IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 85,014

JOSE JIMENEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

FILED
AUG 5 1996
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By

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

CRIMINAL DIVISION

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INITIAL BRIEF OF APPELLANT

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Oral Argument Requested

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INTRODUCTION

Appellant was the Defendant in the trial court and Appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the record on appeal, and "T" will designate the trial transcript.

STATEMENT OF JURISDICTION

This Court has appeal jurisdiction in this case. Defendant **was** sentenced to death. Rule 9.030(a)(1)(A)(i), Florida Rules of Appellate Procedure, provides that the Florida Supreme Court has jurisdiction of final orders of courts imposing sentences of death. See also Section 921.141(4), Florida Statutes.

STATEMENT OF THE CASE

Guilt Phase

Defendant Jose Jimenez was charged by Indictment with one count of First Degree Murder, in violation of Section 782.04(1) and 775.087, Florida Statutes, and one count of Burglary of a Dwelling, in violation of Section 810.02(2)(a), Florida Statutes. In particular, it was alleged that on or about October 2, 1992, Defendant entered the home of Phyllis Minas without her consent and killed Phyllis Minas by stabbing her with a sharp knife-like object. (R. 1-3).

On June 22, 1994, several months before commencement of trial in this cause, the trial court conducted a hearing on an alleged

conflict between Defendant and his court-appointed second chair counsel, Mr. Kassier. After conducting the hearing, the court denied the motion to withdraw by Mr. Kassier and Defendant's motion for discharge. (T. 173-183).

On September 27, 1994, the defense filed a motion to suppress statements. (R. 194-196). On September 29, 1994, Defendant's motion to suppress statements was addressed by the trial court. At the hearing, the defense specifically requested that Defendant's statements to the arresting detectives made prior to the reading of his Miranda rights and Defendant's statements made to his probation officer be suppressed. (T. 222). The defense stipulated to the deposition of Rochelle Baron, Defendant's probation officer, in lieu of her live testimony. (T. 223). The State announced its intention not to use the statements to the detectives. However, the prosecution maintained that the statements to the probation officer were admissible and would be used. (T. 225-226). The court agreed to review the probation officer's deposition (R. 207-221), and announce a decision on the first day of trial. (T. 229). On October 3, 1994, the court denied the motion to suppress. (R. 13; R. 196; R. 201-206; T. 235-236).

After the court's denial of the motion to suppress, trial commenced in the cause. (R. 515). During jury selection, the court conducted sidebar conferences to rule on cause challenges of prospective jurors. Defendant was not present at these sidebar conferences. (T. 262-266; T. 338-340). Following voir dire, a jury

was selected and sworn. (R. 515-517; T. 457). The court then gave the jury preliminary instructions. (T. 457-461).

The following day, the court considered a defense objection to a late fingerprint comparison report provided by the prosecution. The court conducted a Richardson hearing. The State announced that four latents of value had been lifted from the crime scene. The technician, Mr. McQuay, had previously matched one of the prints to Defendant. The prosecutor had asked the technician that very day to compare the remaining prints with the victim. McQuay had now matched the remaining prints with the victim. The assistant state attorney stated that the State had the intention of using this new information in the event the defense were to make an issue of the previously unmatched prints. The trial court made a finding that the State was complying with its ongoing discovery obligations. (T. 471-474). During trial, the court conducted a second Richardson hearing on the State's failure to list the custodian of records for the Medical Examiner's Officer as a predicate witness for the victim's standard prints. The court ruled that although there had been a discovery violation, there was no prejudice because the defense was aware of the State's intention to introduce the medical examiner's records at trial. (T. 672-675).

On another matter, the court reserved ruling on whether Rochelle Baron could be identified as Defendant's community control officer when she testified and whether the nature of Defendant's prior conviction could be revealed to the jury. (T. 477-480). During trial, the defense moved to prohibit mention of Baron's

occupation or law enforcement relationship with Defendant. The court granted this request. (R. 416; T. 695-696).

The State presented an opening statement. (R. 412; T. 483-488). Defendant's counsel thereafter presented opening statement. (R. 412; T. 488-493).[1]

At trial, the State called various witnesses in its case-in-chief. During the course of Detective Ronald Pearce's cross-examination, the State objected to certain questions concerning the search of Defendant's apartment as outside the scope of direct examination. The defense insisted that questions into this area was permissible in light of Pearce's role as the lead crime scene investigator. The court sustained the State's objection, ruling that Pearce could be called by the defense in its case. (T. 559-560; T. 562-563).

Subsequently, during the cross-examination of Detective Anthony Ojeda, the State objected to questions concerning the search of Defendant's apartment as outside the scope of direct examination. The defense insisted that the questions into this area were permissible, especially in light of Ojeda's role as lead investigator. The trial court prohibited the defense from questioning Ojeda in this area as the questions were outside the

[1] Prior to opening statements, the defense mentioned a newspaper article printing out that morning concerning a murder very similar to the facts in the present case and requested a jury inquiry. (T. 468-469). The court later inquired of the jury if any of the jurors had read anything in the newspaper that would have had an impact on them in the case. One of the jurors stated: "Just that there was a murder." The juror, however, answered that the matter would not have an impact on him in this case. (T. 482).

scope of direct examination. (T. 755-758). The trial court also prohibited Defendant from asking Ojeda about the particulars of Defendant's arrest warrant, ruling that the questions would elicit **hearsay** responses. In particular, the defense was not permitted to question Ojeda about Officer Cardona's identification of Defendant at the scene. (T. 765-770).[2]

Following testimony of Rochelle Baron, the State rested its case. (R. 417; T. 776). Defendant presented his arguments on a motion for judgment of acquittal. (T. 776-783) . The court denied the motion. (R. 417; T. 783-785). Thereafter, the court conducted the charge conference.[3] The defense submitted two special instructions. The court denied the proffered circumstantial evidence and fingerprint instructions. (R. 403-407; T. 791-812).

The defense called three (3) witnesses. Thereafter, the defense rested its case. (R. 418; T. 869). The State recalled Detective Ojeda on rebuttal. At the end of Ojeda's testimony, the State rested its rebuttal case. (R. 419; T. 874). The defense renewed all previous motions, including the motion for judgment of acquittal. The court **denied** the motion for judgment of acquittal and re-affirmed its prior rulings. (R. 419; T. 875-877).

Counsel for the State presented closing argument. (R. 419; T. 880-891). The defense then presented closing argument. (R. 419; T.

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[2] The defense later announced that it would not be calling Officer Cardona. (T. 788).

[3] The defense requested two lesser included offense instructions for first degree murder: second degree murder and manslaughter. (T. 793).

891-910). Counsel for the prosecution presented a rebuttal closing argument. (R. 420; T. 911-931).

Subsequently, the court instructed the jury. (R. 420; R. 422-448; T. 931-951). The jury retired to deliberate. (R. 420; T. 952). Thereafter, the court reconvened to accept the jury's verdicts. Defendant was found guilty on both counts. (R. 421; R. 449-450; T. 957). The jury was polled. (R. 421; T. 957-958) . The court adjudged Defendant guilty on both counts. (R. 421; R. 451-452; T. 961).[4]

Penalty Phase

On November 10, 1994, December 8, 1994, and December 14, 1994, the trial court conducted the penalty phase and sentencing hearings. At the November 10th hearing, the parties stipulated to Defendant's prior convictions for resisting with violence and possession of stolen property. (T. 979; T. 998-999). The court reserved ruling on the prosecution's motion in limine for order to prohibit Defendant's expert from testifying that Defendant was high on drugs on the date of the offense. (R. 475-476; T. 975-979).

The court gave the jury preliminary instructions for the penalty phase. (T. 983-984). The State presented the testimony of two (2) witnesses. (R. 513). After Probation Officer Lennox's testimony, the State presented the judgment of burglary entered

[4] The State moved to dismiss Defendant's pending community control violation case. (T. 961-962) .

against Defendant in this case. (T. 1009-1110). The State rested. (R. 513; T. 1011).

Thereafter, after argument, the court denied the State's motion in limine for an order prohibiting Defendant's expert from testifying that Defendant **was** possibly under the influence of drugs at the time of the incident. (T. 1012-1019; T. 1029-1034). The defense presented the testimony of Defendant's father and sister and Dr. Schwartz. (R. 513-514). The defense rested. (R. 514; T. 1081).

The court conducted a charge conference on the penalty **phase.** The State sought several aggravating factors: 1) Commission of crime while Defendant on community control; 2) Defendant's prior felony conviction; 3) Commission of crime while Defendant engaged in the commission of, or attempt to commit, burglary; 4) Heinous, atrocious or cruel; and 5) Pecuniary gain. The defense objected to heinous, atrocious or cruel and pecuniary gain. The court overruled Defendant's objections to heinous, atrocious or cruel, but sustained the objections to pecuniary gain. (T. 1072-1077). The court granted Defendant's request for a mitigation instruction on Defendant's capacity to appreciate the criminality of his actions. (T. 1082-1083).

The court gave the jury preliminary instructions. (T. 1083-1084). The prosecution presented a penalty phase argument. (R. 514; T. 1084-1097). The defense presented its penalty phase argument. (R. 514; T. 1097-1106). The court instructed the jury. (R. 501-511; R. 514; T. 1106-1111). After deliberations, the jury

returned a unanimous verdict recommending the death penalty. (R. 487; R. 514; T. 1113). The jury was polled. (T. 1113-1114).

On December 8, 1994, at the sentencing hearing, Defendant presented a letter from his mother for the court's consideration. (T. 1122-1123). Defendant himself addressed the court. (T. 1123-1127). The defense made an argument against imposition of the death penalty, specifically questioning the applicability of the aggravating factor of heinous, atrocious or cruel. (T. 1128-1131).[5] The prosecution argued for the death penalty, pointing out the violation of the sanctity of the victim's home. The State noted Defendant's total lack of remorse or acceptance of responsibility. (T. 1131-1133).[6] The court reset the sentencing for December 14, 1994. (T. 1134).

On December 14th, the court announced that it had prepared an order.[7] The trial judge imposed the death penalty. (R. 545; T. 1158). The court made certain findings on the record. (T. 1140-1158). As to Count II, burglary, the court imposed a sentence of life imprisonment. The term of imprisonment was ordered to run consecutive to the imposition of death. (R. 546-547; T. 1159).[8]

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[5] The defense presented a sentencing memorandum. (R. 494-500).

[6] The prosecution also filed a sentencing memorandum. (R. 520-528).

[7] A sentencing order was prepared and filed. (R. 529-543).

[8] Defendant's guideline scoresheet on the burglary count provided for a recommended sentence of 5 1/2 to 7 years, and a permitted range of 4 1/2 to 9 years. (R. 548). The court departed from the guidelines on the basis of an unscorable capital offense. (T. 1159).

In December 20, 1994, Defendant filed a notice of appeal. (R. 551). This appeal follows.

STATEMENT OF THE FACTS

Guilt Phase

At trial, Detective Ronald Pearce, City of North Miami Police Department, testified that on October 2, 1992, he was assigned to the crime scene unit. Pearce stated that he responded to 13725 N.W. 6th Avenue, Apt. No. 207, North Miami, Florida, at about 8:50 P.M. Pearce spoke with various uniformed officers at the scene and found out that the victim had been transported to Jackson Memorial Hospital. Detective Ojeda requested that Pearce secure the scene. Pearce, with the assistance of Detective Thompson, began to search for evidence and document the scene by taking photographs. Pearce described various photographs taken of the area and of the apartment. A photograph was also taken of the outside of Defendant's apartment, Apt. No. 309. Pearce also dusted the apartment for latent fingerprints. A sketch of the apartment was also made. The detective testified that $1200 were inside a chest of drawers in the bedroom. There were also large amounts of jewelry, credit cards and watches. Detective Pearce stated that the signs of disturbance were blood on the floor, a phone lying on the floor in the living room and the open sliding glass doors. There was no evidence of ransacking. (T. 493-520).

Detective Pearce testified that he was able to step from the victim's balcony to the neighboring balcony with little difficulty. (T. 522). He processed the balcony railings of apartments 206 and

207 with negative results.[9] Pearce also processed the sliding glass doors, the screen door leading to the balcony, the kitchen table, the interior of the front door and the floor of the kitchen. (T. 522-524). Pearce lifted ten possible latent fingerprints. He submitted the latents to the laboratory for analysis."' Pearce also collected certain items of evidence, including the victim's clothing lying on the floor, a pair of scissors,[11] the victim's jewelry, money, credit cards and personal belongings from the chest of drawers, the victim's pair of glasses, and blood samples. The detective stated that there was not a lot of blood evidence at the scene. (T. 524-531).[12]

Pearce testified that on October 5, 1992, he visited 1575 71st Street, Miami Beach, the home of Defendant's parents.[13] Pearce collected various items including several articles of clothing, a pair of scissors, and an attache case. Pearce also took some photographs of that scene. Pearce described the photographs taken. He collected baseball cap-type hats found inside the bedroom used

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[9] Pearce inspected the balcony areas because he had been told that the suspect had left the apartment by dropping from the victim's apartment balcony. (T. 543).

