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

REPLY BRIEF OF APPELLANT

Oral Argument Requested

PAUL MCKENNA, ESQ.
CURT OBRONT, ESQ.
McKenna & Obront
Attorneys for Appellant
2666 Tigertail Avenue
Suite 104
Coconut Grove, Florida 33133
(305) 2857044

TABLE OF CONTENTS

TABLE OF AUTHORITES

IN THE SUPREME COURT OF FLORIDA

APPEAL NO. 79,604

BOBBIE LEE ROBINSON,

Appellant,

vs.

STATE OF FLORIDA,

Appel tee.

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

REPLY BRIEF OF APPELLANT

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**."

SUMMARY OF ARGUMENT

Florida's use of the electric chair is a violation of Mr. Robinson's Eighth and Fourteenth Amendment rights. Florida's only means of executing its citizens is unquestionably cruel and unusual punishment.

While the prosecution failed to adequately "cover" itself regarding Williams rule evidence, the State now fails to address the impact made when an allegedly corrupt judge issues questionable rulings and decisions.

Every aspect of Mr. Robinson's trial is severely tainted, and his sentence of death is highly unreliable. Even the jury selection was manipulated as African-American jurors were unconstitutionally struck from the venire.

The manner or motive for the trial Court's decisions, such as re-reading instructions sua sponte, is yet another example of the incredibly unfair process that Mr. Robinson was subjected to. The prejudice against Mr. Robinson is clear where, without the judge's interference, the jurors would not have been under pressure to make an immediate decision about so grave a matter as recommending a death sentence.

There was insufficient evidence to convict and sentence Mr. Robinson either for first degree murder or for attempted first degree murder, and inappropriately, Mr. Robinson had the subsequent burden of proving whether he should be allowed to live or die before a jury that was allowed to hear non-statutory aggravating circumstances.

It is repugnant to hold that Mr. Robinson could have possibly received a fair trial before an allegedly corrupt judge while being represented by an unethical defense lawyer. Jurors ware treated in a disgusting and reprehensible manner, and then a

substitute/replacement judge from "County" Court sentences Mr. Robinson without holding a full penalty phase hearing before a jury.

The jury instructions, given during the hearing before the ousted judge, were unconstitutional and the jury was mislead by both improper prosecutorial and defense comments. Mr. Robinson's appointed attorney, who claims that he received money as a gift from the indigent client's family, shamefully tried to persuade the jury that he was just trying to shock them when he pointed the finger at the victim's son as a defense during opening arguments.

Mr. Robinson's trial court proceedings were fraught with procedural and substantive errors which cannot be consider harmless when viewed either individually or as a whole, depriving Mr. Robinson of a fair trial.

This entire case is an embarrassment to the Florida Bar and to the criminal justice system. Mr. Robinson is entitled to due process before an impartial judge in a system that does not and cannot condone the type of outrageous conduct exemplified in this case.

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 employment of the electric chair renders Florida's capital sentencing statute unconstitutional and its use is a violation of Mr. Robinson's Eighth and Fourteenth Amendment rights. Florida's only means of executing its citizens is unquestionably cruel and unusual punishment. Although many of the arguments Mr. Robinson raises in this claim have been previously decided, it is Mr. Robinson's position that this Honorable Court has the responsibility of continuing to explore, discuss and consider this claim where the living nature of our Constitution is fully experienced and evolving standards of decency eventually occur. In light of the recent botched and gruesome execution of Pedro Medina, where either human error or failed machinery caused flames to erupt from his skull, Mr. Robinson argues that this Court should find the application and use of the electric chair unconstitutional, rendering the capital sentencing statute improperly applied, and grant Mr. Robinson a new sentencing hearing.'

'Even if a small handful of politicians declare publicly that the botched executions could be a strong deterrent in the fight against crime, there is no indication in any public record that the Florida legislature's intent in passing the capital sentencing statute was to promote or tolerate the grave assault on human dignity exercised by the use of the electric chair. Flames have erupted on at least two occasions during electrocutions conducted in Florida's electric chair, and Mr. Robinson urges this Court to halt this barbaric procedure and impose an immediate "cease-fire."

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* Rule evidence under 90.404(2), Florida Statutes, was egregiously inserted into Mr. Robinson's trial proceedings. Two aspects of this claim continue to be unrefuted, even after the State has had its opportunity to Answer.

First, the State does not address why the prosecution agreed that it should have "covered itself if no Williams rule violation occurred. The cover-up merely continues....

Second, and perhaps more importantly, the State does not address, here or anywhere in its brief, questionable decisions or rulings that this trial Court made during the course of Mr. Robinson's trial. In light of serious improper judicial conduct that resulted in the removal of this trial Court judge before the conclusion of this case, all decisions and rulings, including the admissibility of evidence the State now claims proved motive and premeditation, should be held as highly suspect prone to effect harmful error severely prejudicing Mr. Robinson.

