that death was inappropriate.

It is well-established that

> the state must establish the existence of one or more aggravating circumstances before the death penalty [can] be imposed . . .
>
> > [S]uch a sentence could be given if the State showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)(emphasis added). This standard was not applied at the penalty phase of Mr. Robinson's trial. Instead, the court and prosecutor shifted to Mr. Robinson the burden of proving whether he should live or die.

It is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684 (1975). Thus, the court injected misleading and irrelevant factors into the sentencing determination. Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); and Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

Prosecutorial argument at Mr. Robinson's penalty phase required the judge to impose a death sentence unless mitigation was not only produced by Mr. Robinson, but also established that the mitigation outweighed the aggravating circumstances. The trial court then employed the same standard in sentencing Mr. Robinson to death. See Zeigler v.

Dugger, 524 So. 2d 419 (Fla. 1988), cert. denied, 112 S. Ct. 390 (1991)(trial court is presumed to apply the law in accord with manner in which jury was instructed). It is clear the burden was on Mr. Robinson to show that life imprisonment was the appropriate sentence since consideration of mitigating evidence was limited to only those factors proven sufficient to outweigh the aggravation.

The standard the prosecutor argued, and upon which the court relied, is a violation of Florida law and the Eighth Amendment to the United States Constitution. See McKoy v. North Carolina, 110 S.Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious").

The judge believed Mr. Robinson carried the burden of proving whether he should live or die. The judge unreasonably believed that only mitigating evidence that rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Robinson is entitled to relief in the form of a new sentencing hearing.

B. The introduction of non-statutory aggravating factors and the state's argument upon non-statutory aggravating factors rendered Mr. Robinson's death sentence fundamentally unfair and unreliable, in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution.

The jury and judge who sentenced Mr. Robinson were presented with and considered non-statutory aggravating circumstances including false allegations that Mr. Robinson was a drug dealer, that Mr. Robinson was involved in a purported conspiracy to commit murder and that Mr. Robinson was associated with individuals arrested in the shooting death of

Mr. Lawrence. In addition, hitting a despicable low, the State attempted to link Mr. Robinson to the killing of an innocent dog, a prejudicial act provoking inflamed passion from Mr. Robinson's jury, denying Mr. Robinson a fair trial.

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors violated the Eighth Amendment to the United States Constitution, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). These impermissible aggravating factors resulted in a sentence that was based on an "unguided emotional response," in violation of Mr. Robinson's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989).

Mr. Robinson is entitled to relief, including a new trial and/or a resentencing.

C. Mr. Robinson was denied a reliable sentencing in his capital trial because the sentencing judge refused to find the existence of both statutory and non statutory mitigation established by the evidence in the record and used an unconstitutional standard of proof for finding mitigating circumstances contrary to the Eighth and Fourteenth amendments to the United States Constitution.

This court erroneously failed to find statutory and non-statutory mitigation on Mr. Robinson's behalf. The failure of the trial court to give weight to these proven mitigators deprived Mr. Robinson of due process of law under the Eighth and Fourteenth Amendments to the United States Constitution; therefore, his sentence of death is constitutionally unreliable. Romano v. Oklahoma, No. 92-9093 (June 13, 1994); California v. Ramos, 463 U.S. 992 (1983); McCleskey v. Kemp, 481 U.S. 279 (1987).

These mitigators, along with other factors in his life, constitute mitigating

circumstances that were found to exist but were not considered by the court. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). In Campbell v. State, 571 So. 2d 415 (Fla. 1990), the Florida Supreme Court stated:

> Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, 571 So. 2d at 420. The judge was required to weigh and give effect to all of Mr. Robinson's's mitigation against the aggravating factors. Mr. Robinson was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments to the United States Constitution. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

The Florida Supreme Court recently held:

> "We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. [citations omitted] That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Farr v. State, 621 So. 2d 1368 (Fla. 1993)(vacating death sentence because trial court failed to consider all available mitigating evidence even though four aggravating factors found beyond a reasonable doubt)(emphasis in original and supplied).

The jury and judge were required to weigh and give effect to all of Mr. Robinson's mitigation against the aggravating factors. The trial court did not weigh this mitigation.