[10] Pearce did not collect any latent prints from the sliding glass doors. (T. 541).

[11] The pair of scissors were collected from the living room floor. The scissors were not submitted either for fingerprint analysis or for serological analysis. (T. 548-549).

[12] No blood samples were collected on the balcony or on the sliding glass doors. (T. 540-541). No blood samples were collected from the back of the door to the apartment. (T. 551).

[13] Pearce was given free access to this apartment by Defendant's father. (T. 553).

by Defendant. Some blood appeared to be on one of Defendant's pants. (T. 531-535).[14]

Doctor Charles Wetli, Dade County Deputy Chief Medical Examiner, testified that on October 3, 1992, he performed an autopsy on Phyllis Minus.[15] Dr. Wetli took the measurements of the body. It was determined that Minus was a 63 year-old, white female, five feet, five inches tall and weighing 135 pounds. Minus had a slight black eye and numerous bruises, including on the right and left hips, the right leg below the knee, the right arm and forearm, the right side of her chest and back and the right hand. Wetli found eight penetrating stab wounds to the body and minor abrasions to the cheek that appeared to have occurred after death. (T. 569-574).

Dr. Wetli described the photographs taken during the autopsy. The doctor testified that there were three superficial cuts to the left side of the neck probably made with a sharp instrument. Wetli stated that the various stab wounds included of two stab wounds to the neck, A and B. Neither of these wounds was lethal. In addition, stab wounds D and E were to the left breast. Stab wound C went between the ribs, nicked one rib and hit the heart. Stab

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[14] Pearce submitted the pants for serological analysis. He also submitted a pair of tennis shoes for analysis. (T. 556-557). On cross-examination, Pearce testified that he was present when blood and saliva samples were taken from Defendant. These samples were submitted for analysis to the crime lab. In addition, Pearce stated that a DNA analysis was conducted on the items collected. (T. 557).

[15] The parties stipulated to legal identification of the victim. (T. 580-581).

wounds F and G were principally superficial and did not cause significant damage. Stab wounds C and D caused one and a half quarts of blood inside the chest cavity, causing the victim's death. (T. 581-585). Wetli also testified that he discovered severe bruising to the brain after removing the victim's scalp. This bruising was most likely caused by blunt force to the head. The doctor determined that a knife was most likely used by the attacker. A pair of scissors could also have been used. (T. 585-587).

Dr. Wetli testified that there was a high likelihood of a small amount of "blood transfer" between the victim and the perpetrator. The attack itself lasted a matter of minutes. In all probability, the attacker and victim faced each'other. Dr. Wetli stated that the wounds were consistent with the victim lying on her back. Dr. Wetli found no obvious defensive wounds on the victim. He also found that the attacker was most likely right-handed. (T. 587-593) .[16]

Virginia Taranco testified that she was living at 13725 N.E. 67th Avenue, Apt. 208, in October, 1992. She stated that Ms. Minas, the victim, lived next to her in apartment #207. On October 2, 1992, between 6 P.M. and 7:55 P.M., Taranco was returning from the band and the grocery store with her mother and Mary Griminger. As Taranco, her mother and Griminger were in the parking area of

[16] Dr. Wetli turned over a portion of the victim's rib to Detective Pearce. This was done so that the rib could be analyzed by the Tool Mark Identification Bureau of the Metro-Dade Police Department. (T. 596).

the apartment complex when they spotted Defendant Jimenez coming down the stairs of the building toward the parking lot. She noticed that Defendant was wearing a multi-colored hat. Taranco knew Defendant as a neighbor. He lived in Apartment #309. Taranco and her mother walked up the stairs to her apartment to unload the groceries. Shortly thereafter, Griminger left to go to her apartment on the third floor. As Taranco watched Griminger go into her apartment, she heard a noise and she started calling out her name fearing that she had fallen. Griminger did not answer. Taranco then heard someone say: "Oh my God. Oh my God." (T. 614-620).

Taranco testified that she heard a second noise, louder than the first.[17] She noticed that the noises were coming from Minas' apartment. She saw that Minas' screen door was ajar. Lecrecia, another neighbor, came out of her apartment and said she also heard a noise. Both Taranco and Lacrecia, fearful that Minas may have had a heart attack, approached her apartment. Both women started calling out to Minas. Lecrecia touched the doorknob and the door opened slightly and then was shut from the inside. Taranco and Lecrecia began banging on the door and calling out Minas' name even harder, but there was no response. They tried to call the apartment by telephone but were unsuccessful. Finally, Taranco went downstairs to see if Minas' car was in the parking lot. Griminger and Lecrecia later went downstairs to look for the car.

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[17] Taranco estimated that the two noises were only about one or two minutes apart. (T. 632).

Since there was no answer, the women decided to call the police. After Taranco called the police, she saw Defendant walking from his apartment from the third floor. She noticed that Defendant's hair was pulled back tight.[18] He said: "What's happening?" Lecrecia told him that Minas may have had a heart attack. Defendant asked Taranco's mother to use the phone to call a taxi. (T. 620-625).

Taranco testified that when the police arrived. They asked the residents if they had any keys to Minas' apartment. Griminger, a former president of the condominium, produced some keys. The police were able to gain access to the apartment. The police asked the persons in the hall to clear out while they entered. Taranco was told by Lecrecia that Minas had been seen lying on the floor with some blood. Taranco herself was able to see Minas' body from the open door of Minas' apartment. She later learned Minas had been stabbed. (T. 625-627).

Lecrecia Ponce testified that she lived in apartment #209 in October, 1992. Ponce stated that on October 2, 1992, at about 8 P.M., she was sitting in her living room when she heard a big boom noise. Ponce went outside and saw Virginia Taranco. Ponce and Taranco discussed the noise. They saw Minas' screen door open. Both women approached Minas' apartment and started calling out Minas' name and knocking on the door. 'There was no answer. Ponce noticed that the door opened about an inch when she touched the doorknob. Suddenly, the door was closed from the inside. Ponce

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[18] Taranco explained that Defendant was hatless and looked "very clean." (T. 638).

heard three locks clicking close. The women decided to call Mary to get Minas' number, but Minas had an unlisted number. Taranco, Ponce **and** Griminger decided to check out Minas' vehicle. Ponce noticed that Minas' car, with a tag reading "Indiana," was still in the parking lot. Taranco decided to call the police. After Taranco called the police, Ponce noticed Defendant walking down from the third floor.[19] Defendant was wearing a white T-shirt and had a ponytail. Defendant asked her what was going on. He later began talking with Taranco's aunt. After the police arrived, Ponce was able to look inside her apartment and saw Minas lying on the floor. She learned that Minas had been stabbed. (T. 647-656). The following morning, Ponce saw Defendant at the apartment complex. She did not speak with him. (T. 662).[20]

William McQuay, fingerprint technician for the Metro-Dade Police Department, testified that he received latent prints from the North Miami Police Department. McQuay compared these prints with the standard prints of Defendant and Phyllis Minas. McQuay determined that only four of the ten latent prints were of value. McQuay determined that the latent lift marked State's Exhibit 31 and the standard taken of Defendant's right little finger matched. The latent print was found on the door. McQuay also determined

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[13] Ponce testified that when Defendant came downstairs, approximately 20 to 25 minutes had elapsed since she had heard the first noise. (T. 658).

[20] Ponce testified that it was not unusual for Defendant to ask to borrow the phone. In fact, Defendant had borrowed Ponce's phone on one occasion. Ponce stated that everyone in the complex knew each other and that they were all very friendly with each other. (T. 660-661).

that the remaining latent lifts of value matched the standard prints of Minas. (T. 663-678).

Officer Walter Sidd, North Miami Police Department, testified that on **October 2,** 1992, he responded to the scene of the stabbing. Sidd was greeted by a couple of elderly women and was told what **was going on.** Sidd decided to gain entry into the Minas apartment. Sidd and another officer were able to obtain a set of keys which were used to open the door. Upon opening the door, Sidd immediately saw Ms. Minas lying on the floor with her face toward him in the opening of the kitchen. Minas **was** wearing a nightgown, which **was stained** with blood. Sidd noticed one laceration on her neck and blood spots underneath her nightgown. Minas, who was still conscious, said there was no one in the apartment and did not know she was bleeding. The officers ascertained that no one else was in the apartment. (T. 682-686). Sidd testified that the sliding **glass** doors to the apartment were slightly opened. He called for Rescue. After Fire Rescue arrived, Sidd permitted them to treat and transport the victim and he sealed the apartment until the investigations division could take over the case. (T. 686-688) .

Captain John Williamson, **Dade** County Fire Rescue, testified that on Ocober 2, 1992, he was dispatched to the scene of the stabbing. Williamson encountered Ms. Minas in her apartment. Minas was lying in the hallway directly inside the front door. He noticed some blood. Minas attempted unsuccessfully to communicate with him. They treated her and had transported to Jackson Memorial

Hospital. En route to the hospital, the victim was in cardiac arrest. (T. 697-700).

Clifford Merriweather testified that on October 2, 1992, he was employed at Florida Silica Sand Company, where he worked the 7:30 to 5 shift. After hours, Merriweather worked at Tropical Condominium as a custodian. He had been working there for about 3 months. At about 8 P.M., Merriweather was sitting on the porch of the condominium waiting for a ride when he saw a man drop off a balcony. The man was wearing dark-colored jeans, a dark shirt, and a baseball-cap hat with gold writing on it. The man was sweating heavily; his eyes were big.[21] The man actually got within 8 to 10 feet from Merriweather. Merriweather recognized the man from living in the building. He noticed that the man walked north around the building. About 25 to 30 minutes later, Merriweather saw the man again. At this time, the man was not sweating. The individual told Merriweather that he was tired of waiting on people. He was waiting for a cab. The man walked away. (T. 701-709).

Merriweather testified that the police arrived at the apartment complex five or ten minutes before he saw the man a second time. Merriweather was later shown a photo line-up. Merriweather was able to pick out the photograph of the man he saw drop off the balcony on October 2nd. Merriweather signed the

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[21] Merriweather did not notice any blood on the individual. (T. 718). The man was not running. (T. 722).

photograph, Merriweather made an in-court identification of Defendant. (T. 709-713).

Sergeant Richard Spotts, North Miami Police Department, testified that in October, 1992, he was asked to assist in the investigation of the stabbing incident. He was directed by his supervisor, Sgt. Lynch, to arrest Defendant. Spotts was also asked to show a photo line-up to Clifford Merriweather. According to Spotts, Merriweather immediately picked out Defendant's photograph. (T. 738-743).

Detective Anthony Ojeda, North Miami Police Department, testified that he was assigned as lead detective into the death of Phyllis Minas. Ojeda stated that he responded to the scene of the stabbing and did a brief walk-thru of the apartment. Ojeda spoke with Clifford Merriweather, Virginia Taranco and Lecrecia Ponce. Ojeda attempted speak with Minas at Jackson Memorial Hospital but she had already died. During the course of the investigation, Ojeda learned that Defendant's fingerprint were found inside Minas' apartment, at which point Ojeda obtained an arrest warrant for Defendant." Ojeda responded to the home of Defendant's parents and left his card. On October 5, 1992, Ojeda spoke with Defendant by telephone and asked him to meet with him to discuss some burglaries. Ojeda did not mention the stabbing incident. Although Defendant stated he could not meet with Ojeda that particular day,

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[22] Ojeda indicated that there were three factors supporting the arrest warrant: 1) the fingerprint evidence; 2) the observations of Officer Cardona of Defendant at the scene on the night of the stabbing; and 3) Merriweather's photo identification. (T. 765).

Ojeda decided to go to Defendant's parent's house. Back-up units were summoned. Ojeda placed a second call to Defendant and advised him that he had an arrest warrant and that the house was surrounded, Ojeda directed Defendant to exit the house from the front door walking backwards with both hands behind his head. Ojeda waited and made several additional calls but Defendant did not exit the house. Finally, about 15 minutes later, Defendant left the house. Defendant explained that he had been speaking with someone. He was transported to the police station and was later formally arrested. (T. 744-752).

Ojeda testified that he had an opportunity to speak with an individual by the name of Rochelle Baron. Baron had been the person with whom Defendant had been speaking when the house was surrounded. Ojeda also testified that he was present during jury selection in this case and was able to observe Defendant using his right hand. (T. 752-754).[23]

Rochelle Baron testified that on October 5, 1992, she received a call from Defendant. Defendant told her that the police were surrounding his house and he wanted to know what to do. Baron told Defendant to get out of the house and leave a note for his parents. Baron asked Defendant what the police wanted. Defendant answered: "They say I stabbed somebody." Baron made a note of the conversation. (T. 772-775).