Without the unlawful use of collateral crime evidence or purported evidence, the State could not have obtained a conviction in this case. Mr. Robinson argues that

---

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

inadmissible Williams rule evidence used against him at trial with allegedly corrupt judge's blessing, became the feature of the State's case and was not inexorably linked to the charges Mr. Robinson faced. 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.

Mr. Robinson argues here and throughout this brief that the decisions and rulings made by an allegedly corrupt judge should be not only highly scrutinized, regardless of whether or not issues and claims are adequately preserved for appellate review, but also held as highly suspect in our system of justice that depends on an unbiased and fair process that places the integrity of the Constitution in peril.

This trial court improperly struck Juror Gibbs from the venire and unconscionably prejudiced Mr. Robinson while 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, 661 So. 2d 10 (Fla. 2nd DCA, 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).

Further, 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 Gibbs avowed inclination to follow the law is not a reasonable, non-pretextual basis for the prosecutor's peremptory strike against him.

Finally, this trial Court also 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, consistent with the trial Court's reprehensible behavior throughout Mr. Robinson's trial, it ignored the Mr. Robinson's objection and did not conduct any inquiry at all. Therefore, because of these gross violations to his Sixth and Fourteenth Amendment Constitutional rights, Mr. 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 INABILIN TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT AND HIS AFFLICTION WITH ALCOHOL AND DRUG ABUSE FOLLOWING HIS BROTHER'S MURDER.

The manner or motive for the trial Court's re-reading instructions to the jury may not have been presented to the Court below, but it is incredulous for the State to argue that the overall corrupt nature of the sitting judge would not or could not have intentionally interfered with Mr. Robinson's right to a fair trial, Any instructions given, any rulings held and any decisions made during the course of Mr. Robinson's trial, where his so-called impartial judge was forced to leave the bench for judicial misconduct, are challengeable under the U.S. and Florida Constitutions. The audacity of the trial Court judge to claim during these proceedings that it would give the jury's recommendation "great weight" is insulting to the entire criminal justice system.

While a trial Court may recall jurors after they have retired to consider the verdict to give them additional instructions, according to the Florida Rules of Criminal Procedure 3.420, it should be noted that no "additional" instructions were given to the jury when the Court, sua sponte, decided to interfere with their deliberations process. Ordinarily, under Derrick v, State, 641 So.2d at 378 (Fla. 1994), there may have been no prejudice to Mr. Robinson, but this is no ordinary case and no ordinary judge responsible for providing Mr. Robinson with a fair trial. The cloud of impropriety over the trial Court judge in Mr. Robinson's case is filled with unreliable and questionable concerns as to its motives.

Furthermore, 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 new and less experienced trial Court judge 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.

Unrefutabte 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 penalty phase, 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.

Furthermore, it is not enough for the replacement judge who sentenced Mr. Robinson to death to merely familiarize himself with the record, as the State claims in its Answer Brief (p.41). The substitute heard different testimony than that heard by the unseated judge and penalty phase jury, which is an additional contestable concern, relying merely on the record to find aggravating circumstances. The prejudice against Mr.

Robinson is clear. Since, Mr. Robinson was sentenced on February 11, 1992, prior to the time that this Court ruled that proper preservation of this issue for appellate review requires a defense objection, and because of the extraordinary circumstances surrounding the process that led to new defense counsel and a new judge before Mr. Robinson's trial process had concluded, it would be unconscionable to procedurally bar this claim when the procedures had not yet been clearly established. See Ferguson v. Sinaletary, 632 So. 2d 53 (Fla. 1993). Mr. Robinson's convictions and sentences, therefore, should be reversed entitling him to a new trial and sentencing hearing before an impartial, competent and honest judge.

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 either crime. Hence, his convictions should be reversed. There was insufficient evidence to convict and sentence Mr. Robinson for attempted first degree murder. These unlawful convictions represented improper aggravating factors in Mr. Robinson's sentencing determination.

Assuming arguendo, this Court affirms the first degree murder convictions, Mr. Robinson is entitled to have his convictions for attempted first degree murder (two counts) vacated and be granted a new sentencing hearing. See In Re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979).

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 THEN 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.

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 aaaravatina circumstances outweiahed the mitiaating 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). It cannot be presumed, in this case, as the State argues in its Answer Brief (p.50-51), that the trial judge knew, and more importantly, honestly and fairly applied the law to Mr. Robinson during his trial. It is Mr. Robinson's contention that it may very well be the case that the replacement/substitute judge from County Court was indeed "overwhelmed," but not from the experience of having to weigh aggravating circumstances reflected only in the record, but rather from the entire horrendous process that he was thrust into.

Furthermore, the jury who made a recommendation of death to the ousted judge was, in effect, presented with and told that they could consider non-statutory aggravating circumstances. The co- 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); Mavnard v. Cartwriaht, 108 S. Ct. 1853, 1858 (1988). 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). In addition, the jury and judge were required to weigh and give effect to all of Mr. Robinson's mitigation against lawful aggravating factors. Mr. Robinson was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments, and he is entitled to relief, including a new trial

and/or a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddinasv. 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.

