IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,485

RONALD SMITH,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT RONALD SMITH

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STATEMENT OF THE CASE

On March 13, 1991, Ronald Smith and codefendants Cornell Austin, Anthony Cobb, Kevin Knolden, Kelvin Bryant, and Tawanah Glass were charged by indictment with first degree murder (I), attempted first degree murder (II), robbery (III, IV), kidnapping (V, VI), burglary (VII), arson (VIII), and conspiracy to commit a felony (IX).' (R. 1-7). Mr. Smith pled not guilty to all charges. (R.211"12).

Mr. Smith moved to suppress the confession the state claimed he gave. (R. 384-86). Following a combined evidentiary hearing with his codefendants, (T. 519-1175), the trial court denied this motion. Mr. Smith's motion to sever based, *inter alia*, on the confessions of his non-testifying codefendants, (R. 380-83), was also denied. (R. 453-4).

Prior to trial, codefendants Glass and Knolden pled guilty and agreed to testify against their codefendants, Glass in exchange for an 18 year sentence and Knolden in exchange for the state's waiver of the death penalty and a life sentence. (T. 1176-96, 4706). Codefendant Cobb's motion for severance was granted. (R. 748-50). Thus, on October 4, 1993, Mr. Smith's joint trial with codefendants Austin and Bryant commenced before the Honorable Circuit Judge Michael B. Chavies.

During jury selection, Mr. Smith became ill. (T. 3386, 3390-91). He moved to recess the proceedings briefly because his illness and the side effects of jail administered medications caused him to sleep in court and otherwise disabled him from jury selection, but the trial court denied the motion. (T. 3392-97, 3485-86, 3511, 3558-59, 3805). Smith's renewed motion to recess and alternative motion to strike the venire were denied, too. (T. 3558-59, 3804-05).

The trial court denied defense counsel's attempts to strike Jurors Nieves, Leon, Brock, and Forsht for cause requiring counsel to exercise peremptory strikes against them. (T. 3784, 3064,

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'The indictment identified Kelvin Bryant as "Jit." A superseding indictment identified "Jit" as Kelvin Bryant. (R. 8-13).

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3044-45, 3748). Smith ultimately exhausted his peremptory challenges and moved, without success, for additional strikes for identified jurors. (T. 3806-09). The trial court granted, over defense objection, the prosecutor's challenge for cause against Juror Laitner. (T. 2253-54, 2260-62). Upon the prosecutor's attempt to exercise a peremptory strike against Juror Alston, an African-American woman, Smith moved for a *Neil* inquiry. (T. 3775-76). Defense counsel objected to the prosecutor's reasons for the strike as pretextual but the trial court overruled the objection and allowed the prosecutor's strike. (T. 3776-3778, 3818-19).

On November 10, 1993, the jury returned verdicts finding Mr. Smith (and both codefendants) guilty on all counts. (R. 1072-80; T. 5950-54). Prior to the penalty phase proceedings, Mr. Smith renewed his motion for severance. (R. 1106-10; T. 5984-87). The trial court denied this motion. (T. 5988). On November 30, 1993, a consolidated penalty phase proceeding for Mr. Smith and codefendants Austin and Bryant commenced. On December 2, 1993, by a vote of nine to three, the jury recommended that Mr. Smith be sentenced to death. (R. 1157; T. 6541). The jury recommended life imprisonment for both Austin and Bryant. (T. 6541-42). Mr. Smith's motion for the judge to override the jury's recommendation of death, (R. 1160-73), was denied. On February 10, 1994, the trial judge followed the jury's recommendation and sentenced Mr. Smith to death. (R. 1205-12; T. 6693-6711).

STATEMENT OF THE FACTS

On February 5, 1991, shortly after midnight, Trevor Munnings and his girlfriend Bridgette Gibbs were about to enter a room at a 27th Avenue motel when three or four black males grabbed them, pulled them to the ground, and took their money and belongings. (T. 3982-4001). The two were placed in the trunk of Munnings's Nissan Maxima. (T. 4003-05). Approximately an hour later, after several stops, the trunk was opened and Munnings and Gibbs were removed. (T. 4012-17). Munnings attempted to crawl under the car but was pulled back and hit on the head with a rock. (T. 4017-18). He feigned unconsciousness from this point forward (T. 4018-19). Shortly

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afterwards Munnings had his hands taped behind his back, his feet taped together, and his face taped from chin to forehead. (T. 4020-21). Munnings was then placed back in the trunk together with Gibbs. (T. 4028-29).

The car remained stationary for about one-half hour. (T. 4029-30). It was then driven to another location where the trunk was opened and Gibbs was removed. She was never returned to the car. (T. 403 1). The car was then driven another half hour to a rocky, gravelly area. (T. 4033). Munnings, still pretending to be unconscious, was removed from the trunk. He was dragged by two people holding him underneath each arm, across rocks and gravel to some railroad tracks where he heard water. (T. 4033-35). His body was lain over the tracks with his upper body suspended in air Upon hearing a voice say "throw him over," he was pushed over the edge landing feet first in the water. (T. 4036-37). Munnings, an experienced swimmer, freed himself from the tape and swam away. (T. 4037-41). He eventually made it to a convenience store where he called his wife and reported the kidnapping. (T. 4045). He then flagged down a police officer to whom he reported his encounter (with the exception of mentioning Gibbs). (T. 4045-47). By the time he reported the incident and gave a description and the license number of his vehicle, police had already located his torched vehicle. (T. 4048-49, 4059).

Munnings remembered only being taped once. (T. 4068-69). He never heard anything to indicate that Gibbs was subjected to any act of violence. (T. 4077). Munnings testified that a man in a flowery shirt was the one who ordered him to get in the trunk in an aggressive voice and took the car keys. (T. 4083-84). Munnings believed he was the leader of the group. (T. 4099-4100, 4103). This was Kevin Knolden. (T. 4083-85, 4102, 5158-63).

The body of Bridgette Gibbs was recovered by Metro-Dade police officers from Biscayne Bay on the morning of February 6, 1991. (T. 43 19-23). Gibbs was clothed in an orange shirt, a beige bra, and one red sandal. (T. 4349, 4389, 4637). Her hands were taped behind her back. Additionally, tape covered her eyes, nose, mouth, and ears. (T.4387). The Dade Medical

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Examiner's representative concluded that the cause of death was drowning. (T. 4001, 503 1). This forensic pathologist concluded that there was no evidence of sexual trauma or anything having been inserted into the victim's vagina. (T. 5030, 5032-37).

By February 7th, the investigation had led police to Tawanah Glass. (T. 4391-95). Glass testified at trial in exchange for a plea of guilty to the reduced charges and a sentence to 18 years imprisonment. (T. 4806). Glass had met codefendant Austin approximately one month before. (T. 4803). She allowed him to live with her because of his threats and intimidation. On the evening of February 5, 1991, she and Austin went to the "game room" where she first met Mr. Smith and Kevin Knolden. (T. 48 10- 11). After meeting up with codefendant Bryant, Austin pressured her to pose as a prostitute to stop cars to be robbed. (T. 48 14-17). When this proved unsuccessful, the group returned to the game room where they met up with codefendant Cobb. (T. 4817). Glass testified that the group then left together in Cobb's white Lincoln with Knolden at the wheel. (T. 4820). Glass and Austin sat in the front seat; Smith, Bryant and Cobb sat in back. When someone in the back seat said, "car in the MO," Knolden made a U-turn and pulled into the motel parking lot. (T. 4825).

Glass testified there had been no discussion about robbery in the car. Everyone but her got out. Austin grabbed a man and held him with Smith while someone else went through his pockets. (T. 4828). Knolden took the man's female companion to the ground. Although Glass saw the man's leg go in the trunk, she testified she did not know where the victims went. (T. 4829). Austin ordered Glass to bring Cobb's car over. Cobb and Bryant got in with Cobb at the wheel. The Maxima followed to an Amoco station. (T. 4832). Shortly afterwards, the white Lincoln broke down and everyone, including Knolden, Austin, Smith, Bryant, Cobb, and Glass got in the Maxima with Knolden at the wheel. (T. 4833). Glass testified that they arrived at Austin's house approximately 45 minutes later at which time she realized the victims were in the trunk. (T. 4834).

Glass followed Austin into his house. After looking in the female victim's purse, Glass

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recognized the victim's picture as an old schoolmate and asked Austin not to hurt her. (T. 4835). Austin assured her that the two merely would be tied-up and left on the side of the road. (T. 4836). After getting some tape, Austin left with the others. (Id.).

Glass saw Austin later that morning when Knolden drove her, with the others, in Cobb's car, to her home. There was no discussion about the abduction. (T. 4837). Once home, Glass threw away Gibbs's identification but kept her purse, watch, and perfume. (T. 4839). Upon seeing Gibbs's body being pulled out of Biscayne Bay on the news later that day, Glass claimed she asked Austin "why were her pants off," to which she testified he responded, "you won't find none of my sperm in her, they used a stick up her." (T. 4843). Glass testified that Austin never told her who threw the victims in the water but assured her that if she went to the police, he would kill her and her kids. (T. 4844-6).

At the time Glass was first interrogated at her house, the police knew there was an outstanding bench warrant for a driver's license violation. (T. 4396). When told they would get a warrant, she consented to a search of her house, (T. 4400-4), and produced Gibbs's purse. The police also recovered Gibbs's wristwatch. (T. 4407-8). Glass identified Cornell Austin and assisted in locating him and the other participants. (T. 4420-21, 4433, 4444).

On May 2, 1991, Mr. Smith was arrested in Tallahassee. (T. 5520-25). Although he had already been indicted and appointed counsel, he was interrogated by Metro-Dade Homicide Detective Romagni over the course of six hours without any contact with or assistance from his attorney. (T. 5614). Mr. Smith had shortly before denied any involvement in the Miami homicide to an FDLE officer. (T. 5534-35). Mr. Smith specifically refused to give a tape recorded statement, (T. 5610, 5634); Romagni failed to pursue the use of a stenographer. (T. 5623-25). Although Mr. Smith signed a Miranda waiver at the beginning of the interrogation, (T. 5574-75; St. Ex. 97), he was never advised that he had been indicted and legal counsel already had been appointed to represent him. According to "standard procedure," Romagni destroyed his interview notes and

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never provided them to the defense. (T. 5583-87).

Detective Romagni testified that on the night in question, Smith said he was at the Hunter's a/k/a Booty Bar drinking beer and playing pool when he saw Kevin Knolden. (T. 5588). He left with Knolden and met several others, including Glass and Cobb, at which time they spoke about some street robberies in the area. They planned that Glass would pose as a prostitute and the others would rob the johns. (T. 5588-89). When this proved unsuccessful, the group got in Cobb's car with an "unknown male"[2] at the wheel and went to another bar. (T. 5590). They then drove by a hotel at which Cobb stopped. (T. 5591). Knolden, Cobb, and the unknown male ran to the motel while Smith and Glass waited in Cobb's car. By the time Smith got out, he observed the others getting into a Nissan Maxima. (T. 5592). Smith Glass, and Cobb got back into Cobb's car with Cobb at the wheel and followed the Maxima away from the motel. (T. 5592). After Cobb's car stalled, the three abandoned it and joined the others in the Nissan. (T. 5593). The group began inspecting the spoils of the robbery and talking about more robberies. (T. 5593-94). Mr. Smith also learned that the victims were still in the trunk. "This person,"[3] the driver of the Maxima, and Glass, who was holding the female victim's purse, got out and went into "this person's" house." "This person" emerged about 15 to 20 minutes later with some tape. Smith asked what they were going to do with the victim's to which "this person" responded he did not know.

"This person" drove the Maxima away from his house. Romagni testified that Smith stated they decided to take the victims to South Dade to bind and leave them. (T. 5595). He testified that Smith said he inspected the tape and, upon determining it was old and weak, suggested he could get

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[2]Upon the denial of codefendants Austin's and Bryant's motions for severance this testimony recounting Smith's oral post-arrest statement was redacted to eliiate all references to Austin and Bryant. The "unknown male" was Kelvin Bryant. Compare (R. 490-99 (unredacted summary of Smith's alleged oral statement)) with 5588-5606 (redacted version of statement testified to by Romagni)) .

[3]"This person" was Cornell Austin. See footnote 3.

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better tape and a battery for Cobb's car from his house. Upon accomplishing this, the group returned to Cobbs' stalled car, jumped the battery, and proceeded to a nearby abandoned house. (T. 5595-96). Smith rode with Cobb in his car; "this person" drove the Nissan with passengers Knolden and the unknown individual. (*Id.*) "This person" opened the trunk after which Knolden and the unknown individual removed the male victim.

Mr. Smith stood at the road as a lookout. When the male victim crawled under the car, "this person" and Knolden pulled him out and hit him on the head with a rock. (T. 5597). "This person" then bound the male victim. Cobb guarded this victim. "This person" and Knolden then removed the female victim who "this person" also bound. The two victims were then placed back in the trunk. (T. 5597).

The group headed to South Dade to abandon the taped captives "this person," Knolden, and the unknown individual in the Nissan, and Cobb and Mr. Smith in Cobb's vehicle. (T. 5598). Upon arriving, they decided it was unfamiliar. Upon "this person's" urging, the group got back into their respective cars and Cobb followed the Nissan back to Miami. Cobb pulled up to the Nissan where it was stopped on the 36th Street bridge over Biscayne Bay. (T. 5599). "This person" said they were going to throw the victims into the water. "This person" opened the trunk and, while Smith acted as a lookout, the others threw the female victim over the bridge. (T. 5599-5600).

Romagni testified that Mr. Smith next said the group drove to another area where there were railroad tracks over a body of water. "This person" said they were now going to throw the male captive into the water. (T. 5600). Two members of the group removed the male captive from the trunk and dropped him into the water. (T. 5601). They then drove a short distance to a place where they decided to set the Maxima on fire. Cobb and Smith waited nearby with Cobb's vehicle. (T. 5602). Romagni testified that Smith stated he later saw "this person," Knolden, and the unknown individual emerge from the area where an automobile fire appeared. (*Id.*). By now it was almost dawn. The group went to a restaurant where they ate and divided the money from the robbery.

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Kevin Knolden was arrested approximately one week after the abductions. In response to interrogation, he initially claimed he was at home watching T.V. at the time of the offenses. (T. 5229). His interrogator, Metro-Dade Homicide Detective Alvarez, became increasingly angry and angrier until he punched Knolden in the mouth drawing blood. (T. 5230, 5238). The interrogators then brought in Cornell Austin. The detectives already had told Knolden that Austin had implicated him. Austin now told Knolden, "You might as well tell the truth." (T. 5231). Glass was also brought in to say, "he's the one." (*Id.*). In their final assault upon Knolden, Knolden testified that the detectives darkened the interrogation room and resumed his beating, one punching him in the side and the stomach and another smashing his head against the wall. (T. 5232, 5240). Fearing further torture, Knolden gave a statement.

Prior to trial, in exchange for the state's agreement not to seek the death penalty, habitual violent offender Knolden, (T. 5298), pled guilty to each count of the indictment and was sentenced to multiple concurrent terms of imprisonment including one life term with a 25 year minimum mandatory. (T. 5 133-5). To achieve this coveted reward, Knolden was required to testify against Mr. Smith and his codefendants. (T. 5254).

Knolden's testimony generally mirrored Glass's testimony and the statement of Mr. Smith except to the extent that he minimized his role and characterized Smith and Austin as the leaders of the group and the most vicious. While he agreed that the group met on the evening of February 5, 1991, at a bar, he claimed he had been drinking there for three hours. (T. 5141). He testified that he, Mr. Smith, and Austin went out to a car and smoked marijuana while they talked about robbery. Knolden was not sure who brought this up, but testified it was not him. (T. 5144-5). Although Knolden acknowledged the robbery in the motel parking lot, he testified that his four male companions grabbed the victims, roughed them up, and took their property, and that he merely picked up the keys to their car, told the male victim to get in the trunk, and assumed the role of the driver of the stolen car. (T. 5 157-62).

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Knolden testified that after Austin obtained the tape, he merely opened the trunk while Austin, Bryant, and Cobb taped the male captive. (T. 5173-74). It was someone else who hit Munnings in the head with the rock and put him in the trunk. (T. 5175). He then testified that after Smith got the duct tape, he had four to five beers, smoked some more marijuana, and snorted some cocaine before driving to the abandoned house. (T. 5 178-80). Knolden testified that he opened the trunk but then walked to the street. (T. 5180-81). When he returned, the male captive was taped and seemed unconscious. (T. 5 182). He merely opened the trunk while the others put the male captive in and removed the female. He testified that he walked back to the road while Smith taped the face of the female as she begged "no." (T. 5183-85). Although Knolden previously told police there had been no rape, he testified that when he returned from the road, Austin said "I want some from the girl," (T. 5185), and that Smith raped the woman with a stick while another of his companions held her down. (T. 5 191-93). He testified that several other people then put the female captive back in the trunk. (T. 5199).

Knolden testified that the group next went to Liberty City to buy marijuana and cocaine. (T. 5200). After they got the drugs, the group discussed taking the captives to the southwest section of Dade County and dropping them off. He testified that while in route, Smith said he did not want to go to that area. (T. 5202). He also testified that Austin had said Tawanah Glass knew Gibbs, the female captive. (T. 5203).

Knolden testified that the group turned around and headed into downtown Miami, looking for someone to rob. (T. 5204-05). As they headed over Biscayne Bay toward Miami Beach, Knolden testified it was Smith who directed him to stop at the top of the bridge. (T. 5206). Knolden claimed that he thought this is where they would be leaving the captives; no one had talked about killing them. (*Id.*). Knolden testified that when he opened the trunk with the key, he realized someone would be dropped off the bridge. (T. 5207). Although everyone else had gotten out of the car, Knolden got back in to the driver's seat. He testified he didn't see what the others were doing

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but heard a splash. (T. 5208). He testified that when everyone returned to the vehicle, it was Smith who said, "she was kicking."

After driving from this area, Knolden testiiied that one of his companions directed him to pull over in a vacant lot. (T. 5210). Again, Knolden opened the trunk but it was the others who removed the remaining captive. He acknowledged helping several of the others carry the captive up to the bridge. (T. 5212). However, Knolden testified that it was Austin or Smith who threw the captive off of the bridge and that Smith had remained and reported that the captive had broken loose. (T. 5213-14).

Knolden testified it was Smith who suggested burning the car. (T. 5215). He admitted assisting in wiping the car clean of fingerprints, (T. 5217), but testified it was Smith who doused the car with gasoline and Cobb who lit the tire. (T. 5217-18).[4]

STATEMENT OF THE ISSUES

A. Guilt Phase

I. Whether the trial court erred in denying the Defendant's challenges for cause to jurors Nieves, Leon, Broche, and Forsht where there was a reasonable doubt about these jurors' ability to be fair and unbiased, in violation of the Defendant's right to an impartial jury under the federal and state constitutions?

II. Whether the trial court erred in granting the prosecutor's challenge for cause to juror Laitner where his views would not prevent or substantially impair performance of his penalty phase duties, in violation of the Defendant's right to an impartial jury under the sixth, eighth, and

---

[4]Codefendants Austin's and Bryant's sworn confessions were summarized and also read verbatim to the jury. (T. 4460-83, 4492-4537, 4565-80, 4594-4617). Although Mr. Smith's name was redacted from these statements and the jury was instructed to consider them only as to Austin and Bryant, respectively, (T. 4465, 4491, 4582), he maintains that these statements of his uncross-examined codefendants served as powerfully incriminating evidence against him for the jury. *See* Argument VI, *infra*.

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fourteenth amendments and article I, sections 16 and 17?

III. Whether the trial court erred in permitting the prosecutor to exercise a peremptory challenge against African-American juror Alston for reasons that were not neutral, record supported, and were otherwise pretextual, in violation of the sixth and fourteenth amendments and article I, sections 2, 9, and 16?

IV. Whether the trial court's failure to provide relief when the defendant became ill with the flu, slept, and suffered other adverse side effects from his illness and jail administered medication, violated his constitutional rights to due process, presence at an essential stage of the trial, and to assist in his own defense, and other Florida procedural rights?

V. Whether the trial court erred in failing to suppress Mr. Smith's supposed confession elicited through uncounseled custodial interrogation after Smith has already been indicted and appointed counsel, and where any waiver of his rights to silence and counsel were not knowingly and intelligently given, in violation of the fifth, sixth, and fourteenth amendments and article I, sections 9 and 16?

VI., Whether the trial court reversibly erred by failing to sever Mr. Smith from his codefendants where each of Mr. Smith's non-testifying co-defendants gave statements incriminating Mr. Smith and where the redacted statements, considered together, unquestionably implicated Mr. Smith, in violation of the right to confrontation protected by the sixth and fourteenth amendments and article I, section 9?

VII. Whether the trial court abused its discretion by admitting evidence of Mr. Smith's uncharged sexual battery on Gibbs which was not clearly and convincingly established, inextricably intertwined with the charged offenses, and for which the danger of unfair prejudice overwhelmingly outweighed any probative value?

VIII. Whether the trial court abused its discretion in denying Mr. Smith's motion for mistrial based on the prosecutor's misconduct in closing argument in **commenting on Mr. Smith's**

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exercise of his constitutional right to silence and inflaming the passion of the jury in an effort to have the jury decide the case on an improper basis?

B. Penalty Phase

IX. Whether the trial court abused its discretion in excluding crucial defense evidence, including polygraph evidence which convincingly impeached the state's most important witness's testimony regarding Mr. Smith's aggravated role in the offense, and mitigating evidence on gang mentality and conduct, thus violating Mr. Smith's right to present mitigation and to due process of law, contrary to the sixth, eighth, and fourteenth amendments and article I, sections 9, 16, and 17?

X. Whether the trial court abused its discretion in failing to sever Mr. Smith from his codefendants for sentencing thereby violating his right to a fair and individualized sentencing protected by the eighth and fourteenth amendments and article I, sections 9 and 17?