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[23] Ojeda testified that the police never found the murder weapon. In addition, the police never found any of the victim's blood on Defendant or his clothing or belongings. The police never found any of the victim's property with Defendant. (T. 770-771).

The defense called Dr. Roger Kahn, criminalist with the Metro-Dade Police Department. Dr. Kahn, a DNA analyst, testified that about the DNA analysis process. Kahn stated that he was given a series of samples to test from criminalist Kathleen Nelson. These items consisted of a blood sample from Phyllis Minas, two pieces of jean material from Defendant Jimenez, a blood standard from Defendant and a blood-stained piece of burgundy towel.[24] According to the witness, the test results showed that one of the two pieces of jeans from Defendant matched his blood standard and that the blood on the burgundy towel matched the victim's blood standard. Kahn ruled out any possibility that the blood on the jeans matched the victim and that the blood on the towel matched Defendant. (T. 816-828).

Detective Anthony Ojeda was recalled by the defense. Detective Ojeda identified consent to search forms executed by Defendant on October 5, 1992. The forms authorized a search of Defendant's apartment at the condominium and his room at his parents' home. Both places were searched. Ojeda testified that some evidence collected was submitted to serology for analysis. Some items were turned over to Dr. Kahn for DNA analysis. Ojeda also learned that evidence was submitted to the tool and mark section by Detective Pearce for analysis. (T. 835-841).

Officer Robert Korland, North Miami Police Department, testified that he responded to the stabbing scene on October 2,

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[24] The towel was retrieved from the victim's apartment. (T. 828).

1992. Korland stated that he arrived at 8:22 P.M. at about the same time that Officer Sidd got to the scene. The two officers took the elevator to the second floor where they met a group of neighbors. As a result of their conversations with the neighbors, Korland and Sidd gained entry into apartment 207. Korland saw Minas lying in the hallway dressed in a nightgown covered with blood. Korland determined that the victim had been stabbed multiple times. Korland went out on the apartment balcony but saw no blood on the sliding glass door leading out into the balcony. Korland noticed a van parked nearby, in a position giving easy access to climb up and down from the balcony. He did not notice anyone in the van. The van was no longer present when Korland left the scene, although Korland acknowledged that he had previously stated under oath that the van was still at the complex when he left. (T. 841-848).

Korland testified that while he was at the scene he had occasion to speak with Clifford Merriweather. The officer stated that Merriweather had seen an individual whom he described as a white Latin male, approximately five feet-six inches to five feet-nine inches tall, weighing about 175 to 190 lbs., and wearing a T-shirt, jeans and a baseball cap, with a partially shaved head and a tail on the back. Korland conceded that he may have previously stated under oath that Merriweather had stated that this Latin male had jumped off the second story balcony onto the van and then onto the ground. Korland stated that Merriweather did not indicate that he knew the Latin male. Korland could not recall if Merriweather

ever stated that he recognized the person he had seen. Korland could not recall if he told the detectives about Merriweather, although he had previously indicated as much in deposition. (T. 848-858).

On rebuttal, the State recalled Detective Ojeda. The detective testified that on the night of the stabbing incident he had occasion to speak with Mr. Merriweather. Merriweather told him that at about 8 P.M. he noticed a subject jump from a balcony which adjoins the victim's balcony and as he hit the floor he walked across in front of Merriweather and disappeared. The witness described the individual to Ojeda as a heavy white male, about five feet, nine inches tall, sweating profusely, wearing a baseball cap with some gold lettering on it and a dark shirt and dark pants. The person wore his hair back in a ponytail. Merriweather told Ojeda that he did not really know the individual but had seen him at the apartment complex, although he did not know if he lived in the complex. Ojeda testified that Merriweather stated that he saw the individual a short while later walking downstairs, wearing different clothes and clean-shaven. (T. 872-873).

Penalty Phase

At the penalty phase, the State called Officer Kenneth Schwartz, Loxahatchee County. Schwartz testified that in July, 1986, he was working for Metro-Dade Police Department. At that time, Schwartz worked in the burglary division. He had occasion to arrest Defendant on a burglary case. Defendant resisted arrest by

fighting with Schwartz. During the fight, which lasted about 5 minutes, the officer's firearm was dislodged from his ankle. (T. 985-988).

Dorothy Lennox, a State probation officer, testified that she had the opportunity to review Defendant's community control file. Lennox stated that Defendant had been placed on community control on June 26, 1992, for one year, on charges of false insurance claims and grand theft, second degree. A criminal order of restitution had been entered for $22,000.00 to the insurance company and for $1,016.00 to the Florida Department of Insurance Fraud. Defendant was still on community control at the time of the incident of October 2, 1992. An allegation of community control violation was made that Defendant failed to remain at his residence on October 2nd at 8 P.M. (T. 999-1006). Lennox testified that Defendant was attending the Warehouse, a program for alcoholic anonymous and narcotics anonymous. Defendant had been recommended for drug treatment as early as 1991. In fact, Defendant was referred to the program due to possession of cannabis and possession of cocaine charges. In August, 1992, the probation department set forth an objective that Defendant remain drug-free. (T. 1007-1009).

The defense called Jose Jimenez; Sr., Defendant's father. Jimenez testified that Defendant received bad grades while in school. He also stated that his son got involved with marijuana while attending military school after the 8th grade. Defendant never finished high school. According to Jimenez, Defendant

attended Spectrum, a program for drug problems, in his late teens, but he dropped out of the program a couple of times. Jimenez recalled that he threw his son out of his house because Defendant was acting wild and was high on drugs. Nevertheless, Jimenez tried to help his son with his drug problems. Defendant attended the Warehouse, another program, but would relapse into drug use. Jimenez testified that when his son was not on drugs he behaved appropriately. (T. 1020-1025).

Dr. Gary Schwartz, a licensed forensic psychologist, testified that he conducted a 3 1/2 hour clinical interview with Defendant. The doctor also tested Defendant. He gave him the standard intelligence test, which showed that Defendant functioned within the average range of intellectual functioning. He gave him the Bender Gestalt motor test for neurological disease or brain damage, which test showed no major signs of neurological deficiencies. Schwartz conducted a second clinical interview with Defendant the following day. This meeting took 2 hours, 45 minutes. Schwartz gave Defendant the Carlson Survey, which showed that Defendant had a substance abuse scale in the 75 percentile, i.e., Defendant's drug and alcohol problem was worse than 75% of the people incarcerated in jail. In two subsequent meetings with Defendant, Schwartz gave Defendant the Minnesota Multi Phase Personality Inventory test in order to determine whether the person is suffering from serious psychological disorders requiring mental health treatment or hospitalization. Dr. Schwartz found that

Defendant had a significant predisposition to drugs and alcohol abuse. (T. 1035-1041).

Dr. Schwartz testified that Defendant informed him that he began to use alcohol at 12 years of age. Defendant also told him that he progressed to drinking up to a bottle of Vodka once or twice a month. When he was a teenager, Defendant said that he drank even more and began using drugs, principally cocaine. He gradually started smoking crack cocaine. According to Schwartz, Defendant stated that in the last several years his habit cost him $300 a day. He also experienced LSD and Quaaludes. Dr. Schwartz interviewed Defendant's father, who confirmed that Defendant had a problem, presumably a drug abuse problem. (T. 1041-1042).

Dr. Schwartz interviewed Defendant about the events of October 2, 1992. Defendant told him that on that day he started smoking crack cocaine and smoked it throughout the day, right up to 8 or 8:30 P.M. He spent $200 on the cocaine. He had feelings of paranoia. Dr. Schwartz concluded to a reasonable scientific certainty that Defendant was under the substantial influence of crack cocaine on October 2nd.[25] Schwartz testified that crack cocaine was probably the most addictive and powerful drug that can be consumed by an individual. Its effects take hold within seconds

[25] Schwartz conceded on cross-examination that aside from Defendant's statements to him he was unaware of any other evidence showing that Defendant was under the influence of crack cocaine on October 2, 1992. (T. 1061-1062).

and affects the nervous system and brain.[26] Schwartz mentioned studies which showed that 90% of addicts go back to using the drug after rehabilitation, According to Schwartz, Defendant would be less aggressive without the effect of crack cocaine. Indeed, Defendant was well-mannered and cooperative during the interviews. (T. 1042-1046; T. 1050-1051).[27]

Iris Deleria, Defendant's sister, testified that she worked as a legal secretary. Deleria stated that she was aware of Defendant's legal problems and drug usage. She testified that when her brother was about 15 years of age she first noticed his disruptive behavior. (T. 1078-1081).

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[26] Schwartz admitted on cross-examination that assuming Defendant was under the influence of crack cocaine on October 2nd, it would not have prevented him from knowing the difference between right and wrong or would not have prevented him from conforming his conduct to the requirements of law. (T. 1067-1068). However, on redirect examination, Schwartz stated that Defendant's use of crack cocaine on October 2nd would have substantially impaired his capacity to appreciate the criminality of his acts. (T. 1069).

[27] Schwartz conceded on cross-examination that he had not reviewed any police reports, witness statements, depositions or trial transcripts in the case. (T. 1055-1056). The doctor did not know the exact nature of Defendant's prior criminal record. (T. 1056-1057).

ISSUES PRESENTED

(I)

DEFENDANT ENTITLED TO NEW TRIAL WHERE HE REQUESTED DISCHARGE OF HIS COURT-APPOINTED COUNSEL PRIOR TO TRIAL AND COURT CONDUCTED INSUFFICIENT HEARING THEREON

(II)

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO HIS ABSENCE FROM, AND LACK OF PARTICIPATION IN, SIDEBAR CONFERENCES DURING THE VOIR DIRE PROCEEDINGS WHERE CAUSE CHALLENGES OF PROSPECTIVE JURORS WERE MADE BY THE ATTORNEYS AND RULED UPON BY THE TRIAL COURT

(III)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S IMPERMISSIBLE RESTRICTION OF HIS RIGHT TO CROSS-EXAMINATION

(IV)

DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON THE TRIAL COURT'S FAILURE TO OBTAIN A PERSONAL WAIVER BY DEFENDANT AS TO LESSER INCLUDED OFFENSE INSTRUCTION

(V)

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS FOR FIRST DEGREE MURDER AND BURGLARY

(VI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

(VII)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

0.7111)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

(IX)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

SUMMARY OF ARGUMENT

Defendant is entitled to a new trial where he requested discharge of his court-appointed counsel prior to trial and the trial court conducted an insufficient hearing thereon. In the present case, the trial judge did not fully explore the basis of conflict between Mr. Kassier and Defendant. Moreover, where a trial judge is confronted with a request for discharge of court-appointed counsel the court must inform the defendant of his right to self-representation. This the trial court did not do.

Defendant was denied a fair trial due to his absence from, and lack of participation in, sidebar conferences during the jury selection process where cause challenges were made by the attorneys and ruled upon by the trial court. Defendant's absence from jury selection sidebars violated both the -Florida Rules of Criminal Procedure and the Florida and United States Constitutions.

Defendant was denied a fair trial by the trial court's impermissible restriction of his right to cross-examination. The defense should have been permitted to cross-examine the State's witnesses, Pearce and Ojeda, concerning concerning the search of

Defendant/s apartment, the particulars of the arrest warrant and the information on which they were operating. This blanket prohibition clearly violated Defendant's rights under the Florida and United States Constitutions.

Defendant must be accorded a new trial since Defendant **was** charged in a capital case in which the prosecution sought the death penalty and since he did not personally waive the reading of the remaining lesser included offense instructions as to first degree murder.

There was insufficient evidence presented at trial to support Defendant's convictions for First Degree Murder and Burglary. The present case was clearly a circumstantial evidence case. The evidence of the fingerprint established, at most, that at some time Defendant was inside the victim's apartment. Moreover, the State failed to establish proof of premeditation or that there was proof of felony murder. There **was** no evidence that Defendant engaged in a fully-formed conscious purpose to kill for a time prior to the act of killing the victim. In addition, there was no proof of the underlying felony for felony murder. There was no proof of forced entry. There was no proof that the victim refused entry or demanded the intruder's exit from the apartment. There was no proof of a specific intent to commit a crime inside the apartment. No items were taken from the victim. None of the victim's property was found on Defendant.

Defendant is entitled to resentencing based upon the prosecutor's improper penalty phase arguments. The prosecutor

improperly argued to the jury non-statutory aggravating circumstances. The prosecutor also improperly argued that the jury was required to return a recommendation of the death penalty. The prosecutor's remarks also constituted an impermissible "message to the community" argument. The prosecutor improperly argued that jurors should impose the death penalty because the victim was unable to present a case on her own. Finally, the assistant state attorney impermissibly diminished the jury's role in the death penalty process.