It is repugnant to hold that Mr. Robinson could have possibly received a fair trial before an allegedly corrupt judge while he was being represented, initially, by an unethical defense lawyer who procured both favor and furor from the court and was eventually sentenced by a County Court replacement judge who relied primarily on the record before sentencing Mr. Robinson to death. Furthermore even the jurors in Mr. Robinson's case were treated with abhorrent disregard, his trial cannot be said to be fair or constitutional.

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.

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).

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. 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.

The jury instructions regarding the aggravator of cold, calculated, and premeditated did not include the Florida Supreme Courts 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. Georaia, 446 U.S. 420 (1980); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and failed to 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 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. Because this aggravating circumstance was considered and found by Mr. Robinson's sentencing court, Mr. Robinson is entitled to a new sentencing hearing.

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.

Perhaps one of the most sinister and appalling aspects of this entire case is that Mr. Robinson was represented by an unethical lawyer (who happened to be a former law

partner with Mr. Robinson's ousted judge.) The incestuous relationship that existed between Judge Sepe **and** Alan Soven, a lawyer who had the gall to represent that he had received a gift for his fine services from a client who had been declared indigent by the court.

Rule 3.600 (b) 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 or impartial trial and was not represented by an attorney who had the client's best interests in mind - but rather focused on his own ability to influence the judge and put money in his pockets"

Mr. Robinson's trial is a disgrace and an embarrassment to anyone who has even the slightest respect or regard for our criminal justice system. It is a noble and formidable calling to represent indigent clients, and where an attorney admits, such as Mr. Soven, that the money he received may have made him work harder, clear prejudice can be inferred that without any additional and illegal funding, Mr. Robinson was denied effective assistance of counsel. This issue can and must be addressed on direct appeal when the evidence is so blatantly spelled out in the record.

In addition, Mr. Robinson was prevented from having a fair and impartial trial since the actions of Mr. Soven clearly fell below the applicable standards of care within the community. Mr. Robinson's counsel severely injured Mr. Robinson's case by his actions during the course of the trial when he admitted that his opening statement, where he asserted that he would prove or show that the victim's son was instrumental in causing the death of the victim, was a lie to shock the jury.

However, the actual shocking event related to Mr. Soven's conduct is the trial Court's ruling and now the State's assertion that Mr. Soven's reprehensible conduct and representation did not deprive Mr. Robinson of a fair and impartial trial. The actions of Mr. Soven do not and can not be considered to be just trial strategy, thus denying Mr. Robinson a fair trial and due process afforded him by the U.S. and Florida Constitutions.

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); Heathv. 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. The severity of the death sentence that Mr. Robinson received "mandates careful scrutiny in the review of any colorable claim of error." See 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.

XI.

MR. ROBINSON'S SENTENCING JUDGE, WHO DID NOT PRESIDE OVER THE ORIGINAL TRIAL AND PENALTY PHASE, ERRED IN SENTENCING MR. ROBINSON WITHOUT CONDUCTING A NEW PENALTY PHASE PROCEEDING BEFORE A JURY TO ASSURE THAT BOTH THE JUDGE AND THE JURY HEAR THE SAME EVIDENCE THAT WILL BE DETERMINATIVE OF WHETHER MR. ROBINSON LIVES OR DIES.

A judge who is substituted before the initial trial on the merits is completed and who does not hear the evidence presented during the penalty phase of the trial must conduct a new sentencing proceeding before a jury to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies. Corbett v.

State, 602 So. 2d 1240, (Fla. 1992).

While this issue has been addressed somewhat in Argument IV, it is Mr. Robinson's position that this Court, before affirming convictions and sentences in this case, must fully consider the unreliability of this sentence of death in a case where, in relationship to and in proportion to other cases where judges, defense counsel and prosecutors, at the end of the day, could be viewed as ethical and reputable representatives of the criminal justice system. Further, Mr. Robinson requests that this Honorable Court address whether a County Court judge who is thrust into a penalty phase of a capital trial had the experience, training and knowledge to constitutionally impose death in this case. In simple fairness to the defendant, Mr. Robinson respectfully requests that his cause be remanded for a new sentencing proceeding before a jury.

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,

PAUL MCKENNA, ESQ.
CURT OBRONT, ESQ.
McKenna and Obront
Attorneys for Appellant
2666 Tigertail Avenue, Suite 104
Coconut Grove, FL 33133
(305) 285-7044

BY: _____
for: PAUL MCKENNA
Florida Bar No. 348481

BY: _____
CURT OBRONT
Florida Bar No. 402494

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5th day of May, 1997, to Fariba Komeily, Assistant Attorney General, 401 N.W. 2nd Avenue, #N-921, Miami, Florida, 33128.

CURT OBRONT, ESQ.