XI. Whether the trial court abused its discretion in failing to strike the penalty phase panel based on the prosecution's misconduct in penalty phase closing argument in arguing inadmissible evidence against Mr. Smith and making other improper and inflammatory arguments in violation of due process.

XII. Whether the trial court erred in finding sufficient evidence to establish the pecuniary gain and avoiding arrest aggravators where the evidence established that the murder did not occur until four hours after the robbery and perpetrators knew that the second victim had survived and would be able to assist police in their arrests?

XIII. Whether the imposition of the death penalty against Smith was disproportionate to the life sentences of codefendants Knolden and Austin?

XIV. Whether the jury was misled as to the significance of its advisory verdict in violation of the eighth and fourteenth Amendments and article I, section 17?

XV. Whether the trial court's refusal to instruct the jury on the meaning of a life sentence and parole eligibility violated the Defendant's rights under the eighth and fourteenth amendments

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and article I, sections 9 and 17?

XVI. Whether Florida's death penalty statutes violates the eighth and fourteenth amendments and article I, sections 9 and 17, because it fails to require a unanimous verdict or adequately guide the jury's discretion?

SUMMARY OF THE ARGUMENT

I. The trial court erred in denying the defendant's challenges for cause to Jurors Nieves, Leon, Broche and Forsht. Nieves had been exposed to prejudicial pretrial publicity which she could not set aside and persistently expressed her presumption of the defendants' guilt. Jurors Leon, Broche, and Forscht each had long-standing affiliations with law enforcement or indicated unyielding bias in favor of police testimony. Smith's defense was that police testimony regarding his alleged oral confession was a lie. Smith exhausted his peremptory challenges on these and other jurors and unsuccessfully requested additional ones to be exercised against identified jurors. The trial court's error in refusing to grant cause challenges to Jurors Nieves, Leon, Broche and Forsht was therefore harmful.

II. The trial court erred in excusing Juror Laitner for cause, where he expressed no views about the death penalty that would have prevented or substantially impaired his ability to serve as a penalty phase juror. Laitner said only that, in the event of a conflict between his moral code and the trial court's penalty phase instructions, he would follow the former. But the penalty phase instructions were described to him in detail and he expressed, without qualification, an ability to follow these instructions.

III. The trial court erred in permitting the prosecutor to exercise a peremptory challenge against African-American Juror Alston, for reasons that were not neutral, not record-supported, and were otherwise pretextual.

lv. The trial court violated Mr. Smith's constitutional rights to due process, presence at an essential stage of the trial, and to assist in his own defense by failing to grant a short recess when

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Mr. Smith became ill with the flu. As a result of his illness and medication administered by the jail, Mr. Smith became drowsy, fell asleep, and suffered other adverse side-effects that impaired his mental faculties and prevented him from assisting counsel during two days of jury selection. Alternatively, the trial court, being fully apprised of Mr. Smith's debilitated condition and his apparent inability to meaningfully assist his counsel or otherwise participate in the proceedings, abused its discretion in failing to order and conduct a competency examination and hearing.

V. The trial court erred in failing to suppress Mr. Smith's supposed confession elicited through uncounseled custodial interrogation. At this time, Mr. Smith had already been indicted and appointed counsel to represent him in this case. Thus, the police were forbidden from interrogating him without his legal counsel. Although the interrogating detectives secured ***Miranda*** waivers, they were invalid in the absence of counsel. Additionally, the detectives' failures to advise Mr. Smith that he had been indicted and already had appointed counsel precluded a knowing and intelligent waiver.

VI. The trial court reversibly erred by failing to sever Mr. Smith from his codefendants. Both Austin and Bryant gave post-arrest confessions incriminating Mr. Smith but failed to testify at trial. Although these confessions were redacted to substitute various symbols for Mr. Smith, it was clear from Mr. Smith's interlocking confession and other evidence that Austin's and Bryant's confessions implicated Smith. Because Smith was denied the opportunity to cross-examine Austin and Bryant, the introduction of their statements denied him his right to confrontation and requires a new trial.

VII. The trial court abused its discretion in admitting evidence of Mr. Smith's uncharged sexual battery upon the female victim. The state failed to demonstrate by clear and convincing evidence that the sexual battery occurred or that Mr. Smith was the perpetrator. This evidence was not inextricably intertwined with the other evidence because it was not impossible to give a complete or intelligent account of the charged crimes without reference to the uncharged sexual

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battery. Assuming the evidence was relevant, its probative value was substantially outweighed by its danger of unfair prejudice.

VIII. The trial court abused its discretion in denying Mr. Smith's motions for mistrial based on prosecutorial misconduct In closing argument, the prosecutor repeatedly, and improperly, commented on Smith's exercise of his right to silence, argued that the jury should convict Smith based on his codefendants' confessions, and utilized arguments intended to inflame the jury and have them convict based on emotion instead of evidence. These and other instances of prejudicial misconduct throughout trial require a new trial.

Ix. The trial court abused its discretion in excluding crucial defense evidence at the penalty phase. The court excluded polygraph evidence that thoroughly impeached state witness Knolden about the defendants' roles in the crimes. Additionally, the court failed to appoint a requested expert, thereby excluding testimony, regarding the role of gang violence and contagion in the commission of the charged offenses. Exclusion of this evidence denied Mr. Smith his constitutional right to a fair and individualized sentencing.

X. The trial court abused its discretion in failing to sever Mr. Smith from his codefendants for sentencing. The joint sentencing unduly highlighted the comparative roles of the defendants in the crime and allowed a jury to compare the mitigating evidence offered by each defendant. Additionally, it exposed the jury to evidence in arguments not relevant to Mr. Smith. Ultimately, the joint proceedings denied him his constitutional right to a fair and individualized sentencing.

XI. The trial court abused its discretion in failing to strike the penalty phase panel based on prosecutorial misconduct. The prosecutor continued to argue Mr. Smith's codefendants' confessions against Smith, this time to support a death sentence. This, together with other inflammatory and improper arguments served to deny Mr. Smith a fair and individualized sentencing hearing.

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XII. The trial court erred in finding sufficient evidence to establish the pecuniary gain and avoiding arrest aggravaters. The evidence failed to establish pecuniary gain where the robberies were quickly accomplished hours before the murder without any expression of intent to kill. The evidence was also legally insufficient to establish Gibbs's murder was to avoid arrest. The evidence established that Mr. Smith did not know there would be any effort to kill the captives until immediately before they were dropped in the water. The fact that there may not have been any other reasonable explanation offered by the defendants failed to support this aggravater.

XIII. Imposition of the death penalty against Smith was disproportionate to the life sentences of codefendants Knolden and Austin. The evidence established that the group acted jointly in committing the crimes. To the extent there was any basis to differentiate the defendants, the evidence established that any leadership role was filled by Austin or Knolden. The aggravaters which the trial court concluded supported the jury's recommendation applied with equal vigor to Austin and Knolden. Thus, Smith's sentence was disproportionate and must be reversed.

XIV. The jury was misled as to the significance of its advisory verdict in violation of the eighth and fourteenth Amendments and article I, section 17. The instructions improperly diminished the jury's sense of responsibility for its sentencing decision.

XV. The trial court's refusal to instruct the jury on the meaning of a life sentence and parole eligibility violated Mr. Smith's rights under the eighth and fourteenth amendments and article I, sections 9 and 17. The failure to explain a life sentence and parole eligibility denied the jury accurate, mitigating information critical to its decision.

XVI. Florida's death penalty statutes violates the eighth and fourteenth amendments and article I, sections 9 and 17 because it fails to require a unanimous verdict or adequately guide the jury's discretion.

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ARGUMENTS AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S CHALLENGES FOR CAUSE TO JURORS NIEVES, LEON, BROCHE, AND FORSHT WHERE THERE WAS A REASONABLE DOUBT ABOUT THESE JURORS' ABILITY TO BE FAIR AND UNBIASED, IN VIOLATION OF THE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY UNDER THE FEDERAL AND STATE CONSTITUTIONS.

A trial court's discretion to decide a juror's competency for cause is limited by the right of a criminal defendant to an impartial jury protected by the sixth amendment of the United States Constitution and its Florida counterpart. The right is implemented through the defendant's exercise of challenges to prospective jurors for bias and prejudice. *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); section 913.03, Fla. Stats. (1995).

The test for determining a juror's competency is not whether he can control his bias and prejudice, but whether he can entirely set aside these emotions and decide a case solely upon the evidence and the law. *Singer v. State,* 109 So.2d 7 (Fla. 1959); *Leon v. State, 396* So.2d 203 (Fla. 3d DCA 1981). A juror should not only be impartial, but should be "beyond even the suspicion of partiality." O'Connor v. *State, 9* Fla. 215, 222 (1860). A juror's ability to be fair and impartial must unequivocally be asserted in the record; his inability to make an unequivocal assertion establishes a reasonable doubt about his impartiality. *E.g., Henry v. State, 586* So.2d 1335, 1337 (Fla. 3d DCA 1991). If there is a basis for any reasonable doubt about the juror's possessing that state of mind which will enable him to render a fair and impartial verdict, he must be excused. E.g., *Hamilton v. State,* 547 So. 2d 630 (Fla. 1989). Close cases should be resolved in favor of excusing the juror. *Phillips v. State, 572 So.* 2d 16 (Fla. 4th DCA 1990).

Where a trial court erroneously refuses to excuse a juror for cause, defense counsel has exhausted his peremptory challenges, and has moved unsuccessfully for an additional strike to be exercised against an identified juror, the trial court's error is harmful and the cause must be reversed.

Trotter v. State, *576 So.* 2d 691 (Fla. 1991).

Mr. Smith challenged Jurors Nieves, Leon, Broche and Forsht for cause. The trial court denied these challenges and Mr. Smith exercised strikes against each. Mr. Smith ultimately exhausted his peremptory challenges and moved for additional ones, to be exercised against Jurors Whitted-Miller and Ruiz. The trial court denied the motion for additional peremptory challenges. (T. 3806-3809). This issue is thus preserved for review under *Trotter*.

A. **The Trial Court Erred in Refusing to Excuse Juror Nieves for Cause, Because (1) She Was Biased by Exposure to Pretrial Publicity and (2) She Presumed the Defendant's Guilt.**

(1) Juror Nieves' Exposure to Pretrial Publicity.

Juror Nieves had seen print and television coverage of the crimes charged, and of the arrest of the defendants. Outside the presence of the other jurors, she was questioned whether she could base her verdict solely upon the evidence presented in court, and not upon the media's account. Juror Nieves consistently expressed doubt about her ability to do so:

> The Court: [W]ould you carry [what you read and heard about the case] into the courtroom or base your decisions just upon the evidence as you heard it in the trial?
>
> Juror Nieves: That will always be in the back of my mind what I heard about it, even if it does not come up in the trial.
>
> The Court: What I wanted to know is whether or not . . . it will so affect you that you will decide this case based upon those kinds of things that you may have read about rather than what was received in the courtroom?
>
> Juror Nieves: I cannot answer that question until it happens. (T. 3 187-88).

Juror Nieves had clearly formed a belief in the defendants' guilt, because of the pretrial publicity, despite her equivocation on this point:

> The Court: How did you feel when you learned that someone had been arrested for this?
>
> Juror Nieves: Glad that they were not out.
>
> The *Court:* Based on what you read and how you feel about what you read, did you form any opinion about the guilt or innocence of the people in Court'?
>
> Juror Nieves: No, not really but I mean they got arrested because they found

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something. (T. 3 188-90).

Mr. Smith's attorney asked whether her exposure to the media accounts would affect her ability to be impartial, and she said it would:

> Juror Nieves: It could in the sense what you are bringing in here is not everything that is out there that you have read in the paper or what you have learned.
>
> Defense Counsel: And would it be fair to say that you could not put all of that out of your mind?
>
> Juror Nieves: I think it would be fair to say I could not. Once you learned something you know it's hard to get out of your mind. (T. 3 191).

The trial court then interjected that it would issue an instruction to rely only upon evidence presented in court, and asked whether Juror Nieves would follow it. She said: **"I don't know".** (T. 3191). Austin's attorney asked whether the pretrial publicity she had seen might "get in the way of [her] following the judge's instructions." (T. 3 192). She answered: **"It may, I'm uot sure but it may."** (T. 3 192). Finally, the prosecuting attorney asked whether she could follow the trial court's instruction to ignore what she had learned outside of the courtroom Juror Nieves said again: **"To tell you the truth, I don't know."** (T. 3192). Juror Nieves was never rehabilitated from this expression of doubt about her ability to rely solely upon evidence presented at trial.

Where exposure to pretrial publicity has affected the prospective juror's ability to be fair and impartial, and to base her decision solely on the evidence presented in court, the juror must be excused for cause. ***E.g., Hill v. State, 477 So.*** 2d 553, 554-555 (Fla. 1985); ***Jones v. Stale, 20*** F.L.W. D1731(Fla. 2d DCA, July 28, 1995).

Juror Nieves had read and watched television news about the crime charged "for quite a few days" after its occurrence. (T. 3186-87). She consistently maintained that she would not rely solely on the evidence at trial, or at best, that she did not know whether she could decide the case on that basis. She was never rehabilitated from this persistent doubt. See ***Bryant*** v. ***State, 656 So.*** 2d 426 (Fla. 1995)(duty of prosecutor or trial court to rehabilitate juror from assertion of doubt about ability

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to be fair). The trial court therefore erred in refusing to excuse her for cause. *E.g., Jones; Ortiz v. State, 543* So.2d 377,378"79 (Fla. 3d DCA 1984); *Plair v. State, 453* So.2d 917, 918 (Fla. 1st DCA 1984); *cf. Turner* v. *State,* 645 So.2d 444 (Fla. 1994)(jurors who had seen media accounts indicated they could base their verdicts solely on the evidence and the court's instructions); ***Geralds v. State,*** 601 So. 2d 1157 (Fla. 1992)(jurors had seen media coverage but did not indicate they were "incapable of setting aside this information and rendering a verdict based on the evidence presented at trial").

(2) Juror Nieves' Presumption of the Defendant's Guilt.

Juror Nieves also expressed doubt about her ability to accept the presumption of innocence.

> Defense Counsel: Look at Ronald Smith now. Can you tell me that you can presume him innocent?
>
> Juror Nieves: I do not have all the evidence if he's innocent or not.
>
> Defense Counsel: [O]ne of the things the Judge will instruct [is that] up until all the evidence you have to prove [sic] that he is innocent [sic]. Can you do this?
>
> Juror Nieves: I guess so.
>
> Defense Counsel: Looking at him now, what do you think when you see Ronald Smith sitting there and his two lawyers sitting next to him and you find out that he is charged with first degree murder?
>
> Juror Nieves: There must be a reason why he is being charged. I was not charged.
>
> Defense Counsel: That is a natural way to feel. That is a natural feeling, certainly.
>
> Juror Nieves: But I have to weigh the evidence.
>
> Defense Counsel: . . . Can you honestly put aside that natural feeling that you have and can you presume that he's innocent?
>
> Juror Nieves: Yes. That is, I am thinking about it. It's a tough one.
>
> Defense Counsel: You are not sure if you can do that?
>
> Juror Nieves: No, I really can't. I'm sorry. I'm really not sure. (T. 35 14).[5]

Juror Nieves expressed the belief that an innocent defendant does not need counsel; that

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'Juror Nieves described herself as strong-willed. (T. 343 1, 3724). She expressed firm commitment to several beliefs discussed during voir dire, but was clear about those which would affect her ability to be fair and those which would not. For example, though she expressed the belief that the jails were "too soft" on prisoners and defendants sentenced to death filed too many appeals, she stated that these beliefs would affect her ability to sit on this jury. (T. 3541-42).

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because the defendant had counsel, she could not presume his innocence:

> Defense Counsel: How do you feel about the presumption of innocence, the state must prove homicide beyond a reasonable doubt.
>
> Juror Nieves: Does not mean he committed murder, but you are contradicting yourself, you are defending somebody that is innocent.
>
> Defense Counsel: What is the contradiction?
>
> Juror Nieves: A person does not need a defense.
>
> Defense Counsel: So in your opinion if I suggested to you that these gentlemen are presumed innocent, what you are . . . saying, because I'm standing here, their lawyer, they are innocent. There must be something more to it.
>
> Juror Nieves: Not that they are, I would not know until I hear everything.
>
> Defense Counsel: Does . . . presuming these three [defendants] innocent at this point give you a problem, in other words, I'm saying to you that they are innocent, are you disagreeing with me?
>
> Juror Nieves: I guess in a way, yes. (T. 3646-48).

At that point, defense counsel explained to the panel that there are no right or wrong answers, that they were being asked only how they felt about the presumption of innocence and the state's burden of proof Defense counsel then turned back to Juror Nieves; she persisted in her resistance to the presumption of innocence and in her inability to accede to instruction:

> Defense Counsel: The question becomes, if you have a problem, do you?
>
> Juror Nieves: Yes, I guess I have a problem.
>
> Defense Counsel: If the Judge says you have to presume him innocent Ms. Nieves -- you might have a little problem with that instruction?
>
> Juror Nieves: I may.
>
> Defense Counsel: We talked to you before about some matters about perhaps you do not think you could be fair because of your feelings, would these be part of that?
>
> Juror Nieves: I'm willing to listen to everything, I'm willing to listen to all of the evidence and make my decision, but I know myself
>
> Defense Counsel: You seem like a very strong woman.
>
> Juror Nieves: Straight line, from here to there.
>
> Defense Counsel: You indicated you do not know if you could follow the Judge's instruction, would this be one of the instructions you may have a problem with?
>
> Juror Nieves: Yes. (T. 3645-3648).

Mr. Smith's counsel challenged Juror Nieves for cause on the bases that her exposure to pretrial publicity might affect her ability to serve on the jury and she had difficulty applying the

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presumption of innocence. (T. 3782-83). The trial court recalled Ms. Nieves, outside the presence of the other veniremembers, and asked leading questions whether she would follow its instruction about the presumption of innocence. Although she said yes, her responses evinced equivocation, confusion and a reluctance to follow the law:

> The Court: We had a question about . . . the presumption of innocence and I think you have a little problem with it. Let me ask you this question. If I was to instruct you that each and every one of these defendants are presumed innocent, could you follow that instruction?
>
> Juror Nieves: Yes.
>
> The Court: You could follow it?
>
> Juror Nieves: That does not mean that they haven't . . . convinced me that they are guilty.
>
> The Court: I am talking about presumption, meaning as they sit here now, you could presume them innocent?
>
> Juror Nieves: Yes, *I guess.*
>
> The Court: Would you follow my instructions, because it is an instruction I will give, that they are presumed to be innocent.
>
> Juror Nieves: *I have to,* yes.
>
> The Court: And the state and the state alone are the only people who have the proof
>
> Juror Nieves: Yes.
>
> The Court: The defense does not have to prove anything, you can follow that instruction as well?
>
> Juror Nieves: Yes. ***I do not understand it, but I can follow it.***
>
> The Court: I am not asking whether you understand it, I am asking whether you can follow it. (T. 3783-84).

A juror is not impartial when her mind is in such a condition that the defendant must provide some evidence of his innocence in order to prevail. ***E.g., Hamilton; Singer; Thompson v. Singletary***, *659* So.2d *435* (Fla. 4th DCA 1995). In ***Hamilton,*** this court held that a juror who had "a preconceived opinion of [the defendant's] guilt [such] that it would take evidence put forth by [the defendant] to convince her he was not guilty" should have been excused for cause. The juror's eventual statement that she would follow the court's instruction did not dispel the reasonable doubt arising from her stated preconception.

In particular, where a juror's statement that she will follow the law is made in response to

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the trial court's leading question, the juror has not been rehabilitated from a persistently-asserted preconception. ***Perea v. State, 657*** So.2d ***8, 9*** (Fla. 3d DCA 1995); ***Henry; Garcia v. State, 570*** So.2d 1082, 1083 (Fla. 3d DCA 1990); ***Imbimbo v. State, 555*** So.2d 954,955 (Fla. 4th DCA 1990); ***Tenon v. State, 545*** So.2d 382,384 (Fla. 1st DCA 1989).

Juror Nieves persistently asserted resistance to the presumption of innocence, and persistently expressed doubt about her ability to follow the trial court's instruction thereon. (T. 3514-15, 3646-48, 3645-48). It was not until the trial court attempted to rehabilitate her through leading questions that Juror Nieves capitulated; and then she only grudgingly agreed to follow an instruction which she insisted she did not understand. (T. 3783-84). ***See Tenon v. State, 545*** So.2d at 384 (juror's agreement to follow the law ineffective as rehabilitation where juror did not understand the law); ***cf. Reaves v. State***, 639 So.2d 1, 4, n. 6 (Fla. 1994)(jurors rehabilitated from initial expressions of difficulty with law where they agreed to follow instruction after trial court explained the law and they indicated they understood it). This juror's eventual equivocal response to the trial court's leading question about her persistently-asserted preconception of the defendant's guilt, did not dispel the reasonable doubt about her ability to be fair. ***E.g., Singer; Henry.***

B. The Trial Court Erred in Refusing to Excuse Juror Leon for Cause Because he Would Believe the Testimony of a Police Officer Unless the Defendant Presented Evidence that the Officer was Lying.

Juror Leon did not believe that a police officer would lie under oath. In particular, if a police officer testified that the defendant had made an oral confession, Juror Leon would believe that this was true, unless the defendant personally controverted the officer's testimony, or otherwise presented evidence that the officer was lying.

Mr. Smith's counsel explained to the venire that a police officer would be testifying that the defendant had made an oral confession, which the defendant disavowed. Counsel asked Juror Leon whether he would "be more inclined to believe the officer:"

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Juror Leon: I believe the officer who is under oath would be saying the truth. Unless you can prove that he is lying. I would believe the officer.