In view of the totality of the mitigating factors in this case, primarily Defendant's diminished mental capacity, imposition of the death penalty would be disproportionate in this case.

The trial court committed several errors in its sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence and a remand for resentencing. The court erred in considering that Defendant was engaged in the commission of, or attempt to commit, burglary. The court also erred in finding that the crime was especially, heinous, atrocious or cruel. In the absence of evidence to demonstrate that a defendant intended to torture a victim, the heinous, atrocious and cruel aggravating factor should not be applied. The trial judge also failed to give Defendant's mitigating circumstances sufficient weight. Rejection of mitigating factor cannot be sustained unless supported by competent substantial evidence refuting existence of factor.

Capital punishment is unconstitutional in view of the paradoxical constitutional commands of non-arbitrariness and need for jury discretion to consider all mitigation. Moreover, capital punishment today may be unconstitutional because of the inordinate delays between sentencing at trial and actual execution, inherent in the legal system.

ARGUMENT

(I)

DEFENDANT ENTITLED TO NEW TRIAL WHERE HE REQUESTED DISCHARGE OF HIS COURT-APPOINTED COUNSEL PRIOR TO TRIAL AND COURT CONDUCTED INSUFFICIENT HEARING THEREON

Defendant is entitled to a new trial where he requested discharge of his court-appointed counsel prior to trial and the trial court conducted an insufficient hearing thereon. Prior to trial, the trial court was apprised of Defendant's desire to discharge his second-chair **counsel**, Mr. Kassier.[28] At the hearing, Defendant made the following statement to the court:

> MR. JIMENEZ: "Okay, what it comes down to is I don't know what's going on with my case. I can never get in touch with my attorneys. Now I am left with one and it is just, I don't get along with an attorney who I can't **reach**. I don't what's going on with my case.
>
> I **am** facing **a death** sentence and I don't know what's going on. My case **was** scheduled for trial and they weren't ready for **trial.**
>
> They were willing to go to trial not being ready, you know, and I can't see that happening. You know, you need an attorney that is going to be ready to defend me. It is my life on the line." (T. 174)

The court proceeded to inform Defendant about the history of the case. The judge noted that Defendant had been represented by several. lawyers since the beginning of the case. The court explained that some of these lawyers had been discharged by the court for various reasons, including conflicts of interest. The judge stated, however, that Mr. Kassier had been on the case for a

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[28] Although the actual hearing concerned Mr. Kassier's representation, Defendant talked about his "attorneys," and complained about the fact that "they" were not ready to proceed to trial. (T. 174).

long time and had been representing Defendant on the death phase.[29] The judge then asked Defendant about any conflicts with Mr. Kassier. The following occurred:

> MR. JIMENEZ: "As a lawyer, no, but it's like again I say I don't know what's going on with my case. As of today if you asked me what's going on, I would tell you I don't know.
>
> Last year August my trial was scheduled for October. I asked for Mr. Hulahan (phonetic). The State argued they didn't want to drag the case through February. Here we are June hitting July and my case hasn't hit because they don't want me to have Hulahan.
>
> They are worried about a couple of months, I am fighting for my life. What's a couple of months to the State when it is my life we're talking about, you know?
>
> Every time I look at him, he wants to snicker at me and try to make me lose my cool. I don't let it bother me. I laugh at him, but it is my life on the line here. What's a couple of months?[30]
>
> THE COURT: That's water under the bridge at this point. At this point that is no longer an issue.
>
> MR. JIMENEZ: Issue is, can I have another attorney, you know, aside from Mr. Kassier?
>
> THE COURT: Let me tell you the law does not permit you to pick and choose who you want to represent you if they're being paid by County funds. If you want to hire your own lawyer, you can hire anybody under the sun.
>
> MR. JIMENEZ: I have to accept an attorney I don't feel is representing me to the fullest?

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[29] The court clerk indicated that Mr. Kassier had been counsel in the case since September 9, 1993. (T. 180).

[30] Defendant was referring to a 'September 9, 1993, hearing, at which the trial judge declined to appoint Mr. Houlihan as second chair at Ms. Cohen's request, noting that because of Mr. Houlihan's trial schedule Defendant's trial could not be scheduled until will into 1994. (T. 81-83). The prosecutor had previously objected to Mr. Houlihan as second chair counsel on grounds that Mr. Houlihan was too busy and that he did not know "how in good conscience he can approach this court and say I want additional work, and I'm objecting." (T. 69). The court had suggested that Ms. Cohen "find someone else." (T. 73).

> THE COURT: You havent' given me any good cause to believe Mr. Kassier is not representing you to the fullest. You are only saying you haven't been meeting with any of the lawyers on your case and don't know what's going on with your case. That doesn't tell me you have any problem with your lawyer on your case..." (T. 178-179).

The trial judge then heard from Mr. Kassier on the matter. Mr. Kassier explained that he had been asked by Defendant's prior counsel, Ms. Cohen, to represent Defendant as second chair. He indicated that since Ms. Cohen had previously withdrawn he believed that he was "simply relieved of any obligation I had as court appointed counsel." (T. 179; T. 181). Mr. Kassier also stated that he "walked away from the case without going into specific details." He concurred that there was a "conflict between Mr. Jimenez and I." (T. 180).[31] Mr. Kassier declined to inform the judge in open court about the nature of this conflict. (T. 180).[32]

The court announced that there was "no right under the law to have a second seat." The judge noted that she saw no reason to appoint a seventh or eighth lawyer on the case. (T. 181). She also indicated a concern about the amount of lawyers who were going to

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[31] On May 26, 1995, the trial court considered Ms. Cohen's motion to withdraw. At that time the court was informed of a possible conflict between Defendant and Mr. Kassier by Ms. Cohen. (T. 140). The assistant state attorney objected to Ms. Cohen's proffer of the conflict, noting that the State had been desirous of trying the case for quite some time and that witnesses and other persons were inquiring about the status of the case. (T. 140). The trial judge granted Ms. Cohen's motion to withdraw without addressing the alleged conflict between Defendant and Mr. Kassier. (T. 143).

[32] Mr. Matters, Defendant's first chair attorney, indicated to the court that based upon his conversations with Mr. Jimenez, he was requesting that the court discharge Mr. Kassier as second chair counsel. (T. 182).

get paid for their services in the case. (T. 182). The judge concluded the hearing by ruling as follows:

> THE COURT: "At this time the Court is making a finding there is nothing that I have heard that leads me to believe that Mr. Kassier has not been properly representing the defendant, that there is some conflict in his representation of the defendant, therefore the motion to withdraw is denied and the motion to appoint new counsel is denied." (T. 183).

The trial court conducted an insufficient hearing on Defendant's motion for discharge of court-appointed counsel and on counsel's motion to withdraw based upon a conflict with Defendant. When a defendant requests the discharge of his court-appointed counsel, a trial judge should:

> "[F]irst determine whether adequate grounds exist for replacement of the defendant's attorney. If the court finds that the defendant... has no legitimate complaint, it is then required to advise the defendant that if his request to discharge his attorney is granted, the court is not required to appoint substitute counsel and the defendant would be exercising his right to represent himself." Matthews v. State, 584 So.2d 1105, 1106-07 (Fla. 2d DCA 1991) (citations omitted).

In the present case, the trial judge did not fully explore the basis of conflict between Mr. Kassier and Defendant. The court could have easily heard Mr. Kassier in camera as to the basis for the conflict, in light of Mr. Kassier's reluctance to disclose his conversations with Defendant in open court.

Assuming arguendo that the trial court was under no obligation to investigate in depth the basis the the attorney-client conflict, the judge nonetheless did not fully advise Defendant as to his options. The court simply indicated that it was disinclined to appoint a second chair attorney. The court cited mainly financial

reasons. In response to Defendant's question if had to accept an attorney that he did not feel was representing him to the fullest, the court simply indicated that Defendant had not given her good cause to believe Mr. Kassier was not representing him to the fullest.

Clearly, a trial court may not force a lawyer upon a defendant. In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 45 L.Ed.2d 562 (1975), the United States Supreme Court noted:

> "It is the defendant... who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law."' Id., 422 U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring)).

The law in Florida is clear that where a trial judge is confronted with a request for discharge of court-appointed counsel the court must inform the defendant of his right to self-representation.[33] Recently, in Smith v. State, ___ So.2d ___, 21 F.L.W. D1619 (Fla. 2d DCA, July 10, 1996), the Second District reconfirmed this principle. The appellate court confronted a situation where a defendant requested discharge of his court-appoint&d counsel at the close of the prosecution's case. The court noted:

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[33] See State v. Young, 626 So.2d 655 (Fla. 1993), where this Court reiterated the principle that a defendant in a criminal case has the constitutional right of self-representation and may forego the right of assistance of counsel. Id., at 656 (citing Faretta v. California, 422 U.S. 806, 836, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975), and Rule 3.111(d), Florida Rules of Criminal Procedure.)

> "We realize that trial judges may be overburdened by defendants who use their right to counsel or to self-representation in deliberate attempts to disrupt the trial... With the power to control proceedings and prevent disruption, the trial judge would have been justified in refusing to grant smith a continuance or otherwise disrupt a trial that was at least half-way finished. **The trial judge was not justified, however, in refusing Smith's request to discharge his attorney and in failing to inform him of his right to self-representation.**" Id., at D1619-20 (emphasis supplied)

In the present case, the trial judge did not inform Defendant of his right to self-representation. Consequently, the court did not conduct a sufficient hearing on Defendant's motion to discharge his court-appointed counsel. Defendant is entitled to a new trial.

(II)

DEFENDANT WAS DENIED A FAIR TRIAL DUE TO HIS ABSENCE FROM, AND LACK OF PARTICIPATION IN, SIDEBAR CONFERENCES DURING THE VOIR DIRE PROCEEDINGS WHERE CAUSE CHALLENGES OF PROSPECTIVE JURORS WERE MADE BY THE ATTORNEYS AND RULED UPON BY THE TRIAL COURT

Defendant was denied a fair trial due to his absence from, and lack of participation in, sidebar conferences during the jury selection process where cause challenges were made by the attorneys and ruled upon by the trial court. At trial, the court conducted preliminary questioning of the prospective jury. After some initial questioning, the following occurred:

> THE COURT: "If I could see the lawyers for just a moment sidebar.
>
> **(Sidebar)**
>
> THE COURT: I'd like to see if there are any cause challenges so we don't have to ask them all the questions.
>
> MR. MATTERS: Judge, can we just do it like one section at a time. I think it will be much easier if we talk about the people in the box first.
>
> THE COURT: What about the two English problems?
>
> MR. MATTERS: Our position is Juror 8 and Jury [sic] 15 should be excused for cause because they don't speak English.
>
> THE COURT: I don't have your numbers but Ms. Duncan is actually the second juror.
>
> MR. MATTERS: I didn't say Duncan. I said Darna, No. Number 15.
>
> THE COURT: Ms. Varner?
>
> MR. MATTERS: No. 15, Judge. Darna. I don't know how you pronounce it.
>
> MR. BAND: Yes.

MR. MATTERS: No. 15 has a little language problems here.

THE COURT: State?

MR. BAND: We have no objection, Judge.

THE COURT: Ms. Darna?

MR. BAND: No objection.

MR. MATTERS: And No. 8.

MR. BAND: Comellas. No objection.

THE COURT: So Ms. Comellas. Okay?

MR. MATTERS: Right. Also on the same row, we also challenge for cause Mr. Stern.

THE COURT: State? Ms. Stern struck for cause. She said she has trouble presuming the defendant innocent. Anyone else?

MR. MATTERS: We don't have any right now in that area, in that box. I don't have any more for cause at this time.

THE COURT: You don't want to agree to the people that said they opposed the death penalty?

MR. MATTERS: I think we would like to question them a bit further.

THE COURT: Any others?

MR. MATTERS: No. 27, Lourdes Hernandez, L. Hernandez.

THE COURT: Ms. L. Hernandez.

MR. MATTERS: Moving to strike for cause.

MR. BAND: We object. She said she could follow the law.

THE COURT: At this time the motion is denied.

MR. MATTERS: Next is No. 30, Mr. David Cabarrocas. He indicated that he clearly would never consider the life sentence.

THE COURT: State?

MR. BAND: No objection.

THE COURT: Okay.

MR. MATTERS: And we move to strike for cause No. 37, Ms. Quintana, who indicated she can't presume him innocent at this stage.

MR. BAND: No objection.

THE COURT: Stricken for cause.

MR. BAND: While we're here Mr. Baker, a soon to be Dr. Baker, we move for cause. He seemed reasonably adamant.

MR. MATTERS: We begrudgingly have to agree.

THE COURT: Mr. Baker for **cause.**

MR. MATTERS: Just one second, Judge. That's it for us.