Mr. Robinson was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments, and he is entitled to relief and a new penalty phase. Zant

v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

VII.

MR. ROBINSON WAS DENIED HIS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JUDGE BECAUSE OF IMPROPER CONDUCT BY THE TRIAL COURT WHICH CREATED A BIAS IN FAVOR OF THE STATE AND BECAUSE THE COURT IMPROPERLY ADMITTED TESTIMONY OF STATE WITNESSES IN VIOLATION OF MR. ROBINSON'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The trial court's blatant bias in favor of the state is evident in the record. The court repeatedly attacked the credibility of Mr. Robinson's counsel while the jury was present, and thereafter berated a juror in an outrageous way, threatening her with jail instead of excusing her, and thereby prejudicing Mr. Robinson with a angry and distraught decision maker who shared her feelings with her fellow jury members. (R. 901-907).

The judge's bias led Mr. Robinson to reasonably question the court's impartiality. "In the case of a first-degree murder trial, where the trial judge will determine whether the defendant is to be sentenced to death, the reviewing court should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Chastine v. Broome, 19 Fla. L. Weekly D14 (Fla. Dec. 22, 1993)(quoting Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983)).

Mr. Robinson was severely prejudiced by the court's improper and biased conduct, and he is entitled to a new trial.

Mr. Robinson is also entitled to a new trial because court improperly admitted testimony offered by State witnesses. Throughout the trial, from the prosecutor's opening statement and continuing through the penalty phase, the prosecutor portrayed Mr. Robinson as a drug dealer. The testimony of Gary Duvall indicated that Mr. Robinson knew where the "drug hole" existed in West Perrine, and that he had been at that location on March 19, 1989 (the day before the victim was killed). According to Gary Duvall, Mr. Robinson held his drugs while Duvall took a weapon back to his apartment and gave it to the co-defendants. Conflicting testimony was elicited from Gary Duvall as to whether or not he had ever given Mr. Robinson any money for drugs.

Testimony was also elicited from Marvin Hauser, to the effect that Mr. Robinson told him that someone had messed with his drugs.

Furthermore, the prosecution argued that Mr. Lawrence (the deceased victim in this case) interfered with Mr. Robinson's drug trade, and that such interference formed the motive for Robinson hiring the co-defendants to kill Mr. Lawrence. However, no proof was adduced at trial that Mr. Robinson and Mr. Lawrence even knew each other, much less that Mr. Lawrence interfered with Mr. Robinson's alleged drug trade. Nevertheless, that theory of prosecution permeated the trial, and became the focus of the prosecution.

The cumulative effect of the testimony of Gary Duvall and Marvin Hauser, coupled with the prosecution's theory being argued repeatedly to the jury, raised a climate of suspicion and innuendo which prejudiced Mr. Robinson's ability to obtain a fair trial. Such evidence was impermissibly presented to the jury, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, Article I, S. 16 of the Constitution of the

State of Florida (1968), and **§90.403** and **§90.404,** Florida Statutes.

The prosecution witness, Marvin Hauser testified that Mr. Robinson approached him approximately one week prior to the shooting of Mr. Lawrence and offered him and his friend "Fat" $14,000.00 to kill somebody who had messed with his drugs. Hauser testified that he assumed that Mr. Robinson meant that someone had either stolen his drugs or interfered with his drugs (over defense objection). Hauser also stated that he did not know who Mr. Robinson was referring to when he made that offer.

Prior to the time that Marvin Hauser testified, Mr. Robinson objected to the presentation of Hauser's testimony, and ore tenus moved to exclude that testimony. The testimony elicited from Hauser, that Mr. Robinson offered him $14,000.00 to kill someone, constitutes the crime of attempted solicitation to commit first degree murder. As such, the State was required, pursuant to **§90.404(2)(b)** to furnish notice to the accused, no later than ten (10) days before trial, of "a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information." As conceded during the hearing on that issue, the State did not provide such notice. After a hearing before the Court, which included a proffer by the prosecution of Hauser's testimony, the Court granted that Motion and excluded Hauser's testimony. After granting that Motion the Court recessed for the day. The next morning, the prosecution moved the Court to revisit its earlier ruling excluding Hauser. After the prosecution re-proffered Hauser's testimony, the Court reversed its earlier ruling, and permitted Hauser to testify. The Defense objected, on the grounds raised during the first argument on the Motion to Exclude Hauser's testimony, namely, that admission of that testimony violated

§90.404(2)(a)(b). In addition, the defense argued that the admission of Hauser's testimony surprised Mr. Robinson, since his attorneys had relied upon the Court's earlier ruling and had not prepared for that witness' cross examination. As such, Mr. Robinson was surprised and prejudiced by its admission and was not afforded an opportunity to properly counter that evidence.