Defense Counsel: Do you think it's possible or would you consider the possibility that a law enforcement officer would come into court under oath saying that a confession was made to him and he is lying?

Juror Leon: . . . He's under oath. He is supposed to tell the truth, and you, the defense, has to prove it. Unless the defense proves that the officer is lying, I don't think I would change my mind.

Q: What if the accused did not take the stand?

Juror Leon: Then you have to prove to me the law enforcement officer is lying. . . I would have to hear whatever happens in the trial, because I make up my mind about the officer to see the law enforcement officer as to whether he is lying.

Defense counsel: Do you think he would be lying about that?

Juror Leon: I don't know why. (T. 2878-82).

The next day, Austin's attorney returned to the question whether Juror Leon could fairly evaluate the credibility of police testimony. Juror Leon emphasized his predisposition to believe it:

Defense Counsel: How do you feel about testing a cop's credibility and testimony?

Juror Leon: Like I said yesterday, anyone can lie but I would be inclined to believe what the police officer would say.

Defense Counsel: I believe you did say that. You had an inclination to believe police officers?

Juror Leon: Yes, I do.

Defense Counsel: Why is that?

* * *

Juror Leon: Well, you have to believe a police officer is representing justice and that he, I don't believe, that he would lie.

Defense Counsel: And in your mind, sir, would you tend to believe a police officer more than a civilian because he represents the power ofjustice?

Juror Leon: I have to hear the full facts. (T. 2968-69).

Austin's attorney then polled numerous jurors as to whether they would believe a police officer's testimony was "entitled to any greater weight than anyone else's [just] because he represents the power of the state." Only Juror Leon answered in the affirmative. (T. 2969-2971). When counsel sought to confirm this last response, Leon reiterated that he would believe a police officer's testimony, unless the defense presented evidence to the contrary, and that he would give

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more weight to police than to civilian testimony:

> Defense Counsel: [Y]ou stated to me that you would believe police officers to the extend [sic] they would testify a little more than other people. Now, is there anything in what you believe that would cause you to compromise that position, for example, the badge gives that person more credibility; do you still believe that?
>
> Juror Leon: My feeling I am suppose to believe that this officer, whatever, that takes the stand under oath about it's an eye for an eye, but you can put something out that can change my mind.
>
> Defense Counsel: And that depends what you hear on the evidence. But the question becomes whether the wearing of the badge makes the person more believable; do you believe that? And if you do just say it?
>
> Juror Leon: Yes. (T. 2989-3000).

Juror Leon was never rehabilitated from this statement of bias in favor of police testimony.

Counsel for Smith challenged Juror Leon for cause, on the basis that he would believe the testimony of a police officer regarding the defendant's oral confession, unless the defendant produced evidence that the officer was lying. Counsel explained that this bias was devastating to the defense case. Although the prosecutor did not oppose the challenge, the trial court denied it and Mr. Smith exercised a peremptory strike against Juror Leon. (T. 3044-45).

A prospective juror who harbors a bias in favor of the credibility of police testimony must be excused for cause. ***E.g., Clayton v. State,*** 616 So. 2d 615, 616, n. 1 (Fla. 4th DCA 1993)(refusal to grant cause challenge of juror who "expressed a steadfast and clear bias in favor of the credibility of police officers. . . is manifest error"); ***Duncan v. State,*** 588 So. 2d 50 (Fla. 3d DCA 1991); ***Mann v. State,*** 571 So. 2d 551 (Fla. 3d DCA 1990); ***Polynice v. State, 568 So.*** 2d 1346 (Fla. 4th DCA 1990). Furthermore, a juror with a preconceived opinion, which the other side must overcome in order to prevail, is not impartial and must be excused. ***Hamilton, 547*** So.2d at 633; ***Coney v. State,*** 643 So.2d 654 (Fla. 3d DCA 1994)(where juror has preconceived opinion that victim would only tell the truth, error not to excuse for cause).

Juror Leon frankly and repeatedly admitted that, for him, police credibility was superior to civilian credibility, that he did not think a police officer would lie, and that he would believe

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whatever an officer testified to, just because the witness was an officer, unless the defense proved that the officer was lying. Juror Leon's responses establish a bias in favor of police testimony, the onus to overcome which was on the defense.

The defense case at trial was that the police officer who testified to the defendant's oral confession had fabricated the confession in order to make a case against the defendant, who was identified by an alleged accomplice in exchange for a plea to life, but against whom there was otherwise no evidence. The defendant did not testify at trial, and did not present any evidence. His defense depended entirely upon the jurors' ability to believe that the investigating officer was lying under oath. Juror Leon was clearly incompetent to serve on Mr. Smith's jury and should have been excused upon unopposed motion of the defense.

C. The Trial Court Erred in Refusing to Excuse Juror Broche Whose Brother is a Police Officer and Who Was Predisposed to Believe the Testimony of Police Officers.

Juror Broche's brother was a police officer with the City of Miami Police Department. The homicide victim, Bridget Gibbs, was the sister of Assistant Miami Police Chief Arnold Gibbs. As soon as the juror disclosed his relationship to the department,[6] the trial court asked whether he would therefore give more weight to police than to civilian testimony. Juror Broche said that he would:

> Court: Would you tend to believe the testimony of a police person just because they are police officers more than someone else?
> Juror Broche: I have my doubts.
> Court: You have your doubts as to whether you would believe or whether.

---

[6]It was the juror's connection with the Miami Police Department that triggered his recollection of news coverage (Channel 7 TV) about the charged offense. The juror could recall having seen the television coverage on two consecutive days, and that on the second day the homicide victim's identity as the assistant police chiefs sister was reported. (T. 3 163-64). It was when the trial court mentioned that the victim was the sister of Chief Gibbs that Juror Broche recalled the pretrial publicity about the crime. (T. 3 164). Asked whether the victim's relationship to Chief Gibbs would affect his "perception of the case," Juror Broche said: "I don't think so." (T. 3165).

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Juror Broche: I would believe the police officer. (T. 3082).

The prosecutor also questioned Juror Broche whether his brother's occupation as a police officer would affect his evaluation of police testimony. He said it would, then equivocated, in response to leading questions, about whether his bias would affect his ability to weigh police testimony pursuant to instruction:

> Prosecutor: You expressed concern . . . whether you could listen to testimony from a cop and be impartial; can you tell me a little about that?
> Juror Broche: I have a pretty good respect for police officers since my brother is a police officer. I think that respect is still there for me.
> Prosecutor: Do you think there is a possibility that a police officer could ever take the stand and may be untrue about his testimony?
> Juror Broche: I don't think so.
> Prosecutor: Do you think there is a possibility that could happen?
> Juror Broche: I could but.
> Prosecutor: The judge will instruct you at the end of the trial to listen to police officers like anyone else. Do you think if the Judge would give you those instructions you'd be able to listen to them and apply them fairly to a police officer, the same as any other witness who might take the stand and testify?
> Juror Broche: I think I could.
> Prosecutor: You would be able to do that?
> Juror Broche: Yes, Ma'am. (T. 3232).

However, in response to questioning by Bryant's counsel, Juror Broche reiterated his predisposition to believe police testimony:

> Defense Counsel: You said you did not believe that the police could tell anything untrue?
> Juror Broche: *They could be lying but it would be very hard for me not to believe them.* (T. 3675).

Bryant's counsel then asked whether, given his predisposition to believe police testimony, Juror Broche could follow the trial court's instruction to evaluate that testimony the same as that of civilian witnesses. Although Juror Broche said he could do so, he continued to express his belief that police officers, as a class, would not lie on the stand:

Juror Broche: Well, the badge and being a policeman would not bother me,

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I will follow the judge's instructions and other evidence that he has I will judge it on that.

Defense Counsel: And if a policeman takes the witness stand would you give him any greater belief because he is a policeman?

Juror Broche: ***Whatever statement he has to say.***

Defense Counsel: Would you still find it a bit harder to believe that a policeman would tell you something that was not true or embellish7

Juror Broche: You mean he ***will*** tell a lie? ***I would not think he would tell a lie, after all he is a police officer***.

Defense Counsel: So you believe a police officer would not tell a lie?

Juror Broche: I have not found it ***-- it would be hard for me to believe that a police officer would lie.*** (T. 3675-76).

Mr. Smith's counsel challenged Juror Broche for cause, on the basis, ***inter alia***, that he would be unable to fmd that a police officer had testified falsely. (T. 3742). Juror Broche was questioned once again about the matter, outside the presence of the other jurors. The court asked, in a peremptory fashion, whether Juror Broche would follow its instruction on weighing police testimony. Although Juror Broche said yes, he continued to evince a marked predilection to believe police testimony:

Court: Based on the fact that your brother is a police officer, would you tend to believe the testimony of a police officer just because that person is a police person more so than someone else?

Juror Broche: Well, ***I would never think that he would lie,*** now there have been cases We all are human, but in my mind, ***yes I would trust whatever the evidence the police.. .***

Court: My question was different. I am saying would you believe the testimony of a police officer more than someone else?

Juror Broche: No. I will listen to both.

Court: Will you follow my instruction?

Juror Broche: Yes, sir. (T. 3745).

Bryant's counsel returned to the subject with more open-ended questions, in response to which Juror Broche expressed that, although he would "listen to both sides," he had a bias in favor of the police, because of his brother's work, and would give more weight to police testimony:

Defense Counsel: You have great regard for policemen's testimony, do you understand that there are times that feeling for your brother . . . might get in the way of your saying that [they're] the same [as] everyone else because they are police

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officers?

Juror Broche: I would listen to both sides.

Defense Counsel: Well the question is does your feelings toward police officers make you feel entitled to a little more belief basically?

Juror Broche: I respect them.

Defense Counsel. Let me ask it again. Does your feelings toward police officers make you feel that they are people who will tell the truth more than the citizen on the street?

Juror Broche: Boy that is a hard one. I don't consider myself as a citizen, lawyer.

Defense Counsel: If you feel that way it is OK to say it, there is nothing wrong with that.

Juror Broche: Just like if you sit there and give me your testimony I would probably believe what you say too as a citizen.

Defense Counsel: Is it your feeling that the police officer, it would be harder for police officers to lie because he is a police officer7

Juror Broche: I think so.

Defense Counsel: And because he is a sworn police officer?

Juror Broche: I believe so, that is a profession. (T. 3746-47).

Despite this juror's persistent expression of bias in favor of the credibility of police testimony, the trial court denied Mr. Smith's challenge for cause, and he was forced to exercise a peremptory challenge against Juror Broche. (T. 3748)

A prospective juror who is biased in favor of the credibility of police testimony must be ***excused*** for ***cause. E.g., Mann; Duncan; Polynice; Clayton.*** Furthermore, where a juror vacillates between partiality and impartiality, having at first expressed a disqualifying bias in strong terms, he should be excused. ***Williams v. State, 638*** So.2d 976,978 (Fla. 4th DCA 1994). As this court observed in ***Johnson*** v. Reynolds, 97 Fla. 591, 599, 121 So. 793,796 (1929),

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Therefore, efforts to rehabilitate a prospective juror must be considered in view of "what the juror had freely said before the salvage efforts began." ***Montozzi v. State, 633*** So.2d 563, 565 (Fla. 4th

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DCA 1984). Where the efforts to rehabilitate consist of directive questions by the prosecutor and the trial court whether the juror will follow instructions, the juror's answers are not determinative of his competency. ***Price*** v. ***State,*** 538 So.2d 486 (Fla. 3d DCA 1989)(juror being asked leading questions "is more likely to 'please' the judge and give the rather obvious answers...and as such these responses alone must never be determinative of competency); ***Tenon*** (rejecting suggestion that juror who acknowledged bias at one moment can, "after perfunctory, generic questioning" experience "some bias-cleansing change of heart or mind").

Juror Broche consistently expressed a bias in favor of the credibility of police testimony:

"I would believe the police officer." (T. 3088).
"They could be lying but it would be very hard for me not to believe them." (T. ***3675).***
"I don't think ['a police officer could ever take the stand and . . . be untrue']." (T. ***3232.***
"I would not think he would tell a lie, after all he is a police officer." (T. 3675).
"[I would believe] whatever statement he has to say." (T. 3675).
"[I]t would be hard for me to believe that a police officer would lie." (T. 3676).
"I would never think that he would lie." (T. 3745).
"I would trust whatever evidence the police [present]." (T. 3745)
"I think ['it would be harder for police officers to lie']" (T. 3745).

His laconic responses [Yes, ma'am" (T. 3232); "Yes, sir." (T. 3745)] to directive questions from the prosecutor and the judge whether he would follow an instruction on weighing police testimony did not dispel the reasonable doubt about his ability to decide this case fairly.'

D. The Trial Court Erred in Refusing to Excuse Juror Forsht for Cause, Because He Admitted that He Would Give Law Enforcement Officers the "Benefit of the Doubt" in Evaluating Their Credibility.

Juror Forsht had been a United States Marshall for 3 1 years, first in special operations, then in charge of the court system for the Southern District of Florida. (T. 2703-06). **During his tenure**

'Juror Broche's agreement to comply with this instruction was particularly ineffectual as rehabilitation in this case, because the court never instructed the jury on the weighing of police testimony. (T. 5887-5935).

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with special operations, Juror Forsht, in command of 400 men, was dispatched to "civil disturbances" around the country. He made hundreds of arrests, interrogated suspects and testified at trial "numerous times," always for the prosecution. (T. 2871-2873; 2924-2930).

After retiring from the Marshall's service ten years earlier, he and another former law enforcement officer had formed a security corporation, employing 200 off-duty police officers. (T. 2305, 2703-04). The corporation conducts drug interdictions and handles bulk storage of evidence, all pursuant to contract with the federal government, and in cooperation with law enforcement agencies throughout the state. (T. 2869-70, 2703-06). Juror Forsht said he knew several of the prosecution's witnesses, one of whom was his employee. (T. 2704).

All the parties asked whether Juror Forsht would be able fairly to evaluate the credibility of police testimony.[8] Juror Forsht initially insisted that his extensive experience in law enforcement would not affect his ability to serve as a juror in this case. (T. 2305, 2393, 2873). But when Mr. Smith's attorney questioned whether he believed that a police officer would lie about a defendant's oral confession, Juror Forsht became thoughtful:

> Juror Forsht: It's feasible, yes . . .
> Defense counsel: Now, obviously because of your background [you] will hope that would not be the case.
> Juror Forsht: Obviously, yes.
> Q: And you would hope that a man or a woman who was sworn to uphold the law would not lie under oath.
> And in evaluating whether or not that person is lying under oath, do you think that you would find yourself giving them the benefit of the doubt.

---

[8] Juror Forsht admitted surprise at being considered as a prospective juror:

> Juror: It's very unusual for law enforcement to sit on a jury. We've never had one do it in the federal courts.
> Q: Why does that . . . happen; do you know?
> Juror: Well, I would think that the defense would be prejudiced against it.

(T. 2706).

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Juror Forsht: Yes, I guess I would. (T. 2876).

Mr. Smith challenged Juror Forsht for cause. (T. 3064). The trial court denied the challenge forcing Mr. Smith to exercise a peremptory strike.

A prospective juror who harbors a bias in favor of the credibility of police testimony must be excused for cause. ***E.g., Mann; Duncan; Polynice***. The more extensive the juror's contacts with law enforcement, the more compelling the inference of bias from any equivocation about his ability to be impartial in this regard. ***See Jefferson v. State, 489*** So.2d 211, 212 (Fla. 3d DCA 1986); ***Mann,*** 571 so.2d at 552; ***Heny, 586 So.*** 2d at 1336-37.

Juror Forsht had spent a lifetime in law enforcement. For 3 1 years, he was a U.S. Marshall; for ten years thereafter, he headed a corporation, entirely funded by the federal government, that performed police functions, employing police officers, in cooperation with police agencies throughout the state. Juror Forsht knew several of the prosecution's police witnesses, one of whom worked for him.

Initially, when asked whether his extensive background in and contacts with law enforcement would affect his evaluation of police credibility he said it would not, that it was "feasible" that a police officer would testify falsely, that he had known it to happen. (T. 2393, 2873, 2875-2876). But, questioned whether in evaluating the credibility of police officers he "would find [himself] giving them the benefit of the doubt," he answered "Yes, I guess I would." (T. 2876).

This response has been held to establish a reasonable doubt about the juror's ability fairly to evaluate the credibility of disputed testimony. See ***Davis v. State***, ***656*** So.2d 560 (Fla. 4th DCA 1995)(where prospective juror in domestic violence case had been involved in brother's divorce, and in sexual discrimination lawsuit, juror's statements that he was more sympathetic towards women and "would give [them] the benefit of the doubt," established basis for cause challenge, notwithstanding eventual statement that he would "judge the facts of this case," and did not "think' his sympathies would affect his ability to be fair). Furthermore, Forsht's subsequent assertion that

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he "would try to do what is right" in evaluating the credibility of police testimony (T. 2967) did not dispel the reasonable doubt arising from his admission that he "would give the benefit of the doubt" to police testimony. *Ortiz v. State,* 543 So.2d 377, 378-79 (Fla. 3d DCA 1989)(prospective juror who had been exposed to pretrial publicity and had concluded defendant guilty said "I could try, yes" when asked if could render impartial verdict); *Robinson v. State, 506* So.2d 1070 (Fla. 5th DCA 1987)(prospective juror's promise to "do [her] best to try" to be impartial did not overcome reasonable doubt).

IL THE TRIAL COURT ERRED IN GRANTING THE PROSECUTOR'S CHALLENGE FOR CAUSE TO JUROR LAITNER WHERE HIS VIEWS WOULD NOT PREVENT OR SUBSTANTIALLY IMPAIR PERFORMANCE OF HIS PENALTY PHASE DUTIES, IN VIOLATION OF THE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 16 AND 17.

"A juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties in accordance with his instructions and his oath." *Adams v. Texas*, *448* U.S. 38, 45, 100 S.Ct. 2521, 2526 (1980); *Herring* v. *State,* 446 So. 2d 1049 (Fla.), *cert.denied, 469* U.S. 989 (1984).

There is no indication that Juror Laitner harbored any views about capital punishment that would prevent or substantially impair the performance of his duties as a penalty phase juror. Although it was a "problem" for him (T. 1701, 2146), it was "certainly possible" for him to find the death penalty to be "proper and warranted", and he could recommend its imposition upon sufficient evidence of aggravation. (T. 170 1-02, 19 16).

Laitner was excused on the asserted basis of his commitment to follow his own moral code rather than the trial court's instructions, in the event of a conflict. (T. 2253, 2260-62). But the law governing penalty phase deliberations was explained to him, in detail. (T. 1689-1690, 1867-1873, 1910-1916, 1942, 2035, 2051-52, 2104-06, 2108, 2147-48, 2186, 2218). Juror Laitner said, without

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qualification, that he could follow all the penalty phase instructions thus described to him. He merely expressed that, in the event of a conflict between the law and his moral code -- and there was none -- he would follow the latter.' (T. 1916, 2147, 2260).

As Juror Laitner himself explained, any conflict was . . . entirely "hypothetical[]". (T. 1916). The fact that a juror would decline to follow a morally repugnant jury instruction does not, in the absence of any such instruction, render him incompetent. Juror Laitner was thoroughly briefed on the penalty phase instructions, expressed no reservations about his ability to follow them, and should not have been excused for cause.

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

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, 476*** U.S. 79, 85, 106 S.Ct. 1712, 1716 (1986). 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, 499*** U.S. 400, 111 S.Ct. 1364, 1436 (1991); 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). Florida's constitution provides even greater protection against improper bias in jury selection. ***State v. Neil, 457 So.*** 2d 481,492 (Fla. 1984).

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[9] Laitner's only concern was that the law allow him to consider mitigating evidence. (T. 1915-16, 2148). Once it was explained that the law required consideration of mitigating evidence, Laitner expressed no other reservation about his ability to follow the law.

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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***, 476 U.S. at 96-98). 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-pretext&. ***Sluppy, 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 Alston, defense counsel objected that the challenge was based on race, and moved for a ***Neil*** inquiry. The prosecutor proffered the following reasons for striking Alston: (1) her occupation as a guidance counselor, a "help profession"; (2) her avowed inclination to err as a penalty phase juror on the side of life; and (3) her reference to Oprah Winfrey, which the prosecutor found "strange and unusual". (T. 37753776). From these factors, the prosecutor inferred that Juror Alston "would be slightly bias[ed] towards the defense." (T. 3776). Over defense counsel's objection that the reasons were pretextual, the trial court permitted the prosecutor to strike Alston from the panel. (T. 3777).[10] Each reason proffered by the prosecutor was either not neutral, not reasonable or pretextual.

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[10]Defense counsel accepted the jury panel prior to being sworn subject to this objection. (T. 3301). The reservation of objection sufficed to preserve it for review by this court. ***E.g., Joiner v. State,*** 618 So. 2d 174, 176 (Fla. 1993).

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A. Juror Alston's Occupation as a Guidance Couuselor

A prospective juror's occupation is not a valid reason for a peremptory challenge absent a demonstrable connection between the occupation and facts of the case. ***Slappy***, *522* So.2d at 23. Regarding Juror Alston, the absence of a demonstrable connection was attributable to the following ***Slappy*** factors and established the prosecutor's reason for striking as unreasonable or pretextual: (1) the alleged group (occupational) bias was not shown to be shared by the juror; (2) a non-existent or perfunctory examination of the juror; and (5) the proffered reason is equally applicable to an unchallenged juror.

In response to questioning, Juror Alston said she was a guidance counselor at a public elementary school counseling fifth and sixth graders. (T. 3302-03).[11] She was never asked whether her counseling had predisposed her against capital punishment in general, or towards capital defendants in particular. Nor was such predisposition naturally inferable from anything Alston said. (T. 3138, 3149, 3425-27, 3504). The prosecutor was not consistent in striking jurors in "help professions." He did not challenge Whitted-Miller, a mentor for elementary school girls, or Ms. Menendez, a second grade teacher, who ultimately served on the jury. (T. 333 1, 3719).