MR. BAND: Judge, there are a number of jurors who indicated they could not set aside their feelings. I don't know based upon what counsel started out with, I don't know if you want to do it here or just Voir Dire them or whether or not there's any arguments.

THE COURT: It's probably not going to take a whole lot for me to question them at this point.

MR. MATTERS: I think probably, I think I know what the State is talking about on the last group but I think our position is we would like to voir them.

MR. BAND: That's fine.

THE COURT: I think I will go through the questions, and before we break for lunch let everybody else go and keep those jurors so we won't spend a lot of time questioning them later.

MR: MATTERS: Okay. Before we even go through the general questioning is the Court going to excuse the people for cause?

THE COURT: That's what I'm going to do now.

End of Sidebar

THE COURT: Ladies and gentlemen, we are going to excuse the following jurors and ask them to report back to the seventh floor. Mr. Comellas, Ms. Stern, Ms. Darna... Mr. Cabarrocas, Mr. Baker, Ms. Quintana..." (T. 262-266).

Defendant was not present during the foregoing sidebar. No inquiry was made of Defendant by the court on his absence from the sidebar or any waiver of his presence at the sidebar during the exercise of the cause challenges. No representation was made by Defendant's counsel that he had discussed the cause challenges with Defendant and had obtained Defendant's consent thereto. Nothing in the record indicates that Defendant had the opportunity to participate in the decisions made at sidebar or ratified those decisions.

Subsequently, during additional questioning by the court, defense counsel requested another sidebar conference to discuss additional cause challenges. The following occurred:

MR. MATTERS: "Judge, could we approach for a second?

Sidebar

THE COURT: Is there any objection from either the defense or State to excuse for cause Mr. Moux and Mr. Espinel based on language?

MR. MATTERS: No.

MS. LYONS: None from the State, Judge.

THE COURT: And which jurors would you like to question?

MS. LYONS: This is the list we have. Dean, Silverio, Dicks, L. Hernandez.

THE COURT: What number is Dicks?

MS. LYONS: 47 on our list. No. 41. I was reading the number wrong.

THE COURT: L. Hernandez.

MS. LYONS: 22. Pincus.

THE COURT: Interiano.

MS. LYONS: And Pincus. And Quintano, should be 37.

THE COURT: 37 was already excused.

MS. LYONS: Okay.

THE COURT: Here's the list.

MR. MATTERS: Start with--

THE COURT: Interiano, Mrs. Dean, 17, Silverio, Ms. L. Hernandez.

MR. MATTERS: Correct.

THE COURT: Any additions?

MR. MATTERS: After L. Hernandez you had who?

THE COURT: Dicks, says she doesn't believe in taking anyone's life. She couldn't recommend the death penalty under any circumstances.

MR. MATTERS: Correct.

THE COURT: Mr. Interiano.

MR. MATTERS: Right. Let's see, let's go by numbers it's easier. I think we're all on the right page.

THE COURT: Interiano, No. 22.

MR. MATTERS: I have 14. And I have Dean, who is 17.

THE COURT: Right.

MR. MATTERS: I have Silverio, No. 19, Interiano, 22. We have L. Hernandez, 27.

THE COURT: Right. Ms. Dicks is No. 41.

MR. MATTERS: Correct.

THE COURT: And Mr. Pincus.

MR. MATTERS: 45.

THE COURT: Do you want to question them all together?

MR. MATTERS: Yes. And just excuse everybody else including the two for cause.

End of Sidebar

THE COURT: Mr. Moux and Mr. Espinel, we're going to excuse the two of you to go back upstairs to the seventh floor. Thank you very much." (T. 338-340).

Defendant was not present during the foregoing sidebar. No inquiry was made of Defendant by the court on his absence from the sidebar or any waiver of his presence at the sidebar during the exercise of the cause challenges. No representation was made by Defendant's counsel that he had discussed the cause challenges with Defendant and had obtained Defendant's consent thereto. Nothing in the record indicates that Defendant had the opportunity to participate in the decisions made at sidebar or ratified those decisions.

Defendant's absence from, and lack of participation in, the aforementioned sidebar conferences warrants a new trial in this cause. Rule 3.180(a)(4), Florida Rules of Criminal Procedure, provides as follows:

Rule 3.180. Presence of Defendant

(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:

(4) at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury

Both the Florida Rules of Criminal Procedure and the due process clauses of the state and federal constitutions provide that a criminal defendant has a right to be present during any "critical" or "essential" stage of trial. See generally Faretta v. California, 422 U.S. 806, 819 n.5, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ; Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982); Rule

3.180, Florida Rules of Criminal Procedure. The exercise of challenges during jury selection has been recognized as a "critical" stage of voir dire when a defendant has a fundamental right to be present. See, e.g., Francis v. State, susra, at 1177-78; Chandler v. State, 534 So.2d 701, 704 (Fla. 1988).

An accused's right to be present during trial is one of the most fundamental rights accorded a criminal defendant. See Mack v. State, 537 So.2d 109, 110 (Fla. 1989) (Crimes, J., concurring) (characterizing a criminal defendant's right to be present, along with other rights, as one of those rights which goes to the very heart of the adjudicatory process").

Applicability of Coney

This court in Coney v. State, 653 So.2d 1009 (Fla.), cert.den., U.S. ___, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), recently had the opportunity to review Rule 3.180 in the context of jury selection.[34] In Conev, this Court ruled as follows:

> "The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised... Where this is impractical, such as where a bench conference is required, the defendant can waive this right and exercise constructive presence through counsel. In such a case, the court must certify through proper inquiry that the waiver is knowing, intelligent, and voluntary. Alternatively, the defendant can ratify strikes made outside his presence by acquiescing in the strikes after they are made... Again, the court must certify the defendant's approval of the strikes through proper inquiry." Id., 653 So.2d, at 1013 (citations omitted).

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[34] This Court should be aware that the issue concerning the applicability of Conev to "pipeline" cases has been raised and briefed extensively in Martinez v. State, Case No. 85,450, and Lett v. State, Case No. 87,541.

It is undeniable that Defendant was not "physically present" at the two sidebar conferences where cause challenges were made and ruled upon. Defendant did not waive his right to be present. The trial court did not certify through any inquiry that Defendant was, in fact, waiving his presence. The record does not show that Defendant Consequently, there can be no question that Rule 3.180(a)(4), Florida Rules of Criminal Procedure, was violated.[35]

The present case was tried before the decision in Coney. However, Defendant's case was pending on direct review when Coney was decided. This Court in Conev pronounced that its ruling was "prospective only." Id. No explanation was provided by the Court as to whether its "prospective" ruling applied to "pipeline" cases. In Lett v. State, 668 So.2d 1094 (Fla. 1st DCA 1996), the First District ruled that the Conev decision did not apply to pipeline cases, i.e., to defendants whose cases were pending on direct review or not yet final at the time of the issuance of the decision. Lett v. State, supra, at 1095. The First District reasoned that whenever this Court specifies that its announcement of a new rule will have "prospective" application only this Court intends. the ruling not to have restropective application to pipeline cases. Id. The First District, however, certified the following question to this Court:

> "DOES THE DECISION IN CONEY APPLY TO 'PIPELINE CASES,' THAT IS, THOSE OF SIMILARLY SITUATED DEFENDANTS WHOSE CASES WERE PENDING ON DIRECT REVIEW OR NOT YET FINAL

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[35] This Court recognized that "no contemporaneous objection by defendant is required to preserve this issue for review..." Id.

DURING THE TIME CONEY WAS UNDER CONSIDERATION BUT PRIOR TO THE ISSUANCE OF THE OPINION?" Id., at 1095-96.

This same question was certified in subsequent cases from the First District. See Gainer v. State, 671 So.2d 240, 241 (Fla. 1st DCA 1996); Howard v. State, 670 So.2d 1149 (Fla. 1st DCA 1996); Caldwell v. State, ___ So.2d ___, 21 F.L.W. D1494 (Fla. 1st DCA, June 27, 1996). Other district courts of appeal have rejected the application of Conev to pipeline cases. See Quince v. State, 660 So.2d 370 (Fla. 4th DCA 1995); Osden v. State, 658 So.2d 621 (Fla. 3d DCA 1995).

The decision in Lett recognized that this Court in Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992), made the following ruling:

> "[A]ny decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retroactive application by the courts of this state in every case pending on direct review or not yet final."

However, the First District in Lett noted that in Wournos v. State, 644 So.2d 1000 (Fla. 1994), this Court had stated: "We read Smith to mean that new points of law established by this Court shall be deemed retrospective with respect to **all** non-final cases unless this Court says otherwise." Id., at 1007-08, n.4. Consequently, the district court in Lett concluded that in Coney this Court's "prospective only" language eliminated retrospective application. The district court, however, conceded that the

language in the Wournos footnote was "susceptible to other interpretations." Lett v. State, supra, at 1095.[36]

This Court's "prospective only" language in Conev did not exclude the applicability of the Conev decision to pipeline cases. For example, in Smith v. State, supra, this Court considered the applicability of Ree v. State, 565 So.2d 1329 (Fla. 1990), modified, State v. Lyles, 576 So.2d 706 (Fla. 1991), to cases not yet final. In Ree, the Court had, on rehearing, held that the decision would apply prospectively only. Id., at 1331. See Smith v. State, sunra, at 1064 n.2. This Court in Smith, after an exhaustive review of law on retrospectivity, concluded as follows:

> "We are persuaded that the principles of fairness and equal treatment underlying Griffith, which are embodied in the due process and equal protection provisions of article I, sections 9 and 16 of the Florida Constitution, compel us to adopt a similar evenhanded approach to the retrospective application of the decisions of this Court with respect to all nonfinal cases. Any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. '[T]he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review.' Moreover, 'selective application of new rules violates the principle of treating similarly situated defendants the same,' because selective application causes 'actual inequity' when the Court 'chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule.' Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new- or different factual

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[36] Recently, this Court in Brown v. State, 655 So.2d 82 (Fla. 1995), appeared to reaffirm the bright-line rule of retroactivity announced in Smith. But see Davis v. State, 661 So.2d 1193 (Fla. 1995) (approvingly citing Wournos). For purposes of stability and clarity of law, this Court should once and for all abondon its pre-Smith retroactivity doctrine and adopt the bright-line approach set forth in Smith and Griffith for all significant "new rules," whether rooted in federal or state law principles.

> situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final." Id., at 1066 (citations and footnotes omitted).

This Court ruled that the decision in Ree would be applied to all cases not yet final when mandate issued after rehearing in Ree, that is, after this Court ruled that the decision in Ree was prospective only.

The Court in Conev, moreover, did not announce a "new rule" of criminal procedure. A rule of law is deemed "new" if it "breaks new ground or imposes a new obligation on the States or the Federal Government... To put it differently, a case announces a new rule if the result was not dictated by [prior] precedent..." Teaque v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). See also Johnson v. United States, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)(if rule of criminal procedure is a "clear break" with past, it will not be given retroactive application to defendants pending on direct appeal at time of announcement of decision), overruled by Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed2.d 649 (1987) (all "new rules" must be given retroactive effect to all cases pending on direct appeal, even if new rule was "clear break" with prior precedent).

The clarification of the law announced in Coney was not a "new rule" of law under the definition of Teaque v. Lane. Consequently, no part of the Coney decision's procedural requirements was a "clear break" with the past. This Court's decision in Coney reaffirmed the long-standing law in Florida that an accused has a right to be present at bench conferences when jury selection

occurs. See Jones v. State, 569 So.2d 1234, 1237 (Fla. 1990); Smith v. State, 476 So.2d 748 (Fla. 3d DCA 1985). In any event, the right to be present at all critical stages of trial applies during all aspects of jury selection. Indeed, this Court in Coney recognized that the language of Rule 3.180 dictated the result. Id. at 1013. In short, this Court's interpretation of Rule 3.180 was merely declaratory of the plain language of the rule and was, therefore, not "new" for purposes of a retroactivity analysis. See Murray v. State, 803 P.2d 225, 227 (Nev. 1990); John Deere Harvester Works v. Indust. Comm'n, 629 N.E.2d 834, 836 (Ill.App. 1994).