Throughout the trial, the victim, Lee Arthur Lawrence was portrayed as an "anti-drug crusader". Evidence was adduced that Mr. Lawrence would chase people from the premises of his business when they were engaged in the sale or possession of drugs. In addition, Detective Dorsey testified that the victim would call the police department and assist them in apprehending suspected drug users and sellers. Such evidence as to the character of the victim was improperly admitted, in violation of §90.404(I)(b), Florida Statutes. Evidence of Mr. Lawrence's character was not offered by Mr. Robinson, or by the State to rebut the evidence offered by Mr. Robinson. Rather, that evidence was placed before the jury by the prosecution, initially in their opening statement, and throughout the course of the prosecution Is case-in-chief, through the testimony of Valerie Bridges, Juanita Meyers, and Officer Dorsey, inter alia. The character and reputation of the victim were factors which are totally unconnected to the culpability of Mr. Robinson. However, since the jury was impermissibly presented with this evidence, their verdict was based upon a factor which was irrelevant to Mr. Robinson's culpability. Such evidence diverted the jury from examining and scrutinizing the circumstances of the crime, and from Mr. Robinson's alleged involvement. This improperly admitted testimony served only to inflame the jury and prevent them from deciding the case on the relevant evidence. cf,

Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529 , 96 L.Ed.2d 440 (1987).

A prosecution witness, Trumaine Tift was also improperly permitted to testify, over defense objection, to statements made to him by a co-defendant, Ronnie Johnson. Johnson asked Tift if Tift wanted to assist him in "spraying up with pop and his son." Over defense objection, the Court improperly admitted this testimony, based upon the prosecution's assurance that they would establish the existence of a conspiracy, thereby rendering the testimony admissible pursuant to §90.803(18)(e), statements of co-conspirators. However, the State never proved the existence of a conspiracy which rendered those statements admissible. In addition, pursuant to Romani v. State, 542 So.2d 984 (Fla. 1989), before co-conspirators' statements can be admitted into evidence, independent evidence of the existence of a conspiracy must first be established. The State is not permitted to "bootstrap" co-conspirators' statements into evidence and later prove the existence of a conspiracy. The Romani court specifically prohibited such an order of proof, rejecting Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Mr. Robinson, therefore, in undisputably entitled to a new trial.

VIII.

MR. ROBINSON'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE AGGRAVATING CIRCUMSTANCES THAT THE JURY WAS REQUIRED TO CONSIDER IN DETERMINING WHETHER MR. ROBINSON SHOULD BE SENTENCED TO LIFE OR DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. The jury was erroneously required to consider pecuniary gain as an aggravating factor, which as a matter of law, did not apply to Mr. Robinson's case.

Pecuniary gain, as a matter of law, is an aggravating circumstance that may be found when the proof, beyond a reasonable doubt, demonstrates that financial gain was the reason for the killing, and that the murder must have been an "intregal step in obtaining some sought-after specific gain. Hardwick v. State, 640 So. 2d 1071, 1076 (Fla. 1988); Peterka v. State, 640 So. 2d 59 (Fla. 1994).

Mr. Robinson's jury was erroneously instructed to consider pecuniary gain despite the fact that one witness testified that Mr. Robinson allegedly claimed that he arranged to have a person killed as some sort of revenge for his brother's murder. The State attempted to infer that Mr. Robinson had another motive for killing a person, that is, to keep that person from interfering with his drug trade. The State, however, failed to offer proof that either Mr. Robinson was a drug dealer or that Mr. Lawrence had in any way actually interfered with alleged drug activity.

In violation of Mr. Robinson's Eighth and Fourteenth Amendment rights, pecuniary gain was considered and found to be an aggravating circumstance which was used, over his objection, to support the recommendation and sentence of death in his case. Mr. Robinson is entitled to a new sentencing hearing.