Florida courts have repeatedly held that under these circumstances, an African-American juror's occupation is a blatantly pretextual reason for a peremptory strike. ***E.g., 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, pretextual in absence of any questions pertaining to basis alleged for bias); ***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

[11] At the time of trial, Juror Alston was enrolled in a class at FIU to become a travel agent, and may since have left guidance counseling for this profession. This possibility is bolstered by Juror Alston's having allowed her membership in a professional guidance counseling association to lapse (T. 3598).

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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,*** 59 1 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 effect of occupation on political beliefs or ability to serve as juror); ***House v. State,*** 614 So. 2d 647, 649 (Fla. 2d DCA 1994); (challenge to African-American mental health worker 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 v. State, 632*** So.2d 702 (Fla. 1st DCA 1994); ***Mayes v. State,*** 550 So. 2d 496,498 (Fla. 4th DCA 1989); ***Johnson v. State, 600 So.*** 2d 32, 34 (Fla. 3d DCA 1992).

B. Juror Alston's Avowed Inclination to Err on Side of Life.

Throughout jury selection, defense counsel repeatedly explained the structure of the statutory provision for the penalty phase as follows: there are limited and enumerated aggravating circumstances which the state must prove beyond a reasonable doubt; there are unlimited unenumerated as well as statutory mitigating circumstances for which the defense need only produce some evidence; it was the legislature's intention, in thus unequally allocating penalty phase burdens, that the sentencer should "err on the side of life." (T. 2052, 2105, 2107, 2148, 2920, 2944-46, 3650, 3659-3660, 3712-14). Defense counsel then questioned individual veniremembers concerning their feelings about the legislature's preference for an error on the side of life. Each person so questioned expressly endorsed the legislative preference:

> Mr. Green: I understand that. (T. 2230).
> Mr. Feliciano: I think that is fair. (T. 2112).
> Ms. Framil: I agree with you on that. That is my opinion. (T. 2112-13).
> Mr. Hubbard: No problem. (T. 2113).
> Mr. Laitner: Understood and felt secure in following instructions to this effect. (T. 2156).

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Mr. Ruiz: I think they're fair standards . . . . (T. 293 1).
Mr. Gomez: No problem. (T. 2932).
Ms. Prater: I believe I can do it justly. (T. 2933).
Ms. Alston: I agree with the legislature that . . . you should err on the side of life. (T. 3714).

It was only Juror Alston whom the prosecutor sought to strike on the basis of agreement with the legislature's preference that the capital sentencer err, if at all, on the side of life.[12]

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); ***Stroud v. State,*** 656 So.2d 195 (Fla. 2d 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, 5*** 11 So. 2d 762, 764-765 (Fla. 3d DCA 1987). The prospective juror's assurance that she will follow some correct statement of the law will not support a valid strike. See ***Gilliam v. State, 645 So.*** 2d 27, 28 (Fla. 3d DCA 1994). Thus Alston's inclination to follow the law also was not a reasonable, non-pretextual basis for the prosecutor's peremptory strike.

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[12]The parties stipulated to a cause challenge to Juror Green, because of his inability to impose the death penalty under any circumstances. (T. 2230). The parties stipulated to cause challenges to Jurors Feliciano and Eomez, because of work problems. (T. 2240; 2262; 3018). The prosecutor exercised a peremptory challenge against Juror Framil because of an undisclosed prior arrest. (T. 2238). The defense exercised a peremptory strike against Juror Hubbard, because he is a corrections officer (T. 3023). The prosecutor challenged Juror Laitner for cause, because he would follow his own beliefs rather than the trial court's instructions, in the event of a conflict between the two. (T. 2253). Jurors Ruiz and Prater were selected to serve on the jury; the prosecutor challenged neither one. (T. 3011, 3465).

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C. Juror Alston's Citation to Oprah Winfrey.

The prosecutor's third reason for striking Juror Alston was her asserted citation to Oprah Winfrey. (T. 3257-3258). Nowhere in the record is there any reference of any kind by Juror Alston to Oprah Winfrey. 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. See, e.g., ***Williams v. State, 574 So.*** 2d 136, 137 (Fla. 1991); ***Brown v. State, 597 So.*** 2d 369 (Fla. 3d DCA 1992).

Furthermore, even if there were record support for this reason, a peremptory strike based on a reference to Oprah Winfrey is neither reasonable nor race-neutral Oprah Winfrey is a well-known, widely-regarded, highly successful talk show hostess, actress and producer who is African-American. It is difficult to imagine which characteristic of Oprah Winfrey -- other than her race -- would render Juror Alston's reference to her "strange and unusual."[13]

Similarly, it is difficult to imagine any characteristic of Juror Alston -- other than her race -- that motivated the prosecutor to strike her from the panel. She was the victim of a crime. (T. 3 110-3 111, 3302-05). She had no scruples against the death penalty; upon proof beyond a reasonable doubt, she could fmd the defendants guilty of first degree murder in a case in which the state is seeking death. (T. 3 144, 3146, 3149, 3504). She understood the principle of weighing aggravating and mitigating circumstances. (T. 3426-27). She believed that witnesses under oath would not ordinarily lie, but that people may honestly experience the same event differently. (T. 3549).[14] She had never before been on a jury, felt she would be a careful juror, and wanted to serve. (T. 37 13-14, *3 547-48).*

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[13]The prosecutor did not apparently find "strange and unusual" Juror Sumner's reference to the television cartoon characters Beavis and Butthead. (T. 2994). Defense counsel struck this juror for cause, over the prosecutor's objection. (T. 3034, 3043).

[14]This response inured to the benefit of the prosecution because, in the guilt phase of the case, all the evidence came from prosecution witnesses.

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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). There was no objective record basis for striking Juror Alston. The trial court's error in allowing the prosecutor to strike her violated the federal and Florida constitutions and requires reversal. ***Batson; Powers; Slappy.***

Iv. THE TRIAL COURT'S FAILURE TO PROVIDE RELIEF WHEN THE DEFENDANT BECAME ILL WITH THE FLU, SLEPT IN COURT, AND SUFFERED OTHER ADVERSE SIDE EFFECTS FROM HIS ILLNESS AND JAIL ADMINISTERED MEDICATION VIOLATED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS, PRESENCE AT AN ESSENTIAL STAGE OF THE TRIAL, AND TO ASSIST IN HIS OWN DEFENSE, AND OTHER FLORIDA PROCEDURAL RIGHTS.

A. Trial Court Proceedings

On the morning of day nine of jury selection, Mr. Smith informed the trial court that he was sick: he had chills and fever, was unable to eat, and thought he had the flu.[15] (T. 3386, 3390-91). Defense counsel moved for a one-day recess, to permit Mr. Smith to receive medical treatment and recover. (T. 3392, 3394). Alternatively, in the event the trial court denied this motion, counsel sought to waive Mr. Smith's presence until he recovered. (T. 3392). Defense counsel opined, based on conversation with Mr. Smith that morning, that his illness had so impaired his mental faculties that he could not assist counsel in jury selection. (T.3396-97).

Disregarding counsel's report upon Mr. Smith's condition, the court purported to find him

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[15]As early as day six, Mr. Smith was experiencing flu symptoms. He was fatigued and drowsy. He wanted to leave court because he was concerned that the jury would misinterpret his fatigue as boredom. The court refused to let him go. (T. 2805-8). Later that day, defense counsel had to explain to the venire that Mr. Smith's apparent unconciousness was not an indication that he lacked interest in the proceeding. (T. 3832). By day eight, Smith had reported to counsel that he was ill but unable to get treatment. (T. 3386, 3391). By day nine, he was fully symptomatic, and aware that he had come down with the flu. (T. 3390-91).

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"alert," "intelligent", and "in good shape to . . . advise counsel." (T. 3397). The trial court offered to consider medical evidence to the contrary (T. 3397); but it would not recess until the nurse who had seen Mr. Smith over the weekend reported to work (T. 3398); and it would not allow the prosecutor to bring a nurse to the courtroom to examine him there. (T. 3394). Based on this studiously uninformed finding regarding Mr. Smith's condition, the trial court denied the motion for recess, and denied the alternative motion to go to the clinic and required that Mr. Smith remain in the courtroom, sick with the flu. That morning, the jurors individually discussed their ability to understand and to apply Florida's death penalty statute. (T. 3403-3434).

By mid-morning, defense counsel reported to the court that Mr. Smith had in fact been too impaired to assist in that morning's jury selection. The court at last sent him to the clinic and directed that the jail nurse report back on the clinical findings. Rather than awaiting this report, however, the trial court resumed jury selection while Mr. Smith was away. During Smith's absence, the jurors were questioned individually about the concepts of felony murder and principle liability and about their ability to weigh accomplice testimony pursuant to instruction. (T. 3441-3474).

Upon Smith's return, the jail nurse reported that he was suffering from the flu and that the jail doctor had administered sudafed drowsy formula, tylenol for cough and stuffy nose, and Guiatuss cough medicine. (T. 3485-3486). Defense counsel renewed the motion to recess for a day or two, noting Smith's continued symptoms and incompetence to assist counsel in jury selection. (T. 3485-87). Alternatively, he moved to waive Mr. Smith's physical presence. (T. 3488).

The trial court again denied both motions and Mr. Smith remained in the courtroom for the rest of the day, during which he fell asleep. He snored so loudly that the court clerk could hear him, and defense counsel periodically had to physically awaken him. (T. 3805). Defense counsel was forced to explain to the panel that Mr. Smith was asleep because he was sick with the flu. (T. 38 11). The trial court refused counsel's additional reqeust for a recess. (T. 3558-3559). That afternoon, the jurors were questioned individually about: evaluating evidence of the defendants' confessions;

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their relationships with law enforcement officers and the effect of these relationships on their ability to serve; evaluating the credibility of police testimony; their ability to view gruesome photographs; and their prejudices, if any, against Black people generally and young Black men in particular. (T. 3488-3661).

The following morning, Mr. Smith announced he was feeling better, had twice the preceding evening been administered medication, and was to receive another dose before lunch. (T. 3636). During the lunch break, however, Mr. Smith relapsed and threw up. (T. 3636). Defense counsel renewed the motion to recess, to no avail. (T. 3696). Peremptory and cause challenges were exercised, and jury selection concluded that afternoon.

The next day, before the jury was sworn defense counsel moved to strike the third panel on the basis that the day of his clinic visit, Mr. Smith had been administered four drowsy formula sudafeds, as well as other medications which caused him to sleep through that afternoon's proceedings, with the result that he could not assist counsel in the selection of jurors from that panel. (T. 3803-04).[16] In the alternative, counsel moved to strike those five jurors selected from the third panel: Menendez, Stepherson, Coleman, Williams and Sanchez. (T. 3804). While acknowledging that Mr. Smith had fallen asleep in court, (T. 3805), the trial judge also made the entirely inconsistent finding that he had been "awake," and "alert," and had "assisted counsel in the selection

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[16]An active ingredient in sudafed plus is chlorpheniramine which, the manufacturer cautions, may cause drowsiness. PHYSICIANS DESK REFERENCE FOR NONPRESCRIPTION DRUGS 544 (12th ed. 1991). An active ingredient in Tylenol cold and flu formula is diphenhydramine hydrochloride, which may cause "marked drowsiness." *Id.* at 1346. A recent study confirms that extreme drowsiness and impairment of psychomotor performance occur within one to three hours following administration of standard dosages of chlorpheniramine and diphenhydramine. Witek, et al., "Characterization of daytime sleepiness and psychomotor performance following H^1 receptor antagonists, ANNALS OF ALLERGY, ASTHMA AND IMMUNOLOGY, Vol. 74, May, 1995. The study documents statistically significant sleepiness and significant impairment in divided attention and choice reaction tasks following administration of these ingredients. That is why people taking medication containing these ingredients are advised not to drive a car or operate heavy machinery (PDR). It hardly need be said that, for the same reasons, a person taking medication containing these ingredients should not select a capital murder jury.

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of his jury." The court concluded that Mr. Smith's intermittent unconsciousness did not "hamper his ability in any way, shape or form." (T. 3804-05).

B. The Trial Court Violated Mr. Smith's Bight to be Present at an Essential Stage of the Trial.

A criminal defendant has the constitutional and statutory right to be present at all stages of his trial where fundamental fairness might be thwarted by his absence. ***Snyder v. Massachusetts***, 291 U.S. 97, 54 S.Ct. 330 (1938); ***Francis*** v. ***State***, 413 So. 2d 1175 (Fla. 1982); Fla.R.Crim.P. 3.180. Although the defendant may waive this right, the waiver must be knowing, intelligent and voluntary. ***Turner v. State***, 530 So. 2d 45 (Fla. 1988), ***cert. denied, 489*** U.S. 1040 (1989). Where a defendant's absence from an essential stage of his criminal trial is involuntary, the state must establish, beyond a reasonable doubt, that the absence was not prejudicial. ***Garcia v. State, 492 So.*** 2d 360, 364 (Fla.), ***cert. denied, 479*** U.S. 1022 (1986).

It is Mr. Smith's position that his illness and related mental impairment during two days of jury selection constituted (a) an absence, (b) that was involuntary, (c) from an essential stage of the trial, (d) to his prejudice.

(1) Mr. Smith was Absent During Two Days of Jury Selection

The right to presence requires the defendant's mental as well as physical presence:

> The right of an accused to be present at trial is not fully accorded unless he is mentally, as well as physically, present and capable of understanding the proceedings and cooperating with his attorney. It has been held that the trial court has no discretion to go ahead with trial where the defendant is not mentally present or fully conscious of what is going on . . .

21A Am.Jur. 2d § 905.

Therefore, where a defendant is physically present, but is mentally impaired from comprehending or assisting counsel in the conduct of an essential stage of trial, the defendant has been deprived of his constitutional and statutory right to presence. ***See State v. Murphy,*** 355 P.2d

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323 (Wash. 1960)(where defendant caught cold during trial, and jail trusty administered medication containing tranquilizing agent which rendered defendant "lackadaisical", right to presence violated, court noting that "this right is of particular significance . . . where the matter of the life or death of the accused may well depend upon the attitude, demeanor and appearance he presents to the jury"); ***Reid v. State,*** 133 S. W. 974 (Tex. 1939)(where defendant unconscious for one hour after epileptic seizure in courtroom; trial court's denial of recess and requiring counsel to exercise peremptory challenges denied right to presence: "If a defendant . . . should be bodily present . . . but in an unconscious condition, it cannot avail him his right to presence in the fullest sense, for it certainly cannot be said that he has the opportunity . . . to assist ***his*** counsel"); ***People v. Berling,*** 115 Cal.App. 2d 255, 25 1 P.2d 1017 (1953)(court's failure to recess trial of intermittently unconscious defendant violated right to presence: "An interpretation of the presence rule as requiring only physical presence would lead to such an absurdity as the purported trial of an imbecile or an insane person without the least understanding of what was taking place in the courtroom. Only in the most unenlightened age could such a so-called trial be countenanced.").

During days nine and 10 of jury selection, Mr. Smith was sick with the flu: he was fatigued, unable to eat, uncomfortable and preoccupied with his illness. Jail personnel administered medication with documented side effects including extreme drowsiness and significant impairment in performing divided attention and choice reaction tasks, tasks essential to jury selection. Smith's flu symptoms and medication side effects disabled him from meaningfully assisting his counsel.

The trial court's findings that Mr. Smith was "awake," "alert" and assisting counsel are belied by uncontroverted record evidence that Mr. Smith was asleep during day nine: the proffered testimony of the court's own clerk and counsel for co-defendant that Mr. Smith was asleep, (T. 3805); defense counsel's remarks to the venire that Mr. Smith was asleep (T. 35 11); defense counsel's report to the court that Mr. Smith was asleep (T. 3558-59); and the trial court's concession that Mr. Smith had fallen asleep. (T. 3804-05). It is thus undisputed that Mr. Smith had the flu, was

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administered medications which cause drowsiness, and was asleep during selection. The defendant's illness and consequent mental impairment constituted an absence from jury selection. ***Murphy; Reid; Berling***.

(2) Mr. Smith's Absence From Jury Selection was Involuntary

Courts are enjoined to "indulge every reasonable presumption against waiver" of fundamental constitutional rights. ***Johnson v. Zerbst***, *304* U.S. 458, 464-65, 58 S.Ct. 1019, 1023 (1938). Although a defendant may waive a fundamental right like presence, the waiver must be knowing, intelligent and voluntary. ***Id.***

Where a defendant is not mentally present or, because of physical illness, is not fully conscious of what is going on, then, unless this condition is self-induced, the defendant has not knowingly, intelligently and voluntarily waived his right to be present, and the trial may not occur. 2 1A Am. Jur. 2d §905; ***Dufour v. State***, *495* So. 2d 154, 161 (Fla. 1986)(no violation where defendant absent from pretrial hearing because of hospitalization resulting from hunger strike).

Mr. Smith had the flu. He moved for a recess of the trial, so that he could recover his capacity to assist in jury selection. The trial court denied the motion forcing Mr. Smith to be physically present, but not mentally present. His mental absence from the trial was the involuntary result of the trial court's refusal to recess the trial.[17]

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[17]Nor could it be said that Mr. Smith's initial agreement to waive his presence rendered the absence voluntary. A defendant's waiver of the right to presence, made in exchange for something to which he is entitled -- medical treatment -- is invalid. ***See, e.g., United States v. Gordon, 829*** F.2d 119, 126 (D.C. Cir. 1987) (defendant's waiver of presence, made to avoid having jury observe him escorted by marshals into the courtroom, invalid; defendant should not have been forced into "Hobson's Choice" of either risking "negative inferences" arising from evidence of pretrial incarceration or remaining behind). For the same reason, Mr. Smith's physical absence, during the clinic visit, was involuntary. He could not be made to choose between remaining in court, physically disabled and mentally absent; or being physically absent in order to receive medical treatment.

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(3) Mr. Smith's Involuntary Absence Occurred During an Essential Stage of the Trial.

The examination of the jury is *an* essential stage of a criminal trial. ***Francis,*** 413 So. 2d at 1178; Fla. R. Crim. P. 3.180. During examination of the jury, the defendant has the opportunity to hear the "venire's responses to questions and to observe their reactions to him." ***United States v. Alipko,*** 944 F.2d 206,210 (5th Cir. 1991). What might otherwise go unnoted by counsel "may tap a memory or association of the defendant's which in turn may be of some use to his defense." ***Boone v. United States,*** 483 A.2d 1135, 1137-38 (D.C. App. 1984). His presence during examination of the jury thus provides a basis for "meaningful assistance to counsel, as distinguished from a proceeding involving solely points of law." ***Alipko, 944*** F.2d at 210.

Presence during examination of the jury is necessary to the effective exercise of peremptory challenges, which is also an essential stage of trial. ***See Coney v. State,*** 653 So. 2d 1008, 1013 (Fla. 1995). As this Court noted in ***Francis,*** peremptory challenges are "often exercised on the basis of sudden impressions and unaccountable prejudices based only on the bare looks and gestures of another or upon a juror's habits or associations." ***Francis,*** 413 So. 2d at 1179. Finally, the exercise of peremptory challenges is "not a mere mechanical function, but may involve the formulation of on-the-spot strategy decisions" which may be influenced by contemporaneous acts of the prosecuting attorney. ***Salcedo v. State,*** 497 So. 2d 1294, 1295 (Fla. 1st DCA 1986)(citing ***Francis,*** 413 So.2d at 1179).

Mr. Smith was sick, intermittently unconscious and otherwise too impaired to participate in days nine and ten of jury selection. During these two days, the venire was examined in detail and peremptory and cause challenges were made to members of all three venires. Mr. Smith was therefore absent from an essential stage of the trial.

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(4) Mr. Smith was Prejudiced by His Absence From Days Nine and Ten of Jury Selection.

Because of the importance of the defendant's presence during questioning and challenging of the jury, the government's burden to show that the defendant was not prejudiced by his absence is a heavy one. ***United States*** v. ***Gordon,*** 829 F.2d 119, 1123 (D.C. Cir. 1987). The defendant is "sorely handicapped and can be of little assistance to counsel when he has not had the opportunity to hear the venire's responses to questions and observe their reactions to him . . ." ***Alipko, 944*** F.2d at 210. In the present case, it wasn't simply that Mr. Smith lost an opportunity to provide meaningful assistance to counsel at this essential stage of trial. According to counsel, Mr. Smith had availed himself of this opportunity, in the week preceding his sickness, during which he had taken notes of the responses by the veniremembers, and had discussed his reactions with counsel. (T. 3440, 3806). Furthermore, the fact that counsel exhausted Mr. Smith's allotted peremptory challenges does not suggest a lack of prejudice. Had he been present, he "might well have formed impressions concerning individual jurors that would have resulted in a different exercise of peremptory challenges." ***United States v. Mackey,*** 915 F.2d 69, 74 (2d Cir. 1990).

In addition to the lost opportunity to assist counsel in jury selection, Mr. Smith's absence from this essential stage may have had an adverse effect on the prospective jurors, either "consciously or unconsciously," ***Alipko,*** at 210; ***United States v. Fontanez, 878*** F.2d 33, 38 (2d Cir. 1989) (defendant's presence during voir dire has "psychological function" for venire). As Justice Kennedy explained, concurring in ***Riggins v. Nevada, 504*** U.S. 127, 112 S.Ct. 1810 (1993), the sedating side effects of medication administered to a criminal defendant in custody can gravely damage his defense, vitiating both his right to presence and his right to counsel:[18]

"Because Mr. Smith was unable to consult with counsel during the two days of his illness, he is alleging, in addition to a violation of his right to presence, a violation of his right to counsel, under the state and federal constitutions. ***See Geders v. United States***, 425 U.S. 80, 975 S.Ct. 1330 (1976); ***Bova v. State,*** 410 So. 2d 1343 (Fla. 1982).