The requirement of the Coney "rule" that the trial court obtain an on-the-record personal waiver of presence from the accused did not break new ground. Previously, this Court has strongly recommended that trial courts personally inquire of defendants when a waiver of the right to be present is required. Ferry v. State, 507 So.2d 1373, 1375-76 (Fla. 1987); Amazon v. State, 487 So.2d 8, 11 n.1 (Fla. 1986); Mack v. State, supra, at 110 (Grimes, J., concurring). See also Nixon v. State, 572 So.2d 1336, 1342 (Fla. 1990); Chandler v. State, supra, at 704; Remeta v. State, 522 So.2d 825, 828 (Fla. 1988). Since the mid-1980s, when Ferry and Amazon were decided, trial courts have regularly required personal, on-the-record waivers of a criminal defendant's right to be present at a critical stage of trial. Moreover, the United States Supreme Court has recognized that courts indulge every reasonable presumption against waiver of fundamental constitutional

rights and that courts do not presume acquiescence in the loss of fundamental rights. Carnley v. Cochran, 369 U.S. 506, 514, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)(citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938)). As such, even if personal-on-the-record waiver was not dictated at the time that Coney was decided by prior Florida precedent interpreting Rule 3.180, such a procedural requirement governing waiver was required by the U.S. Constitution. See also Larson v. Tansy, 911 F.2d 392, 396 (10th Cir. 1990); United States v. Gordon, 829 F.2d 119, 124-26 (D.C. Cir. 1987); United States v. Kupau, 781 F.2d 740, 743 (9th Cir. 1986).

Even assuming that Coney announced a "new rule" that would not qualify for retroactive application to Defendant's direct appeal under traditional standards of retroactivity, established state and federal cases require that Defendant be permitted to benefit from Conev. In Griffith v. Kentucky, supra, the United States Supreme Court held that all new rules of criminal procedure rooted in the federal Constitution must be applied to all applicable criminal cases pending at trial or on direct appeal at the time that the new rule was announced. See, e.g., Whitlev v. Williams, 994 F.2d 226, 235 (5th Cir. 1993)("[T]he retroactivity test adopted in Griffith appears to enjoy constitutional status."). A state court must apply the Griffith retroactivity framework because the United States Supreme Court's current retroactivity doctrine is rooted in the U.S. Constitution. See Harper v. Virsinia Department of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 2518, 125 L.Ed.2d 74 (1993)

("The Supremacy Clause... does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law... cannot extend to interpretations of federal law."). The procedural requirement of an on-the-record, personal waiver by a defendant, as recognized in Coney, implicates the U.S. Constitution insofar as such a waiver of the fundamental constitutional right to be present at a critical stage of trial is itself constitutionally mandated. Consequently, the procedure in Coney does not "rest [] on adequate and independent state [law] grounds because the state court's decision fairly appears to... be interwoven with federal law." Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Under these circumstances, the Equal Protection and Due Process Clauses of the Fourteenth Amendment require this Court to give Conev retroactive application to Defendant's direct appeal. Even if, arquendo, the Coney "rule" rested solely on state law principles, the Equal Protection and Due Process provisions of the Florida Constitution independenty would require that this Court give retroactive application of Conev to Defendant's direct appeal.

Applicabilitv of Pre-Coney Precedent

Defendant is entitled to a new trial under this Court's pre-Coney precedent, which held that the absence of a criminal defendant from a critical stage of trial does not violate the defendant's right to be present if the defendant waived that right

in a "knowing, voluntary, and intelligent" manner. See Turner v. State, 530 So.2d 45, 49 (Fla. 1988). See also DeConingh v. State, 433 So.2d 501, 503 (Fla. 1983).[37] Prior to Conev, waiver by a defendant could be established by waiver on the record prior to absenting himself from the courtroom,[38] or by a defendant's ratification or acquiescence in counsel's waiver on behalf of the defendant,[39] or by some form of misconduct amounting to constructive waiver.[40]

In the present case, Defendant did not waive his presence on the record, he did not ratify or acquiesce in any counsel's waiver, and he did engage in any type of misconduct amounting to constructive waiver. There is no evidence on the record that counsel for Defendant obtained Defendant's consent to any waiver. Silence by a defendant following a purported waiver by defense counsel is an ineffective form of post hoc acquiescence or ratification. See 14A Fla.Jur.2d, Criminal Law, Section 1278, at 319 (1993).

Harmless Error Analysis

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[37] This Court has made no exception for capital cases in this regard. See Peede v. State, 474 So.2d 808, 812-14 (Fla. 1985). However, in light of established United States Supreme Court precedent holding that the right to presence in capital cases is so fundamental that a defendant cannot waive it (Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed.2d 500 (1912)), this Court should reconsider its position.

[38] Chandler v. State, 534 So.2d 701, 704 (Fla. 1988).

[39] State v. Melendez, 244 So.2d 137, 139 (Fla. 1971); Amazon v. State, 487 So.2d 8, 11 n.1 (Fla. 1986).

[40] Capuzzo v. State, 596 So.2d 438, 440 (Fla. 1992); Illinois v. Allen, 397 U.S. 337 (1970).

Once a violation of a defendant's right to be present is established, the State has the burden to show behond a reasonable doubt that the error was harmless. Garcia v. State, 492 So.2d 360, 364 (Fla. 1986)(citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).[41] An error is not deemed harmless unless the State can show that the defendant's absence had **no** effect on the defense strategy insofar as he could have offered no further assistance during counsel's actual exercise of challenges. Turner v. State, 530 So.2d 45, 49 (Fla. 1987). It is impossible to say beyond a reasonable doubt that had Defendant been contemporaneously present at the bench conferences, defense counsel would not have exercised cause challenges in a different manner **based** on client input or acquiesced to State challenges.[42]

Accordingly, because the error in this case is not harmless beyond a reasonable doubt, this Court must reverse Defendant's convictions and corresponding sentences and remand for new trial.

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[41] It appears that application of the harmless error analysis to this type of constitutional violation is erroneous since the right to be present at a critical stage of trial such as jury selection is a "structural" error that is not amenable to harmless error analysis. See Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995) (violation ofdefendant's right to presence is "structural defect" not amenable to harmless error analysis) .

[42] The Court in Coney ruled that Rule 3.180(a)(5) could not be read to include bench conferences in which counsel and the court discuss purely legal issues. Coney v. State, supra, at 1013 n.5. In Coney, however, the cause challenges at issue concerning death qualifying matters. In the present case, cause challenges also pertained to language problems by some of the jurors. Given Defendant's own Hispanic background the striking of Hispanic jurors was clearly an issue toward which Defendant would have had a basis for input. Compare Harvey v. State, 529 So.2d 1083, 1086 (Fla. 1988), cert. den., 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989) .

(111)

DEFENDANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S IMPERMISSIBLE RESTRICTION OF HIS RIGHT TO CROSS-EXAMINATION

During the course of Detective Ronald Pearce's cross-examination, the State objected to certain quetions concerning the search of Defendant's apartment as outside the scope of direct examination. The defense insisted that questions into this area was permissible in light of Pearce's role as the lead crime scene investigator. The court sustained the State's objection, ruling that Pearce could be called by the defense in its case. (T. 559-560; T. 562-563).

Subsequently, during the cross-examination of Detective Anthony Ojeda, the State objected to questions concerning the search of Defendant's apartment as outside the scope of direct examination. The defense insisted that the questions into this area were permissible, especially in light of Ojeda's role as lead investigator. The trial court prohibited the defense from questioning Ojeda in this area as the questions were outside the scope of direct examination. (T. 755-758). The trial court also prohibited Defendant from asking Ojeda about the particulars of Defendant's arrest warrant, ruling that the questions would elicit hearsay responses. In particular, the defense was not permitted to question Ojeda about Officer Cardona's identification of Defendant at the scene, (T. 765-770).

The trial court abused its discretion in limiting Defendant's cross-examination. The defense should have been permitted to

cross-examine the State's witnesses, Pearce and Ojeda, concerning concerning the search of Defendant's apartment, the particulars of the arrest warrant and the information on which they were operating.

The right to cross-examination is central to the constitutional right of confrontation, as embodied in the Sixth Amendment to the United States Constitution. In Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the United States Supreme Court made the following observations on the right of cross-examination:

> "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him....' Confrontation means more than being allowed to confront the witnesses physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'
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> * * *
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> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony... A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The impartiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'... We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected

right of cross-examination." Id., 94 S.Ct., at 1110 (emphasis supplied) (citations omitted).

The Sixth Amendment to the United States Constitution provides the "accused shall enjoy the right... to be confronted with the witnesses against him." A primary interest secured by the confrontation clause is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). A complete denial of cross-examination constitutes constitutional error of the first magnitude. Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966).

In Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), the United States Supreme Court ruled the Confrontation Clause of the Sixth Amendment to the United States Constitution does not prevent a trial judge from imposing reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness. The Court noted a trial judge may consider such factors as witness harassment, prejudice, confusion of issues, the witness' safety, and repetitive or marginally relevant questioning. The Court, however, warned against a blanket prohibition of all questioning into a specific area of potential bias and, in fact, found the trial judge in the case had committed constitutional error by cutting off all questioning about a subject area which the jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony.

In the present case, the trial judge prohibited any questioning of either Pearce or Ojeda concerning the search of Defendant's apartment, the particulars of the arrest warrant and

all the information on which they were operating. The court refused to permit interrogation on these matters altogether, directing any such questions could be asked only if Defendant called the witnesses in his case. This blanket prohibition clearly violated Defendant's rights under the confrontation clause of the Sixth Amendment and Article I, Section 16, Florida Constitution. There clearly was no basis to limit such cross-examination under any of the factors mentioned in Delaware v. Van Arsdall, supra. The defense was prevented from exposing to the jury facts from which the jurors, "as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974).

Cross-examination is the principal means by which an accused can test a witness' perceptions and memory, and its vital importance is even clearer when the cross-examination is of a key prosecution witness. See Porter v. State, 386 So.2d 1209 (Fla. 3d DCA 1980). It is clear, Defendant has a constitutional right to a full and fair cross-examination, especially when such examination involves the State's key witness. Taylor v. State, 623 So.2d 832, 833 (Fla. 4th DCA 1993)(citing Cox v. State, 441 So.2d 1169 (Fla. 4th DCA 1983)). There can be little doubt that the State's lead detectives were "key" witnesses for the prosecution, especially in light of the circumstantial nature of this case.

Cross-examination of a witness in matters relevant to credibility ought to be given a wide scope in order to delve into

the witness' story. Mendez v. State, 412 So.2d 965 (Fla. 2d DCA 1982). The purpose of cross-examination is to disprove, weaken or modify the testimony of the witness on direct examination. See Coco v. State, 62 So.2d 892 (Fla. 1953). This Court in Coco explained the essential nature of cross-examination in criminal **cases:**

> "It is too well settled to need citation of authority that a fair and full cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with a crime of murder in the first degree.... Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error. Moreover, the right of cross-examination stems from the constitutional guaranty that an accused person shall have the right to be confronted by his accusers." 62 So.2d, at 895.

Cross-examination may not be limited simply to narrow facts elicited on direct examination. Considerable latitude should be permitted on cross-examination. Padsett v. State, 64 Fla. 389, 59 So. 946 (1912). Limiting the scope of cross-examination "in a manner which keeps from the jury relevant and important facts bearing on trustworthiness of crucial prosecution testimony is improper." Mendez v. State, supra, at 966. It has long been recognized that cross-examination extends

> "'to all matters germane to the direct examination... when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts which constitute a unity, or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination... cross-examination is not confined to the identical

> details testified to in chief, but extends to **all** matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on cross-examination.'" Coco v. State, supra, 62 So.2d, at 895. (quoting 58 Am.Jur. Witnesses, **s.632**, at 352 (1948)) (emphasis supplied)

In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the United States Supreme Court underscored the importance of the right of cross-examination noting:

> "The risht of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional risht of confrontation, and helps assure the 'accuracy of the truth-determining process.'... It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional **goal.'...** Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process... But its denial or significant diminution calls into question the ultimate 'intesritv of the fact-findinsnrocess' and requires that the competing interest be closely examined." 410 U.S., at 295 (citations omitted) (emphasis supplied).

A party should be permitted to rebut adverse inferences arising from witness testimony on direct examination, and **to** fully **explore the entire context and surrounding circumstances of the subject matter testified to by such witness.** See, e.g., Roberts v. State, 510 So.2d 885 (Fla. 1987), cert. den., 485 U.S. 943, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988); Nelson v. State, 362 So.2d 1017 (Fla. 3d DCA 1978); Embrev v. Southern Gas & Electric Corp., 63 So.2d 258 (Fla. 1953). An accused should be allowed to cross-examine witnesses regarding matters which are germane to the that witness' testimony and plausibly relevant to the defense. Coxwell v. State, 361 So.2d 148 (Fla. 1978). A witness's abridged testimony on direct examination, which leaves an accusatory

implication against an accused, cannot foreclose exploratory cross-examination by the defense in an attempt to refute such implication. Id.[43]

Clearly, the defense should have been allowed to explore the facts and circumstances surrounding the search of Defendant's apartment. The fact that Defendant fully gave consent to the search and that no incriminating evidence was recovered in the ensuing search was germane and highly relevant. The particulars of the arrest warrant and the nature of the information on which the lead detectives were operating were equally important and relevant to the case. The credibility, bias or prejudice of a prosecution witness should be of paramount concern to a jury in the exercise of its fact-finding function and cross-examination in these areas should not be unduly restricted. See, e.g., Lutherman v. State, 348 So.2d 624 (Fla. 3d DCA 1977); D.C. v. State, 400 So.2d 825 (Fla. 3d DCA 1981).