B. The cold, calculated, and premeditated aggravating factor is unconstitutionally vague. In addition, Mr. Robinson's sentencing jury was improperly instructed on the cold, calculated, and premeditated aggravating factor which, as a matter of law, did not apply to his case, in violation of the Eighth and Fourteenth amendments.

The jury instructions regarding the aggravator of cold, calculated, and premeditated did not include the Florida Supreme Court's limiting construction of the aggravating circumstance in finding this factor. Jackson v. State, No. 79,509 (Fla. April 21, 1994).

This aggravating factor was over broadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. CR. 1853 (1988), o genuinely narrow the class of persons eligible for the death sentence, see Zant v. Stephens, 462 U.S. 862, 876 (1983), and did not apply as a matter of law. Power v. State, 605 So. 2d 856 (Fla. 1992). As a result, Mr. Robinson's death sentence was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The Florida Supreme Court has adopted several limiting instructions regarding this aggravating factor. Most recently, in Jackson v. State, No. 79,509 (Fla. April 21, 1994), the court said the following instruction must be used:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. 'Cold' means the murder was the product of calm and cool reflection. 'Calculated' means the defendant had a careful plan or prearranged design to commit the murder. 'Premeditated' means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A 'pretense of moral or legal justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Id. at 10-11, n.8

Defense counsel objected to the jury being instructed on this aggravator. Counsel's objections were overruled. Mr. Robinson's sentencing jury was simply told:

> [T]he crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner

> without any pretense of moral or legal justification.
> A cold, calculated, and premeditated crime is one in which the defendant though out, designed, prepared, or adapted by forethought or careful plan the murder he committed.

(R.). Such an instruction violates Jackson v. State, No. 79, 509 (Fla. April 21, 1994); Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), Godfrey v. Georgia, 446 U.S. 420 (1980), and the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Robinson's jury was inadequately guided and channeled in its sentencing discretion. Jackson v. State, No. 79,509 (Fla. April 21, 1994). The jury received jury instruction regarding the "cold, calculated and premeditated" aggravating factor, but was not instructed on any of the Florida Supreme Court's limiting constructions regarding this aggravating circumstance. In Espinosa, the United States Supreme Court explicitly held that "an aggravating circumstance is invalid...if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. CR. at 2928.

The Florida Supreme Court has held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). Moreover, in addition to the heightened premeditation element, the Court has made clear that in order to satisfy the "coldness" element, the murder must also be the

product of calm and cool reflection. See, e.g., Richardson v. State, 17 Fla. L. Weekly S241, S242 (Fla. April 9, 1992) ("[w]hile there is sufficient evidence to show calculation on Richardson's part, the record clearly establishes that the present murder was not `cold'"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991) ("there was no deliberate plan formed through calm and cool reflection"). Regarding the "pretense of moral or legal justification" prong of the aggravating factor, the Florida Supreme Court has held that this is "any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculated nature of the homicide." Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989).

In Jackson, the Florida Supreme Court invalidated as unconstitutionally vague a jury instruction on the cold, calculating, and premeditated aggravating circumstance that mirrored the statute. The instruction in Mr. Robinson's case is similarly vague and unconstitutional.

The Florida Supreme Court requires trial judges to apply these limiting constructions, often and consistently rejecting the aggravator when these limitations are not met. See, e.g., Thompson v. State, 17 Fla. L. Weekly S342 (Fla. June 4, 1992); Waterhouse v. State, 17 Fla. L. Weekly S277, 280-81 (Fla. May 7, 1992); Geralds v. State, 17 Fla. L. Weekly S268 (Fla. April 30, 1992); Power v. State, 17 Fla. L. Weekly S247, 250 (Fla. April 16, 1992); Jackson v. State, 17 Fla. L. Weekly S237, 239 (Fla. April 9, 1992); Richardson v. State, 17 Fla. L. Weekly S241 (Fla. April 9, 1992); Happ v. State, 596 So. 2d 991 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Wright v. State, 586 So. 2d 1024 (Fla. 1991); Santos v.