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> It is a fundamental assumption of the adversary system that the trier of fact is observing the accused throughout the trial . . . This assumption derives from the right to be present at trial . . . At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial . . . 'By administering medication, the state may be creating a prejudicial negative demeanor in the defendant - making him look. . . so calm or sedated as to appear bored, cold, unfeeling, and unresponsive' . . . As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to proceedings and to demonstrate remorse or compassion . . . In a capital sentencing proceeding, assessments of character and remorse may carry great weight and perhaps be determinative of whether the offender lives or dies. [citations omitted]

Id., at 142-144 (Kennedy, J., concurring).

There is simply no way '"to assess the extent of prejudice" Mr. Smith sustained by being absent during the examination and challenging of the third venire. ***Francis,*** 413 So. 2d at 1179. Under these circumstances, the trial court's error in refusing to recess the trial until Mr. Smith could recover his capacity to assist in jury selection was harmful. ***Id.***

C. The Trial Court's Failure to Order an Examination and Hearing Into the Defendant's Competency to Proceed Violated His Right to Due Process of Law, Under the Federal and State Constitutions, and His Rights Under Fla. R Crim. P. 3.210.

It is fundamental to an adversary system of justice that a person who lacks the capacity to understand the nature of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial. ***Drope v. Missouri, 420*** U.S. 162, 95 S.Ct. 896 (1975). Therefore, the due process clauses of the federal and Florida constitutions and Fla.R.Crim.P. 3.210 prohibit the criminal trial of a mentally incompetent criminal defendant. ***Pate v. Robinson,*** 283 U.S. 375, 86 S.Ct. *836* (1966); ***Hill v. State, 473 So.*** 2d 1253 (Fla. 1988). Rule 3.210(b), Fla. R. Crim. P. (1995), provides that if, at any material stage of the proceeding, the court has reasonable grounds to believe that the defendant is not mentally competent to proceed, it must order an examination and a hearing to determine his condition. Even where a defendant is competent at the

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commencement of a trial, the court must be alert to circumstances comprising reasonable grounds to believe that he has since become incompetent to proceed. ***Drope,*** 95 S.Ct. at 904.

In determining whether there are reasonable grounds to believe a defendant is incompetent, a trial court must consider as true all evidence before it including evidence of the defendant's behavior, his demeanor, and medical opinions bearing on his competence. ***Drope,*** 95 S.Ct. at 908. A defense attorney's expression of doubt about his client's competency also should weigh heavily in the court's decision whether to order an examination and hearing. ***United States v. Renfroe, 825*** F.2d 763,767 (3d ***Cir.*** 1987); ***Scott v. State, 420 So.*** 2d 595 (Fla. 1982). A court's failure to order a hearing when presented with reasonable grounds to believe the defendant may be incompetent violates the defendant's right to due process of law. ***Scott, 420*** So.2d at ***596; Kothman v. State, 442*** So. 2d 357 (Fla.App. 1st DCA 1983).

Where the trial court is on notice that a defendant is on medication which may adversely affect his ability to understand and assist counsel in the proceedings, it has reasonable grounds to believe the defendant may be incompetent, and must order examination and hearing. ***Moran v. Godinez, 40*** F.3d 1570, 1572 (9th Cir. 1994); ***Renfroe,*** 825 F.2d at 767; ***Fallada v. Dugger,*** 819 F.2d 1564, 1569 (11th ***Cir.*** 1987); ***Manley v. United States, 396*** F.2d 699, 702 (5th Cir. 1968). The fact that the defendant appears competent to the trial court does not obviate the requirement of a hearing, if the trial court knows that the defendant is on medication which is likely to impair his mental faculties. See ***Hansford v. United States, 365*** F.2d 920 (D.C.Cir. 1966)(error not to order evaluation where trial court knew defendant used narcotics during part of trial and may have suffered withdrawal at end of trial, despite appearance of competency; Court noted demeanor not dispositive . . . "because lay observations are often inaccurate")." ***See also Campbell v. State, 488***

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[19]As the United States Supreme ***Court*** recognized ***in Sanders v. United States, 373 U.S.*** 120, 83 S.Ct. 1068, 1079 (1963), "whether or not [a defendant] was under the influence of narcotics [during trial] would not necessarily have been apparent to the trial judge." See ***also Pate, 86*** S.Ct.

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So. 2d 592 (Fla. 2d DCA 1986)(when defendant undisputedly "under medication" at time of plea, and somewhat inarticulate during colloquy, trial court's assessment of defendant's demeanor did not overcome post-conviction allegations of incompetency).

On day nine of jury selection, Mr. Smith notified the trial court that he was sick with the flu and required medical treatment. The jail doctor confirmed that he had the flu, and administered various medications. As discussed ***supra,*** the pharmacology of these medications indicates that, within one to three hours following administration, patients exhibit extreme drowsiness as well as statistically significant impairment in psychomotor functions, such as divided attention and choice reaction tasks. See footnote 16, ***supra.*** Clearly, extreme drowsiness, as well as significant impairment in performance of divided attention and choice reaction tasks would adversely affect a person's ability to select ***a*** jury. ***See, e.g. Riggins, 504*** U.S. at 137, 112 S.Ct. at 1816 (where defendant administered medication with documented side effects of "drowsiness or confusion," it was "clearly possible that such side effects impacted . . [defendant's] ability to follow the proceedings, or the substance of his communication with counsel" and that "defense was impaired due to the administration" of medication).

Indeed, defense counsel repeatedly advised the court, throughout days nine and ten, that Mr. Smith's illness and the side effects of the medications rendered him too impaired, both physically and mentally, to be able to attend to the proceedings or to assist counsel in the selection of the jury.[20] Furthermore, defense counsel himself was reluctant to confer with Mr. Smith, assuming ***arguendo*** his ability to confer, for fear of contracting his flu at the commencement of this capital murder trial.

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at ***842; United States v. Mason, 52*** F.3d 1286, 1293 (4th Cir. 1995).

[20]Where, as here, defense counsel repeatedly argues to the trial court that the defendant is not competent to proceed, the failure specifically to request a competency hearing does not operate as a waiver of his right to have the court inquire upon reasonable grounds. ***Pate, 86*** S.Ct. ***at*** 841. The court has a duty ***sua sponte*** to order examination and hearing upon reasonable grounds. Fla.R.Crim.P. 3.210(b).

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Finally, the trial court itself, while purporting to find that Smith's demeanor demonstrated his ability to consult with counsel, acknowledged that he was in fact intermittently unconscious during these two days of trial.

Mr. Smith is not suggesting that evidence that he was on medication alone required a hearing into his competency. See *Fallada*. Nor is he suggesting that evidence that he fell asleep during trial alone required a hearing. See *Watts v. State*, 537 So. 2d 699 (Fla. 4th DCA)(defendant slept through much of trial but, upon inquiry, denied taking narcotics, and provided lucid explanation for conduct; defense counsel remained silent during defendant's explanation and did not seek inquiry; and defendant did not disclose until after conviction that sleeping attributable to narcotics use), *rev. denied*, 545 So. 2d 1370 (Fla. 1989). But where, as here, (1) the trial court knows that the defendant is on medication that could impair his mental faculties, (2) defense counsel repeatedly informs the trial court that the medication, and the condition for which it was administered, have rendered the defendant incapable of attending to and assisting in the conduct of trial, and (3) the trial court itself observes that the defendant has fallen asleep during the course of the proceedings, the trial court has reasonable grounds to believe the defendant may be incompetent and errs in failing to order examination and hearing thereon.

V. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS MR SMITH'S SUPPOSED CONFESSION ELICITED THROUGH UNCOUNSELED CUSTODIAL INTERROGATION AFTER SMITH HAD ALREADY BEEN INDICTED AND APPOINTED COUNSEL, AND WHERE AN-Y WAIVER OF HIS RIGHTS TO SILENCE AND COUNSEL WERE NOT KNOWINGLY AND INTELLIGENTLY GIVEN, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND *16.*

Mr. Smith was arrested in Tallahassee on May 2, 1991. (T. 864, 940-41, 982-85). By this time, an initial indictment, and a superseding indictment, had already been filed charging him with first degree murder. (R. 1-7, 8-14). An attorney had been appointed to represent him in this case

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nearly one month earlier. (T. 125-27, 1035-38). Notwithstanding the pendency of the indictment and his representation in this case by counsel, Mr. Smith was interrogated by FDLE Agent Cornelius who arrested him, (T. 986-90, 5534-35), and Metro-Dade Homicide Detective Romagni who flew to Tallahassee from Miami specifically to interrogate him. (T. 941-50, 5571-74). Cornelius secured a written, standard waiver of *Miranda* rights prior to his interrogation. (T. 985-86, 993). However, Cornelius never indicated that he advised Smith that he had already been indicted for the murder about which he was being interrogated and that he had already had counsel appointed to represent him in this case. Likewise, Detective Romagni secured a standard written waiver of *Miranda* warnings prior to his three to six hour interrogation of Smith. (T. 945-46, 951, 5574-75, St. Ex. 97). However, Romagni, too, never advised Smith that he had already been indicted for the murder about which he was being interrogated and that he had already been appointed counsel to represent him. (T. 964-66, 5614).

Mr. Smith moved to suppress his statements based, *inter alia*, on the violation of his constitutional right to counsel and because his statements were not freely and voluntarily given (R. 384-85; T. 1147-55). Following an evidentiary hearing, (T. 939-1009, 1035-38, 1126-61), the trial court denied Mr. Smith's motion. (T. 1162). The motion was renewed, but denied, at trial. (T. 5552-57).

A. Violation of Mr. Smith's Sixth Amendment and Article I, Section 16, Right to Counsel.

The purpose of the sixth amendment right to counsel "is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil* v. *Wisconsin*, 501 U.S. 171, 177-78, 111 S.Ct. 2204, 2209 (1991)(citation omitted). The right attaches when "judicial criminal proceedings" commence:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the

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> starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Kirby v. Illinois, 406 U.S. 682, 689-90, 92 S.Ct. 1877, 1882-83 (1972). In Florida, the right attaches at the earliest of the following points: "When he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance." ***Phillips v. State,*** 612 So.2d 557, 559 (Fla. 1992)(quoting *Traylor v. State, 596* So.2d 957, 970 (Fla. 1992)). "Once the right attaches, an accused is entitled to assistance of counsel at each 'critical stage' of the prosecution, including police questioning." ***Owen v. State, 596*** So.2d 985,989 (Fla. 1992)(citing ***Michigan v. Jackson, 475*** U.S. 625, 106 S.Ct. 1404 (1986)). "Where the right has attached and been invoked, any subsequent waiver in the absence of counsel during police-initiated questioning is invalid. *Id.*

In a ***highly*** analogous ***case, this court in Phillips*** v. St&, 612 So.2d 557 (Fla. 1992), reversed the defendant's conviction based on a confession elicited in violation of his right to counsel under both United States and Florida constitutions. Following his arrest in connection with the robbery, kidnapping, and murder of a liquor store clerk, Phillips gave police a statement denying any knowledge of the crime. *Id.* at 558. Several hours after a public defender was appointed at first appearance on the next day, police initiated another interview in the absence of counsel. After Phillips signed a ***Miranda*** waiver, police elicited inculpatory statements during two interrogation sessions. This court concluded that Phillips's right to counsel had attached and been invoked prior to the police-initiated interrogations which elicited incriminating statements. Since these interrogations were conducted without counsel, the resulting statements were inadmissible.

In the instant case, as in ***Phillips,*** by the time FDLE Agent Cornelius and Detective Romagni

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interrogated Mr. Smith on May 2nd and 3rd, he had already been indicted and appointed counsel. Thus, his right to counsel had attached and been invoked. Accordingly, any waiver of Smith's *Miranda* rights during this police-initiated questioning was invalid, *Owen,* and his statements to the law enforcement officers should have been suppressed.

The state will undoubtedly argue that because Mr. Smith did not specifically request an attorney, and was not even aware one had been appointed, prior to his interrogations, he had never "invoked" his right to counsel so as to benefit from this protection. *See Phillips,* 612 So.2d at 559 n. 2. Any such position ignores the expansive right to counsel in Florida and the importance of that right under both the United States and Florida constitutions. For instance, Florida Rule of Criminal Procedure 3.111 provides:

> (a) **When Counsel Provided,** A[n indigent] person *shall* have counsel appointed when he is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committee magistrate, whichever occurs earliest. (Emphasis added).

In other words, in Florida, a court is obliged to appoint counsel to an indigent defendant as soon as he is formally charged by indictment or information. This rule is obviously to ensure that upon this initiation of "judicial criminal proceedings," a defendant will have the advice of an expert schooled "in the intricacies of substantive and procedural criminal law," to stave off the assault of the "prosecutorial forces of organized society," including police questioning. From this point forward, a defendant is entitled to have counsel serve as a "medium" between him and the state. This role of counsel is so important that a defendant need not do anything to secure this right: "The failure of a defendant to request appointment of counsel or the announced intention of a defendant to plead guilty shall not, in itself constitute a waiver of counsel at any stage of the proceedings." Fla. R. Crim. P. 3.111(d)(1).

By the time Mr. Smith was interrogated in Tallahassee, his right to counsel had attached. *Phillips; Traylor*. The trial court, obviously aware of Smith's indigency, had previously fulfilled

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its obligation and appointed counsel to represent Smith. This procedurally mandated appointment constituted an adequate "invocation" for purposes of article I, section 16, and the sixth amendment. Any ruling to the contrary would render this required act a nullity. Thus, because Mr. Smith's right to counsel had attached and been invoked, his subsequent waiver in the absence of counsel during police initiated interrogation was invalid and his statements should have been suppressed.

B. No Valid Waiver of Mr. Smith's *Miranda* Rights.

Under ***Miranda v. Arizona,*** 384 U.S. 436, 86 S.Ct. 1602 (1966), the admission of statements elicited through custodial interrogation outside the presence of counsel is conditioned upon the government's ability to show "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475, 86 S.Ct. at 1628; ***see Moran v. Burbine, 475*** U.S. 412,421, 106 S.Ct. 1135, 1141 (1986).

In the instant case, Mr. Smith's purported ***Miranda*** waivers were invalid in that they failed to reflect a free and deliberate choice absent deception, or ones made with full awareness of the essential surrounding circumstances. Crucial to any "knowing and intelligent" waiver, the interrogating officers failed to advise Mr. Smith that he had been indicted for first degree murder, an offense which carried the death penalty. Likewise, Smith had not been advised that he had already been appointed legal counsel to represent him in these proceedings. ***See Haliburton v. State,*** 514 So.2d 1088 (Fla. 1987). Absent an advisement of these crucial circumstances bearing on the officers' interrogation, any waivers cannot be deemed to have been valid. For these reasons, too, Mr. Smith's statements should have been suppressed.[21]

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[21]Mr. Smith maintains that Detective Romagni's failure to advise him that he already had been indicted for a capital offense and had counsel appointed, which Romagni knew or reasonably should have known, (T. 959-65), also violated Mr. Smith's due process rights and required suppression of ***his*** confession. ***See Haliburton; see also Miller v. Fenton, 474*** U.S. 104, 109-10, 106 S.Ct. 445,449 (1985).

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VI. THE TRIAL COURT REVERSIBLY ERRED BY FAILING TO SEVER MR. SMITH FROM HIS CODEFENDANTS WHERE EACH OF MR SMITH'S NON-TESTIFYING CODEFENDANTS GAVE CONFESSIONS STATEMENTS INCRIMINATING MR. SMITH AND WHERE THE REDACTED STATEMENTS, CONSIDERED TOGETHER, UNQUESTIONABLY IMPLICATED MR SMITH, IN VIOLATION OF THE RIGHT TO CONFRONTATION PROTECTED BY THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 9.

At the time of their arrests, codefendants Austin and Bryant gave sworn statements implicating themselves and Mr. Smith. Mr. Smith moved for severance urging that the introduction of these statements of his non-testifying codefendants at a joint trial would violate his constitutional right to confront the witnesses against him. (R. 380-381). Following a hearing, (T. 1303-86), the court denied Smith's motion. (R. 453-54). Accordingly, the statements of Austin and Bryant were redacted to eliminate any reference to Mr. Smith, generally substituting symbols such as "this person," or "others," (including Smith). (R. 581-623 (Austin unredacted); R. 935-975 (Austin redacted); R. 626-651 (Bryant unredacted); R. 909-934 (Bryant redacted)). The jury was instructed several times not to use these statements against Smith. (T. 4465, 4491, 4582). Nonetheless, given the interlocking nature of these confessions with Smith's post-arrest statement to Romagni, and Knolden's testimony, the confessions of Austin and Bryant, even in their redacted form, were so powerfully incriminating of Smith that the jury could not have followed its instructions to ignore them as to him.[22] Mr. Smith renewed his request for severance throughout trial and at the times his non-testifying codefendants' confessions were introduced. (T. 4453, 4550, 4590). The trial court denied each of these renewed requests for severance. (*Id.*).

A defendant's sixth amendment right to confront his accuser is violated when a

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[22] Predictably, shortly after the jury retired, it specifically requested, and was provided, the redacted statements of Austin and Bryant. (R. 10 18; T. 5941-42). This provided the jury an easy opportunity to compare the two side-by-side, and together with their recollection of Smith's confession and Knolden's testimony, fill in the blanks with Smith's name. (T. 5984-85).

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codefendant's confession, which incriminates the defendant, is admitted into evidence and the codefendant does not testify. *E.g.*, ***Bruton v. United States***, 391 U.S. 123, 88 S.Ct. 1620 (1968); see ***Bryant v. State,*** 565 So.2d 1298, 1302 (Fla. 1990). The Court recognized in ***Bruton*** that, even where a jury is instructed to disregard the codefendant's confession that incriminates the defendant, such an instruction is inadequate to protect the defendant:

> There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id., 391 U.S. at 135-36, 88 S.Ct. at 1627-28 (citations omitted).

In ***Cruz*** v. New ***York,*** 481 U.S. 186, 107 S.Ct. 1714 (1987), the Court resolved that exclusion (or severance) is required even where the defendant's own confession "interlocks" with the non-testifying codefendants' confessions. Indeed, the Court observed that, the more a codefendant's confession tends to confirm the defendant's confession, the greater the need for severance:

> [I]t seems to us that 'interlocking' bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession.

Id. at 192, 107 S.Ct. at 1718. Thus, the Court held in ***Cruz*** that "where a non-testifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." ***Id.*** at 17 19.

Although redaction may cure the problem of a jury ignoring the court's instruction and submitting to the tendency to consider a codefendant's confession against the defendant, the United

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States Supreme Court has approved this alternative to severance only where "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." ***Richardson v. Marsh***, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987). The standard for evaluating a ***Bruton*** violation is: "[I]f the jury was 'highly likely' to determine from a codefendant's statement that the defendant was the nameless individual incriminated by the statement, a ***Bruton*** violation has occurred, even if the inference drawn from the codefendants's statement is incriminating only when considered in light of other evidence offered at trial." ***Delgado v. State, 574*** So.2d 1129, 1130 (Fla. 3d DCA 1991)(citations omitted).

In the instant case, notwithstanding the redactions of Austin's and Bryant's statements and the instructions to the jury that these statements should not be considered against Smith, it is "highly likely' tbat the jury was able to, and did, determine that Austin and Bryant incriminated Smith with their statements. This was not the case of ***Richardson*** where the statements were redacted "to eliminate not only [Smith]'s name, but any reference to his . . . existence." Id. 481 U.S. 211, 107 S.Ct. at 1709. To the contrary, Austin's and Bryant's statements vividly indicated the participation of several unidentified persons in the crimes they confessed. Their confessions severely incriminated these other persons. Austin's statement identified Tawanah Glass, Kevin Knolden, Tony [Cobb], and himself as participants in the brutal crimes he confessed. In addition to the persons identified in his statement, the statement made numerous references to "someone." (R. 943, 947, 960). The written version of the statement, which the jury requested and received, obviously had been typographically altered. It contained numerous blanks where obvious references to other participants had been made but eliminated. (R. 940, 943, 945, 947, 951, 952, etc.). Numerous symbols indicating other unidentified persons had an obviously different typeset from the rest of the text. (R. 940 ("and two others;" Tony and "someone"). 945 ("While we were doing that, they;" "Well, one ran"); 947 ("someone grabbed;" 'Someone and Tony"); 951 ("me, Tony, and some others"); 952 ("did anyone ask you"); 956 ("And what did he do;" "One was grabbing"), etc.).

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Inappropriate punctuation and capitalization in the written statement also indicated it had been altered. (R. 940 ("what were you doing"); 945 ("yes."); etc. The only participants not identified in Austin's statements who were identified at trial were Smith and Bryant.

Likewise, Kelvin Bryant's statement specifically identified "K" [Kevin Knolden], (R. 914), "a girl" [Tawanah Glass, the only female participant], (R. 914), and Tony [Cobb], coparticipants with Bryant in the offenses to which he confessed. This statement, too, repeatedly referred to other unidentified persons in a typeset different from the rest of the text. (R. 918 ("me and someone else"); 920 ("I think to someone's house); 924 (me, "K," Tony, some other"); etc.). This written statement is also riddled with blank spaces where the text indicates other persons were identified. The only persons who were involved in the trial and were not specifically identified in Bryant's statement were Smith and Austin.