An accused should not be placed in a position where he is forced to take the burden in presenting any evidence at trial. Such a position runs contrary to the clear mandate of Article I, Section 9, Florida Constitution and the Fifth Amendment, United States Constitution. By prohibiting the defense from cross-examining the lead detectives as to' their work in this case amounted to a "denial or significant diminution" (Chambers v.

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[43] Since the last century, it has been recognized in Florida that all facts of a matter, addressed only in part by a witness on direct examination, can be dealt with on cross-examination. See, e.g., Wallace v. State, 41 Fla. 547, 26 So. 713 (1899).

Mississippi, supra) of Defendant's constitutional right of confrontation and his right to full cross-examination.[44] Additionally, the limitation of the cross-examination may have left the jury with the impression that the defense was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. Davis v. Alaska, supra.

It certainly cannot be argued the defense was permitted sufficient cross-examination into the detective's possible prejudice or bias, when the court prohibited any questions on the issue. It has long been recognized that

> "'...discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.'" United States v. Tolliver, 665 F.2d 1005, 1008 (11th Cir.), cert. den., 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 (1982) (quoting United States v. Elliott, 571 F.2d 880, 908 (5th Cir.), cert. den., Hawkins v. United States, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978)) (emphasis supplied). See also United States v. Brisht, 630 F.2d 804 (5th Cir. 1980).

Because this case was wholly circumstantial, the trial court's order preventing cross-examination of the lead detectives into areas of possible bias and prejudice cannot be deemed harmless. See Taylor v. State, supra (limitation of cross-examination of prosecution's star witness, where little else to incriminate Defendant, not harmless error).

Based on the foregoing, Defendant is entitled to a new trial.

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[44] There are, of course, practical considerations why a defendant may not want to call witnesses in his case. One of the most important factors is the loss of rebuttal closing argument. See Rule 3.250, Florida Rules of Criminal Procedure.

(IV)

DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON THE TRIAL COURT'S FAILURE TO OBTAIN A PERSONAL WAIVER BY DEFENDANT AS TO LESSER INCLUDED OFFENSE INSTRUCTION

At the charge conference, the trial court inquired of defense counsel as to the lesser included offense instructions for first degree murder. The following occurred:

> THE COURT: "... Now, what lessers are the defense requesting?
>
> MR. MATTERS: Second degree murder, manslaughter. That's all we're asking for.
>
> THE COURT: And they already prepared them..." (T. 793).

The court did not obtain a personal waiver from Defendant as to any other lesser included offense instructions. In Mack v. State, 537 So.2d 109 (Fla. 1989), this Court ruled that in capital cases a trial court must obtain a personal waiver from the defendant as to the waiving of any lesser included offense instructions. The Court in Mack cited with approval the following statement from Harris v. State, 438 So.2d 787 (Fla. 1983), cert. den., 466 U.S. 963, 104 S.Ct. 2181, 80 L.Ed.2d 563 (1984):

> "But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made." Id., 438 So.2d, at 797.

Since Defendant was charged in a capital case in which the prosecution sought the death penalty and since he did not personally waive the reading of the remaining lesser included offense instructions as to first degree murder (such as third

degree murder, Section 782.04141, Florida Statutes),[45] Defendant must be accorded a new trial.

[45] Third degree murder is a Category II lesser included offense of first degree murder. See Florida Standard Jury Instructions in Criminal Cases, Schedule of Lesser Included Offenses. In Gould v. State, 577 So.2d 1302, 1304 (Fla. 1991), this Court noted that where the burden of proof of the major crime cannot be discharged without proving the lesser crime as an essential link in the chain of evidence, the lesser offense is a necessarily included lesser offense of the major offense. Id., at 1304 (citing Brown v. State, 206 So.2d 377, 382 (Fla. 1968)).

(V)

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS FOR FIRST DEGREE MURDER AND BURGLARY

There was insufficient evidence presented at trial to support Defendant's convictions for First Degree Murder and Burglary. The present case was clearly a circumstantial evidence case. The principle facts supporting the State's case consisted of Defendant's fingerprint found near the front door of the victim's apartment, Mr. Merriweather's testimony identifying Defendant as the person he saw jumping from one of the apartment balconies, and Defendant's statement to his community control officer that he was wanted on a stabbing.

The evidence of the fingerprint established, at most, that at some time Defendant was inside the victim's apartment. There was evidence, including the night of the incident, that Defendant had gained access to one of the apartments to make a phone call. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. This Court in McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977), stated the standard as follows:

> "[w]here the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." See also M.F. v. State, 549 So.2d 225 (Fla. 3d DCA 1989); J.W. v. State, 467 So.2d 796 (Fla. 3d DCA 1985).

In Jaramillo v. State, 417 So.2d 257 (Fla. 1982), this Court reversed convictions for first degree murder and vacated death

sentences where the State adduced proof that the defendant's latent fingerprint was found on a knife and packaging for a knife at the scene of a double shooting. This Court concluded that the State's evidence was not legally sufficient to establish a prima facie case against the defendant. Id., at 258.[46]

The State also failed to establish proof of premeditation or that there was proof of felony murder. There was no evidence that Defendant engaged in a fully-formed conscious purpose to kill for a time prior to the act of killing the victim. Premeditation, as an element of first-degree murder,

> "is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Weaver v. State, 220 So.2d 53 (Fla. 2d DCA), cert. den., 225 So.2d 913 (Fla. 1969). Premeditation does not have to be contemplated for any particular period of time before the act, and may occur at a moment before the act. Hernandez v. State, 273 So.2d 130 (Fla. 1st DCA), cert. den., 277 So.2d 287 (Fla. 1973). Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned. Larry v. State, 104 So.2d 352 (Fla. 1958)." Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), cert. den., 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

In the present case, the prosecution's argument in support of premeditation primarily consisted of the fact that the victim was

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[46] At the very least, Defendant's special instructions on circumstantial evidence and fingerprint evidence should have been given in light of the paucity of direct evidence presented below.

stabbed eight times (T. 782) . However, this factor alone does not support a finding of premeditation. This Court in Sireci, supra, mentioned various factors to be considered, including the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. Moreover, there was no proof that Defendant had the intent for such time before the homicide as would have enabled him to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

The State also did not establish the underlying burglary in support of the felony murder theory. There was no proof of forced entry. There was no proof that the victim refused entry or demanded the intruder's exit from the apartment. There was no proof of a specific intent to commit a crime inside the apartment. No items were taken from the victim. None of the victim's property was found on Defendant.

Based on the foregoing, Defendant's convictions should be reversed.

(VI)

DEFENDANT IS ENTITLED TO RESENTENCING BASED UPON THE PROSECUTOR'S IMPROPER PENALTY PHASE ARGUMENTS

Defendant is entitled to resentencing based upon the prosecutor's improper penalty phase arguments. During his penalty phase remarks, the assistant state attorney made the following comments:

> MR. BAND: "The next mitigating circumstance you may consider is the catch all, any other aspect of the defendant's character or record, and any other circumstance of the offense.
>
> I suggest to you there is nothing during the course of this offense, in any way, shape or form, that is mitigating. Stabbing a 63 year old woman, in her home, is not mitigating.
>
> Is there anything about his record or character? **Did we learn that he's a beautiful son? Did he ever listen to his** parents **when they tried to get him help? When his father testified about going to the principal, putting him in drug programs, and finally they had to throw him out** of **the house because** of **the flight.**
>
> **Was he a boy scout? Any academic achievements? Was he a good worker? Did he ever have a job and was he a good worker, and productive member of society?**
>
> **I hate to compare people, but something you should consider is what has he done in his life--**
>
> MR. KASSIER: Objection.
>
> THE COURT: Sustained." (T. 1093) (emphasis supplied).

In the foregoing comments, the prosecutor improperly argued to the jury non-statutory aggravating circumstances. The assistant state attorney clearly alluded to Defendant's apparently useless, unproductive life. He made clear reference to Defendant's lack of academic achievement, his poor employment record, and his disobedience of his parents.

Ordinarily, when the defense places the character of the defendant at issue, the prosecution may rebut the evidence with other character evidence. Otherwise, such evidence or argument is impermissible and constitutes an illegal non-statutory aggravating factor. In this case, the defense presented evidence as to Defendant's drug problems. No attempt was made to positively portray Defendant's character. There was, therefore, no basis for the State to present any type of "rebuttal." Compare Johnson v. State, 660 So.2d 637, 646 (Fla. 1995) (prosecution properly rebutted defendant's evidence that defendant was good father figure with testimony concerning violent arguments; such evidence not non-statutory aggravating factor). As such, the prosecutor improperly argued to the jury non-statutory aggravating circumstances.

The prosecutor also made the following improper argument to the jury during his penalty phase remarks:

> MR. BAND: "You know, nothing is easy about this job for you all. This time you spend here, particularly this evening, will probably represent the hardest decision, the most soul-searching time of your life.
>
> You sit as an adversary [sic] board to this Court. You tell the Judge how you feel about this crime, and we have young people and people not so young, African American, Latins, people from all walks of life. You tell the Court how you feel about this crime, and we're not talking about any other crime or what goes on outside this courtroom.
>
> We're only concerned with this charge. You tell the Court what society's reaction is to this crime, and what the appropriate punishment should be.
>
> * * *
>
> ... People, we formed a society and we developed rules in that society, and if there is one universal rule, it's against the killing, the deliberate killing of one another. And if someone violates that rule they should face the death penalty, and we're not here to discuss the

issue of the death penalty. Our legislature made a decision for you, like it or not, and no one wants to participate in a process where a life will be taken. We're taught it is wrong.

It's not an easy task we're asking you to do. We're not asking you to do the easiest thing. We're asking you to do the right thing. You all took an oath to follow the law, and you promised you would follow the law, and whether or not you like the law, and as in jury selection, people feel that they like the law, but they really don't like it, when it comes down to it.

If you find the aggravating circumstances outweigh the mitigating circumstances there's only one recommendation you can come back with. The death penalty has been imposed in this case by the actions of this defendant upon Phyllis Minas, a victim who was not protected by the law, lawyer, or Court or legal safeguard. A victim not given an opportunity to plead her case or present to you mitigating factors.

* * *

You will soon return to that room and reason among yourselves, using your common sense, your life experiences, and discuss rationally and candidly, as members of society, a society we all live in, with rules that we all share, a society that makes all of us responsible, accountable for our own actions, and indeed, in the beginning of this case you told me you believe everyone is accountable for their own actions.

What we as a society do when a member violates the highest crime, that is kill in cold blood, the decision that you render speaks to the twelve of you, and as our representatives as to what should happen when someone does this, when someone commits this crime." (T. 1094-1096).

The prosecutor's foregoing comments were improper on several grounds, The prosecutor also improperly argued that the jury was required to return a recommendation of the death penalty. The assistant state attorney informed the jury that "if someone violates that rule they should face the death penalty, and we're not here to discuss the issue of the death penalty. Our legislature made a decision for you, like it or not" and "[I]f you find the aggravating circumstances outweigh the mitigating

circumstances **there's only one recommendation you can come back with.** The death penalty has been imposed in this case by the actions of this defendant upon Phyllis Minas..."

The impact of these statements was to impress upon the jury that they had no choice but to impose the death penalty. The prosecutor's argument undermined any argument for the jury to exercise its unique ability to confront and examine the individuality of the defendant. The jury was disuaded from considering "[those] compassionate or mitigating factors stemming from the the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) .

The prosecutor's remarks also constituted an impermissible "message to the community" argument. This Court recently reiterated the long-standing rule prohibiting these types of comments in capital cases. In Campbell v. State, ___ So.2d ___, 21 F.L.W. S287 (Fla., June 27, 1996), this Court considered the following prosecutorial remarks:

> "'The death penalty is a message sent to certain members of our society who choose not to follow the rules. It's only for one crime, the crime of first degree murder. It is for those who choose to violate the sacredness and sanctity of human life.'" Id., at S288.

This Court found these remarks to be impermissible as an obvious appeal to the emotions and fears of the jurors. Id. (citing Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985)). These remarks together with other improper comments, concluded the Court, "played to the jurors' most elemental fears" and possibly affected

the jury's sentencing deliberations, in that some jurors may have "voted for death not out of a reasoned sense of justice but out of a panicked sense of self-preservation." Campbell, supra, at S288. The courts must go to extraordinary measures to ensure that defendants sentenced to death are "afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddinss v. **Oklahoma**, 455 **U.S. 104, 118, 102** S.Ct. **869, 878, 71** L.Ed.2d **1** (1982) (O'Connor, J., concurring).