State, 591 So. 2d 160 (Fla. 1991); Bedford v. State, 589 So. 2d 245 (Fla. 1991); Dailey v. State, 594 So. 2d 254 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). Such "confusion in lower courts is evidence of vagueness which violates due process." Hermanson v. State, 17 Fla. L. Weekly S385, S387 (Fla. July 2, 1992) (citing United States v. Cardiff, 344 U.S. 174 (1952)).

Mr. Robinson's sentencing jury was not told about the aforementioned limitations but presumably found this aggravator present. Jackson; Espinosa, 112 S. Ct. at 2928. In fact, the trial court erroneously found this factor to exist. Power v. State, 605 So. 2d 856 (Fla. 1992). As the Florida Supreme Court has held, the instruction given the jury in Mr. Robinson's case does not establish the "cold, calculated and premeditated" aggravating factor. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). Under these circumstances, it must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa.

When an aggravating factor is legally inapplicable, the Florida sentencing jury should not be instructed on the factor. In Archer v. State, 613 So. 2d 446 (Fla. 1993), "[a]t the penalty-phase charge conference Archer argued that the jury should not be instructed on the heinous, atrocious or cruel aggravator because that aggravator could not be applied vicariously to him." 613 So. 2d at 448. Resentencing was ordered because "[o]n the facts of this case we are unable to say that the error in instructing on and finding this aggravator is harmless." (Id.). The Florida Supreme Court has ordered resentencings in cases because the jury was instructed upon inapplicable aggravators. Lawrence v. State, 18 Fla.

L. Weekly S147, 148 (Mar. 11, 1993)("we cannot find the error in instructing the jury on and finding these inapplicable aggravators to be harmless"); White v. State, 18 Fla. L. Weekly, S184, 186 (Mar. 25, 1993)("We agree with White that the trial judge erred in instructing the jury on and finding that this murder was committed in a cold, calculated and premeditated manner"); Padilla v. State, 18 Fla. L. Weekly S181 (resentencing ordered where jury instructed to consider inapplicable aggravator).

In Mr. Robinson's case, defense counsel objected to the jury being instructed on the cold, calculated, and premeditated aggravator. Archer therefore requires that this court remand for resentencing.

Richmond v. Lewis, 113 S. Ct. 528 (1992), requires not only that states adopt a narrowing construction of an otherwise vague aggravating factor, but also that the narrowing construction actually be applied during a "sentencing calculus." Richmond, 113 S. Ct. at 535. In Florida, as the Florida Supreme Court has recognized, the penalty phase jury is part of the "sentencing calculus." See Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993). The only way for a penalty phase jury to apply a narrowing construction of an aggravating factor is for the jury to be properly instructed as to the narrowing construction. Walton v. Arizona, 497 U.S. 639, 653 (1990).

As Judge Tjoflat stated:

> I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

Booker v. Dugger, 922 F.2d 633, 644 (11th Cir. 1991)(Tjoflat, C.J. specially concurring).

C. The jury was erroneously required to consider great risk of harm as an aggravating factor, which as a matter of law, did not apply to Mr. Robinson's case.

The great risk of harm aggravating circumstance has been generally interpreted to mean that, in addition to the homicide victim, the perpetrator must have known that the act would create great risk of death to at least three other persons. Lucas v. State, 490 So. 2d 943 (Fla. 1986); Johnson v. State, 393 So. 2d 1069 (Fla. 1981). The general rule is, especially where there is no shootout, that a killing in a public place does not establish the aggravating circumstance per se. Brown v. State, 381 So. 2d 689 (Fla. 1979). The mere possibility of a risk of death is insufficient. White v. State, 403 So. 2d 331 (Fla. 1981).

The record in this case does not support the use of this aggravating circumstance since no proof was offered to show that Mr. Robinson knowingly created great risk of harm to others. On the contrary, unrefuted mitigation evidence reveals that Mr. Robinson did not appreciate the criminality of his conduct evidencing that he could not possibly have known, even if he was involved in the shooting death of Mr. Lawrence, that there would be more than a mere possibility of great risk of harm to at least three other persons. Because this aggravating circumstance was considered and found by Mr. Robinson's sentencing court, Mr. Robinson is entitled to a new sentencing hearing.