As in *Cruz*, given the interlocking nature of Smith's own confession with the sworn statements of Austin and Bryant, Austin's and Bryant's symbolic references to Smith virtually screamed Smith's name.[23] Smith, for instance, stated in his statement that after the robbery, he got into Cobb's car with Cobb. (R. 492). In his statement, Austin said that "someone" and Tony [Cobb] got into Cobb's car. (R. 947). Smith admitted in his statement that he went to his house and retrieved the silver duct tape from his stepfather's tool box that was ultimately used to tape the victims. (R. 493). Austin's statement indicates that after he had gotten his tape, "someone" didn't want that tape and went to "his home" and shortly afterwards returned with "the tape" and said, "Let's go." (R. 951-52). Bryant's statement stated that "somebody" had an idea to get some tape and the group went to the house to get the tape which was gotten to "tape the people up" because

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[23]The announcement of Smith's identity in Austin's and Bryant's statements was particularly vivid given the relatively simple fact pattern and the substantial degree to which Smith's alleged confession corroborated Austin's and Bryant's confessions. Because the degree of interlocking bears a positively inverse relationship to devastation, *Cruz*, 48 1 U.S. at 192, 107 S.Ct. at 1718, Austin's and Bryant's statements were "enormously damaging" to Smith. Id.

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"they wanted to kill them." (R. 920-21). In Austin's statement he said "someone" gave the instructions to take the victims out of the trunk at the top of the bridge. (R. 96 1). Bryant said "one" said, "over here," meaning "throw her over right there." Obviously, neither Austin nor Bryant were referring to themselves in these parts of their statements. The only unidentified person left to fill this devastating role, the person Austin and Bryant claimed ordered the killing, was Smith.

Kevin Knolden's testimony, impeached and contradicted as it was, also interlocked with Austin's and Bryant's statements and assisted in identifying the symbols in their statements as Smith. For instance, Knolden testified that Smith was among the last to return from dropping the female off the bridge and said "she was kicking [in the water.]" (T. 5208). This identified the person in Austin's statement who he said watched as the female was thrown from the bridge, claimed to have seen her hit the water, and then "started laughing, saying, "look at her, look at her." (R. 963-64). Similarly, Knolden testified that, after the male captive was thrown off the second bridge, Smith stayed on the bridge and reported back that the "guy broke loose." (T. 5213-14). This testimony clearly identified the person Austin referred to as "someone" who at this point, after watching the male victim fall to the water, reported back to the group, "the bitch got loose." (R. 967). Knolden testified that Smith doused the Maxima with gasoline. (T. 5217). This further served to identify Smith as "somebody" in Austin's statement who he claimed poured the gasoline on the car. (R. 969).

In these ways, notwithstanding the trial court's efforts to shield the jury's eyes and ears from Austin's and Bryant's confessions which devastatingly incriminated Smith, the jury could not help itselfbut to accept Austin's and Bryant's statements as trumpeting Smith's guilt. It is precisely for this reason that the Court ***in Richardson*** went only so far as to conclude that "the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when. . . ***the confession is redacted to eliminate not only the defendant 's name, but*** my ***reference to his. . . existence." Id.,*** 481 U.S. at 211, 107 S.Ct. at 1709 (emphasis added).

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The use of symbols in the instant case was simply too transparent to shield the jury from Austin's and Bryant's "powerfully incriminating" accusations against Smith. Absent the ability to thoroughly cross-examine these devastating accusers, Smith's constitutional confrontation rights were egregiously violated.[24]

The violation of Smith's confrontation rights cannot be deemed harmless. The evidence supported a colorable argument that Romagni, who destroyed his notes and failed to secure a taped confession, fabricated Smith's confession. (T. Supp. 24-30). Even accepting Smith's supposed statement at face value, it portrays Smith as a lookout and a follower, uninvolved with most of the particularly heinous aspects of the crimes. The only other evidence against Smith was that of Knolden, the state's impeached and contradicted star witness, who had the greatest incentive to lie by minimizing his own role (which others described as a leader) and by ascribing this role to someone else, Smith. For these reasons, the *Bruton* error was harmful and requires reversal of Smith's conviction.[25]

VII. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE OF MR SMITH'S UNCHARGED SEXUAL BATTERY ON GIBBS WHICH WAS NOT CLEARLY AND CONVINCINGLY ESTABLISHED, INEXTRICABLY INTERTWINED WITH THE CHARGED OFFENSES, AND FOR WHICH THE DANGER OF UNFAIR PREJUDICE OVERWHELMINGLY OUTWEIGHED ANY PROBATIVE VALUE.

Over objection, (T. 5188), the trial court permitted the state to introduce evidence of criminal misconduct that was not charged in the indictment. The state elicited from cooperating codefendant Knolden that, over gagged and blindfolded victim Bridgette Gibbs's cries for mercy, Ronald Smith

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[24]Mr. Smith was also denied the right to impeach declarants Austin and Bryan under section 90.806 because their statements purportedly were not evidence against Smith. (T. 4625-35).

[25]The *Bruton* violation was exacerbated by the state's closing argument. This issue is addressed in argument VI, *infra*, but also must be considered here. Additionally, the devastating *Bruton* implications during the penalty phase are discussed in argument X, *infra*.

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brutalized her by inserting a foreign object into her vagina while other codefendants held her down. (T. 5184-85, 5191-92).[26] This testimony was permitted though Knolden could not recall who had removed the victim's pants, (T. 5293), the size of the stick, (T. 5283), where Smith got the stick, how many times he inserted it, or how far he inserted it. (T. 5287). In response to specific police questioning following his arrest, Knolden stated there had been no rape. (T. 5197). Indeed, when asked if he remembered who took Gibbs's pants off, Knolden responded, "I don't recall her pants coming off at all." (T. 5292). When his lawyers initially asked him if there had been any sexual assault or rape, Knolden said, "No." (T. 5293-94). The first time Knolden ever made a sworn statement regarding any sexual assault was at his August 9, 1993, deposition, two and one-half years after the incident and 10 days after his plea bargain with the state. (T. 5295-96). Flatly contradicting Knolden, the medical examiner, after specifically looking for evidence of sexual injuries, testified that Gibbs suffered no vaginal trauma. (T. 5029-5030, 5033-37).[27]

In the state's account of Mr. Smith's alleged confession, Smith never stated that he or anyone else raped or sexually battered the female captive. (T. 5597). Likewise, in Austin's sworn statement, he did not recall anyone trying to rape the female. (T. 4519). Although Detective McDermott testified that Bryant thought someone had removed the female's pants, Bryant swore in his statement that no one had attempted or completed any sexual act. (T. 4575, 4607). Finally, though Tawanah Glass testified that Austin told her that they stuck a stick inside the female victim, (T. 4843), Austin's statement did not specifically implicate Smith. Indeed, any statement he made to Glass most likely arose from the apparent talk that one or more of the assailants contemplated

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[26]Upon Smith's request, the court instructed the jury that the defendants were not on trial for any crime not included in the indictment. (T. S 190).

[27]The trial court excluded evidence that Knolden failed numerous polygraphs administered at different times by three different expert polygraphers, regarding the limited role he claimed in the crimes. *See* argument IX, *infra*. This evidence would have impeached Knolden on the sexual battery issue, too.

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raping the victim, and his desire to defend his fidelity with Glass.

The sexual battery evidence had no relevance other than to improperly imply Mr. Smith's bad character and propensity to commit violent, criminal acts. It was not inextricably intertwined with the evidence regarding the charged offenses. Clearly, its danger of unfair prejudice overwhelmingly outweighed any probative value it might have had. Section 90.403, Fla. Stat.

In *Griffin v. State,* 639 So.2d 966 (Fla. 1994), this court considered the admissibility of certain evidence reflecting uncharged misconduct which arose from circumstances surrounding the charged offenses. This court observed that "[g]enerally, the test for the admissibility of evidence is relevance. Section 90.402, Fla. Stat. (1991). Relevant evidence is defined as 'evidence tending to prove or disprove a material fact.' Section 90.401, Fla. Stat. (1991)." *Id.* at 968. "[R]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." *Huddleston v. United States, 485* U.S. 68 1, 689, 108 S.Ct. 1496, 1501 (1988)(citation omitted). Thus, "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* In Florida, the state must prove by clear and convincing evidence that the defendant was the perpetrator of the uncharged act. *E.g., State v. Norris,* 168 So.2d 541, 543 (Fla. 1964); *Chapman v. State,* 417 So.2d 1028, 103 1 (Fla. 3d DCA 1982).

In the instant case, the state failed to prove by clear and convincing evidence that Ms. Gibbs was sexually battered and that Smith was the perpetrator of any such crime. Smith never acknowledged any sexual battery in the statement the state claims he gave. Austin and Bryant specifically denied any sexual battery in their alleged confessions. The only witness who claimed Gibbs was sexually battered was Knolden. Knolden's allegation did not emerge until more than two and one-half years after the charged offenses, and 10 days after he desperately pled guilty to avoid possible imposition of the death penalty. He failed to mention any sexual battery when he confessed upon his arrest one week following the offenses, or during interviews with his lawyers and other

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police officers up until the time that he pled guilty. Of greatest significance, the medical examiner who examined Ms. Gibbs's body less than 12 hours after her death and who conducted the autopsy testified that there was no trauma to Gibbs's vagina. This evidence failed to clearly and convincingly establish any sexual battery, much less one committed by Mr. Smith.

In *Griffin* this court also clarified the reach of the "*Williams*[28] rule." *Id., 639* So.2d at 968-69. The *Williams* rule *is* limited *to* "[s]imilar fact evidence." *Id.* at 968 (citation omitted). "'Evidence of uncharged crimes which are inseparable from, . . . [or] inextricably intertwined with [,] the crime charged, is not *Williams* rule evidence. It is admissible under section 90.402 because 'it is a relevant and inseparable part of the act which is in issue . . . . [I]t is necessary to admit the evidence to adequately describe the deed.'" *Id.* (quoting C. Ehrhardt, FLORIDA EVIDENCE § 404.17 (1993)). Professor Ehrhardt has further described inseparable acts as those "so linked together in time and circumstance with the happening of another crime, that the one cannot be shown without proving the other." FLORIDA EVIDENCE at 177-78 (1994). Such evidence is admissible "where it is impossible to give a complete or intelligent account of the crime charged without reference to the other crime." *Id.* at 178. This exception to the general rule of exclusion must be narrowly interpreted to ensure it does not swallow the rule. *Id.* at 178-79.

In the instant case, neither the uncharged sexual battery nor the uncharged robberies were so linked with the charged offenses as to render them inextricably intertwined. It was certainly not "impossible" to give a complete or intelligent account of the charged crimes without reference to these uncharged acts. They were not necessary to demonstrate relationship or critical circumstance. Assuming the sexual assault occurred, it was, at best, spontaneous and not an integral part of the charged crime spree. The state's evidence could easily have been presented without reference to these uncharged acts. Thus, this evidence should have been excluded. See *Griffin*; *Tumulty v.*

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[28] *Williams v. State,* 110 So.2d *654, 662* (Fla.), *cert.denied,* 361 U.S. 847 (1959).

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State, 489 So.2d 150, 153 (Fla. 4th DCA), *rev.denied, 496* So.2d 144 (Fla. 1986).

Assuming, *arguendo*, the evidence of sexual battery and intended but uncommitted robberies was relevant and inextricably intertwined with the evidence of the charged offenses, it should still have been excluded because its probative value was substantially outweighed by its danger of unfair prejudice. ***E.g., Cooper v. State, 659*** So.2d 442 (Fla. 2d DCA 1995); ***Herbert v. State, 526*** So.2d 709,713 (Fla. 4th DCA), rev. ***denied, 53*** 1 So.2d 1355 (Fla. 1988). The "unfair prejudice" standard is intended to bar evidence "which inflames the jury or appeals improperly to the jury's emotions." ***State v. McClain***, 525 So.2d 420,422 (Fla. 1988)(citation omitted).

The evidence established that, on the morning of February 6, 1991, Mr. Smith ran with a gang that senselessly robbed and kidnapped two people, ultimately killing one and attempting to kill the other. The dubious suggestion that Mr. Smith sexually brutalized Ms. Gibbs, as she was held down, bound and gagged, pleading for her life, was of such an inflammatory nature as to prevent the jury from deciding the relevant issues based on the evidence, instead of emotion. This evidence unfairly and improperly suggested a heightened level of cruelness on Smith's part and improperly impugned Smith's character and implied a propensity to commit violent offenses. For all of these reasons, the trial court abused its discretion in admitting this evidence. Section 90.402, 90.403, Fla. Stats. Accordingly, Mr. Smith's convictions must be reversed.

VIII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. SMITH'S MOTIONS FOR MISTRIAL BASED ON THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT AND ELSEWHERE THROUGHOUT THE TRIAL.

A. Improper Closing Argument

In ***Berger v. United States***, 295 U.S. 78, 55 S.Ct. 629 (1936), the Court emphasized that the prosecuting authority is not "an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." ***Id.*** At 88, 55

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S.Ct. At 633. Accordingly, the prosecutor must not strike foul blows and must "refrain from improper methods calculated to produce a wrongful conviction . . . ." *Id.; see Peterson v. State, 376* So.2d 1230, 1234, 1235 (Fla. 4th DCA 1979). When such egregious tactics are used which prejudice the defense, a defendant's conviction must be reversed. *Alvarez v. State, 374* So.2d 1119 (Fla. 3d DCA 1991); *see also Rosso v. State, SO5* So.2d 611 (Fla. 3d DCA 1987).

Any comment on the defendant's silence is viewed as egregious argument. As the Court stated *in Griffin v. California, 390* U.S. 609, 85 S.Ct. 1229 (1965):

> [C]omment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," [citation omitted], which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on a privilege by making its assertion costly. . . . What the jury may tier, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Id. at 614, 85 S.Ct. 1232-33. Florida courts are particularly solicitous of a defendant's right to be protected against a jury's improper inference from his silence. Florida's "very liberal rule" is: "If the comment is 'fairly susceptible' of being interpretted by the jury as a comment on the defendant's right to remain silent it will be treated as such. *Jackson v. State, 522* So.2d 802, 807 (Fla. 1988)(citations omitted).

Arguments designed to appeal to passion or prejudice are also considered misconduct under Florida law. "The prosecutor should not use argument calculated to inflame the passions or prejudices of the jury." ABA STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-5.8C(c) (2d ed. 1982). Name calling is a notoriously common form of this type of prosecutorial misconduct. ALSCHLJLER, COURTROOM MISCONDUCT BY PROSECUTORS AND TRIAL LAWYERS, 50 Tex. L. Rev. 629,642 (1972). As this court stated in *Bertolotti* v. *State, 476* So.2d 130, 134 (Fla. 1985):

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict

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> reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Such improper arguments warrant reversal of a defendant's conviction. See, e.g., ***Blanco v. State,*** *7* So.2d *333,339* (Fla. 1942); ***Classman v. State,*** *377* So.2d 208,211 (Fla. 3d DCA 1979).

Lastly, a prosecutor must not mistake the evidence or mislead the jury about inferences it may draw. ABA STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standards 3-5.8(a), 3-5.9. "[I]mproper suggestions, insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." ***Berger***, 295 U.S. at 88.

1. Prosecutor's Comment on Mr. Smith's Exercise of Right to Silence.

In its closing argument, the state made several arguments "fairly susceptible" of being interpreted by the jury as comments on Mr. Smith's right to remain silent. In responding to the evidence and argument regarding police misconduct, and more specifically Mr. Smith's argument that his confession was fabricated by police and reflected the same type of police misconduct demonstrated by the beating of Knolden, the prosecutor argued:

> Did anyone get up here and say McDermott acted wrongly or did anyone get up here and say Romagni acted wrongly when these defendants confessed to them? Was that in one iota of testimony? Was there a single individual witness who suggested that actually took place? No.

(T. 5734). Counsel's objection, (T. 5734-35), was denied. (T. 5775). Returning to this theme later, the prosecutor again urged the jury to disbelieve the officers fabricated Smith's confession because Smith never took the stand and denied making the statement:

> Is there any evidence whatsoever? Is there a word that says that Romagni's version of [Smith's statement] was incorrect, or what he wrote down in his notes or record is anything but one hundred percent accurate?
>
> [Defensen counsel] said in opening -- he said he is going to contest it. Well, you can contest it when the sun rises in the east and sets in the west, but that doesn't make it so.

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What the jury has to rely on is evidence. You have one piece of evidence on that --

(T. 5802-03). The court overruled Mr. Smith's objection and denied his motion for mistrial. (T. 5803). Continuing to emphasize the impermissible inference of guilt from silence, the prosecutor returned, yet a third time, to the police misconduct argument:

> I already talked to you about how painting everything with that big brush is if you do it to police officers, as if you do it to anybody else, because there was not one word of evidence, not a single bit of testimony that Detective James McDermott and Detective Thomas Romagni acted improperly when they questioned Ronald Lee Smith. . . .

(T. 5806). Again, Smith's objection was overruled. (T. 5806, 5826-27).

As trial counsel urged below, this argument clearly highlighted Mr. Smith's failure to take the stand in his own defense. There were only two witnesses to Smith's interrogation: Romagni and Smith. The jury had heard from Romagni; the only other person who could have provided "evidence" or "a word" that Romagni's version of the statement was incorrect was Smith. The prosecutor's argument clearly invited the jury to believe Romagni's testimony about Smith's supposed confession because Smith had failed to testify that the statement was fabricated. The argument, concommitantly, invited the jury to convict Smith based on the forbidden inference that, because he failed to testify that Romagni's testimony was false, Romagni's rendition of Smith's statement must be accurate and Smith must be guilty. See *United States v. Flannery*, 451 F.2d 880, 881-82 (5th Cir. 1971).

2. Prosecutor's Use of Codefendants' Confessions to Convict Smith.

The prosecutor also repeatedly argued that the statements of Mr. Smith's codefendants, which were not admitted against him, proved his guilt. Reading from Bryant's confession, the prosecutor made improper use of it against Smith:

> "Question: What was the reason they wanted to get the tape?"
> "Answer: To tape the people up."
> And the next question.

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> "Question: Do you know why **they** wanted to tape the people up'?"
> And here is his answer.
> "Yes, **they** wanted to kill them."
> That is in defendant Bryant's mind two and a half to three and a half hours before the murder. He knew when **they** said **they** were going to get the tape to tape the people up that **they** were going to kill them.
> Is that enough time to premeditate when **they** put people back in the trunk and drive around town? Is that enough time for someone to say, "Let's stop it right here, we don't have to go through with the killing"? Of course it's enough time. Of course it is enough time for premeditation.

(T. 5749-50)(emphasis added). Smith's objection was overruled and motion for mistrial denied. (T. 5750, 5776). The prosecutor again misused Bryant's damning confession against Smith later:

> And very very important, before **they** even get back to Cornell Austin's house and before the **first** taping takes place there was some discussion of it in the car, page 12 the question is:
> "Do you know why **they** wanted to tape the people up?"
> And his answer: "yes, **they** wanted to kill them."

(T. 581 1)(emphasis added). Mr. Smith's objection was, again, overruled. (T. 5811-12). Finally, after urging the jury to give Mr. Smith "credit" on all nine counts for the "special" interest he took in the crimes, the prosecutor again argued to convict by Smith's codefendants' statements:

> Many witnesses were called in this case. There may be some discrepancies between one witness and another. As I said, its only human. Memories are not perfect. But the big areas, the important areas, everybody admits that there was a robbery plan and that they all were part of it. Everybody admits --

(T. 5818). The defense objection on sixth amendment grounds was overruled. (T. 5818-19).

The entire purpose of redacting Austin's and Bryant's confessions to eliminate all references to Smith, and instructing the jury to disregard those statements as to Smith, was to ensure that the damning accusations of these uncross-examined, admitted murderers would not be used against Smith. Assuming, ***arguendo***, the efficacy of these precautions (but see argument VI, ***supra***), *the* prosecutor's closing argument nullified them. By his argument, the prosecutor urged the jury, in essence, to convict Mr. Smith based on the confessions of his codefendants. In a case where, instead

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of severing defendants and absolutely insuring of Mr. Smith's confrontation rights, the trial court determined, instead, to walk the paper thin line of redactions and instructions, the prosecutor clumsily fell off that line and invited the jury to convict Mr. Smith based on his codefendants' confessions. Because Mr. Smith's objections were overruled, the jury was allowed to improperly consider the codefendants' confessions. This improper argument, alone and in conjunction with the other improper arguments, severely prejudiced Mr. Smith and requires reversal of his conviction.

3. Other Improper and Inflammatory Arguments.

The prosecutor, also, resorted to other improper arguments and inflammatory name-calling. The prosecutor invoked the sixth commandment against murder. (T. 5747-48)(objection sustained). Later, the state argued that murder, kidnapping, robbery, arson, and burglary had developed an interesting appetite in the defendants: "I think it is very hard for anybody to understand how anybody, any civilized human being, could have an appetite under those circumstances." (T. 5822). The defense objection was sustained. (T. 5822-23). These inflammatory comments were obviously intended to pique the emotions of the jury and assist the prosecutor in his efforts to secure a conviction, if not based on the facts, then based on emotion. There was no place in this trial for such comments. These comments, in conjunction with the others referenced above or objected to at trial, denied Mr. Smith a fair trial and require reversal.[29]

B. Other Instances of Prosecutorial Misconduct.

Many other instances of prosecutorial misconduct permeated the trial. In opening statements, the prosecutor referred more than once to '"innocent, random victims," thus improperly

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[29] Although some of the defense objections were sustained, and several sustained objections were followed by cautionary instructions, in a case like this where the closing arguments spanned many hours, the occasional cautionary instructions were particularly meaningless. In this setting, it is particularly true that "one cannot unring a bell, after the thrust of the saber it is difficult to say forget the wound, and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States, 307* F.2d 883, 886 (5th Cir. 1962).