Here, the prosecutor continually reminded the jurors of their **obligation to** "tell the Court what **society's reaction** is to this crime, and what the appropriate punishment should be" and urged **them to "discuss ...** as members of **society, a society we all live in, with rules that we all share, a society that makes all of us responsible,** accountable for our own actions," and noted that "what we **as a society do** when a member violates the highest crime, that is kill in cold blood, the decision that you render **speaks to the twelve of you, and as our representatives** as to what should happen when someone does this, when someone commits this crime." It is undeniable that the State improperly injected matters outside of the proper "scope of the jury's deliberations" and "violated the prosecutor's duty to seek justice." Bertolotti v. State, supra, at 133.

The prosecutor also improperly argued that jurors should impose the death penalty because the victim was unable to present a case on her own. The assistant state attorney impermissibly

argued to the jurors that "[T]he death penalty has been imposed in this case by the actions of this defendant upon Phyllis Minas, **a victim who was not protected by the law, lawyer, or Court or legal safeguard. A victim not given an opportunity to plead her case** or **present to you mitigating factors."** These comments likewise improperly injected matters outside of the proper "scope of the jury's deliberations" and "violated the prosecutor's duty to seek justice." Bertolotti v. State, supra, at 133.[47] See also White v. State, 616 So.2d 21 (Fla. 1993) (prosecutor's argument that victim would have chosen life imprisonment instead of being shot to death and that because defendant made decision for victim, he too deserved to die, urged consideration of improper factors).

Finally, the assistant state attorney impermissibly diminished the jury's role in the death penalty process. He informed the jurors that "[Y]ou sit as an adversary [sic] board to this Court. You tell the Judge how you feel about this crime..." and "[O]ur legislature made a decision for you, like it or not..." and "[Y]ou all took an oath to follow the law, and you promised you would follow the law, and whether or not you like the law, and as in jury selection, people feel that they like the law, but they really don't like it, when it comes down to it." The impact of these

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[47] As previously noted, the courts must go to extraordinary measures to ensure that defendants sentenced to death are "afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed **out of whim, passion, prejudice, or mistake."** Eddings v. Oklahoma, susra, 455 U.S., at 118, 102 S.Ct., at 878(O'Connor, J., concurring).

comments was to clearly undermine the very important role jurors play in the death penalty process.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the United States Supreme Court ruled that

> "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id., 105 S.Ct., at 2639.

The prosecutor's argument reduced the jury's role to a sounding board for opinions about how they "felt" about the case. These comments wholly denigrated the voice of the jury, whose recommendation is accorded "great weight." See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This Court in Combs v. State, 525 So.2d 853 (Fla. 1988), noted that Caldwell was distinguishable in that the jury's role in Florida is, in fact, "advisory." See also Grossman v. State, 525 So.2d 833, 839 (Fla. 1988). However, the prosecutor's remarks in this respect **coupled with** the other comments at issue, worked **cumulatively** to deprive Defendant of a fair sentencing determination.

Based on the foregoing, Defendant's sentence of death should be vacated and the case remanded for resentencing.

(VII)

THE TRIAL COURT'S SENTENCE OF DEATH SHOULD BE VACATED SINCE DEATH WAS A DISPROPORTIONATE SENTENCE IN THIS CASE

In view of the totality of the mitigating factors in this case, primarily Defendant's diminished mental capacity, imposition of the death penalty would be disproportionate. It is necessary in capital cases that this Court engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. Sinclair v. State, 657 So.2d 1138 (Fla. 1995). It is not a comparison between the number of aggravating and mitigating circumstances. Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) (citing Hallman v. State, 560 So.2d 223 (Fla. 1990)).

(VIII)

THE TRIAL COURT'S SENTENCING ORDER HAS ERRORS THAT, BOTH INDIVIDUALLY AND CUMULATIVELY, REQUIRE REVERSAL OF DEFENDANT'S DEATH SENTENCE AND A REMAND FOR RESENTENCING BY THE TRIAL COURT

The trial court committed several errors in its sentencing order which, individually and cumulatively, require reversal of Defendant's death sentence and a remand for resentencing. Pursuant to Section 921.141, Florida Statutes, Defendant was sentenced to death by the trial court after an advisory jury recommended a death sentence by a vote of 12-0. The trial court considered four aggravating circumstances: 1) Commission of crime while Defendant on community control; 2) Defendant's prior felony conviction; 3) Commission of crime while Defendant engaged in the commission of, or attempt to commit, burglary; 4) Heinous, atrocious or cruel.

The court erred in considering that Defendant was engaged in the commission of, or attempt to commit, burglary, under Section 921.141(5)(d), Florida Statutes. The trial judge simply concluded **that** the State proved beyond a reasonable doubt that Defendant was "committing an Armed Burglary with Phyllis Minas's home and during the commission of that Burglary did beat and stab Phyllis Minas to death." (R. 530). The court accorded this factor "great weight" and opined that Ms. Minas "had the right to feel safe **and** to be safe within her own home." (R. 530-531).

Although the record arguably demonstrates that Defendant entered the victim's apartment, there is little if any proof that Defendant entered the apartment with the intent to commit a crime

therein. Indeed, the testimony at trial indicated that it was not at all unusual for neighbors to visit each other and invite each other into their apartments. The State's theory that Defendant intended to commit a theft (T. 1073-1075), is belied by the fact that no property was taken. Indeed, there is nothing in the record to show that Defendant rummaged through the apartment, or that Defendant had taken anything from the apartment or was found with any of the victim's property. Compare Johnston v. State, 497 So.2d 863, 871 (Fla. 1986)(ample proof in record that defendant entered victim's apartment with intent to commit theft in light of defendant's admissions to taking items from victim's apartment).

The court erred in finding that the crime was especially, heinous, atrocious or cruel, pursuant to Section 921.141(5)(h), Florida Statutes. This factor applies only to

> "torturous murders, those that evince extreme and outrageous depravity as exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993). See also Wickham v. State, 593 So.2d 191 (Fla. 1991).

The trial judge relied upon the following reasons in support of this aggravating circumstance: the number of stab wounds, the victim's cry: "Oh my God," overheard by neighbors, and the fact that the victim was still alive when Fire Rescue arrived. The judge gave this aggravating factor "great weight." (R. 531-533). The judge's reasons, individually and jointly, did not establish this aggravating circumstance.

In the absence of evidence to demonstrate that a defendant intended to torture a victim, the heinous, atrocious and cruel

aggravating factor should not be applied. See, e.g., McKinney v. State, 579 So.2d 80 (Fla. 1991). There must be additional facts, beyond the number of wounds, to raise the crime to the shocking level required by this factor. Id. In the present case, the State did not present evidence to show that the victim suffered a high or unusual level of pain, or that she was subjected to a heightened level of suffering as a result of the crime. There was no evidence of defensive wounds. (R. 533).[48] The State failed to prove this factor beyond a reasonable doubt. Compare Barwick v. State, 660 So.2d 685 (Fla. 1995)(thirty-seven stab wounds and numerous defensive wounds supported aggravating factor of heinous, atrocious and cruel); Campbell v. State, 571 So.2d 415 (Fla. 1990) (victim stabbed 23 times over course of several minutes and had defensive wounds supported aggravating factor of heinous, atrocious and cruel); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (over 30 stab wounds to victim, some of which were defensive wounds, supported aggravating factor of heinous, atrocious and cruel); Nibert v. State, 508 So.2d 1 (Fla. 1987) (victim stabbed 17 times with defensive wounds supported aggravating factor of heinous, atrocious and cruel).

[48] The victim's cry: "Oh my God," was not shown to have been made during the commission of the homicide. Indeed, the statement may have been made as an expression of surprise when the victim discovered the presence of an intruder.

The trial judge also failed to give Defendant's mitigating circumstances sufficient weight.[49] The defense presented testimony from family members and from Dr. Gary Schwartz about Defendant's long-standing, serious drug problems. The testimony showed that Defendant suffered from a severe drug addiction. Dr. Schwartz concluded to a reasonable scientific certainty that Defendant was under the substantial influence of crack cocaine on October 2nd, the date of the incident. This expert testimony was unrefuted by the State. The judge only gave this factor "minimal weight." (R. 539). In a capital sentencing proceeding, it is within the trial judge's discretion to reject either opinion or factual evidence in mitigation where there is record support for conclusion that is untrustworthy. Farr v. State, 656 So.2d 448 (Fla. 1995). However, rejection of mitigating factor cannot be sustained unless supported by competent substantial evidence refuting existence of factor. Maxwell v. State, 603 So.2d 490 (1992) . See also Knowles v. State, 632 So.2d 62 (1993). Here, the State did not refute Defendant's expert. Compare Jones v. State, 652 So.2d 346 (Fla. 1995) (state's expert refuted existence of extreme or non-extreme mental or emotional disturbance at time of shooting).

Special considerations in death penalty reviews

The need to carefully examine and scrutinize the imposition of a death sentence is underscored by the finality of such sentence. Justice Barkett in Hamblen v. State, 527 So.2d 800 (Fla. 1988)

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[49] Once established, a mitigating circumstance may not be given no weight at all during penalty phase of capital case. Dailey v. State, 594 So.2d 254 (Fla. 1991).

(Barkett, J., dissenting), clearly and eloquently noted the importance of review in death penalty cases:

> "This compliance requires a weighing of many factors to be sure that the severest of all state penalties is applied, in accordance with the law, only in the most extreme cases.
>
> * * *
>
> The need for careful judicial scrutiny in cases involving a possible loss of life applies with even greater force when the state itself is the instrument of death. Consequently, stringent procedural and substantive safeguards have been erected to ensure that the state will not take life in an arbitrary or capricious manner and that the death penalty will be reserved for the most heinous of crimes committed by the most depraved of criminals. As Justice Stewart noted,
>
> > 'The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.' Furman v. Georgia, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).
>
> We recognize the the exigencies of modern society demand compromises. Thus, in noncapital cases, we erect barriers of finality beyond which no court can go despite apparent error or injustice. Where imprisonment is the punishment, we are willing to accept the risk of mistake or arbitrary treatment because of a need for finality due to the sheer number of cases involved.
>
> We are not so willing to accept mistake or arbitrariness, however, when the price is a human life. As Charles Black notes, when death-is the punishment the safeguards must be greater because
>
> > 'death is different...[and] the infliction of death by official choice ought to require a higher degree of clarity and precision in the governing standards than we can practicably require of all choices, even of choices for punishment.' C.L. Black, Capital Punishment: The Inevitability of Caprice and Mistake (1981), at 29-30.

> Black recognizes that in some sense everything that occurs or is suffered is irrevocable.
>
> > 'But it is a blurred vision indeed that cannot see a radically different kind of irrevocability in death.' Id. at 40.
>
> This principle recurs time and again, both expressly and implicitly, throughout our death penalty jurisprudence." Hamblen v. State, supra, at 807 (Fla. 1988) (Barkett, J., dissenting).[50]

Defendant respectfully requests that this Court carefully review the entire record and consider each of the issues raised herein. Defendant requests that this Court vacate his sentence of death and remand the case for resentencing.

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[50] See also Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), where the United States Supreme Court noted:

> "...the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Id., 428 U.S. at 305, 96 S.Ct. at 2991.

(IX)

CAPITAL PUNISHMENT AS PRESENTLY ADMINISTERED VIOLATES THE STATE AND FEDERAL CONSTITUTIONS

Although this Court has repeatedly rejected constitutional challenges to capital punishment, this Court has never specifically considered the argument advanced by former Justice Blackmun in his dissent in Callins v. Collins, ___ U.S. ___, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994), that capital punishment is unconstitutional in view of the paradoxical constitutional commands of non-arbitrariness and need for jury discretion to consider all mitigation. This Court has also not addressed the issue suggested by Justice Stevens' opinion respecting denial of certiorari in Lackey v. Texas, ___ U.S. ___, 115 S.Ct. 1421 (1995), subsequent proceeding, 115 S.Ct. 1818 (1995), that capital punishment today may be unconstitutional because of the inordinate delays between sentencing at trial and actual execution, inherent in the legal system.

In light of the foregoing, this Court should reconsider whether, at least as currently administered, capital punishment violates the United States and/or Florida Constitutions.

CONCLUSION

For the foregoing reasons, Jose Jimenez respectfully requests that this Honorable Court enter an order reversing his convictions and corresponding sentences and remand for a new trial on all counts of the indictment. In the alternative, this Court must vacate Defendant's death sentence and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Fariba N. Komeily, Esq., Office of the **Attorney** General, 491 N.W. 2nd Avenue, Miami, Florida, 33128, Suite N-921, on this 2nd day of August, 1996.

_____
J. RAFAEL RODRIGUEZ