D. Mr. Robinson's jury was required to consider contemporaneous convictions of attempted first degree murder as aggravating circumstances even though evidence was insufficient to support these convictions.

Mr. Robinson is innocent of the attempted first degree murder convictions, and the use of these unlawful convictions to support the aggravating circumstance of prior violent felonies violates Mr. Robinson's Eighth and Fourteenth Amendment rights.

IX.

MR. ROBINSON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE OF COURT ERRORS OR MISCONDUCT, BECAUSE OF PROSECUTORIAL MISCONDUCT INCLUDING THE STATE WITHHOLDING OF EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR THE PRESENTATION OF MISLEADING EVIDENCE AND BECAUSE OF THE INAPPROPRIATE CONDUCT BY OF MR. ROBINSON'S COURT-APPOINTED COUNSEL.

A. The Court erred when it held a suppression hearing without allowing Mr. Robinson to be present, and further erred when it denied the Motion to Suppress a tape recording subsequently introduced into evidence and used against Mr. Robinson at his trial.

Florida Rule of Criminal Procedure 3.600(b) says the court shall grant a new trial if grounds are established, providing substantial rights of the Mr. Robinson were prejudiced thereby.

A blatant violation of this Rule occurred when Mr. Robinson was not allowed to be present during an important proceeding. Rule 3.180 of the Florida Rules of Criminal Procedure requires the presence of the Mr. Robinson ... (6) when evidence is addressed to the Court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.

In this case, the State introduced an alleged consensual tape recording. This tape recording was introduced during the course of this trial through Detective Borrego, and the tape recording was alleged to be consensual. Consent was allegedly given by Rodney Newsome when Newsome, at the request and instruction of the police, called Mr. Robinson.

The trial court ruled following a Motion to Suppress hearing that there was consent. The ruling was in a Motion to Suppress held in the case of State of Florida vs. Rodney Newsome. No determination of consent was separately made in this case, in the presence of the Mr. Robinson. Mr. Robinson was not present during the Motion to Suppress which, was heard in the case of State vs. Rodney Newsome. In addition, Mr. Robinson was not present when the issue was argued before the Judge in this cause itself. Further, Rodney Newsome never testified prior to the introduction of the tape recording.

The introduction of this tape recording not only violated Rule 3.180, but also violated the Mr. Robinson's right to confrontation as guaranteed by the Sixth Amendment to the Constitution of the United States as well as Article 1, Section 16 of the Florida Constitution.

In addition, the introduction of this tape violated Article 1, Section 23 of the Florida Constitution, the right to privacy. Article 1, Section 23 of the Florida Constitution gives protection to individuals from governmental intrusion. This privacy interest is strongly implicated in a case like this where the Mr. Robinson was in jail and in custody and certainly was not in a position to do anything other than speak to the "consenting" individual. The Court's errors entitle Mr. Robinson to a new trial.

B. Mr. Robinson is entitled to a new trial because of prosecutorial misconduct, including the withholding of Brady material, inflammatory and improper comments and the introduction of non-statutory aggravating circumstances in violation of Mr. Robinson's Sixth, Eighth and Fourteenth Amendment rights.

Rule 3.600(b) also states that the Court shall grant a new trial if it is established that the Prosecuting Attorney was guilty of misconduct.

Throughout Mr. Robinson's trial, the prosecuting attorney continually placed the character of the Mr. Robinson in issue over the objection of Mr. Robinson. The prosecuting attorney in this case also continued to do everything in his power to prevent Mr. Robinson from being able to introduce evidence on his own behalf. Throughout the course of the pretrial proceedings, Mr. Robinson's wife was harassed and persecuted by Assistant State Attorney Joe Rosenbaum with the direct idea and implication of preventing Mr. Robinson's wife from being able to testify on behalf of Mr. Robinson.

During the course of this trial, prosecutor Rosenbaum presented, in closing argument, a blow-up of a transcript of a telephone conversation. This tape recording was introduced into evidence absent a transcript. The actual transcript used was prepared by the State without consent, coordination or agreement by the defense. The transcript was utilized by prosecutor Rosenbaum during the course of his closing argument over the objections of the defense. It was totally improper and invalid for the prosecutor to use an illegal, improper, unsubstantiated transcript and utilize it as if it was evidence in the cause by alluding to its own creation rather than the actual tape recording itself during his closing argument. Thus the prosecutor's actions certainly were those of misconduct.