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suggesting that anyone of the jurors could have been a victim to the defendants. (T. 3886). Though the objection to this clearly improper argument was sustained, the impression on the jury, and the prejudice to Mr. Smith, were irreparable. During the state's direct examination of lead detective McDermott, the prosecutor intentionally elicited inflammatory information that the court previously ruled inadmissible. The prosecutor asked the detective if, before arresting Mr. Smith, he had prepared anything for the media. (T. 4543). Defense objection was overruled. (Id). The detective testified: "There had been a reenactment for 'America's Most Wanted."' (*Id.*). This testimony was a clear violation of the trial court's ruling that this inflammatory and highly prejudicial evidence would be inadmissible. (T. 4543-46). Although the court advised the jury to disregard the remark, this, too, was beyond their capability. Perhaps the most egregious prosecutorial misconduct was its presentation and endorsement of Knolden who the state knew, from his repeatedly failed polygraphs, *(see Argument* IX, *infra*), was lying on the stand. See ***Mooney v. Holohan***, *294* U.S. 103, 112, 55 S.Ct. 340 (1935)("[D]eliberate deception of court and jury by the presentation of testimony known to be perjured . . . is . . . inconsistent with the rudimentary demands of justice.") These acts and others objected to below, individually and cumulatively, served to deny Mr. Smith due process and his right to a fair trial.

Ix. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING CRUCIAL DEFENSE EVIDENCE, THUS VIOLATING MR. SMITH'S RIGHT TO PRESENT MITIGATION AND TO DUE PROCESS OF LAW, c oNTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 17.

A. The Rules of Evidence are Substantially Relaxed During the Penalty Phase.

A defendant in a capital case has an absolute right to introduce non-statutory **mitigating** evidence at the penalty phase of his trial. ***Lockett v. Ohio, 438*** U.S. 586, 98 S.Ct. 2954 (1978); ***Griffin v. State, 639*** So.2d *966,970* (Fla. 1994); ***Hitchcock v. State,*** 578 So.2d 685,689 (Fla. 1990), ***vacated on other grounds,*** 112 S.Ct. 3020 (1992). Mitigating evidence consists of matters relevant

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to the defendant's character or record, or the circumstances of the offense, proffered as a basis for a sentence less than death. ***Rogers v. State,*** 511 So.2d 526, 534 (Fla. 1987), *cert.denied, 484* U.S.. 1020 (1988)(quoting ***Lockett***, 438 U.S. at 604-05, 98 S.Ct. at 2964-65). In presenting such evidence, a defendant need not strictly adhere to the rules of evidence during penalty proceedings. ***Hitchcock,*** 578 So.2d at 690. Indeed, Florida's capital punishment statute specifically states that "evidence may be presented as to any matter the court deems relevant to the nature of the crime and the character of the defendant . . . [and a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . . ." Section 921.141, Fla. Stat.

B. The Trial Court Abused Its Discretion in Excluding Polygraph Evidence Which Convincingly Impeached Knolden's Testimony Regarding Mr. Smith's Aggravated Role in the Offense.

Perhaps the most crucial role for the penalty phase jury was to assess the defendants' respective roles in the crimes. In Smith's post-arrest statement, he emphatically maintained he was not the leader. (T. 5572-73). He stated he did not participate in the initial robbery, (T. 5591); he did not learn the victims were in the trunk of the Maxima until after their abduction, (T. 5594); he acted as a lookout and did not participate in the taping of the victims, (T. 5597); and he did not directly participate in throwing the captives in the water but acted only as a lookout.. (T. 5599, 5601). The confessions of Austin and Bryant were not to be used against Smith. Glass was not a witness to any of the events following the abduction.

Star witness Knolden, however, contradicted Smith's statement. Knolden implicated Smith as a leader and driving force behind the group's crimes. He testified it was Smith who drew the group's attention to the victims of their robbery, (T. 5154); taped the female's mouth and then sexually battered her while she squirmed on the ground, (T. 5184, 90-93); gave the order to stop at the top of the bridge, (T. 5206); stayed and watched while the victims hit the water, (T. 5208, 52 14);

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and suggested burning the stolen car. (T. 5215). As for his role, Knolden generally maintained he was hands-off -- a chauffeur and a lookout. He testified that he played no role in binding either victim, (T. 5 180-82, 5183-85), and that he did not physically assist in throwing either victim off of the bridges. (T. 5207-8, 5212-13).

Through an evidentiary proffer, Mr. Smith offered to show that Knolden had been polygraphed by two highly credentialed polygraphers, once on October 9, 1992, at the request of his defense counsel, (T. 6083-86, 6320), and another time on July 16, 1993, at the request of lead detective McDermott. (T. 6144). Robert Gately, the expert who polygraphed at McDermott's request, (T. 6142-44), examined Knolden on three questions: whether he participated in binding either victim; whether he participated in throwing Bridgette Gibbs from the bridge; and whether he had any physical contact with Trevor Munnings when he was dropped in the water. (T. 6148). Gately tested Knolden three times on each question. (T. 6149). On each test, Knolden answered all three questions "no." (T. 6150-52). Regarding the first question, the first chart was inconclusive and the second and third charts indicated deception; regarding the second question, all three charts indicated deception; and regarding the third question, the total numerical evaluation was inconclusive but Gately's subjective evaluation indicated deception. The penalty jury never heard this crucial evidence.

Regarding the earlier polygraphs, expert polygrapher Slattery testified that, though two tests in which Knolden stated 1) he intended to answer questions truthfully, 2) he did not physically participate in throwing Gibbs off the bridge, and 3) he did not physically take part in throwing Munnings off the bridge, were inconclusive, three other charts testing the truth of Knolden's denial that he helped or participated in throwing Gibbs off the bridge indicated deception. (T. 6320-22). The penalty jury never heard this crucial evidence.[30]

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[30]Mr. Smith filed a third polygraph examination report, this one by Kent C. Jurney, with his Motion to Override Jury Recommendation of Death. (R. 1174-76). On two separate charts,

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This court has long ago held polygraph evidence admissible where the parties stipulate to its receipt. *E.g., Davis v. State,* 520 So.2d 572 (Fla. 1988); *Codie* v. *State,* 313 So.2d 754 (Fla. 1975). Although this court has not recently grappled with the ever-evolving scientific assessment of polygraphs, it has indicated that Florida's *per* se rule of exclusion must fall when the reliability of polygraph testing is sufficiently established. *See Farmer v. City of Ft. Lauderdale, 427* So.2d 187, 190 (Fla.), *cert.denied,* 464 U.S. 816 (1983). Recent case law from other jurisdictions reveal the increasing acceptance of polygraph evidence by the courts. In light of this growing trend and, especially, Mr. Smith's heightened due process rights at his penalty phase proceeding, the trial court abused its discretion in excluding his polygraph evidence.

In *United States v. Piccinonna,* 885 F. 2d 1529 (11th Cir. 1989)(*en banc*), the court reexamined its previous rule barring admission of all polygraph evidence. In light "of the significant progress made in the field of polygraph testing over the past 40 years and its increasingly widespread use," *id.* at 1530, it ruled that polygraph evidence in the 1 lth Circuit would henceforth be admissible by stipulation or over objection when offered to corroborate or impeach the testimony of a trial witness. *Id.* at 1537.

Other courts are following the 1 lth Circuit's lead. In *United States v. Posado,* 57 F.3d 428 (5th Cii. 1995), the court scrapped its prior *per* se rule of inadmissibility and remanded to the district court to determine whether the "tremendous advances . . . in polygraph instrumentation and technique in the years since *Frye*"[31] meet the relaxed standard for the admissibility of novel

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Knolden stated he would answer the questions truthfully, he did not lift Gibbs over the bridge railing, and he did not physically assist in throwing Gibbs off the bridge. (R. 1174). On two additional charts, Knolden stated he would answer the questions truthfully, he at no time touched Gibbs, and he did not physically help throw Gibbs off the bridge. (R. 1175). This polygrapher, as did Gately and Slattery, concluded that Knolden was not being truthful in response to these questions.

[31] *Frye v. United States, 293* F. 1013 (D.C. Cir. 1923).

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scientific evidence set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). *Id.* at 434. The court noted that polygraphs accurately predict truth or deception seventy to ninety percent of the time, are widely used, and the field is becoming more standardized and professional. *Id.* at 434,436 *nn. 7-9. In United States v. Galbreth*, 908 F.Supp. 877 (D.N.M. 1995), the court held in a case in which the defendant proffered the results of a polygraph examination to show that he did not knowingly omit certain items of income from his income tax returns, modern polygraph technique is a valid science and admissible upon proof of the competence of the examiner and the method by which the examination was conducted. In *United States v. Crumby, 895* F. Supp. 1354 (D. Ariz. 1995), the court held that a defendant may use evidence that he has passed a polygraph examination to counter attacks on his credibility. In upholding the admissibility, the court also referred to the increasing reliability of polygraph science. *Id.* at 1358-61. *See United States v. Padilla*, 908 F.Supp. 923 (S.D. Fla. 1995); *cf. Cassamassima v. State, 657* So.2d 906 (Fla. 5th DCA 1995)(*en banc*)(holding that defendant can be required as a condition of probation or community control to submit to polygraphs and discussing, generally, recent trends in judicial use of polygraphs).[32]

Under circumstances strikingly similar to the instant case, in *State v. Bartholomew,* 101 Wash.2d 631, 683 P.2d 1079 (1984), the court held that polygraph examination results are admissible by the defense in a capital sentencing proceeding if the examiner is qualified and the test is conducted under proper conditions provided that the opposing party may cross-examine. *Id.* at *646, 683* P.2d at 1089.[33] The court based its decision on the paramount rights of a defendant in a

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[32]Although this court appears to have rejected *Daubert* in favor of *Frye*, *State v. Vargas*, Case No. 83935, 1995 WL 735925 at 4 (Fla. Dec. 14, 1995)(Overton, J. dissenting), these recent cases demonstrate that polygraphy has reached the requisite level of general acceptance to pass the *Frye* standard.

[33]Similar to the instant case, *in Bartholomew,* the prosecution's principle witness was someone present at the time of the charged offenses who claimed he played no role in their

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death penalty case to implore a jury that his life should be spared. *Id.*[34]

Even assuming this court is unprepared to find polygraph evidence admissible under the Florida Evidence Code,[35] the trial court abused its discretion in failing to admit this crucial evidence at the penalty phase. The polygraph evidence flatly contradicted Knolden's claim of a minimal role and specifically his testimony that he neither assisted in binding the victims, nor physically throwing them off the bridges. These contradictions impeached Knolden's general credibility in asserting Smith's leadership role in the offenses. Particularly given the paramount rights of Mr. Smith at stake in the penalty phase, the trial court reversibly erred in excluding the polygraph evidence.

C. The Trial Court Abused Its Discretion in Denying Mr. Smith's Motion for Appointment of an Expert on Group Violence and Contagion Thereby Effectively Excluding This Crucial Evidence Relevant to Statutory and Non-Statutory Mitigating Circumstances.

Another important role for the penalty phase jury was to determine the reason why the robbery victims were abducted, taped, and dropped off bridges into water which would cause nearly certain death. The robberies utterly failed to explain this conduct. These were accomplished relatively easily, within a matter of moments, apparently hours before the captives were taped and dropped off the bridges. Likewise, the offenses were not committed out of hatred or animosity toward the victims. The assailants did not know them and the victims proved to be easy prey and yielded substantial property. Elimination of witnesses or avoidance of arrest also failed to explain the group's efforts to kill the victims. The circumstances of the crimes made clear the victims likely

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commission. *Id.* at 644, 683 P.2d at 1088. The polygraphist concluded that this witness was deceptive in denying his involvement in the offense. *Id.*

[34] At the time of the *Bartholomew* decision, Washington law, like Florida's, excluded polygraph evidence, even for impeachment, pursuant to its rules of evidence. *See State v. Ellison*, 36 Wash.App. 564, 676 P.2d 531 (1984).

[35] Mr. Smith maintains on appeal, as he did at trial, (T. 4364-77), that the polygraph evidence also was admissible at the guilt phase and that exclusion was reversible error.

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would be unable to identify the defendants. There was little evidence of any discussion of murder prior to the captives being dropped off of the bridges. Indeed, the group appeared to be preoccupied with drinking, doing drugs, and committing other robberies.

To explain the conduct of the group in general, and Mr. Smith in particular, Smith, who had previously been declared indigent, requested the court to appoint Dr. Armando Morales, an expert in group violence and contagion, to review case materials and ultimately testify regarding the psychology of group violence and how an individual's will and intent can become subservient to the group. (R. 1179-81). The trial court's refusal to appoint this expert, (T. 6130-3 1), denied Mr. Smith equal protection under the law and effectively precluded him from presenting this crucial mitigating evidence to the jury.

The United States Supreme Court has recognized "that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." ***Ake v. Oklahoma***, *470* U.S. 68, 76, 105 S.Ct. 1087, 1092 (1985). This principle is based in significant part on the due process guarantee of fundamental fairness. ***Id.*** The equal protection clause of Florida's Constitution also provides special protection to indigent defendants in criminal trials. "Each Florida citizen -- regardless of financial means -- stands on equal footing with all others in every court of law throughout our state." ***Traylor v. State***, 596 So.2d 957,969 (Fla. 1992); see art. I, § 2 Fla. Const. "[A] defendant is entitled to the 'basic tools' of an adequate defense, and abuse of discretion is the point at which the court concludes the defense has not been provided such a 'basic tool."' ***Cade v. State,*** 658 So.2d 550, 553 (Fla. 5th DCA 1995)(rehearing). In reviewing a trial court's denial of a motion requesting the appointment of an expert, see section 914.06, Fla. Stat., the appellate court must "weigh whether necessity compels the appointment of the expert and whether the defendant was prejudiced by the trial court's denial of the motion . . . ." ***Dingle v. State, 654*** So.2d 164, 166 (Fla. 3d DCA 1995).

In the instant case, the necessity of the expert appointment was clear. Mr. Smith was

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defending against the ultimate penalty, death. He was seeking to present evidence of the statutory mitigating circumstance where he acted under extreme duress and the substantial domination of the group. Section 921.141(6)(e), Fla. Stat. The evidence was also "relevant to the nature of the crime and the character of the defendant. . . ." Section 921.14 1(1). It would have contradicted the state's position that Smith was the leader. The evidence before the jury cried out for a reasonable explanation for the group's inexplicable behavior.

Mr. Smith was substantially prejudiced by the denial of his motion. The state argued that the killing and attempted killing were rational acts to avoid arrest and detection and for pecuniary gain. (T. 6419-24). On the other hand, Mr. Smith was prevented from introducing the evidence he needed to argue that the murder and attempted murder were not rational acts but were the result of a group psychology that ultimately overcame the will and intent of the group members. Mr. Smith was entitled to present this evidence relevant to the statutory mitigating factor of extreme duress or substantial domination, section 921.141(6)(e), Fla. Stat., or to his character. See *Gore v. Dugger*, 532 So.2d 1048, 1050 (Fla. 1988)(evidence of non-present cousin's domination relevant to character and admissible). Because this evidence was crucial mitigation in the penalty phase, the district court's failure to appoint an expert which effectively precluded this evidence constituted reversible error.

X. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO SEVER MR. SMITH FROM HIS CODEFENDANTS FOR PENALTY PHASE PROCEEDINGS THEREBY VIOLATING HIS RIGHT TO A FAIR AND INDIVIDUALIZED SENTENCE PROTECTED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 17.

Prior to the penalty phase, Mr. Smith moved for severance of defendants at penalty phase proceedings. (R. 1106-08). He argued, *inter alia*, that a joint penalty phase would impermissibly invite the jury to compare the evidence against, and in favor, of the codefendants in violation of the fifth, sixth, eighth, and 14th amendments to the United States Constitution and article I, sections 2,

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9, 16, and 17 of the Florida constitution. Throughout the penalty phase proceedings, Mr. Smith renewed his motion for severance both on these grounds and the grounds raised in his original motion riled prior to trial. (T. 5984, 6345). The sentencing court denied these motions. (R. 1110; T. 59886347).

In a penalty phase proceeding, a defendant has the right to individualized justice, a right inevitably compromised by joint penalty proceedings. The right to an individualized determination is protected by the eighth amendment and article I, section 17, of the Florida constitution. The eighth amendment requires "precise and individualized sentencing," Stinger v. *Black, 503* U.S. 222,112 S.Ct. 1130, 1137 (1992), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio, 438* U.S. 586,605, *98* S.Ct. 2954, 2965 (1978).

In the penalty phase proceedings, Mr. Smith's eighth amendment and article I, section 17, rights to individualized sentencing was violated by virtue of the jury's natural and irresistible tendency to judge the three defendants in comparison to each other. For instance, Smith was the only defendant implicated in the uncharged sexual battery. The state argued that Smith was the one who watched after the victims were thrown off the bridges. (T. 6395-96). Smith also had the most extensive criminal history. The jury could not have helped but compare these and other facts to those regarding the other defendants in recommending death for Smith.

The mitigating evidence presented by Smith was, at least in appearance, far less substantial than that of Austin and Bryant. Austin, for instance, presented the testimony of a university clinical neuropsychologist who testified, *inter alia*, that Austin was in the "low-average to borderline range" in intelligence which, though not in the retarded range, indicated a limited ability to perform and score well on intelligence tests. (T. 6239-40). From this highly trained doctor's testing and interviewing of Austin, he concluded Austin was "cooperative, very cordial, very appropriate, polite," and that there was nothing aggressive about his behavior." (T. 6248).

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The only testimony Mr. Smith presented through a trained professional was that of Jose Garcia, a substance abuse counselor. (T. 6107-08). He testified that Smith had a long history of substance abuse, particularly concerning alcohol, (T. 6109-11), but that he believed Smith was amenable to long-term residential treatment. (T. 6112). Although this testimony served as the basis for a mitigator which the sentencing court found supported and gave great weight, (R. 1211), it was no comparison to the testimony of the clinical psychologist on behalf of Austin. A substance abuse problem is generally viewed as a result of a voluntary choice; low intelligence is perceived as an organic disability over which a person has no control. When compared to Austin's involuntary condition of having low-average to borderline intelligence, the amenability to alcohol rehabilitation treatment of Smith, a man facing either death or life in prison, could not have been viewed by the jury as particularly mitigating. While this may have proved a significant mitigator to a jury in a severed penalty phase proceeding, it was most certainly disregarded in the context of the joint proceedings.

The evidence presented of Austin's and Bryant's family circumstances was also far more evocative of sympathy than the evidence presented on behalf of Smith. Bryant presented evidence, for instance, that his father drank heavily and repeatedly beat his mother, even in the presence of Kelvin. (T. 6273-74, 6288-91). Kelvin got involved in these fights and attempted to protect his mother. (T. 630506). Bryant also introduced evidence that his mother died of AIDS which she contracted from Kelvin's father while Kelvin was in jail. (T. 6274). Kelvin helped care for his dying mother before he went to jail. (T. 6275-76). Kelvin's dad, who he told others he hated for what he did to his mother, had also died. (T. 6293-94). Bryant presented testimony that shortly before his mother died, she was brought to jail where Kelvin apologized to her for anything bad he may have done and asked for her forgiveness. (T. 6297-98).

Austin presented evidence, for example, that he had meningitis as a child, that his father, too, was a heavy drinker and drug abuser, and that his father also beat his mother. (T. 6173, 6179).

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Cornell also intervened in his stepfather's violence on behalf of his mother. (T. 6180). Austin's birth father was sentenced to jail when he was just an infant and Austin had virtually no contact with him. (T. 6205-06).

By dramatic contrast, Smith's mitigation evidence established that he grew up in a caring household filled with immediate and extended family. (T. 6015-21, 6044-45, 6051-52). His evidence focused mostly on how he had been a caring family member. The jury certainly compared the supportive, caring family background of Smith to the dysfunctional family backgrounds of Austin and Bryant in sentencing Smith to death.

Smith was also severely prejudiced by the joint penalty phase proceedings because of the evidence regarding the crimes introduced against his codefendants that was improperly argued as a basis for sentencing him to death. In perhaps the most inflammatory argument, the prosecutor urged that Smith should be sentenced to death because he was the one who, after watching Bridgette Gibbs after she had been thrown off the bridge, "[came] back to the car laughing and joking about how she was kicking and bobbing in the water." (T. 6395). The only evidence about anyone laughing after this event was Austin's redacted statement that "someone" had been laughing. (T. 4527). Smith's objection to this argument was overruled. (T. 6396). The prosecutor also argued, over repeated defense objection, that Bryant's damning post-arrest statement, that Gibbs was being thrown into the water "so she wouldn't recognize us," was a basis to find the witness elimination aggravater against all of the defendants. (T. 6421-24). This evidence, too, would never have been introduced, or argued, against Mr. Smith at a separate penalty phase proceeding. For all of these reasons, the joinder of defendants at the penalty phase denied Mr. Smith his constitutional rights to a fair and individualized sentencing.

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XI. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MEL SMITH'S MOTION TO STRIKE THE PENALTY PHASE PANEL BASED ON THE PROSECUTOR'S MISCONDUCT IN PENALTY PHASE CLOSING ARGUMENT IN ARGUING INADMISSIBLE EVIDENCE AGAINST MR SMITH AND MAKING OTHER IMPROPER AND-TORY ARGUMENTS, IN VIOLATION OF DUE PROCESS.

The prosecution's misconduct continued in its penalty phase closing argument. Mr. Smith continued to be devastingly prejudiced by the state's argument that evidence admitted against his codefendants, but not him, supported imposing the death penalty. For instance, in urging this was a "'brutal case," (T. 6394), the state argued that Smith was the individual who looked over the water at Gibbs and returned to the car "laughing and joking about how she was kicking and bobbing in the water." (T. 6395). The only evidence of this came from Austin's redacted statement, (T. 4527-28), which was not to have been admitted against Smith. Smith's objection was overruled. (T. 6396). In arguing for the witness elimination aggravater, the prosecutor urged that it was supported by Bryant's statement where "he said the words out loud two and a half to three hours before the murder" and then "they [Smith] got the tape." (T. 6422). Repeatedly using Bryant's incriminating remarks against Smith, the prosecutor read from his statement:

> Question: Do recall anyone saying why they wanted to throw the girl into the water?
> Answer: So she wouldn't recognize us.
> Now, that means at that time, the primary purpose or the motive was to prevent that lawful arrest, to prevent her ability to identify them as witnesses or to be a witness against them.
> Smith's counsel: Same objection.
> Court: Objection sustained.
> Prosecutor: Even though Bryant is the only one that said it let's use our common sense.
> Smith's counsel: Objection.
> Court: The objection is sustained.