Further misconduct occurred by the prosecutor when the State withheld critical

Brady material from Mr. Robinson regarding a jailhouse informant's deal with the State in exchange for testimony used against Mr. Robinson.

The United States Supreme Court has explained:

> a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the state and the prosecutor. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680.

The prosecution's suppression of evidence favorable to the accused violates due process. United States v. Bagley. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel request the specific information. A defendant's right to present favorable evidence is violated by such

state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972).

Further, Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

(a) Prosecutor's Obligation.

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(I) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

(ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement . . . .

* * *

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

Failure to honor Rule 3.220 requires a reversal. Roman v. State, 528 So. 2d 1169 (Fla. 1988). Here, exculpatory evidence and statements material to Mr. Robinson's case were undisclosed.

The prosecution's suppression of evidence favorable to the accused violated due process. United States v. Bagley. The prosecutor must reveal to defense counsel any and

all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, including impeachment evidence, and regardless of whether defense counsel requests the specific information. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as the undisclosed deal here renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, United States v. Bagley; Arango v. State, 497 So. 2d 1161 (Fla. 1986). See Dennis v. United States, 384 U.S. 855, 874 (1966)("In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts"). A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). The resulting unreliability of a conviction or sentence of death derived from proceedings such as those in Mr. Robinson's case also violates the Eighth Amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Beck v. Alabama, 447 U.S. 625 (1980). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984); Brady, supra. The Bagley

materiality standard is met and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. Such a probability undeniably exists here. Had this evidence been disclosed, there would have been no conviction, and no death sentence.

Here, exculpatory evidence did not reach the jury. The state unreasonably failed to disclose its existence. Moreover, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no adversarial testing occurred. Confidence is undermined in the outcome. There is a reasonable probability of a different outcome. Mr. Robinson's trial was "a sacrifice of [an] unarmed prisoner [] to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom.; Sielaff v. Williams, 423 U.S. 876 (1975). Mr. Robinson's convictions must be vacated and a new trial ordered.

C. Because Mr. Robinson did not receive a fair and impartial trial, due to no fault of his own, Mr. Robinson is entitled to a new trial.

Rule 3.600 (b) further states that the Court shall grant a new trial if it is established that for any other cause, not due to the Mr. Robinson's own fault, he did not receive a fair and impartial trial.

In this case, Mr. Robinson did not receive a fair and impartial trial due to the actions of his court-appointed counsel. Counsel in this case, Alan Soven, was appointed by Judge

Alfonso Sepe, a former law-partner. Court-appointed counsel, Alan Soven, during the course of his representation of Mr. Robinson, requested additional funds from the Mr. Robinson's family and later claimed these funds were gifts. Court-appointed counsel requested that Mr. Robinson's family give him additional funds because he was not sufficiently compensated by the State and he told them he could not do an adequate job unless he received more money. Mr. Robinson's family, for fear that Mr. Robinson would not get a fair trial, consented to and gave additional funds of their own to court-appointed counsel Alan Soven. The actions of Alan Soven prejudiced Mr. Robinson because there is no way to determine whether or not Mr. Robinson could get a fair trial when the amount of funds given to counsel Soven was under the amount demanded. Counsel Soven prejudiced Mr. Robinson by requesting this money, in violation of his responsibilities as court-appointed counsel. The actions of counsel Soven in requesting additional funds from Mr. Robinson's family while he was being paid by the State certainly would be considered to be conduct that is prejudicial to the administration of justice as well as conduct prejudicial to Mr. Robinson. Prejudice to Mr. Robinson is evidence from the inference that Mr. Robinson's counsel might not have worked as diligently as required without the additional money requested.

All attorneys are bound by the Rules of Professional Conduct as adopted by the Florida Supreme Court. Rule 4-1.3 of the Rules of Professional Conduct requires that "A lawyer shall act with reasonable diligence and promptness in representing the client." The diligence of counsel became an issue that prejudices Mr. Robinson when additional funds were requested by Mr. Soven after he was already court-appointed. Rule 4-1.5, of

the Rules of Professional Conduct state: "(a) An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the rules regulating the Florida Bar." In this case, the money requested by Soven and given by Mr. Robinson's family is clearly illegal since counsel Soven was court-appointed and was to receive a fee paid by the State or the County.

In addition, Mr. Robinson was prevented from having a fair and impartial trial since the actions of Mr. Robinson's counsel clearly fell below the applicable standards of care within the community. Mr. Robinson's counsel clearly injured the Mr. Robinson's case by his actions during the course of the trial. Counsel in his opening statement stated that he would prove or show that the victim's son was instrumental in causing the death of the victim. Later, in closing argument, Counsel said "in the opening statement in the beginning of this trial, I did two things. I shocked you and I told you to stay focused. I shocked you when I told you that Lee Arthur Lawrence, Jr. , murdered his father or that he had his father executed and I told you to stay focused. Why did I do that;" "So I told you that Lee Arthur Lawrence, Jr. executed his father and it shocked you and it got your attention. It got you to sit on the edge of your chair and it got you to open your mind. But most importantly, it got you to question the State's case and you did that. I told you to stay focused and you did that."

The actions of counsel, certainly violated his duty to do everything possible for his client in a fair, proper and diligent way. The actions in his opening and closing statement were so clearly outside the realm of the norm as to have prevented this Mr. Robinson from

getting a fair trial. The actions of this Mr. Robinson's Court-Appointed Attorney could not by any stretch of the imagination be considered to be just trial strategy, thus denying Mr. Robinson a fair trial.

X.

MR. ROBINSON'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Robinson did not receive the fundamentally fair proceeding to which he was entitled under the Eighth and Fourteenth Amendments to the United States Constitution. See Ellis v. State, No. 75,813 (Fla. July 1, 1993); Ray v. State, 403 So. 2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991), cert. denied, 112 S. Ct. 981 (1992). It is Mr. Robinson's contention that the process itself failed him. It failed because the number and types of errors involved in his proceedings, when considered as a whole, dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the issue is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.
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> Seaboard Air Line R. R. Co. v. Ford, 92 So. 2d 160, 165 (Fla. 1956) (on rehearing); see also,e.g., Alvord v. Dugger, 541 So. 2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and collectively"), cert. denied, ____ U.S. ____, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); Jackson v. State, 498 So. 2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). See also Ellis v. State (new trial ordered because of prejudice resulting from cumulative error).

The United States Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors can result in a prejudicial effect to the defendant. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the plea, verdict, and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

There were many flaws in the system that sentenced Mr. Robinson to death. They have been set forth, in part, through this direct appeal brief. While there are means for addressing each individual error, it still remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards that are required by the United States and Florida Constitutions. Repeated instances of error by the trial court significantly tainted the process. These errors were not harmless.[13]

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[13]With the high number of reversible errors committed in this case which denied Mr. Robinson due process and a fair trial, Mr. Robinson implores this Honorable Court, with all its wisdom, to remand this cause for a new trial, or in the alternative vacate the sentence of death and order a new sentencing hearing. This Court must certainly be able to see the numerous issues that the appellate counsel is unable to develop and raise in this forum which will undoubtably be the subject for years and years of post-conviction review. While the trial court was unable to take the enormous cost of continuing litigation into account, this Court is obligated to stop the ridiculous waste of resources used to explore, ad nauseam, blatant ineffective assistance of counsel and prejudicial judicial act claims that clearly occurred during Mr. Robinson's trial. Valuable resources and funds are being taken right out of our children's mouths and away from our elderly's health care and security, and Mr. Robinson requests that, rather than depleting the State and County budgets that will be required to pursue this cause in post-conviction claims, this Honorable Court reverse these convictions and remand this case for a new trial, or in the alternative, vacate Mr. Robinson's sentence of death.

CONCLUSION

For the foregoing reasons, appellant's convictions and sentences for first degree murder and attempted first degree murder must be reversed and the case remanded for a new trial. Alternatively, appellant's sentence of death must be vacated and the case remanded for a new sentencing proceeding before an impartial jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of June, 1996, to Fariba Komeily, Assistant Attorney General, 401 N.W. 2nd Avenue, #N-921, Miami, Florida, 33128.

Curt O Bront by

CURT OBRONT, ESQ.