(T. 6423-24). Although some of these objections were sustained, many were not. In any event, these arguments were improper and violated Mr. Smith's confrontation rights. Thus, the trial court abused its discretion by denying his motion to strike the penalty phase jury panel. (T. 6443).

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The prosecutor utilized other grossly improper and inflammatory arguments. The prosecutor subtley compared Mr. Smith and his codefendants to serial killers or mass murderers. (T. 6401). Defense objection was sustained. (T. 6401-02). He improperly urged that sentencing the defendants to life in prison would render Gibbs's life meaningless. (T. 6420). Objection was sustained. These statements were grossly inflammatory and improper. Individually and cumulatively, they served to deny Mr. Smith his right to a fair and individualized penalty phase proceeding.

XII. THE TRIAL COURT ERRED IN FINDING SUFFICJENT EVIDENCE TO ESTABLISH THE PECUNIARY GAIN AND AVOIDING ARREST AGGRAVATORS.

At the penalty phase, the state introduced no evidence other than documents regarding Mr. Smith's criminal history. (T. 6013-14; St. Ex. 2, 3, 4). The court instructed the jury on five statutory ▪ aggravating circumstances including, *inter alia*, crime committed for pecuniary gain and to prevent arrest. (T. 6532). By a vote of nine to three, the jury recommended that Mr. Smith be sentenced to death. (T. 6541).

In its sentencing order, the court concluded that the state had proven the five aggravating circumstances beyond a reasonable doubt. (R. 1205-09). Regarding "felony for pecuniary gain," the court essentially concluded that because the murder followed the robberies was for pecuniary gain. (R. 1206-07). Regarding "felony to avoid arrest or detection," the court reasoned that this aggravater was supported because "1) one of the co-defendants felt she knew the victim, 2) there is (sic) discussion about the killing of the victim and 3) the victims are (sic) dropped into bodies of water for seemingly no apparent reason . . . ." (R. 1207). The record reflects that the state failed to prove these aggravaters beyond reasonable doubt and that the error was harmful.

A. Strict Standard of Proof.

Certainly, the standard of proof beyond a reasonable doubt at a penalty phase proceeding is no less stringent than the identical standard in the guilt phase. Indeed, this court appears to require

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"clear proof' beyond reasonable doubt. ***See Rogers v. State,*** 511 So.2d 526, 533 (Fla. 1987), ***cert.denied,*** 484 U.S. 1020 (1988). Moreover, in a case such as this where the aggravaters were supported, if at all, by circumstantial evidence, the state was required to exclude any reasonable hypothesis that the aggravating factors did not exist. ***Simmons v. State,*** 419 So.2d 3 16, 3 18 (Fla. 1982); see, e.g., ***State v. Law,*** 559 So.2d 187, 188-89 (Fla. 1989). The state was prohibited from piling inference upon inference to satisfy its heavy burden. ***See, e.g., Keys v. State, 606*** So.2d 669, 673 (Fla. 1 st DCA 1992).

B. The Evidence was Legally Insufficient to Establish Gibbs's Murder was for Pecuniary Gain.

To establish the pecuniary gain aggravater, the state must prove "a pecuniary motivation for the murder," ***Simmons*** at 3 18, and that the killing was "a step in furtherance of the sought-after gain." ***Rogers*** at 533. Although the state did not prove any other reasonable explanation for the killing of Gibbs,[36] it also failed to prove these elements beyond a reasonable doubt. The evidence established that the theft of the victims' property occurred and was fully accomplished upon the defendants' initial contact with them. That is when the defendants appropriated Gibbs's purse and its contents and Munnings's wallet, cash, keys, and car. There was no evidence of a plan or intent to murder these victims prior to or at the time of the robbery. Killing them was certainly not necessary to attain the defendants' pecuniary motive. Significantly, the defendants failed to take any action to kill the victims until some four hours after their robbery and abduction. Even then, the conflicting and impeached testimony established there was no discussion about killing the victims until immediately before, if at all, the incident leading to Gibbs' death. No statements, whatsoever, indicating a pecuniary motivation are attributable to Mr. Smith.

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[36]The absence of a reasonable explanation further underscores the trial court's error in failing to appoint, and thereby excluding the testimony of, the expert on group violence. See argument IX, *supra*.

Concluding that the evidence in this case established pecuniary motivation would fail to separate it from any other in which a homicide followed, by any time period, a property offense against the victim. It would result in a mechanical application of this aggravater and would "divert the life-and-death choice away from the nature of the defendant and the deed, as [section 92 1.14 1, Fla. Stat.] seems to require." ***Mendez v. State, 368*** So.2d 1278, 1282 (Fla. 1979). It would likewise lead to the freakish and inconsistent imposition of capital punishment which any constitutional death penalty scheme cannot tolerate. See ***Furman*** v. ***Georgia, 408*** U.S. 238, 92 S.Ct. 2726 (1972). Thus, this evidence was legally insufficient.

C. **The Evidence was Legally Insuffkient to Establish Gibbs's Murder was to Avoid Arrest.**

The evidence also failed to establish beyond reasonable doubt that the killing was for the purpose of avoiding arrest or detection. (R. 1207). This requires "that the killing's dominant or only motivation was the elimination of a witness." ***Rogers,*** 5 11 So.2d at 526. "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." ***Riley*** v. ***State, 366*** So.2d 19, 22 (Fla. 1978), *cert. denied,* 459 U.S. 981 (1982). The reasons cited by the trial judge and evidence utterly failed to support this aggravator.

The first reason cited by the court, that one of the codefendants felt she knew the victim, failed to support this aggravator. Just because a robber knows his or her victim does not usually, or even likely, lead to elimination murder. See Doyle v. ***State,*** 460 So.2d 353, 358 (Fla. 1984). Moreover, Tawanah Glass did not recognize Gibbs at the scene of the robbery but only recognized her from Gibbs's identification, later. (T. 4808). The record fails to establish the extent of Glass's familiarity with the victim but most reasonably indicates the two had no personal relationship. There is nothing to indicate Gibbs knew her or that even if she did, that she could have identified Glass who claimed she remained in the car, during the defendants' brief encounter with the victims. Glass's unspecified knowledge of Gibbs failed to support this aggravater.

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Regarding the trial court's finding that there was discussion about the killing of the victim, the evidence of this fact was vague and contradictory and also failed to support the trial court's conclusion Smith's statement, elicited and presented by Detective Romagni (who had the benefit of all of the facts and statements made prior to his interrogation), fails to indicate that he knew the two captives or believed that the captives knew or could identify him or any of his codefendants. His statement indicates he did not know what was going to be done with the captives in the trunk and did not know there would be any effort to kill the captives until he was told, on top of the bridge, that they would be dropped in the water. (T. 5594, 5599). Smith's statement that, while hiding out after the crime spree, he was fearful of the city of Miami police because the female victim was related to a high ranking City of Miami police officer, (T. 5605), clearly reflects information he received after the crimes and had no bearing on any motivation for Gibbs's murder. Even the state's star witness Knolden claimed that it was not until he opened the trunk on top of the bridge that he realized someone would be dropped off. (T. 5207). He testified that no one ever talked about killing the victims. (T. 5206).[37]

Clearly, the most significant fact bearing on this issue was that, after the male captive was dropped off the railroad bridge, all of the people in the car knew that he was swimming away and that he would be able to assist in investigating their crimes. Nonetheless, the group left this area without any further discussion, or taking any action, to attempt to stop him. Certainly, had the

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[37]The inadmissible statements of the codefendants also failed to support the court's finding. Bryant's statement indicated that he did not learn the victims would be thrown from the bridges until immediately before this happened. (T. 4610). When asked if he recalled anybody saying why they wanted to throw the girl in the water, Bryant responded, "So she wouldn't recognize us or something." (T. 4610-11). However, immediately after this, Bryant answered the leading question, "The woman [Tawanah Glass] recognized her [Gibbs] when they were initially robbed in the parking lot of the motel," "Yes." Thus, it appears that this detailed but erroneous information was coming from the detective and not codefendant Bryant upon his arrest more than four months after the incident. (T. 577-78). Austin's statement that someone said at the bridge, "this is where our problems end," (T. 4478, 4525), added little to clarify this issue. This statement was ambiguous and failed to indicate whether it reflected intent or relief that the victims were being left on the road.

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purpose of dropping the captives off of the bridges been to avoid arrest or detection, immediate action would have been taken to recapture and eliminate the male victim. This circumstance wholly undermines the trial court's conclusion that the "avoid arrest" aggravating factor was proven beyond a reasonable doubt.

The third factor cited by the trial court was that the victims were dropped into bodies of water "for seemingly no apparent reason." This statement indicates that the trial court improperly placed the onus on the defendants to explain their conduct. This shifting of the burden of proof wholly contradicted the statutory requirement that any aggravating factor be proven by the state beyond a reasonable doubt. See section 921.141, Fla. Stat. Mr. Smith sought to provide an explanation for the group's otherwise inexplicable conduct through the testimony of Dr. Morales. (R. 1179-81). However, the trial court's refusal to appoint this expert, (T. 6130-3 1), denied Mr. Smith the ability to present a reasonable explanation. Thus, not only did this reason fail to support the trial court's conclusion, it demonstrated an impermissible shifting of the burden of proof and requires a finding that this aggravating factor had not been proven.

XIII. IMPOSITION OF THE DEATH PENALTY AGAINST SMITH WAS DISPROPORTIONATE TO THE LIFE SENTENCES OF CODEFENDANTS KNOLDEN AND AUSTIN.

The crimes against Munnings and Gibbs were committed by a group of people moving, planning, acting, and reacting together. To the extent there was a basis to differentiate the defendants, the record establishes that any leadership role was filled by Austin or Knolden. Their culpability was greater than the others by measure of their decisional authority, the manner and degree of their participation, and the viciousness and cruelty of their personal acts. Incredulously, Smith was the only defendant sentenced to death.

When a codefendant is equally or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment impermissibly disproportionate. E.g.,

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Larzelere v. *State*, Case No. 81,793, 21 F.L.W. S147, S151 (Fla. March 28, 1996). Thus, an equally or more culpable codefendant's sentence is relevant to proportionality analysis. Id. This court should reduce a defendant's sentence to life where any equally or more culpable codefendant receives a term of imprisonment, *see Slater v. State, 3* 16 So.2d 539 (Fla. 1975), even if by virtue of a negotiated plea. See *Malloy v. State, 382* So.2d 1190 (Fla. 1979).

Looking first at the evidence against Austin, it is clear that his culpability was far greater than Smith's Tawanah Glass testified it was Austin who forced her to stand on a street corner to attract potential robbery victims. (T. 48 13-15, 4878). Austin grabbed the male victim and held him on the ground. (T. 4827-28). He ordered Glass to back the Lincoln up to the location of the robberies. (T. 4829, 4886).

Knolden's testimony corroborated Glass's about Austin's role and added additional details. He confirmed Austin's role in forcing Glass to act as a decoy for robbery victims. (T. 5 149-5 1). Knolden testified that he and Austin grabbed the male victim. (T. 5157-58). He elaborated that Austin also grabbed the woman slammed her head on the trunk when she was uncooperative, and then closed the trunk with the victims inside. (T. 5160-61). Knolden testified that Austin participated in taping the male victim the first time. (T. 5 174). He testified it was Austin who raised the concern that Glass knew Gibbs which was the kernel of evidence that led to the avoiding arrest aggravater for Smith. (T. 5203).

Perhaps most telling about Austin's substantial role in the offense was his own statement. Austin admitted going into his house to get tape he knew would be used to bind the victims. (T. 4473, 4511). He admitted getting the male out of the trunk and then holding both victims while they were bound with the tape. (T. 4475-76, 4517-18). He helped place the female victim back in the trunk. (T. 4520). Finally, knowing full well the intent to murder the victims, Austin admitted helping to remove both from the trunk and assisting in throwing them off the bridges. (T. 4478-80, 4525-26, 4531).

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Although Knolden labored diligently to minimize his culpability, the testimony of other witnesses indicated his far more substantial role. Munnings, the surviving captive, testified that a man in a flowery shirt told him, in an aggressive voice, to get in the trunk. This is the same man who took the car keys, opened the trunk, and later barked to Munnings, "which key starts the car." (T. 4083-85, 4102). (Knolden admitted he was the one to pick up Munnings's car keys, told Mum-rings to get in the trunk, and drove the Maxima. (T. 5158-63).) Munnings testified that the man in the flowery shirt shouted orders to the other men to do things throughout the ordeal. (T. 4099-4103). Munnings believed the man in the flowered shirt was the leader of the group. (*Id.*).

Glass corroborated that Knolden drove Cobbs's Lincoln while the group looked for robbery victims, (T. 4820), and doubled back on 27th Avenue to take the group to the scene of the robbery. (T. 4825, 4880). She testified Knolden threw Gibbs to the ground and held her there. (T. 4828, 4884-85). He then took control, as driver, of the victim's vehicle. (T. 4886). Knolden remained the driver after the Lincoln broke down when all of the people got in the Maxima. (T. 4833).

Contrary to Knolden's efforts to minimize his role, the statements of the three defendants corroborated the other witnesses' indications that Knolden was a leader and driving force. The defendants' statements reflected that Knolden opened the trunk and assisted in removing both victims. (T. 4516, 4576, 5173, 5596-97). Austin's statement reflected that Knolden held the female while she was taped. (T. 4520). Knolden continued on as the driver of the stolen vehicle carrying the victims. (T. 4523). Austin and Smith confirmed Knolden's confession that he opened the trunk at the sites on the two bridges, knowing that the victims would be thrown off. (T. 4523, 4530, 5207, 5211). In contradiction to Knolden's statement, both Austin and Smith claimed he participated in throwing both victims off of the bridges into Biscayne Bay. (T. 4526,453 1, 5599).[38]

By comparison, the evidence indicated Mr. Smith was probably less, but certainly no more,

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[38]The proffered polygraph evidence, likewise, confirmed Knolden helped throw the victims off the bridges, flatly contradicting his own testimony. (T. 6148-52, 6320-22).

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Culpable than Austin and Knolden. Looking first to the statement Detective Romagni claimed Smith made, though Smith acknowledged specific acts such as examining the spoils of the robberies, (T. 5593), intending to do additional robberies, (T. 5594), inspecting the old, weak tape and volunteering to get better tape, (T. 5595), laughing with the others when someone in the group said they were going to throw the victims into the water, (T. 5599), and sharing in the robbery proceeds with the other defendants, (T. 5602), Smith generally characterized his role as that of a lookout. (T. 5597, 5599).

Even ignoring Smith's statement, the other testimony specifically implicating Smith, so substantially biased as it was, demonstrated a level of culpability less than that of Austin and Knolden. Unlike Austin and Knolden whose apparent leadership and aggressiveness singled them out for recollection by Munnings, Munnings had no individual recollection of Smith. Tawanah Glass, too, failed to indicate anything that singled Mr. Smith out from the rest of the group. She testified he sat in the back of Cobb's Lincoln, not the front which she occupied with Austin and driver Knolden. (T. 4820). Also by contrast with Austin and Knolden, Glass testified that she never saw Smith do anything to the man or woman. (T. 4828, 4892). She made clear that Smith did not tell Knolden to turn into the motel parking lot. (T. 4883).

Knolden, testifying desperately to preserve his life sentence, is the only one who attributed significantly more to Smith. He was the only one to attribute the statement identifying the victims in the motel parking lot to Smith. (T. 5154). He identified Smith (together with Austin) as one of the participants in the initial conversation about taping the victims. (T. 5 168). Knolden's claim that Smith taped Gibbs's face, (T. 5184), was contradicted by Austin. (T. 4519). His testimony that Smith sexually abused Gibbs, as discussed *supra*, was substantially impeached by his earlier testimony and statements that there was no rape, and flatly contradicted by the statements of the codefendants, Munnings, (T. 4077), and the unequivocal medical evidence that Gibbs' vagina exhibited no trauma. (T. 5030, 5032-37). Thus, perhaps with the exception of the riddled and

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contradicted testimony about the supposed rape, the evidence, on the whole, indicated Mr. Smith was less culpable, or at best, equally culpable, to Austin and Knolden who received life sentences.

The trial court's sentencing order further illuminates the disproportionality of Smith's death sentence. Assuming, *arguendo*, the validity of each of the five aggravating factors which the trial court concluded applied, (R. 1205-09), they clearly applied with equal vigor to Austin and Knolden. The trial court concluded that Smith established the existence of several mitigating circumstances but gave them little weight. (R. 1209-11). Although the mitigating circumstances applicable to Knolden and Austin differed somewhat, it did not differ sufficiently to render Smith's death sentence proportionate. Thus, Smith's death penalty should be reversed.

XIV. THE JURY WAS MISLED AS TO THE SIGNIFICANCE OF ITS ADVISORY VERDICT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17.

Repeatedly throughout voir dire examination, both the trial judge and the prosecutor reassured the jury that their penalty phase verdict was advisory only, neither binding on the trial court nor dispositive of the sentence. The trial judge instructed the prospective jurors as follows: "[your verdict] is advisory only, not binding," (T. 1689); "[your vote is] just a recommendation. It's not your decision, it's my decision," (T. 1887-88); "[you are an] advisory jury only," (T. 2329); "[yours is an] advisory role, the recommendation is not binding . . . It's up to me to decide what punishment is appropriate . . . " (T. 3 142); "[yours is an] advisory jury." (T. 3 143). The prosecutor echoed this theme: "The judge is not bound by your recommendation. The judge can decide life, even if the jurors say death." (T. 1867); "[The juror] need not be the one to sign the paper." (T. 1911); "[yours is a] recommendation only." (T. 3404).

In addition, just prior to penalty phase deliberation, the trial judge issued the standard instruction on the advisory nature of the jury's verdict:

> As you have been told the final decision as to what punishment should be imposed is the responsibility of the judge. However, it is your duty to follow the law that will

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now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (T. *5999, 653* 1).

The standard instruction, as well as the trial court's and the prosecutor's refrain during voir dire regarding the non-binding character of the jury's recommendation, constitute an inaccurate and misleading characterization of Florida law. The common and ordinary meaning of the words "advisory" and "recommendation" suggests that although the trial judge may consider the jurors' "advice" or "recommendation," he is free to disregard it. But in Florida the trial judge is not free to disregard the jury's recommendation "unless the facts suggesting a [contrary sentence are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State, 322* So.2d 908,910 (Fla. 1475). The standard instruction, coupled with the trial court's and the prosecutor's emphasis during the voir dire on the advisory nature of the jury's verdict, therefore improperly diminished the jury's sense of responsibility for its sentencing decision in violation of *Caldwell v. Mississippi, 972* U.S. 320, 105 S.Ct. 2633 (1985).[39]

XV. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE MEANING OF A LIFE SENTENCE AND PAROLE ELIGIBILITY VIOLATED MR. SMITH'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 17.

Mr. Smith reqested the court to instruct the jury on the meaning of a "life sentence" and parole eligibility. (T. 6354-55; R. 1153). The trial court denied this request. It was essential for the jury to have this information to properly assess the alternative to death, life in prison with a 25 year minimum mandatory term. *See Simmons v. South Carolina,* 114 S.Ct. 2187, 2194

[39] Although this court has repeatedly held that the standard instructions do not violate *Caldwell*, appellant respectfully submits that those decisions should be reconsidered. *E.g., Johnson v. State, 20* F.L. W. S343, S346 (Fla. July 13, 1995).

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(1994)(plurality opinion of Blackmun, J.). Additionally, accurate information that, if sentenced to life, Mr. Smith would not automatically be released in 25 years, was mitigating evidence that the jury was entitled to consider in that it might serve as a basis for a sentence less than death. See, ***e.g.,*** ***Jones*** v. ***State,*** 569 So.2d 1234, 1239-40 (Fla. 1990). Particularly where Florida's due process and excessive punishment clauses have been interpreted more broadly than their federal counterparts, ***see Traylor; Allen*** v. ***State,*** 636 So.2d 494,497 (Fla. 1994), the court's refusal violated Mr. Smith's fundamental constitutional rights.

XVI. FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 17 BECAUSE IT FAILS TO REQUIRE A UNANIMOUS VERDICT OR ADEQUATELY GUIDE THE JURY'S DISCRETION.

The trial court denied Mr. Smith's motions to declare section 921.141, Florida Statutes, unconstitutional for, ***inter alia,*** failure to require a unanimous verdict, (R. 305-09) and for failure to provide the jury adequate guidance in the finding of sentencing circumstances. (R. 293-304). Although Mr. Smith recognizes that this court has rejected attacks on the statute based on lack of unanimity, ***see James v. State,*** 453 So.2d 786 (Fla. 1984), Mr. Smith maintains that under the principles of primacy and this court's expanded interpretation of article I, sections 9 and 17, the tremendous need for reliability where the stakes are so high demands the concurrence of a unanimous jury to recommend death.

The statute is also defective for its failure to provide adequate guidance to the jury in their monumental task. It fails to sufficiently apprise the jury how to fmd mitigation, the accurate standard to be used, and how to find aggravating circumstances. (R. 295-303). For these reasons, too, the statute violates the due process and cruel and unusual punishment clauses of the United States and Florida constitutions.

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CONCLUSION

For the foregoing reasons, Mr. Smith's convictions and death sentence must be reversed and the case remanded for a new trial. Alternatively, the appellant's death sentence should be reduced to life or this case should be remanded for a new sentencing proceeding.

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CERTIFICATE OF SERVICE;

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States mail this 15th day of April, 1996, to: Ms. Fariba Kromeily, Esquire, Office of the Attorney General, Criminal Division, P.O. Box 013241, Miami, Florida 33101.

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